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**Turkey under Emergency Rule:
Politicized Terrorism Prosecutions and Criminalized Dissent**

Human Rights, States of Emergency, and International Law

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ABSTRACT

In July 2016, a failed *coup d'état* plunged Turkey into a nationwide state of emergency. Despite its recent status as a model for democratization in the Middle East, Turkey has veered dangerously towards authoritarianism under emergency rule. The state of emergency has empowered Turkish President Recep Tayyip Erdoğan to bypass parliament and pass sweeping new anti-terror laws by executive decree. Under the international legal framework, the state of emergency has further allowed Turkey to suspend its human rights obligations as a states party to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Turkey's emergency counterterrorism laws and policies have increasingly been used to target dissident journalists, academics, human rights activists and members of the political opposition and prosecute them on heavily politicized and trumped-up terrorism charges.

Using the current situation in Turkey as its chief case study, this paper asks two central questions. First, it examines how the state of emergency has facilitated human rights abuses, finding that freedom of expression has been criminalized by emergency counterterrorism decrees and further led to increased risks of torture against detained dissidents. Second, this paper investigates what role international human rights law plays and how the existing framework might be improved to better strengthen human rights protections during emergencies. It finds that the efficacy of monitoring and accountability mechanisms are significantly hindered by political, strategic, and economic relations, but argues that those same factors can be used as leverage against repressive states. Finally, Turkey's cross-border efforts to hunt and capture dissidents, which have included the use and abuse of international policing systems, bilateral extradition treaties, and state-sponsored abductions, reveals a key opportunity for international human rights law to respond to the troubling impacts of counterterrorism on human rights.

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List of Abbreviated Terms

AAICJ	American Association for the International Commission of Jurists
AKP	<i>Adalet ve Kalkınma Partisi</i>
AYM	<i>Anayasa Mahkemesi</i>
BTK	<i>Bilgi Teknolojileri ve İletişim Kurumu</i>
CAT	Convention on Torture
CHP	<i>Cumhuriyet Halk Partisi</i>
CoE	Council of Europe
DHKP-C	Devrimci Halk Kurtuluş Partisi-Cephesi
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FETÖ	Fethullahçı Terör Örgütü
HDP	Halkların Demokratik Partisi
HRW	Human Rights Watch
ICCPR	International Covenant for Civil and Political Rights
ICTs	Information and Communication Technologies
İHD	<i>İnsan Hakları Derneği</i>

IHRL	International Human Rights Law
IR	International Relations
ISIS	Islamic State of Iraq and Syria
MİT	Millî İstihbarat Teşkilatı
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NSC	National Security Council
OHAL	<i>Olağanüstü Hal</i>
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention on Torture
PKK	<i>Partiya Karkerên Kurdistanê</i>
RS	Regime Security
SEL	State of Emergency Law
SoE	State of Emergency
TCK	Turkish Criminal Code
TİB	Telekomunikasyon İletişim Başkanlığı
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UN HRC	United Nations Human Rights Council

CHAPTER I: Introduction

On the evening of July 15, 2016, factions of the Turkish Armed Forces attempted to overthrow the government. Rebel soldiers occupied major landmarks including the Bosphorus bridges and Taksim Square in Istanbul, international airports, and state-run media offices, while military leadership including the Turkish Chief of the General Staff, commander of the Turkish Land Forces, and head of the Turkish Air Force were abducted and held hostage.¹ Using hijacked military aircraft, the *coup d'état* soldiers bombed Turkish Parliament and the Presidential Palace in Ankara. President Recep Tayyip Erdoğan, on holiday in the southern coastal city Marmaris at the time, stated that there had also been an attempt to bomb his hotel.² Though the government regained control in less than twenty-four hours, the attempted coup resulted in the deaths of 265 people, 161 of whom were civilians.³

Amidst the chaotic aftermath of the attempted overthrow, President Erdoğan declared a three-month state of emergency on July 20, 2016.⁴ The declaration granted the government significant emergency powers, allowing the executive to bypass parliament when drafting new laws, limit or suspend rights and freedoms without parliamentary approval, and pass decrees without the possibility of appeal to the constitutional court.⁵ Though the state of emergency (SoE) was finally lifted in July 2018 - after being extended seven times - several emergency measures have been codified into permanent Turkish law.

The special powers granted to the Turkish executive under the SoE have been used to significantly expand the country's domestic counterterrorism mandate. Since the SoE was declared, more than 160,000 people across the country have been arrested and 50,000 have either been remanded to pretrial custody or prosecuted for terrorism charges under the national

¹ "Genelkurmay Başkanı Orgeneral Hulusi Akar yaşadıklarını ilk kez anlattı," *CNN Türk*. July 17, 2016, <https://www.cnnturk.com/video/turkiye/genelkurmay-baskani-orgeneral-hulusi-akar-yasadiklarini-ilk-kez-anlatti>

² "Erdogan Arrives in Istanbul as Turkish Military Coup Crumbles," *Haaretz*. July 16, 2016, <https://www.haaretz.com/middle-east-news/turkey/erdogan-arrives-in-istanbul-as-coup-crumbles-1.5411005>

³ Ayla Jean Yackley and Nick Tattersall, "Death toll rises to 265 in failed Turkey coup: official." *Reuters*, July 16, 2016, <https://www.reuters.com/article/us-turkey-security-casualties-idUSKCN0ZW132>

⁴ Gareth Jones and Asli Kandemir, "Turkey's Erdogan announces three-month state of emergency," *Reuters*, July 20, 2016, <https://www.reuters.com/article/us-turkey-security-erdogan-emergency-idUSKCN1002TU>

⁵ Ceylan Yeginsu and Safak Timur, "Turkey's Post-Coup Crackdown Targets Kurdish Politicians," *The New York Times*, November 4, 2016, <https://www.nytimes.com/2016/11/05/world/europe/turkey-coup-crackdown-kurdish-politicians.html>.

Anti-Terror Law.⁶ Terrorism charges have also been used to pursue Turkish nationals outside of the country's borders: Ankara has issued hundreds of extradition requests and Interpol 'Red Notice' arrest warrants, and has further acknowledged its use of covert operations to seize more than 100 Turkish nationals from nearly two dozen countries abroad.⁷ Mass arrests under the SoE have not been strictly limited to people connected to the coup but have instead increasingly targeted dissident members of civil society, particularly human rights defenders, journalists, academics, opposition politicians, lawyers and judges, the vast majority of whom have been detained on tenuous terrorism-related grounds.

Turkey has been widely condemned by international human rights organizations for violating basic civil and political rights *en masse* since the attempted coup, particularly rights to freedom of expression, association, and assembly, and rights related to due process and fair trial.⁸ Further questions have been raised regarding the treatment of detainees in Turkish prisons, as severe human rights abuses including forced disappearances, rape, sexual abuse, waterboarding, electric shocks and other forms of torture have been consistently reported since 2016.⁹ The state of emergency and the executive powers it grants have allowed for the implementation of sweeping anti-terrorism measures, in turn impacting basic rights and freedoms of Turkish nationals both inside and outside of the country.

A. Research Objective and Methodology

Using the current situation in Turkey as its chief case study, this paper asks two central questions. First, how do states of emergency impact human rights? Second, what role does international human rights law (IHRL) play during public emergencies? Does the existing legal framework effectively monitor and restrain human rights abuses during emergencies? If not, how might the relevant areas of IHRL be improved to better strengthen human rights protections during SoE periods?

This paper begins with the basic hypothesis that states of emergency facilitate human rights abuses by increasing the power of the executive vis-a-vis the legislative and judicial bodies of the state. Excluding SoEs declared in the face of natural disasters, public emergencies are nearly

⁶ "Turkey: Law No. 3713 of 1991, Law to Fight Terrorism." Refworld, last modified April 12, 1991, accessed September 11, 2018, <http://www.refworld.org/docid/4c4477652.html> and "World Report 2018: Rights Trends in Turkey," Human Rights Watch, January 18, 2018, <https://www.hrw.org/world-report/2018/country-chapters/turkey>.

⁷ Dildar Baykan, "Over 100 FETO members brought back to Turkey: Cavusoglu," *Anadolu Agency*, July 16, 2018, <https://www.aa.com.tr/en/politics/over-100-feto-members-brought-back-to-turkey-cavusoglu/1205603>

⁸ "Turkey: Crackdown on Kurdish Opposition," Human Rights Watch. March 20, 2017, <https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition>.

⁹ "Turkish and Kurdish Detainees Tortured, Raped – UN Rapporteur Says," *Ahval*, January 23, 2018, <https://ahvalnews.com/human-rights/turkish-and-kurdish-detainees-tortured-raped-un-rapporteur-says>.

always declared on the basis of ‘terrorism’, which results in the justification of emergency measures as necessary to ‘counter terror’ and ‘protect national security.’ This paper will therefore examine how emergency powers have been used in the context of countering terrorism in Turkey, closely analyzing the impacts of anti-terror emergency decrees on fundamental rights and freedoms. Particular attention will be paid to the human rights implications of counterterrorism measures used transnationally, investigating the responsibilities of other states under international human rights law with regard to issues of extradition, state-sponsored abductions, torture and the fundamental legal principle of *non-refoulement*.

The second objective of this research is to examine the international legal framework and enforcement mechanisms designed to monitor government action and protect human rights under SoEs. Under international law, SoE are primarily governed by the derogation clauses set out first by the European Convention of Human Rights (ECHR) in 1953 and subsequently by the International Covenant on Civil and Political Rights (ICCPR) in 1966. The latter section of this paper will examine the judicial bodies and mechanisms mandated with monitoring the compliance of state parties to the SoE derogation provisions laid out in the ECHR and the ICCPR, questioning the effectiveness of existing mechanisms in restraining government actions and seeking to identify key political factors limiting their successful implementation.

Turkey is only one example of the increasingly visible connection between SoEs and expansive counterterrorism campaigns: France, Britain, the United States, and several other countries have passed similarly dangerous counterterrorism laws during emergencies on the pretext of national security.¹⁰ There is a clear link between emergency regimes and grave human rights abuses, with ‘national security’ among the most powerful rationales governments use to repress, surveil and control civilian populations.¹¹ As counterterrorism measures grow more invasive and technologically sophisticated, the risks posed to human rights and civil liberties have proliferated, particularly for vulnerable groups like ethnic and religious minorities. By thoroughly examining Turkey as its central case study, this research ultimately hopes to contribute to the ongoing debate regarding how international human rights law can or should respond to the troubling impacts of counterterrorism on human rights, particularly during emergency situations.

To answer its research questions, this paper relies on qualitative research methods and procedures, primarily legal research, analysis of SoE scholarship and case law, ECtHR

¹⁰ Francesco Ragazzi, "Suspect Community or Suspect Category? The Impact of Counter-terrorism as ‘policed Multiculturalism’," *Journal of Ethnic and Migration Studies* 42, no. 5 (2016): 726, doi:10.1080/1369183x.2015.1121807.

¹¹ Joan F. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision." *Human Rights Quarterly* 7, no. 1 (1985): 91, doi:10.2307/762039.

jurisprudence, and a close assessment of relevant publicly available documents. Documents examined include local, regional, and international media reports; reports, press releases, statements, and primary research conducted by human rights advocacy groups and civil society organizations, legal bodies and bar associations, the UN Human Rights Committee, various human rights and rule of law-related committees formed under the auspices of the Council of Europe, with particular weight afforded to the work of the Venice Commission, and the fact-finding reports of several UN Special Rapporteurs following missions to Turkey. Finally, a close analysis of available primary research was conducted, namely transcripts and summaries of interviews with anonymous and identified Turkish detainees and dissidents published by Human Rights Watch, Amnesty International, local human rights organizations and international bodies like the Crisis Group.

B. Literature Review

The following section briefly outlines a theoretical framework within which to situate and explore the nexus between human rights, counterterrorism, and states of emergency. I first examine the rise of the security state paradigm in political theory and international relations literature, within which we can develop a fuller idea of SoEs as a form of exceptional rule that often acts as a precursor to competitive authoritarianism. Second, I investigate how conceptions of terrorism in Turkey have shifted from ethno-religious ‘othering’ to regime security, wherein the public enemy is defined by its opposition to official state policy and the ruling party. Third, I analyze how the anti-imperialist nationalism used to eliminate support for dissidents damages international leverage: critics, dissidents, and proponents of ‘Western’ liberal democracy and its central tenets - secularism, freedom of the press, rule of law, and so on - are accused of acting not against the government but against the Turkish state itself. Critical questions arising here are rooted in underlying politico-philosophical questions of power, which fundamentally shape the relationship between terrorism and legitimate civil disobedience or political dissent. Finally, I examine the relationship between state sovereignty and the international human rights regime, paying particular attention to the ECHR and the ICCPR, and survey existing critiques of SoE derogations and enforcement mechanisms.

i. Rise of the Security State: Exceptional Rule and Authoritarianism

Emergency anti-terror laws came into force in the United States, Canada, Britain, France, Belgium and several other European states in the immediate aftermath of the terrorist attacks perpetrated on September 11, 2001. This new ‘security state’ that rose from the ashes of the early 2000s was defined by a significant expansion of government surveillance, the limiting of civil and individual liberties, and, as Kaygusuz (2018) writes, a “massive surge in coercive state

activity” that has “facilitated the effective management of growing social and political dissent.”¹² The permanent state of exception and securitization as a technique of government has become a key focus of political theory and international relations (IR) scholarship, much of which agrees that the new security order has increasingly interfered with social and political life.¹³

In the context of the post-9/11 passage of the controversial U.S. Patriot Act, Agamben (2003) highlighted how counterterrorism measures and legislation have reorganized political life in liberal democracies into a permanent, normalized state of exception.¹⁴ The state of exception is characterized by three critical features: the loss of power and independence of key state institutions; the emergence of a parallel network of decisionmakers who replace institutional and accountable decisionmaking mechanisms; and the rapid codification of exceptional practices into permanent legislation.¹⁵ Drawing on Poulantzas’ theory of authoritarian statism, which highlighted the use of authoritarian practices in liberal democracies throughout the 1970s and 80s, Boukalas (2008) similarly argued that since 9/11 several ‘emergency-type features’ have been normalized and incorporated into capitalist liberal democracies.¹⁶ He identified two trends particularly ascendent today: first, the increased concentration of power at the executive level, at the expense of legislative and judicial bodies, and second, the criminalization of political activities and restricted use of democratic channels in order to marginalize and oppress segments of society.¹⁷ Bruff (2014) further develops this in his conceptualization of *authoritarian neoliberalism*, characterized as a shift away from public negotiation and consent and toward coercive constitutional and legal mechanisms: “Dominant social groups are less interested in neutralizing resistance and dissent via concessions and forms of compromise...favoring instead the explicit exclusion and marginalization of subordinate social groups through the constitutionally and legally engineered self-disempowerment” of key democratic institutions.¹⁸

A growing body of IR scholarship has focused on global ‘democratic retrenchment’ since the 2000s, noting weakening democratic systems in the Balkans, Russia, Latin America, Eastern

¹² Özlem Kaygusuz, “Authoritarian Neoliberalism and Regime Security in Turkey: Moving to an ‘Exceptional State’ under AKP,” *South European Society and Politics* 23 (June 2018): 282, <https://doi.org/10.1080/13608746.2018.1480332>.

¹³ See, for example, Agamben 2003; Huysmans 2004; Brown 2005; Boukalas 2008.

¹⁴ Giorgio Agamben, *State of Exception*, trans. Kevin Attell (University of Chicago Press, Ltd. 2005), originally published as *Stato di eccezione*, 2003 Bollati Boringhieri editore s.r.l., Torino.

¹⁵ Christos Boukalas, “No Exceptions: Authoritarian Statism. Agamben, Poulantzas, and Homeland Security,” *Critical Studies on Terrorism* 7, no.1 (Winter 2014): 12, <http://dx.doi.org/10.1080/17539153.2013.877667>.

¹⁶ See Nicos Poulantzas, *State, Power, Socialism*, trans. Patrick Camiller (Verso, 1980), originally published as *L'état, le Pouvoir, le Socialisme* (Presses Universitaires de France, 1978).

¹⁷ Christos Boukalas, “Counterterrorism legislation and the U.S. State form: authoritarian statism, phase 3,” *Radical Philosophy* 151, no. 1 (Sept/Oct. 2008): 39.

<https://www.radicalphilosophy.com/article/counterterrorism-legislation-and-the-us-state-form>

¹⁸ Ian Bruff, “The Rise of Authoritarian Neoliberalism,” *Rethinking Marxism: A Journal of Economics, Culture & Society* 26, no. 1 (2014): 116, <https://doi.org/10.1080/08935696.2013.843250>.

Europe and rising right-wing movements across Western Europe and North America.¹⁹ As Akyuz and Hess (2018) observe, earlier waves of democratization have stalled and even reversed in many countries over the last two decades, while international NGO Freedom House has found a global decline in civil liberties and political rights over the same time period.²⁰ Increasing in the stead of faltering liberal democracies are hybrid regimes: in essence, governments that hold regular elections but strategically weaken other critical elements of liberal democracy, namely the independence of the judiciary, parliamentary checks and balances, and freedom of media, academia, and civil society.²¹ Levitsky and Way (2010) call this *competitive authoritarianism*: regimes combine electoral competition with varying degrees of autocracy, holding competitive elections but allowing them to be heavily influenced by electoral manipulation, unfair media access, abuse of state resources, and harassment, violence, and intimidation.²² Competitive authoritarianism is closely related to *democratic backsliding*, defined by Akyuz and Hess (2018) as “a decrease in the competitiveness (or potential of competitiveness) of the electoral playing field due to the concentration of power in the hands of the incumbent executive, relative to other actors”²³, the deliberate result of “regime choices made by incumbent executive leaders to reduce the competitiveness of elections, weaken the protection of civil liberties, manipulate the electoral playing field, and erode formal limits on executive power.”²⁴

Certainly this shift to competitive authoritarianism is visible in Turkey, where the ruling *Adalet ve Kalkınma Partisi* (AKP) has jailed members of parliament, brought media to heel, and criminalized dissent, all of which will be explored in the subsequent sections. Critical to our purposes here is the close link between Turkey’s growing authoritarianism and its use of states of emergency, as is mirrored in other hybrid regimes with similar trajectories. In most cases, transitions from democracy to ‘soft authoritarianism’, or indeed from soft to hard authoritarianism, are directly enabled by states of emergency and the expansive executive powers they afford and often make permanent on the pretext of national security.

¹⁹ Steven Levitsky and Lucan A. Way, “The Rise of Competitive Authoritarianism,” *Journal of Democracy* 13, no. 2 (April 2002): 2, https://scholar.harvard.edu/levitsky/files/SL_elections.pdf.

²⁰ Kadir Akyuz and Steve Hess, “Turkey Looks East: International Leverage and Democratic Backsliding in a Hybrid Regime,” *Mediterranean Quarterly* 29, no. 2, (2018): 1. <https://doi.org/10.1215/10474552-6898075>.

²¹ Hybrid regimes have also been conceptualized as semi-democracies (Case 1993), virtual democracies (Norris and Jones 1998), illiberal democracies (Zakaria 1997), and soft authoritarianism (Means 1996; Winckler 1984).

²² Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, (Cambridge: Cambridge University Press, 2010), 3.

²³ Akyuz and Hess, “Turkey Looks East,” 4.

²⁴ Jennifer Raymond Dresden and Marc Morje Howard, “Authoritarian backsliding and the concentration of political power,” *Democratization* 23, no. 7 (2016): 1125. <https://doi.org/10.1080/13510347.2015.1045884>.

ii. Elusive Enemies: From Ethno-Religious Othering to Regime Security

Conceptions of terrorism shifted in the post-9/11 era from political and ideological underpinnings to a conflation with ethnic separatism, ethnic nationalism and religious extremism. As a result, minority communities associated with ethnic liberation movements became “inescapably criminalized”, a phenomenon particularly apparent in the cases of the Kurds and the Palestinians.²⁵ For example, as Sentas (2015) noted, the enjoyment of human rights among Kurdish communities in Western Europe has been impacted as a result of this conflation between terrorism and ethnic nationalism, with the Kurdish diaspora collectively criminalized and subject to security policing in Britain as a ‘suspect community.’²⁶

A significant body of literature analyzes the intriguing dynamics shaping the relationship between ethno-religious demands for separatism, political violence, and human rights. Hannum (1990), in considering whether ethnic self-determination might in fact comprise a ‘right to autonomy’, argued that separatist demands may be legitimate in the face of extreme denials of human rights, which aligns with theories of ‘internal self-determination’.²⁷ As per the landmark ruling of the Supreme Court of Canada (*Reference re Secession of Quebec*, 1998) in determining the right of Quebec to secede from Canada, the principle of self-determination allows for separation from an existing state “only exceptionally, when the rights of the members of the people are violated in a grave and massive way.”²⁸

Human rights thus play a critical role in determining the validity of ethnic claims to self-determination and the perception of political violence committed to this end. Most importantly to our purposes here, Hannum (1990) made the vital connection between human rights violations and accusations of terrorism levelled against a dissident ethnic group, noting that: “...the central authorities are able to shift international attention from alleged human rights violations to supposed attacks on the state’s sovereignty and territorial unity.”²⁹ Pokalova (2010) similarly argued that states have a clear incentive to frame ethnic political movements as

²⁵ Christina Pantazis and Simon Pemberton, "From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation," *British Journal of Criminology* 49, no. 5 (2009): 650, doi:10.1093/bjc/azp031.

²⁶ Vicki Sentas, "Policing the Diaspora: Kurdish Londoners, MI5 and the Proscription of Terrorist Organizations in the United Kingdom," *British Journal of Criminology* 56, no. 5 (2015): 899, doi:10.1093/bjc/azv094.

²⁷ Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights*, (Philadelphia: University of Pennsylvania Press, 1990), 11.

²⁸ "Self-Determination," Oxford Public International Law, last modified June 6, 2017, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>.

²⁹ Hannum, *Autonomy*, 118.

terrorism in order to justify the use of violent repression or mass human rights violations to the wider domestic and international public.³⁰

The underlying legal and philosophical questions of whether ethnic groups possess a ‘right’ to autonomy and self-determination fundamentally shape the discourse on political violence and terrorism. Though a preliminary understanding of international terrorism was first outlined by the global community at the 1937 Terrorism Convention in Geneva, little consensus exists as to what constitutes *terror* and where exactly terrorism falls in relation to insurgency and guerrilla warfare or what position it occupies on the spectrum of political violence as a whole.³¹ As Chadwick (2016) points out, UN principles of equal rights and the self-determination of ‘peoples’ further complicate political and juridical questions over how to approach purported acts of ‘terrorism’ when such acts are perpetrated during an armed struggle for ethnic self-determination.³² This literature is vital to understanding terrorism charges in the context of the Kurdish question in Turkey.

However, as Kaygusuz (2018) writes, while ethnic minorities, migrants, and the poor have long been marginalized groups, other social groups - particularly those who vocally oppose or criticize government policy - have become increasingly and explicitly excluded under neoliberal notions of the rule of law.³³ Turkey is an excellent example of this paradigm shift: while ethnic minorities including the Kurds and the Armenians have historically been perceived as the chief enemies of the Republic, the post-coup crackdown has demonstrated a shift from such ethno-religious ‘Othering’ to the targeting of a broad blend of socioeconomic classes and political stripes, united simply on the basis of their opposition to government policy. Public enemies are no longer defined necessarily by their ethnic heritage but instead by the degree of allegiance they hold to the state; ethno-religious separatist threats to the ‘territorial integrity’ of a nation-state have been replaced with a broader, more slippery threat, one without any clear or specific objective. While terrorism and states of emergency are longtime elements of modern Turkey, particularly since the 1980s rise of the militant Kurdish separatist group known by its acronym PKK (*Partiya Karkerên Kurdistanê*), the AKP has recently widened the definition and

³⁰ Elena Pokalova, "Framing Separatism as Terrorism: Lessons from Kosovo," *Studies in Conflict & Terrorism* 33, no. 5 (2010): 430, doi:10.1080/10576101003691564.

³¹ The Convention for the Prevention and Punishment of Terrorism, colloquially referred to as the Terrorism Convention, defined ‘acts of terrorism’ as ‘criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’. See "U.S. Draft Convention for Prevention and Punishment of Terrorism Act." *International Legal Materials* 11, no. 06 (1972): 1382-387. doi:10.1017/s0020782900055704.

³² Elizabeth Chadwick, "Terrorism and Self-determination," in *Research Handbook on International Law and Terrorism*, ed. Ben Saul (Sydney: Edward Elgar Publishing, 2016), 298-314. doi:10.4337/9780857938817.00026.

³³ Kaygusuz, "Authoritarian Neoliberalism," 284.

concept of ‘terrorism’ to such a degree that it can be weaponized against anyone who dares vocalize social and political dissent.³⁴

This shift reflects the growing popularity of the regime security (RS) paradigm, which is described in IR and political theory literature as a set of practices that emerge when governing elites view the security of their own survival in power as the primary political priority.³⁵ As Kaygusuz (2018) articulates, ruling elites who perceive their own political survival as the survival of the state itself may employ violent and nonviolent mechanisms to compel and coerce other social groups into accepting the same perception.³⁶ In what might be seen as a rather prescient view of the current situation in Turkey, Jackson (2013) identified several RS techniques used by ruling elites who perceive real or alleged threats to their power: the reconfiguration of internal security forces and the granting of expansive powers, including immunity from the reach of the judiciary; the silencing of opposition through the use of torture, imprisonment, and violent suppression of political activities; and monopolizing the media so as to control and curate its content, carefully used to project a sheen of legitimacy to the international community.³⁷

The key here is the fusion between the ruling regime and the state itself, which complicates the question of a *coup d’etat* in the legal framework on states of emergency. According to Article 15 of the ECHR and Article 4 of the ICCPR, the right to derogate from human rights obligations can be invoked only in time of war or other public emergency “threatening the life of the nation.”³⁸ The meaning of the term was further developed by the European Court of Human Rights (ECtHR) in *Lawless v. Ireland* (1961), wherein the Court defined it as “an exceptional situation of crisis or emergency which affects the whole population.”³⁹ However, the precise threshold of what constitutes a “threat to the life of the nation” remains unclear and relatively open to interpretation.

In the context of derogation regimes, the nature of a *coup d’etat* - which by definition aim to depose the ruling regime - poses an interesting question. As Nugraha (2018) points out, the delegates negotiating the ICCPR text during the eighth session of the UN Commission on Human Rights Drafting Committee in 1952 specifically chose the term ‘nation’ as opposed to

³⁴ For a good analysis on the use of the ‘terrorist’ label as a political tool, see Andre Barrinha, “The political importance of labelling: terrorism and Turkey’s discourse on the PKK,” *Critical Studies on Terrorism* 4, no. 2 (2011)

³⁵ See, for example, Jackson 2013, 162; Job 1992, 144-45; Kindley 2015.

³⁶ Kaygusuz, “Authoritarian Neoliberalism,” 285.

³⁷ Richard Jackson, “Regime security,” in *Contemporary Security Studies*, ed. Alan Collins (Oxford: Oxford University Press, 2016), 167.

³⁸ “Derogation in time of emergency - factsheet.” *European Court of Human Rights - Press Unit*, last modified August 2018, 2. https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf

³⁹ *Lawless v. Ireland*, No. 1/61, Judgment of July 1, 1961, of the European Court of Human Rights.

‘government’ or ‘state.’⁴⁰ The term’s reference to the nation and not to the government indicates that the threat a coup poses to an existing government is insufficient to claim that there is a public emergency.⁴¹ As Hallsworth and Lea (2011) observe, the blurring of the boundary between the security of the *state* and the security of the *government* allows for the political and the criminal to be bound up as one⁴², thereby broadening the type of circumstances under which emergency derogations are permissible under international law.

iii. Traitors, Terrorists, and Spies: Foreign Influence and Domestic Power

A critical effect of the conflation between state and government is the tendency to portray political dissidents not only as traitors and terrorists but as foreign spies. Turkish human rights defenders, for example, are smeared as foreign operatives working against Turkey’s national interests. Indeed, accusations of both terrorism and espionage have been levelled against several dual citizens in the aftermath of the attempted coup: two Turkish-Americans, a NASA scientist and a pastor, remain imprisoned at the time of writing on charges of spying; a German-Turkish reporter for *Die Welt* newspaper was imprisoned without charge for more than a year on ‘suspicion of espionage’, released only after Chancellor Angela Merkel personally intervened; and President Erdoğan has repeatedly accused detained German and Swedish human rights activists of being ‘Western spies’ sent to meddle in Turkish affairs.⁴³

The post-coup crackdown has been accompanied by increasingly hostile anti-West rhetoric, as Erdoğan angrily dismissed calls to respect human rights and the rule of law. For example, in response to critical comments made by U.S. Central Command Chief General Joseph Votel, Erdoğan accused the U.S. of “taking the side of coup plotters instead of thanking this state for defeating the coup attempt.”⁴⁴ In response to the French Foreign Affairs Minister Jean-Marc Ayrault’s warning not to use the failed coup as a ‘blank cheque’ against opponents, Erdoğan stated in an interview with *Al Jazeera*: “Does he have the authority to make these declarations? No, he does not. If he wants a lesson in democracy, he can very easily get a lesson in democracy

⁴⁰ United Nations Commission on Human Rights, Summary Record of the 330th Meeting, 8th Session, 10 June 1952, E/CN.4/SR.330, 11-12, http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-SR_330_0.pdf?null.

⁴¹ Ignatius Yordan Nugraha, “Human rights derogation during coup situations,” *The International Journal of Human Rights* 22, no. 2 (August 2017): 198, <https://doi.org/10.1080/13642987.2017.1359551>.

⁴² Simon Hallsworth and John Lea, “Reconstructing Leviathan: Emerging contours of the security state,” *Theoretical Criminology* 15, no. 2 (May 2011): 149, <https://doi.org/10.1177/1362480610383451>.

⁴³ Hannah Lucinda Smith, “Human rights workers are Western spies, Erdogan claims,” *The Times*, July 26, 2017, <https://www.thetimes.co.uk/article/erdogan-brands-detained-human-rights-workers-western-spies-mzft582f8>.

⁴⁴ “Erdogan tells West to ‘mind your own business’ over Turkey crackdown,” *France 24*, July 30, 2016, <https://www.france24.com/en/20160730-erdogan-tells-west-mind-own-business-over-turkey-crackdown>.

from us.”⁴⁵ He offered similar rebukes to both the EU and the US in the weeks following the attempted overthrow, stating in a speech at the presidential palace: “Some people give us advice; they say they are worried. Mind your own business! Look at your own deeds!”⁴⁶ Erdoğan has used the situation to position himself as a staunch defender of Turkish nationalism and a bulwark against insidious Western manipulation in the Muslim world, at one point stating that “the era of a submissive Turkey bowing to every Western demand is over.”⁴⁷ The clear shift against the West has greatly diminished international leverage over human rights in Turkey and allowed the AKP to consolidate domestic power at the expense of foreign influence.

Turkey’s relationship with the international community has played a critical role in its recent political history and shaped its response to the coup. Paranoia and suspicion of foreign meddling in domestic affairs compromises the efficacy of international law, particularly in countries and regions badly impacted by the legacies of colonialism, foreign invasions and outside interference in internal politics. The AKP, driven in particular by former foreign minister and prime minister Ahmet Davutoğlu, has portrayed the Middle East and the Muslim world as a whole as a civilization fallen from grace at the hands of Western imperialism, the legacy of which was “artificial borders, conflicted identities and culturally alienated leaderships... that left the region prey to foreign ideas and impurities.”⁴⁸ Growing anti-Western sentiment fanned by the AKP has given rise to the related conviction that liberal democracy is a form of Western colonialism, and that ‘real’ democracy must be Islamic rather than secular.⁴⁹

According to Palabiyik (2018), the AKP shifted its political strategy around 2010 in response to both its lack of progress with EU accession and the spread of the Arab Spring across the Middle East and North Africa, which initiated the current split between Ankara and its Western allies.⁵⁰ EU-mandated reforms - particularly those concerning Cyprus and Kurdish issues - had stirred resistance among the AKP’s nationalist electoral base, and Turkey’s full membership to the EU had likewise been met with “deep concern” by countries including Germany and France.⁵¹ Cinar (2018) credits Davutoğlu with Turkey’s rejection of Western hegemony in world politics and

⁴⁵ “Erdoğan tells French foreign minister to mind his own business,” *Radio France International*, July 21, 2016, <http://en.rfi.fr/middle-east/20160721-erdogan-tells-french-foreign-minister-mind-his-own-business>.

⁴⁶ “Erdoğan tells West ‘mind your own business’ as journalists jailed,” *News 24*, July 30, 2016, <https://www.news24.com/World/News/erdogan-tells-west-mind-your-own-business-as-journalists-jailed-20160730>.

⁴⁷ “Erdoğan: Era of bowing to Western pressure is over,” *Al Jazeera*, July 25, 2017, <https://www.aljazeera.com/news/2017/07/erdogan-era-bowing-western-pressure-170725135359270.html>.

⁴⁸ Birol Baskan, “Islamism and Turkey’s foreign policy during the Arab Spring,” *Turkish Studies* 19, no. 2 (2018): 274, <https://doi.org/10.1080/14683849.2017.1405346>.

⁴⁹ Bill Park, “Populism and Islamism in Turkey,” *Turkish Studies* 19, no. 2 (2018): 172. <https://doi.org/10.1080/14683849.2017.1407651>.

⁵⁰ Mustafa Serdar Palabiyik, “Politicization of recent Turkish history: (ab)use of history as a political discourse in Turkey,” *Turkish Studies* 19, no. 2 (2018): 248, <https://doi.org/10.1080/14683849.2017.1408414>.

⁵¹ Menderes Cinar, “Turkey’s ‘Western’ or ‘Muslim’ identity and the AKP’s civilizational discourse,” *Turkish Studies* 19, no. 2 (2018): 185, <https://doi.org/10.1080/14683849.2017.1411199>.

pro-Western secular democratic ideals, based on the heightened costs and diminishing benefits of potential EU accession.⁵² Davutoğlu recognized that “the more influential Turkey becomes in the Middle East, the more bargaining power it will possess vis-à-vis the other powers” and accordingly viewed the Arab Spring as a key opportunity “to play a regional leadership role, akin to that of the Ottoman Empire’s one as protector of the Middle East.”⁵³

Consequently, in the six years prior to the attempted coup, the AKP had begun more heavily emphasizing its Islamic ‘authenticity’ in opposition to the pro-Western Kemalist doctrine and cultivated a populist nativist image with an increasingly “accusatory tone” towards the post-World War I “Europeanizing elites.”⁵⁴ As Palabiyik (2018) observes, the AKP has painted competing political parties as historical accomplices to the overthrow of Abdulhamid II, the loss of Aegean and other territories in the Lausanne Treaty, the imposition of secularism, the abolition of the Caliphate, the banning of the Arabic call to prayer, and the adoption of alphabet reform.⁵⁵ In recent years, the AKP has asserted itself as reclaiming Turkey’s rightful identity, reintroducing Ottoman Turkish into the national education curricula, re-Islamifying Turkish society, and employing what Park (2018) terms a ‘revisionist approach’ to the country’s foreign policy.⁵⁶ The AKP’s suspicion of the West has allowed for the easy dismissal of the international human rights regime as untrustworthy, biased, and lacking credibility, ultimately hindering the ability of the international community to successfully apply political and diplomatic pressure regarding respect for human rights and the rule of law.

Critically, the AKP’s new “unitarian, communal, and civilizational Islamism” casts a suspicious eye on those out of step among the country’s own population.⁵⁷ According to Sezal and Sezal (2018), the new Islamist nativist doctrine of the AKP has made a concerted effort to highlight the ‘foreign’ nature of the Kemalist elite in contrast with Islamic virtues, which has had the effect of representing secularists, liberals, Gulenists, Kemalists, Kurds and adherents of Shi’ism as enemies of ‘true’ Islam and of the ‘real’ people of Turkey.⁵⁸ It is this shift against secularism and pro-Western ideals that underpins the broadened conception of *terrorism* in Turkey and has positioned social and political dissidents in the crosshairs of counterterrorism.

⁵² *Ibid*, 186.

⁵³ Emre Ersen, “Geopolitical Codes in Davutoglu’s Views Towards the Middle East,” *Insight Turkey* 16, no. 1 (2014): 93, <http://ezproxy.cul.columbia.edu/login?url=https://search-proquest-com.ezproxy.cul.columbia.edu/docview/1506139005?accountid=10226>.

⁵⁴ *Ibid*, 187.

⁵⁵ Park, “Populism and Islamism,” 172.

⁵⁶ *Ibid*.

⁵⁷ Mustafa A. Sezal and Ihsan Sezal, “Dark taints on the looking glass: Whither ‘New Turkey?’” *Turkish Studies* 19, no. 2 (2018): 228, <https://doi.org/10.1080/14683849.2017.1402681>.

⁵⁸ *Ibid*.

iv. Sovereignty, Emergencies, and the International Human Rights Framework

The formal announcement of a national state of emergency is a legal declaration under both international and domestic law, activating the right of governments to suspend rights and freedoms ordinarily protected by a country's constitution or by international human rights law. Within the international legal framework, rules relating to emergency rights derogations are set out by Article 15 of the ECHR and Article 4 of the ICCPR. The ECHR entered into force on September 3, 1953 and has been ratified by 47 states as of 2018, while the ICCPR entered into force some two decades later on March 23, 1976 and enjoys a more international status with 171 states parties.⁵⁹

Briefly, states parties to the ECHR and the ICCPR are permitted by Article 15 and Article 4 to derogate from the treaty obligations "in time of war or other public emergency threatening the life of the nation."⁶⁰ However, derogations under both treaties are conditional: measures must be "strictly required by the exigencies of the situation" and must not be inconsistent with the state party's other obligations under international law.⁶¹ Further, under both treaties, several core rights are considered strictly non-derogable, including the right to life, the right to be free from torture and slavery, the right to due process, and freedom of thought, conscience and religion.⁶²

The derogation clauses of both the ECHR and the ICCPR have generated much criticism. Dolezal (2000), for example, argues that the ICCPR's failure to strictly define the term 'public emergency' renders its derogation provision unclear and open to abuse.⁶³ He identified as a significant weakness the failure to require states to report the specific derogation measures taken, which in turns renders it difficult to determine whether state actions meet the test of necessity.⁶⁴ Writing in the context of the American-led 'war on terror', Fitzpatrick (2003) argued that derogations have allowed governments to construct 'rights-free zones' that significantly alter the

⁵⁹ International Covenant on Civil and Political Rights, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en.

⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as amended by Protocol Nos. 11 and 14, *Refworld*, <http://www.refworld.org/docid/3ae6b3b04.html> and UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

⁶¹ ECHR, *supra* 64.

⁶² Aly Mokhtar, "Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights," *The International Journal of Human Rights* 8, no. 1 (2004): 70, doi:10.1080/1364298042000212547.

⁶³ Scott Dolezal, "The Systematic Failure to Interpret Article IV of the International Covenant on Civil and Political Rights: Is There a Public Emergency in Nigeria?" *American University International Law Review* 15, no. 5 (2000): 1168-69, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1283&context=auilr>.

⁶⁴ *Ibid*, 1174.

rules on the use of force in international relations and in norms of humanitarian law.⁶⁵ Mokhtar (2004) observed that the question of what consequences a state faces if it does not follow the procedures laid down in Article 15 of the ECHR have thus far remained unanswered by the Convention organs and previous case law.⁶⁶

Further, the practical effectiveness of monitoring and enforcement mechanisms are limited by political constraints. As Burstein (2006) observes, regional human rights courts like the ECtHR are boxed in by the political dynamics between the defendant-state and the rest of the community.⁶⁷ While some have urged human rights bodies to reconsider their deferential approach to states' claims regarding derogations, Burstein (2006) found that the dependence of courts on member states to enforce their judgements bounds them by human rights norms the community already defines as acceptable, thus preventing a more aggressive approach.⁶⁸

In the post-9/11 period, the scope of international human rights law has been increasingly limited by national security policies passed under states of exception, as has been the case in Turkey, France, Britain and Ukraine, among others. As Kadelbach and Roth-Isigkeit (2017) argue, counterterrorism policy, states of emergency and constitutional reservations made by states share the common aim of defining the essence of state interest beyond the reach of international law.⁶⁹ Indeed, recent decisions by supreme and constitutional courts in Germany, Britain and Russia have explicitly reserved the ultimate say in any case before the ECtHR that touches on domestic rights and constitutional sovereignty, thereby weakening the Court's authority.⁷⁰ In *R v. Horncastle & Others* (2009), for example, the Supreme Court of the United Kingdom agreed that it is required to "take into account" any judgment of the ECtHR but held that it possesses the ultimate authority to decline to follow Strasbourg decisions.⁷¹

⁶⁵ Joan Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights," *European Journal of International Law* 14, no 2 (2003): 242, <https://doi.org/10.1093/ejil/14.2.241>.

⁶⁶ Mokhtar, "Human Rights Obligations," 78.

⁶⁷ Mike Burstein, "The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights," *Berkeley Journal of International Law* 24, no. 2 (2006): 424, <http://scholarship.law.berkeley.edu/bjil/vol24/iss2/2>.

⁶⁸ *Ibid*, 425.

⁶⁹ Stefan Kadelbach and David Roth-Isigkeit, "The Right to Invoke Rights as a Limit to Sovereignty - Security Interests, State of Emergency and Review of UN Sanctions by Domestic Courts under the European Convention of Human Rights," *Nordic Journal of International Law* 86, no. 3 (2017): 3.

⁷⁰ German Federal Constitutional Court, BVerfG, 14 October 2004, Judgment, BVerfge 111, 307 at 329; Supreme Court of the United Kingdom, uksc, 9 December 2009; *R v Horncastle*, Judgment, [2009] uksc 14, § 11; Constitutional Court of the Russian Federation, ccrf, 26 February 2010, Case No. 4-P, Applications of A.A. Doroshok, A.E. Kot, and E.Y. Fedotova, Judgment, § 3.3.

⁷¹ *R v. Horncastle & Others* [2009] Judgment, UKSC 14 paras. 10-11, available online at: https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0073_Judgment.pdf

The question of human rights in the context of national security has long been stagnant as a result of its stalemate with state sovereignty, arguably the most fundamental principle of the global system. Empowering international bodies to investigate and prosecute human rights violations caused by national security measures would threaten the hierarchy of the Westphalian international order, wherein ultimate sovereignty over state affairs trumps more idealistic pursuits of international justice. Consequently, most recent scholarship in this area defers on the question of human rights to the principle of sovereignty or vaguely alludes to the theoretical balance that must be struck between defending national security and protecting human rights.

CHAPTER II:

States of Emergency: Executive Powers and Exceptional Rule

TURKEY

A. Three Coups and the Republic

The Republic of Turkey was created in 1923 after a four-year war of independence, led by the Turkish National Movement against British, French, Greek, and Italian troops occupying the fallen Ottoman Empire in the aftermath of World War I.⁷² Under the leadership of military commander Mustafa Kemal Atatürk, the new Turkish nation-state abolished the absolute monarchy of the Ottoman sultanate and established in its place the Grand National Assembly of Turkey.⁷³ Kemal, heralded as the founder of the Republic, established a state ideology based on secularism, democracy, the rule of law, popular sovereignty and the separation of powers.⁷⁴ However, though the *Six Arrows* of Kemalism have been the sacrosanct ideology of the state for much of Turkey's history, in recent years the paradigm has been criticized as a top-down, elite-defined "hindrance to democracy and public participation."⁷⁵ Though neither Kemalism nor Turkey's political history will be given a detailed analysis here, the fundamental tension between the "secularist establishment" - generally thought to include the military top brass, the upper levels of the bureaucracy and the judiciary, and established political parties like the Republican Peoples Party (*Cumhuriyet Halk Partisi*, CHP) - and the neo-Ottoman Islamist identity of the AKP is critical to understanding the attempted coup of July 2016 and the mass purges that followed.

⁷² Paul C. Helmreich, *From Paris to Sèvres: The Partition of the Ottoman Empire at the Peace Conference of 1919-1920* (Columbus: Ohio University Press, 1974).

⁷³ Alexander Lyon Macfie, *The End of the Ottoman Empire, 1908-1923* (London: Routledge, 2014), 197.

⁷⁴ Ayla Göl, "The Identity of Turkey: Muslim and secular," *Third World Quarterly* 30, no. 4 (2009): 806, <https://doi.org/10.1080/01436590902867383>.

⁷⁵ Menderes Çınar, "Turkey's Transformation under the AKP Rule," *The Muslim World* 96 (July 2006): 471, <http://repository.bilkent.edu.tr/bitstream/handle/11693/38257/bilkent-research-paper.pdf?sequence=1>. The 'Six Arrows' of Kemalism are: Republicanism (*Cumhuriyetçilik*), Nationalism (*Ulusçuluk*), Populism (*Halkçılık*), Statism (*Devletçilik*), Secularism (*Laiklik*), and Revolutionism (*Devrimcilik*). For further background on the Six Arrows, see Hikmet Bila, *Sosyal Demokrat Süreç içinde CHP ve sonrası* (The Republican Peoples' Party in the Social Democratic Process and its Aftermath), Istanbul 1987.

Similarly critical is Turkey's unique relationship with *coup d'états*, emanating from the power Kemalism bequeathed on the military as 'the guardians' of Turkey's secular democracy.⁷⁶ Since the Republic's founding in 1923, the Turkish Armed Forces have overthrown three elected governments, launching successful coups in 1960, 1971, and 1980. The first coup resulted in the purging of more than 500 judges and public prosecutors, 1,400 academics, the arrests of the the Chief of the General Staff, the President, and the Prime Minister, and the executions by hanging of the Ministers of Finance and Foreign Affairs.⁷⁷ The subsequent 'coup by memorandum' in 1971 followed a decade of increasingly violent social unrest and economic instability. In response to the government's parliamentary stalemate on widespread demands for social and financial reform, the Chief of the General Staff sent a memorandum to the prime minister threatening that the military would "exercise its constitutional duty" to intervene and restore order.⁷⁸ The prime minister resigned hours later, and the military elite selected and installed a 'caretaker government' in its place.⁷⁹ In less than a decade, military generals again intervened with a third and particularly brutal coup, which resulted in the dissolution of Turkish Parliament, the revocation of the Constitution, the stripping of citizenships of more than 14,000 people, forced disappearances and mass arrests of more than 650,000 people, the executions by death penalty of more than 500 people, another 200 people killed by torture in custody, and widespread restrictions on the press.⁸⁰

Serious social unrest and the series of government overthrows together resulted in repeated periods of *de facto* military rule in Turkey, with martial law acting as a precursor to states of emergency. Though a single authoritative definition of 'martial law' does not exist⁸¹, it is generally defined as the administration of law by military forces when civilian law enforcement agencies are unable to maintain public order and safety.⁸² Martial law was imposed for twenty-nine months in 1971 and applied again in December 1978, initially on 14 of 67 provinces and extended to 20 provinces by 1980.⁸³ A state of emergency regime was then implemented in

⁷⁶ Gerassimos Karabelias, "The Military Institution, Ataturk's Principles, and Turkey's Sisyphean Quest for Democracy," *Middle Eastern Studies* 45, no. 1 (January 2009): 59, <https://www.jstor.org/stable/40262642>.

⁷⁷ "Turkey commemorates victims of 1960 coup," *TRT World*, May 26, 2016, <https://www.trtworld.com/turkey/may-27-1960-coup-against-democracy-113681>

⁷⁸ "Timeline: A history of Turkish coups," *Al Jazeera*, July 15, 2016, <https://www.aljazeera.com/news/europe/2012/04/20124472814687973.html>.

⁷⁹ *Ibid.*

⁸⁰ "Turkey's 1980 coup facts," *Hurriyet Daily News*, April 4, 2012, <http://www.hurriyetdailynews.com/turkeys-1980-coup-facts-17628>

⁸¹ William Feldman, "Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege," *Cornell International Law Journal* 38, no. 3 (2005): 1022, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1666&context=cilj>.

⁸² "Martial law" entry in the Legal Information Institution, Cornell Law School, available online at: https://www.law.cornell.edu/wex/martial_law.

⁸³ "Turkey under Martial Law," CIA National Foreign Assessment Center, December 27, 1978, available online at: <https://www.cia.gov/library/readingroom/docs/CIA-RDP80T00634A000500010042-5.pdf>.

the country's predominantly Kurdish provinces in the southeast, beginning in July 1987 and ending in late 2002 for a total of fifteen years. Importantly, Turkey's history of repeated emergency regimes has allowed the executive to gradually and permanently expand the powers of the government at the expense of human rights and civil liberties.

Repeated emergency periods of exceptional rule have fundamentally shaped the relationship between national security and human rights in Turkey. The concept and language of 'national security' was in fact only introduced into the constitution and national legislation after the 1960 coup, a shift from perceptions of security previously rooted in 'defense' from external threats.⁸⁴ The National Security Council (NSC) was also borne out of the 1960 coup: formally established by the 1961 Constitution, it was created by the new military rulers as a "forum to share their views with civilian authorities" or more aptly, as a tool necessary to maintaining the military's political power and influence even after a civilian government had been elected.⁸⁵

Indeed, after each overthrow and subsequent period of exceptional rule, the powers of the government and the military grew. After the 1971 coup, the military elite amended 35 regular articles of the constitution and added nine temporary articles, all of which "aimed to reinforce the powers of the government against threats to national unity, public order, and national security."⁸⁶ Constitutional amendments also increased the authority of the Minister of Defense and enhanced the powers of the military members of the NSC.⁸⁷ Civil liberties were simultaneously stripped, as were the functions of the judiciary: restrictions were placed on the press, unions, and universities, while civilian administrative courts lost the ability to review the actions of military personnel.⁸⁸ Special courts were created to deal with "dissent", trying over 3,000 people in only five years before being declared unconstitutional and abolished in 1976.⁸⁹ Similarly, the generals behind the 1980 takeover created the 1982 Constitution, which further expanded the powers of the military establishment by increasing the authority of the NSC relative to the Cabinet.⁹⁰

Turkey's unique history of coup d'états and repeated periods of emergency rule are critical to our purposes here for two central reasons. First, as outlined above, periods of exceptional rule had permanent impacts on the Turkey's legal and political apparatus: emergency measures were codified into Turkish law and embedded into permanent national security structures of the state,

⁸⁴ Betül Urhan and Seyit Celik, "Perceptions of 'National Security' in Turkey and Their Impacts on the Labor Movement and Trade Union Activities," *European Journal of Turkish Studies* (2010): 1, <http://ejts.revues.org/4333>.

⁸⁵ George S. Harris, "Military Coups and Turkish Democracy, 1960-1980," *Turkish Studies* 12, no. 2 (2011): 204, <https://doi.org/10.1080/14683849.2011.573181>.

⁸⁶ *Ibid*, 206.

⁸⁷ *Ibid*, 206.

⁸⁸ *Ibid*, 206.

⁸⁹ Kerim Yildiz and Susan Breau, *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms* (London: Routledge, 2010), 11.

⁹⁰ *Ibid*, 210.

and several key amendments made to the original constitution during or as a result of emergency situations increasingly jeopardized core rights and freedoms owed to the citizenry. Second, it is critical to underscore that modern Turkey was founded with a fundamental tension between the military and the executive by design. The constitution placed the duty with the military to keep the government in check if it strays from the foundational principles of Kemalist secular democracy.⁹¹ Far from being unprecedented, the failed military coup against President Recep Tayyip Erdoğan in July 2016 must be understood as part of the country's tradition of military intervention in government and longtime mistrust between elements of the state.

B. Dark July: Executive Powers and Exceptional Rule

The Turkish government was almost overthrown for a fourth time on July 15, 2016, when a faction of the military attempted to seize power. Rebel officers hijacked two dozen F-16s, detained and held hostage senior military leaders, blocked major roads and bridges, and occupied key institutions including state-run media facilities and international airports.⁹² Parliament was bombed, the president's guards were ambushed by a helicopter sent to capture Erdoğan, and by morning more than 260 people had been killed.⁹³ In a public statement rebel soldiers forced a state news anchor to read on national television, the coupists cited AKP corruption and support of terrorism, the destruction of the country's democratic institutions, and a lack of respect for human rights as justification for their actions, lamenting that: "The secular and democratic rule of law has been virtually eliminated."⁹⁴

Within five days of the failed putsch, President Erdoğan declared a nationwide state of emergency for a period of ninety days.⁹⁵ He announced the state of emergency in a televised address given at the presidential palace in Ankara, stating that it was necessary "in order to remove swiftly all the elements of the terrorist organization involved in the coup attempt."⁹⁶ Erdogan attributed the coup to Turkish Islamic cleric Fethullah Gülen, a former AKP ally who has lived in self-imposed exile in Pennsylvania since 1999, and the *Hizmet* movement he had

⁹¹ Ozan Varol, "The Turkish 'model' of civil-military relations," *International Journal of Constitutional Law* 11, no. 3 (September 2013): 741, <https://doi.org/10.1093/icon/mot023>.

⁹² Dexter Filkins, "Turkey's Thirty-Year Coup," *New Yorker*, October 17, 2016, <https://www.newyorker.com/magazine/2016/10/17/turkeys-thirty-year-coup>

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ "Turkey Declares 'State of Emergency' after Failed Coup," *Al Jazeera*, 21 July 2016, <https://www.aljazeera.com/news/2016/07/erdogan-declares-stateemergency-turkey-160720203646218.html>.

⁹⁶ Stuart Williams, Fulya Ozerkan and Frank Zeller, "Erdogan declares three-month state of emergency in Turkey," *Times of Israel*, July 21, 2016, <https://www.timesofisrael.com/erdogan-declares-3-month-state-of-emergency-in-turkey/>.

developed, which Turkey officially designated a terrorist organization in May 2016.⁹⁷ The decision to declare a state of emergency was made pursuant to Article 120 of the Turkish Constitution and Article 3(1)(b) of the State of Emergency Act (Law No. 2935), both of which allow for emergency measures to be invoked in the case of emergencies resulting from widespread acts of violence or serious public disorder. Per its obligations as a states party to the ECHR, the government submitted its notification of a state of emergency to the Council of Europe on July 21. The following section will briefly survey the government's actions in the wake of the failed coup and analyze the domestic and international legal bases for such.

Empowered by the declared state of emergency, the government embarked on a swift and widespread crackdown. The numbers are staggering: according to a CNN report published within five days of the failed coup, the licenses of 21,738 teachers had been revoked, 2,745 judges and prosecutors had been detained, 1,577 university deans were asked to resign, nearly 50 journalists were arrested, and 24 radio and television companies had been shut down.⁹⁸ 50,000 people were fired or suspended, most from the Prime Minister's office, government bodies, and the state broadcaster, while 118 generals and admirals were detained and stripped of their rank.⁹⁹ According to the state-run Anadolu Agency, the authorities suspended 8,777 Ministry of Interior personnel, including thirty governors, and 100 Turkish intelligence service personnel.¹⁰⁰ More than 16,000 people were detained on suspicion of involvement with the coup by the end of the month, while emergency decrees issued on July 21 resulted in the closure of 35 health institutions and medical organisations, 1,043 private education institutions, 1,229 foundations and associations, 19 unions and 15 foundation schools due to alleged links to the coup.¹⁰¹

The crackdown intensified in the weeks and months that followed. *Turkey Purge*, a website established by a grassroots group of Turkish journalists to track the AKP's "campaign of political repression" in the wake of the failed coup, has extensively documented the final impacts of the emergency decrees. The final numbers are staggering: at the time of writing, 170, 372 people have been dismissed; 142, 874 have been detained; 81, 417 have been arrested; 6,021 academics have lost their jobs; 4,463 judges and prosecutors have been dismissed; 3,003 schools,

⁹⁷ The movement is generally described as a transnational Islamic social movement based on Gulen's religious teachings. It is classified as the 'Fethullah Gulenist Terror Organisation' in Turkey, commonly known by its Turkish acronym FETÖ (*Fethullahci Teror Orgutu*). Suspected members of the organization are often simply referred to as 'Gulenists'. See "Turkey labels former Erdogan ally's group as terrorists," *The Guardian*, May 31, 2016.

<https://www.theguardian.com/world/2016/may/31/turkey-labels-ex-erdogan-ally-fethullah-gulen-group-terrorists>.

⁹⁸ Isil Sariyuce and Angela Dewan, "Turkey declares three-month state of emergency," *CNN*, July 20, 2016,

<https://www.cnn.com/2016/07/20/europe/turkey-failed-coup-attempt/index.html>.

⁹⁹ *Ibid.*

¹⁰⁰ Fatma Bülbül, "Turkey: At least 8,000 officials suspended after coup attempt," *Anadolu Agency*, July 18, 2016,

<https://www.aa.com.tr/en/politics/turkey-at-least-8-000-officials-suspended-after-coup-attempt/610202>.

¹⁰¹ "Turkey to shut down all Gulen-linked companies," *Middle East Monitor*, July 24, 2016,

<https://www.middleeastmonitor.com/20160724-turkey-to-shut-down-all-gulen-linked-companies/>.

dormitories and universities have been shut down; 319 journalists have been arrested; and 189 media outlets have been shut down.¹⁰²

DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORKS ON SoEs

A. Turkish Law

Turkey is not unfamiliar with states of emergency: as outlined above, the Republic or parts of it have been under some form of extraordinary rule for much of its 94-year history. The predecessor of today's SoE regime was the Law for the Establishment of Public Order (*Takrir-i Sükûn Kanunu*), enacted on March 4, 1925, shortly after the establishment of the Republic.¹⁰³ This law classified social dissent and political opposition movements as threats to national security, and became “a tool...for forestalling possible social opposition and containing all political opposition, including the press.”¹⁰⁴ It also empowered the government to ban and dissolve any publication or organization that posed a threat to the country's “social order, peace, calm, security and safety.”¹⁰⁵ In 1971, the government passed Law No. 1488, which used the term ‘national security’ to limit the right of association established by Article 29 of the 1961 Constitution, and the right per Article 46 to establish trade unions.¹⁰⁶ Law No. 1488 also expanded the scope of Article 24, adding to the list of criteria allowing for the proclamation of martial law. The Martial Law Act (Law No. 1402), adopted the same year, explicitly empowered martial law commanders to restrict or completely suspend constitutional rights and civil liberties at their discretion.

The government's authority to declare a state of emergency (*Olağanüstü Hal*, OHAL) is derived from Articles 120 and 121 of the Turkish Constitution.¹⁰⁷ Article 120 permits the President of the Republic to “declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months” in the event of “serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of

¹⁰² “Turkey's post-coup crackdown,” homepage of *Turkey Purge*, available online at: <https://turkeypurge.com/>.

¹⁰³ Urhan and Celik, “Perceptions of ‘National Security’,” 5.

¹⁰⁴ *Ibid*, 5.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*, 11.

¹⁰⁷ Article 119 also relates to states of emergency and procedures governing emergency rule, but only relates to emergencies on account of natural disaster, dangerous epidemic diseases or serious economic crises, issues that will not be addressed here.

violence.”¹⁰⁸ Article 120 requires the President to convene a meeting of the Council of Ministers and consult with the National Security Council prior to declaring the SoE.

Article 121 of the Constitution sets out the rules of procedure governing emergency rule. According to this provision, the President is required to publish the decision in the Official Gazette (*T.C. Resmi Gazete*), thereby immediately notifying the public that emergency rule is in effect, and is further mandated to submit the declaration to the Turkish Grand National Assembly for approval. The Assembly has the authority to alter the duration of the SoE, extend the period for a maximum of four months each time at the request of the Council of Ministers, or lift the SoE if it sees fit.¹⁰⁹ Article 121 further empowers the Council of Ministers under the direction of the President to issue “decrees having force of law on matters necessitated by the state of emergency.”¹¹⁰ Per Article 148(1) of the Turkish Constitution, emergency decrees cannot be subject to appeal or review by the Constitutional Court: “No action shall be brought before the Constitutional Court alleging the unconstitutionality as to the form or substance of decrees having force of law, issued during a state of emergency, martial law or in time of war.”¹¹¹

It is worth mentioning a curious development in the attitude of the Constitutional Court (*Anayasa Mahkemesi*, AYM) towards emergency decrees. In a landmark decision in 1991, the AYM held that the SoE is a legal regime regulated by the Constitution and therefore cannot be beyond the scope of judicial scrutiny.¹¹² Despite the prohibition on constitutional reviews of emergency decrees set out by Article 148(1), the AYM reasoned that it nonetheless possesses the authority to determine whether decree laws in fact meet the criteria set out by Articles 120 and 121. That is, the AYM can examine whether decrees are sufficiently within the bounds of proportionality, temporariness, and geographical restriction required by the Constitution; the AYM can only assess the constitutionality of a decree if it does not meet the criteria necessary to render it a legitimate decree.¹¹³ The AYM further widened the scope of its jurisdiction over SoEs in 2003, when it ruled that the power of the government to issue emergency decree laws was subject to judicial limitations afforded by the constitutional authority of Articles 121 and 122.¹¹⁴

However, the AYM has since reversed the aforementioned precedent, deviating from its own jurisprudence and abandoning previous assertions that it possesses the right to rule on the

¹⁰⁸ Constitution of the Republic of Turkey [Turkey], 7 November 1982, available online at: <http://www.unhcr.org/refworld/docid/3ae6b5be0.html>, Article 120.

¹⁰⁹ *Ibid*, Article 121.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*, Article 148(1).

¹¹² Serkan Köybaşı, “Developments in Turkish Constitutional Law: The Year 2016 in Review,” *Blog of the International Journal of Constitutional Law*, December 11, 2017, <http://www.iconnectblog.com/2017/12/turkey-2016-review/>.

¹¹³ *Ibid*.

¹¹⁴ E.2003/28, K.2003/42

legitimacy of emergency decrees. In the fall of 2016, the CHP appealed for the annulment of four emergency decrees (Decree Nos. 668, 669, 670, and 671) on the grounds that they violated the constitution; the party applied to the AYM to annul 13 more emergency decrees in June 2018.¹¹⁵ The AYM rejected every application on the basis of a strict interpretation of Article 148(1), concluding that the original writers of the Constitution had intended it to completely prohibit judicial scrutiny, a reversal of its own previous case law.¹¹⁶ As President of the AYM, Zühtü Arslan, stated: “Constitution Article No. 148 explicitly states that the statutory decrees issued during the State of Emergency cannot be taken to the Constitutional Court. Departing from this point, the AYM ruled that it doesn’t have the authority to review the statutory decrees put into effect during the State of Emergency. We cannot be expected to step outside the constitutional borders.”¹¹⁷

With the AYM’s newfound deference on emergency decrees in mind, it is necessary to highlight the increasing levels of influence the executive has exercised over the court. In 2010, for example, the powers and structure of the AYM were altered via constitutional referendum, the result of which was the appointment of six judges to the court chosen personally by President Erdoğan.¹¹⁸ A second constitutional referendum, controversially held during the SoE period in April 2017, granted the president the power to handpick twelve of the AYM’s fifteen judges.¹¹⁹ Moreover, two AYM judges, Alparslan Altan and Erdal Tercan, were detained within twenty-four hours of the attempted coup, later dismissed from the court and permanently barred from the judicial profession due to their alleged ties to FETO.¹²⁰ Altan and Tercan were quickly

¹¹⁵ “Turkey’s Constitutional Court rejects CHP application to cancel 13 gov’t decrees,” *Stockholm Center for Freedom*, July 1, 2018,

<https://stockholmcf.org/turkeys-constitutional-court-rejects-chp-application-to-cancel-13-govt-decrees/>.

¹¹⁶ Selin Esen, “Judicial Control of Decree Laws in Emergency Regimes - A Self-Destruction Attempt by the Turkish Constitutional Court?” Blog of the International Association of Constitutional Law, December 19, 2016, <https://iaclaidd.wordpress.com/2016/12/19/judicial-control-of-the-decree-laws-in-emergency-regimes-a-self-destruct-ion-attempt-by-the-turkish-constitutional-court/>.

¹¹⁷ “Head of top court in Turkey confirms they don’t have authority to review statutory decrees,” *Stockholm Center for Freedom*, April 26, 2017, <https://stockholmcf.org/head-of-top-court-in-turkey-confirms-they-dont-have-authority-to-review-statutory-decrees/>.

¹¹⁸ Köybaşı, “Turkish Constitutional Law.” For more information, see Law on Establishment and Rules of Procedures of the Constitutional Court (Law No. 6216, March 2011).

¹¹⁹ “Turkey referendum: What happened and what comes next,” *CNN*, April 18, 2017, <https://www.cnn.com/2017/04/17/europe/turkey-referendum-explainer/index.html>.

¹²⁰ The Court was granted the power to dismiss its own members by Decree No. 667, which it did in this case largely on the basis of social network information indicating that Altan and Tercan had a connection to the Gulen network. Significantly, as Olcay (2017) highlights, the Court determined that Decree No. 667 did not require ‘membership in’ or ‘affiliation with’ a terror group but that ‘adherence to’ or a ‘connection with’ it were sufficient grounds for dismissal.” See Tarik Olcay, “Firing Bench-mates: The Human Rights and Rule of Law Implications of the Turkish Constitutional Court’s Dismissal of its Two Members,” *European Constitutional Law Review* 13 (2017): 568, doi:10.1017/S1574019617000207.

replaced by two new justices chosen directly by the president.¹²¹ Finally, Erdoğan recently publicly rebuked the AYM following its decision to release two jailed journalists, stating that he does not “abide by the decision or respect it”, calling the decision one “against the country and against its people” and threatening the future existence of the court: “The court’s future is in doubt if it were to make another such ruling... I hope the Constitutional Court will not try to repeat this in a way that would call into question its existence and its legitimacy.”¹²² It would certainly appear that the court’s sudden reversal on this issue is the result of political pressure and a stacked deck of judges chosen personally by the president.

Returning to the governance of the SoE regime in Turkey’s domestic legal framework, the specific provisions of emergency rule are ceded by the Constitution to the State of Emergency Law (SEL)(Law No. 2935), which was passed under the State of Emergency Act in October 1983. Article 4 of the SEL allows the President and the Council of Ministers to issue decrees having the force of law “without complying with the restrictions and procedures laid down in Article 91 of the Constitution” during states of emergency.¹²³ The restrictions and procedures it refers to are the “fundamental rights, individual rights, and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter” which, per Article 91, cannot be regulated by decree - except during periods of martial law and states of emergency.¹²⁴ Article 15 of the Constitution expands on this right of the government to restrict rights and liberties under certain circumstances, stating:

“In times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual’s right to life, and the integrity of his material and spiritual entity can be inviolable except where death occurs through lawful act of warfare and execution of death sentences; no one may be compelled to reveal his religion, conscience, thought or opinion nor be accused

¹²¹ Maria Haimerl, “The Turkish Constitutional Court under the Amended Turkish Constitution,” *Verfassungsblog*, January 27, 2017,

<https://verfassungsblog.de/the-turkish-constitutional-court-under-the-amended-turkish-constitution/>.

¹²² Charlotte Beale, “Turkish President Erdogan threatens court’s ‘existence’ after it releases two journalists,” *The Independent*, March 12, 2016,

<https://www.independent.co.uk/news/world/europe/erdogan-threatens-courts-existence-after-it-releases-two-journalists-a6927421.html>.

¹²³ State of Emergency Act (October 1983): State of Emergency Law No. 2935. Published in the Official Gazette on 27 October 1983, No. 18204. Accessed online in English at: <https://www.legislationline.org/documents/id/6974>.

¹²⁴ Constitution of the Republic of Turkey [Turkey], 7 November 1982, available at: <http://www.unhcr.org/refworld/docid/3ae6b5be0.html>, Article 91.

on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven by a court judgment.”¹²⁵

Under SoEs provoked by widespread violence or threats to the public order, the powers granted to the government are set out under Chapter Three, Article 11 of the SEL. The government may implement a wide range of measures via emergency decree, several of which plainly restrict fundamental human rights and civil liberties: (b) prohibits any kind of assembly or procession; (c) authorizes officials to search persons, their vehicles, or property; (e) prohibits, or imposes the obligation to require permission for, the publication (including issuance of reprints and editions) and distribution of newspapers, magazines, brochures, books, etc.; prohibits the importation and distribution of publications published or reprinted outside regions declared to be under a state of emergency, and allows for the confiscation of books, magazines, newspapers, brochures, posters and other publications of which publication or dissemination has been banned; (f) controls and, if deemed necessary, restricts or prohibits every kind of broadcasting and dissemination of words, writings, pictures, films, records, sound and image bands (tapes); (h) controls and, if deemed necessary, suspends or prohibits the exhibition of all kinds of plays and films; (m) prohibits, postpones, or imposes a requirement to obtain permission for, assemblies and demonstrations in both enclosed and open spaces; regulates the time and place of permitted assemblies and demonstrations; and allows for the supervision, and if deemed necessary dispersal, of all kinds of permitted assemblies; and (p) allows for the planning and execution of operations, in so far as they may be necessary, beyond the borders of Turkey to capture or incapacitate persons who, having carried out disruptive actions in Turkey, have sought refuge in a neighbouring country.¹²⁶

Since the SoE came in effect July 2016, the Turkish government has issued 32 emergency decrees implementing virtually all of the aforementioned measures.¹²⁷ Further, the decrees have allowed for more than 300 amendments to be made to more than 150 separate laws.¹²⁸ Human rights organizations have criticized the decrees as violating both Turkish and international law. For example, the Turkish Human Rights Association (*İnsan Hakları Derneği*, İHD) stated on July 28, 2016 that the decrees are “clearly incompatible with the Turkish Constitution Article 15, Clause 2... and even with the Articles of the Turkish Constitution concerning the decrees during

¹²⁵ Serap Yazici, “A Guide to the Turkish Public Law Order and Legal Research,” GlobalLex: NYU Hauser Global Law School Program, September 2006.

http://www.nyulawglobal.org/globalex/Turkey.html#_Historical_Background.

¹²⁶ State of Emergency Act (October 1983): State of Emergency Law No. 2935. Published in the Official Gazette on 27 October 1983, No. 18204. Accessed online in English at: <https://www.legislationline.org/documents/id/6974> Chapter III, Art. 11.

¹²⁷ “The State of Emergency has ended but urgent measures are now needed to reverse the roll back of human rights,” *Amnesty International*, July 18, 2018, <https://www.amnesty.org/en/latest/campaigns/2018/07/turkey-state-of-emergency-lifted/>.

¹²⁸ *Ibid.*

emergency states.”¹²⁹ The group pointed to the fact that the clauses of the decree share no connection to the subject of and reason for the declared SoE. The UN Office of the High Commissioner of Human Rights similarly found that several of the emergency decrees lack any connection to a national threat or public emergency.¹³⁰ This issue will be explored in more depth in the following section.

Finally, it is important to note that neither the term ‘national security’ nor ‘state of emergency’ are explicitly defined in Turkish law. The phrase ‘state of emergency’ lacks clarity in the legislation, but the legal and operational framework of such has been developed to some degree by the case law of the AYM and the ECtHR, as will be examined below. No definition of national security, however, is clearly laid out, lacking in both the 1949 High Council of National Security and the 1962 Law of the NSC.¹³¹ While the amended 1983 Law of the NSC (Law No. 2945) offers a broad definition - “The protection and maintenance of the constitutional order, national presence, integrity, all political, social, cultural, and economic interests in international field as well as against any kind of internal and external threats, of the State”¹³² - its open-ended wording has been criticized as leaving the term open to subjective interpretations and arbitrary implementation, ripe for abuse.¹³³

Employing vague, easily manipulated terminology in this context is not an issue limited to Turkey: both concepts of ‘national security’ and ‘public emergencies’ remain ambiguous at the international level. The former is most often defined by a blend of both military and non-military characteristics that correspond roughly to the ‘hard’ and ‘soft’ power capabilities underpinning state sovereignty: freedom from military threat, foreign domination, or political coercion¹³⁴; the ability to preserve a nation’s physical integrity and territory, maintain international economic relations, preserve its institutions and governance from disruption, and control its borders¹³⁵; and the capacity of a nation to overcome multi-dimensional threats to the well-being of its people, its

¹²⁹ “The Decree Devised within the Scope of the Emergency State Law and Ignoring Human Rights and Fundamental Principles of Rule Of Law Should Be Urgently Revoked!”, press release issued by the Turkish Human Rights Association, 28 July 2016, <http://ihd.org.tr/en/index.php/2016/07/28/the-decree-devised-within-the-scope-of-the-emergency-state-law-and-ignoring-human-rights-and-fundamental-principles-of-rule-of-law-should-be-urgently-revoked/>.

¹³⁰ “Turkey: UN Report Details Extensive Human Rights Violations during Protracted State of Emergency,” OHCHR, March 20, 2018, available online at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22853>.

¹³¹ See Law. No. 129 of 11 December 1962, issued in accordance with Article 111 of the 1961 Constitution.

¹³² See Law No. 2945 of 1 November 1983, issued in accordance with Article 118 of the 1982 Constitution.

¹³³ Urhan and Celik, “Perceptions of ‘National Security’ in Turkey,” 4.

¹³⁴ Joseph J. Romm, *Defining national security: the nonmilitary aspects* (New York: Council on Foreign Relations Press, 1993), 122.

¹³⁵ Harold Brown, *Thinking about National Security: Defense and Foreign Policy in a Dangerous World* (Boulder, CO: Westview Press, 1983), 281.

survival as a nation-state¹³⁶ and its acquired values.¹³⁷ ‘Public emergencies’ are defined in health and humanitarian contexts as a “managerial term describing a state, demanding decision and follow-up in terms of extraordinary measures”; the World Health Organization (WHO) further defines a ‘state of emergency’ as something that “demands to be declared or imposed by somebody in authority... thus, it is usually defined in time and space, it requires threshold values to be recognized, and it implies rules of engagement and an exit strategy.”¹³⁸ From a rights-based perspective, however, the UN Human Rights Council has been criticized for making “no attempt” to provide a specific definition of or criterion for the term “public emergency”, leaving the term dangerously open to interpretation.¹³⁹

B. International Human Rights Law

In the month following the failed coup, President Erdoğan submitted formal notice of Turkey’s intention to derogate from several of its human rights obligations under the ECHR and the ICCPR, respectively ratified in 1954 and 2003. As previously noted, both the ECHR and the ICCPR provide for the limited suspension of certain treaty obligations during emergency situations. Article 15(1) of the ECHR states that during times of war or other public emergency “any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required to the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”¹⁴⁰ The derogation clause of the ICCPR, Article 4(1), uses identical language, but adds that measures taken during times of emergency “must not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.”¹⁴¹

However, the derogation clauses of both treaties forbid the suspension of several core, fundamental rights. Both prohibit derogations from the right to life (Article 2 of the ECHR and Article 6 of the ICCPR), the right to be free from torture, including inhuman or degrading treatment or punishment (Article 3 of the ECHR and Article 7 of the ICCPR), the right to be free from slavery and forced labour (Article 4 of the ECHR and Article 8 of the ICCPR), and the

¹³⁶ Prabhakaran Paleri, *National Security: Imperatives and Challenges* (New Delhi: Tata McGraw-Hill, 2008), 521.

¹³⁷ Arnold Wolfers, “‘National Security’ as an Ambiguous Symbol,” *Political Science Quarterly* 67, no. 4 (1952): 149, doi:10.2307/2145138.

¹³⁸ Public Emergencies - Definitions: Glossary of Humanitarian Terms, World Health Organization, <http://www.who.int/hac/about/definitions/en/>.

¹³⁹ Dominic McGoldrick, “The interface between public emergency powers and international law,” *International Journal of Constitutional Law* 2, no. 2 (April 2004): 392, <https://doi.org/10.1093/icon/2.2.380>.

¹⁴⁰ ECHR, Article 15(1).

¹⁴¹ ICCPR, Article 4(1).

prohibition of punishment without law (Article 7 of the ECHR and Article 15 of the ICCPR).¹⁴² The ICCPR further recognizes the right to be free from imprisonment on the grounds of inability to fulfil a contractual obligation (Article 11), the right to recognition as a person before the law (Article 16), and the right to freedom of thought, conscience, and religion (Article 18) as strictly non-derogable rights.¹⁴³

On July 21, 2016, Turkey notified the Secretary General of the Council of Europe, Thorbjørn Jagland, of its intention to derogate from several obligations under the ECHR.¹⁴⁴ As has become its longtime habit in declaring derogations, Turkey failed to specify what articles would be subject to derogation, stating simply that “measures taken may involve derogation” from ECHR obligations.¹⁴⁵ Turkey subsequently notified the Secretary General of the UN that it was invoking Article 4 of the ICCPR, which entered into effect on August 2, 2016. In the notification letter submitted to UN Secretary General Ban Ki-Moon by Y. Halit Çevik, Permanent Representative of Turkey to the UN, Turkey declared its intention to derogate from thirteen articles of the ICCPR: the right to a remedy (Art. 2.3), liberty (Art. 9), the humane treatment of detainees (Art. 10), movement (Art. 12), safeguards against expulsion (Art. 13), fair trial (Art. 14), privacy and family (Art. 17), expression (Art. 19), assembly (Art. 21), association (Art. 22), political participation (Art. 25), equality and nondiscrimination (Art. 26), and minority rights (Art. 27).¹⁴⁶

For reference, after recent terrorist attacks killed 130 people in Paris, France derogated from only three ICCPR articles: the rights to liberty (Art. 9), movement (Art. 12), and privacy (Art. 17). In fact, no states party aside from Turkey has suspended more than seven articles of the ICCPR during a state of emergency: Chile, Azerbaijan, Colombia, Nepal have each previously derogated from four articles, while Russia derogated from five in 1994 and Sri Lanka from seven in 2010.¹⁴⁷ Turkey’s lengthy list of suspended articles clearly deviates from derogation norms.

¹⁴² The full text of Article 7(1) reads: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

¹⁴³ ICCPR, Articles 11, 16 and 18.

¹⁴⁴ Declaration contained in a letter from the Permanent Representative of Turkey, dated 21 July 2016, registered at the Secretariat General on 21 July 2016, available online in English at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=HC8HmHOM.

¹⁴⁵ Martin Scheinin, “Turkey’s Derogation from the ECHR - What to Expect?” Blog of the *European Journal of International Law*, July 27, 2016, <https://www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/>.

¹⁴⁶ Reference: C.N.580.2016.TREATIES-IV.4 (Depositary Notification): <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>.

¹⁴⁷ “Counter-Terrorism and Situations of Public Emergency,” UN Office of Drugs and Crime E4J University Module Series on Counter-Terrorism (2016), <https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/examples.html>.

i. The Derogation Clauses: Interpretation and Application

The nature and scope of ECHR Article 15 has been further developed by ECtHR jurisprudence. Three major cases have dealt with the question of derogation: *Lawless v. Ireland* (1961), the *Greek Case* (1969), and *Ireland v. United Kingdom* (1978). In *Lawless* and *Greek*, the ECtHR expanded on the definition of a ‘public emergency’, determining that it must possess the following four characteristics: it must be actual and imminent; its effects must involve the whole nation; the continuance of the organized life the community must be threatened; and the crisis or danger must be exceptional in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, “are plainly inadequate.”¹⁴⁸

Though the ICCPR lacks a judicial organ akin to the ECtHR, the interpretation and application of its derogation clause has been developed by two general comments adopted by the UN Human Rights Committee, General Comments No. 5 and 29, as well as by the Siracusa Principles and the Paris Minimum Standards. The UN Human Rights Committee first adopted a brief one-page commentary in 1981, emphasizing that any measures taken under Article 4 must be “exceptional” and “temporary”, insofar as that they “may only last as long as the life of the nation concerned is threatened.”¹⁴⁹ Subsequently, in September 1984, the International Committee on the Enforcement of Human Rights Law within the International Law Association completed the development of a set of minimum standards during states of emergency, called the Paris Minimum Standards of Human Rights Norms in a State of Emergency.¹⁵⁰ Based on a four-year study of the international monitoring of SoEs, the Paris Minimum Standards were developed to help governments, international monitoring bodies and NGOs understand the meaning, scope and effect of their treaty obligations and enable more effective protections of basic human rights.¹⁵¹

The following year, in April 1985, the American Association for the International Commission of Jurists (AAICJ) published the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. Recognizing that SoEs are “one of the main instruments employed by governments to repress and deny the fundamental rights and freedoms of peoples”, the AAICJ similarly sought to more sharply define permissible grounds

¹⁴⁸ *The Greek Case* (3321-23/67; 3344/67) 5.11.1969, para 153.

¹⁴⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 5: Article 4 (Derogations)*, 31 July 1981, available at: <http://www.refworld.org/docid/453883ff1b.html> at para. 3.

¹⁵⁰ Chaired by Richard B. Lillich, with members from Australia, Bangladesh, Bulgaria, Canada, Finland, the Federal Republic of Germany, Ghana, Guyana, Hungary, India, Japan, the Republic of Korea, Nepal, the Netherlands, Nigeria, the Philippines, Sweden, Switzerland, the United Kingdom, the United States, and Yugoslavia.

¹⁵¹ Richard B. Lillich, “The Paris Minimum Standards of Human Rights Norms in a State of Emergency,” *The American Journal of International Law* 79, no. 4 (October 1985): 1073, <https://www.jstor.org/stable/2201848>.

for rights limitations and derogations.¹⁵² No. 6 and No. 7 of the Siracusa Principle reaffirmed that measures taken must be directly connected to the reason for the emergency, respectively stating: “No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed” and “No limitation shall be applied in an arbitrary manner.”¹⁵³ With respect to the aforementioned element of necessity, Principle No. 10 determined that derogation measures must fulfill four criteria: be based on one of the grounds justifying limitations recognized by the relevant article of the Covenant; respond to a pressing public or social need; pursue a legitimate aim; and be proportionate to that aim. Principle No. 11 further expanded on the element of proportionality, noting that: “States shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”¹⁵⁴

In 2001, the UN Human Rights Committee adopted a more lengthy and rigorous commentary on emergency derogations. General Comment No. 29, adopted in August 2001, added further dimension to a key phrase of Article 4, which required that derogation measures be “strictly required by the exigencies of the situation.”¹⁵⁵ According to General Comment No. 29, the necessity of measures taken is measured by the duration, geographical coverage, and material scope of the SoE and the according proportionality of derogation measures.¹⁵⁶ General Comment No. 29 further emphasizes that states parties are under a dual obligation when invoking the right to derogate from the Covenant: they must first justify how the situation meets the threshold of constituting a “threat to the life of the nation”, and second must sufficiently demonstrate how all derogation measures taken were strictly required by the situation at hand.¹⁵⁷ Finally, the UN Human Rights Committee emphasized that Article 4 should not be interpreted as an ‘escape clause’ allowing for violations of humanitarian law or peremptory norms of international law.¹⁵⁸ Of importance to the current situation in Turkey is the clear instruction in General Comment No.

¹⁵² UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html> 5.

¹⁵³ *Ibid*, 3.

¹⁵⁴ *Ibid*.

¹⁵⁵ ICCPR, Article 4(1).

¹⁵⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://www.refworld.org/docid/453883fd1f.html> para. 4.

¹⁵⁷ *Ibid*, para. 5.

¹⁵⁸ See United Republic of Tanzania (1992), CCPR/C/79/Add.12, paragraph 7; Dominican Republic (1993), CCPR/C/79/Add.18, paragraph 4; United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add.55, paragraph 23; Peru (1996), CCPR/C/79/Add.67, paragraph 11; Bolivia (1997), CCPR/C/79/Add.74, paragraph 14; Colombia (1997), CCPR/C/79/Add.76, paragraph 25; Lebanon (1997), CCPR/C/79/Add.78, paragraph 10; Uruguay (1998), CCPR/C/79/Add.90, paragraph 8; Israel (1998), CCPR/C/79/Add.93, paragraph 11.

29 against the deviation from fundamental principles of the rule of law, including fair trial, due process, and the presumption of innocence.¹⁵⁹

In sum, there are three overarching principles underpinning emergency derogations from human rights treaties: the principles of exceptional threat, which renders extraordinary measures necessary; the principle of proportionality, which requires that measures correspond in magnitude to the nature and scope of the emergency; and the principle of non-derogability, which protects fundamental peremptory norms even in emergencies.¹⁶⁰ The following section will first identify the human rights impacts of the SoE, particularly those connected to counterterrorism-related emergency decrees, and will subsequently assess whether Turkey's emergency measures abide by the criteria set out in the derogation clauses of the ECHR and the ICCPR.

¹⁵⁹ UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <http://www.refworld.org/docid/453883fd1f.html> para. 11.

¹⁶⁰ Further, as first argued by Oraá (1999), the derogation clauses of the ECHR and the ICCPR have advanced another two principles governing human rights during emergencies: the principle of non-discrimination and the principle of procedure, that is, proclamation and notification. See Jaime Oraá, "The Protection of Human Rights in Emergency Situations under Customary International Law," in *The Reality of International Law: Essays in Honour of Ian Brownlie*, ed. Guy S. Goodwin-Gill and Stefan Talmon (Oxford: Oxford University Press, 1999), 413-38. doi:10.1093/acprof:oso/9780198268376.003.0019.

CHAPTER III:

Countering Terror or Criminalizing Dissent?

Human Rights under the State of Emergency in Turkey

“Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom.”
Benjamin Cardozo

Since the SoE went into effect in July 2016, Turkey has issued thirty-two emergency decrees with the force of law.¹⁶¹ The legal text of each decree and their corresponding explanatory notes unanimously cite ‘fighting terrorism’ and ‘protecting national security’ as the stated aims of the measures contained therein. As a result, the SoE has significantly broadened the domestic counterterrorism powers of the Turkish government by facilitating the expedited passage of new terror-related legislation, numerous amendments to existing laws, and the restructuring of key security, police, and intelligence bodies. Turkey’s counterterrorism powers have been further expanded by the government’s systematic use of the SoE to weaken the rule of law and empower the executive vis-à-vis both the parliament and the judiciary, allowing for increasingly punitive and politicized terrorism prosecutions.

As explored in the previous section, the derogation clauses of the ECHR and the ICCPR allow for the suspension of certain rights and freedoms during emergencies with two key caveats: the nature and scope of rights derogations must be proportionate to the declared reason for the emergency, and measures taken to that effect must be strictly required by the exigencies of the situation. The derogation clauses further draw a clear line between derogable and non-derogable rights, the latter of which must never be suspended even during SoEs. Turkey’s string of

¹⁶¹ “The State of Emergency has ended but urgent measures are now needed to reverse the rollback of human rights,” *Amnesty International*, July 18, 2018, <https://www.amnesty.org/en/latest/campaigns/2018/07/turkey-state-of-emergency-lifted/>.

emergency decrees has raised serious questions in both regards. The following section will first assess how Turkey’s emergency counterterrorism-related measures have impacted human rights, and will subsequently examine whether these measures meet the aforementioned tests required by the derogation clauses.

A. Freedoms of Expression, Association, and Assembly

Turkish nationals have a right to freedoms of expression, association, and assembly under both domestic and international law. Under Article 26 of the Turkish constitution, “Everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively.”¹⁶² Article 10(1) of the ECHR and Article 19(2) of the ICCPR define freedom of expression as the “right to hold opinions and the freedom to seek, receive and impart information and ideas without interference by public authority and regardless of frontiers.”¹⁶³ Freedom of expression is not limited to freedom of the press but extends to political speech, commercial speech, and artistic expression; in 2011, the UN Human Rights Committee reaffirmed that all forms of expression are protected, including spoken, written, and sign language, expressions made orally, in writing or in print, and non-verbal expressions like art.¹⁶⁴ Moreover, the ECtHR has held that expressions protected by Article 10 “include not only ideas that are favourably received or regarded as inoffensive...but also those that offend, shock or disturb the State or any sector of the population.”¹⁶⁵

The growing tendency to use ‘counterterrorism’ as a convenient pretext to limit freedoms of expression, association and assembly is particularly evident in Turkey. The country’s longtime penchant for systematic ‘silencing policies’ is made clear by ECtHR case law: out of 619 judgments in which the Court has found a violation of the right to freedom of expression, 258 have concerned Turkey.¹⁶⁶ Methods previously used to repress and criminalize dissenting expression in Turkey have included the forced dismissal of journalists critical of the government and its policies; administrative sanctions and criminal investigations into media outlets and their

¹⁶² Article 6, Constitution of the Republic of Turkey [Turkey], 7 November 1982, available at: <http://www.unhcr.org/refworld/docid/3ae6b5be0.html>.

¹⁶³ ECHR, Article 10(1) and ICCPR, Article 19(2).

¹⁶⁴ UN Human Rights Committee (2011), General Comment No. 34, Article 19, Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹⁶⁵ *Handyside v. the United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976), para. 49.

¹⁶⁶ Data reflects the period between 1959 and 2015. It is worth noting that the member state with the next highest number of violations of Article 10 has 34 violations. See Violations by Article and Respondent State, 1959-2015, European Court of Human Rights, https://www.echr.coe.int/Documents/Stats_violation_1959_2015_ENG.pdf.

owners; forced removal of internet content; the blocking of websites and social media platforms, and general restraints on publication.¹⁶⁷

However, under the 2016 to 2018 SoE period, these practices have shifted from general government censorship to measures more strongly associated with ‘counterterrorism’.¹⁶⁸ Cases concerning freedom of expression have increasingly been viewed as criminal offences under the Law on Fight Against Terrorism of Turkey (Law No. 3713), commonly known as the Anti-Terror Act, in conjunction with the Turkish Criminal Code (*Türk Ceza Kanunu*, TCK). Persons with superficial associations to the Gulen network, for instance those with children enrolled in a Gulen-linked preparatory school, have been charged with ‘membership in a terrorist organisation’ under Article 2 of the Anti-Terror Act, despite not holding a place within its hierarchical structure.¹⁶⁹ Article 220(6) of the TCK similarly allows for a broad interpretation of ‘membership’, enabling prosecutions for “committing crimes on behalf of an armed organization without being a member of that organisation.”¹⁷⁰ Writers and journalists that have written positive articles about Fethullah Gulen and his movement have further been charged with ‘aiding and abetting an armed organization’ under Article 220(7) and Article 314 of the TCK.

The most common article used to criminalize dissent is Article 7(2) of the Anti-Terror Law, which defines ‘propaganda’ as “portraying a terrorist organization’s use of force, violence or methods including threats as legitimate or praising them or inciting people to use these methods.”¹⁷¹ This offence is especially dangerous for journalists, reporters, and other members of the media, as the penalty is aggravated by one half “if this crime is committed through means of mass media.”¹⁷² Under Article 6 of the Anti-Terror Act, persons who “print or publish declarations or announcements of terrorist organisations shall be punished with imprisonment from one to three years” and specified that if these acts are committed by means of mass media, “editors-in-chief who have not participated in the perpetration of the crime shall be punished

¹⁶⁷ Yaman Akdeniz and Kerem Altıparmak, “Turkey: Freedom of Expression in Jeopardy: Violations of the Rights of Authors, Publishers and Academics under the State of Emergency,” Report for English PEN, March 2018, 3. https://www.englishpen.org/wp-content/uploads/2018/03/Turkey_Freedom_of_Expression_in_Jeopardy_ENG.pdf.

¹⁶⁸ *Ibid*, 6.

¹⁶⁹ Turkey: Criminal Code [Turkey], Law No. 5237, 26 September 2004, available at: <http://www.refworld.org/docid/4c447a5f2.html>, translation provided by OSCE Office for Democratic Institutions and Human Rights. Art. 220 § 6 and 7. Article 2 reads: “Any person, who, being a member of organisations formed to achieve to achieve the aims specified under Article 1, in concert with others or individually, commits a crime in furtherance of these aims, or who, even though does not commit the targeted crime, is a member of the organisations, is defined as a terrorist offender.” See Law on Fight Against Terrorism, Act. No. 3713, 1991, as amended: 1995, 1999, 2003, 2006, 2010. <https://www.legislationline.org/topics/country/50/topic/5>.

¹⁷⁰ *Ibid*, Art. 220(6).

¹⁷¹ “Turkey: Law No. 3713 of 1991, Law to Fight Terrorism.” *Refworld*. April 12, 1991, as amended: 1995, 1999, 2003, 2006, 2010 <http://www.refworld.org/docid/4c4477652.html> Article 7(2).

¹⁷² *Ibid*, Article 7.

with a judicial fine.”¹⁷³ The same article criminalizes several broad forms of ‘announcement and publication’ including the “publication of periodicals involving public incitement of crimes within the framework of activities of a terrorist organisation, praise of committed crimes or of criminals or the propaganda of a terrorist organisation.”¹⁷⁴

Human rights activists and civil society organizers are at particular risk of being prosecuted under Article 7(a) and (b) of the Anti-Terror Act. Article 7(a) limits the freedom of assembly by prohibiting “covering the face in part or in whole, with the intention of concealing identities” during public meetings and demonstrations “that have been turned into a propaganda for a terrorist organisation.”¹⁷⁵ Article 7(b) broadens the interpretation of ‘membership in a terrorist organisation’ by criminalizing the carrying of insignia and signs belonging to the organisation, shouting slogans or making announcements that “imply being a member or follower of a terrorist organisation.”¹⁷⁶ The crackdown on freedoms of speech, expression, and association levied by emergency decrees has targeted certain groups unrelated to the failed coup, namely media and journalism, academia and education, legal and judicial bodies, human rights groups and other civil society organizations.

B. Impacts of Emergency Decrees on Freedoms of Expression, Association, and Assembly

In its first emergency decree of July 23, 2016, the Turkish government ordered the permanent dissolution of any institution, structure, entity, organization, or group “found to pose a threat to national security, or whose connection or contact with them have been found to exist.”¹⁷⁷ The decree resulted in the immediate closure of 934 private schools, 15 universities, and 1,229 civil society associations and foundations. Decree No. 668, passed two days later, turned its attention from civil society and the education sector to the media, ordering the immediate closure of 45 newspapers, 18 television networks, 23 radio stations and three news agencies based on their perceived support of or connection to FETÖ. In late October of the same year, Decree No. 675 ordered the closure of another 16 newspapers, 2 news agencies, 3 journals, 1 television network, and 1 radio station while the following month, Decree No. 677 shuttered 357 more associations, 7 newspapers, 1 journal and 1 radio station.¹⁷⁸ Through Decree Nos. 668, 675, 677 and 683, the

¹⁷³ *Ibid*, Article 6; judicial fine from one thousand to fifteen thousand days’ rates. However, the upper limit of this sentence for editors-in-chief is five thousand days’ rates.

¹⁷⁴ *Ibid*, Article 6.

¹⁷⁵ *Ibid*, Article 7(a).

¹⁷⁶ *Ibid*, Article 7(b).

¹⁷⁷ Decree No. 667, passed July 22, 2016, available in English at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069661d>

¹⁷⁸ Decree No. 677, passed November 22, 2016, available in English at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e)

Turkish government liquidated 166 media outlets, including publishing houses, newspapers and magazines, news agencies, TV stations and radios, on the grounds that they “belong to, connect to, or have contact with” FETÖ.¹⁷⁹

Civil society and the media have been particularly vulnerable to terror-related arrests and prosecutions during the SoE crackdown. 370 human right NGOs were suspended within four months of the failed coup.¹⁸⁰ Turkey, which already accounted for one-third of the world’s jailed journalists prior to the coup, imprisoned 149 journalists within six months of it, most of whom were kept in pretrial detention without access to legal counsel for several months.¹⁸¹ Altogether, more than 300 journalists and editors have been arrested and charged with a range of terror-related offences stemming from the government’s allegation that their publications contained “apologist sentiments” regarding terrorism or other verbal act offences. Prosecutions of journalists have primarily been based on charges of disseminating propaganda on behalf of a terrorist organization, being a member of or working in the press office of an armed terrorist organisation.¹⁸² Those media outlets and journalists that have avoided closure or arrest have faced a reported “increase in pressure and intimidation” from government officials.¹⁸³ In a public memorandum on freedom of expression and media freedom in Turkey, released in February 2017, the Commissioner for Human Rights at the Council of Europe, Nils Muižnieks, noted that the SoE had led to a further increase in an already high level of intolerance towards “legitimate criticism of elected officials and their policies”, which manifested in “aggressive civil lawsuits, exclusions of critical journalists from government events, as well as numerous reported cases of direct or indirect pressure on media companies to change their editorial policy or fire journalists.”¹⁸⁴

Emergency decrees also provided the basis for a series of mass dismissals and arrests that have heavily impacted lawyers, judges, and prosecutors. Legal and judicial bodies were immediately targeted by emergency decrees, as first made clear when more than 3,000 judges and prosecutors

¹⁷⁹ Decree No. 668, Art. 2, passed July 27, 2016, available in English at:

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e)

¹⁸⁰ Ece Toksabay and Can Sezer, “Turkey continues to clamp down on human rights and children’s organizations following July’s attempted coup,” *Business Insider*, November 12, 2016,

<https://www.businessinsider.com/r-turkey-halts-activities-of-370-groups-as-purge-widens-2016-11>.

¹⁸¹ Bora Erdem, “US-Turkey Relations in Light of Turkey’s Freedom of Press,” *Global Media Journal* 16, no. 30 (June 2018),

<http://www.globalmediajournal.com/open-access/usturkey-relations-in-the-light-of-turkeys-freedom-of-press.pdf>.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ “Memorandum on freedom of expression and media freedom in Turkey,” Commissioner for Human Rights: Council of Europe. (Strasbourg: February 2017), available online at:

<https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-turkey/16806f1ae2>.

were arrested within twenty-four hours of the coup.¹⁸⁵ In fact, EU Commissioner Johannes Hahn suggested to the *Irish Times* that such immediate identification and detention likely meant that members of the judiciary were targeted based on a “list... prepared in advance to be used at a certain stage.”¹⁸⁶ According to Human Rights Watch, one month after the coup the authorities had yet to present any evidence to substantiate the allegations of criminal conduct against the 1,684 judges and prosecutors being held in pretrial detention.¹⁸⁷ The ensuing arrests of 2,204 judges in the criminal judiciary and 541 in the administrative judiciary amounted to the suspension of 36% of all judges in Turkey at the time¹⁸⁸, creating a domino effect for the overall state of justice and the rule of law in the country.

Academic freedom has also been impacted by the slew of emergency decrees, with 28,163 people from the Ministry of Education and 236 academics from public universities dismissed by Decree No. 672, passed on September 1, 2016, and 2,219 from the Ministry of Education and 1,267 academics dismissed by Decree No. 675 the following month.¹⁸⁹ In November, Decree No. 677 dismissed another 942 academics and 119 employees of the Ministry of Education, publicly listing names of those targeted for terror-related dismissal in annexes attached to the emergency decrees and distributed in the government’s nationwide *T.C. Gazette*.¹⁹⁰

By publicly naming-and-shaming academics with alleged links to the Gulen movement, the decrees have not only denigrated the presumption of innocence but further compromised academic freedom from within. The SoE saw a sudden uptick in cases of students reporting professors and tutors to the university or to law enforcement for criticizing the government. In fact, the MIT reported that the number of people offering tips almost doubled from 34,000 in 2015 to 65,000 in 2016.¹⁹¹ In several cases, students clandestinely recorded fellow students and professors criticizing the government, which has created an atmosphere of fear and paranoia. Self-censorship has festered in the place of academic freedom, with one dismissed political

¹⁸⁵ Ruadhan Mac Cormaic, “Why has Turkey locked up 3,000 judges?” *The Irish Times*, July 19, 2016, <https://www.irishtimes.com/news/world/europe/why-has-turkey-locked-up-3-000-judges-1.2726431>.

¹⁸⁶ *Ibid.* Decree No. 675 dismissed another 2,536 people from the Ministry of Justice and 182 people from the Presidency of the Judicial Council. Decree No. 677 resulted in the dismissal of 15 people from the High Council of Judges and Prosecutors, while Decree No. 679 ordered the dismissal of 699 employees of the Ministry of Justice and eight members of the Presidency of the Judicial Council.

¹⁸⁷ “Turkey: Judges, Prosecutors Unfairly Jailed,” *Human Rights Watch*, August 5, 2016, <https://www.hrw.org/news/2016/08/05/turkey-judges-prosecutors-unfairly-jailed>.

¹⁸⁸ “Human Rights Now urges the government of Turkey to respect international human rights laws and give all detained and suspended lawyers, judges and prosecutors the full right to exercise their duties,” press release issued by Human Rights Now, August 15, 2016, <http://hrn.or.jp/eng/news/2016/08/15/turkey-detained-lawyers-statement/>.

¹⁸⁹ Decree No. 675, passed October 29, 2016, available online in English at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e).

¹⁹⁰ Decree No. 677, passed November 22, 2016, available online in English at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e).

¹⁹¹ “Erdogan’s informers: Turkey’s descent into fear and betrayal,” *Financial Times*, March 15, 2017, <https://www.ft.com/content/6af8aaca-0906-11e7-97d1-5e720a26771b>.

scientist stating that “Nobody can speak out freely and without fear anymore” due to the stifling and policing of critical speech.¹⁹² President Erdogan has encouraged the public to act as informants, telling the public in October 2016: “You may have friends from that community. I say: denounce them. You must inform our prosecutors. This is the duty of a patriot.”¹⁹³

Rhetoric of this kind has been a key element of Turkey’s post-coup counterterrorism strategy. The AKP has conflated the concept of a ‘terrorist’ with that of a traitor, painting criticism of government policy as a betrayal of the country. Such a conflation has further been used to cast the international community as acting against the interests of the Turkish state, diminishing the leverage of international human rights bodies and mechanisms. For example, when a petition circulated calling for international experts to monitor the Turkish military offensive in Afrin, Erdogan stated: “...they also invite foreigners to monitor developments. This is the mentality of colonialism.”¹⁹⁴ The president further accused the petition signatories of being a “fifth column” and of “disseminating a colonisers’ mentality.”¹⁹⁵ Human rights defenders similarly calling for international bodies like the UN and the EU to restrain Erdogan’s post-coup crackdown have been smeared by the government as “agents of foreign forces” and “terrorists lovers or supporters.”¹⁹⁶

Consequently, Turkish human rights defenders, journalists, and academics with strong ties to the international community have faced charges of ‘espionage’ under Article 337 of the TCK in addition to the common terror-related offences discussed above. Journalists Can Dundar and Erdem Gul, for example, were charged with espionage, as was Deniz Yucel, Turkey correspondent for the German newspaper *Die Welt*. During the one-year period that Yücel was under arrest without any charges brought against him, President Erdogan repeatedly declared that Yücel was a “German spy and a terrorist.”¹⁹⁷ Erdogan has levelled the same accusations against several foreign national and dual citizen journalists, academics, and human rights defenders caught up in the post-coup purge.

¹⁹² “Turkey: Government Targeting Academics,” Human Rights Watch, May 14, 2018, <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>.

¹⁹³ “Erdogan’s informers: Turkey’s descent into fear and betrayal,” *Financial Times*, March 15, 2017, <https://www.ft.com/content/6af8aaca-0906-11e7-97d1-5e720a26771b>.

¹⁹⁴ “Turkey slams academics over petition, invites Chomsky to Turkey,” *Hurriyet Daily News*, January 12, 2016, <http://www.hurriyetdailynews.com/erdogan-slams-academics-over-petition-invites-chomsky-to-turkey-93760>.

¹⁹⁵ Matthew Weaver, “Turkey rounds up academics who signed petition denouncing attacks on Kurds,” *The Guardian*, January 15, 2016, <https://www.theguardian.com/world/2016/jan/15/turkey-rounds-up-academics-who-signed-petition-denouncing-attacks-on-kurds>.

¹⁹⁶ Hannah Lucinda Smith, “Human Rights Workers Are Western Spies, Erdogan Claims,” *The Times*, 26 July 2017, <https://www.thetimes.co.uk/article/erdogan-brands-detained-human-rights-workers-western-spies-mzft582f8>.

¹⁹⁷ “German reporter Deniz Yucel, in prison interview, says Erdogan is ‘afraid’,” *Deutsche Welle*, November 11, 2017, dw.com/en/german-reporter-deniz-yucel-in-prison-interview-says-erdogan-is-afraid/a-41336294

Finally, Turkey has brandished terrorism rhetoric to justify a crackdown on freedom of assembly in the aftermath of the attempted coup. The government initially restricted freedom of assembly on the grounds of ‘national security’ during the Gezi Park protests of 2013, during which it responded to peaceful demonstrations against the AKP by explicitly threatening to treat protesters like ‘terrorists’. In an interview two days into the Gezi Park protests, then-minister of European Union Affairs, Egemen Bağış, told broadcaster *A Haber*: “From this point on, anybody who remains there will be treated as terrorists.”¹⁹⁸ Erdogan has used much the same rhetoric throughout the recent SoE period: for example, in response to students at Istanbul’s Boğaziçi University gathering to peacefully protest Turkey’s military excursion into Afrin, Syria, Erdoğan himself publicly declared them “traitors to their country” and accused them of being “terrorist youth.”¹⁹⁹ In a worrying indication of the president’s power, twenty-four students were immediately detained, and fourteen were subsequently charged with ‘spreading propaganda for a terrorist organization’ as a result of criticizing Turkish government policy.²⁰⁰

The trend of retribution via arrest, detention, dismissal and and liquidation has continued throughout the two-year emergency period, demonstrating a range of worrying elements including direct executive interference, heavily politicized prosecutions, and a blurring between ‘terrorism’, dissent, and civil disobedience. Erdogan has exploited the SoE to purge all political opposition and muzzle dissent in civil society. As one Canadian journalist noted, “The purges came so swiftly that it became apparent Mr. Erdogan must have had lists prepared beforehand. He himself called the failed putsch a ‘gift from god as he settled scores and eliminated political opponents, including prosecutors who were bringing corruption charges against him.”²⁰¹

The widespread and longterm crackdown has produced a complex web of severe human rights violations on a massive scale. Though this research focuses primarily on civil and political rights, the social and economic rights violated by the emergency measures on an individual scale should not be discounted. For example, several academics who have lost their jobs have committed suicide, while others have reported financial difficulty or social stigma affecting job prospects, physical health, and mental wellbeing. Thousands of others allegedly involved in the coup had their passports revoked and citizenships stripped, which human rights groups have warned violates international laws prohibiting the arbitrary deprivation of nationality and creates an issue

¹⁹⁸ “Police to consider protesters in Istanbul’s Taksim Square terror organization members: Minister,” *Hurriyet Daily News*, June 16, 2013,

<http://www.hurriyetdailynews.com/police-to-consider-protesters-in-istanbuls-taksim-square-terror-organization-members-minister-48875>.

¹⁹⁹ “Turkey: Government Targeting Academics,” Human Rights Watch, May 14, 2018, <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>.

²⁰⁰ *Ibid.*

²⁰¹ “Erdogan finishes what Turkey’s coup plotters started,” *Globe and Mail*, June 25, 2018, <https://www.theglobeandmail.com/opinion/editorials/article-globe-editorial-erdogan-finishes-what-turkeys-coup-plotters-started/>.

of statelessness.²⁰² Ultimately, it is clear that the unchecked and expansive emergency decrees deeming dissenting opinions and associations criminal offences under Turkey's Anti-Terror Act are directly responsible for a myriad of severe human rights violations.²⁰³

C. Surveillance, Social Media, and the Right to Privacy

Increased government control of commonly used information and communication technologies (ICTs) has further facilitated Turkey's crackdown on freedoms of expression and association by violating rights to privacy. The right to privacy is set out in Article 22 of the Turkish constitution, which reads, "Everyone has the right to freedom of communication, and secrecy of communication is fundamental." Under the relevant international legal framework, it is set out by Articles 8 and 9 of the ECHR, with Article 8(1) declaring that "Everyone has the right to respect for his private and family life, his home and his correspondence" and 8(2) further stating that "There shall be no interference by a public authority with the exercise of this right."²⁰⁴ Similarly, Article 17(1) of the ICCPR states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence."²⁰⁵ Both Article 9(1) of the ECHR and Article 18(1) of the ICCPR further state that: "Everyone has the right to freedom of thought, conscience and religion...either alone or in community with others and in public or private..."²⁰⁶

However, it should be noted that under both domestic and international law, the government may violate the right to privacy if necessary for reasons of 'national security.' Article 22 of the Turkish constitution permits violation under a court order in cases of "national security, public order, prevention of the commission of crimes..."²⁰⁷ Article 8(2) of the ECHR likewise provides an exception on the basis of national security: "in the interests of national security, public safety...for the prevention of disorder or crime..."²⁰⁸ Derogating from the right to privacy on the grounds of national security is permissible, then, even beyond the parameters of a declared emergency, but the extent to which Turkey has impeded on this right and the permanent basis on which it has done so raises questions as to whether its measures meet the threshold of the 'national security' exception.

²⁰² Emma Batha, "Turkey's threat over failed coup risks leaving scores stateless: think tank," *Reuters*, July 17, 2017, <https://www.reuters.com/article/us-turkey-security-stateless/turkeys-threat-over-failed-coup-risks-leaving-scores-stateless-think-tank-idUSKBN1A21B7>.

²⁰³ "Turkey: Government Targeting Academics," Human Rights Watch, May 14, 2018, <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>.

²⁰⁴ ECHR, Article 8(1) and (2).

²⁰⁵ ICCPR, Article 17(1).

²⁰⁶ ECHR, Article 9(1) and ICCPR, Article 18(1)

²⁰⁷ Article 2 of the Constitution of the Republic of Turkey [Turkey], 7 November 1982, available at: <http://www.unhcr.org/refworld/docid/3ae6b5be0.html>.

²⁰⁸ ECHR, Article 8(2).

The right to privacy was infringed most noticeably by the Turkish government's co-option of social media monitoring as a counterterrorism tool. Three days after the attempted coup, the Turkish National Police issued a statement urging citizens to report law enforcement of social media users connected to the coup, while several emergency decrees issued in the ensuing months significantly widened Turkish surveillance powers and increased the capacity of law enforcement to access ICT-related records and data.²⁰⁹ Decree No. 670 empowered the government to intercept all digital communications of people under coup-related investigation, as well as their spouses and children, and allowed the government to collect their personal data from private companies as well as public authorities. Decree No. 671 further empowered the Turkish authorities to "obtain and use information, documentation, data, and records from the relevant authorities within the scope of its tasks" while Decree No. 674 established a new 'Computer Forensics Specialization Department' tasked with providing a "prompt, impartial and transparent system for experts on the matters requiring specializing in information technologies during judicial investigation."²¹⁰ Together these changes increased the capacity of the government to successfully gather and weaponize personal data against dissenters.

The government's internet surveillance and censorship capabilities were particularly strengthened by Decree No. 671, passed on August 15, 2016, again on the pretext of maintaining "national security and public order."²¹¹ The government alleged in this decree that the Turkish Telecommunications Authority (TIB), a privately-held digital communications company, had been involved in the coup attempt and therefore ordered that it be brought under the control of the Information and Communication Technologies Authority (*Bilgi Teknolojileri ve İletişim Kurumu*, BTK), a government agency responsible for regulating the telecommunications industry. As a result, the government gained the power to demand that internet service providers (ISPs) remove content and block websites at its behest.²¹² The BTK is legally obliged to comply

²⁰⁹ Bilge Yesil and Efe Kerem Sozeri, "Online Surveillance in Turkey: Legislation, Technology and Citizen Involvement," *Surveillance & Society* 15, no. 3, (2017): 546, <http://library.queensu.ca/ojs/index.php/surveillance-and-society/index>.

²¹⁰ Decree No. 671, passed on August 17, 2016, "Turkey: Extracts - Emergency Decree Laws Nos. KHK/668, 670, 671, 675, 677, 679, 680, 683, 685, 686, 687," European Commission for Democracy Through Law (Venice Commission). Strasbourg, 20 February 2017. Opinion No. 872/2016. CDL-REF(2017)011. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e). Decree 674, passed on September 1, 2016. "Turkey: Emergency Decree Laws of July - September 2016, Nos. 667 - 674. European Commission for Democracy Through Law (Venice Commission). Strasbourg, November 10, 2016. Opinion No. 865/2016. CDL-REF(2016)061. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)061-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)061-e).

²¹¹ Decree No. 671, "Turkey: Extracts - Emergency Decree Laws Nos. KHK/668, 670, 671, 675, 677, 679, 680, 683, 685, 686, 687." European Commission for Democracy Through Law (Venice Commission). Strasbourg, 20 February 2017. Opinion No. 872/2016. CDL-REF(2017)011. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e).

²¹² "Turkey - 2017 Country Reports on Human Rights Practices," U.S. Department of State, Bureau of Democracy, Human Rights, and Labor. April 20, 2018, <https://www.state.gov/j/drl/rls/hrrpt/2017/eur/277227.htm>.

with the government's request to block websites within four hours, and is not required to inform the public of the reasons for the block. Government ministers, including the president, have the power to order websites blocked; President Erdogan reportedly employed staff to constantly monitor the internet and brought charges against individuals found to be insulting the government online.²¹³ Charges based on opinions posted online were facilitated by Decree No. 680, which amended the Law on Police Duties and Responsibilities to grant police the authority to access information on the identity of internet users for purposes of investigating crimes committed online.²¹⁴

The government has made full use of its newfound powers to repress freedom of speech and expression online. According to the internet freedom NGO *Engelliweb*, the number of websites blocked annually in Turkey shot from 58,635 in 2014 to 115,315 in 2016, with the vast majority (93%) ordered blocked by the government through the BTK as opposed to ordered blocked by a judicial court order.²¹⁵ The internal transparency report of global social media platform Twitter is also revealing: according to its data, Turkish authorities made 2,493 legal requests to remove content from Twitter, and ordered Twitter to block more than 30 media and journalism-related accounts between July and September 2016 alone.²¹⁶ In fact, Twitter has reported that Turkey requests the blocking or removal of content more than any other government.

While the emergency decrees and the measures they authorized were made public, there is evidence to suggest that the Turkish government also began monitoring people secretly during the SoE. According to the Citizen Lab, an academic research laboratory that investigates digital espionage against civil society and other practices impacting freedom of expression online, the Turkish government may have begun using digital spyware programs to surveil the public.²¹⁷ Secret surveillance programs have likely been used to collect information on users' online behavior without their knowledge, enable the interception of passwords and emails, and perhaps most troublingly, enable the remote control of a device's microphone to record conversations.²¹⁸

²¹³ *Ibid.*

²¹⁴ Decree No. 680, "Turkey: Extracts - Emergency Decree Laws Nos. KHK/668, 670, 671, 675, 677, 679, 680, 683, 685, 686, 687," European Commission for Democracy Through Law (Venice Commission). Strasbourg, 20 February 2017. Opinion No. 872/2016. CDL-REF(2017)011. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e).

²¹⁵ Bilge Yesil and Efe Kerem Sozeri, "Turkey's Internet Policy after the Coup Attempt: The Emergence of a Distributed Network of Online Suppression and Surveillance," Internet Policy Observatory, February 28, 2017, available at: <http://repository.upenn.edu/internetpolicyobservatory/22>.

²¹⁶ "Turkey leads in social media censorship: new Twitter transparency report," *Turkey Blocks*, March 21, 2017, <https://turkeyblocks.org/2017/03/21/turkey-leads-social-media-censorship-new-twitter-transparency-report>.

²¹⁷ For more detailed information, see "Bad Traffic: Sandvine's PacketLogic Devices Used to Deploy Government Spyware in Turkey and Redirect Egyptian Users to Affiliate Ads?" *Citizen Lab*, March 9, 2018, <https://citizenlab.ca/2018/03/bad-traffic-sandvines-packetlogic-devices-deploy-government-spyware-turkey-syria/>.

²¹⁸ Programs include Phorm, Package Shaper, Remote Control Systems; FinFisher; and Procera Networks. See Yesil and Sozeri, "Online Surveillance in Turkey," 546.

Government monitoring and surveillance has provided the basis for thousands of terror-related prosecutions. Within six months of the failed coup, the Turkish government had detained and investigated 3,861 people due to “social media sharing”, 1,734 of whom were subsequently arrested on terror-related charges.²¹⁹ Charges related to social media have predominantly been “inciting public enmity and hatred”, “propagating on behalf of terrorist organizations”, “announcing one’s affiliation with terrorist organizations”, “engaging in defamatory or libelous remarks against state officials”, and “threatening state sovereignty and public safety.” According to international NGO Freedom House, more than 70,000 social media accounts have been put under surveillance since July 2016.²²⁰ The surveillance ‘terror probe’ has resulted in the opening of at least 10,000 criminal investigations into ‘terror-related activity’ on social media and the Internet as a whole, despite the fact that no laws in Turkey specifically criminalize the online activities in question.²²¹

D. Countering Terror or Criminalizing Dissent? Case Studies

Is the Turkish government fighting terrorism, or is it using its newfound emergency powers to stifle dissent? A closer analysis of individual cases suggests that many such terror-related dismissals, arrests and prosecutions share no clear or substantial connection to the attempted coup and the group allegedly responsible for it. What many affected individuals do share, however, are critical stances on a range of government policies.

Taner Kılıç, for example, has long been a vocal critic of Turkey’s human rights record. Kılıç is a prominent Turkish civil rights activist, known internationally for founding the Turkey branch of Amnesty International and serving as its president since 2014.²²² In both this position and his previous position as chair of refugee rights NGO *Mültecilerle Dayanışma Derneği*, which he held from 2008 to 2014, he publicly criticized the current AKP government and participated in various human rights oriented actions including online petitions and protests. In June 2017 he was arrested on charges of membership in a terrorist group and aiding a terrorist organization; the only claim against him was the alleged downloading of ByLock, which the prosecution failed to provide evidence for. ByLock is an encrypted communications application that the government claims was a key tool used by members of FETO to plan and execute the attempted

²¹⁹ Özgün Topak, “The Making of a Totalitarian Surveillance Machine: Surveillance in Turkey Under AKP Rule,” *Surveillance & Society* 15, no. 3 (2017): 536, <http://library.queensu.ca/ojs/index.php/surveillance-and-society/index>.

²²⁰ Turkey: Country Profile, Freedom on the Net 2017, Freedom House, 2017, <https://freedomhouse.org/report/freedom-net/2017/turkey>.

²²¹ “Turkey targets 10,000 social media users in ‘terror’ probe,” *BBC*, December 24, 2016, <https://www.bbc.com/news/world-europe-38427933>.

²²² Profile on Taner Kilic, Amnesty International Turkey, available online at *Frontline Defenders*: <https://www.frontlinedefenders.org/en/profile/taner-kilic>.

overthrow. Though it was an easily accessible and popular app in 41 countries, available for free on Apple and Google app stores, and was fully legal prior to the coup, downloading ByLock has been the central evidence used to arrest ‘tens of thousands’ of Turkish citizens, including 404 people in October 2016 alone.²²³ Though Kılıç denied having downloaded the app, and several independent experts could find no trace of it ever having been downloaded to his phone, he was kept in pre-trial detention for more than one year.²²⁴ He was finally released in August 2018, but charges against him have not been dropped.

Critical voices in journalism and media have similarly been targeted by terrorism charges. Thirteen reporters, editors, and executives from *Cumhuriyet*, an opposition newspaper, were convicted of “aiding and abetting terror organizations without being a member” in April 2018 on the basis of sympathetic coverage towards FETO, the PKK, and DHKP-C, a far-left Marxist-Leninist group.²²⁵ The paper had reportedly been “fiercely critical” of Erdogan, “long seen as a thorn in Erdogan’s side” and “one of the few remaining voices critical of the government.”²²⁶ Most recently, expansive laws passed in relation to the Gulen movement’s alleged coup have extended to people critical of the Turkish government’s military actions in Afrin, a Kurdish-majority town in Syria. According to the Turkish Interior Ministry, authorities detained 648 people between January 20 and February 26, 2018 over social media posts critical of the Afrin military operations.²²⁷ Most have been journalists, human rights activists, politicians, members of NGOs, academics, and students.²²⁸ Journalist and human rights activist Nurcan Baysal, for example, was charged with “inciting hatred and enmity among the population” for criticizing the Turkish military operation in Afrin on Twitter. She faces three years in jail as a result of her posts, though according to HRW none of the eight tweets listed in the indictment promote or incite any violence.²²⁹ Similarly, documentary filmmaker Sibel Tekin was detained and released under judicial supervision for a handful of Twitter posts reporting on police repression of peaceful protests against the Afrin offensive.²³⁰

²²³ “In Turkey, you can be arrested for having this app on your phone,” *LA Times*, October 19, 2016, <http://www.latimes.com/world/europe/la-fg-turkey-purge-crackdown-snap-story.html>.

²²⁴ Carlotta Gall, “Amnesty International Official in Turkey Ordered Released but Remains in Jail,” *New York Times*, January 31, 2018, <https://www.nytimes.com/2018/01/31/world/europe/turkey-amnesty-international.html>.

²²⁵ “Turkey: anti-Erdogan journalists defiant after convictions on terror charges,” *The Guardian*, April 26, 2018, <https://www.theguardian.com/world/2018/apr/26/turkey-anti-erdogan-journalists-defiant-convictions-terror-charges>.

²²⁶ Ali Kucukgoemen, “Turkish court sentences more than dozen Cumhuriyet staff to prison on terrorism charges,” *Reuters*, April 25, 2018, <https://www.reuters.com/article/us-turkey-security-newspaper/turkish-court-sentences-more-than-dozen-cumhuriyet-staff-to-prison-on-terrorism-charges-idUSKBN1HW2PK>.

²²⁷ “Turkey: Crackdown on Social Media Posts,” *Human Rights Watch*, March 27, 2018, <https://www.hrw.org/news/2018/03/27/turkey-crackdown-social-media-posts>.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

Among the most striking examples of the crackdown on dissent was the government's response to the "Academics for Peace" petition. Signed by more than 2,000 people, the petition criticized the government's military campaign in Kurdish towns in the southeast, objected to the heavy toll on Kurdish civilians, demanded an end to the round-the-clock curfews imposed on Kurdish areas, and called on the government to negotiate peace with the PKK.²³¹ The government responded by accusing petition signatories of making propaganda for a terrorist organisation. 500 academics that signed the petition were fired, had their passports revoked, and were subject to travel bans. 148 of them were put on trial, facing sentences of up to seven and a half years in prison.²³² Such examples are not the exception but the norm, highlighting how the government has widened the use of its draconian anti-terror laws far beyond coup-related activity and targeted a broad range of government critics in journalism, academia, and civil society.

Turkey's crackdown on the Kurds is arguably the clearest evidence that the government has exploited the SoE to purge opposition movements and silence dissent unrelated to the coup. The Kurds, an ethnic minority comprising approximately 20% of Turkey's population, have no known organized links to the attempted overthrow. The Kurdish independence movement is entirely distinct from and in fact generally opposes the Gulenist movement, particularly given that Gulen has urged increased Turkish aggression against Kurdish separatism.²³³ Moreover, the pro-Kurdish People's Democratic Party (HDP) publicly condemned the attempted coup. Yet it is Kurdish political parties and Kurdish media that have increasingly borne the brunt of the emergency counterterrorism campaign: eleven democratically-elected Kurdish members of parliament were arrested, thirty Kurdish mayors have been removed from office, more than 11,000 teachers in Kurdish regions have been suspended and dismissed, and at least 20 Kurdish media outlets have been permanently shut down for "spreading terrorist propaganda."²³⁴ While a fuller discussion of ethnicity and independence movements in the context of counterterrorism is beyond the scope of this paper, it is critical to highlight that ethnic minorities are exceptionally vulnerable to abuses of emergency powers, politically motivated targeting, and the stifling of free expression and association under the guise of counterterrorism.

The aforementioned rights violations are the direct result of broad, vaguely-worded emergency decrees passed under the SoE without sufficient opportunity for legislative debate or judicial challenge. According to Human Rights Watch, the emergency decrees fail to provide any

²³¹ Judith Butler and Başak Ertür, "In Turkey, academics asking for peace are accused of terrorism," *The Guardian*, December 11, 2017, www.theguardian.com/commentisfree/2017/dec/11/erdogan-turkey-academics-terrorism-violence-kurdish-people.

²³² *Ibid.*

²³³ Diego Cupolo, "Voices of Turkey's Purged," *The Atlantic*, August 19, 2016, <https://www.theatlantic.com/international/archive/2016/08/turkey-erdogan-coup-purge-kurds-akp/496535/>.

²³⁴ Ceylan Yeginsu and Safak Timur, "Turkey's Post-Coup Crackdown Targets Kurdish Politicians," *New York Times*, November 4, 2016, <https://www.nytimes.com/2016/11/05/world/europe/turkey-coup-crackdown-kurdish-politicians.html>.

individualized justifications or sufficient evidence of wrongdoing aside from the generic phrase of alleged ‘links to terrorist organizations’.²³⁵ The OHCHR found that the “sheer number, frequency and lack of connection” of several decrees to the attempted coup indicates the misuse of emergency powers “to stifle any form of criticism or dissent vis-a-vis the government.”²³⁶ While curtailed freedoms of speech and expression are nothing new in Turkey, previously sporadic violations have been replaced with what Baser (2017) describes as a troubling new era: “The government’s approach to using counterterrorism discourse as a weapon against dissent [has] promised suppression of freedom on an unprecedented scale.”²³⁷ The effects of such emergency measures have breached Turkey’s obligations under both domestic and international law to respect and protect individual freedoms of expression, association, and assembly.²³⁸

²³⁵ “Turkey: Government Targeting Academics,” Human Rights Watch, May 14, 2018, <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>

²³⁶ Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January – December 2017, Office of the United Nations High Commissioner for Human Rights, March 2018, p. 11, https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

²³⁷ For example, rights to publish or teach on ‘sensitive’ political issues have long been restricted, with academics challenging the official state narrative on the Kurdish question, the Armenian Genocide, or the invasion of Cyprus being imprisoned as punishment. Bahar Baser, “‘Academics for Peace’ in Turkey: A Case of Criminalizing Dissent and Critical Thought via Counter-Terrorism Policy,” *Critical Studies on Terrorism* 10, no. 2 (May 2017): 275, <https://pureportal.coventry.ac.uk/en/publications/academics-for-peace-in-turkey-a-case-of-criminalizing-dissent-and>.

²³⁸ “Turkey: Government Targeting Academics,” Human Rights Watch, May 14, 2018, <https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>

CHAPTER IV: Human Rights and Cross-Border Counterterrorism

A. The Turkish Dragnet: Extraditions and State-Sponsored Abductions

Under the SoE, Turkey has weaponized international policing systems and bilateral extradition treaties to hunt dissidents abroad. The cross-border counterterrorism operations are a direct result of the SoE: under Decree No. 3310, passed during a previous state of emergency in September 1988, the government is empowered to plan and execute operations “beyond the borders of Turkey” to “capture or incapacitate persons who, having carried out [disruptive] actions in Turkey, have sought refuge in a neighboring country.”²³⁹ The government is only able to invoke this power when an emergency per Article 121 of the Turkish constitution has been declared.

Following the attempted coup, the government did not make any formal announcement signaling its intention to invoke this power. However, in a televised interview with *Haberturk TV* in early April 2018, Deputy Prime Minister Bekir Bozdağ said that MIT had extended its counterterrorism operations beyond Turkey’s borders, stating that Turkish intelligence agents had “bundled up and brought back 80 FETO members from 18 countries.”²⁴⁰ Three months later, Turkey’s Foreign Minister Mevlut Cavusoglu publicly acknowledged in an interview with *CNN Turk* that the number of renditions had risen to more than one hundred: “We have been watching these traitors for two years and have brought the leading figures of FETO to our country. I could frankly say that more than 100 FETO affiliates have been brought to Turkey.”²⁴¹ Turkish nationals with alleged links to the attempted coup have been covertly seized from countries including Kosovo, Bulgaria, Ukraine, Malaysia, Pakistan, Sudan, Myanmar, and Georgia, with unconfirmed reports of the same occurring in Greece and Afghanistan. A number of those abducted for alleged “links to terrorism” have been teachers or doctors at one of Gulen’s 3,000 schools and health facilities worldwide.

²³⁹ Decree No. 3310, September 3, 1988.

²⁴⁰ “Turkey: Deputy PM touts success of MIT’s Gulen dragnet,” *Deutsche Welle*, April 5, 2018, <https://www.dw.com/en/turkey-deputy-pm-touts-success-of-mits-gulen-dragnet/a-43269843>.

²⁴¹ Dildar Baykan, “Over 100 FETO members brought back to Turkey: Cavusoglu,” *Anadolu Agency*, July 16, 2018, <https://www.aa.com.tr/en/politics/over-100-feto-members-brought-back-to-turkey-cavusoglu/1205603>.

Transnational kidnappings and forced disappearances perpetrated by governments are generally known as “state-sponsored disappearances” or “irregular rendition.”²⁴² This practice constitutes a “hybrid human rights violation” combining elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals.

²⁴³

Only a handful of the government’s post-coup irregular renditions have been publicly reported. One of the most high profile cases was the nighttime abduction of six Turkish nationals, five teachers and one doctor, from Kosovo in March 2018, during which the six were reportedly forced onto a Turkish military jet in a covert joint operation between MIT and the Kosovo interior ministry.²⁴⁴ The following month, it was revealed that two Turkish teachers had been abducted by MIT agents in Kuala Lumpur, Malaysia in late 2016 and subjected to “beating, torture, death threats and staged executions” while subsequently held in pretrial detention in Ankara.²⁴⁵ The Stockholm Center for Freedom reported in October 2017 that a Turkish man abducted from Pakistan was abducted along with his wife and two daughters, forced onto an unmarked plane, and subjected to severe beatings and abuse by Turkish police and intelligence officers.²⁴⁶ President Erdogan’s press secretary, İbrahim Kalın, has denied that the foreign abductions were illegal, insisting that the operations had been executed within the legal framework of bilateral extradition treaties.²⁴⁷

However, extradition requires the knowledge and cooperation of the sending state, but several countries denied having any knowledge of the abductions. The Kosovar PM, for example, fired the chief intelligence agents responsible for orchestrating the abductions. Notably, MIT’s attempt to covertly seize Turkish national Veysel Akçay in Mongolia was disrupted by significant public pressure and government condemnation of the attempted abduction. After human rights activists gathered at the Genghis Khan airport to protest the forcible transfer, the Mongolian government

²⁴² Not to be confused with ‘extraordinary rendition’, which involves a third-party state, or rendition, which is the handing over or surrender of a fugitive from one state to another and includes extradition. The key difference in ‘irregular rendition’ is that government-perpetrated abductions do not rely on the secondary state.

²⁴³ David Weissbrodt and Amy Bergquist, “Extraordinary Rendition: A Human Rights Analysis,” *Harvard Journal of Human Rights* 19 (2006): 127,

https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1249&context=faculty_articles.

²⁴⁴ Kosovar PM subsequently stated that he was unaware of the operation and fired the intelligence agents responsible for it.

²⁴⁵ “Cellmate: Teacher abducted by Turkey’s MIT from Malaysia subjected to torture in Ankara,” *Stockholm Center for Freedom*, April 1, 2018, available at:

<https://stockholmcf.org/cellmate-teacher-abducted-by-turkeys-mit-from-malaysia-subjected-to-torture-in-ankara/>.

²⁴⁶ “Turkish family faced abuse, violence and lies during forcible removal from Pakistan,” *Stockholm Center for Freedom*, October 31, 2017,

<https://stockholmcf.org/turkish-family-faced-abuse-violence-and-lies-during-forcible-removal-from-pakistan>.

²⁴⁷ “Turkey: Deputy PM touts success of MIT’s Gulen dragnet,” *Deutsche Welle*, April 5, 2018,

<https://www.dw.com/en/turkey-deputy-pm-touts-success-of-mits-gulen-dragnet/a-43269843>.

grounded the plane, removed the Turkish teacher, and announced its intention to investigate the attempted abduction, which the deputy Foreign Minister Battsetseg Batmunkh called “an unacceptable act of violation of Mongolia’s sovereignty and independence.”²⁴⁸

Aside from this, most states have cooperated with Turkey’s more legal means of cross-border counterterrorism by extraditing nationals within their jurisdiction. During the SoE, Turkey has issued hundreds of extradition requests on the basis of alleged links to the coup; within three months of it, Turkey lodged 81 extradition requests to Germany alone.²⁴⁹ Countries that have extradited Turkish nationals include Spain, Germany, the United Kingdom, Bahrain, Saudi Arabia, Gabon and Angola. In the context of international human rights law, extradition poses an interesting conundrum: while Turkey is acting within the law to request the extradition of its nationals from other states, the request transfers the onus to protect the human rights of Turkish nationals to the requested state.

B. The Principle of Non-Refoulement under International Human Rights Law

Though no international law specific to extradition exists, bilateral extradition treaties and agreements are nonetheless restrained by the fundamental legal principle of *non-refoulement*. First, under customary international law, a state does not have any obligation to surrender an alleged criminal to a foreign state, because a central principle of state sovereignty is the legal authority over any person within its borders.²⁵⁰ Second, under both customary international law and the 1951 UN Convention on the Status of Refugees (“Refugee Convention”), states are prohibited from returning persons to a country “where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion” or where they are at risk of torture, cruel, inhuman or degrading treatment or punishment.²⁵¹

²⁴⁸ Munkhchimeg Davaasharav, “Turkish teacher kidnapped in Mongolia freed after authorities ground flight,” *Reuters*, July 28, 2018, <https://www.reuters.com/article/us-mongolia-kidnapping-turkey/turkish-teacher-kidnapped-in-mongolia-freed-after-authorities-ground-flight-idUSKBN1KI03N>.

²⁴⁹ “Germany: Turkey made 81 extradition requests since failed coup,” *Deutsche Welle*, October 23, 2017, <https://www.dw.com/en/germany-turkey-made-81-extradition-requests-since-failed-coup/a-41074177>.

²⁵⁰ Dan E. Stigall, “Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law,” *Notre Dame Journal of International and Comparative Law* 3, no. 1 (February 2013): 19, <https://ssrn.com/abstract=2211219>.

²⁵¹ The principle of non-refoulement is not limited to states that have signed and ratified the Refugee Convention, but has instead become a peremptory rule of customary international law based on consistent and widespread practice. Further, persons do not need to have formally sought asylum for the principle of non-refoulement to apply. Further, the prohibition of *refoulement* applies to any form of removal, including extradition or state-sponsored abductions.

In the Turkish case, the risks of political persecution and subjection to torture bar the *refoulement* of Turkish nationals. First, with respect to political persecution, suspected Gulenists or other political dissidents face persecution based on their (perceived) membership to a social group and/or their political opinions, both of which are increasingly deemed ‘terrorism’ by the Turkish government. Further, political persecution automatically jeopardizes the right to a fair trial, a non-derogable right under international human rights law treaties, including the ECHR and the ICCPR, and customary international law. According to UNHCR, states considering extradition requests must assess the quality and impartiality of the criminal proceedings which would await him or her if surrendered.²⁵² Customary international law recognized in the early 1800s that the extradition of political dissidents would compromise the right to a fair trial, which led to the development of a ‘political offence exception’. This provision is highly relevant to Turkey’s current cross-border counterterrorism operations and the growing conflation between political dissidence and terrorism more broadly.

The ‘political offence exception’, incorporated into the extradition treaties of several countries including France, Belgium, Britain and the United States, limits the obligation of a state to extradite a suspect if it believes they are being prosecuted for political reasons.²⁵³ Like ‘terrorism’, there is no universally agreed-upon definition of a ‘political offence’, but the exception generally applies to “offences directed against the political organization or government of a state, containing no element of a common crime whatsoever.”²⁵⁴ Pure political offenders act as agents “for a group that wants to alter the political structure of the state”, aiming not to commit violence against the civilian population but instead to disrupt or affect “the organizational structure of a state.”²⁵⁵ Pure political offences include treason, espionage, and sedition.

The classification of treason and sedition as purely political crimes poses a problem to President Erdogan, who has repeatedly accused Gulenist coup plotters of committing “an act of treason.”²⁵⁶ Indeed, he seems to be correct on this point, as attempts to overthrow the government are a

²⁵² Sibylle Kapferer, “The Interface between Extradition and Asylum,” UNHCR Legal and Protection Policy Research Series. PPLA/2003/05, November 2003. Available at: <http://www.unhcr.org/3fe84fad4.pdf> p. ix.

²⁵³ Aimee J. Buckland, “Offending Officials: Former Government Actors and the Political Offense Exception to Extradition,” *California Law Review* 94, no. 2 (March 2006): 440, <http://scholarship.law.berkeley.edu/californialawreview/vol94/iss2/4>.

²⁵⁴ Antje C. Petersen, “Extradition and the Political Offense Exception in the Suppression of Terrorism,” *Indiana Law Journal* 67, no. 3 (1992): 787, <http://www.repository.law.indiana.edu/ilj/vol67/iss3/6>.

²⁵⁵ *Ibid*, 776.

²⁵⁶ Kim Sengupta and Chris Stevenson, “Turkey coup: President Erdogan denounces ‘treason’ of attempt by military to take control of country,” *The Independent*, July 16, 2016, www.independent.co.uk/news/world/europe/turkey-coup-erdogan-violence-military-government-a7140336.html.

central tenet of the definition of treason in most individual jurisdictions.²⁵⁷ Given Erdogan's own admission that Gulenists are guilty of treason, then, it would seem that Turkish nationals with alleged links to the coup are not eligible for extradition. Further, the political crime of sedition, generally defined as "conduct or speech inciting people to rebel against the authority of a state or monarch", seems troublingly close to what Turkey prosecutes as 'terrorist propaganda.'²⁵⁸ It becomes clear that the concerted conflation between political dissidence and terrorism serves a useful purpose: prosecutions on 'terrorism'-related charges allow far more leeway in the context of extradition and international counterterrorism efforts than would more overt political charges, like treason and sedition. The political acts being prosecuted as 'terrorism'-related offences casts doubt on the legality of extraditions and abductions of writers, journalists, academics, teachers, human rights activists and other political dissidents.

Finally, the fundamental legal principle of *non-refoulement* prohibits states from returning persons to situations where they face serious risk of torture, summary execution, or other forms of cruel and degrading treatment or punishment. Codified in the UN Convention Against Torture (CAT), states are forbidden from expelling, returning, or extraditing a person to another state where there are substantial grounds for believing that they would be in danger of being subjected to torture. CAT further demands that the actual risk to a person be considered before transferring him or her to the custody of authorities in another country; a country's anti-torture laws or verbal assurances that a person will not be tortured are not sufficient guarantees for extradition. Risks of torture are heightened for persons irregularly rendered across borders without being granted an extradition or expulsion hearing before an independent judicial body.

Torture and ill-treatment of detainees are prohibited under Turkish law: Article 15 of the Constitution declares that, even under circumstances of war, mobilization, or a state of emergency, the individual's right to life and the integrity of his or her body and mind are inviolable.²⁵⁹ Turkey is further bound by its 1988 ratification of CAT and the subsequent Optional Protocol in 2011 (OPCAT).²⁶⁰ Allegations of torture in Turkish detention facilities have nonetheless been widespread under the SoE. Human Rights Watch has documented 'repeated and widespread' instances of torture, including the beatings of detainees by security forces, the subjection of detainees to stress positions, and rape and sexual abuse, both threatened and

²⁵⁷ Notably, treason is not defined in the Turkish Constitution or the Turkish Criminal Code. For definitions of treason in other jurisdictions, see J. Taylor McConkie, "State Treason: The History and Validity of Treason Against Individual States," *Kentucky Law Journal* 101, no. 2 (2013): <https://uknowledge.uky.edu/klj/vol101/iss2/3>.

²⁵⁸ Sarah Sorial, "Sedition and the question of freedom of speech," *Current Issues in Criminal Justice* 18, no. 3, (2007): 431,

<https://ro.uow.edu.au/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=2714&context=artspapers>.

²⁵⁹ Turkish Criminal Code, Law No. 5237, September 26, 2004.

²⁶⁰ "Torture in Turkey: past, present and future?" Freedom from Torture, report published April 2017, https://www.freedomfromtorture.org/sites/default/files/news/country_briefing_final_0.pdf.

actualized.²⁶¹ According to a report by the UN Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, detainees have consistently reported “severe beatings, punches and kicking, blows with objects, *falaqa*, threats and verbal abuse, being forced to strip naked, rape with objects, other sexual violence or threats thereof, sleep deprivation, stress positions, and extended blindfolding and/or handcuffing for several days.”²⁶²

The *non-refoulement* bar to extradition includes the risk of being subject to summary execution, an issue that has resurfaced in Turkey under the SoE. Though Turkey prohibited the death penalty in 2004, in the days immediately following the failed coup Erdogan vowed to “chop off traitors’ heads” in retaliation. Such rhetoric transformed to a call for action: in April 2017, Erdogan began serious discussions with the prime minister and prominent parliamentarians to reintroduce capital punishment and use it against coup conspirators.²⁶³ If the death penalty were to be reintroduced, it would deepen states’ responsibility to refuse extradition requests and prevent state-sponsored abductions of Turkish nationals within their jurisdiction.

Though bilateral extradition treaties often incorporate rights-based safeguards, and are theoretically subject to the aforementioned aspects of international customary law, extraditions are ultimately not governed by a legally-binding international convention. Critically, this renders extradition not a legal process but a political one: while judicial and legislative bodies in a requested state may object to an extradition on human rights-related grounds, they can generally be overruled by the executive. As a result, political relations and strategic goals often outweigh potential human rights concerns: issues of *refoulement* may be ignored due to fears of provoking retaliatory measures or jeopardizing important political or economic relations, particularly if the requested state is weaker than or dependent on the requested country. Denial of extradition on the basis of human rights remains an ‘exceptional’ measure often used only in high-profile cases, and has not yet become an established norm produced by an independent, objective legal process.²⁶⁴

Turkey’s successful hunt for dissidents abroad illustrates why strengthening international human rights protections in the context of cross-border counterterrorism is crucial. *Non-refoulement* applies to any form of removal: therefore, states bear the responsibility not only to reject

²⁶¹ “Turkey: Renewed Torture in Police Custody, Abductions,” Human Rights Watch, October 12, 2017, <https://www.hrw.org/news/2017/10/12/turkey-renewed-torture-police-custody-abductions>.

²⁶² “Turkish and Kurdish Detainees Tortured, Raped – UN Rapporteur Says,” *Ahval*, January 23, 2018, <https://ahvalnews.com/human-rights/turkish-and-kurdish-detainees-tortured-raped-un-rapporteur-says>. *Falaqa* is a method of corporal punishment consisting of whipping the soles of a person’s bare feet.

²⁶³ “Turkey referendum: Could Erdogan resume executions?” *Deutsche Welle*, April 24, 2017, <https://www.dw.com/en/turkey-referendum-could-erdogan-resume-executions/a-38571043>.

²⁶⁴ Mariana (Mitra) Radu and Cătălina Mititelu, “The Observance of Human Rights and Freedoms in the Extradition Proceedings at National and International Levels,” *Journal of Danubian Studies and Research* 3, no. 2 (2013): 105, <http://journals.univ-danubius.ro/index.php/research/article/view/2085/1860>.

extradition requests but to ensure that Turkish dissidents are protected from covert abductions. Given that the power to extend counterterrorism operations transnationally can only be invoked during states of emergency, the link between SoE regimes and human rights abuses is deepened further.

CHAPTER V:

The Turkish Case: Findings and Analysis

From the outset, Turkey's derogations from the ECHR and the ICCPR was met with trepidation from the international community. Within one month of the failed coup, the UN Human Rights Council voiced concern over Turkey's invocation of the ICCPR derogation clause: "The invocation of Article 4 is lawful only if there is a threat to the life of the nation, a condition that arguably is not met in this case."²⁶⁵ Two years later, initial concerns over the SoE in Turkey seem to be validated: as the above section made clear, emergency decrees and the counterterrorism measures contained therein have significantly impacted a range of human rights in Turkey, with a particularly detrimental effect on freedoms of expression, association and assembly. Dissidents whose opinions and associations have been deemed criminal face a second set of troubling human rights violations related to abusive arrest and detention practices and heavily politicized terrorism prosecutions.

However, under SoE derogation regimes, some leeway is afforded for such human rights violations. The critical question is therefore whether the emergency measures producing grave human rights abuses are legitimate per the derogation provisions of the ECHR and the ICCPR. Article 15 and Article 4 set out key criteria to determine whether emergency measures are valid, the interpretation of which has been developed by the ECtHR, the UN Human Rights Committee, the Siracusa Principles, and the Paris Minimum Standards. When invoking the right to derogate from human rights obligations, states have three duties: first, the derogating state must justify how the situation meets the threshold of a 'public emergency'; second, it must sufficiently demonstrate how all derogation measures taken were proportionate to and strictly required by the situation; and third, it must under no circumstances violate non-derogable rights.

A. Public Emergencies, Proportionality, and Necessity

In *Lawless v. Ireland* (1961) and the *Greek Case* (1969), the ECtHR set out four features that determine whether a situation constitutes a 'public emergency': first, the emergency must be actual and imminent; second, its effects must involve the whole nation; third, the continuance of the organized life of the community must be threatened; and fourth, the crisis or danger must be

²⁶⁵ "UN experts urge Turkey to adhere to its human rights obligations even in time of declared emergency," UN Office of the High Commissioner of Human Rights, August 19, 2016, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>.

exceptional to the point that normal measures are insufficient.²⁶⁶ It is questionable whether the Turkish case possessed any of these four characteristics in the first place, let alone enough to warrant seven extensions of the SoE over a two-year period in total. It is also doubtful whether the emergency measures taken fulfilled the elements of proportionality and necessity, which require the geographic and temporal scope of emergency measures to be strictly required and directly related to the cause of the SoE.

First, it is questionable whether the situation in Turkey constituted an “actual and imminent” emergency given that the attempted coup had been quashed by the time the SoE was declared. In fact, the Turkish government itself announced that the threat had been “crushed” and it had “regained full control” less than twenty-four hours after the outbreak of the coup.²⁶⁷ Moreover, the government did not appear to fear any future “actual and imminent” threats of violence, occupation, terrorist attacks or armed struggles of any kind related to the initial coup attempt, as demonstrated by Prime Minister Binali Yildirim’s assurances to the public that “life had returned to normal” on July 17.²⁶⁸

Second, it is difficult to argue that the effects of the attempted coup involved the whole nation or threatened the organized life of the community. A successful coup may have met this threshold: a public subject to domination by an unelected military regime may sufficiently meet this criteria, even if individual members were not directly impacted by the overthrow itself. As the coup failed, however, this was not the case. In fact, the violence and public disorder emanating from the attempted coup was primarily limited to three major cities, Istanbul, Ankara, and Marmaris, in a country of 81 provinces and 923 districts.²⁶⁹ This further violates the element of geographical coverage integral to the principle of proportionality: emergency decrees that impact the entire nation in response to a situation that only directly affected three cities for one night certainly appears to contravene that requirement.

Moreover, the very nature of a coup is that it is directed towards the government or ruling power. As noted in an earlier section, the language included in Article 15 of the ECHR does not mention that the life of a state, government, party, administration or regime must be under threat but rather the life of the *nation*. As Schreurer opined in 1982, interpreting this clause to include a threat to the existing power structure and the status of the ruling elites must be rejected, given

²⁶⁶ *The Greek Case* (3321-23/67; 3344/67) 5.11.1969, para 153.

²⁶⁷ “Erdogan claims Turkey coup is crushed,” *Financial Times*, July 16, 2016, <https://www.ft.com/content/1e11f52a-4ac9-11e6-8d68-72e9211e86ab>.

²⁶⁸ “Turkish warplanes patrol skies as country remains on edge after failed coup,” *CBC News*, July 18, 2016, <https://www.cbc.ca/news/world/turkey-coup-police-purge-eu-reaction-death-penalty-1.3683360>.

²⁶⁹ “Turkey Political Map,” *Turkish Press*, undated, <http://www.turkishpress.com/maps/turkey-political-map/>.

that it would render nonviolent opposition or even the victory of an opposition party justifiable grounds for derogation.²⁷⁰

Third, it is worth inquiring what about the situation was so exceptional that it rendered ordinary measures inadequate to maintaining public order. By all accounts, the situation was under government control within one day; no systematic, organized, coup-related violence ensued beyond that one-day period.²⁷¹ Once violent activity was subdued, it is not clear why normal investigative and judicial measures were insufficient to pursue and prosecute the coupists. Four days after the failed coup, the Secretariat of the NSC stated that it had recommended the implementation of an SoE to the government in order to “immediately eliminate all elements of the terrorist organization that committed the coup attempt.”²⁷² However, this implies that the objective of the SoE was punitive rather than preventative, used not to suppress ongoing acts of violence, but to punish the alleged perpetrators. In the absence of ongoing, widespread acts of violence threatening the functioning of the public order, health, or safety, there is no clear reason why fighting terrorism and eliminating elements of terrorist groups should not be carried out within the bounds of ordinary criminal law and counterterrorism policy.

The length of the SoE and the scope of the emergency decrees passed further seem to violate principles of proportionality and necessity. The requirement of proportionality dictates that the extent of a derogation must be “strictly related” to the situation: there must be a clear link between the facts of the emergency and the specific measures chosen.²⁷³ Decrees and measures implemented several months after the situation had been resolved maintain a tenuous link to the emergency at best. This can be gleaned from the language used in emergency decrees: while the first SoE decrees justify their measures as necessary to “fight against the coup attempt”, subsequent decrees widen their net by using vague, general language like “fighting against terrorism” and “fighting entities threatening national security.” The Siracusa Principles and the Paris Minimum Standards similarly set out that exceptional measures taken must be temporary, but Turkey has permanently incorporated several emergency elements into its national laws, which violates the principles of temporariness and necessity.

²⁷⁰ Christoph Schreuer, “Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights,” *Yale Journal of International Law* 9, no. 1 (1982): 122, <http://digitalcommons.law.yale.edu/yjil/vol9/iss1/6>.

²⁷¹ There were reports of some groups taking advantage of the instability to perpetrate acts of violence. For instance, in Malatya groups of pro-AKP Sunni Muslims reportedly entered Paşaköşkü and Çavuşoğlu to threaten ethnic Alevi residents. However, there was no further organized violence attributed to the Peace at Home Council responsible for the attempted coup.

²⁷² “NSC Recommends Government to Declare State of Emergency,” press release from the Office of the Presidency of the Republic of Turkey, July 20, 2016. Available in English at: <https://www.tccb.gov.tr/en/news/542/49699/nsc-recommends-government-to-declare-state-of-emergency>.

²⁷³ Report of the European Commission on Human Rights (*Ireland v. U.K.*), 1976-78 ECHR, ser. B, vol. 23-I, at 8 *Ireland v. U.K.*, [1978] 2 ECHR 25 (Eur. Court of Human Rights) p. 119.

B. Non-Derogable Rights: Rights to Fair Trial and Freedom from Torture

Finally, mounting evidence suggests that Turkey has violated two fundamental rights deemed strictly non-derogable under the ECHR and the ICCPR: the right to be free from torture, including inhuman or degrading treatment or punishment, and the right to fair trial and due process. First, under the SoE, there has been a sharp uptick in allegations of torture used against individuals detained in connection to the failed coup. In fact, the majority of documented cases of torture and ill-treatment in custody have concerned individuals detained on terror-related charges under the Anti-Terror Law. In an April 2017 report, international NGO Freedom from Torture found that of sixty subjects alleging torture, thirty-six or 60% specified that it was anti-terrorist units of the police that detained and tortured them in custody.²⁷⁴ Another fifteen people or 25% of the subjects surveyed said that they were detained and tortured by the Gendarmerie Intelligence and Counterterrorism unit known in Turkish as *Jitem*.²⁷⁵ The pattern of torture used only against persons detained in connection to the coup suggests that it is being used as a purposeful tool of repression and retaliation. According to Freedom from Torture, torture is not used sporadically but is instead a method of control Turkey “systematically uses to suppress and stamp out political dissent.”²⁷⁶

The SoE has further facilitated the use of torture by authorizing the removal of several rights-based safeguards designed to strengthen protections for detainees. A report published by Human Rights Watch in October 2017, for example, cites the denial of sufficient access to legal aid and representation as preventing the timely reporting and documentation of torture. OHCHR similarly argued that unfettered access to a lawyer is a key condition to the prohibition of torture and the right to liberty.²⁷⁷ Detention facilities have further refused to provide detainee’s medical reports to their legal counsel, a practice that both OHCHR and HRW condemn as preventing the adequate documentation and substantiation of allegations of physical abuse.²⁷⁸

Second, Turkey’s emergency measures have violated rights to liberty, due process, and fair trial. According to the UN Human Rights Committee, the jurisprudence of the supervisory and judicial

²⁷⁴ “Torture in Turkey: past, present, and future?” Report published by Freedom from Torture, April 2017, https://www.freedomfromtorture.org/sites/default/files/news/country_briefing_final_0.pdf 7.

²⁷⁵ *Ibid*, 7.

²⁷⁶ *Ibid*, 2.

²⁷⁷ Preliminary observations and recommendations of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Nils Melzer; Official visit to Turkey – 27 Nov. to 2 Dec. 2016: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20976&LangID=E#sthash.KzObbpgb.MIBmjRA.dpuf>.

²⁷⁸ “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January – December 2017,” Office of the UN High Commissioner for Human Rights, March 2018, https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf 19.

organs of the ECHR and the ICCPR have extended non-derogability status to the “fundamental requirements of the rights to a fair trial and to liberty.”²⁷⁹ Elements of fair trial include the presumption of innocence, the right to a lawyer, and the right to challenge the lawfulness of detention before an independent judicial body, as guaranteed by the Geneva Conventions.²⁸⁰ As Kadelbach and Roth-Isigkeit (2017) argue, the procedural guarantees inherent to the right to fair trial underlie all other guarantees of the ECHR: in essence, independent judicial review mechanisms protect the ‘right to invoke rights’.²⁸¹

Several measures implemented by Turkey’s emergency decrees have severely jeopardized the right to fair trial. The first emergency decree limited detainees’ access to legal counsel, empowering the government to detain suspects without charge and hold them *incommunicado* for 30 days, a sharp increase from the previous limit of four days.²⁸² Decree No. 668 allowed the government to deny detainees accused of crimes within the scope of the Anti-Terror Law access to a lawyer for up to five days, an increase from the previous limit of twenty-four hours, which was later permanently incorporated into the Criminal Procedure Code by Decree No. 676. The government further compromised attorney-client privilege by granting itself the right to record, limit, end, or attend meetings per Article 6 of Decree No. 668: “Meetings between lawyers and clients may be recorded, observed, and/or interrupted by a public official where there is a threat to national security and the client has been convicted for a terror crime.”²⁸³ The scope of this power was later broadened to include the monitoring of all communications between attorneys and clients, in person or otherwise, therefore effectively suspending attorney-client privilege, a central element of fair trial guarantees.²⁸⁴ According to Human Rights Joint Platform, more than 600 lawyers have themselves been arrested on presumption of “guilt by association” with clients, which violates the right to defence, another key component of the right to a fair trial.²⁸⁵

²⁷⁹ Human Rights Committee (CCPR), General Comment no. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14-16.

²⁸⁰ Joan Fitzpatrick, “Speaking Law to Power: The War Against Terrorism and Human Rights,” *European Journal of International Law* 14, no. 2 (April 2003): 248, <https://doi.org/10.1093/ejil/14.2.241>.

²⁸¹ Kadelbach and Roth-Isigkeit, “The Right to Invoke Rights,” 277.

²⁸² Moreover, there were reportedly numerous instances where persons were held without charge in excess of the 30 day limit. See “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January – December 2017,” Office of the United Nations High Commissioner for Human Rights, March 2018, https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf.

²⁸³ Decree No. 667, see “Turkey: Emergency Decree Laws of July - September 2016, Nos. 667 - 674. European Commission for Democracy Through Law (Venice Commission). Strasbourg, November 10, 2016. Opinion No. 865/2016. CDL-REF(2016)061. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)061-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)061-e).

²⁸⁴ Decree No. 676, see “Turkey: Extracts - Emergency Decree Laws Nos. KHK/668, 670, 671, 675, 676, 677, 679, 680, 683, 685, 686, 687.” European Commission for Democracy Through Law (Venice Commission). Strasbourg, 20 February 2017. Opinion No. 872/2016. CDL-REF(2017)011. Available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)011-e).

²⁸⁵ “A state in emergency? When exceptions become the new norm,” report published by Civil Rights Defenders (Stockholm: March 2018) 9, <https://crd.org/wp-content/uploads/2018/04/CRD-6700-Rapport-Turkiet-1.pdf>.

Moreover, the right to liberty includes the right to be informed promptly of the reasons for the arrest.²⁸⁶ Turkey has violated this right by refusing to provide individual bases for arrests and further failing to provide evidence to that effect. The government provided a blanket reason for arrest to all persons charged in the wake of the coup - ‘links to a terrorist organisation’ - but it is questionable whether this satisfies the right to liberty. Turkey has not made public what methods were used to determine dismissals and arrests, nor what proof of wrongdoing has justified publicly accusing people of links to terrorism in the annexes of emergency decrees and lawyers have reported that they have no access to the evidence cited against their clients, due to national security-related cases being subject to ‘confidentiality orders.’²⁸⁷ According to OHCHR, many individuals arrested in relation to emergency decrees “were not provided with evidence against them” and were unaware of the basis on which arrests were made, which the Commissioner for Human Rights of the Council of Europe criticized for leaving people “unable to defend themselves.”²⁸⁸

²⁸⁶ Guide on Article 5 of the European Convention on Human Rights: Right to liberty and security. Last updated on August 31, 2018. Published by the Council of Europe. Available at:

https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

²⁸⁷ “Turkey: Government Targeting Academics,” Human Rights Watch, May 14, 2018,

<https://www.hrw.org/news/2018/05/14/turkey-government-targeting-academics>.

²⁸⁸ Council of Europe: Commissioner for Human Rights, Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, 7 October 2016, CommDH(2016)35, available at:

<http://www.refworld.org/docid/58120efb4.html> See paras 23-24, 26, and 65.

CHAPTER VI:

States of Emergency and International Law: Strengthening Human Rights Protections

Given the nature and scope of human rights abuses facilitated by the SoE in Turkey, a critical question arises: how can international law better protect human rights during emergency situations? This section will first examine the monitoring and evaluation provisions of the ECHR and ICCPR derogation clauses, and then consider several political and economic dynamics that damage the efficacy of international human rights law in the case of Turkey and elsewhere.

Both the ECHR and the ICCPR include monitoring and evaluation provisions. Article 19 of the ECHR established the ECtHR “to ensure the observance of the engagements undertaken by the High Contracting Parties”²⁸⁹, while Article 46(2) assigned the Committee of Ministers of the Council of Europe the responsibility to supervise the execution of ECtHR judgements and ensure that payments are awarded to successful applicants.²⁹⁰ Implementation of obligations under the ICCPR are monitored by the UN Human Rights Committee, comprised of eighteen independent experts elected by states parties to serve four-year terms.²⁹¹ Unlike the ECHR, the ICCPR did not establish a judicial organ to enforce its judgments and therefore lacks the ability to legally compel changes in state behavior. Theoretically, then, the ECtHR has the strongest potential capacity to temper abusive counterterrorism campaigns and mitigate human rights violations during SoEs. The ability of the ECtHR to constrain human rights violations during emergencies will therefore be reviewed below.

A. Turkey and the European Court of Human Rights

Since its establishment in 1959, the ECtHR has not shied away from cases involving human rights in Turkey. In fact, of 20,657 judgments issued between 1959 and 2017, Turkey was the

²⁸⁹ ECHR, Article 19.

²⁹⁰ “Derogation in time of emergency - factsheet.” *European Court of Human Rights - Press Unit*. August 2018. https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf, 2.

²⁹¹ “Human Rights Committee” homepage on the UN Office of the High Commissioner of Human Rights website, available at: <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>.

respondent State in 3,386 (16.36%) of them.²⁹² The ECtHR found that Turkey had violated human rights in 2,988 of those judgments, or 88.2%, making it the foremost violator of human rights among ECHR member states. Most importantly for our purposes here is Turkey's history of violating Article 10, which protects freedom of expression: of 700 judgments in which the ECtHR has found a violation of freedom of expression, Turkey ranks first with 281 judgments, far ahead of Russia with 39, France with 37, and Austria with 35.²⁹³ Further, according to Akdeniz and Altıparmak in a March 2018 report for global press freedom NGO English PEN, most of the ECtHR's judgments concerning Turkey are a result of politicized prosecutions under the Anti-Terror Law.

The ECtHR has previously ruled on a number of the terror-related offences Turkey is currently using to target dissident writers, journalists, academics, and human rights activists. In considering convictions resulting from charges of “disseminating propaganda on behalf of a terrorist organization”, the ECtHR has held that such statements in writings, books, publications and so on do not justify interference in freedom of expression.²⁹⁴ Even when expressions are deliberately provocative, the Court has determined that any interference with freedom of expression requires “very strong reasoning for justifying restrictions.”²⁹⁵ In *Sorguç v. Turkey* (2009) and *Sapan v. Turkey* (2010), the ECtHR further developed the distinct importance of academic freedom in the context of freedom of expression, asserting that it “should be afforded special protection.”²⁹⁶ Moreover, in its judgment concerning *Aksu v. Turkey*, the ECtHR emphasized that expressions deemed offensive or criminal must be viewed in their proper context: “It is also in line with the Court's approach to consider the impugned passages not in isolation but in the context of the book as a whole.”²⁹⁷ This is critical in considering Turkey's terror-related prosecutions of journalists and reporters, in which the government has failed to properly consider the context of the expressions being made.

The trajectory of Turkey's acquiescence to the authority of the ECtHR and its judgments appears largely dependent on its relationship with the EU, highlighting the interplay between international politics and human rights law. In the early 2000s, Turkey implemented a series of legislative reforms to its human rights and anti-terror laws as part of the EU accession process, and the first period of AKP rule saw a significant “toning down” of recourse to anti-terrorism legislation.²⁹⁸ More recently, Turkey amended its legislation on freedom of expression in response to the judgments of the ECtHR, which successfully influenced the Law on

²⁹² Akdeniz and Altıparmak, “Turkey: Freedom of Expression,” 4.

²⁹³ *Ibid.*, 4.

²⁹⁴ *Ibid.*

²⁹⁵ See *Sürek v. Turkey* (1), no. 26682/95, para 61., *Taranenko v. Russia*, no. 19554/05, 13.10.2014, para. 77.

²⁹⁶ See *Sorguç v. Turkey*, no.17089/03, 23.6.2009, para. 35; *Sapan v. Turkey*, no. 44102/04, 8.6.2010, para. 34.

²⁹⁷ *Aksu v. Turkey* [BD], nos. 4149/04 and 41029/04, para. 72. <https://www.legal-tools.org/doc/d4f13a/pdf/>.

²⁹⁸ Akdeniz and Altıparmak, “Turkey: Freedom of Expression,” 5.

Amendments to Some Laws in Relation to Human Rights and Freedom of Expression (Law No. 6459) in 2013. This law was welcomed as a clear indication that Turkey was taking serious steps to bring its domestic legislation in line with Strasbourg jurisprudence.²⁹⁹

As EU accession talks stalled, however, the increasingly frayed relationship between Turkey and the West has negatively impacted the ability of the ECtHR to restrain human rights violations. According to a 2017 Turkey country report prepared by the ECHR monitoring body within the Council of Europe, Turkey has only implemented 52% of ECtHR judgments; 1,384 judgments have yet to be executed.³⁰⁰ Turkey ranks third, behind Italy and Russia, in terms of member states failing to comply with ECtHR rulings. The expanding anti-terrorism powers and marked increase in human rights violations described above seem to be a clear indication that Turkey's compliance with ECtHR judgments is worsening rather than improving.

B. The Role of International Politics

Turkey's refusal to respect its obligations under international human rights law raises a less discussed but equally important question: why has there been relatively little legal and political response from the international community? Under the SoE, the Turkish government has shown a wanton disregard for human rights, broken several of its legal commitments as a states party to international human rights treaties, and trampled over the fundamental principles of emergencies, including the violation of sacrosanct non-derogable rights. Yet Turkey has suffered few political repercussions and the international community has been reluctant to apply any significant pressure despite massive abuses of Turkish citizens during the SoE.

The failure of the international community to more zealously enforce international human rights law can be attributed to current political dynamics, the result of Turkey's successful efforts to make itself a key geopolitical player on the world stage. First, Turkey is a key strategic asset in the Global Coalition to Defeat the Islamic State in Iraq and Syria (ISIS), an American-led initiative consisting of 70 nations and four international organizations.³⁰¹ Given the wave of terrorist attacks perpetrated by ISIS or its lone wolf followers in Western cities including Paris, Brussels, London, and Barcelona, the counterterrorism campaign has been a central political goal of many Western and European governments and a matter of much public interest. Turkey, who

²⁹⁹ Onur Andreotti and Nils Muižnieks, *Journalism at risk: Threats, challenges and perspectives* (Strasbourg: Council of Europe Publishing, 2015), 146.

³⁰⁰ Sedat Ergin, "Turkey fails to implement ECHR decisions," *Hurriyet Daily News*, December 22, 2017, <http://www.hurriyetdailynews.com/opinion/sedat-ergin/turkey-fails-to-implement-echr-decisions-124537>.

³⁰¹ The four organizations are the European Union, NATO, the Arab League, and Interpol. See "The Global Coalition to Defeat ISIS: A Success Story." *American Foreign Service Association*, undated. <http://www.afsa.org/global-coalition-defeat-isis-success-story>.

shares its southern border with both Iraq and Syria, has proven itself strategically and militarily essential by allowing the coalition to launch airstrikes against ISIS from its Incirlik Air Base.

Beyond the coalition, Turkey has used the Syrian conflict to significantly increase its power in the international arena. As thousands fled Syria in 2015, travelling through Turkey to Europe in search of refuge, a wave of xenophobic backlash and populist fearmongering caused the EU to search for a way to stem the influx. On March 20, 2016, Brussels and Ankara struck a deal: in effect, Turkey would stop the flow of asylum seekers and allow asylum seekers arriving on the Greek islands to be returned, in exchange for €6 billion from the EU, to be used to host the Syrian refugee communities, in addition to receiving visa-free travel for its citizens and fast-tracked EU membership.³⁰² Politically, the Syrian crisis deepened tensions between Moscow, who backed President Bashar Assad, and Washington, who initially called for him to step down amidst the uprising in 2011 and subsequently armed and trained rebel groups during the ensuing civil war. Turkey has used this rift to assume the role of mediator between the US and Russia, thereby further increasing its status as an important player on the world stage.³⁰³ Ankara's burgeoning relationship with Moscow has caused calls to cancel its NATO membership, but Turkey remains too important a regional ally to Western countries seeking to curb Iranian ambition and balance Russian and Chinese interests in the Middle East and Eurasia.

The case of Turkey demonstrates that a country's overall political power in the global arena impacts the extent to which other states police and enforce international human rights law. This is certainly not an issue unique to Turkey: countries often remain silent on human rights issues in order to achieve foreign policy goals or maintain strong trade and economic relations. Canada and the UK, for example, have been criticized for silence on human rights issues in Saudi Arabia in exchange for profitable arms deals and other trade. American silence on Israeli human rights abuses in Gaza and the West Bank have been attributed to Israel's strategic value in the Middle East, among other things, while silence on China is similarly tied to its status as the world's second-largest economy. As Fitzpatrick (2003) wrote: "Liberal democracies sacrifice their leverage over repressive governments... by crassly agreeing to tone down or silence criticism in exchange for cooperation in counter-terrorist strategies."³⁰⁴ Pai and Singh similarly noted in 2014 that Western powers calculate that "engaging Middle Eastern and East Asian countries in regional security and trade arrangements is more important than letting human rights issues derail them."³⁰⁵

³⁰² Tuncay Şahin, "How does the EU-Turkey refugee deal work?" *TRT World*, October 24, 2017, <https://www.trtworld.com/turkey/how-does-the-eu-turkey-refugee-deal-work--11588>.

³⁰³ Dorian Jones, "Turkey to Mediate between US, Russia on Syria Tensions," *VOA*, April 13, 2018, <https://www.voanews.com/a/turkey-mediate-vs-russia-syria-tensions/4347035.html>.

³⁰⁴ Fitzpatrick, "Speaking Law to Power," 262.

³⁰⁵ Nitin Pai and Sushant Singh, "Promoting human rights in the Indo-Pacific: Prospects, drivers and constraints," in "Shifting Power and Human Rights Diplomacy," eds. Doukje Lettinga and Lars van Troost, Amnesty International

C. The Politics of Terrorism and Counterterrorism

Turkey was already an anomaly with regard to terrorism prosecutions prior to the current SoE. In the decade following 9/11, Turkey accounted for a third of the total of 35,000 terrorism convictions worldwide.³⁰⁶ The astonishing quantitative difference in Turkey's terrorism prosecutions record is partially a result of its qualitative assessments of what constitutes terrorism. As then-Interior Minister Idris Naim Sahin stated in an infamous 2011 speech, Turkey is unique in its criminalization of several different categories of terrorism, including 'artistic', 'scientific', 'poetic', and 'journalistic' terrorism.³⁰⁷ Erdogan publicly endorsed the further broadening of Turkey's anti-terrorism laws in March 2016: "It might be the terrorist who pulls the trigger and detonates the bomb, but it is these supporters and accomplices who allow that attack to achieve its goal. The fact their title is politician, academic, writer, journalist or head of a civil society group does not change the fact that individual is a terrorist."³⁰⁸

The country's hardcore views of terrorism have long been a stumbling block to Turkey's bid for EU accession and visa liberalization. In May 2016, for example, negotiations for visa-free access to the EU collapsed over Turkey's refusal to narrow its definition of "terror" and change its domestic anti-terrorism legislation to prevent the politicized prosecutions of journalists, academics, and government critics.³⁰⁹ Instead, Turkey has intensified its counterterrorism campaign: in the two years following the failed 2016 coup, more than 64,000 Turkish nationals have been imprisoned on terrorism-related charges.³¹⁰

The broad interpretation of counterterrorism hinges on the equally elusive concept of 'terrorism'. Terrorism has no universally accepted definition, as exemplified by a famous 1988 survey that found more than 100 definitions of terrorism had been used in the relevant literature.³¹¹ It should

Netherlands (March 2015): 38,

https://www.amnesty.nl/content/uploads/2015/04/amn15_01_strategische_verkenningen_india_digitaal_def.pdf.

³⁰⁶ Martha Mendoza, "Rightly or wrongly, thousands convicted of terrorism post-9/11," NBC News, Sept. 4, 2011, http://www.nbcnews.com/id/44389156/ns/us_news-9_11_ten_years_later/t/rightly-or-wrongly-thousands-convicted-terrorism-post-/.

³⁰⁷ Ayça Çubukçu, "Operational Accidents': On the Turkish State and Kurdish Deaths," *Jadaliyya*, December 30, 2011, <http://www.jadaliyya.com/Details/25023/Operational-Accidents-On-the-Turkish-State-and-Kurdish-Deaths>.

³⁰⁸ Umit Bektas, Nick Tattersall, and Humeyra Pamuk, "Suicide bombing exposes divisions tearing at Turkey's stability," *Reuters*, March 15, 2016, <https://www.reuters.com/article/us-turkey-blast-divisions-insight-idUSKCN0WH1TQ>.

³⁰⁹ "Why Turkey's terror law is the 'Achilles heel' of the EU-Turkey visa deal," *France 24*, May 13, 2016, <https://www.france24.com/en/20160513-why-turkeys-terror-law-achilles-heel-eu-turkey-migrant-deal>.

³¹⁰ "Turkey," *Human Rights Watch*. <https://www.hrw.org/europe/central-asia/turkey>

³¹¹ Walter Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (New York: Oxford University Press, 1999), 6.

be emphasized that most definitions of ‘terrorism’ possess some form of violence. The grey area is in indirect, non-violent forms of terrorism, such as ‘providing material support for’ a terrorist group that consequently enables it to perpetrate acts of violence. It is this blurrier area of terrorism that allows for broad, vaguely defined counterterrorism policies, in turn ensnaring or deliberately targeting legitimate dissenters and penalizing supporters of dissenting ideas, opinions critical of the government, and opposition groups in politics, civil society, and elsewhere. With the rise of social media opening the door to dangerous new interpretations of ‘spreading terrorist propaganda’ and other indirect terror-related offences, developing a more uniform conceptualization of the bounds of terrorism and counterterrorism is paramount. The lack of a uniform, internationally-agreed upon understanding of ‘terrorism’ allows countries a wide discretion to employ highly questionable counterterrorism policies, which is broadened further by states of emergency.

D. Normalizing Exception: Conclusion and Recommendations

Turkey is not alone: as previously pointed out by UN Rapporteur Leandro Despouy, “if the list of countries which have proclaimed, extended or terminated a state of emergency were to be projected onto a map of the world... the resulting area would cover nearly three-quarters of the Earth’s surface.”³¹² Recently, however, SoE regimes are growing in depth, breadth, and frequency: in the last two years, France, Tunisia, Venezuela, Ecuador, Ethiopia, Egypt, and Mali have all imposed and subsequently extended states of emergency.³¹³ The spike in SoEs is an alarming trend for two reasons: first, technological advancement allows for new and more sophisticated violations of human rights and civil liberties, and second, SoE regimes are increasingly incorporating exceptional measures into permanent law.

The alarming growth of SoE regimes and the incorporation of extraordinary counterterrorism measures into permanent domestic legal frameworks begs one final question: are rights derogations really necessary? Emergency derogation provisions in the ECHR and the ICCPR are based on the premise that suspending rights is necessary to restoring public order and protecting national security, but the actual evidence affirming its effectiveness in doing so is scant. On the contrary, in fact, many terrorism scholars have identified human rights violations as a chief *cause* of radicalization and homegrown terrorism. Even if human rights derogations are effective in the short-term, it is worth considering whether the potential unrest sparked by expansive government crackdowns on human rights is in fact counterproductive. The necessity of derogation clauses is

³¹² Report by the UN Special Rapporteur, Mr. Leandro Despouy, on the question of Human Rights and States of Emergency, UN Doc. E/CN. 4/Sub. 2/1997/19 (June 23, 1997). Available at: http://hrlibrary.umn.edu/demo/HumanRightsandStatesofEmergency_Despouy.pdf para. 181.

³¹³ Aamna Mohdin, “The world’s depressing state (of emergency) in 2016, mapped,” *Quartz*, July 21, 2016, <https://qz.com/738249/the-worlds-depressing-state-of-emergency-in-2016-mapped/>.

further undercut by the fact that only nine of 47 member states have ever invoked their right of derogation.³¹⁴ Moreover, the popular assertion that states would refuse to sign international human rights treaties like the ECHR and the ICCPR without the derogation ‘escape clause’ is weakened by the African Charter on Human and Peoples’ Rights, which unequivocally rejected emergency derogations and yet has been ratified by 54 states.³¹⁵ Rather than accepting the premise on its face, exploring the very idea that suspending human rights is necessary to protect national security merits deeper scrutiny.

Ultimately, this paper finds that states of emergency lead to serious human rights abuses on the pretext of countering terror, directly facilitated by the unique powers that states of emergency bestow on the executive at the expense of judicial and parliamentary levels of government. In analyzing Turkey as its chief case study, this paper finds that states of emergency produce two sets of human rights abuses. First, states of emergency allow for the rapid and unchecked passage of broad counterterrorism legislation and policies that criminalize nonviolent dissent and legitimate criticism of government policy, violating rights to privacy and endangering fundamental freedoms of speech, expression, and assembly. Second, the increased powers of the police and security services under states of emergency create serious abuses in relation to detentions, prosecutions and the rule of law, found to violate rights to a fair trial and due process and the right to be free from torture and other cruel and degrading punishment. The effects of unbridled counterterrorism campaigns are particularly felt by already marginalized and securitized ethnic minorities.

The case of Turkey offers interesting insight into how the international human rights community can strengthen protections of individuals beyond their jurisdiction. The cross-border nature of Turkey’s human rights violations under the SoE highlights key weaknesses in the global protection of political dissidents. First, the international human rights community should lobby for an international extradition convention to replace the current patchwork of bilateral treaties. The current system leaves political dissidents vulnerable to forced returns from weaker states to those it fears or depends on, or at risk of being used by governments to negotiate separate strategic goals. The current system should be replaced with a rights-based legal process overseen by an independent monitoring body, so as to ensure strong judicial oversight and full respect for the principle of *non-refoulement*. Lessening the political influence on extradition processes would be a positive step in strengthening the global protection of dissidents.

³¹⁴ Member states that have invoked their right of derogation are Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, the United Kingdom and Ukraine. See “Derogation in time of emergency - factsheet.” European Court of Human Rights -Press Unit. August 2018. https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf, 2.

³¹⁵ Nugraha, “Human rights derogations,” 201.

Second, the international community should renew previous attempts to negotiate an international Terrorism Convention. Establishing a uniform understanding or agreement of what constitutes terrorism, and what differentiates acts of terror from political dissent and civil obedience, may help restrain *counterterrorism* policies as a result. This would also serve to establish a common basis for extraditions even within the existing bilateral framework. Relatedly, Turkey's misuse of the Interpol Red Notice system to have political dissidents arrested and returned suggests that this system is in urgent need of reform to prevent politicized and unlawful arrests. Finally, Turkey's previous willingness to engage in substantial human rights and anti-terror reforms during the EU accession negotiations underscores how political and economic harmony in the bloc can be successfully leveraged against incentivized states to positively influence human rights practices.

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