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# Counterterrorism and Human Rights: A Comparative Analysis of United States and European Laws, and Suggestions for Turkish Law Reform

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# Counterterrorism and Human Rights: A Comparative Analysis of United States and European Laws, and Suggestions for Turkish Law Reform

S.J.D. DISSERTATION

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2- In what cases do you need preventive detention? Is intelligence information (such as information obtained via preventive electronic surveillance) enough to prevent terrorist attacks, or do you need any other preventive measures to terminate the activities of dangerous people?

3- What do you think about material witness detention in the U.S.? Should it also be legalized in Turkey? Would such an amendment contribute to your counterterrorism efforts?

4- Should dangerousness be enacted as another reason for pre-trial detention? Is there a need to amend the Criminal Procedure Code in that respect?

5- What amendments do you think are necessary for Turkish Criminal Procedure Code and the Counterterrorism Code? What are the deficiencies of current rules on arrest, pre-trial detention, electronic surveillance, and search and seizure? Should the strong suspicion requirement in electronic surveillance be lowered to the probable cause standard?

6- Do you think that rules regarding the use of force are sufficient? What are the relevant issues arising in practice? Are there any statistics on the number of security officials who

are; 1) accused or convicted of murder due to the excessive use of force, or 2) subjected to any disciplinary punishment?

7- Should intelligence information be used as evidence at trial? What are the advantages and disadvantages of such an amendment in the Turkish system?

8- What level of suspicion do you seek for preventive electronic surveillance? The Police Code does not provide any standard of cause. Do you seek reasonable suspicion or probable cause in practice?

9- Do security officials have any difficulty in conceptualizing different levels of suspicion? Can you explain your understanding of reasonable suspicion, probable cause and clear and convincing evidence standards? Do you think that Turkish law is clear enough? Do you think that relevant rules in the Criminal Procedure Code is consistent with the Police Code?

10- What legal amendments should be made for better intelligence gathering, especially through data surveillance?

11- What is your suggestion for strengthening oversight mechanisms to oversee the intelligence unit of the police department?

12- What legal amendments are necessary in your opinion to more effectively prevent terrorist attacks?

13- How is the immigration detention of terror suspects conducted in practice? Is the state able to obtain information about future attacks through the interrogation of immigration detainees? What is the average period of detention?

14- What amendments should be made regarding terror crimes? Do you think that Turkey should expand the scope of terror crimes and criminalize more remote preparatory acts as in France and Germany? Is there such a need in practice?

15- What issues arise with regard to the right to counsel during interrogation?

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24- Do you think that special expertise is necessary for judicial officials in counterterrorism? Do you support the idea that a special counterterrorism court system should be established in Turkey for more effective counterterrorism? How the experience of a regular judge would differ from that of an expert judge?

25- What other legal amendments do you think are necessary for more effective counterterrorism? Which are the most problematic rules in your opinion?

Imagine a 17-year-old boy who takes part in the Kurdistan Workers' Party (PKK)'s massacre of villagers in Southeastern Turkey, and who works in the immediate personal service of a militant leader. He gets arrested in a police raid. Since the boy has served the group leader for a substantial period of time, the police believe that interrogating him might reveal substantial information regarding future attacks and connections in the leader cadre. The terrorist organization sends a lawyer to the police station to compel the boy to refuse to disclose any information about the organization and the village massacre event. The lawyer secretly threatens the boy with the lives of his mom and siblings, and coerces him into rejecting any cooperation request from the police. As a result, the boy refuses to disclose any information. The police try hard to persuade the boy to collaborate with the state. They remind him that his cooperation may lead to a lesser sentence, and that he is young enough to establish a new life after the serving of his sentence. The boy nevertheless does not assist the police as he is worried about his family's life.

If the police had the right to exclude defense counsel upon a showing of reasonable suspicion of coercion, the boy might have cooperated with the police. The leader cadre might have been revealed, and future attacks might have been prevented. The boy might have received a lower sentence, which means a diminished time in jail and a higher likelihood of re-integration into society after release.

These are the kinds of problems that counterterrorism specialists in Turkey encounter on a daily basis. Similar issues arise due to inadequate preventive legal measures and the lack of judicial expertise on counterterrorism. This dissertation examines whether Turkish law could be amended in order to more fully address the concerns of counterterrorism officials without unnecessarily infringing on relevant rights.

This study differs from other research conducted on counterterrorism law in a number of ways. First, it provides general information on the concept of terrorism and the history and evolution of terrorism in Turkey. It further compares terrorism in Turkey with Europe and the United States (U.S.). Second, it compares relevant counterterrorism laws of the United States, the United Kingdom, France, Germany, and Turkey. Third, it shows the approaches of the European and United States highest courts to shared counterterrorism law issues. Fourth, it incorporates interviews with counterterrorism officials in Turkey in the course of its analysis in each chapter, for more concrete legal assessment involving the needs of Turkish counterterrorism practice.

The dissertation is comprised of two sections. Section I explains terrorism, its evolution, national and international definitions and common elements of terrorism. It also describes the history and evolution of terrorism in Turkey, and compares Turkey's terrorism with that of the United States and Europe. It later shows the methodology followed by the author when determining proposals for Turkish counterterrorism law: a) the comparison of European and United States laws with Turkish law, and the determination of the gaps in Turkish law, b) interviews with security officials, judges and prosecutors who have experience in counterterrorism, c) the incorporation of the findings in interviews as supporting arguments for proposed legal amendments in Turkey. Section II proposes three main amendments to Turkish law; compares relevant European and United States laws with the Turkish law; analyzes the European Court of Human Rights (ECtHR) and the United States Supreme Court decisions on these proposals; and integrates interviews to support arguments for the proposals.

This study suggests three amendments to Turkish law. First, preventive detention on future dangerousness grounds (in the pre-trial and post-sentence stages) should be enacted in Turkey. Second, a public safety exception to the right to counsel and the right to be informed of procedural

rights during police interrogation should be established. Further, defense counsel who are engaged in representing others in the same terrorist organization or who aim to obstruct justice in certain ways should be excluded from police interrogation via a magistrate court order. Third, a specialized counterterrorism court system, which involves judges and prosecutors with comprehensive knowledge and expertise on Turkey's national security priorities and the characteristics of terrorist organizations, should be established.

# I.TERRORISM

This section includes five chapters. The first chapter explains the concept of terrorism, its evolution over time, the national and international definitions of terrorism, and common elements of terrorism. The second chapter explains the history of terrorism in Turkey, and compares Turkey's terrorism with that of the United States and Europe. The third chapter sheds light on the roots of Turkish law and Turkey's adoption of European legal standards, and generally compares European and American legal standards. The fourth chapter provides information about interviews with counterterrorism officials, and their way of use in this thesis. Finally, the fifth chapter informs the reader about initial and final proposals of legal amendment asserted by the author.

## **A.**INTRODUCTION

### 1. Terror and Terrorism

The term *terror* in English originates from the Latin word *terrēre* that means "frighten".[1] Terrorism is more of a political and legal term. The Encyclopedia Britannica defines it as "the

[1] HAMIDE ZAFER, CEZA HUKUKUNDA TERRORIZM [TERRORISM IN CRIMINAL LAW] 9 (1999); HANS H. ØRBERG, LATIN-ENGLISH VOCABULARY II 36 (1998).

systematic use of violence to create a general climate of fear in a population and thereby to bring about a particular political objective".[2] While *terror* refers to the subjective experience of extreme fear, *terrorism* alludes to the systematic and planned utilization of violent or non-violent terrorizing methods against individuals to coerce a government to fulfill terrorists' political demands.[3] Terrorism, in this sense, is regarded as one of the oldest psychological warfare techniques.[4]

The term *terrorism* was first used in France in the aftermath of the French Revolution to indicate the Reign of Terror between 1793 and 1794.[5] Yet, the systematic and planned use of violence to fulfill political goals dates back to Ancient Times. The first known terrorist acts were conducted in the first century by Jewish Zealots known as the Sicarii. The Sicarii formed an uprising against the Roman Occupation in Palestine[6] that brought about the destruction of the second temple in 70 A.D. and the Diaspora.[7] The Sicarii (Dagger men of Zealots) used a small but lethal knife called *sica* to assassinate Roman officials and their Jewish collaborators by hit and run techniques in crowds.[8] The Sicarii also sabotaged public buildings, grain depots and aqueducts.[9] Another important terrorist organization, which invented terrorist methods and the organizational structure utilized by today's terrorist groups, was the Ismaili Sect known as the Assassins.[10] The

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[2] ENCYCLOPEDIA BRITANNICA, BRITANNICA CONCISE ENCYCLOPEDIA 1890 (2006).
[3] PAUL WILKINSON, TERRORISM AND THE LIBERAL STATE 47-49 (1977).
[4] *Id.* at 49.
[5] ANDREW MANGO, TURKEY AND THE WAR ON TERROR: FOR FORTY YEARS WE FOUGHT ALONE 2 (2005).
[6] RANDALL D. LAW, TERRORISM: A HISTORY 26 (2009); ALEX P. SCHMID, THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH 687 (2011).
[7] GÉRARD CHALIAND & ARNAUD BLIN, THE HISTORY OF TERRORISM: FROM ANTIQUITY TO AL QAEDA 2, 3, 9, 55 (2007); ROBERT TAYLOR, THE HISTORY OF TERRORISM 13, 14 (2002).
[8] SCHMID, *supra* note 6, at 687, 703; TÜRKIYE BAROLAR BIRLIĞI [THE TURKISH BAR ASSOCIATION], TÜRKIYE VE TERÖRIZM [TURKEY AND TERRORISM] 28 (2006); TAYLOR, *supra* note 7, at 14.
[9] [THE TURKISH BAR ASSOCIATION], *supra* note 8, at 28; Ihsan Bozkurt, Terör, PKK ve Dış Destek [Terror, PKK and External Support] 28 (2013) (Unpublished M.A. thesis, Celal Bayar University).
[10] Osama Bin Ladin and Al-Qaeda utilized the organizational scheme invented by Hassan-i- Sabbah. Suicide techniques, the de-centralized structure of the organization, propaganda means, the recruitment and training of terrorists are very much similar in Assasins and Al-Qaeda. CHALIAND & BLIN, *supra* note 7, at 69; TAYLOR, *supra* note 7, at 21, 22.

Assassins was a religious sectarian organization founded by Hassan-i- Sabbah to spread the influence of the Ismaili sect of Shia Islam in the world.[11] They conducted attacks against Muslim dignitaries in Iran and Syria between 1090 and 1272.[12] The organization used clandestine hit and run techniques of guerilla warfare and invented assassination techniques to weaken the Seljuk Turk Empire in the region.[13]

Terrorism took a new form at the end of the 18th century with the French Revolution[14]. State terrorism, for the first time in history, was used to repress the opponents or presumed opponents of the French Revolution. During *the Reign of Terror*, Jacobins under Maximilien Robespierre arbitrarily arrested more than 300,000 people and guillotined 17,000.[15] The term ended with the execution of Robespierre himself on July 28th 1794 by his opponents in the revolutionary legislature called as the Convention.[16] Terrorism, only after then, had come to receive a definition, and was explained in 1798 by the Académie Française Dictionary as a "system, or regime of terror".[17]

According to today's understanding, terrorism is the systematic use or threat of violence to intimidate or coerce a government, individuals or groups to alter their behavior or policies.[18] It is designed to generate power in situations where power was previously absent.[19] It comes in many forms, such as ethnic-separatist terrorism, religious-radical terrorism, far-right and far-left

[11] TAYLOR, *supra* note 7, at 18; LAW, *supra* note 6, at 40.
[12] CHALIAND & BLIN, *supra* note 7, at 3, 61.
[13] *Id.* at 68; TAYLOR, *supra* note 7, at 18.
[14] The French Revolution had begun in the summer of 1789 with the establishment of National Assembly against French King Louis XVI, requesting a constitution curtailing the power of the King. The National Assembly was founded as a legislative body. From 1789 to 1792, the National Assembly "abolished the class system; declared that sovereignty resided in the nation, not the king; limited the power and influence of the Catholic Church; and eventually created a constitutional monarchy." LAW, *supra* note 6, at 60.
[15] SCHMID, *supra* note 6, at 681; TAYLOR, *supra* note 7, at 24.
[16] TAYLOR, *supra* note 7, at 26.
[17] RANDALL D. LAW, THE ROUTLEDGE HISTORY OF TERRORISM 63 (2015).
[18] STEPHEN DYCUS, WILLIAM C. BANKS, PETER RAVEN-HANSEN, COUNTERTERRORISM LAW 3 (2012).
[19] JAMES M. LUTZ & BRENDA J. LUTZ, GLOBAL TERRORISM 10 (2004); TAYLOR, *supra* note 7, at 10.

terrorism, anarchism, nihilism, individual terrorism, state terrorism, domestic and international terrorism.[20]

Terrorism is different from ordinary violence in many ways: First, terrorist violence is directed towards political ends instead of personal financial gain.[21] Political ends may be any changes with regard to a government policy, the governmental structure of a state, or territorial extent of a state.[22] Second, the target audience of terrorist attacks is the general public instead of the immediate victims of violence.[23] Victims are thus selected on a non-personal basis.[24] Terrorist attacks are designed to send messages to governments through the selection of symbolic targets such as government officials, politicians, or civilians.[25] Third, terrorism is a psychological warfare and is designed to induce fear in a population. Its main goal is to generate a feeling in a society that the government is no longer capable of protecting the lives of its citizens.[26] Fourth, terrorism is planned, systematic and continuous, and generally involves an organization which guarantees the continuity and credibility of a particular political cause.[27]

By the same token, terrorists are different from ordinary criminals. They are highly committed to their religious or ideological cause,[28] group-focused, and well-trained for the mission.[29] They willingly risk their lives and often cause their own deaths. They are also not easily deterred by the threat of future punishment.[30] They are trained to resist ordinary interrogation

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[20] *See* generally ZAFER, *supra* note 1, at 60-73.
[21] JAMES M. LUTZ & BRENDA J. LUTZ, TERRORISM: ORIGINS AND EVOLUTION 7 (2005).
[22] *Id*. at 7.
[23] *Id*. at 7, 8.
[24] WILKINSON, *supra* note 3, at 52.
[25] PAUL WILKINSON, TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE 1 (2006); LUTZ & LUTZ, *supra* note 21, at 8; CIAN C. MURPHY, EU COUNTER-TERRORISM LAW 7 (2012).
[26] LUTZ & LUTZ, *supra* note 21, at 8.
[27] *Id*. at 8.
[28] Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 882 (2011).
[29] MICHAEL R. RONCZKOWSKI, TERRORISM AND ORGANIZED HATE CRIME: INTELLIGENCE GATHERING, ANALYSIS, AND INVESTIGATIONS 46 (2007).
[30] Walen, *supra* note 28, at 871, 887, 888.

techniques as well.[31] Ordinary criminals, in contrast, are generally uncommitted to a cause, self-centered, untrained and escape-oriented.[32]

Terrorism is different from guerilla warfare in two respects.[33] For one thing, terrorists attack innocents or unarmed members of a government to intimidate the public and to influence the government conduct.[34] Guerillas or freedom fighters, however, attack the supporters of an oppressive state and armed members of government in order to overthrow the government or to make a regime change.[35] Second, terrorism is directed against legitimate governments that are accepted by the people they govern.[36] Guerilla warfare, however, targets illegitimate oppressive governments that refuse to accord individuals their natural rights.[37] In this sense, guerilla fighters are named as "freedom fighters". The justification of guerilla warfare or liberation movements is either *the right to resist* against an oppressive government that lost its legitimacy due to its indifference towards individual rights,[38] or the right to self-determination of nations.[39]

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[31] Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811, 824 (2008).
[32] RONCZKOWSKI, *supra* note 29, at 44.
[33] *See* generally LUTZ & LUTZ, *supra* note 19, at 8, 9; ROSEMARY H. T. O'KANE, TERRORISM 38 (2007).
[34] LUTZ & LUTZ, *supra* note 19, at 8.
[35] *Id*. at 8; CINDY C. COMBS & MARTIN SLANN, ENCYCLOPEDIA OF TERRORISM 321, 322 (2007).
[36] LUTZ & LUTZ, *supra* note 19, at 8.
[37] *Id*.
[38] The right to resist is not by itself an independent human right. Yet, it may be considered as a remedial right closely connected to the ideal of human rights. CHRISTOPHER J. FINLAY, TERRORISM AND THE RIGHT TO RESIST: A THEORY OF JUST REVOLUTIONARY WAR 19, 54 (2015).
[39] *Id.* at 36.

## 2. The Definitions and Elements of Terrorism

### a) National

The international community unfortunately has not reached a consensus on the definition of terrorism. This is partly because terrorism is not only a legal but also a political phenomenon. The political nature of terrorism affects the way terrorism is defined by states. Each state defines the term in accordance with its political ideals, history, constitutional structure, threat perceptions, and social values.

Nevertheless, the general scope of terrorism in one state is more or less akin to another. Terrorism definitions are largely built upon various offenses to be committed with a specific intent by an individual or collective undertaking. The definition of terrorism in each state contains three common elements:[40] a specific purpose or intent *(mens rea),* particular terrorist acts *(actus reus),* and an organization.[41] Thus, in order to understand the similarities and differences between the concepts of terrorism in the states analyzed in this study, these three elements must be scrutinized.

#### (1) Specific terrorist purposes (*Mens rea*)

The purposes of terrorism covered by the statutes are as follows:[42]

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[40] LUTZ & LUTZ, *supra* note 19, at 10-13.

[41] Except the U.S.

[42] According to the U.S. law, acts or threat of actions dangerous to human life that are a violation of the criminal laws of the U.S. or of any state should be deemed as terrorist acts if: 1) they are committed to intimidate or coerce a civilian population, 2) to influence the policy of a government by intimidation or coercion, or 3) to affect the conduct of a government by mass destruction, assassination or kidnapping. 18 U.S.C. §§ 2331-1-B, 5-B, 2332b-g-5-A. Different from other states, the U.S. law distinguishes international terrorism from domestic terrorism. If terrorist acts "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum", it is regarded as international terrorism. If terror acts occur primarily within the jurisdiction of the United States, it is regarded as domestic terrorism. *Id.* § 2331-1, 5.

a) to intimidate the public or to disrupt public order by intimidation or coercion (Fr., U.S., U.K., Ger., Turk.)

b) to influence the policy and conduct of a government or an international organization by coercion and intimidation (U.S., U.K., Ger.)

c) to realize a particular political, religious, or ideological cause (U.K., Turk.)

d) to demolish the democratic social and constitutional structure of a state. (Ger., Turk.)

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According to the United Kingdom law, terror crimes can be committed by a proscribed organization for the purposes of influencing the government or an international governmental organization, or to intimidate the public, or to advance a political, religious, racial or ideological cause. Terrorism Act 2000, §§ 1, 3.

The French Penal Code provides a list of crimes considered as acts of terrorism when committed intentionally in connection with an individual or collective undertaking for the purpose of seriously disrupting public order through intimidation or terror. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 421-1.

The German Criminal Code encompasses three terrorist purposes: the disruption of public order, influencing or affecting the policy or conduct of a government or an international organization, and demolishing the democratic social and constitutional order. Section 129a-1 provides that terrorist acts are those intended to "seriously intimidate the population, to unlawfully coerce a public authority or an international organization through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organization". In order for terrorist acts to be punished, these acts must objectively have the potential to seriously damage a state or an international organization given the nature or consequences of such offenses. STRAFGESETZBUCH [STGB] [PENAL CODE], § 129a-2-5, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html. Intention by itself thus is not enough to punish terrorist acts.

The Turkish Counterterrorism Code has a mixed structure. It encompasses a definition to protect not only individual liberties and public order from intimidation and coercion but also the secular and unitary constitutional structure of the Turkish state. It has the most nationalistic terror definition among other countries, probably because of the variety of domestic and foreign threats directed against the existence of the state.

According to Article 1 of the Counterterrorism Code, the terror definition covers all criminal acts by members of an organization that is conducted through coercion and violence, oppression, intimidation or threat, designed to: a) change the characteristics of the republic; b) change the political, legal, social, laic, economic structure and order demonstrated in the Constitution; c) destroy the unity of the nation and the country; d) endanger the existence of the Turkish State and the republic; e) weaken, demolish, or seize the state authority; f) eradicate fundamental rights and freedoms; g) disrupt the internal and external security of the State, public order or public health.

Communist bloc countries' terror definitions were generally aimed to protect the socialist structure of the state instead of the protection of people and their freedoms from intimidation. For example, the Union of Soviet Socialist Republics, Czechoslovakia and Eastern Germany regarded terrorism as violent crimes against the socialist structure of the state. In contrast, liberal bloc states' statutes were designed to protect individual rights and public order. Turkey, as a liberal state and the only NATO ally at the very eastern front of the Cold War, followed a mixed approach. Under the mixed approach, the terror definition sought to protect; a) the fundamental rights of people, b) the secular republican constitutional structure of the state, and c) the unity of the Turkish territory. ZAFER, s*upra* note 1, at 45-47, 51.

Terrorist purposes in each definition depend on the threats a state faces as well as its historical and constitutional background. The U.S., U.K., and France --- countries that do not face any substantial threat to their constitutional structures and which established economic colonies around the world --- do not cite constitutional values in their terrorism definition. For instance, in the U.S., a violent terror act is one that is intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass-destruction, assassination and kidnapping.[43] Similarly in the U.K., a terrorist act could be designed to influence the government or an international governmental organization, or to intimidate the public or to advance a political, religious, racial or ideological cause. In France, the protection of social order is the foremost purpose as France faces Islamist terror attacks that instill fear in its society. That is, since the U.S., U.K. and France do not encounter any substantial inside threat against their parliamentary and secular regimes governed by the rule of law, their terrorism definitions do not encompass domestic threats to its constitution.

Turkey and Germany, however, chose to protect their respective constitutional foundations through their terrorism definitions. Germany experienced Hitler, who came to power through democratic principles and then demolished the democratic structure of Germany, establishing a dictatorship. Turkey, after the collapse of the theocratic and multi-national Ottoman Empire, established a secular Turkish nation state based on the fundamentals of Western democratic values. Unlike Europe, Turkey established a democratic and secular structure through Atatürk's legal and cultural revolution instead of a gradual evolution.[44] This resulted in part of the society rebelling against the democratic revolution in favor of an Islamist theocratic state. For this reason, one of

[43] 18 U.S.C. § 2331.
[44] BERNARD LEWIS, THE EMERGENCE OF MODERN TURKEY 480-83 (1968).

the biggest threats that Turkey faces is the changing of its constitution by direct or indirect coercion or force. That is probably the reason why in Turkey ---like in Germany--- threats to the constitutional and democratic structure of a state is listed among other terrorist purposes.[45]

While it may be unthinkable in the U.S., U.K. and France that people seize the government authority and change the constitutional structure of the state, this is probably the biggest threat for Turkey. Crimes of treason constitute serious but not terror-related crimes under U.S., U.K. and French laws. But treason might be deemed a terror crime if it is committed through coercion or violence within the scope of an organization for the purposes stated in Art. 1 of the Turkish Counterterrorism Code.[46] Under German law, the crime of treason may also be considered an act of terrorism if it is committed by an organization formed to commit the crimes stated in German Penal Code Section 129a in order to demolish the democratic social and constitutional order.[47] This distinction might have consequences on the length of a sentence and the determination of an applicable sentence execution regime. This is so, especially if a legal system entails different sentencing and execution rules for terror crimes. For instance, Turkish law requires a 50% increase of a sentence in terror offenses.[48] Terror convicts are also required to be detained in high security and closed penitentiary institutions.[49] Turkish law also permits release on parole only after terror

[45] TERÖRLE MÜCADELE KANUNU [ T.M.K.] [COUNTERTERRORISM CODE] art. 1 (Turk.).
[46] For example, the U.S. law punishes treason and rebellion as different crimes from terrorism, in a different chapter in its federal code. While treason and rebellion are in chapter 115, terrorism is in chapter 113 B. 18 U.S.C. §§ 2381, 2383; *Id.* §§ 2331-2339D.
The French Penal Code also distinguishes the crime of treason from terrorist crimes. The crime of treason is stated in its Penal Code Article 411-1, and it is not among the terror crimes stated in Articles 421-1, 2.
Similarly, the crime of treason is not stated among one of the terror offenses in Terrorism Act 2000 and Terrorism Act 2006 under the U.K. law. Instead, the U.K. law has separate Treason Acts. For U.K. Treason Acts from 1351 to 1945, *see* http://www.legislation.gov.uk/all?title=treason#top.
[47] The German Penal Code contains separate sections of high treason. [StGB], §§ 81, 82.
[48] [T.M.K.] art. 5.
[49] [I.K.] art. 9-1. For regular criminals, however, the duration to be served in prison for parole eligibility is shorter. The serving of 2/3 of a sentence is enough so long as other conditions are met. [T.M.K.] art. 17-1; [I.K.] art. 107-2.

convicts have served at least ¾ of their sentence.[50] And terrorists who received aggravated life-sentences are not eligible for release on parole.[51]

While U.S. and U.K. terrorism statutes include the purpose of influencing the policy or conduct of a government, France does not incorporate such a reason in its penal code. Rather, it only involves the disruption of public order as a terrorist purpose. The reason for this difference raises curiosity, because these countries tackle the similar terrorist threat of religious extremism. The dissimilarity between terrorist purposes might stem from differing threat perceptions between Anglo-Saxon and Continental European law makers. The disruption of public order eventually aims to change or influence government conduct. Therefore, this difference seems to be only a matter of statutory expression and should not give rise to substantially contrasting outcomes in counterterrorism prosecutions.

(2) Terrorist acts (*Actus reus*)

Each state criminalizes six main terrorist acts (if committed with a terrorism purpose):[52]

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[50] [I.K.] art. 107-4.

[51] [T.M.K.] art. 17-4; [I.K.] art. 107-16

[52] According to the U.S. Law, terrorist acts generally are the kills, kidnaps, maims, assaults involving serious bodily injury, assaults with a dangerous weapon, substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real and personal property within the U.S. 18 U.S.C. § 2332b-a-1. In order for these acts to be considered as terror crimes, they should be committed for one of the three specific terrorist purposes stated in the code. 18 U.S.C. § 2331-1, 5.

18 U.S.C. § 2332b-g-5 defines the term "Federal crime of terrorism" as follows: An offense that—

**(A)** is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

**(B)** is a violation of sections relating to: destruction of aircraft or aircraft facilities; violence at international airports; arson within special maritime and territorial jurisdiction; biological weapons; variola virus; chemical weapons; congressional, cabinet, and Supreme Court assassination and kidnaping; nuclear materials; participation in nuclear and weapons of mass destruction threats to the United States; plastic explosives; arson and bombing of Government property risking or causing death; arson and bombing of property used in interstate commerce; killing or attempted killing during an attack on a Federal facility with a dangerous weapon; conspiracy to murder, kidnap, or maim persons abroad; protection of computers; killing or attempted killing of officers and employees of the United States; murder or manslaughter of foreign officials, official guests, or internationally protected persons; hostage taking; government property or contracts; destruction of communication lines, stations, or systems; injury to buildings or property within special maritime and territorial jurisdiction of the United States; destruction of an energy facility; Presidential and Presidential staff assassination and kidnaping; terrorist attacks and other acts of violence against

railroad carriers and against mass transportation systems on land, on water, or through the air; destruction of national defense materials, premises, or utilities; national defense material, premises, or utilities; violence against maritime navigation; maritime safety; violence against maritime fixed platforms; certain homicides and other violence against United States nationals occurring outside of the United States; use of weapons of mass destruction; acts of terrorism transcending national boundaries; bombing of public places and facilities; missile systems designed to destroy aircraft; radiological dispersal devices; acts of nuclear terrorism; harboring terrorists; providing material support to terrorists; providing material support to terrorist organizations; financing of terrorism; military-type training from a foreign terrorist organization; torture; prohibitions governing atomic weapons; sabotage of nuclear facilities or fuel; aircraft piracy; assault on a flight crew with a dangerous weapon; explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft; application of certain criminal laws to acts on aircraft; destruction of interstate gas or hazardous liquid pipeline facility; and narco-terrorism. 18 U.S.C. § 2332b-g-5.

According to the U.K. Law, terrorist offenses involve acts or threat of actions that; a) involve serious violence against a person or serious damage to property, b) endanger a person's life, c) create a serious risk to the health or safety of the public, d) are designed seriously to interfere with or to disrupt an electronic system. Terrorism Act 2000, § 1-2. *See* also KENT ROACH, COMPARATIVE COUNTER-TERRORISM LAW 168, 169 (2015). These acts must be committed with the three specific terrorist purposes stated in Terrorism Act 2000.

The U.K. promulgated several terrorism statutes since 2000 to more effectively counter terrorism, two of which are the Terrorism Act of 2000 and the Terrorism Act of 2006. Some of the terrorist offenses in these Acts are as follows: membership in and support to a terrorist organization (Terrorism Act 2000, §§ 11, 12); weapons training: (providing, receiving or inviting another to receive instruction or training in the making or use of firearms, explosives, or chemical, biological or nuclear weapons, *Id*. §§ 54, 55); directing terrorist organization (*Id*. § 56); possession of articles for terrorist purposes (*Id*. § 57); collection of information that could be useful to a person committing or preparing an act of terrorism (*Id*. § 58); wearing clothes or carrying or displaying an article in such a way to arouse reasonable suspicion that he is a member or supporter of a proscribed organization (wearing uniforms of the organization in a public place, *Id*. § 13); fund raising for terrorism: providing, receiving or inviting to provide funds for the purposes of terrorism (*Id*. § 15); use or possession of money for the purposes of terrorism (*Id*. § 16); money laundering (*Id*. § 18); encouragement of terrorism (Terrorism Act 2006, c. 11, § 1); dissemination of terrorist publications (*Id*. § 2); encouragement of terrorism or dissemination of terrorist publications through a service provided electronically (*Id*. § 3); preparation of terrorist acts (*Id*. § 5); training for terrorism: to provide or receive terrorist instruction or training knowing that the skills will be used in the commission or preparation of acts of terrorism (*Id*. § 6); attendance at a place used for terrorist training (*Id*. § 8); making and possession of radioactive devices and materials (*Id*. § 9); misuse of devices or material and misuse and damage of facilities (*Id*. § 10); terrorist threats relating to devices, materials or facilities (*Id*. § 11); trespassing on nuclear sites *Id*. § 12; eliciting, publishing or communicating information about members of armed forces etc. (Counter-Terrorism Act 2008, c. 28, § 76).

Terror crimes listed in French Penal Code Articles 421-1 and 421-2 are as follows: willful attacks on life, willful attacks on the physical integrity of persons, abduction and unlawful detention; hijacking of planes, vessels or any other means of transport; theft, extortion, destruction, defacement and damage, and also computer offenses; offenses committed by combat organizations and disbanded movements; the offenses set out under Articles 434-6, 441-2 to 441-5 (harboring terrorists, financing, and aiding terrorists; forgery on a document delivered by a public body; unlawfully procuring for another person a document delivered by a public body); the production or keeping of machines, dangerous or explosive devices; the production, sale, import or export of explosive substances; the purchase, keeping, transport or unlawful carrying of explosive substances or of devices made with such explosive substances; the detention, carrying, and transport of weapons and ammunition falling under the first and fourth categories; the offenses forbidding the designing, production, keeping, stocking, purchase or sale of biological or toxin-based weapons; the offenses on the prohibition of developing, producing, stocking and use of chemical weapons and on their destruction; receiving the product of one of the offenses set out above; money laundering offenses; insider trading offenses; the introduction into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment is an act of terrorism where it is committed intentionally in connection with an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror; the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 421-2-1 (same citation applicable for the above crimes as well); to finance a terrorist organization by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in

part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place (*Id*. art. 421-2-2); being unable to account for resources corresponding to one's lifestyle when habitually in close contact with a person or persons who engage in one or more of terrorist activities (*Id*. art. 421-2-3).

The 2016 Amendments to the French Penal Code establish additional terror crimes that criminalize relatively remote acts: a) the gathering of information regarding the place of a future terror act or persons who are potential targets (reconnoitering) *(Id*. art. 421-2-6-II-2-a ); b) receiving or providing weapons training *(Id*. art. 421-2-6-II-2-b); c) the learning of combat techniques, the learning of production or use of explosive, flammable, nuclear, radiological, biological, chemical weapons (*Id*.); d) the learning of or endeavor to learn using planes or ships *(Id*.); d) the possession of documents or habitual visiting of internet sites that encourage or praise terror acts, excludes *bona fide* online searches such as scientific researches, searches for the exercise of a job related to informing the public, searches to obtain evidence for justice *(Id*. arts. 421-2-6-II-2-c, 421-2-5-2); e) taking part with a terrorist organization abroad in theater of operations (*Id*. art. 421-2-6-II-2-d); f) the conspiracy or formation of a group to commit preparatory offenses *(Id*. art. 421-6); g) the offering or promising to offer food or drink or gifts to a person, or threatening or pressurizing him in order to assure his participation in a terror act, regardless of its effects *(Id*. art. 421-2-4); h) the encouragement of terror acts, or the praise of terror acts in public *(Id*. art. 421-2-5); i) intentional copying, forwarding, or extracting the acts of praise for the particular purpose of diminishing the effectiveness of the particular procedure stated in Article 6 of the Trust in Numeric Economy Code, or that of the Article 706-23 of Criminal Procedure Code *(Id*. art. 421-2-5-1).

German Criminal Code Section 129a punishes the formation of and membership in terrorist organizations in the commission of various terror crimes: murder under specific aggravating circumstances or murder, genocide [different than other countries, as an historical effect of the Holocaust by the Hitler regime), a crime against humanity, a war crime; crimes against personal liberty; acts causing serious physical or mental harm to another person; offenses of computer sabotage, destruction of buildings, destruction of important equipment, or offenses endangering the general public such as arson, arson causing death, causing a nuclear explosion, causing an explosion, misuse of ionizing radiation, causing flooding, causing a common danger by poisoning, dangerous disruption of rail, ship and air traffic, disruption of public services, attacks on air and maritime traffic, disruption of telecommunications facilities; offenses against the environment; offenses regarding various sections of the Weapons of War (Control) Act. [StGB], § 129a-1, 2.

The German legislature passed the 2009 Law for the Prosecution of Preparation of Severe Seditious Acts of Violence which established new criminal offenses that were inserted into German Criminal Code Sections 89a, 89b and 91. (In German, the law is called as "Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten", which passed on 30 July 2009 and entered into force on 4 August 2009. ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORIZED LEGISLATOR?: A COMPARISON OF COUNTER-TERRORISM LEGISLATION AND ITS IMPLICATIONS ON HUMAN RIGHTS IN THE LEGAL SYSTEMS OF THE UNITED KINGDOM, SPAIN, GERMANY AND FRANCE 283 (2009).

First, section 89a criminalized the preparation of a serious violent offence endangering the state by imprisonment of six months to ten years. A serious violent offence endangering the state refers to an offence against life or personal freedom, which is "intended to impair and capable of impairing the existence or security of a state or of an international organization, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany". [StGB], § 89a-1; OEHMICHEN, *supra*, at 283.The law is applicable only when the person engages in preparation by: 1) "instructing another person or receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offence or other skills that can be of use for the commission of an offence" against life or personal freedom" (Participation in terrorist training camps is criminalized via this law. OEHMICHEN, *supra*, at 283); 2) "producing, obtaining for himself or another, storing or supplying to another weapons, substances or devices and facilities mentioned under No. 1 above"; 3) "obtaining or storing objects or substances essential for the production of weapons, substances or devices and facilities mentioned under No. (1) above", or; 4) "collecting, accepting or providing not unsubstantial assets for the purpose of its commission". [StGB], § 89a-2.

Second, section 89b punishes the act of establishing or maintaining contacts with a terrorist organization, with the intention to get training for committing a serious violent offense endangering the state. Punishment for this offense is either a maximum three years of imprisonment or a fine. And lastly, Section 91 criminalizes the encouragement of the commission of a serious violent offence endangering the state. Specific acts criminalized under this section are as follows: 1) displaying or supplying to another written material capable of serving as an instruction to the commission of a serious violent offence endangering the state, "if the circumstances of its dissemination are

conducive to awakening or encouraging the preparedness of others to commit a serious violent offence endangering the state" *(Id.* § 91-1-1.); 2) obtaining such instructive written material for committing a serious violent offence endangering the state. *Id*. § 91-1-2.

Punishment for this offense is either maximum three years of imprisonment or a fine. [StGB], § 91-1; OEHMICHEN, *supra*, at 284.

These acts are not unlawful if they serve the purpose of "citizenship education, the defense against anti-constitutional movements, arts and sciences, research or teaching, reporting about current or historical events or similar purposes" or "the fulfilment of lawful professional or official duties". [StGB], § 91-2-1, 2.

Turkish Law sets forth three types of terror offenses: absolute terror offenses, relative terror offenses, and offenses facilitating the commission of terror acts. Absolute terror crimes are themselves considered as terrorist acts, with no additional specific purpose needed. Relative terror acts can be deemed as terrorist acts only if they are committed for the terrorist purposes stated in Art. 1, within the scope of a terrorist organization. Facilitation offenses ease the commission of absolute or relative terror offenses. ZAFER, s*upra* note 1, at 124, 125, 131; [T.M.K.] art. 4.

Absolute terror offenses stated in the Turkish Counterterrorism Code are as follows: disrupting the unity and integrity of the state (CEZA KANUNU [T.C.K.] [PENAL CODE] art. 302); destruction of military facilities and conspiracy that benefits enemy military movements *(Id*. art. 307); attempts to demolish, change or hinder the enforcement of the constitutional order via the use of force *Id*. art. 309; offenses against the legislative body *(Id*. art. 311); offenses against the government (*Id*. art. 312); armed revolt against the government of Turkish Republic (*Id*. art. 313); armed organization (*Id*. art. 314); supplying arms (*Id*. art. 315); enlistment of soldiers in foreign service (*Id*. art. 320); assassination of the President (*Id*. art. 310-1).

Relative terror offenses in the Code are: migrant smuggling (*Id*. art. 79); human trafficking (*Id*. art. 80); murder (*Id*. arts. 81, 82); suicide inducement (*Id*. art. 84); regular and aggravated physical injury (*Id*. arts. 86, 87); torment (*Id*. art. 96); threatening (*Id*. art. 106); blackmailing (*Id*. art. 107); coercion (*Id*. art. 108); deprivation of liberty (*Id*. art. 109); obstruction of education (*Id*. art. 112); obstruction of public services (*Id*. art. 113); obstruction of the exercise of political rights (*Id*. art. 114); obstruction of the exercise of the freedom of belief, thought and opinion (*Id*. art. 115); breach of the inviolability of home (*Id*. art. 116); breach of the freedom of labor and work (*Id*. art. 117); obstruction of the exercise of union rights (*Id*. art. 118); aggravated theft (*Id*. art. 142); plunder, aggravated plunder (*Id*. arts. 148,149); damage to property (*Id*. arts. 151, 152); purposeful endangering of public safety (*Id*. art. 170); dissemination of radiation (*Id*. art. 172); causing atomic explosion (*Id*. art. 173); possession or exchange of hazardous substances without permission (*Id*. art. 174); endangering life and health with toxic substances (*Id*. art. 185); production and trade of narcotics and psychotropic substances (*Id*. art. 188); counterfeiting valuable stamps (*Id*. art. 199.); instruments for the production of money and valuable stamps (*Id*. art. 200); counterfeit of a public seal (*Id*. art. 202.); counterfeit of official documents (*Id*. art. 204); documents presumed to be official (*Id*. art. 210); threat with the intention of causing fear and panic among the public (*Id*. art. 213); provocation to commit an offense (*Id*. art. 214.); praise of a crime and a criminal (*Id*. art. 215); hijacking or seizure of transportation vehicles (*Id*. art. 223); occupation of a stationary platform on territorial land or industrial zone (*Id*. art. 224); access to a data processing system (*Id*. art. 243); preventing the functioning of a system and deletion, alteration or corruption of data (*Id*. art. 244); obstruction of public duty (*Id*. art. 265); assisting a detainee to escape (*Id*. art. 294); degrading the symbols of state sovereignty (*Id*. art. 300); conspiracy to commit an offense (*Id*. art. 316); seizure of a military institution (*Id*. art. 317); alienation of the public from military service (*Id*. art. 318); inducement of soldiers for disobedience (*Id*. art. 319); physical attack against the president (*Id*. art. 310-2); offenses stated in the Weapons Act ([T.M.K.] art. 4-b); offenses regarding forest fire under the Forests Act. (*Id*. art. 4-c); offenses requiring incarceration under the Anti-Smuggling Act. (*Id*. art. 4-ç); offenses that led to the state of emergency under the Constitution art. 120 (*Id*. art. 4-d); illegal trafficking of cultural and natural treasuries (*Id*. art. 4-e).

The Counterterrorism Code refers to a third type of terror offense which facilitates the commission of absolute or relative terror crimes. ZAFER, s*upra* note 1, at. 131. These crimes of facilitation are as follows:

1) To establish and direct a terrorist organization ([T.M.K.] art. 7-1);
2) Membership in a terrorist organization (*Id*. arts. 2, 7-1);
3) Terrorist propaganda: propaganda that praises, legitimizes and encourages the coercive, forcible and threatening means of terror. If this crime is committed by means of press, it constitutes aggravated propaganda. Other acts regarded as terrorist propaganda are: Regardless of whether these occurred during public assemble and demonstrations:

i. carrying or hanging the emblem or insignia, pictures and symbols of a terrorist organization
ii. shouting slogans
iii. broadcasting through sound equipment

- The violent acts or threat of actions dangerous to human life,
- The violent acts or threat of actions physical integrity
- The violent acts or threat of actions against personal freedom
- The destruction of property
- The formation of or membership in or material support to a terrorist organization
- Hijacking

In 2016, France ---as a response to the growing ISIS threat in 2015--- enacted new laws to criminalize remote preparatory acts of terrorism that are suggestive of future terrorist acts. These offenses, which are absent in other systems, mainly are as follows: a) the habitual visiting of internet sites that encourage or praise terror acts; b) the learning of or endeavor to learn using planes or ships; c) the gathering of information regarding the place of a future terror act or persons who are potential targets.

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iv. wearing of uniforms on which there is the insignia, picture or symbols of a terrorist organization. *Id*. art. 7-2.

4) During illegal public assembly and demonstrations in which terrorist propaganda is made, people who totally or partly cover their faces to disguise themselves or conceal their identity will be punished between 3 to 5 years of incarceration. *Id*. art. 7-3. If such people utilize coercion or force, or use or possess any type of weapons, Molotov cocktail, or similar types of explosive, oxidizer and flammable substances, the punishment will be no less than 4 years. If this crime is committed in buildings, clubhouses, bureaus, educational institutions, student dormitories (or their attachments) of unions, foundations, political parties, worker and professional organizations, or their sub-institutions, the punishment will be twice the basic punishment. *Id*. art. 7-4.

5) The commission of crimes on behalf of the terrorist organization without being a member of the organization (lone wolf cases) is punished as if he is the member of the terrorist organization. *Id*. art. 7-5, with some exceptions.

6) Printing and publishing the manifesto, bulletin or statements that praises, legitimizes and encourages the use of coercive, forcible and threatening means of terror is punished between 1 to 3 years. *Id*. art. 6-2.

7) Revealing or publishing any information regarding the identity of counterterrorism officials or informants. With or without explicit disclose of name &ID, but in a way making it easier to understand the identity. [T.M.K.] art. 6-1, 3.

8) Revealing the fact that a terror act will be directed against somebody and the identity thereof. With or without explicit disclose of name &ID, but in a way making it easier to understand the identity. *Id.*

9) Terrorist financing. *Id.* art. 8.

(3) Organization

Turkey, Germany and U.K. require the direct or indirect involvement of an organization to regard an offense as an act of terrorism. French law, in contrast, incorporates both individual and collective undertakings.[53] U.S. law does not contain a specific organization requirement like the former three countries do, which leads us to conclude that both individual and organizational activities are implied in the U.S. terrorism definition.[54] Thus, under U.S. and French laws, every violent deed can be deemed to be a terrorist act, regardless of whether an organization is behind it, so long as it is committed with a terrorist purpose.

Any difference observed during the examination of these three elements (terrorist purposes, terrorist acts, and an organization) most likely stem from each state's historical background, differing Anglo-Saxon or Continental European legal traditions, constitutional priorities, and the structure and scope of relevant codes.[55] For this reason, there is no best statutory enactment to be preferred over another. Each state is unique in itself, and has its own reasons for certain enactments. Yet there is plenty of room for borrowing --- every state has an interest in considering other state's laws as examples to see if a foreign rule would meet its own needs in counterterrorism.[56]

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[53] [ T.M.K.] art. 1; [StGB], § 129a-1, 2; Terrorism Act 2000, § 1, 3; [C. PÉN.] art. 421-1; ZAFER, *supra* note 1, at 51.
[54] 18 U.S.C. § 2331; ZAFER, *supra* note 1, at 51.
[55] For instance, Germany and Turkey chose the way to protect the state from insider threats against their constitutional order, and preferred a statutory language more protective of their constitution compared to other states. The U.S., the U.K., and Germany, whose governments have substantial influence on international politics, regarded violent acts aimed to influence a government conduct as terrorism. It might be surprising that France, which entails similar characteristics with the former states, only focused on the disruption of public order. This should be a matter of articulation of the concept of terrorism by the French legislator.
[56] For example, Turkey may consider following the French example of criminalizing preparatory acts of terrorism if such a need appears in the future.

b) International

In order to ensure the legality and certainty of terrorism definitions as well as the ideologically neutral assessment of terrorism, states in the international arena have attempted to set a clear definition of terrorism.[57] The first proposal was drafted by the League of Nations (the predecessor of today's United Nations) under the Convention for the Prevention and Punishment of Terrorism in Genova on November 16, 1937.[58] The draft Convention, for the first time, defined the 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."*[59] The draft convention did not receive sufficient support due to the upcoming World War II.[60] Since the 1970s, ad hoc United Nations Committees have also attempted to generate several proposals, which also did not receive sufficient support.[61] For instance, the U.N. Ad Hoc Committee in 1996

[57] OMER ELAGAAB & JEEHAN ELAGAAB, INTERNATIONAL LAW DOCUMENTS RELATING TO TERRORISM XX5 (2007).
[58] ERIK LUNA, WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 5 (2015); MARIANNE VAN LEEUWEN, CONFRONTING TERRORISM: EUROPEAN EXPERIENCES, THREAT PERCEPTIONS AND POLICIES 211 (2003); *Id.* at. XX5.
[59] League of Nations Convention for the Prevention and Punishment of Terrorism, art. 1-1, Nov. 16, 1937, League of Nations Doc. C.94.M.47.1938.V (never entered into force). BEN SAUL, TERRORISM: DOCUMENTS IN INTERNATIONAL LAW 1-7 (2012). *See* also The Library of Congress-World Digital Library, Convention for the Prevention and Punishment of Terrorism, *available at* https://www.wdl.org/en/item/11579/.
Additionally, the Convention Articles 2&3 required the signature states to criminalize certain acts if they fit the definition of acts of terrorism under its Article 1. These acts are as follows:
a) Any willful act causing death or grievous bodily harm or loss of liberty to heads of states, wives or husbands of them, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
b) Willful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party;
c) Any willful act calculated to endanger the lives of members of the public; d) Any attempt to commit such an offense;
e) The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offense falling within the present article (Article 2);
f) Conspiracy, incitement if successful, direct public incitement regardless of whether it is successful, willful participation, knowing assistance towards the commission of any such act (Article 3) (extradition crimes under Article 8).
[60] The Convention was not ratified by signature states due to the upcoming World War II. ZAFER, *supra* note 1, at 27.
[61] LUNA, *supra* note 58, at 5.

drafted a Comprehensive Convention on International Terrorism.[62] The Committee, though, could not agree on a description of the purpose and motive of terrorism, the perpetrator of terrorism, whether the definition of terrorism should entail state-sponsored terrorism, the difference between terrorism and legitimate fight against oppression, the characteristics of terrorist acts, and on what bases a terrorist chooses his target of the public or property.[63]

Many attempts to define terrorism have failed because terrorism is partly a political phenomenon, and ideological differences play a big role in international law. "One person's terrorist is another person's freedom fighter"[64] is a widely known expression implying that different ideologies and conflicts of interests shape international legal principles. With no international consensus on the definition, member states to the United Nations and to the Council of Europe, instead, took the path of generating conventions that prohibit particular acts tied to terrorism, namely the hijacking of aircraft, kidnapping, detonating bombs, and financing such activities.

The United Nations has produced nineteen international legal instruments designed to prevent terrorism. These agreements are with regard to civil aviation, the protection of international staff, the taking of hostages, nuclear material, maritime navigation, explosive materials, terrorist bombings, the financing of terrorism, and nuclear terrorism. The U.N. legal instruments that direct states to enact certain offenses are as follows:[65]

- Convention for the Suppression of Unlawful Seizure of Aircraft (1970)[66]

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[62] G.A. Res. 51/210, (Dec. 17, 1996), *available at* http://legal.un.org/docs/?symbol=A/57/37(Supp); U.N. Draft Comprehensive Convention on International Terrorism, U.N. Doc. A/59/894, (Feb.11, 2002). SAUL, *supra* note 59, at 163-172.
[63] ELAGAAB & ELAGAAB, *supra* note 57, at XX5.
[64] *Id*.
[65] International documents are *available at* https://www.un.org/sc/ctc/resources/international-legal-instruments/; *Id*. at III, IV, 302. *See* also SAUL, *supra* note 59.
[66] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 10, 1970, 860 U.N.T.S. 106, *available at* https://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf.

- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)[67]
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation (1988)[68]
- Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010)[69]
- Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010)[70]
- Protocol to Amend the Convention on Offenses and Certain Acts Committed on Board Aircraft (2014)[71]
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973)[72]
- International Convention against the Taking of Hostages (1979)[73]
- Convention on the Physical Protection of Nuclear Material (1980)[74]

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[67] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178, *available at* https://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf.

[68] Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474, *available at* https://treaties.un.org/doc/db/Terrorism/Conv7-english.pdf.

[69] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Sept. 10, 2010*, available at* https://www.icao.int/secretariat/legal/Administrative%20Packages/Beijing_Convention_EN.pdf. (not yet in force)

[70] Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, Sept. 10, 2010, *available at* https://www.icao.int/secretariat/legal/Administrative%20Packages/Beijing_protocol_EN.pdf (not yet in force) SAUL, *supra* note 59, at 25-31.

[71] Protocol to Amend the Convention on Offenses and Certain Acts Committed on Board Aircraft, Apr. 4, 2014, *available at* https://www.icao.int/secretariat/legal/list%20of%20parties/montreal_prot_2014_en.pdf. (not yet in force)

[72] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 168, *available at* https://treaties.un.org/doc/db/Terrorism/english-18-7.pdf.

[73] International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 206, *available at* https://treaties.un.org/doc/db/Terrorism/english-18-5.pdf.

[74] Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 125, *available at* https://treaties.un.org/doc/db/Terrorism/Conv6-english.pdf.

- International Convention for the Suppression of Terrorist Bombings (1997)[75]
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)[76]
- Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005)[77]
- International Convention for the Suppression of Terrorist Bombings (1997)[78]
- International Convention for the Suppression of the Financing of Terrorism (1999)[79]
- International Convention for the Suppression of the Acts of Nuclear Terrorism (2005)[80]

Although none of the U.N. treaties explicitly define "terrorism", they require signature states to criminalize particular acts that are tied to terrorism. These offenses mainly are as follows: hijackings [81]; murder, kidnapping, or other attack upon the person or liberty of an internationally protected person[82]; seizure or detainment and threatening to kill, to injure or to continue to detain another person in order to compel a third party[83]; the receipt, possession, use, transfer, or alteration of nuclear material that is likely to cause death or serious injury to any person or substantial damage to property[84]; seizure or control over a ship by force or threat of force, or any other form

[75] International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256, *available at* https://treaties.un.org/doc/db/Terrorism/english-18-9.pdf. SAUL, *supra* note 59, at 99-105.
[76] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222, https://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf.
[77] Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Oct. 14, 2005 (not yet in force). SAUL, *supra* note 59, at 67-80.
[78] 2149 U.N.T.S. 256, *supra* note 75.
[79] International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229, *available at* https://treaties.un.org/doc/db/Terrorism/english-18-11.pdf.
[80] International Convention for the Suppression of the Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S., https://treaties.un.org/doc/db/Terrorism/english-18-15.pdf.
[81] 860 U.N.T.S., *supra* note 66, at 107, art. 1.
[82] 1035 U.N.T.S., *supra* note 72, art. 2-1-a.
[83] 1316 U.N.T.S., *supra* note 73, at 206, 207, art. 1- 1, 2.
[84] 1456 U.N.T.S., *supra* note 74, at 125, 127, art. 7, 1-a.

of intimidation;[85] delivery, placement, discharge, or detonation of an explosive or other lethal device in or against a place of public use;[86] providing or collecting funds directly or indirectly in the knowledge that they are to be used to carry out a terror act;[87] possession of radioactive material, or making or possession of a device, with the intent to cause death or serious bodily injury, or substantial damage to property or to the environment.[88]

The Council of Europe member states also generated treaties for cooperation against terrorism. The Council generated many treaties determining extraditable (terror) and non-extraditable (political) offenses. The relevant European treaties are as follows:[89]

- European Convention on the Suppression of Terrorism (1977)[90]
- Protocol Amending the European Convention on the Suppression of Terrorism (2003)[91]
- Council of Europe Convention on the Prevention of Terrorism (2005)[92]
- Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (2015)[93]

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[85] 1678 U.N.T.S., *supra* note 76, at 224, art. 3-1-a.
[86] 2149 U.N.T.S*, supra* note 75, at art. 2-1-a, b.
[87] 2178 U.N.T.S., *supra* note 79, art. 2-1. SAUL, *supra* note 59, at 115-124.
[88] 2445 U.N.T.S., *supra* note 80, art. 2-1-a. SAUL, *supra* note 59, at 145-153.
[89] *See* generally Council of Europe, Conventions on Counter-Terrorism, https://www.coe.int/en/web/counter-terrorism/conventions (last visited Aug. 22, 2018). Other regional instruments are as follows: The Arab Convention on the Suppression of Terrorism (1998), Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (1999), Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999), Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (1999), Shanghai Convention against Terrorism, Separatism and Extremism (2001), Inter-American Convention against Terrorism (2002), SAARC Regional Convention on Suppression of Terrorism (1987), among others. ELAGAAB & ELAGAAB, *supra* note 57, at 522, 541, 491, 185, 533, 556 (2007); *See* also SAUL, *supra* note 59.
[90] European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. No. 90, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016800771b2.
[91] The Protocol amending the European Convention on the Suppression of Terrorism, May 15, 2003, E.T.S. No.190, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680083 70d.
[92] Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016808c3f55.
[93] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, Oct. 22, 2015, C.E.T.S. No. 217, *available at* https://rm.coe.int/168047c5ea.

According to the European Convention on the Suppression of Terrorism (1977) and The Protocol amending the European Convention on the Suppression of Terrorism (2003) list serious offenses that require extradition.[94] These offenses basically are any attacks against the life, physical integrity or liberty of internationally protected persons,[95] kidnapping,[96] the use of a bomb, grenade, rocket, or automatic firearm if this use endangers persons.[97]

The Council of Europe Convention on the Prevention of Terrorism (2005) requires the contracting states to criminalize certain preparatory acts designed to commit terror crimes. These acts are "public provocation to commit a terrorist offense",[98] "recruitment for terrorism",[99] "training for terrorism".[100] The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (2015) requires contracting states to criminalize "receiving training for terrorism",[101] "travelling abroad for the purpose of terrorism",[102] "funding travelling abroad for the purpose of terrorism",[103] "organizing or otherwise facilitating traveling abroad for the purpose of terrorism".[104]

In conclusion, the United Nations and the Council of Europe have not established a clear definition of terrorism. Yet, they provide the international community with a series of rules obliging the contracting parties to take precautionary measures to prevent the commission of certain acts of terrorism and to criminalize their perpetration.

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[94] The conventions do not provide a list of terrorist acts, but only state the offenses which could not be regarded as political offenses for extradition purposes. ELAGAAB & ELAGAAB, *supra* note 57, at 163-164; E.T.S. No. 90, *supra* note 90; E.T.S. No.190, *supra* note 91.
[95] E.T.S. No. 90, *supra* note 90, at art. 1-1- c.
[96] *Id.* art. 1-1- d.
[97] *Id.* art. 1-1- e.
[98] C.E.T.S. No. 196, *supra* note 92, at art. 5.
[99] *Id.* art. 6.
[100] *Id.* art. 7.
[101] C.E.T.S. No. 217, *supra* note 93, at art. 3.
[102] *Id.* art. 4.
[103] *Id.* at art. 5.
[104] *Id.* at art. 6.

## **B.** TERRORISM IN TURKEY

This Chapter involves two sub-chapters: the history of terrorism in Turkey, and the comparison of terrorism in Turkey with terrorism in the United States and Europe. The first sub-chapter classifies the history of terrorism in Turkey in two stages: the ethnic separatist terrorism inherited from the Ottoman Empire, and the terrorism against the democratic constitutional order of modern Turkey. The second sub-chapter provides a list of terrorist organizations in Turkey, Europe, and the United States, and compares Turkey's terrorism with that of other countries.

### 1. The History of Terrorism in Turkey

Turkey's terrorism has three dimensions: ethnic separatist terrorism dating back to the Ottoman Empire, Islamist terrorism against the democratic constitutional order of Modern Turkey, and the Marxists-Leftist terrorism against the liberal structure of the state. This sub-chapter will provide substantial information on the types of terrorism, the historical roots of terrorism in Turkey, and particular terrorist organizations.

#### a) The Ethnic Separatist Terrorism Inherited from the Ottoman Empire

##### (1)The Fall of the Ottoman Empire

The Ottoman Empire was a multiethnic, multi-cultural and multi-religious[105] military empire that ruled territories on the three continents of Europe, Asia, and North Africa. The Empire was founded in 1299 by the Turks, whose origin lay in central Asia.[106] Having today's Turkey as

[105] GÁBOR ÁGOSTON & BRUCE MASTERS, ENCYCLOPEDIA OF THE OTTOMAN EMPIRE 306 (2009); ANDREW MANGO, TURKEY: THE CHALLENGE OF A NEW ROLE 5 (1994).

[106] The Turks, commanded by the Great Seljuk Sultan Alp Arslan, entered into Anatolia in 1071 defeating the Eastern Roman Byzantine Empire Romanos IV Diogenes at Malazgirt (which is the Eastern Anatolia today). MANGO, *supra*

the mainland, the Empire was expanded to the gates of Vienna[107] in the West encircling the Balkan states from Adriatic Sea to the Black Sea, the Northern borders of the Black Sea including Crimea and southern part of the Ukraine, the whole Arabian Peninsula in the South East, and the Northern African countries from Morocco to Egypt on the Mediterranean Sea.[108] The empire consisted of Greeks, Bulgarians, Serbians, Jews, Arabs, Slavs, Armenians, Bosnians, Albanians, Circassians, Pomaks, Kurds, Tatars and Turks.[109] Today's Slovakia, Hungary, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Serbia, Albania, Macedonia, Bulgaria, Romania, Greece, Moldova, Southern Ukraine including Crimea, Georgia, Armenia, Azerbaijan, Southwest Iran, Iraq, Syria, Lebanon, Jordan, Israel, Saudi Arabia, Yemen, Oman, United Arab Emirates, Qatar, Bahrain, Egypt, Libya, Tunisia, Algeria, Morocco, and eventually Turkey (as the heir of the founder Ottoman Turks) are the states once included in the maps of the multi-continental Empire.[110]

The Ottomans ruled these territories with great tolerance and flexibility for different cultures, religions, and ethnicities.[111] Each protected non-Muslim community was granted great autonomy in internal affairs.[112] These communities were represented by their religious leaders in matters of state.[113]

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note 105; KATE FLEET, SURAIYA N. FAROQHI & REŞAT KASABA, THE CAMBRIDGE HISTORY OF TURKEY: BYZANTIUM TO TURKEY 1071-1453 V.1 1, 356 (2008).

[107] LEWIS, *supra* note 44, at 36.

[108] For the maps of the Ottoman Empire, *see* STANFORD J. SHAW & EZEL KURAL SHAW, HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY: VOLUME II: REFORM, REVOLUTION, AND REPUBLIC: THE RISE OF MODERN TURKEY, 1808-1975 V.II xxii, xxiii (2005).

[109] KATE FLEET, SURAIYA N. FAROQHI & REŞAT KASABA, THE CAMBRIDGE HISTORY OF TURKEY: TURKEY IN THE MODERN WORLD V.4 175 (2008).

[110] STANFORD J. SHAW, HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY VOLUME I: EMPIRE OF THE GAZIS: THE RISE AND DECLINE OF THE OTTOMAN EMPIRE 1280-1808 xiv (2002); SHAW & SHAW, *supra* note 108, at xxii, xxiii.

[111] ÁGOSTON & MASTERS, *supra* note 105, at xviii; JUSTIN MCCARTHY, DEATH AND EXILE: THE ETHNIC CLEANSING OF OTTOMAN MUSLIMS 1821-1922 6, 7, 13 (2004).

[112] LEWIS, *supra* note 44, at 107.

[113] ERIC J. ZURCHER, TURKEY: A MODERN HISTORY 10 (2003).

In theory, the Ottoman Empire was a theocratic state governed by Islamic law. Yet, in practice, by the eighteenth century, Islamic rules were confined to matters of family law and of ownership.[114] Public law issues such as land tenure, taxation and criminal law were mostly based on the secular decrees of sultan (*örf* or *kanun)*.[115]

The Ottoman Empire began to collapse in the seventeenth century for four main reasons.[116] First, the discovery of new trade routes by Europe in the sixteenth century diminished Europe's dependency on the Ottoman Empire to obtain goods from Asia and led to a financial crisis in the Empire.[117] Second, industrial revolutions increased the economic, technological and military power[118] of Western Europe. The Ottoman Empire, however, fell behind Europe in economy and technology.[119] The Empire continued to use primitive techniques of production and transportation,[120] and remained "a medieval state with a medieval mentality and a medieval economy". [121]

Third, the developments in European military science and training to which the Turks were indifferent eventually resulted in the halting of the Ottoman advance into Europe. The failure of the second siege of Vienna in 1683, followed by other defeats by Austrians at the second battle of Mohacs in 1687 and at Zenta in 1697, confirmed the downfall of the Turks.[122] The Carlowitz Treaty signed in 1699 was the beginning of a new era of decline.[123]

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[114] *Id.*
[115] *Id.*; ÁGOSTON & MASTERS, *supra* note 105, at 306, 307.
[116] *See* generally LEWIS, *supra* note 44, at 28-36.
[117] *Id.* at 27-29.
[118] *Id.* at 25, 26.
[119] *Id.* at 32, 36.
[120] *Id.* at 35.
[121] *Id.* at 36.
[122] *Id.*
[123] *Id.*

Fourth, the ideals of liberty, equality, fraternity and nationalism that emerged as a result of the French Revolution influenced the Christian Ottoman subjects and led to their uprisings against the State.[124] The first nationalist insurrection was conducted by the Serbs and Greeks,[125] followed by Bulgarians, Bosnians, Romanians, Macedonians, and Albanians.[126]

The Turco-Russian War in 1877-78 resulted in the great defeat of the Ottoman Empire in the Balkans, Southern Caucasus, and Eastern Anatolia. In the West, the Russian Army was assisted by the Bulgarian and Romanian fighters.[127] The Treaty of Berlin signed at the end of the war imposed harsh conditions on the Empire. According to the Treaty, either full or limited autonomy was granted to certain parts of Bulgaria. Serbia, Montenegro and Romania were recognized as independent states. Bosna-Herzegovina was placed under the protection of Austria-Hungary.[128] In Eastern Anatolia, the Russians were given Kars, Ardahan, Batumi, and Southern Bessarabia. [129]

The Ottoman Empire later was defeated in the Turco-Italian War in 1911-12 and lost its North African territory in Libya to Italy.[130] While the War in Libya continued, the Balkan states of Serbia, Bulgaria, Montenegro, and Greece formed an alliance and waged war against the Ottomans.[131] The Balkan States were victorious in the war. They not only strengthened their

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[124] *Id.* at 67, 258; ZURCHER, *supra* note 113, at 9, 26.

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> The Serbs had rebelled earlier, but their rebellion, which was primarily aimed at the misrule of the Janissaries in Serbia, had few of the marks of the national uprisings that were to occur for the next century. The Greek rebellion was the first of the movements that identified themselves by the murder and expulsion of Muslims from their land. The Greek revolution set a pattern later followed by other national revolts against the Ottomans. MCCARTHY, *supra* note 111, at 8, 9.

[126] For the maps on the decline of the Empire, *see* SHAW & SHAW, *supra* note 108, at 25.

[127] ÁGOSTON & MASTERS, *supra* note 105, at 497, 498.

[128] *Id*. at 499.

[129] *Id*.

[130] LORD KINROSS, ATATÜRK: BIR MILLETIN YENİDEN DOĞUŞU [ ATATÜRK: THE REBIRTH OF A NATION] 114, 117, 125 (2016). ÁGOSTON & MASTERS, *supra* note 105, at 192.

[131] ÁGOSTON & MASTERS, *supra* note 105, at 371.

independence, but also gained more territory from the Ottoman Empire. Balkan defeat brought about the expulsion of the Balkan Turks from Europe.[132]

The last strike against the Empire was World War I in 1914-18. The Ottoman Empire entered into the war along with the Central Powers of Germany and Austria-Hungary against the Allied Powers of France, Britain, and Russia.[133] The Empire additionally sought to suppress the Arabic and Armenian separatist nationalist movements that rose up during the War.[134] The Ottoman Empire had to fight on several fronts. The Allied Powers defeated the Central Powers, and the Ottoman participation in the war ended with the Mudros Armistice signed by the Ottoman government in 30 October 1918.[135] The Treaty ordered the discharge of the Ottoman military and government.[136] The Allied Powers retained the right to occupy six Armenian territories in case of a disorder and any strategic points in cases of a threat to allied security.[137] The Treaty was followed by the occupation of Istanbul (then the Capital of the Ottoman Empire) in 1918 and the partition of the Empire by the Allied Powers.

The final agreement to abolish the Ottoman Empire was the Treaty of Sévres, which was signed between the Allied Powers and the Istanbul government in August 10, 1920. The Treaty partitioned the Ottoman's homeland territory of Anatolia, where the majority was Muslim,[138] to the Allied Powers.[139] According to the Treaty, Anatolia was divided among victorious powers and only one fifth of Anatolian territory was left to the Turks.[140] The Treaty ordered Turkey to

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[132] JACOB GOULD SCHURMAN, THE BALKAN WARS: 1912-1913 7 (2008).
[133] ÁGOSTON & MASTERS, *supra* note 105, at 599.
[134] *Id.* at 598.
[135] *Id.* at 434, 600.
[136] The Mudros Armistice, Gr. Brit.- The Ottoman Empire, Oct. 30, 1918, *available at* http://germanhistorydocs.ghi-dc.org/pdf/eng/armistice_turk_eng.pdf.
[137] *Id.* arts. 7, 24.
[138] ZURCHER, *supra* note 113, at 10.
[139] The Treaty of Sevres, Allied and Assoc. Powers- Turkey (The Ottoman Empire), Aug. 10, 1920, *available at* http://sam.baskent.edu.tr/belge/Sevres_ENG.pdf.
[140] *Id.*; ÁGOSTON & MASTERS, *supra* note 105, at 434;

recognize an Armenian state in the East,[141] a Kurdish state in the Southeast, and a Greek state in Western Anatolia.[142] The Treaty left Egypt, Sudan and Cyprus to British protectorate;[143] Syria, Mesopotamia and Palestine to the protectorate of the commission comprised of the representatives of France, Britain, Italy and Turkey;[144] Libya and many Aegean Islands to Italy;[145] Western Anatolia and some Aegean islands to Greece; Eastern Anatolia to Armenia; and Southeastern Anatolia to Kurdistan.[146]

The Turks, under the leadership of Mustafa Kemal (later Atatürk), began an armed resistance as a response. The Turkish General National Assembly, which had been established in April 1920 in Ankara as a reaction to the Ottoman government and which had directed the National Independence War between 1920 and 1922, repudiated the Treaty of Sevres.[147] The Turkish National Assembly was victorious in its independence war against the Allied Powers. Eventually, the Treaty of Sevres was replaced by the Treaty of Lausanne in July 24, 1923.[148] The Treaty of Lausanne[149] was signed between the Allied Powers and the Ankara Government.[150] The Peace Treaty of Lausanne officially ended the 700-year old Ottoman Empire, set aside the conditions of the Treaty of Sevres, and recognized Turkey as an independent, free and equal country with

[141] The Treaty of Sevres, *supra* note 139, art. 88.
[142] *Id.* arts. 66, 69, 71, 84
[143] *Id.* § IX.
[144] *Id.* § VII.
[145] *Id.* art. 122.
[146] *Id.* art. 62. For a clearer demonstration of the partition of Anatolia among Allied Powers, *see* the map of the Treaty of Sevres, *available at* https://www.themaparchive.com/treaty-of-sevres-1920.html (last visited Aug. 22, 2018).
[147] ÁGOSTON & MASTERS, *supra* note 105, at 520.
[148] *Id.*
[149] The Peace Treaty of Lausanne, Turk.- Brit. Fr., It., Japan, Greece, the Serb-Croat-Slovena State, U.S., July 24, 1923, http://www.mfa.gov.tr/lausanne-peace-treaty.en.mfa (last visited Aug. 22, 2018).
[150] The Ankara government abolished the Ottoman Sultanate and the Ottoman government in Istanbul in November 1922. *Id.* at 323; EDEL HUGHES, TURKEY'S ACCESSION TO THE EUROPEAN UNION: THE POLITICS OF EXCLUSION? 17 (2011).

territories in Anatolia and Europe.[151] The Western powers withdrew their forces from Turkey as commanded by the Treaty.[152]

Turkey proclaimed itself a Republic on 29 October 1923,[153] and established a secular democratic state under the 1921 and 1924 Constitutions[154] (with constitutional amendments in 1928 that secularized the state).[155] The Caliphate was abolished by the Turkish Grand National Assembly in November 1924. The Declaration of Republic was followed by many legal and cultural reforms up until 1934. These reforms were designed to modernize and secularize the country. The wearing of headscarves was banned in official premises, the wearing of turbans and robes was restricted to Islamic officials, the veiling of women was officially discouraged, dervish lodges were closed, modern dress was imposed, women were given equal rights with men, Western civil and criminal codes were translated into Turkish and adopted into the legal system, international numerals replaced Arabic numerals, the Latin alphabet replaced Arabic scripts, and women were given the right to vote and to be elected in elections.[156]

(2) Armenian and Kurdish Separatist Terrors since the Ottoman Era

In its 100 years of history, Modern Turkey witnessed two types of separatist terrorism in Eastern Turkey, namely the Armenian and Kurdish separatist movements. Both of these movements date back to the Ottoman Era.

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[151] FLEET ET AL., *supra* note 109, at 142. ÁGOSTON & MASTERS, *supra* note 105, at 325.
[152] ÁGOSTON & MASTERS, *supra* note 105, at 601.
[153] FLEET ET ALL, *supra* note 109, at 228.
[154] ANDREW MANGO, ATATÜRK 785 (1999); LEWIS, *supra* note 44, at 276. For the English translation of the 1924 Constitution, *see* Edward Mead Earle, *The New Constitution of Turkey,* 40 POL. SCI. QUARTERLY 73, 89-100 (1925).
[155] The 1928 Amendment to the 1924 Constitution removed the clause "The religion of the Turkish state is Islam", and disestablished Islam from the constitutional structure of the new state. LEWIS, *supra* note 44, at 276. HUGHES, *supra* note 150, at 20.
[156] MANGO, *supra* note 154, at 1117, 1119, 1124, 1185, 1186, 1207.

Armenian[157] riots against the Ottoman Empire were conducted between 1878 and 1915.[158] The most destructive insurrections occurred in the 1890s,[159] including the 1894-95 revolts in Sasun[160] and Zeytun, and 1896 revolts in Van,[161] with the alliance[162] of Russia[163] at places where

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> [A]rmenian history reaches back more than two thousand years. In AD 301 the Armenians were the first people to adopt Christianity as their official religion; the Holy Apostolic and Orthodox Church of Armenia (also known as the Gregorian Church) has played an important role in the survival of a people who for much of their history have lived under the rule of foreigners. The last independent Armenian state, the Kingdom of Cilicia, fell in 1375, and by the early part of the sixteenth century most Armenians had come under the control of the Ottoman Empire. Under the millet system instituted by Sultan Mohammed II (1451-81) the Armenians enjoyed religious, cultural, and social autonomy. Their ready acceptance of subservient political status under Ottoman rule lasted well into the nineteenth century and earned the Armenians the title "the loyal community." Over time large numbers of Armenians settled in Constantinople and in other towns, where they prospered as merchants, bankers, artisans, and interpreters for the government. The majority, however, continued to live as peasants in the empire's eastern provinces (vilayets), known as Great Armenia, as well as in several western districts near the Mediterranean called Cilicia or Little Armenia. We have no accurate statistics for the population of the Ottoman Empire during this period, but there is general agreement that by the latter part of the nineteenth century the Armenians constituted a minority even in the six provinces usually referred to as the heartland of Armenia (Erzurum, Bitlis, Van, Harput, Diarbekir, and Sivas). Emigration and conversions in the wake of massacres, the redrawing of boundaries, and an influx of Muslims expelled or fleeing from the Balkans and the Caucasus (especially Laz and Circassians) had helped decrease the number of Armenians in their historic home. Their minority status fatally undermined their claim for an independent or at least autonomous Armenia within the empire-aims that had begun to gather support as a result of the influx of new liberal ideas from the West and the increased burdens weighing upon the Christian peasants of Anatolia. GUENTER LEWY, THE ARMENIAN MASSACRES IN OTTOMAN TURKEY: A DISPUTED GENOCIDE 10-11 (2005).

158 Dikran Kevorkyan, *Uluslararası Terörizm Bünyesinde Ermeni Terörizmi [Armenian Terrorism within the Structure of International Terrorism]*, *in* ANKARA ÜNİVERSITESİ [ANKARA UNIVERSITY], ULUSLARARASI TERRORİZM VE UYUŞTURUCU MADDE KAÇAKÇILIĞI [INTERNATIONAL TERRORISM AND DRUGS TRAFFICKING] 91, 94 (1984).

159 Armenians provided help to the invading forces of Russia even before the 1890s, such as in 1828, 1854 and 1877 Russian-Turkish Wars. This was the reason why the Ottoman government did not trust Armenians. Justin McCarthy, *Zehir ve Panzehir Olarak Tarih [History as a Poison and Antidote], in* ANKARA ÜNİVERSITESİ [ANKARA UNIVERSITY], ULUSLARARASI TERRORİZM VE UYUŞTURUCU MADDE KAÇAKÇILIĞI [INTERNATIONAL TERRORISM AND DRUGS TRAFFICKING] 81, 85 (1984).

160 "Armenians often used the name 'Şatak' to encompass the entire northern area, but the European usage of 'Sasun' is applied here. The Ottoman Sasun Region is divided among a number of modern Turkish provinces- Muş, Bingöl, Bitlis, Siirt, Batman, and Diyarbakır today." JUSTIN MCCARTHY &ÖMER TURAN& CEMALETTIN TAŞKIRAN, SASUN: THE HISTORY OF AN 1890S ARMENIAN REVOLT 3 (2014).

161 JUSTIN MCCARTHY& ESAT ARSLAN & CEMALETTIN TAŞKIRAN & ÖMER TURAN, THE ARMENIAN REBELLION AT VAN 60-62 (2006).

162 Before the beginning of 1728-1829 Russia-Ottoman War, Russians promised autonomy and some privileges to the Armenians in return of the Armenians' support in Russian invasion. This promise still has not yet been realized. McCarthy, *supra* note 159, at 81, 86.

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> It was the Russians, not the Armenian revolutionaries, who gave the first impetus to Armenian separatism. The change in Armenian sympathies began when Russian power was felt in the East. In their wars against Iran and the Ottoman Empire in 1827–29, the Russians defeated first the Persians then the Ottomans. The Russians killed or expelled 26,000 Turks from their newly won territories, including the province of Erivan (now the Armenian Republic), where Turks had been a majority. Armenian elements had supported the Russians in their conquests. The Russians, in turn, offered to Armenians the lands and farms from which the Turks had been evicted, as well as relaxation of normal taxes. More than a hundred thousand Armenians came from Iran and

Armenians are a minority.[164] Their strategy was the same as the Bulgarians:[165] gangs attack the Muslims, let them respond, and seek Russia's help through invasion. [166] In 1896, the Armenians also stormed the Ottoman Bank in Istanbul and killed four employees. In 1905, Sultan Abdulhamit II was the target of an assassination attempt from which he barely survived when the bombs planted by Armenian terrorists did not explode.[167] During World War I in 1915, Armenians again compromised with the Russians at the back of the Caucasus Front,[168] revolted against the Ottoman Empire, and annihilated groups loyal to the Ottomans, mainly the majority Muslim Turks and

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the Ottoman Empire. The process was repeated in the 1877–78 Russo-Turkish War, when Armenians in the Ottoman northeast supported Russian invaders, even acting as Russian police in occupied cities. When the Russians left at war's end, they were accompanied by perhaps twenty-five thousand Armenians. In turn, the Russians expelled more than a hundred thousand Muslims from their newly conquered territories. MCCARTHY ET AL., *supra* note 161, at 46.

[164]

European pressure did the most damage to the Ottoman ability to wage war on rebels. As in subsequent generations, fighting guerrillas effectively involved punishing those who supported the rebels as well as fighting the rebels themselves. These were the tactics used by the British, French, and Russians against rebels in their own colonies. One need only compare Ottoman actions in Van Province with British actions against rebels in India, French actions in North Africa, or Russian actions in the Caucasus to see the double standard that was at work. The situations were indeed different, because the Europeans were imposing colonial rule on majorities, whereas the Ottomans were attempting to protect a majority, the Muslims, against a distinct minority, the Armenian rebels. The Europeans, however, would not allow the Ottomans the tools that they themselves used to put down revolt. Comparing the Ottomans and Russians reveals the inequity. The Russians in effect expelled millions of Jews from their northwest provinces. By 1878 they had murdered or expelled 1.2 million Caucasian Muslims and four hundred thousand Turks and Tatars from their Asiatic conquests and the Crimea. Yet there was no European outcry against them. The Ottomans, in contrast, were not to be allowed even to stop a rebellious minority. MCCARTHY ET AL., *supra* note 161, at 48.

"Even before 1915 event, between 1911 and 1912, it was clear that the Armenians were only the minority. The truth was that after the centuries long Turkish sovereignty, not only majority but the vast majority of Asia Minor had been Islamized." McCarthy, *supra* note 159, at 81, 85.

[165] "The Bulgarians had an advantage that the Armenians of Eastern Anatolia did not share: they were a much larger proportion of the population." MCCARTHY ET AL., *supra* note 161, at 73.

[166]

The intent of the revolutionaries was not to defeat the Muslims but rather to cause retaliatory atrocities against Armenians. These, they were sure, would draw European support. England and France would intervene diplomatically. Russia might go to war. The Armenians would be granted their state. This was not a far-fetched plan. It was exactly what had happened in Bulgaria. Bulgarian revolutionaries had attacked Bulgarian Muslims in 1876, killing perhaps 1,000. The Muslim response killed 3,000–12,000 Bulgarian Christians. The Russians then invaded. Ultimately 260,000 Bulgarian Muslims died and 575,000 were driven from Bulgaria. A Bulgarian principality was created. The Armenian revolutionaries hoped to emulate the Bulgarian success. MCCARTHY ET AL., *supra* note 161, at 60.

[167] MANGO, *supra* note 5, at 3.

[168] Kevorkyan, *supra* note 158, at 91, 94.

Kurds as well as loyal Armenians.[169] The Armenian population in the eastern region, which involves six cities of Bitlis, Van, Mamuretulaziz, Diyarbakir, Sivas and Erzurum, in 1912 was 870.000. In these six cities, the population of Muslim Turks was six times as many as the Armenians. The rest of the Armenians were dispersed throughout the Empire, and they were equal to the East in terms of number, which was 870,000.[170] This shows that the total number of Armenian subjects in the Empire was not more than 1,800,000.[171]

In response to the rebellious Armenians who were attacking the villages (of the Turks, Kurds and loyal Armenians), the Ottoman government decided to deport the rioting Armenians to the Eastern provinces which were not invaded by the Russians, mainly Syria (which was then an Ottoman state) and the very East. While Armenians that were deported to Syria arrived safely due to stronger Ottoman authority in that area, the ones who were exiled to the East suffered from disease, hunger, and the attacks of Kurdish tribesmen and bandits, and ill-treatment of some irregular Ottoman soldiers.[172] Armenian deaths in Anatolia were around 600.000 in total.[173]

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> By March 1915 the Eastern Anatolian countryside was completely at war. Armenian rebels and deserters increased their incursions into the neighborhood of the city of Van. Without distinction of age or sex, Muslims who met with the rebels were simply killed… The Armenians have prepared a general revolt that will aid the upcoming Russian attack from Abaak and Saray and the enemy occupation of Van. MCCARTHY ET AL., *supra* note 161, at 196.

170 McCarthy, *supra* note 159, at 81, 83, 84.

171 The official documents and statistics of the Ottoman Empire on population shows that the Armenian population in the Ottoman Empire was 1.293.000. Accepting a 15% odd of mistake in the statistics, the number would not exceed 1.500.000, according to the author. Kevorkyan, *supra* note 158, at 91, 94.

172 Who were later punished (1367 people) and executed (62 people) for this ill-treatment which was explicitly prohibited by the military orders sent from Istanbul, according to Ottoman records. McCarthy, *supra* note 159, at 81, 85; Kevorkyan, *supra* note 158, at 91, 94.

173 *Id.*

On the other side, the Russian invasion[174] of the Caucasus (including Crimea and today's Armenia)[175] and the Armenian collaboration with Russia in 1800s resulted in 1.2 million Turks being deported from the Caucasus by the Russians to the Eastern Anatolia,[176] and 2.5 million Turkish deaths in the whole of Anatolia.[177]

Seeking revenge for the 1915 events, Armenian revolutionists sought world public attention through terrorism in order to pressurize and influence the Turkish government and its relationship with its NATO allies.[178] Armenian terrorism, which was thought to be supported by then Soviet Union to cause instability in Turkey,[179] was active in 1975-85. It targeted Turkish diplomats and other soft targets in foreign countries.[180] The organizations were ASALA (Armenian Secret Army for the Liberation of Armenia) and JCAG (Justice Commandos of the Armenian Genocide). Nine months after the establishment of ASALA,[181] the Turkish ambassador in Paris was murdered together with his bodyguard. Many Turkish diplomats were assassinated in the following years in Austria, Greece, Holland, Spain, Switzerland, and Australia.[182] The wife of a Turkish ambassador was assassinated in Madrid in 1978, and the son of a Turkish ambassador was

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> Worse than any cause of state poverty, though, was the effect of Russian military action against the Ottomans. The Russians invaded the Ottoman Empire in 1806, 1828, 1853, and 1877–78. They left behind destruction, a much weakened tax base, and the loss of territories such as Bulgaria, in which the Ottomans had spent much of their limited capital for development. Then the Russians demanded, and received, reparations from those they had attacked. MCCARTHY ET AL., *supra* note 161, at 263.

175 For example, 80% of the city of Erivan was Turkish, before the Russian invasion and the replacement of deported Muslim villages with Armenians brought from Eastern Anatolia. McCarthy, *supra* note 159, at 81, 86.

176 Which are later replaced by the Ottoman Armenians of around 560.000 in total on different invasions. McCarthy, *supra* note 159, at 81, 86-87.

177 *Id.* at 81, 85.

178 Michael M. Gunter, *Ermeni Terörizminin Çağdaş Görünümü [The Contemporary Appearance of Armenian Terrorism], in* ANKARA ÜNİVERSITESİ [ANKARA UNIVERSITY], ULUSLARARASI TERRORİZM VE UYUŞTURUCU MADDE KAÇAKÇILIĞI [INTERNATIONAL TERRORISM AND DRUGS TRAFFICKING] 130 (1984).

179 *Id.* at 101, 132- 133.

180 MANGO, *supra* note 5, at 11.

181 On October 24, 1975. MANGO, *supra* note 5, at 12. The name of its leader is Hagop Hagopian. Bruce Hoffman, *Filistin Terörizminde Son Gelişmeler [Last Developments in Palestine Terrorism], in* ANKARA UNIVERSITESİ [ANKARA UNIVERSITY], ULUSLARARASI TERRORIZM VE UYUSTURUCU MADDE KACAKCILIGI [INTERNATIONAL TERRORISM AND DRUG TRAFFICKING] 233, 241 (1984); Gunter, *supra* note 178, at 101, 114-115.

182 MANGO, *supra* note 5, at 12.

murdered in Holland in 1979. Deadly attacks were conducted on Turkish Airlines and tourist offices in many countries. Bomb attacks were conducted in the Istanbul airport and its railway station in May 1977, Ankara Airport in August 1982, Orly Airport in Paris, the Turkish embassy in Lisbon in June 1983, and the Turkish embassy in Ottowa in March 1984.[183] In total, 42 Turkish diplomats were assassinated in 110 incidents in 21 countries.[184]

Kurdish rebellions emerged as feudal tribal riots against the central government authority in Ottoman Eastern Anatolia, rather than ethnic uprisings.[185] Major rebellions were erupted in 1806–8, 1828–29, 1834–37, 1840–47, 1855, and 1878–82.[186] The rebellions continued during the years of the Independence War (1920-1923) and even after the proclamation of the Republic in 1923.[187] The most serious insurrection was Sheikh Said's rebellion which posed a serious threat on the republican state.[188] The riot involved both ethnic and religious ideology and demanded the reinstatement of the Caliphate (which was abolished by the Modern Turkish Republic in 1924).

After the riot of Dersim in 1937, the Kurdish movement slowed down until 1976, when today's PKK (Kurdistan Workers Party) was established in a meeting organized by its leader Abdullah OCALAN in Dikmen, Ankara.[189] The principles, ideology, logistics and structure of the organization was formed in that meeting, and terrorist attacks against the state began with the August 15, 1984 Eruh and Semdinli simultaneous attacks in Southeastern Turkey.[190] Until the 2000s, PKK utilized Marxist-Communist ideology to establish a separate Kurdistan, including

[183] *Id.;* Gunter, *supra* note 178, at 122.
[184] MANGO, *supra* note 5, at 12.
[185] Bozkurt, *supra* note 9, at 59.
[186] "Even in normal times the semi-nomadic and nomadic Kurdish tribes upset civil order. Their only loyalty was to their chiefs, not to the state." MCCARTHY ET AL, *supra* note 161, at 14. For more detailed information regarding the riots, *see* Bozkurt, *supra* note 9, at 59, 62-69.
[187] For other rebellions and more information, *See* Bozkurt, *supra* note 9, at 59, 69-73; [THE TURKISH BAR ASSOCIATION], *supra* note 9, at 533.
[188] Bozkurt, *supra* note 9, at 71.
[189] *Id.* at 89.
[190] *Id.* at 99, 100.

Southeastern Turkey, Northern Iraq and Syria, and Northern Iran. For realizing this purpose, the organization established four stages:[191]

1) to ensure cultural and social development within Kurdish elements in four countries

2) to obtain autonomous and self-governing administrations in each state

3) to establish an independent Kurdish state in each state

4) to assemble each independent state and to establish the "Great Kurdistan"

PKK has been listed as a terrorist organization by the United States and the European Union (E.U.).[192] PKK terror has led to the death of approximately 35,000 people since 1984.[193] The organization receives enormous material and financial support from several foreign states,[194] and earns large amounts of money from illegal drug trafficking and from legal Kurdish institutions established in Europe that fund the terrorist organization.[195]

[191] *Id.* at 96.

[192] U.S. Department of State, Foreign Terrorist Organizations, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Aug. 22, 2018); Council Decision 2017/1426, annex- II, 12, 2017 O.J. (L 204) 95, 98 (2017) (E.U.), https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32017D1426&from=EN.

[193] MANGO, *supra* note 5, at 31. "Compare this with the 800 or so victims of the Basque separatist terror group ETA, killed over a period of 34 years (1968-2002), and the 1800 people killed by the IRA (nearly 650 of them civilians) since 'Bloody Friday' in July 1972." *See* also Berkay Mandıracı, *Turkey's PKK Conflict: The Death Toll*, INT.'L CRISIS GRP. (July 20, 2016), https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-pkk-conflict-death-toll.

[194] Bekir Gücenmez, Terörizmin Finansmanı: PKK, ETA ve IRA Terör Örgütlerinin Karşılaştırılması [The Financing of Terrorism: The Comparison of PKK, ETA and IRA Terrorist Organizations] 73-78 (2014) (Unpublished M.A. thesis, Turkish Military Academy); Bozkurt, *supra* note 9, at 138-198.

[195] For more detailed information, *see* Bozkurt, *supra* note 9, at 148, 149-155, 159, 161, 163, 165, 167, 170-72, 177, 180, 181, 190, 192, 193.

b) Terrorism against the Democratic Constitutional Order of the Turkish Republic

(1)Islamist Terrorism against the Democratic Constitutional Order of Modern Turkey

The abuse of Islam for political purposes had long been a security issue that has affected the Turkish states. Radical Islam was a threat directed against the territorial integrity of the Ottoman Empire, and is now challenging the constitutional structure and existence of Modern Turkey. The Ottomans had tried hard to restrain religious fanaticism, which was a security threat targeted at the unity of the state itself. When Ottomans were in control of the Arabian Peninsula, they fought against Wahhabis in today's Saudi Arabia and the Zeydis in Yemen, which were violent political movements advocating the return to primitive Islam by establishing a new state independent from the Ottoman rule.[196] Modern Turkey also has been intensely fighting against religious fanaticism, knowing that it threatens the spread of modern knowledge,[197] hampers social development, and harms secular and democratic[198] constitutional order. Islamist terrorism in

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> The Wahhabis who arose among the Bedouins of central Arabia in the middle of the eighteenth century, at a time of Ottoman weakness, were considered particularly pernicious because they branded as infidels all Muslims who did not follow their puritanical teaching. They were ejected from Mecca in 1812–13 by Muhhamad Ali, the Ottoman governor of Egypt. When the Ottoman reforming statesman Midhat Pasha was governor of Baghdad in 1870, he described the Wahhabis as 'evil men' and pushed them out of the Arabian coast of the Persian Gulf. It is instructive to remember that before Napoleon invaded Ottoman Egypt at the beginning of the nineteenth century, one of his generals tried to open relations with the Wahhabis. Similarly, the Italians sustained the Zeydi Imam Yahya in his revolt against the Ottomans in Yemen in order to facilitate their invasion of Libya in 1911. During World War I, when the British financed the revolt of Husayn, the Hashimite ruler of Mecca, they also negotiated both with the Wahhabi chieftain Ibn Saud in central Arabia and with Imam Yahya in Yemen. The rise to power of the Wahhabi dynasty of Ibn Saud in Arabia was the direct result of the destruction of the Ottoman Empire, as the British protégé, the Hashimite Emir (later King) Husayn, proved unable to retain control of the Muslim Holy Places. As the Saudi dynasty gradually moved away from Wahhabi extremists, the latter joined forces with another group of fanatics known as Salafis. Their doctrine of return to primitive Islam was developed in Egypt in the middle of the nineteenth century and then spread to North Africa and Syria. Today Islamist terrorists justify their recourse to violence in terms of Wahhabi-Salafi teaching, which arose as an expression of opposition to the Ottoman order. These extremist doctrines have always been alien to Turkish Islam. MANGO, *supra* note 5, at 58, 59.

*See* also EMIN DEMIREL, AFGANISTAN: TALIBAN, EL KAIDE- LADIN VE PAYLAŞILAMAYAN ÜLKE AFGANISTAN [AFGHANISTAN: TALIBAN, AL QAEDA-LADIN AND THE UNSHARED STATE AFGHANISTAN 119 (2002).

197 MANGO, *supra* note 5, at 58.

198 Contrary to what is generally thought, the democracy attempts of the Turks did not begin with the establishment of Modern Turkey. Ottomans had long tried to instill democratic institutions to the structure of the Empire, and to

Turkey has been supported by the adversaries of Western democratic values and the proponents of an Islamist regime.[199]

The Islamist terrorist organizations posing substantial threat to Turkey are Al Qaeda, Hezbollah, ISIS and FETO. The aim of Al Qaeda was to demolish the Western supremacy over Islamic countries, to establish the caliphate again, and to found an Islamic empire in the world.[200] The most damaging attack of Al Qaeda in Turkey was the Istanbul bombings of 2003, conducted in two synagogues, the HSBC Bank, and the British Consulate.[201]

Hezbollah aims to demolish the secular structure of Turkey and to establish a theocratic state governed by Islamic Sharia principles.[202] Hezbollah mainly operates in Eastern Turkey, receives material support from Iran[203] and would like to export the Iranian type of a theocratic regime to Turkey.[204] The organization has so far perpetrated crimes in four ways: internecine

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limit the authority of the Sultan. The 1839 Imperial Edict of Gulhane *(Tanzimat Fermani)* and 1856 Reform Edict *(Islahat Fermani*) limited the authority of Sultan, emphasized the equality of all Ottoman subjects before the law, guaranteed the life, honor, and property of all Ottoman subjects regardless of their religion, and had made substantial administrative, legal, military, and tax reforms.
The First Constitution called as *Kanuni-Esasi* was promulgated in 1876, and remained in force until the promulgation of the 1924 Constitution by the Turkish National Assembly.
The Parliament had been suspended by the Sultan Abdulhamid II in 1878, reinstated by the Young Turk Revolutionists in 1908, and dissolved again by Sultan Vahdettin in 1918. These reforms principally aimed to prevent the secession of different religious and ethnic groups from the Empire and to generate parliamentary representation. Yet, they were not received the expected welcome from Ottoman subjects (except the Turks). ÁGOSTON & MASTERS, *supra* note 105, at 7, 13, 307, 371, 424, 449, 456, 457, 485, 553, 554. *See* 1924 Constitution art. 104, *available at* Earle, *supra* note 154, at 100.

[199] MANGO, *supra* note 5, at 61.

[200] Osman Şen, Dini Terör Çerçevesinde El Kaidenin Yeri ve Uluslararası Eylemlerinin Değerlendirilmesi [The Place of Al Qaeda within the Framework of Religious Terrorism, and the Assessment of its International Acts] 54 (2011) (Unpublished M.A. thesis, Gazi University).

[201] The four bombings brought about 62 deaths and 718 injuries. *Id.* at 91, 93.

[202] Deniz Akdağlı, Türk Hizbullahının Yakın Gelecekte Türkiye'nin Ulusal Güvenliğine Etkilerinin Analizi [The Effects of Turkish Hizbullah on Turkey's National Security in the Near Future] 49, 52 (2010) (Unpublished M.A. thesis, Turkish Military Academy).

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> Many of the murderers and their accomplices went to Iran, some repeatedly, and received training there. A committee of the Turkish parliament which investigated 'murders by a person or persons unknown', stated in the report it issued in 1995, that the Iranian consul general in Istanbul and members of his staff had helped set up the Turkish Hizbullah, which then enjoyed the support of Iran in all respects. MANGO, *supra* note 5, at 62, 63, 66.

[204] *Id.* at 61.

fighting, the conflict with Marxist PKK, contract killings, and the assassination of secularists in universities and media.[205]

ISIS was also established as a reaction to Western democracies and principles, and aimed to establish an Islamic Empire in a territory including the Middle East and Turkey. ISIS has been conducting attacks in Turkish territory since 2014, causing at least 360 deaths in 16 attacks.[206]

The latest organization in Turkey accused of terrorism is the Fethullah Terrorist Organization (FETO), which conducted the military coup on July 15th, 2016.[207] From outside, FETO is only a religious organization with schools, charities and businesses around the world.[208] Yet, many have argued that it is an organization raising radical Islamist students who are later to be appointed in higher state bureaucracy, in order to take part in the misappropriation of state authority.[209]

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[205] *Id.* at 62-65.

[206] At least until 2017. Haberturk, *Terör örgütü IŞİD'in Türkiye'ye yönelik gerçekleştirdiği saldırılar [ISIS attacks in Turkey],* (July 11, 2016 9.34 AM), http://www.haberturk.com/gundem/haber/1264903-teror-orgutu-isidin-turkiyeye-yonelik-gerceklestirdigi-saldirilar;
The Guardian, *Isis leader behind Turkey nightclub attack is killed by US forces in secretive raid,* (Apr. 21, 2017 11.44 PM), https://www.theguardian.com/world/2017/apr/22/isis-leader-behind-turkey-nightclub-attack-killed-by-us-forces#img-1;
Al Jazeera, *Timeline of attacks in Turkey,* (Feb. 19, 2017), http://www.aljazeera.com/indepth/interactive/2016/06/timeline-attacks-turkey-160628223800183.html.

[207] 249 people were dead and more than 2000 were wounded as a result. TRT World, *What is FETO?*, (July 10, 2017), https://www.trtworld.com/turkey/what-is-feto--8654.

[208] Daily Sabah, *Charity sold donated goods to funnel money to FETÖ,* (April 1, 2018), https://www.dailysabah.com/investigations/2018/04/02/charity-sold-donated-goods-to-funnel-money-to-feto-1522616386;
TRT World, *51 Turkish companies raided over links to FETO*, (Aug. 16, 2016) https://www.trtworld.com/turkey/over-50-companies-raided-over-funding-feto-166224;
Tunca Ozcuhadar, *'FETO disguised as charitable education organization'*, Anadolu News Agency (July 16, 2018), https://www.aa.com.tr/en/analysis-news/-feto-disguised-as-charitable-education-organization/1205599.

[209] Anadolu News Agency, *What is FETO: An overview of the terrorist organization,* (Aug. 10, 2016), https://www.aa.com.tr/en/vg/video-gallery/what-is-feto-an-overview-of-the-terrorist-organization.

The real nature of FETO is disputed between the U.S. and Turkey. While the U.S. regards it as a dissident group that rebelled against the oppressive government in 2016, Turkey has considered it to be an Islamist terrorist organization since 2017.[210]

(2)Marxist-Leftist Terrorism against the Liberal Structure of the State

Turkey, which was founded as a liberal state, was a Western bloc state in the Cold War and is a NATO ally since 1952.[211] The terrorist organization advocating Marxist-leftist ideology and the communist system of governance in Turkey has been DHKP/C (The Revolutionary People's Liberation Party/ Front). DHKP-C aims to establish a communist state and to remove the U.S. and NATO presence in Turkey.[212] DHKP/C began its terror attacks in 1972, and intensified the attacks against foreign targets, governmental and judicial officials, the police, and banks since the 1990s.[213] The U.S. and E.U. also regard DHKP/C as a terrorist organization.[214]

2. Turkey's Terrorism Compared to the United States, the United Kingdom, France, and Germany

The United States, The United Kingdom, France and Germany have also had their own domestic and international terrorism problems, like Turkey.

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[210] For the first Turkish High Court judgment deeming FETO a terrorist organization, *see* C.G.K. 26.9.2017 E. 2017/16-956 K. 2017/370, *available at* http://www.kazanci.com/kho2/ibb/files/cgk-2017-16-956.htm.
[211] North Atlantic Treaty Organization, Member Countries, https://www.nato.int/cps/en/natohq/topics_52044.htm (last visited Aug. 22, 2018).
[212] Republic of Turkey, Ministry of Foreign Affairs, DHKP-C, http://www.mfa.gov.tr/dhkp_c.en.mfa (last visited Aug. 22, 2018).
[213] MANGO, *supra* note 5, at 23-30.
[214] U.S. Department of State, Foreign Terrorist Organizations, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Aug. 22, 2018); Council Decision 2017/1426, annex- II, 19, 2017 O.J. (L 204) 95, 98 (2017) (E.U.), https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32017D1426&from=EN; *See* also MANGO, *supra* note 5, at 29.

In terms of domestic terrorism, the United States experienced left-wing terrorism in the 1960s and 1970s, and right wing terrorism in 1980s and 1990s.[215] Left-wing terrorism was opposed to the American military involvement in Indochina and capitalism in general.[216] The Weather Underground was the most important group that carried out some lethal attacks.[217] Right wing extremist violence included neo-Nazi groups, racist (like Ku Klux Klan), anti-gay, anti-abortionist, and anti-Semitist groups, the militia movement, extreme tax protest organizations, and Christian Identity violent extremist groups.[218] The U.S. has not experienced ethnic separatist terrorism. In terms of international terrorism, U.S. targets at home and abroad have been under attack by Al-Qaeda various times since early 1990s.[219] The 9/11 attacks had the most devastating effect,[220] killing almost 3000 people.[221] There have also been attacks inspired or conducted by ISIS in the U.S. since 2014.[222]

The United Kingdom has long suffered from separatist terror in Northern Ireland conducted by the Irish Republican Army.[223] The purpose of the Irish Republican Army was to separate Northern Ireland (2/3 of which is Protestant) from Protestant U.K, and unite it with the Catholic Republic of Ireland. The Good Friday Agreement (also known as the Northern Ireland Act 1998 or Belfast Agreement) between the U.K. and Ireland was a turning point to end Irish separatist terrorism and to ensure peace in Northern Ireland.[224] The Northern Ireland Assembly was

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[215] BRENDA J. LUTZ& JAMES M. LUTZ, TERRORISM IN AMERICA 102, 113 (2007).
[216] *Id.* at 102.
[217] *Id.*
[218] *Id.* at 95, 99, 113, 114, 115, 122.
[219] *Id.* at 128, 129, 132.
[220] *Id.* at 131.
[221] CNN, *September 11 Terror Attacks Fast Facts*, (Aug. 5, 2018), https://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html.
[222] Tim Lister et al, *ISIS goes global: 143 attacks in 29 countries have killed 2,043*, CNN (Feb. 12, 2018), https://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html.
[223] M.R. HABERFELD & JOSEPH F. KING & CHARLES ANDREW LIEBERMAN, TERRORISM WITHIN COMPARATIVE INTERNATIONAL CONTEXT: THE COUNTER-TERRORISM RESPONSE AND PREPAREDNESS 43 (2009).
[224] *Id. ;* BBC-History, *Good Friday Agreement*, http://www.bbc.co.uk/history/events/good_friday_agreement (last visited Aug. 22, 2018).

established,[225] and a new government that shared power between the Unionist Protestants (who were loyal to the Crown and the U.K.) and Nationalist Catholics (who wanted to secede from the U.K. and to join the Northern Ireland) was formed.[226] The IRA was disarmed in 2005,[227] and the British Army officially terminated its operations in Northern Ireland in 2007.[228] As international terrorism, ISIS has conducted many attacks on British soil.[229]

France, as domestic terrorism, had the left wing Action Directe between 1972-1987 and Corsican separatist terrorism until the early 2000s.[230] As international terrorism, it tackled the Algerian terrorism, Armenian ASALA terrorism, and the Islamic jihad group of Hezbollah.[231] ISIS has also conducted many attacks in France since 2015.[232]

Germany had the left-wing terrorism of the Red Army Faction from the late 1960s to 1998,[233] and right-wing and racist violence from 1979 to the early 1990s.[234] Germany did not experience separatist terrorism. International terrorism in Germany mainly was directed toward

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[225] BBC-Newsround, *What was the Good Friday Agreement?*, (Apr. 10, 2018), http://www.bbc.co.uk/newsround/14118775 (last visited Aug. 22, 2018).
[226] *Id.*
[227] HISTORY, 2005-IRA Officially Disarms, https://www.history.com/this-day-in-history/ira-officially-disarms (last visited Aug. 22, 2018).
[228] BBC-Newsround, *supra* note 225.
[229] Liam Stack, *Terrorist Attacks in Britain: A Short History*, the N.Y. TIMES (June 4, 2017), https://www.nytimes.com/2017/06/04/world/europe/terrorist-attacks-britain-history.html;
Richard Engel et al., *Manchester Bomb Suspect Said to Have Had Ties to al Qaeda, Terrorism Training Abroad,* NBC NEWS (May 23, 2017 3.38 PM), https://www.nbcnews.com/storyline/manchester-concert-explosion/manchester-bomb-suspect-said-have-had-ties-al-qaeda-terrorism-n763691;
Jason Hanna, *The London train explosion is the latest of 5 terror incidents in 2017 in the UK*, CNN (Sept. 15, 2017 1.11 PM ), https://www.cnn.com/2017/09/15/world/uk-terror-events-2017/index.html;
RT, *Year of terror: Timeline of ISIS attacks in Great Britain*, (Sept. 16, 2017), https://www.rt.com/uk/403529-london-attack-tube-parasons/.
[230] LEEUWEN, *supra* note 58, at 71, 72; Jeremy Shapiro & Bénédicte Suzan, *The French Experience of Counter-terrorism*, 45 THE INT'L INST. FOR STRATEGIC STUD. 68, 69 (2003).
[231] LEEUWEN, *supra* note 58, at 73.
[232] *See* The Straits Times, *A timeline of terror attacks in France,* (Apr. 21, 2017 2.46 PM), https://www.straitstimes.com/world/europe/a-timeline-of-terror-attacks-in-france.
[233] HABERFELD ET AL., *supra* note 223, at 103-107; LEEUWEN, *supra* note 58, at 112.
[234] LEEUWEN, *supra* note 58, at 113.

targets related to a conflict in a terrorist organization's country of origin.[235] For instance, in the 1990s, the Kurdistan Worker's Party attacked Turkish shops, community centers, and embassies in Germany.[236] Lebanese Hezbollah, the Palestinian Hamas, and the Algerian GIA had branches in Germany, and participated in mostly non-violent fundraising, recruitment and political propaganda activities.[237] Al Qaeda (and later ISIS) became an international terrorism problem for the West including Germany since the 9/11 attacks.[238]

| TERRORIST ORGANIZATIONS | TYPE | GENERAL INFORMATION | TERRORIST PROFILE | ORGANIZATIONAL STRUCTURE | FUNDING |
|---|---|---|---|---|---|
| AL QAEDA[239] | • Islamic jihad<br>• Since 1988<br>• Listed in U.S. designated foreign terrorist organizations since 1999[240] | • Afghanistan, United States, France, India, Turkey<br>• 9/11 attacks that killed nearly 3000 Americans<br>• 2003 bombings that killed 62 and injured 718.[241] | • Training camps are located in numerous countries around the globe<br>• Physical training as well as indoctrination through study, videos, prayer, and a generally regimented lifestyle | • Has become decentralized, with affiliates acting semi-autonomously as extensions of al-Qaeda's core mission. | • Iran, Kuwait, Qatar, Saudi Arabia<br>• Private donors, charities and foundations<br>• Drug trafficking, bank robbery, hostages |

[235] *Id.* at 115.
[236] *Id.*
[237] *Id.*
[238] BBC-News, *Berlin attack: So-called Islamic State claims responsibility*, (Dec. 20, 2016), https://www.bbc.com/news/world-europe-38385961.
[239] Counter Extremism Project, *Al-Qaeda,* http://www.counterextremism.com/threat/al-qaeda (last visited Aug. 22, 2018).Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source.
[240] U.S. Department of State, *supra* note 214.
[241] Şen, *supra* note 200, at 91, 93.

| | | | | | |
|---|---|---|---|---|---|
| DHKP/C[242] | • Leftist (Marxist)<br>• Anti-U.S. and Anti-NATO<br>• Since 1978<br>• Listed in U.S. designated foreign terrorist organizations since 1997[243] | • Turkey, primarily Istanbul<br>• Attacks against current and retired Turkish security officials.<br>• U.S. officials in Turkey<br>• Suicide bombings, assassinations, the use of explosive devices | • Recruited supporters from high schools and universities[244]<br>• Urban poor[245] | • | • Western Europe<br>• Armed robberies<br>• Extortion |
| HEZBOLLAH[246] | • Islamic jihad<br>• Since 1982<br>• Listed in U.S. designated foreign terrorist organizations since 1997[247] | • Lebanon, Syria, Germany, Mexico, Brazil, Turkey<br>• Against U.S., Israel and the Jews, Turkey[248]<br>• Since 2012, Hezbollah has been fighting on behalf of Syria's President Bashar Assad against al-Qaeda, the Nusra Front, and other rebels. | • Between 200 and 250 fighters<br>• Searching for 15,000 new recruits by the fall of 2013.<br>• Shiite Hezbollah has expanded its recruitment to include Sunnis and non-Muslims | • Networks of schools, camps, and religious programming throughout Lebanon.<br>• Runs summer camps, field trips, and religious holiday programing. | • Extensive military and financial support from Iran through Syria<br>• First and foremost an instrument of the Iranian regime.<br>• Transnational criminal activities<br>• Extortion, robbery, taxing their own members and supporters, revenue from foreign sources mainly Iran[249] |
| IRISH REPUBLICAN ARMY (IRA)[250] | • Separatist<br>• Political pressure group dedicated to removing British forces from Northern Ireland and unifying Ireland<br>• Since early 1998<br>• Between 1969 and 1998, IRA brought about | • Northern Ireland, Irish Republic and Great Britain<br>• Seeks separation from protestant U.K. 1/3 of the Northern Ireland's population is Catholic, while 2/3 of it is Protestant. The Protestant majority remains loyal to the U.K. and refuses to secede from it.[252] Southern Ireland's majority was Catholic and gained independence from | • 100 to 200 activists<br>• Good Friday Agreement between U.K. and Ireland in 1998.[254]<br>• Declared initiation of disarmament in 2001; total | • Cell structure<br>• Highly secretive<br>• Military structure | • Annual revenue: 6-15 million dollars between 1978 and 1998[256]<br>• Oil and cigarette trafficking, extortion, robbery, counterfeiting[257]<br>• Prohibited its members from engaging in drugs trafficking[258]<br>• Provides guns from US gun dealers<br>• Receives funds from sympathizers |

[242] RONCZKOWSKI, *supra* note 29, at 298. Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source. *See* also Olga Khazan, *Turkey bombing: What is the DHKP/C terrorist group?*, WASH. POST (Feb. 1, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/02/01/turkey-bombing-what-is-the-dhkpc-terrorist-group/?utm_term=.dfa365597f91.

[243] U.S. Department of State, *supra* note 214.

[244] BBC, *Profile: Turkey's Marxist DHKP-C,* (Feb 2, 2013) https://www.bbc.com/news/world-europe-21296893.

[245] *Id.*

[246] Counter Extremism Project, *Hezbollah*, http://www.counterextremism.com/threat/hezbollah (last visited Aug. 22, 2018). Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source.

[247] U.S. Department of State, *supra* note 214.

[248] MANGO, *supra* note 5, at 66.

[249] *Id.*

[250] RONCZKOWSKI, *supra* note 29, at 294-95. Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source.

[252] HABERFELD ET AL., *supra* note 223, at 40.

[254] *Id.* at 110.

[256] Gücenmez, *supra* note 194, at 124.

[257] *Id.* at 124.

[258] *Id.* at 113.

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| | 3700 deaths and 30.000 injuries.<br>• Real IRA (RIRA) had been listed in U.S. designated foreign terrorist organizations since 2001[251] | U.K. in 1920s. IRA also would like to separate itself from U.K. and get united with today's Ireland.[253] | disarmament in 2005.[255] | | • Sophisticated weapons from Balkans<br>• Funding from Libya until 1987 and the United States until the end of the 1980s.[259]<br>• Trade organizations, donations and financial aid from NORAID and Ireland diaspora in the US[260] |
| THE RED ARMY FACTION (RAF) [261] | • Left-wing (communist) organization<br>• Also known as Baader-Mainhof Gang | • Germany<br>• Founded in 1970 by Andreas Baader, Gudrun Ensslin, and others<br>• Emerged as a violent fall-out of the 1968 student revolt<br>• Operated from the late 1960s to 1998<br>• Responsible for more than 40 deaths, and 100 injuries in the 30 years of activity<br>• Hostage taking, bombing, hijacking, assassination<br>• Main targets were economic and political leaders<br>• RAF core members committed suicide in prison in 1977<br>• In April 1998, the RAF declared its disbandment | • Student revolt groups converted to militant gangs | • Urban militant group | |
| KURDISTAN WORKERS PARTY (PKK) [262] | • Separatist<br>• Marxist<br>• Since 1974<br>• PKK left at least 14.739, if not 35.000, dead[263], and 5337 people wounded.[264]<br>• Listed in U.S. designated foreign terrorist | • Turkey, Europe, and the Middle East<br>• The goal is to establish an independent Kurdish State in Southeastern Turkey<br>• Targets are Turkish security as well as civilians<br>• Conducted attacks on Turkish diplomatic and commercial facilities in dozens of Western European cities in 1990s. | • Militant groups | • Three layers of structure: "Party", Army and "Front". Party is the determiner of the political purpose and ideology. "Front" organizes the students, workers, youth and officers. Arranges propaganda | • Annual revenue: 550-750 million dollars<br>• Aid from neighbors,[267] mainly Syria, Iran, Iraq, Greece<br>• Support from Western Europe: a refuge, a school for its supporters, a source of funds, a base for wide ranging propaganda campaign inciting violence in Turkey and |

[251] U.S. Department of State, *supra* note 214.
[253] Gücenmez, *supra* note 194, at 103.
[255] *Id.* at 110-111; HISTORY, *supra* note 227.
[259] Gücenmez, *supra* note 194, at 124.
[260] *Id*.
[261] HABERFELD ET AL., *supra* note 223, at 104, 105, 106, 107; LEEUWEN, *supra* note 58, at 112. Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source.
[262] RONCZKOWSKI, *supra* note 29, at 284. Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source.
[263] MANGO, *supra* note 5, at 31.
[264] Approximate official statistics state that there are 14.739 deaths (1984-2016) and 5337(1984-2012) injuries. Andrew Mango, however, declares 35.000 deaths between 1978-2002. Although it is hard to determine the definite number of casualties, it is clear that tens of thousands of people died (civilian and military). Approximately 10.000 people should also be wounded.
[267] MANGO, *supra* note 5, at 31.

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| | organizations since 1997[265] | • Bombed tourist sites, hotels, and kidnapped foreign tourists in 1990s. | | activities and logistics to the army as well as revenue to the organization. "Army" conducts violent terrorist acts. "Army" and 'Front" implements the decisions of the "Party".[266] | seeking Western support for it.[268]<br>• Indirect support from US: Material support to PYD[269], and the consequences of Iraq War on Turkey and the capture of Saddam's ammunition by the PKK<br>• Drugs trafficking, migrant trafficking, weapons trafficking, cigarette, alcohol, and oil trafficking, counterfeiting, racket<br>• Trade organizations, donations[270]<br>• 2 newspapers, 4 TV channels, 13 radio channels, 19 magazines, 3 printing houses, and many websites in Europe.[271] |
| ISIS[272] | • Islamic jihad<br>• Since 2004 as Al- Qaeda in Iraq<br>• Since 2013 as ISIS<br>• ISIS was used to be known as Al Qaeda in Iraq until 2013[273] | • Attacks worldwide; mainly Turkey, France, United States, Belgium, Nigeria, Lebanon, Malaysia, Bangladesh, Indonesia, Tunisia, Kuwait<br>• Holds territory in Syria, Iraq, Libya, Egypt, Algeria, Yemen, Saudi Arabia, Nigeria, Afghanistan, | • Ideological and physical training[275]<br>• High level military techniques[276] | • Comprised of many ministry-like councils: leadership council, financial council, military council, security council, intelligence council, media council, fighters' | • The richest terrorist organization in the world: $2-3 billion of annual revenue via taxes, oil trade, bank looting and kidnapping ransoms[282]<br>• Daily income of $3 million[283] |

[265] U.S. Department of State, *supra* note 214.
[266] Gücenmez, *supra* note 194, at 43-44.
[268] *Id*. at 35.
[269] Reuters, *Turkey says U.S. support for Syrian Kurdish YPG 'not befitting' of an ally* (May 31, 2017), https://www.reuters.com/article/us-mideast-crisis-turkey-usa-idUSKBN18R2TA;
The New York Times, *U.S. Weapons, Given to Iraqis, Move to Turkey* (Aug. 30, 207), https://www.nytimes.com/2007/08/30/washington/30contract.html;
Hürriyet Daily News, *Turkey has evidence of US arming 'terror' groups: Ministry* (18 Nov. 2017), http://www.hurriyetdailynews.com/turkey-has-evidence-of-us-arming-terror-groups-ministry-122615; The Washington Post, *Trump tells Turkish president U.S. will stop arming Kurds in Syria* (Nov. 24, 2017), https://www.washingtonpost.com/world/national-security/trump-tells-turkish-president-us-will-stop-arming-kurds-in-syria/2017/11/24/61548936-d148-11e7-a1a3-0d1e45a6de3d_story.html?noredirect=on&utm_term=.71a29ef3ee88.
[270] Gücenmez, *supra* note 194, at 124.
[271] *Id*. For details, *see* also Bozkurt, *supra* note 9, at 148, 149-155, 159, 161, 163, 165, 167, 170-72, 177, 180, 181, 190, 192, 193.
[272] Counter Extremism Project, *ISIS*, https://www.counterextremism.com/threat/isis (last visited Aug. 22, 2018). Unless specifically cited, the following information on this chart regarding this terrorist organization was obtained from the same source.
[273] Zack Beauchamp, *18 things about ISIS you need to know,* VOX (Nov.17, 2015 10:25 AM), https://www.vox.com/cards/things-about-isis-you-need-to-know/what-is-isis.
[275] Counter Extremism Project, *ISIS-Key Leaders*, https://www.counterextremism.com/threat/isis#keyleaders (last visited Aug. 22, 2018).
[276] *Id.*
[282] Counter Extremism Project, *ISIS-Overview*, https://www.counterextremism.com/threat/isis#overview (last visited Aug. 22, 2018).
[283] *Id.*

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| | • Listed in U.S. foreign terrorist organizations list as Al Qaeda in Iraq in 2004.[274] | Pakistan, and the North Caucasus. | | assistance council, legal council[277]<br>• Lone wolf attacks[278] which account for 70 percent of all deaths in the West from 2006 to 2014.[279]<br>• 50.000 fighters half of which are foreigners<br>• Since 2011, between 25.00-30.000 fighters from 100 countries have arrived in Iraq and Syria.[280]<br>• Europe comprises of 21 percent of all foreign fighters, while 50 percent is from neighboring Middle East and North African countries.[281] | |
| FETHULLAH TERRORIST ORGANIZATION (FETO)[284] | • Radical Islamist | • Turkey's democratic constitutional structure<br>• July 2016 coup attempt led to 240 deaths and 2200 injuries. | • Raise of poor students with religious ideology, infiltration of them into the bureaucracy of military, judiciary, and the executive departments. | • Highly secretive<br>• Strict organizational structure<br>• High devotedness | • Schools, charities and businesses worldwide |

***Table 1 - The Characteristics of Terrorist Organizations[285]***

The above table suggests that terrorism in Turkey has been more grave than Western terrorism in three respects: the lengthy life span of terrorist organizations, their strength and

[274] U.S. Department of State, *supra* note 214.
[277] *Id.*
[278] "Lone wolf terrorists are individuals or a small number of individuals who commit an attack in support of a group, movement or ideology without material assistance or orders from such group." INSTITUTE FOR ECONOMICS & PEACE, GLOBAL TERRORISM INDEX 54 (2015).
[279] *Id*.
[280] *Id*. at 3.
[281] *Id*.
[284] Anadolu News Agency, *supra* note 209.
[285] For more information about some of these terrorist organizations, *see* U.S. Department of State, Country Reports on Terrorism 2015, https://www.state.gov/j/ct/rls/crt/2015/257523.htm (last visited Aug. 22, 2018).

capacity, and the variety of organizations operating simultaneously. Firstly, terrorist organizations in Turkey has a lengthier history than those in Europe and the U.S. Secondly, the strength and capacity of terrorist organizations targeting Turkey is greater than that of Europe and the United States. This is particularly because of two reasons: the close geographic position of Turkey to the Middle East and the substantial foreign support behind terrorist organizations in Turkey. For one thing, terrorist organizations emerge in the conditions of instability where democracy under the rule of law is weak. Instability and the authority gap in the Middle East thus generate favorable conditions for the emergence of terrorist organizations in the region. For another thing, states that have economic and political interests in the Middle East seek to undermine Turkey by providing material and financial support to terrorist organizations.[286] And lastly, Turkey has been under threat from different types of terrorist organizations at the same time: communist DHKP-C, separatist PKK, Islamist Hezbollah, Al Qaeda, ISIS. Given these unique factors, Turkey may need to take special measures at counterterrorism. These possibilities are discussed in the next section.

## **C.** THE COMPARISON OF TURKISH LAW WITH EUROPEAN AND UNITED STATES LAWS

### 1. The Roots of Turkish Law, Its Relationship with the European Convention on Human Rights, and the Binding Force of the European Court of Human Rights Decisions

With the fall of the Ottoman Empire and the establishment of the modern Republic of Turkey in 1923, the Turks turned their face to the West instead of the East. The founders of the Turkish Republic established a Westernized legal system. They took Western Constitutions as

[286] *See* the above table for details.

models,[287] abolished the application of Islamic Sharia rules, and adopted Western Criminal and Civil Codes. In order to eliminate the authoritarian social structure and to promote individualism in society, Western Codes were integrated into the Turkish legal system in the 1920s. The first criminal code was adopted from Italy, and the civil code was adopted from Switzerland in 1926.[288] The commercial code and the criminal procedure code were adopted from Germany in 1929.[289] Necessary amendments to these codes were later made in consideration of legal developments in the West as well as issues arising in Turkish legal practice.

Turkey expressed its commitment to human rights values in various international arenas such as the United Nations (U.N.) and the Council of Europe. Turkey is a founding member state of the United Nations.[290] The United Nations General Assembly proclaimed the Universal Declaration of Human Rights in 1948.[291] Turkey is a party to 15 of 18 of the U.N. Human Rights Conventions.[292]

Turkey had been one of the founding members of the Council of Europe that was established in 1948 after World War II.[293] It ratified many human rights conventions and protocols signed under the Council of Europe, one of which is the European Convention on Human Rights. The European Convention on Human Rights was signed in Rome in 1950, and entered into force

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[287] For more information, *see* generally Earle, *supra* note 154, at 100.
[288] MANGO, *supra* note 154, at 1124-26; ZURCHER, *supra* note 113, at 173; HUGHES, *supra* note 150, at 19.
[289] MANGO, *supra* note 154, at 1194-95; DOĞAN SOYASLAN, CEZA MUHAKEMELERİ USULÜ HUKUKU [CRIMINAL PROCEDURE LAW] 171 (2016).
[290] United Nations, Founding Member States, http://www.un.org/depts/dhl/unms/founders.shtml (last visited Aug. 25, 2018); United Nations, Turkey, http://www.un.org/depts/dhl/unms/turkey.shtml (last visited Aug. 25, 2018).
[291] United Nations, The Universal Declaration of Human Rights, http://www.un.org/en/universal-declaration-human-rights/ (last visited Aug. 25, 2018); G.A. Res. 217A (Dec. 10, 1948), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III).
[292] Republic of Turkey Ministry of Foreign Affairs, Human Rights, http://www.mfa.gov.tr/İnsan-hakları.en.mfa (last visited Aug. 25, 2018).
[293] Republic of Turkey Ministry of Foreign Affairs, Council of Europe, http://www.mfa.gov.tr/council-of-europe.en.mfa (last visited Aug. 25, 2018); Council of Europe, Complete list of the Council of Europe's treaties, https://www.coe.int/en/web/conventions/full-list (last visited Aug. 25, 2018).

in 1953.[294] Turkey signed the European Convention on Human Rights in 1950, and the Convention was ratified by the Turkish Parliament and entered into force in 1954.[295] The Council established the European Court of Human Rights to ensure the proper application of the European Convention and its additional protocols.[296] Turkey recognized the right of individual petition to the European Court of Human Rights in 1987, and accepted the Court's compulsory jurisdiction in 1990.[297]

The European Court of Human Rights decisions are binding for Turkish courts under Article 46 of the Convention[298] and the Turkish Constitution Article 90.[299] First, Article 46 states

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[294] Council of Europe, Details of Treaty No.005, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (last visited Aug. 25, 2018).

[295] Council of Europe, Chart of signatures and ratifications of Treaty 005, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures (last visited Aug. 25, 2018).

[296] Council of Europe, *supra* note 294.

[297] Council of Europe Parl. Ass., Situation of Human Rights in Turkey, EUR. PARL. ASS. RES. 985, art. 4-1, 4-5 (June 30, 1992), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16396&lang=en. HÜSEYIN EKINCI & MUSA SAĞLAM, 66 SORUDA BIREYSEL BAŞVURU [INDIVIDUAL APPLICATIONS IN 66 QUESTIONS] 2 (2015). For more information regarding the Council of Europe, the ECHR, and its Court, *see* Council of Europe, European Court of Human Rights, http://www.coe.int/en/web/tirana/european-court-of-human-rights; Republic of Turkey Ministry of Foreign Affairs, Council of Europe, http://www.mfa.gov.tr/council-of-europe.en.mfa.

[298] The European Convention on Human Rights, Article 46:

> Binding force and execution of judgments
>
> 1. **The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.**
>
> 2. The final judgment of the Court shall be transmitted **to the Committee of Ministers, which shall supervise its execution.**
>
> 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
>
> 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1.
>
> 5. **If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken**. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

[299] Turkish Constitution Article 90/5 is as follows:

> International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. TÜRKİYE BÜYÜK MİLLET MECLİSİ [TBMM] [GRAND NATIONAL ASSEMBLY OF TURKEY], CONSTITUTION, *English translation available at* https://global.tbmm.gov.tr/docs/constitution_en.pdf.

that ECtHR decisions have a binding force over member states, one of which is Turkey.[300] Second, Article 90 of the Turkish Constitution states that international agreements on human rights norms would prevail over statutes if any contradiction exists. Article 90 also asserts that the unconstitutionality of the international agreements (such as the European Convention) cannot be claimed before the Turkish Constitutional Court. This latter provision implies that international agreements are superior to the Turkish Constitution. For these reasons, the ECtHR decisions, by which the norms of the European Convention on Human Rights are interpreted, would prevail over statutory (and even constitutional) rules, and should primarily be taken into consideration by Turkish judges.[301]

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[300] The Convention nevertheless does not impose any explicit sanction if a contracting party does not abide by the Court's ruling.

[301] French, German and the U.K. laws also have similar provisions.

1) French Constitution Article 55 states that "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party." LA CONSTITUTION 1958 CONST. 55 (Fr.).

The ECtHR ruled on October 14, 2010 in *Brusco v. France* that the applicant had been denied access to a lawyer for 20 hours and not told of his right to silence, which was a violation of the right to a fair trial under Article 6 of the ECHR. On October 19, 2010, in three judgements, the French Supreme Court declared that *Brusco* should have been followed and that persons in GAV should have been entitled to the assistance of lawyers at all times, except when there were compelling reasons based on the circumstances of a case. Brusco v. France (App. No. 1466/07, 2010), press release in English is available at http://hudoc.echr.coe.int/eng-press#{"fulltext":["brusco"],"languageisocode":["ENG"]}; DIANE WEBBER, PREVENTIVE DETENTION OF TERROR SUSPECTS: A NEW LEGAL FRAMEWORK 163 (2016); Dean Spielmann, *Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe*, *in* MICHEL ROSENFELD & ANDRÁS SAJÓ, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1231, 1239, 1248, 1249 (2012).

2) German Constitution Article 25 [Primacy of International law] states that "The general rules of international law shall be an integral part of federal law. They shall take precedence over the law and directly creates rights and duties for the inhabitants of federal territory."

Article 59/2 also provides that: "Treaties which regulate the political relations of the federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation."

The Convention thereby has the status of a federal law in German law. It has a lower rank status than the Constitution, but still has a binding effect for all organs of the executive and all courts. In case of a conflict with the Convention, the Constitution (the Basic Law) will prevail. Although the Convention is below than Constitution in the hierarchy of norms, the Federal Constitutional Court nevertheless interprets fundamental constitutional rights in conformity with relevant Convention rights. The High Court uses conventional rights to support its arguments and assessments in its review. In its *Görgülü* decision, the Court held that the ECtHR decisions were binding on domestic courts, yet this binding effect was not unconditional. The ECHR and ECtHR decisions should be taken into account according to the cannons of justifiable interpretation of the law. A failure to consider the ECtHR decisions may violate fundamental rights and the principle of the rule of law. The Constitutional Court also emphasized that by considering Convention rights, it was "indirectly acting in the service of enforcing international law". Spielmann, *supra* at 1231, 1236, 1237, 1246, 1247. For instance, in May 2011, the Court held preventive detention unconstitutional, based on relevant ECtHR

The European countries examined in this paper are members of the Council of Europe, and they ratified the European Convention on Human Rights.[302] Yet, the judgments of the ECtHR are not directly enforceable in the way like that domestic court judgments would be.[303] All of the member states are obliged by the Convention to abide by the judgments of the ECtHR.[304] The means for conforming to these judgments is left to the discretion of states, whether it be through a legislative change or the alteration of an administrative policy that violates the Convention.[305] The Committee of Ministers, which is comprised of Ministers for Foreign Affairs[306] of member states, oversees the execution of the Court's judgments.[307] The Committee examines a) whether any just satisfaction awarded by the Court has been paid, b) whether individual measures have been undertaken to cease the violation and whether the individual party has been put to the same condition prior to the violation, and c) whether general measures were adopted to prevent similar future violations or to terminate continuing violations.[308] If the Committee concludes that a state

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decisions (*see* M. Germany, App. No. 19359/04, 17 Dec. 2009), finding preventive detention impermissible. Giuseppe Martinico, *Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts*, 23 EJIL 401, 411 (2012).

3) In the United Kingdom, the Human Rights Act 1998 Section 3/1 [Interpretation of Legislation] requires that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." In *A and Others v. Secretary of State for the Home Department* [2004 UKHL 56], the House of Lords decided that Section 23 of the Anti-Terrorism, Crime and Security Act 2001 did not comply with the Articles 5 and 14 of the ECHR. The case was with regard to the detention of foreign nationals who were suspected to be international terrorists and who could not have been deported without breaching Article 3 of ECHR (torture, inhuman and degrading treatment or punishment). The House ruled that the detention measure was disproportionate and allowed the detention of suspected terrorists in a way discriminating on the grounds of nationality or immigration status. The provisions of the Act were repealed by the Prevention of Terrorism Act 2005, which established a new control orders regime. Spielmann, *supra* at 1231, 1234, 1235, 1236.

[302] See *supra* note 295.

[303] WILLIAM A. SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY 861 (2015).

[304] European Convention on Human Rights [E.C.H.R.] art. 46-1, Nov. 4, 1950, E.T.S.005, *available at* https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[305] SCHABAS, *supra* note 303.

[306] The Statute of the Council of Europe art. 14, May. 5, 1949, E.T.S. 1, *available at* https://rm.coe.int/1680306052.

[307] [E.C.H.R.] art. 46-2.

[308] The Committee of Ministers' Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, rule 6-2, a, b. (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies), *available at* https://rm.coe.int/16806eebf0.

has refused to abide by the Court's final decision to which it is a party, it can refer the matter to the Court for determination of whether the state has failed to fulfill its obligation under Article 46/1.[309] This is called an "infringement proceeding", and such proceedings may be initiated only in exceptional circumstances.[310] The Committee is required to give formal notice to the infringing state prior to the initiation of infringement proceedings. If the Court finds a violation, it refers the case to the Committee of Ministers for consideration of the measures to be taken.[311] The Convention and the Statute of the Council of Europe are both silent about what those potential measures (or sanctions) are.

### 2. The General Comparison of European and American Legal Principles

From a general perspective, European and American basic legal standards are similar. First, the proportionality standard (in Europe) and the balancing test (in the U.S.) are the primary principles that various aspects of law are grounded upon. These two standards function similarly.[312] Second, state intrusions on liberty are subject to the requirements of judicial warrant and a reasonable standard of cause in each system.[313] The more serious a human rights intrusion, the more level of cause is required for state intrusions as a result of the balancing analysis used in both systems. For instance, while arrest requires probable cause or reasonable grounds,[314] pre-trial detention necessitates a more demanding standard than probable cause both in Europe and the

[309] [E.C.H.R.] art. 46-4, 5.
[310] The Committee of Ministers' Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, *supra* note 308, at rule 11-2.
[311] [E.C.H.R.] art. 46-5.
[312] *See infra* Sec. II-A-5-b-1-i.
[313] *See infra* Sec. II-A-3-b, c.
[314] [E.C.H.R.] art. 5-1-c; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] [CRIMINAL PROCEDURE CODE] art. 63 (Fr.); Police and Criminal Evidence Act 1984, c. 60 § 24, 25 (Gr. Brit); [CMK] art. 91-2; U.S. CONST. amend. IV; Brinegar v. United States, 338 U.S. 160, 175 (1949).

U.S.[315] This standard is named as "clear and convincing evidence" or "strong suspicion", depending on the system.[316]

Third, reasons for pre-trial detention are similar: the destruction of evidence, witness tampering, flight risk, the renewal or consummation of a crime, the protection of the suspect or defendant.[317] Fourth, procedural rights such as the privilege against self-incrimination, the right to counsel, the right to silence, and the right to be informed of procedural rights are fundamental in the investigative stage.[318] As the basic standards are the same, this study concentrated on the comparison of specific rules used in counterterrorism in each jurisdiction.

Because Turkey is legally bound by international human rights principles, any proposals for Turkey must comply with these universal standards. For this reason, European and American legal principles hold considerable importance in determining the utmost limit of human rights intrusions that could be suggested for Turkish counterterrorism law. In this thesis, European and U.S. Laws are first compared, and then are used to determine the gaps in Turkish law and to propose suitable statutory amendments that meet Turkish security needs.

### **D.** INTERVIEWS AS SUPPORTING ARGUMENTS

This study incorporates interviews with counterterrorism officials into its analysis to support possible legal amendments to the Turkish system. These interviews were conducted with Turkish security officials, and judges and prosecutors with experience in counterterrorism. Interviews were conducted within a three-month period from February 2017 to April 2017. Each interview took approximately two hours.

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[315] *See* generally *infra* Sec. II-A-3-b, II-A-5-b-3-ii.
[316] *See* generally *infra* Sec. II-A-3-b.
[317] *Id.*
[318] *See* generally *infra* Sec. II-B-1.

Interviewed security officials consisted of: a) the general heads of counterterrorism, intelligence, and organized crime departments of the police and gendarmerie; b) the heads of specific units of these departments; c) some retired senior security officials.[319] The number of these interviewees are as follows: twelve officials from the counterterrorism department, five officials from the intelligence department, and two officials from the organized crime department. All of the security officials had 10-20 years of experience in counterterrorism. With regard to the judiciary, six judges and three public prosecutors with experience in counterterrorism were interviewed.

Each interview was based on previously prepared questionnaires with 20-25 questions. Different questions were prepared for different departments. Judicial officials were also asked similar questions. The content of the questions was exhaustive. It included questions that were prepared for the initial scope of my thesis. The previous scope of this study contained the following topics: preventive (security) detention, the limitation of the procedural rights of counsel and the right to be informed of the right to silence, the expansion of terror crimes, counterterrorism courts, the extension of the duration of arrest, the use of deadly force against fleeing terrorists posing a non-imminent but continuous threat, and intelligence gathering laws specifically on electronic surveillance and data surveillance. Questions were prepared considering any potentially problematic parts of existing laws in each topic, and then were discussed with counterterrorism officials. They are attached as an appendix.

The experience and positions of the interviewed officials suggest their credibility. Yet, with regard to security personnel, it was observed that they had biases as a result of the police sub-culture and subjective experiences. Interviews with security personnel were limited to the

[319] The names of the interviewees are on file with the author, and will not be provided in this paper for confidentiality reasons.

functioning of the existing law and the system. They talked about the problems they experience in the application of the rules more than provided suggestions for change. Interviews with judicial officials were, however, mostly about legal issues in the application of the rules and potential changes in current rules.

Interviews were initially thought to be used as the sole reason for relevant statutory changes. Yet, after conducting the interviews, I realized that it was not plausible to depict interviews as the sole grounding of proposals. They could only be used as supportive arguments for already determined gaps of Turkish law identified through comparative law assessment. This is mainly because the opinions of interviewed officials stem from their subjective experiences and cannot be generalized to the whole counterterrorism system of Turkey. In order to make more generalized statements and to reach accurate conclusions, a comprehensive statistical data analysis on the effects of each counterterrorism rule should be conducted. This type of a work requires the substantial use of state sources and a deep-down analysis of secret government information available only to high-ranked state officials.

## **E.**INITIAL AND CURRENT PROPOSALS

The initial proposals made in this thesis included the enactment of; a) preventive detention, b) the limitation of procedural rights of counsel and the right to be informed of the right to silence, c) preparatory terror crimes, d) counterterrorism courts, e) an extended duration of arrest, f) the use of deadly force against fleeing terrorists posing non-imminent but continuous security threat, and g) improved intelligence gathering laws on electronic surveillance and data surveillance. Considering the exhaustiveness of this scope and suggestions of my dissertation committee members, I decided to limit this thesis to three proposals:

a) Preventive detention based on general dangerousness in pre-trial and post-sentence stages.

b) The limitation of procedural rights in the investigative stage: a public safety (or compelling needs) exception to the right to counsel and to the right to be informed of procedural rights, and the exclusion of defense counsel who are aiming to obstruct justice in certain ways.

c) The establishment of a counterterrorism court system that consists of judges and prosecutors with special knowledge on Turkey's national security priorities and terrorist organizations.

## II. TURKISH LAW REFORM PROPOSALS AND RELEVANT EUROPEAN AND UNITED STATES LAWS

Based on the comparative law research and interviews conducted, this section makes three main proposals for the Turkish system related to counterterrorism. The proposals are as follows: a) preventive detention based on general dangerousness both in pre- trial and post-sentence stages, b) a public safety exception to the right to counsel and the right to be informed of procedural rights, and the exclusion of defense counsel affiliated with a terrorist organization, c) the establishment of a specialized court system that consists of judges and prosecutors with special knowledge, training, and expertise on counterterrorism.

### **A.** PREVENTIVE DETENTION ON GENERAL DANGEROUSNESS GROUNDS

This section discusses the difficult balance between security and liberty. It then discusses why preventive detention is critical in counterterrorism. And it reviews the types of preventive detention applied in the United States and countries in Europe. It proposes two preventive legal

measures that are lacking in Turkish law: 1. Pre-trial detention on a showing of terrorism-related dangerousness; 2. Post-sentence detention of former terrorists who retain their dangerousness even after serving of their sentences. A proportionality analysis is conducted and arguments against post-sentence detention are discussed. Dangerousness factors and a precise level of cause are also suggested to prevent arbitrary detention by the state. The dangerousness factors are prison radicalization, mental disorder, prison intelligence, and personal and criminal background. The level of cause suggested is the preponderance of evidence for a temporary detention, and clear and convincing evidence if the detention period extends.

### 1. The Security and Liberty Relationship

The Oxford Dictionary defines security as "the state of being free from danger or threat".[320] The state of security refers to two distinct conditions: objective and subjective states.[321] First, the objective state of security means "being protected from threats", through their "neutralization", "avoidance", or "non-exposure to risk".[322] Second, the subjective state of security derives from the Latin word *securitas* and indicates individual sense of safety, the feeling of being secure, or freedom from anxiety.[323]

The Oxford Dictionary defines liberty as "the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views".[324] Liberty has roots in the Latin word *libertas*.[325] It refers to a broad concept including not merely

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[320] OXFORD UNIVERSITY PRESS, OXFORD LIVING DICTIONARIES (2018), *available at* https://en.oxforddictionaries.com/definition/security (last visited Aug. 16, 2018).
[321] LUCIA ZEDNER, SECURITY 14 (2009).
[322] *Id.* at 14.
[323] *Id.* at 16.
[324] OXFORD UNIVERSITY PRESS, OXFORD LIVING DICTIONARIES (2018), *available at* https://en.oxforddictionaries.com/definition/liberty (last visited Aug. 22, 2018).
[325] ØRBERG, *supra* note 1, at 21.

freedom from bodily restraint but also any limitation that impedes the pursuit of happiness in life.[326] The right to life, to marry, to contract, to acquire knowledge, to engage in or refrain from any type of religious observance as one's conscience directs, and other rights are all within the scope of the concept of liberty.[327]

Security and liberty have a nourishing relationship. Security is the principal precondition[328] of exercising individual liberties that pave the way for individual and social development; and the uninterrupted exercise of individual liberties contributes to the preservation of security. On one hand, the feeling of insecurity would deter individuals from taking necessary actions in pursuit of happiness, hindering the proper exercise of liberties.[329] On the other hand, the exercise of liberties generates peace in a society as individuals are given the opportunity of self-realization.

The liberty and security balance should be proportionately set. Otherwise, each would have an undermining effect on the other. Too much security may harm individual liberties, while the lack of security may render liberties unusable. It is important to establish a fair balance between a need for security and a need to execute a particular individual right.[330]

### 2. Preventive Detention in Counterterrorism

According to the classical liberal political theory, the state and citizen relationship is built upon obligations. The state is under the obligation of providing security to persons and their property, while citizens are obliged to obey the law and respect others' rights.[331] Thomas Hobbes,

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[326] Mever v. Nebraska, 262 U.S. 390, 399 (1923). For the right to pursue happiness, *see* the American Declaration of Independence, *available at* http://www.constitution.org/us_doi.pdf (last visited Aug. 22, 2018).
[327] *Mever*, 262 U.S. at 399.
[328] The classical political theory also suggests that security is central to the liberal conception of the state, and order and security are the prerequisites of freedom. ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 8 (2014).
[329] See also HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 21 (1996).
[330] *See* also ZEDNER, *supra* note 321, at 134, 135.
[331] ASHWORTH & ZEDNER, *supra* note 328, at 7.

in his groundbreaking work of *Leviathan*, suggested that the sovereign power (be it a monarch or an assembly ) was obliged by the law of nature to ensure the safety of the people.[332] The state's duty to provide security generates two core state functions: First is the protection of citizens' lives and property, and the prevention of any potential harm towards individuals. States are for this reason under the duty to enact laws and follow policies to ensure security for its citizens.[333] Second is the exclusive authority to use coercion to carry out these laws and to ensure the safety of its people. In return for the state's efforts to provide security, citizens are under the obligation to abide by the law, to respect others' rights, and to accept state coercion as the price of peace and order.[334]

A state's core duty of prevention increases in cases of terrorism, because catastrophic terror attacks can affect thousands of victims in one instance, and leave long-term psychological effects on a society. Some countries have developed preventive legal measures under the notion of "prevention is better than cure".[335] The enactment of unconsummated offenses, preventive electronic surveillance, the use of deadly force to protect the lives and bodily integrity of individuals, and the preventive detention of the dangerous are among these measures.

This chapter examines the preventive detention of dangerous persons in immigration proceedings as well as in pre-trial and post-sentence stages. It first explains the conditions on which Europe and the United States detain dangerous persons preventatively in these stages, and then gives information about interviews conducted with counterterrorism officials, and finally makes relevant suggestions to the Turkish law.

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[332] THOMAS HOBBES, LEVIATHAN 222 (ed. J. C. A. Gaskin, 1996).
[333] Andrew Ashworth & Lucia Zedner, *Punishment Paradigms and the Role of the Preventive State*, in LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSH 10 (AP Simester et al. eds., 2014).
[334] *Id.*
[335] ASHWORTH & ZEDNER, *supra* note 328, at 252.

### 3. The Types of Preventive Detention

#### a) Immigration Detention

##### (1) The United States

Immigration detention is the preventive detention of foreigners accused of immigration violations pending removal from the U.S. It is a discretionary measure utilized by the Attorney General.[336] The Attorney General may either detain an individual or release him on bond or conditional parole.[337]

Immigration detention is a useful tool to detain foreigners who have possible ties to terrorism and to prevent future terror attacks.[338] Under the U.S. law, those foreigners who are suspected to be engaged in terrorist activities are inadmissible and subject to detention until they are deported from the U.S.[339] According to the relevant U.S. Code, any alien who

a) has engaged in or is likely to engage in a terrorist activity,

b) is a representative or member of a terrorist organization, or

c) endorses terrorist activity or is engaged in such groups

is inadmissible in the U.S. and will be subjected to immigration detention pending deportation.[340]

Aliens can be detained for a 90-day removal period.[341] This duration can be extended if an alien poses a risk to the community or is unlikely to comply with the removal order.[342] In the event of connection with terrorism, the detention period can be even longer. Although the Code does not

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[336] 8 U.S.C. § 1226-e (1952).
[337] *Id.* § 1226-a-1, 2.
[338] DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION 57 (2009).
[339] 8 U.S.C. §§ 1182-a-3-B, 1226-c-1-D.
[340] *Id.* §§§ 1182-a-3-B, F, 1226a-a-3, 1227-a-4-B. For an example of immigration detention, *see* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).
[341] 8 U.S.C. § 1231/a-1-A.
[342] *Id.* § 1231/a-6; WEBBER, *supra* note 301, at 175; STIGALL, *supra* note 338, at 56.

provide a certain limit for detention, the U.S. Supreme Court in *Zadvydas v. Davis*[343] did. First, the Court set a six-month limit, the passing of which would generate a presumption that there was "good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future."[344] The alien must provide "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future."[345] The government then bears the responsibility to rebut this presumption. Second, the Court ruled that the six-month presumption did not mean that every alien not removed within six months should have been released. An alien could be held in confinement "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[346] The longer the duration of the pre-removal confinement, the less likely it is that an alien will be removed in the reasonably foreseeable future.[347]

(2)The United Kingdom

Immigration detention in the U.K. is a means for the government to detain foreign nationals whom the government cannot prosecute criminally, or cannot deport for legal or practical reasons.[348] The Anti-terrorism, Crime and Security Act authorizes the Secretary of State to issue a detention certificate if there are reasonable grounds to believe that a foreigner's presence in the U.K. poses a threat to national security, and there is suspicion that the person is a terrorist.[349] The Act does not provide any limit regarding the duration of detention.[350]

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[343] Zadvydas v. Davis, 533 U.S. 678 (2001).
[344] *Id*. at 701.
[345] *Id*.
[346] *Id*.
[347] *Id*.
[348] EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: LESSONS FROM THE UNITED STATES, THE UNITED KINGDOM, AND ISRAEL 132 (2006); The Anti-terrorism, Crime and Security Act 2001 c. 24 p.4 § 23-1.
[349] The Anti-terrorism, Crime and Security Act 2001, c. 24 p.4 § 21, 23.
[350] *Id.* § 23; GROSS, *supra* note 348.

A detention certificate is subject to strict judicial supervision by the Special Immigration Appeals Commission. The judicial body is required to hold periodic reviews of the detention certificate, regardless of whether the detainee challenges the decision.[351] If there is no reasonable basis to issue a detention certificate, the commission has to nullify it.[352] In case of no-nullification, it could be appealed to the Court of Appeals and thereafter to the House of Lords.[353]

(3) Germany

The Residence Act sets forth the grounds for expulsion and pre-deportation detention of foreigners. The expulsion decision is made after "weighing the interests in the foreigner's departure against the foreigner's individual interests in remaining in the federal territory" under the totality of circumstances.[354] The foreigner may be expelled if there is an overriding public interest in him leaving. The Act provides a list of occasions where there is a particularly serious public interest in expelling him. One of these cases is terrorism involvement. A foreigner must be subjected to pre-deportation detention, if he:

a) threatens the free democratic basic order or the security of the Federal Republic of Germany,[355]
b) is a leader of a banned organization,[356]
c) is involved in violent activities in the pursuit of political or religious objectives or calls publicly for the use of violence or threatens the use of violence,[357] or

[351] The Anti-terrorism, Crime and Security Act 2001, c. 24 p.4 § 25, 26; GROSS, *supra* note 348, at 132-133.
[352] The Anti-terrorism, Crime and Security Act 2001, c. 24 p.4 § 25-1, 2.
[353] GROSS, *supra* note 348.
[354] [AUFENTHG], § 53.
[355] Such a threat is presumed "if there is reason to believe that the foreigner is or has been a member of an organization which supports terrorism", or he himself "supports or has supported such an organization", or he is "preparing or has prepared a serious violent offence endangering the state" under the Criminal Code Section 89a. *Id*. § 54-1-2.
[356] *Id*. § 54-1-3.
[357] *Id*. § 54-1-4.

d) incites others to hatred against segments of the population.[358]

The deportation order can be issued by the supreme *Land* authority (the highest federal authority) without a need for a prior expulsion order, in cases when there is a special danger to the security of the Federal Republic of Germany or a terrorist threat.[359] In other cases, the notice of intention to deport must be issued to the foreigner. He must be given a reasonable period between 7-30 days for voluntary departure.[360] This period can be shortened or waived altogether if the foreigner poses a serious danger to public safety or order.[361]

The Residence Act allows custody awaiting deportation to prepare and to secure deportation. Principally, pre-deportation detentions are issued by judicial order.[362] The Act suggests two types of pre-deportation orders: "custody to prepare deportation" and "custody to secure deportation". The former is issued to prepare deportation in cases when a deportation order cannot be issued immediately and if deportation would be much more difficult or impossible without such detention.[363] The latter is issued in cases when there are reasonable grounds that the foreigner will evade deportation.[364]

The duration of "custody to prepare deportation" cannot exceed six weeks. If a deportation order has been issued for a foreigner with terrorist involvement and the order is not immediately enforceable, a judicial order for "custody to secure deportation" can be issued.[365] Custody to secure deportation can be ordered for up to 6 months, and may be extended by a maximum of twelve

[358] *Id*. § 54-1-5-c.
[359] *Id*. § 58a-1; Tim Nikolas Mueller, *Preventive Detention as a Counterterrorism Instrument in Germany,* 62 CRIME L. SOC. CHANGE 323, 328 (2014).
[360] [AUFENTHG], § 59.
[361] *Id*. § 59-1-2.
[362] *Id*. § 62-2.
[363] *Id*.
[364] *See* generally *Id*. § 62-3-1-5.
[365] *Id*. § 62-3-1a.

months in cases where the foreigner hinders his deportation (for example by destroying travel documents like a passport).[366] It may additionally be extended for twelve more months in security or terrorism cases, and where the transmission of relevant documents was delayed.[367]

In exceptional cases, the authority preparing detention applications can automatically detain foreigners without the need of a judicial order. The administrative authority can order custody to secure deportation in cases where; 1) there is a strong suspicion that the deportation order that has been issued to avert a special danger to the security or a terrorist threat is not immediately enforceable, and 2) it is not possible to obtain the judicial order beforehand; and 3) "there is a well-founded suspicion that the foreigner intends to evade the order for custody to secure deportation".[368]

(4) Turkey

Immigration detention[369] is utilized in cases of visa violations as well as engagement in terrorism. In cases of terrorism, the orders of deportation can be issued against; a) leaders or members of a terrorist organization, b) aliens posing a threat against public safety, security, and health, and c) aliens who are deemed by international organizations to be associated with terrorist organizations.[370] These deportable aliens may be kept in administrative detention at most for six months, if they;

a) are negligent in timely deporting

b) pose a risk of flight or missing

[366] *Id*. § 62-4; Mueller, *supra* note 359.
[367] *Id*. § 62-4.
[368] *Id*. § 62-5-1, 2, 3.
[369] YABANCILAR VE ULUSLARARASI KORUMA KANUNU [Y.K.] [ALIENS AND INTERNATIONAL PROTECTION CODE] art. 54, 57 (Turk.).
[370] *Id*. art. 54.

c) violated the entrance and exit rules

d) used counterfeit documents, or

e) pose a threat against public safety, security and health.[371]

The order of administrative detention is given by the office of the governor, and can be extended for at most six more months.[372] The immigration detention order can be appealed to a magistrate's court by the alien, his legal representative, or his counsel.[373]

(5) The European Court of Human Rights

The European Convention on Human Rights Article 5---The Right to Liberty and Security --- provides the cases and conditions in which a person can be deprived of his liberty. Article 5-1-f permits immigration detention in cases of "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."[374] According to the ECtHR's interpretation of these words, the Article does not demand that the detention be reasonably considered as necessary, for instance to prevent the commission of new offenses or fleeing.[375] Whether the underlying reason for expulsion can be justified under national or Convention law is thus insignificant.[376] So

[371] *Id*. art. 54, 57- 2.
[372] *Id*. art. 54, 57- 1, 2, 3.
[373] *Id*. art. 57- 6.
[374] [E.C.H.R.] art. 5-1-f.
[375] Chahal v. The United Kingdom, 1996-V Eur. Ct. H. R. para. 112, *available at* https://hudoc.echr.coe.int/eng#{"tabview":["document"],"itemid":["001-58004"]}; J.N. v. The United Kingdom, 64 Eur. H. R. Rep. 491, 507, para. 81 (2016), *available at* https://hudoc.echr.coe.int/eng#{"itemid":["001-162855"]}; Khamroev and others v. Ukraine, App. No. 41651/10, at. para. 85 (2016), *available at http://hudoc.echr.coe.int/eng?i=001-166690*; S.Z. v. Greece, App. No. 66702/13, at. para. 53 (2018), *available at* http://hudoc.echr.coe.int/eng?i=001-183816.
[376] *Chahal*, at para. 112; *J.N.,* at para. 81.

long as the detention is made with a view to deportation or extradition and the deportation proceedings are conducted with due diligence, any immigration detention will be justified.[377]

Thus, according to the ECtHR, what matters is whether a reason of expulsion is stated in the statutes of a state. If terrorist involvement is one of those reasons, which mostly likely would be so in any democratic state, it may lawfully lead to the expulsion and pre-deportation detention of foreigners. For instance, in *Chahal v. the United Kingdom*,[378] a foreigner was detained "in view of the national security threat represented by him"[379]. The foreigner, Mr. Chahal, denied that he posed a national security threat and demonstrated his reasons for his argument. The Court deferred to the determination of national authorities, especially considering that a judicial panel reviewed the evidence relating to the national security threat posed by him and reached the same conclusion as the Home Secretary. The Court reiterated that this procedure provided "an adequate guarantee that there was at least prima facie grounds" to believe that national security would be in jeopardy if Mr. Chahal was at liberty, and that administrative authorities had not acted arbitrarily when ordering detention.[380]

The Court imposes some additional requirements for an extended immigration detention to continue to be permissible. The detention should be lawful under "substantive and procedural rules of national law",[381] the authorities must act with "due diligence" in conducting extradition proceedings,[382] and there should be sufficient guarantees against arbitrariness.[383]

In terms of lawfulness, the Court interprets the words "in accordance with a procedure prescribed by law" in the Article, and has declared that the ground and proceedings regarding

[377] *Chahal*, at para. 112, 113; *Khamroev*, at. para. 85; *S.Z.,* at. para. 53.
[378] *Chahal*, at para. 112, 113.
[379] *Id.* at para. 120.
[380] *Id.* at para. 122.
[381] *Id.* at para. 118.; *Khamroev,* at. para. 87-89; *J.N.,* at para. 84.
[382] *Chahal*, at para. 123; *Khamroev*, at. para. 96; *S.Z.,* at. para. 53.
[383] *Chahal*, at para. 123; *S.Z.,* at. para. 53.

detention should conform to the substantive and procedural rules of national law.[384] In this analysis, the Court scrutinizes the quality of that law, the state's compliance with the rule of law, and whether the law is sufficiently accessible, foreseeable and precise to avoid any risk of arbitrariness.[385]

When evaluating whether the authorities acted with due diligence, the Court examines whether there are "unjustified delays on the part of the domestic authorities",[386] and the length of the detention and extradition proceedings.[387] The Court does not impose any definite time limits for detention pending deportation, and assesses each case within its particular circumstances.[388] In its case law, the Court has found it excessive to detain individuals pending extradition for periods from about two to three years.[389] But in the national security case of *Chahal v. the United Kingdom,* the Court allowed the six years of lengthy detention considering the exceptional circumstances of the case, and the facts that authorities acted with due diligence and that there were sufficient guarantees against arbitrariness.[390]

In order for a detention not to be arbitrary, the immigration detention "must be carried out in good faith", "it must be closely connected to the ground of detention relied on by the Government", "the place and conditions of detention should be appropriate", and "the length of the detention should not exceed that reasonably required for the purpose pursued".[391] The existence of an effective remedy (like a judicial review procedure) to contest the lawfulness and the length

[384] *Chahal*, at para. 118; *J.N.,* at para. 84; *Khamroev*, at. para. 85; *S.Z.,* at. para. 53.
[385] *Chahal*, at para. 123; *Khamroev*, at. para. 86; *J.N.,* at paras. 77, 84.
[386] R.M. v. Turkey, App. no. 81681/12, at. para. 58 (2017), *available at* http://hudoc.echr.coe.int/eng?i=001-174402.
[387] *R.M.,* at. para. 59, 60.
[388] *J.N.,* at para. 83.
[389] Quinn v. France, App. no. 18580/91, 21 Eur. H.R. Rep. 529 (1995), *available at* http://hudoc.echr.coe.int/eng?i=001-57921; Gallardo Sanchez v. Italy, 2015 Eur. Ct. H.R., *available at,* http://hudoc.echr.coe.int/eng?i=001-153518.; *R.M.*
[390] *Chahal*, at para. 12, 123.
[391] Z.A. and Others v. Russia, para. 95 (2017), *available at* http://hudoc.echr.coe.int/eng?i=001-172107 ; *S.Z.,* at. para. 53.

of detention is considered an important safeguard against arbitrariness.[392] Such a remedy should be "available during a person's detention to allow that person to obtain speedy review", it must be of a "judicial character", must provide appropriate guarantees, must be capable of leading to release, and must be sufficiently certain in theory and practice.[393]

b) Pre-Trial Detention

(1)The United States

The Bail Reform Act of 1984[394] allows the detention of an arrestee pending trial, if "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community".[395] The Act also lists some offenses that raise a rebuttable presumption on flight risk and endangerment of community safety in cases when there is *probable cause* about their commission.[396]

In a detention hearing under the Bail Reform Act, courts are required to assess whether any release conditions will reasonably assure the appearance of the person and the safety of any other person or the community in two groups of cases.[397] The first group involves; a) crimes of violence, b) offenses for which the maximum sentence is life imprisonment or death, c) offenses for which the maximum sentence is ten years or more in the Controlled Substances Act, d) any felony if the person has been convicted of two or more offenses, e) any felony that is not a crime of violence but involves a minor victim or that involves the possession or use of a firearm or destructive device,

[392] *Chahal*, at para. 122; *J.N.,* at para. 77.
[393] *J.N.,* at para. 88.
[394] 18 U.S.C. § 3142.
[395] *Id.* § 3142-e-1.
[396] *Id.* § 3142- e-3.
[397] *Id.* § 3142- f-1, 2.

or any other dangerous weapon, or a failure to register.[398] The second group includes cases that involve a serious risk that the arrestee will flee, or a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror.[399] This provision shows that courts are required to consider alternative measures to pre-trial detention, even in cases when it is more likely to order detention pending trial. These are cases involving serious crimes and cases where there is a serious risk of flight, the obstruction of justice, or tampering with witnesses or jurors.[400]

In determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community, courts are required to take into account various factors: the nature and circumstances of the offense charged, the weight of the evidence against the person, the history and characteristics of the person, the nature and seriousness of the danger to any person or the community that would be posed by the person's release.[401]

When assessing the nature and circumstances of the charged offense, courts should consider whether the offense is a crime of violence, a federal crime of terrorism, or involves a minor victim, or a controlled substance, firearm, explosive, or destructive device.[402] In evaluating the history and characteristics of the person, courts should take into account the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal

[398] *Id.* § 3142- f-1.
[399] *Id.* § 3142- f-1, 2.
[400] *Id.*
[401] *Id.* § 3142-g. *See* also Emilio C. Viano, *Pre-trial Detention in the United States of America: A Multiple Problem Crisis, in* PRE-TRIAL DETENTION: HUMAN RIGHTS, CRIMINAL PROCEDURAL LAW AND PENITENTIARY LAW, COMPARATIVE LAW 812 (2012) (P.H.P.H.M.C. VAN KEMPEN ed.).
[402] 18 U.S.C. § 3142-g-1.

history, and record concerning appearance at court proceedings.[403] If the person has committed a crime while on release for another offense, courts should also consider the release status of the accused at the time of the current offense or arrest. Judges should determine whether he was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law.[404]

In *United States v. Salerno*[405] case, the U.S. Supreme Court assessed the Bail Reform Act's requirement of flight risk and the safety of community under the "clear and convincing evidence" standard.[406] That is, in order for a judge to order pre-trial detention, there must be clear and convincing evidence of flight risk and endangerment of community safety if released. In a "clear and convincing evidence" assessment, courts will consider the above mentioned factors such as the nature and seriousness of the offense, the weight of the evidence, the history and characteristics of the person, and the nature and seriousness of the danger to any person or the community that would be posed by the person's release.[407]

The Court in *Salerno* basically ruled that if there was clear and convincing evidence that release conditions would not eliminate the flight risk and endangerment of the safety of the community, the detention of an arrestee pending trial would comply with the substantive due process principle under the Fifth Amendment.[408] The Court weighed the legitimate and compelling government interest in preventing crime against an individual's interest in liberty, and reiterated that the right to liberty may in some cases be subordinated to the greater needs of society when the

[403] *Id.* § 3142-g-3-A.
[404] *Id.* § 3142-g-3-B.
[405] United States v. Salerno, 481 U.S. 739 (1987).
[406] *Id.* at 741.
[407] 18 U.S.C § 3142- g-1-4.
[408] *Salerno*, 481 U.S. at 751.

government's interest was sufficiently weighty, as in this case.[409] Since the legislature precisely described the circumstances of pre-trial detention including dangerousness factors, and the Court required the standard of "clear and convincing evidence" of identifiable and articulable threat, the Court concluded that pre-trial detention upon a showing of future dangerousness complied with the Due Process Clause of the Fifth Amendment.[410]

In terrorism cases, the U.S. law requires "probable cause" instead of "clear and convincing evidence" to raise a rebuttable presumption in favor of pre-trial detention.[411] If *probable cause* exists regarding the commission of a terror crime, there emerges a rebuttable assumption that no release conditions will reasonably assure the safety of the community and the appearance of the person at trial. Turkey also has a similar rule for terrorism. Yet, the level of suspicion required is strong suspicion, which is equivalent to the clear and convincing evidence standard.[412]

The Bail Reform Act is under-inclusive, for it only incorporates flight risk and safety as reasons for pre-trial detention. Witness tampering and the destruction of evidence are not among these reasons. They are instead regarded only as pre-requirements for conducting a pre-trial detention hearing to assess whether any release conditions would reasonably assure the appearance of the accused and the safety of the community.[413] U.S. legislators may have been looking from a different angle than their counterparts in Europe. But the rule could have been more

[409] *Id.* at 750-52. The *Salerno* case involved two gang leaders who were charged with fraud, extortion, gambling, and conspiracy to commit murder. The government moved for the pre-trial detention of the two defendants. The District Court granted the government's detention motion on the grounds that the criminal organization would continue its illegal business if released even on the strictest conditions of bail. Since the illegal business involved threats, beatings and murder in this case, the Court concluded that the defendants posed a real threat to the community, and therefore the government's interest was weighty enough to prevail over the defendant's liberty interest. The Supreme Court upheld the District Court's judgment. *Id.* at 743, 744, 755.
[410] *Id.* at 746, 750, 751.
[411] *Id.* § 3142- e-3-B, C.
[412] *See infra* Sec. II-A-3-b-5.
[413] 18 U.S.C. § 3142- f-2.

comprehensive, if witness tampering and destruction of evidence had been integrated into the provision as independent reasons.

(2) The United Kingdom

The Bail Act 1976 provides the occasions in which the bail need not be granted to a defendant. According to Section IV, a defendant may not be granted bail if there are substantial grounds for believing that if released on bail, he would; a) "fail to surrender to custody", b) "commit an offence while on bail", or c) "interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person".[414] Like other states, flight risk, the prevention of the commission of a new offense, witness tampering, and the destruction of evidence (the obstruction of justice) are the main reasons for pre-trial detention. In addition to these primary reasons, the U.K. Act suggests that defendants can be detained for their own protection, or, if he is a child or young person, for his own welfare.[415]

When making pre-trial detention decision, courts should take into consideration the following factors:

(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),

(b) the character, antecedents, associations and community ties of the defendant,

(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,

[414] The Bail Act 1976, c. 63 § 4 sch. I, p.1, art. 2 (Gr. Brit). *See* also Stephen Cameron Shute & Paul David Mora, *Pre-trial Detention, the Treatment of Terror Suspects, and the Human Rights Act: A Critical Analysis of the Position in England and Wales*, *in* PRE-TRIAL DETENTION: HUMAN RIGHTS, CRIMINAL PROCEDURAL LAW AND PENITENTIARY LAW, COMPARATIVE LAW 368 (2012) (P.H.P.H.M.C. VAN KEMPEN ed.).
[415] The Bail Act 1976, c. 63 § 4 sch. I, p.1, art. 3.

(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,

as well as to any others which appear to be relevant.[416]

Since the U.K. law also allows pre-trial detention to prevent the commission of a new offense, we may conclude for the purposes of this sub-chapter that pre-trial detention for future dangerousness is lawful under the U.K. law.

U.K. law's structure is similar to that of U.S. law probably as a result of Anglo-Saxon legal traditions. For one thing, they both perceive pre-trial detention as an alternative to bail. Bail is the rule; pre-trial detention is the exception. Pre-trial detention is ordered only if bail conditions are not met. Yet, one important difference is that while bail is a right under U.K. law with some exceptions,[417] there is no right to bail in U.S. law.[418]

For another thing, both U.S. and U.K. laws set forth many factors that guide judges to decide on bail or pre-trial detention. These factors would help judges make more individualized determinations for each defendant and incentivize them to touch upon relevant factors in their judicial reasoning. As a result, judges may refrain from acting as rubber stamps and be tempted to provide fully grounded decisions.

(3) France

The French Code of Criminal Procedure Article 144 states that:

Pre-trial detention may only be ordered or extended if it is the only way:

1º to preserve material evidence or clues or to prevent either witnesses or victims or their families being pressurized or fraudulent conspiracy between persons under judicial examination and their accomplices;

[416] *Id.* § 4 sch. I, p.1, art. 9.
[417] *Id.* § 4 sch. I, p.1, art. 2, 3.
[418] Carlson v. Landon, 342 U.S. 524, 545 (1952); *Salerno*, 481 U.S. at 752, 753.

2º to protect the person under judicial examination, to guarantee that he remains at the disposal of the law, **to put an end to the offence or to prevent its renewal**;

3º to put an end to an exceptional and persistent disruption of public order caused by the seriousness of the offence, the circumstances in which it was committed, or the gravity of the harm that it has caused.

The French law thereby allows pre-trial detention for wide range of reasons:

a) Protection of evidence: to prevent destruction of material evidence, tampering of witnesses or victims or their families, or fraudulent conspiracy between suspects and their accomplices,
b) Protection of the suspect or defendant,
c) Eliminate the flight risk: to ensure that the suspect is subject to the law,
d) Prevention of further crimes: To put an end to the commission of the offence or to prevent its renewal,
e) To put an end to the persistent disruption of public order caused by the seriousness of the offence, the circumstances in which it was committed and the harm it caused.

French law involves the most comprehensive reasons, as compared to other states, for pre-trial detention. It provides many more reasons than flight risk, the destruction of evidence, and witness tampering. It allows pre-trial detention to protect the defendant, to prevent future offences, and to end the continuous disruption of public order as well. Since pre-trial detention to prevent future offenses is allowed in the French system, we may conclude for the purposes of this sub-chapter that pre-trial detention for future dangerousness is lawful under French law.

(4) Germany

The German Code of Criminal Procedure Section 112 states that the remand detention may be ordered if grounds for arrest are satisfied, and there is strong suspicion that the suspect committed the offence. The term "arrest" mentioned in the official translation should be understood as "detainment" or "seizure". The article is as follows:

> (1) Remand detention may be ordered against the accused if he is strongly suspected of the offence and if there is a ground for arrest. It may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed.
>
> (2) A ground for arrest shall exist if, on the basis of certain facts,
>
> 1. it is established that the accused has fled or is hiding;
> 2. considering the circumstances of the individual case, there is a risk that the accused will evade the criminal proceedings (risk of flight); or
> 3. the accused's conduct gives rise to the strong suspicion that he will
>
> a) destroy, alter, remove, suppress, or falsify evidence,
> b) improperly influence the co-accused, witnesses, or experts, or
> c) cause others to do so,
>
> and if, therefore, the danger exists that establishment of the truth will be made more difficult (risk of tampering with evidence).
> …

The Code allows detention on remand if there is strong suspicion that an offense is committed and there are grounds for arrest. Grounds for arrest are flight risk, destruction of evidence, and tampering with evidence. In cases of the crime of forming terrorist organizations, detention may be ordered pursuant to Section 112-3 even if one of these grounds for arrest does not exist.

Section 112a additionally sets forth another ground for arrest (detention), which is future dangerousness. If "certain facts substantiate the risk that prior to final conviction a person will commit further serious criminal offences of the same nature or will continue the criminal offence", and "if detention is required to avert the imminent danger", this must also be considered as a reason

for arrest under the Section. Future dangerousness can be a reason for arrest only in enumerated serious offenses, one of which is the repeated commission of violent crimes that endanger the state and undermine the legal order.

Pre-trial detention upon future dangerousness, therefore, is permissible under German law for certain crimes and when there are supporting facts establishing that the individual will either commit further crimes or consummate the prior offense.[419] The purpose of the detention is to avert imminent danger.

(5) Turkey

Turkish Criminal Procedure Code Article 100 sets forth three reasons for pre-trial detention upon the determination of strong suspicion regarding the commission of a crime. These reasons are as follows: 1) flight or hiding, or the risk of flight, 2) destruction or alteration of evidence upon strong suspicion thereon, 3) witness tampering.[420] The government must provide a strong factual showing that one of these grounds are met, and if so, a defendant can be detained pending trial. The statute requires "concrete facts" for flight risk, and "strong suspicion" for the destruction of evidence and witness tampering. We may conclude that the levels of cause that the Code requires are "the preponderance of evidence" for flight risk, and "clear and convincing evidence" for witness tampering and the destruction of evidence.

Besides these three general reasons, the article also provides a list of offenses which presumptively satisfy the standards for detention. These crimes are as follows: genocide, crimes

[419] For more information, *see* Johannes Feest, *Pre-trial Detention in Germany: Factual Reduction and Legal Confusion*, *in* PRE-TRIAL DETENTION: HUMAN RIGHTS, CRIMINAL PROCEDURAL LAW AND PENITENTIARY LAW, COMPARATIVE LAW 398 (2012) (P.H.P.H.M.C. VAN KEMPEN ed.).

[420] *See* also FERIDUN YENİSEY & AYŞE NUHOĞLU, CEZA MUHAKEMESİ HUKUKU 360-362 (2015); ÖZTÜRK ET AL, CEZA MUHAKEMESİ HUKUKU [CRIMINAL PROCEDURE LAW] 463-466 (2015); NUR CENTEL & HAMİDE ZAFER, CEZA MUHAKEMESİ HUKUKU [CRIMINAL PROCEDURE LAW] 336-338 (2013); SOYASLAN, *supra* note 289, at 320.

against humanity, murder, aggravated assault, torture, sexual assault, child molestation, theft, robbery, the production and trafficking of drugs, the establishment of illegal organization to commit crimes, crimes against state security, crimes against constitutional order, weapons trafficking, embezzlement, crimes of smuggling, intentional forest fire, crimes regarding illegal demonstrations, and terror crimes.[421] If there is "strong suspicion" about the commission of one of these crimes, a judge may presume that there is a risk of flight, the destruction of evidence or the tampering of witnesses.

What is lacking in the Turkish system is "future dangerousness" as a reason for pre-trial detention.[422] That is, besides the existing reasons, the Turkish legislature should have considered the possibility that the suspect will commit further serious offences in the future, and should have enacted it as a fourth reason for detention. Although the violent crimes that raise the presumption imply dangerousness, the legislature should have made it clear that suspects or criminals can be detained pending trial if they have the propensity to commit more crimes or to pose a threat to others. This is mainly because the existing presumption is rebuttable by the defendant. If the defendant shows that he does not pose any risk of flight, destruction of evidence or witness tampering, the Court has to release the person. The person who has the propensity to commit another terror crime may therefore be set free. The release of a dangerous person would put the society in danger and generate one more obstacle to the already demanding counterterrorism efforts. The police would need to continuously follow the released in order to prevent his engagement in terrorism. Adding future dangerousness, however, will at least take the already

[421] CEZA MUHAKEMESI KANUNU [C.M.K.] [CRIMINAL PROCEDURE CODE] art. 100-3 (Turk.). *See* also YENİSEY & NUHOĞLU, *supra* note 420, at 362, 363; ÖZTÜRK ET AL., *supra* note 420, at 466, 467; CENTEL & ZAFER, *supra* note 420, at 338; SOYASLAN, *supra* note 289, at 320, 321.
[422] YENİSEY & NUHOĞLU, *supra* note 420, at 363.

accused criminals off the ground, diminish the number of dangerous people that security officials need to oversee outside of the prison, and prevent any further attacks.

The level of cause for the reason of dangerousness should be either "the preponderance of evidence" or "clear and convincing evidence", depending on how common it is to commit more crimes or harm others pending trial in the country. If the propensity to commit more crimes or harm third persons is common and can be expected from everybody, like in "flight risk" situations, the level of cause should be determined as "the preponderance of evidence". Yet, if it is not so common or may not be expected from every criminal, like in "the destruction of evidence" or "witness tampering", the level of cause should be set as "clear and convincing evidence".

(6) The European Court of Human Rights

The European Convention on Human Rights Article 5 regulates the right to liberty and security of a person, and the specific conditions under which the right can be limited. Its sub-article 1-c describes the circumstances in which the deprivation of liberty through pre-trial detention is lawful. The article allows the detention in cases of "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".[423] The Convention establishes three justifications for pre-trial detention: 1) bringing the defendant before the competent legal authority, 2) prevention of the commission of an offence, and 3) flight risk.

The European Court of Human Rights interpreted member states' grounds for pre-trial detention in various cases. Generally, the justifications that were regarded as permissible, provided

[423] [E.C.H.R.] art. 5-1-c.

that the duration of detention was reasonable, are as follows: 1) the risk of pressure on witnesses, 2) the danger of absconding, 3) the preservation of public order or prevention of public disorder.

In *Letellier v. France*[424], a case of detention of the accessory of a pre-meditated and organized murder, the Court considered France's grounds for pre-trial detention. First, in terms of tampering with witnesses, the Court ruled that such risk must have endured during the whole detention period in order to justify its lengthiness. In the Court's words: *"a genuine risk of pressure being brought to bear on the witnesses may have existed initially, but (*The Court) *takes the view that it diminished and indeed disappeared with the passing of time*." [425] Second, with regard to the danger of absconding, the Court determined that such danger could not have been assessed merely on the basis of the severity of a sentence. There must be some other relevant factors either confirming the existence of such danger to justify pre-trial detention.[426]

Third, in terms of the preservation of public order, the Court discussed whether the commission of a crime by itself would be sufficient to establish a risk of disturbance of public order upon pre-trial release.[427] The Court accepted the fact that particular grave offenses and their effect on the public may justify pre-trial detention, yet only for a short period of time.[428] The Court ruled that pre-trial detention on public order grounds could be *"regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence*."[429] The Court, in *Geisterfer v. the Netherlands*[430] case, reiterated the requirement that the government

[424] Letellier v. France, App. No. 12369/86 (1991), *available at* http://hudoc.echr.coe.int/eng?i=001-57678.
[425] *Id.* at para. 39.
[426] *Id.* at para. 42, 43.
[427] *Id.* at para. 50.
[428] *Id.* at para. 51.
[429] *Id.* at para. 51.
[430] Geisterfer v. the Netherlands, App. No. 15911/08 (2014), *available at* http://hudoc.echr.coe.int/eng?i=001-148654.

must show a threat to public order that would be caused by the release,[431] and ruled that courts could not presume that the gravity of an offense would justify detention pending trial at all times regardless of the existence of suitable release conditions.[432] Detention determinations from such "a purely abstract point of view" were thus prohibited.[433]

It is well-established in the Court's case law that there must be *"specific indications of a general public interest, which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty".*[434] Further, overriding reasons for pre-trial detention must persist during the entire detention period in order to keep a person in remand for an extended period of time.[435]

c) Post-Sentence Detention

(1) The United States

The U.S. Supreme Court, in two opinions, has approved the post-sentence preventive detention of dangerous offenders who have difficulty in controlling their behaviors due to a mental abnormality or a personality disorder. In *Kansas v. Hendricks,*[436] the Supreme Court evaluated the constitutionality of the Kansas Sexually Violent Predator Act,[437] which established procedures for

[431] *Id.* at para. 33.
[432] *Id.* at para. 33, 43.
[433] Goral v. Poland, App. No. 38654/97, para. 64 (2004), *available at* http://hudoc.echr.coe.int/eng?i=001-61415; Kudła v. Poland, 2000-XI Eur. Ct. H.R. 197, 227, para. 110, *available at* http://hudoc.echr.coe.int/eng?i=001-58920; *Geisterfer,* at para. 33.
[434] Labita v. Italy, 2000-IV Eur. Ct. H.R. 99, 138, para. 152, *available at* http://hudoc.echr.coe.int/eng?i=001-58559. ; *Kudła*, at. para. 110; McKay v. The United Kingdom, 2006-X Eur. Ct. H.R. 325, 339, para. 42, *available at* http://hudoc.echr.coe.int/eng?i=001-77177. ; *Geisterfer*, at para. 38; Panchenko v. Russia, App. No. 45100/98 at. para. 97 (2005), *available at* http://hudoc.echr.coe.int/eng?i=001-68148.
[435] *Kudła*, at. para. 115.
[436] Kansas v. Hendricks, 521 U.S. 346 (1997).
[437] Kan. Stat. Ann. § 59-29a01 (1994).

the civil commitment of persons who were likely to engage in "predatory acts of sexual violence" as a result of a "mental abnormality" or a "personality disorder". The state applied the statute to an inmate who was convicted of multiple counts of sexually molesting children and who was going to be released from prison soon after the statute became law. The inmate, Hendricks, challenged the statute on the grounds of substantive due process, double jeopardy, and the prohibition on *ex post facto* application of penal rules. After the Kansas Supreme Court invalidated the Act, the Court ruled that the statute was constitutional, and complied with the Due Process and Double Jeopardy Clauses of the Fifth Amendment as well as with the prohibition on ex post facto application of punitive rules under U.S. Constitution Article 1.

The Supreme Court ruled that the statute complied with the substantive due process requirements prohibiting arbitrariness, as the statute required more than a mere "predisposition to violence".[438] For civil commitment proceedings to be initiated, there must have been a show of prior conviction or charge of a sexually violent crime as well as a mental abnormality or personality disorder making the person likely to engage in the predatory acts of sexual violence upon release. Because the statute did not allow civil commitment solely on the grounds of general dangerousness, but in addition required "previous instances of violent behavior" and "mental illness" or "mental abnormality", it satisfied the substantive due process clause forbidding arbitrary governmental action. The Court emphasized that the liberty interest (upon fully serving a sentence) was not absolute and may be limited even in the civil context.[439]

In terms of the double jeopardy argument, the Court rejected Hendrick's claim that the continued detention was based upon the prior conduct for which he had already been convicted

[438] *Hendricks*, 521 U.S. at 357.
[439] *Id.* at 356-58.

and served the prison sentence.[440] The Double Jeopardy Clause prohibits multiple "punishment", and the Court held that the civil commitment was not a "punishment" because it did not serve the punitive purposes of retribution and deterrence.[441] Rather, it fulfilled the purposes of incapacitation and treatment of sexually violent offenders.[442] Thus, the main goal of the civil commitment statute was not to punish an offender twice but instead to segregate sexually violent offenders from the public. Therefore, it did not offend the Double Jeopardy Clause.

In *Kansas v. Crane*,[443] the Court re-explained and crystallized its ruling in *Kansas v. Hendricks*. It made it clear that the state was not required to prove "lack of control" in order to establish proper grounds for civil commitment.[444] Rather, some proof of serious "difficulty"[445] in controlling behavior, coupled with a finding of dangerousness would suffice to authorize civil commitment. The court stated that it was not possible to measure inability in controlling behaviors with mathematical precision, and that scientific determinations did "not control ultimate legal determinations."[446]

In *Kansas v. Crane*, the Court did not draw a distinction between volitional, emotional, and cognitive impairments for constitutional purposes. It further recognized that *"there may be 'considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control . . . behavior.'"*[447] This finding is significant in the sense that emotion or volition-related mental abnormalities that show themselves as radicalism and conditioned thinking in terrorism cases may justify the civil commitment of terrorists in future decisions.

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[440] *Id.* at 361.
[441] *Id.* at 362-63.
[442] *Id.* at 365-66.
[443] Kansas v. Crane, 534 U.S. 407 (2002).
[444] *Id.* at 411.
[445] *Id.* at 413.
[446] *Id.* at 413.
[447] *Id.* at 415; Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 685 (1983) (*discussing* "psychotic" individuals).

The dissenting opinion written by Justice Scalia in *Kansas v. Crane* would have gone even further, as he would have permitted detention without any showing that the detainee could not control his behavior. Justice Scalia asserted that one could exercise volition but could still be extremely indifferent to others' rights, which would make him too dangerous to set free. In his own words: "The man who has a will of steel, but who delusionally believes that every woman he meets is inviting crude sexual advances, is surely a dangerous sexual predator." Justice Scalia's dissenting opinion interpreting *Hendricks* is important, as he was one of the Justices in the *Hendricks* majority.[448] It seems that there is not yet a clear consensus on the scope of *Hendricks* and the post-sentence detention of dangerous offenders. Justice Scalia's view might pave the way for preventive detention of convicted terrorists who have served their sentences, solely on dangerousness grounds in the future.

(2) Germany

German law permits post-sentence detention of dangerous offenders for the purpose of incapacitation. German Criminal Code Section 66 (detention for the purpose of incapacitation) and Section 66b allow for the post-sentence detention of particular types of dangerous offenders due to their propensity to commit serious offenses.[449]

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[448] Justice Thomas, who took part in the majority opinion in *Hendricks*, dissented and joined the dissent opinion of Scalia in *Crane*.

[449] Section 66 Detention for the purpose of incapacitation

(1) The court shall make an incapacitation order in addition to the term of imprisonment if

1. a person has been sentenced for an intentional offence to a term of imprisonment of not less than two years, and

a) **the offence was directed against life or limb, personal freedom or sexual self-determination**,

b) the offence falls under Chapters One, Seven, Twenty or Twenty-Eight of the Special Part, or under the Code of International Criminal Law or the Drugs Act, and the maximum sentence threatened is **no less than ten years' imprisonment**, or

German trial courts are authorized to determine post-sentence detainment for incapacitation purposes at the time of the sentencing hearing, and a determination may also be made at a later point. An incapacitation order at the sentencing hearing can be issued for:

1) an offender who had been sentenced for an intentional offense to at least two years; and his offense targeted the life and limb, personal freedom or sexual self-determination of a person, or his offense falls under particular chapters of the Criminal Code, or the Code of International Criminal Law or the Drugs Act and requires no less than ten years of imprisonment.[450]

2) recidivists[451]

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c) violates section 145a insofar as the supervision order was made on the basis of an offence under a) or b) above, or if it violates § 323a insofar as the offence committed in the drunken state was one of those mentioned under a) or b) above.

2. the offender had been convicted for offences under No. 1 above, committed before the present offence, at least twice to a term of imprisonment of no less than one year each,

3. the offender had for at least one of these offences before the present offence served at least two years in prison or under a custodial measure of rehabilitation and incapacitation, and

4. a **comprehensive evaluation at the time of the present conviction of the convicted person and his offences reveals that, due to his propensity to commit serious offences, particularly of a kind resulting in serious emotional trauma or physical injury to the victim, he poses a danger to the general public**.

Section 66b Subsequent incapacitation order

If pursuant to section 67d (6) a mental hospital order has been declared moot because the condition causing insanity or diminished responsibility on which the order was based did not exist at the time of that declaration, the court may subsequently make an incapacitation order

1. if the mental hospital order pursuant to section 63 was made based upon more than one of the offences set forth in section 66 (3) 1st sentence or if the person had either previously been sentenced to a term of imprisonment of no less than three years or had a mental hospital order made against him because of one or more such offences having been committed by him prior to the offence leading to the mental hospital order pursuant to section 63, and

2. if a comprehensive evaluation of the person, his offences and his development until the date of the decision indicate a **high likelihood of his committing serious offences resulting in serious emotional trauma or physical injury to the victims.**

This shall apply mutatis mutandis if after serving an order under section 63 a term of imprisonment imposed at the same time is to be enforced in its entirety or in part.

[450] STRAFGESETZBUCH [StGB] [PENAL CODE], § 66-1-1-a, b (Ger.).
[451] *Id.* § 66-1-2,3.

3) offenders who poses a danger to the general public "due to his propensity to commit serious offenses, particularly of a kind resulting in serious emotional trauma or physical injury to the victim".[452]

A subsequent incapacitation order can be issued if there is a high likelihood that the offender will commit offences resulting in serious emotional trauma or physical injury to the victims. After the serving of ten years of an incapacitation order, the court must terminate the measure if there is no more "danger that the person under placement will commit serious offenses resulting in serious emotional trauma or physical injury to the victims."[453]

German law provides that detention for incapacitation must be carried out in institutions which offer some level of care and comprehensive treatment through an implementation plan. Psychiatric, psycho-socio-therapeutical treatment that is suitable to the needs of the detainee must also be provided. Such detention must be implemented in special buildings or sections that are separate from the prison regime.[454]

(3) The European Court of Human Rights

The European Convention on Human Rights sets forth the permissible circumstances for preventive detention in its Article 5. Preventive detention is permissible;[455] 1) when it is reasonably considered necessary to prevent committing an offense,[456] 2) for the prevention of the spreading

[452] *Id.* § 66-1-4.
[453] *Id*. § 67d-3.
[454] *Id.* § 66c-1-1-a, 1-2-b.
[455] Reasons for pre-trial detention are yet not provided in this section.
[456] [E.C.H.R.] art. 5-1-c.

of infectious diseases,[457] 3) the prevention of the unsound mind,[458] alcoholics,[459] drug addicts or vagrants, and 4) to prevent an unauthorized entry into the country.[460] For the purposes of this section, only cases regarding post-sentence detainment will be scrutinized. [461]

The European Court of Human Rights evaluated Germany's above-mentioned post-sentence detention regime which was carried out for the incapacitation of dangerous offenders in *M. v. Germany.*[462] The Court ruled that the German law did not comply with the right to liberty under the Convention. The case involved the post-sentence detention of a recidivist who had committed many assaults.[463] The Court found that any potential further offenses were not concrete and specific enough to satisfy the requirement conditioning detention on the prevention of "an

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[457] [E.C.H.R.] art. 5-1-e.

[458] *Id.* The Court rejected to provide a precise determination for "unsound mind", considering that its meaning would evolve in time with the effect of any progress in psychiatry. In order to preventatively detain a person on the grounds of unsound mind, three conditions should be satisfied:
1) True mental disorder must be established before a competent authority on the basis of objective medical expertise,
2) The mental disorder must be of a kind or degree warranting compulsory confinement: the confinement of a person is necessary in cases when he needs therapy, medication or other clinical treatment to cure and alleviate his condition, but also where he needs control and supervision to prevent him from causing harm to himself or others.
3) The validity of continued confinement depends on the persistence of such a disorder. Petschulies v. Germany, App. No. 6281/13 at paras. 59, 61 (2016), available at http://hudoc.echr.coe.int/eng?i=001-163358.; Bergman v. Germany, App. No. 23279/14 at. paras. 96, 97 (2016), *available at* http://hudoc.echr.coe.int/eng?i=001-159782.; S. v. Germany, App. No. 3300/10 at para. 80 (2012), *available at* http://hudoc.echr.coe.int/eng?i=001-111682.; Glien v. Germany, App. No. 7345/12 at paras. 72, 73 (2014), *available at* http://hudoc.echr.coe.int/eng?i=001-138580; Haidn v. Germany, App. No. 6587/04 at para. 77 (2011), *available at* http://hudoc.echr.coe.int/eng?i=001-102621; Varbanov v. Bulgaria, 2000-X Eur. Ct. H.R. 225, 240, para. 45 (2000); Winterwerp v. the Netherlands, App. No. 6301/73 at. para. 39 (1979), available at https://hudoc.echr.coe.int/eng#{"itemid":["001-57597"]}.

[459] The Court ruled in *S. v. Germany* and *Petschulies v. Germany* that:

> The object and purpose of this provision cannot be interpreted as only allowing the detention of "alcoholics" in the limited sense of persons in a clinical state of "alcoholism". Persons who are not medically diagnosed as "alcoholics", but whose conduct and behavior under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety. It does not, however, permit the detention of an individual merely because of his alcohol intake. That is to say, it is not necessary for a person to be alcoholic in the clinical sense to be preventively detained. A person who poses a threat to the society or themselves due to his alcohol intake can thus be subject to preventive detention. *S.,* at para. 83; *Petschulies*, at para. 65.

[460] [E.C.H.R.] art. 5-1-e.

[461] For more information, *see* Edwin Bleichrodt, *Right to Liberty and Security (Article 5),* in PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 447-469 (2018).

[462] M. v. Germany, 2009-VI Eur. Ct. H. R. 169, *available at* http://hudoc.echr.coe.int/eng?i=001-96389.

[463] Attempted murder, robbery, dangerous assault, blackmail, the stabbing of a prison guard, and the assault of a disabled prisoner.

offense" under of the Convention.[464] The Court additionally required that the offense and its place, time and victims must be specific and concrete in order to justify post-sentence detention.[465] The Court eventually concluded that detention on general dangerousness grounds was impermissible, and that an individual or a category of individuals with a general propensity to commit a crime (without specific and concrete information regarding the upcoming offense) could not be an adequate justification for preventive detention.[466]

(4) Turkey

Turkish law does not include any provision allowing the preventive detention of dangerous offenders after they have served their sentences. It only provides for probation measures for recidivists after the serving of their sentences. The duration of such probation is at least one year, which could be extended by a judge up to five years.[467] Probation terms for post-sentence probation are the same with the terms applied for parole release: voluntary public work, supervision and surveillance at a house or a particular place, prohibition on traveling to particular places, participation in particular rehabilitation programs.[468] Detention in rehabilitation centers is not among the possible probation measures. Turkish law thus does not offer any post-sentence detention even specifically for terrorists, who are known to become even more radicalized and professionalized in harsh prison conditions.

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[464] *M.,* at. paras. 89, 102, citing *Guzzardi* para. 102. *See* also *Haidn*, at para. 76.
[465] *M.,* at. para. 102. For similar rulings: Blokhin v. Russia, 2016 Eur. Ct. H. R. at. paras.122, 123, *available at* http://hudoc.echr.coe.int/eng?i=001-161822; *Haidn*, at para. 90, *available at* http://hudoc.echr.coe.int/eng?i=001-102621; Guzzardi v. Italy, App. no. 7367/76, at para. 102 (1980), *available at* http://hudoc.echr.coe.int/eng?i=001-57498.
[466] *See* also Bleichrodt, *supra* note 461, at 459.
[467] Infaz ve Güvenlik Tedbirlerinin Uygulanması Hakkında Kanun [I.K.] [THE CODE ON THE EXECUTION OF PUNISHMENT AND SECURITY MEASURES Article] art. 108-4, 6 (Turk.).
[468] [I.K.] art. 105-A-5.

## 4. Interviews: The Need to Focus on Prevention Instead of Prosecution

"The Turkish system seems to be designed to detect terrorists after a terror attack than to prevent it", said a public prosecutor, who was responsible for prosecuting terror crimes, in a meeting in Ankara. He added:

> We have more tools to investigate and prosecute than to prevent a deadly terror attack. The two occasions that we can detain an attacker before he consummates his offense are: a) in cases of attempt, and b) when we have precise information regarding the identity of a future attacker and when the place, time, and the way of an attack is clear. We cannot jump in, seize and prosecute a future attacker without concrete information on a particular attack. This is because we can detain people only for investigation and prosecution purposes, respectively through arrest and pre-trial detention. The Turkish system is not open to preventive detention at all, if the offense is not crystalized enough. That is, without a certain crime reasonably attributable to a person, we just wait for terrorists' new action or follow them through intelligence. We know that an attack is underway but we have to wait for a terrorist organization to more clearly determine its attacker and the place of attack. If we determine the attacker, we seize him for membership in a terrorist organization in order to prevent the attack. Yet, the organization in most cases has substitutes for an attacker. So, they conduct it anyways, which forces us to follow the attacker more closely and to identify other details of the attack to prosecute for attempt before another militant consummates the offense. In some cases, responsible heads of the organization make last minute changes of their target or mislead intelligence services by leaking incorrect information regarding the place, time and conductor of a future attack. Then, the attack occurs somewhere else. These are the risks we unfortunately take.

Hearing these comments, I wondered what more could be done to prevent dangerous persons from conducting further terror attacks in Turkey. Researching on European and American preventive legal measures, I concluded that pre-trial detention to prevent the commission of new crimes, and the post-sentence detention of terrorists on dangerousness grounds, could be potential preventive means to incapacitate terrorists and to prevent them from harming more people. As a country that is in the middle of instability and violence, we should have the right to detain people upon the multifaceted determination of future dangerousness, without waiting for them to initiate the substantial steps of a new offense.

For these reasons, pre-trial and post-sentence detention on dangerousness may be useful tools to protect the public from terrorists who are waiting for the right time or an order from their leader to conduct an attack. The opportunity should be in the hands of the innocent and thereby of the state, instead of dangerous terrorists. Thus, we should detain terrorists pending trial to prevent more offenses they may commit. Additionally, we must continue to detain terrorists who remain to be dangerous to a society even after their serving of sentences. We must keep them in rehabilitation centers, where they will be more isolated from their counterparts than in prisons. They will also benefit from psychological and mental treatment opportunities in these centers. Even if there is the slightest chance of re-integration into society, we should give reformed terrorists a chance regardless of the proposed measure's potential economic burdens on the society. We could be able to save the lives of innocents by converting a terrorist into a society-friendly human being. Therefore, this section proposes pre-trial and post-sentence detention of terrorists on dangerousness grounds.

## 5. Proposals for Turkey: The Pre-Trial and Post-Sentence Detention of Terrorists on Dangerousness Grounds

### a) Pre-Trial Detention on Dangerousness Grounds

A review of European and United States laws on the subject indicates that there is a gap in Turkish criminal procedure law regarding the authorization of pre-trial detention to prevent the commission of further offences or to protect public safety from danger. Turkish law authorizes pre-trial detention only in cases of flight risk, the risk of destruction of evidence, and the risk of tampering with witnesses, victims or others. The risk of furthering the charged offense, the

commission of other crimes, or danger to public safety are not enacted as reasons for detention pending trial.

This deficit results in the misinterpretation of existing rules to fulfill the needs of public safety and especially of counterterrorism. Firstly, some magistrate judges are inclined to automatically authorize pre-trial detention in cases of the serious offenses enumerated in the Turkish Criminal Procedure Code Article 100/3, even though there is no risk of flight, destruction of evidence, or tampering with witnesses or victims.[469] They are reluctant to refute the rebuttable presumption that if the enumerated crimes exist, judges may assume that there is a risk of flight, the destruction of evidence, or the tampering of witnesses or victims. These judges thereby prefer not to disprove the assumption and apply the rules without any consideration of the actual tendencies of the accused, namely whether he has the real capacity to abscond, destroy or disguise the evidence, or pressurize witnesses or victims. If dangerousness or inclination to commit further crimes had been recognized as a reason, judges may not have had the tendency to use their discretion in such a way leading to misinterpretation and misapplication of law.

Secondly, in order to disguise the underlying reason of preventing dangerousness or preserving public safety, some judges tend to use as pretexts any of the existing bases in the law, without providing sufficient concrete supporting facts.[470] Such pre-textual results violate the ECtHR decisions that require a genuine public interest to deprive a person of his liberty pending trial and that prohibit the determination of detention upon purely abstract grounds.[471] Such

[469] This assertion is based on interviews.
[470] This assertion is based on interviews and some magistrate court decisions.
[471] Labita v. Italy, 2000-IV Eur. Ct. H.R. 99, 138, para. 152, *available at* http://hudoc.echr.coe.int/eng?i=001-58559.; McKay v. The United Kingdom, 2006-X Eur. Ct. H.R. 325, 339, para. 43, *available at* http://hudoc.echr.coe.int/eng?i=001-77177; Goral v. Poland, App. No. 38654/97, para. 64 (2004), *available at* http://hudoc.echr.coe.int/eng?i=001-61415. ; Kudła v. Poland, 2000-XI Eur. Ct. H.R. 197, 227, para. 110, *available at* http://hudoc.echr.coe.int/eng?i=001-58920; Geisterfer v. the Netherlands, App. No. 15911/08, at para. 33 (2014), *available at* http://hudoc.echr.coe.int/eng?i=001-148654.

mechanical and incorrect application of existing rules damages the integrity of the Turkish criminal justice system and diminishes the public's trust in it, notwithstanding the fact that the courts are trying to address a terror threat. This proposal, therefore, is designed to preserve the honesty and reliability of Turkish courts in the public eye, more than to further counterterrorism.

b) The Post-Sentence Detention of Terrorists on Future Dangerousness Grounds

The detention of convicted terrorists who served their sentence but still pose substantial threat to society is another means of preventing future terror attacks through preventive detention. Since the post-sentence detention restricts various rights of imprisoned terrorists, we must make sure that such a limitation is justifiable under human rights law. This section of the paper will touch upon various issues in three chapters. The first chapter will compare the proportionality standard of European law with the U.S.'s balancing standard that stems from the Due Process Clauses of the Fifth and Fourteenth Amendments under its Constitution. It will later determine whether the proposed post-sentence detention of terrorists would pass the European proportionality analysis.

The second chapter will discuss the arguments against post-sentence detention, namely whether the double jeopardy principle is violated, and whether post-sentence detention contradicts the basic notion of human dignity. And finally, the third chapter will set forth safeguards against arbitrariness through proposing dangerousness factors, a certain level of cause, and a particular detention period.

(1) The Justification of Post-Sentence Detention of Terrorists

i. The Proportionality Standard of Europe versus the Balancing Analysis of the United States

European proportionality and American balancing analysis have different historical origins but relatively insignificant substantive differences. The proportionality principle was created by Germany in 1958 for administrative law issues.[472] It was generated as a result of an effort to protect individual rights against unwarranted governmental intrusion.[473] Its emergence was influenced by the concepts of the liberal state and natural rights.[474] It migrated to other European countries either in the late 1990s or early 2000s.[475] The proportionality was adopted by the ECtHR in 1976 in *Handyside v. United Kingdom*,[476] where the Court ruled that *"every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued."*[477].

The U.S. balancing test emerged in private law and then extended to public law.[478] It was generated by the United States Supreme Court to prevent the overzealous protection of individual rights stemming from excessively strict reading of the Constitution.[479] The balancing test has been used by the Court in the constitutionality analysis of relevant Bill of Rights provisions. It was utilized as a criterion under the Fourth Amendment reasonableness test, the Due Process Clauses

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[472] Moshe Cohen-Eliya& Iddo Porat, *American Balancing and German Proportionality: The Historical Origins,* 8 INT.'L J. OF CONST. L. ISSUE 263, 266 (2010).
[473] *Id.*
[474] AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 177 (2012).
[475] For more information regarding the years that European states adopted the proportionality principle, *see* the diagram at BARAK, *supra* note 474, at 182. Some of the adoption dates are generally as follows: ECHR (1976), E.U. (1970), Turkey (2001).
[476] Handyside v. United Kingdom, App. No. 5493/72 (1979), *available at* http://hudoc.echr.coe.int/eng?i=001-57499; Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 125, 126-127 (1993) (R. St. J. Macdonald et al. eds., 1993).
[477] *Handyside*, at para. 49.
[478] Eliya & Porat, *supra* note 472.
[479] *Id.* For an example, *see* Lochner v. New York, 198 U.S. 45 (1905).

of the Fifth and Fourteenth Amendments, and strict scrutiny analysis under the Equal Protection Clause.

The European proportionality analysis has four elements: *proper purpose* (legitimate aim), *rational connection* (suitability), *necessity,* and *proportionality stricto sensu* (balancing, or proportionality in the narrow sense).[480] First, the proper purpose requirement demands the existence of some overriding interest to justify any human rights intrusion. Proper purposes could be either the protection of others' rights or any public interest (such as national security, public order that includes public health and the protection of minors' interests).[481] Second, rational connection or suitability demands that there is a fit between means chosen and the proper purpose.[482] That is to say, the means chosen to realize a government interest must be appropriate to further the goal.[483] Third, necessity involves the consummation of equally applicable but least restrictive alternatives in order to make sure that an individual's rights are restricted as little as possible.[484] Thus, if there are two means that are equally suitable to realize the desired purpose, the less intrusive one should be selected.[485] And fourth, the proportionality *stricto sensu* (the balancing test) makes a value-based comparison between the social importance of the restricted individual right and that of the purpose furthered by the intrusion on the individual right.[486] Different than the first three components that are grounded upon a means and ends analysis, the balancing focuses on individual rights and their values in a specific context.

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[480] BARAK, *supra* note 474, at 245, 303, 317, 340; MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 8 (2012); Bernhard Schlink, *Proportionality (1), in* MICHEL ROSENFELD & ANDRÁS SAJÓ, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 722-725 (2012).
[481] BARAK, *supra* note 474, at 255, 256, 268, 269.
[482] BARAK, *supra* note 474, at 305.
[483] Eliya& Porat, *supra* note 472, at 267.
[484] BARAK, *supra* note 474, at 317, 323, 324, 337.
[485] KLATT & MEISTER, *supra* note 480, at 9.
[486] BARAK, *supra* note 474, at 349.

The United States Supreme Court applies only the balancing test with least restrictive means analysis[487] when needed in a particular case.[488] For the purposes of this chapter, I will focus on the balancing test that the Court applies under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Due Process is divided into two concepts of procedural and substantive due process, both of which are based on the balancing of competing interests of individual liberty or autonomy and government power[489]. While the procedural due process requires fairness in proceedings by which a government restricts the rights of an individual, the substantive due process demands that the rights of an individual are sufficiently protected from unnecessary government intrusions. That is, the substantive due process protects the essence of substantive rights, while the procedural due process examines whether substantive rights are limited in a fair manner.[490]

In *Matthews v. Eldridge*,[491] which was a procedural due process case, the Court reiterated that the Due Process Clause required the "analysis of the governmental and private interests that

[487] Although the U.S. Supreme Court does not explicitly state that it is applying *the strict scrutiny analysis* in cases when the fundamental right of liberty is at stake, it applies the balancing test in combination with least restrictive means analysis which suggests the high threshold of strict scrutiny review. Under the strict scrutiny analysis, an individual right restriction must be necessary to achieve a compelling governmental interest, must be narrowly tailored to realize that interest, and must meet the necessity standard requiring the least restrictive means. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 554, 814-18 (2011). The Court applies the strict scrutiny analysis not only in equal protection cases but also in cases when other fundamental rights are infringed by a state action. *Id*. at 812. ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM: AN INTERNATIONAL LEGAL ANALYSIS 169 (2009). It practically makes a strict scrutiny analysis in substantive due process cases, while it only makes a balancing analysis in procedural due process cases. For a procedural due process case, *see* Mathews v. Eldridge, 424 U. S. 319, 334-35 (1976). For a substantive due process case, *see* Youngberg v. Romeo, 457 U.S. 307, 324 (1982).

[488] Such as in *United States v. Salerno*, where the U.S. Supreme Court looked for alternative means of release conditions that would equally ensure the safety of the community or any person. *Salerno*, 481 U.S. at 742, 750.

[489] E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 55, 56 (2013).

[490] In this sense, the procedural due process resembles the right to a fair trial under the Article 6 -Right to a fair trial- of the ECHR, while the substantive due process can be likened to all other conventional articles that protects substantive rights against arbitrary governmental interference.

[491] *Mathews*, 424 U.S. at 334-35; *Youngberg*, 457 U.S. at 320-21. While the former is a procedural due process case, the latter is a substantive due process case.

were affected".[492] In *Youngberg v. Romeo*,[493] a substantive due process case, the Court concluded that in order to decide whether a substantive right protected by the Due Process Clause was violated, it was necessary to balance "the liberty of the individual" against "the demands of an organized society."[494] The balancing of liberty interest against a relevant state or public interest, thereby, is the way to conduct a due process analysis designed to protect individual rights against excessive government intrusions.

From the information given above, we may conclude that the balancing test is being applied by both Europe and the U.S., and the primary difference between the two jurisdictions is that Europe has additional and explicit requirements of necessity and rational connection. Europe's proportionality standard thus seems to be more comprehensive and protective than the U.S. balancing test at the first sight. Nevertheless, this conclusion is misleading and their differences are insubstantial. This is because the U.S. Supreme Court conducts its constitutionality analysis under the totality of circumstances of each case, which inherently requires the consideration of whether means and ends are rationally connected and whether there are least restrictive alternatives (necessity) to the current measure.[495] The least restrictive alternatives test functions very similarly to the necessity test.[496] Thus, the differences between the two systems are more interpretive than outcome-determinative.

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[492] *Mathews*, 424 U.S. at 334. For a similar case, *see* Sutton v. City of Milwaukee, 672 F. 2d 644, 645 (1982).
[493] *Youngberg*, 457 U.S. 307.
[494] *Id.* at 320, citing the *dissent* opinion of Justice Harlan at Poe v. Ullman, 367 U.S. 497, 542 (1961).
[495] For example, *see Salerno*, 481 U.S. at 742, 750. The Court looked for whether any "conditions of release can reasonably assure the safety of the community or any person."
[496] BARAK, *supra* note 474, at 269.

### ii. The Proportionality Analysis of the Post-Sentence Detention of Terrorists

Turkey incorporated the European proportionality analysis into its legal system through an amendment to its Constitution Article 13. The Article is as follows:

> Restriction of fundamental rights and freedoms
> ARTICLE 13- (As amended on October 3, 2001; Act No. 4709)
>
> Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.[497]

The proportionality analysis encompasses four main elements: proper purpose, rational connection, necessity, and proportionality *stricto sensu* (the balancing test).[498] The issue before us

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[497] [TBMM], *supra* note 299.

[498] BARAK, *supra* note 474, at 245, 303, 317, 340; KLATT & MEISTER, *supra* note 480, at 8. *See* also Laurens Lavrysen, *System of Restrictions*, in PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 314-321 (2018); YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 11, 12, 14 (2002); Eissen, *supra* note 476, at 125-146.
Some rights in the ECHR involves limitation clauses requiring member states to limit a particular right only when it is "necessary in a democratic society." (For example, see articles 8-11.) The Court developed the standard of proportionality from this clause. Other conventional rights without such a limitation clause (except torture) were also interpreted as relative rights and were also subject to the proportionality standard during interpretation. BARAK, *supra* note 474, at 184. These relative rights are presumed to have "implied limitations". Laurens Lavrysen, *System of Restrictions*, in PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 309 (2018). The ECtHR in its proportionality analysis thereby interprets the "necessary in a democratic society" standard that exists in many articles. The Court ruled in relevant cases that the "necessary in a democratic society" requirement implied that a) there must be "a pressing social need", b) the interference must be corresponded to a pressing social need, c) the interference should be "proportionate to the legitimate aim pursued", and that d) there must be relevant and sufficient reasons to justify such an interference. For ECtHR decisions on proportionality, *see* Handyside v. United Kingdom, App. No. 5493/72, 1 ECtHR 737 at para. 48, 49, 50 (1979), *available at* http://hudoc.echr.coe.int/eng?i=001-57499 (Article 10- Freedom of Expression); Nada v. Switzerland, 2012-V Eur. Ct. H. R. 213, 273, 274, 275, 276, paras. 174, 181, 185, *available at* http://hudoc.echr.coe.int/eng?i=001-113118 (Article 8- Right to respect for private and family life); Khoronshenko v. Russia, 2015 Eur. Ct. H.R. para. 118, *available at* http://hudoc.echr.coe.int/eng?i=001-156006 (Article 8- Right to respect for private and family life); Halis v. Turkey, App. No. 30007/96 at. para.33 (2005), *available at* http://hudoc.echr.coe.int/eng?i=001-67917 (Article 10- Freedom of Expression); The Sunday Times v. The United Kingdom (No.1), para. 59 (1979), *available at* http://hudoc.echr.coe.int/eng?i=001-57584 (Article 10-Freedom of Expression).

In terms of the Article 5-The Right to Liberty and Security of ECHR, the Convention imposed six express restrictions on the exercise of the right. These restrictions are presumed as "proportional" by the Convention. They are as follows:

is whether the post-sentence detention of terrorists posing an unspecific but genuine threat to public safety would meet the proportionality standard, paving the way for its enactment into Turkish law. Post-sentence detention is absent in Turkish law and is needed by Turkish counterterrorism practitioners.[499] Therefore, this sub-chapter will analyze each element of the proportionality principle, and determine whether the post-sentence detention of terrorists is sufficiently proportionate to be legislated in the future.

### a. Proper purpose

The first element is the purpose of the proposed liberty restriction. Public safety, public order and national security are my main arguments to support the post-sentence detention of terrorists that continue to be dangerous to a society. To elaborate on these public interest considerations, a brief explanation of their scopes will be provided.

Public interest in the post-sentence detainment of dangerous terrorists are as follows: 1) public safety, 2) public order, and 3) national security.[500] First, public safety is concerned with the

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a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for
the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound
mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his
effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

These restrictions are comprehensive and cannot be expanded. Yet, this does not mean that the proportionality principle should not be used when interpreting the Article 5-The Right to Liberty and Security. On the contrary, the right to liberty and security is a relative right, and it must be interpreted in compliance with the proportionality principle like other non-absolute rights.

[499] *See supra* Sec. II-A-4.

[500] National security can be distinguished from safety as it is the pre-requisite of safety. PETER CANE & JOANNE CONAGHAN, THE NEW OXFORD COMPANION TO LAW 193 (2009). Safety refers to freedom from danger, while national

protection of citizens' physical integrity and sense of security.[501] Terrorist attacks not only directly affect the life and bodily integrity of targeted individuals but also indirectly harm the mental wellbeing of the whole society by imposing fear. Attacks damage the subjective sense of security of individuals and thereby erode state authority.

Second, public order refers to the smooth running of an orderly society.[502] It is a similar concept to public safety but with more emphasis on stability in a country. In a society where public order exists, citizens would believe that current living and security conditions will be sustained for a foreseeable period of time, and that there are plausible grounds for further life expectations. Public order is thus the basis for hope for the future and for the development of a society as a civilized nation. Third, national security indicates the "protection of the very existence of the state from any internal or external threats or dangers and the measures taken to protect it."[503] For these reasons, a state has an interest in protecting against the risks posed by terrorists who have served their sentence but remain a danger to society.

### b. Rational connection

The rational connection element demands that there be a fit between the means and ends of a limitation. The ends of a limitation in the counterterrorism context are to ensure public safety,

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security is a more comprehensive term. It refers to the protection of the existence of a state from internal or external threats, let alone protection of its people from a concrete danger. As national security raises issues of the protection of existence, it "encompasses more than protecting the state's territorial integrity and extends to military and strategic secrets, and protection from terrorism and protection of essential infrastructure from sabotage." *Id.* at 151 (2009).

[501] *Id.* at 193. BLACK'S LAW DICTIONARY 1351 (9th ed. 2009).

[502] This understanding is concluded from the definition of offenses against public order in the Oxford Dictionary of Law. The dictionary defines "offenses against public order" as "crimes that affect the smooth running of orderly society" such as "riot, violent disorder, affray, threatening behavior, stirring up racial hatred, public nuisance, and obstruction of highways". OXFORD DICTIONARY OF LAW 340 (5th ed. 2003). *See* also CANE & CONAGHAN, *supra* note 500, at 179.

[503] H. VICTOR CONDÉ, AN ENCYCLOPEDIA OF HUMAN RIGHTS IN THE UNITED STATES V.1 164 (2011).

public order, and national security. The issue before us is whether continued detention of terrorists in rehabilitation centers (the means) has a common-sense logical connection to fulfill these ends.

The continued detention of dangerous persons in rehabilitation centers is designed to fulfill incapacitation and rehabilitation purposes. These purposes are aimed to be realized during the initial detention period as well. Yet, in some cases, rehabilitation and incapacitation services provided by prisons may not work. This might be so because of a prisoner's personal and family circumstances, his psychological condition, his tendency towards violence, his interaction with other prisoners, his connection with the terrorists outside, crowded prison conditions, or corrections officers' attitude toward prisoners. This might even be the case because a prisoner needs further individualized care for rehabilitation and a forced isolation from past environment for incapacitation. In these type of cases, continued detention in rehabilitation centers might be a suitable measure to retry achieving these goals.

The incapacitation and rehabilitation of the dangerous is necessary to ensure public safety and order, and national security. Detention in rehabilitation centers serves the incapacitation purpose since it isolates a person from his natural environment and deprives him of the tools and connections necessary to conduct a terrorist attack. It also to some extent rehabilitates a terrorist through providing psychological treatment and a certain level of education. For these reasons, this measure entails the necessary logical connection with the purposes of public safety, order, and national security.

c. Necessity

The necessity test examines whether there are less restrictive alternatives that would equally advance a proper purpose.[504] Post-sentence detention is a highly intrusive measure that deprives an individual of his personal liberty that is essential to the exercise of other rights. If we are to restrict liberty, detention should be the last resort. If any alternative less restrictive means equally fulfills these proper purposes, then detention is not necessary.

Potential alternatives to detention are as follows: supervision by a designated person, treatment, employment, participation in an educational program, restrictions on personal associations and on traveling to certain places, regular reports to a law enforcement agency, prohibition of the possession of weapons or destructive devices, undergoing a particular treatment, or in-home detention.[505] The question before us is where these alternatives are sufficient to achieve the proposed law's purpose of protecting society from further terror attacks to be perpetrated by professional terrorists just released from prison.

The supervision, employment, treatment and education would rehabilitate a released prisoner and ease his reintegration into society. Yet, these measures won't be enough to isolate him from his previous environment after he is released from prison. Social environment is one of the primary reasons for engagement in terrorism.[506] It is very hard for a terrorist to disengage himself from an organizational hierarchy. This difficulty increases if a convicted terrorist returns to his previous environment after discharge from prison. For these reasons, these alternate

[504] BARAK, *supra* note 474, at 324.
[505] These are the alternatives for pre-trial detention enumerated in 18 U.S.C § 3142-c (Release or detention of a defendant pending trial) and [C.M.K.] art. 109.
[506] Tamara Kiknadze, *Terrorism as a Social Reality, in* UNDERSTANDING TERRORISM: ANALYSIS OF SOCIOLOGICAL AND PSYCHOLOGICAL ASPECTS 56 (Süleyman Özeren et al. eds., 2007).

measures applied outside of a detention facility would not sufficiently detach a terrorist from his previous contacts, which would most likely be the members of the same terrorist organization.

A ban on particular personal associations and on travel to certain places, in-home detention, and regular reports to a law enforcement agency would be effective to an extent to monitor the behaviors and relationships of a released. A ban on the possession of weapons would limit dangerous conduct. Yet, these measures would not be as effective as detention, because supervision and oversight would be difficult to impossible. First, prohibition on communication with particular persons would only prevent a terrorist from communicating with the people who are known by the government to have terrorist connections. It has no preventive effect on communications with people who are not known as terrorists but yet still have terrorist engagement. Second, travel limitations would also be under-inclusive as it is impossible to fully know through which channels and with whom terrorists communicate secretly. A simple travel ban might prevent a convicted terrorist from physically going to places the government knows as terrorist grounds. Yet, a person does not need to travel to terrorist territories in order to engage in terrorism. He can provide material support to an organization without going anywhere. Third, in-home detention might be effective in some respects but still does not suffice to prevent a former terrorist from building bombs at home. Indeed, the latest trend of lone wolf attackers is to produce destructive weapons at home by using materials accessible to the general public, such as pressure cookers. Since in-home detention does not allow monitoring inside of a home, it does not fully regulate the behavior of a former terrorist who still has violent tendencies and keeps terrorist connections. Fourth, regular reports to a law enforcement agency is an alternative designed to prevent flight. It won't prevent an individual from engaging in terrorist acts or providing support to an organization in his daily life.

The least restrictive means that might be used instead of post-sentence detention in prisons is detention in rehabilitation centers. It would sufficiently isolate terrorists from the outside world and would at the same time provide treatment and education. On the other hand, it would provide the government with the opportunity of fully monitoring and observing terrorist behavior. The closer supervision opportunity would ensure that terrorists are released when they no longer pose a threat to society and that they benefit from better rehabilitation facilities than regular prisoners. This means would serve the ultimate purposes (of protecting public safety, public order, and national security), without unnecessarily infringing on individual's liberty interest, providing him with more dignified conditions of custody.

### d. Proportionality *stricto sensu* (The Balancing Test)

Proportionality *stricto sensu* (the balancing test) requires a just balance between relevant individual rights and public interests. The post-sentence detention of terrorists, in this sense, demands the weighing of the fundamental right of individual liberty against the interests of public safety, public order, and national security.[507]

To put it in other words, the social importance of the right to liberty should be measured against the social importance of the public interest in preventing catastrophic terror attacks through post-sentence detainment. The social importance and value of a public interest and a particular individual right can differ depending on the state. The social value of a public interest as well as an individual right are affected by "different political and economic ideologies", "the unique history of each country", "the structure of the political system", and "different social values".[508] For example, the protection of human dignity and the prohibition of torture are the most

[507] BARAK, *supra* note 474, at 255, 268, 269.
[508] *Id.* at 349, 350.

fundamental principles in German law because of the Nazi background.[509] By the same token, the balancing analysis in this paper will be conducted considering Turkey's own historical background, constitutional and foundational priorities as well as its social values.

The right to liberty is the primary condition of the complete and fulfilling enjoyment of every other right. The right to privacy, the freedom of movement, the freedom of expression, the freedom of association, the right to property and even the right to life would be less meaningful without an actual physical liberty. All these rights are diminished in prison conditions. Even the right to property loses its meaning in a prison as the prisoner lacks the proper means and opportunities to exercise his sovereign power upon his property.

The right to liberty has a paramount importance in Turkey. This is because modern Turkey was determined to make human rights improvements. The founders of the Turkish Republic were aware of the fact that the underlying reason for the Ottoman Empire's collapse was the lack of the basic concept of freedom ("freedom of the mind from constraint and indoctrination, to question and inquire and speak")[510] in the society. The founders were determined to instill the Western values of individualism and freedom into Turkish society, through secular legal enactments. For this purpose, the Turkish Republic adopted Western statutes in the 1920's, ratified the ECHR in 1954, and accepted ECtHR's compulsory jurisdiction in 1990.[511] All these efforts indicate

[509] Nicole Jacoby, *Redefining the Right to Be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States*, 35 GA. J. INT'L & COMP. L. 433, 454 (2007).
[510] Like in other Middle Eastern states. *See* Bernard Lewis, *What Went Wrong*?, THE ATLANTIC (JAN. 2002), https://www.theatlantic.com/magazine/archive/2002/01/what-went-wrong/302387/.
[511] For more information, *see* Council of Europe, European Court of Human Rights, http://www.coe.int/en/web/tirana/european-court-of-human-rights; European Court of Human Rights, Press Country Profile: Turkey, http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf , and Republic of Turkey Ministry of Foreign Affairs, Council of Europe, http://www.mfa.gov.tr/council-of-europe.en.mfa.

Turkey's commitment to international human rights standards, and demand more vigilance in regulating infringements of liberty.[512]

Public interest in the post-sentence detention of dangerous terrorists are public safety, public order, and national security.[513] First, public safety is related to the aim of protecting the public from further terror attacks that are directed to its people's physical integrity and the sense of security.[514] This interest is higher in the Turkish system due to the variety of terrorist organizations operating in the Middle Eastern region. The higher the possibility of an attack, the more public safety interest it generates. Thus, the high possibility of terror attacks in Turkey and the variety of terrorist organizations engender a weighty public safety interest.

Second, public order[515] is a similar concept but with more emphasis on stability in a country. The continuous terror problem in Turkey and the ongoing wars in the Middle East region undermines the stability of the country, erodes the sense of security in the society, and diminishes future life expectations. Thus, the potential of having terror attacks at home and the violence in neighbors disrupting the smooth running of orderly society, create a substantial interest in public order.

Third, the national security interest is particularly high in Turkey. The Turkish Republic was founded on the premise of not making the same mistakes the Ottomans had made.[516] The Turkish Republic was established as a secular parliamentary democracy based on republican

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[512] Attentiveness in liberty intrusions yet should not result in putting the society into danger of terrorism in the name of making human rights improvements. The overprotection of individual liberties may cause the erosion of security and safety in a society, especially when dangerous persons are released in the name of the protection of human rights. The under-protection of liberty, on the other hand, may lead to the undermining of the sense of legal security.
[513] *See supra* note 500.
[514] The Oxford Dictionary defines safety as "the state of being free from danger or threat". Safety has a connotation of being free from danger, and is being regarded as a condition of being secure. CANE & CONAGHAN, *supra* note 500 at 193. BLACK'S LAW DICTIONARY, *supra* note 501.
[515] *See supra* note 502.
[516] *See supra* Sec. I-B-1-a-1.

constitutional values. The nation state adopted the concept of "citizenry" instead of the Ottoman term of "subject".[517] The Turkish Republic shifted from religious education to secular education methods[518] in order to bolster cultural, scientific and technological developments in the country. And lastly, it established a "peace at home, peace in the world principle"[519] as a state policy in foreign relations to strengthen regional security and thereby stability.

Turkey has a great national security interest in the weakening and incapacitation of terrorist organizations through the post-sentence detention of dangerous terrorists. First, Turkish democracy and human rights ideals would be strengthened through the elimination of terrorist organizations and full restoration of law and order in the region. Second, a peaceful society with a sense of security would bolster future life expectations and thereby technological and scientific developments. Third, eliminating the threat from terrorist organizations at home and establishing stability in the Middle East would contribute to Turkey's territorial integrity.

The balancing of all these interests is a tough issue in the Turkish context. Turkey wants to make human rights improvements while at the same time it struggles to provide full security and stability to its vulnerable territory as well as to the neighboring region. The weight of individual liberty is heavy and thus comes very close in the scale to the public interests of safety, order, and national security.

Turkey has an authoritarian background. Libertarian and democratic culture is not enshrined in the very deep of Turkish society. This is because democracy was brought by the founders of the Turkish Republic through a revolution instead of a gradual evolution in the society. Turkey moved from a theocratic authoritarian governmental system to a secular democratic

[517] HALIL İNALCIK, ATATÜRK VE DEMOKRATIK TÜRKİYE [ATATÜRK VE DEMOCRATİC TURKEY] 104, 105 (5th ed. 2016).
[518] UMUT AZAK, ISLAM AND SECULARIZM IN TURKEY: KEMALISM, RELIGION AND THE NATION STATE 10 (2010).
[519] 1982 CONST. Preamble (Turk.); YONAH ALEXANDER & EDGAR H. BRENNER & SERHAT TÜTÜNCÜOĞLU KRAUSE, TURKEY: TERRORISM, CIVIL RIGHTS AND THE EUROPEAN UNION 49, 269 (2008).

republic by Atatürk's cultural and legal revolution. The principles of democracy were imposed by Atatürk through the adoption of Western constitutional principles and statutes. For these reasons, I conclude that Turkey lacks a complete democratic culture like in Europe, and it still has to generate human rights awareness in the society.[520] This is possible only through the preservation of security and peaceful life conditions in the region. Therefore, in the Turkish context, security is the very prerequisite of exercising individual liberties.

In sum, post-sentence detention of terrorists would pass the fair balancing threshold, particularly because Turkey's special circumstances necessitate the consideration of the protection of the state as the highest value over individual liberty under the lessons it learned from the collapse of the Ottoman Empire. The more the public interest, the more liberty restriction can justifiably be imposed. Turkey's special interests of national security, public order, and public safety therefore justify such a high deprivation of liberty following the serving of sentence.

(2) Arguments Against Post-Sentence Detention

i. The Prohibition of Double Jeopardy *(Non bis in idem)*

*Non bis in idem*, the right not to be tried or punished twice (double jeopardy) for the same offense, is an essential principle in European and United States laws. The principle, however, is not explicitly stated either in the Turkish Constitution or in its Criminal Procedure Code.[521] Nevertheless, the *non bis in idem* principle is integrated into the Turkish system through Turkish

[520] *See* generally *supra* Sec. I-B-1-a-1. *See* also Ceyda Nurtsch, *"There is a lack of democratic culture in Turkey"*, (Apr. 25, 2014), https://en.qantara.de/content/interview-with-elif-shafak-there-is-a-lack-of-democratic-culture-in-turkey (last visited Oct. 18, 2018).

[521] Turkish Criminal Procedure Code yet implies the *non bis in idem* principle in various occasions. For instance, the Code prohibits new prosecutions after a no-prosecution decision by a prosecutor if there is no new evidence emerged. The Code also prohibits new prosecutions if there is already a verdict or an ongoing prosecution for the same person and for the same offense. [C.M.K.] arts. 172-2, 223-7.

Constitution Article 90/5. Article 90/5 attributes to international agreements the force of law and recognizes the prevailing effect of international human rights principles over statutory provisions.[522] The Turkish system thereby applies the *non bis in idem* principle by incorporating the European Convention on Human Rights Protocol 7-Article 4/1 into its system.

Some may argue that post-sentence detention on dangerousness grounds violates the *non-bis in idem* principle for two reasons: First, terrorists will be deprived of their liberty for the offenses that they have committed before. Second, due to the high infringement that detention imposes on personal liberty, it would function as a criminal penalty instead of a civil protective measure, and thus would serve as a punishment in reality. This sub-chapter is intended to address these concerns. It will first discuss the European and American *non bis in idem* principles, and then will provide the reasons why post-sentence detention does not violate the double jeopardy principle.

### a. The European Court of Human Rights

The European Convention on Human Rights Protocol 7-Article 4/1 refers to the *non bis in idem* principle as follows:

> Right not to be tried or punished twice
> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State…

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> International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail. 1982 CONST. art. 90-5 (Turk.). *See* [TBMM], *supra* note 299.

The European Court of Human Rights conducts a three step analysis when determining whether Article 4 is violated: First, whether the proceedings are "criminal" in nature; second, whether the offense a person is prosecuted for is "the same"(*idem*); and third, whether there is a duplication of proceedings (*bis*).[523]

The Court assesses the "criminal" nature of the proceedings considering the criteria that were first established in *Engel and Others v. the Netherlands case.*[524] The *Engel* criteria require the examination of three elements when deciding on the criminal nature of the proceedings:

a) "the legal classification of the offense under national law",[525] taking into account whether "the measure is imposed by a general legal provision applying to all citizens rather than towards a group possessing a special status"[526]

b) "the very nature of the offense",[527] taking into account whether it entails the characteristics of criminal penalties such as punishment and deterrence purposes or only compensation[528]

c) "the degree of severity of the penalty that the person concerned risks incurring",[529] mainly considering the nature, duration, and manner of execution of the measure, and whether it cannot be regarded as "appreciably detrimental" under these features of execution.[530] In cases where the measure involves loss of liberty, the Court presumes that the proceedings are "criminal" and this presumption can be rebuttable only in exceptional cases.

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[523] Milenković v. Serbia, App. No. 50124/13 at paras. 33, 35, 36, 43 (2016), *available at* http://hudoc.echr.coe.int/eng?i=001-161001.
[524] Engel and Others v. the Netherlands, App. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976), *available at* http://hudoc.echr.coe.int/eng?i=001-57479.
[525] *Milenković,* at para. 33.
[526] *Id.* at para. 35; Šimkus v. Lithuania, App. No. 41788/11 at. para. 43 (2017), *available at* http://hudoc.echr.coe.int/eng?i=001-174398.
[527] *Engel and Others,* at para. 82; *Milenković,* at para. 33.
[528] *Milenković*, at para. 35; *Šimkus*, at. para. 43.
[529] *Engel and Others,* at para. 82; *Milenković*, at para. 33; Jussila v. Finland, 2006-XIV Eur. Ct. H.R. 1, 13, 14, at paras. 30, 31. For other cases repeating the *Engel* criteria, *see* Ezeh and Connors v. the United Kingdom, 2003-X Eur. Ct. H.R. 101, 127-129, paras. 82-86; Boman v. Finland, App. No. 41604/1117 at. para. 30 (2015), *available at* http://hudoc.echr.coe.int/eng?i=001-152247.
[530] *Milenković*, at para. 36.

The second and third criteria are deemed "alternative and not necessarily cumulative" by the Court.[531] The Court nevertheless warned that "where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge", the cumulative approach may be applicable.[532] Therefore, when assessing the criminal nature of the proceedings, the Court assesses the three criteria independently. If one of these criteria strongly suggests that the proceedings are criminal in nature, *non bis in idem rule* would take effect. If there is no such strong and determinative conclusion, the Court would consider the three criteria together to determine whether double jeopardy principles are at stake.

### b. The United States Supreme Court

The Fifth Amendment to the U.S. Constitution demonstrates its commitment to the *non bis in idem* principle: "…nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". This is regarded as "the Double Jeopardy Clause" in U.S. law. Jeopardy attaches when a defendant's trial begins: when the jury is "impaneled and sworn" in a jury trial or "when the judge begins to hear evidence" in a bench trial.[533] In double jeopardy analysis, the U.S. Supreme Court first examines whether there is a criminal offense, and then whether offenses are the same.

In *Hudson v. United States*,[534] the Court set forth two elements to determine whether there is a criminal offense. First, the legislative intent, and second, "whether the statutory scheme was so punitive either in purpose or effect…as to "transfor[m] what was clearly intended as a civil

[531] Ezeh and Connors, at para. 86; *Jussila*, at paras. 30, 31.
[532] Ezeh and Connors, at para. 86; *Jussila*, at paras. 31.
[533] Crist v. Bretz, 437 U.S. 28, 29 (1978); ERWIN CHEMERINSKY& LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 372 (2008).
[534] Hudson v. United States, 522 U.S. 93 (1997).

remedy into a criminal penalty".[535] The Court then declared the factors discussed in *Kennedy v. Mendoza-Martinez*[536] as useful guidelines for such determination:

(1) "[w]hether the sanction involves an affirmative disability or restraint";

(2) "whether it has historically been regarded as a punishment";

(3) "whether it comes into play only on a finding of *scienter";*

(4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";

(5) "whether the behavior to which it applies is already a crime";

(6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and

(7) "whether it appears …excessive in relation to the alternative purpose assigned."[537]

c. The Post-Sentence Detention of Terrorists under the Double Jeopardy Analysis

Considering European and U.S. approaches, we may conclude that both jurisdictions focus on the same question when a person is detained after serving a sentence --- whether the continued detention is "punishment" for the crime previously committed. In determining whether the detention is "punishment", the courts generally look for;

- legislative intent or the legal classification of the offense
- whether the offense is designed for punishment (retribution) and deterrence purposes or another civil purpose

[535] *Id.* at. 99.
[536] Kennedy v. Mendoza-Martinez, 372 U. S. 144, 168-169 (1963).
[537] *Hudson*, 522 U.S. at 99-100.

- whether criminal intent is required
- the severity of the measure: the nature, duration, and manner of execution of the measure
- the measure is applicable to all citizens or just a group possessing a special status

For the purposes of this paper, we will discuss whether the post-sentence detention of terrorists violates the *non bis in idem* principle.

The first question is whether the proceedings that would authorize continued detention are criminal in nature. The main feature of criminal proceedings is that the purpose of the measure should be punishment (retribution) and deterrence. In the post-sentence detention case, however, the purpose of post-sentence detention is neither punitive nor deterrent. It is for the prevention of further terror attacks as well as the incapacitation and rehabilitation of the dangerous, to protect innocents. Moreover, there is no determination of any criminal intent, which would indicate the retributive purpose that distinguishes criminal from civil proceedings. Instead of criminal intent, factors such as mental abnormality or personality disorder, personal and criminal background, prison radicalization, and prison intelligence will be considered. These factors show a preventive purpose rather than retribution against or the deterrence of a criminally culpable intent.

Since the proposed measure will deprive a terrorist of his liberty, such a severe limitation may indicate a punitive intent. Yet, the nature, duration, and the manner of execution of the proposed preventive detainment suggest otherwise. In terms of the nature and manner of execution, the detainee, under my proposal, will be kept in rehabilitation centers segregated from prisons. Rehabilitation centers have less restrictive rules than prisons, and they are supervised by departments other than the Corrections Department. Different methods of treatment and education than prisons will be provided to re-integrate a terrorist into society.

In terms of duration, the confinement is only "potentially" indefinite.[538] The detainee will be released immediately after a determination that he no longer poses a threat to others. This would not be the case if there was any punitive intent. Another indication showing non-punitive intent is that the measure will not be applicable for all citizens, but just for terrorists who served their sentence and yet remain dangerous to society.

The second question is whether the detainee is receiving a second punishment for the original crime. The answer is no, because under my proposal a new finding will have to be made that the detainee poses a risk of future dangerousness. Thus he is not being detained for what he did in the past, but for what he might do in the future. It is true that judges will consider many factors in evaluating future dangerousness, one of which is prior criminal background. The offenses a terrorist has committed before, thereby, will be used as supporting reasons for his continued detention upon determination that the prison did not rehabilitate the terrorist. But prior conduct will be used only for evidentiary purposes to substantiate the fact that he still poses a danger to the society. It is not designed to re-punish his past misdeeds. The fact that a statutory determination is tied to a criminal activity does not deem the statute punitive as well.[539] For these reasons, the post-sentence detention of terrorists does not trigger the *non bis in idem* principle.

[538] A similar argument was raised for detention of mentally disordered and dangerous persons by the U.S. Supreme Court in *Hendricks*, 521 U.S. at 363-364.
[539] Same argument held by the U.S. Supreme Court *in* United States v. Ursery, 518 U.S. 267, 292 (1996).

### ii. Human Dignity

Human dignity is the ideal that everybody is valuable and entitled to a certain level of respect because of the sole reason that she is a human being. Today, we regard human dignity as the very essence of human rights.

Human dignity is regarded either as a constitutional value or as a constitutional right depending on the constitution of each state.[540] Yet, what is common in each system is that human dignity lies behind the existence and protection of basic individual rights such as life, liberty, privacy, freedom of expression, or even due process rights such as the presumption of innocence or privilege against self-incrimination.[541] Any infringement on these rights thereby harms human dignity to some extent. Human dignity in this sense is not an absolute right or value, but a relative

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[540] The United States, Turkey and France see human dignity as a constitutional value instead of a constitutional right, as there is no explicit right to human dignity in constitutional texts of these states. *See* Carter Snead, *Human Dignity in U.S. Law*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY 386-393 (Marcus Düwell et al. eds., 2014); Stéphanie Hennette-Vauchez, *Human Dignity in French Law*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY 368-373 (Marcus Düwell et al. eds., 2014); 1982 CONST. Preamble (Turk.) (mentioning human dignity).

The ECHR also does not contain a right to dignity in its text, although the ECtHR refers to human dignity in many cases especially regarding Article 2 (Right to life), Article 3 (Prohibition of Torture), Article 4 (Prohibition of Slavery and Forced Labor), and Article 7 (No punishment without law), and Article 8 (Right to respect for private and family life). Jean-Paul Costa, *Human Dignity in the Jurisprudence of the European Court of Human Rights*, in UNDERSTANDING HUMAN DIGNITY 393-399 (Christopher McCrudden ed., 2014). Human dignity in privilege against self-incrimination (Article 6) is stated only in a dissenting opinion in *John Murray v. U.K.* (8 February 1996) case. (Case currently unavailable either print or online) *Id.* at 398.

Differently, human dignity is a constitutional right under Article 2 &4 of Israeli Basic Law. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 280 (2015).
German Basic Law Art. 1 states that human dignity is inviolable and to be respected and protected by the state. GRUNDGESETZ [GG] [BASIC LAW], *translation at* https://www.gesetze-im-internet.de/englisch_gg/ (Ger.). Yet, German scholars still discuss whether it is a constitutional right or value, as well as if it is absolute or relative. BARAK, *supra*, at 227-28, 232-34. Horst Dreier, *Human Dignity in German Law*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY 375-385 (Marcus Düwell et al. eds., 2014).
*See* Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, in UNDERSTANDING HUMAN DIGNITY 361-380 (Christopher McCrudden ed., 2014), for more general information on the constitutional right and constitutional value discussion.

[541] *See* generally BARAK, *supra* note 540, at 156-162, 288-300; Jean-Paul Costa, *Human Dignity in the Jurisprudence of the European Court of Human Rights*, in UNDERSTANDING HUMAN DIGNITY 396-402 (Christopher McCrudden ed., 2014).

one. Its justifiable limitation depends on the circumstances and the fair weighing of public interests against individual rights.

For the purposes of this paper, we must address whether post-sentence detention unjustifiably infringes on human dignity in two respects: First, whether a presumption that a convict will commit further terror offenses disregards their humane ability to make rational and autonomous decisions, and thereby treats them as mere objects. Second, whether the right to liberty is infringed by post-sentence detention to such a deep extent that it would deny individual dignity.

With regard to the first argument of denial of autonomy, the limits of a person's freedom of choice should be considered. A person's autonomy and the freedom of choice are protected so long as he does not harm the autonomy of others.[542] A prospective terrorist thus can lawfully be refrained from acting under his free will if a state has sufficiently concrete information on his dangerousness to others, which is supported by his prison intelligence on his continuing relationship with the terrorist organization, prison radicalization, mental disorder, and personal and criminal background.

With regard to the second argument that whether the deprivation of liberty of dangerous terrorists would harm the very essence of individual liberty and thereby human dignity, the state must assure that the measures of detention will ameliorate these concerns. The detainee should be kept in humane conditions as well as such conditions proportional to his non-prisoner status. A disproportionate manner of execution would harm the dignity of the person, and the very core of the right to liberty. Because a detainee has served the sentence for his initial crime, he cannot be kept in prison, especially in solitary confinement, and if kept, that would violate his dignity. He should be kept in places providing more freedom to a detainee but eliminating his dangerousness

[542] JOSEPH RAZ, THE MORALITY OF FREEDOM 419, 420 (1988).

and incapacitating him at the same time. For these reasons, the post-sentence detention of dangerous terrorists does not unduly offend human dignity, provided that detainees are kept in dignified conditions recognizing their non-prisoner status.

(3) Safeguards Against Arbitrariness

In order to prevent state arbitrariness against dissenting and minority groups, and to ensure firm justification of the post-sentence detention of terrorists, some protective legal safeguards must be established. This chapter presumes that the principle of 'clear and precise' laws[543] itself is already a safeguard that states must comply with in the first instance, and offers three more safeguards for enactment. These safeguards are an articulation of specific dangerousness factors, a judicial finding of a certain level of cause, and a particular period of detention.

First, the proposed dangerousness factors are prison radicalization, mental disorder, prison intelligence establishing a relationship with a terrorist organization, and personal and criminal background. Each sub-chapter explains these concepts and provides information on how to evaluate these factors. Second, the reasonable level of cause suggested for the post-sentence detention of terrorists is the preponderance of evidence, followed by a clear and convincing evidence standard as the duration of detention extends. The level of cause was set up as such because of two reasons: a) There is a heightened state interest in preventing terrorist attacks, and b) the liberty interest of convicted terrorists is diminished since they will be kept in less restrictive rehabilitation center conditions instead of high security prisons.

[543] TOM BINGHAM, THE RULE OF LAW 37 (2010).

### i. The Statutory Factors of Dangerousness

#### a. Prison Radicalization

Of course it is so that many terrorist offenders radicalize before they get to prison, but this may not be the case in all occasions. A terrorist offender may engage in terrorist acts for reasons other than firm devotion to the terrorist cause. He might instead need financial support or might be coerced by a terrorist organization. These type of terrorist offenders may nevertheless develop radicalization in prisons. This sub-chapter therefore focuses on first-time and further radicalization in prisons.

##### 1) The Determination of Radicalization

The radicalization of prisoners is a common problem encountered in counterterrorism. Prison radicalization means the adoption of extremist views and beliefs by prisoners during the incarceration period.[544] These beliefs legitimize the use of violent or non-violent measures to realize particular social, political or religious objectives.[545] Radicalization thus can be either violent or non-violent, depending on whether a particular ideology and a prison group encourage violence.[546]

Radicalization occurs as a consequence of various personal, social, and institutional factors.[547] Personal factors are experiences of discrimination or humiliation,[548] quest for self-

[544] Joshua Sinai, *Developing a Model of Prison Radicalization, in* PRISONS, TERRORISM, AND EXTREMISM: CRITICAL ISSUES IN MANAGEMENT, RADICALIZATION AND REFORM 36 (Andrew Silke ed., 2014).
[545] *Id.*; Farhad Khosrokhavar, *Radicalization in Prison: The French Case,* 14 POL., RELIGION & IDEOLOGY 284, 286 (2013); TINKA M. VELDHUIS, PRISONER RADICALIZATION AND TERRORISM DETENTION POLICY: INSTITUTIONALIZED FEAR OR EVIDENCE-BASED POLICY MAKING? 43 (2016).
[546] VELDHUIS, *supra* note 545.
[547] Andrew Silke & Tinka Veldhuis, *Countering Violent Extremism in Prisons: A Review of Key Recent Research and Critical Research Gaps Perspectives on Terrorism,* 11 PERSP. ON TERRORISM 2, 3 (2017).
[548] VELDHUIS, *supra* note 545, at 42, 47; Michelle Dugas & Arie W. Kruglanski, *The Quest for Significance Model of Radicalization: Implications for the Management of Terrorist Detainees* 32 BEHAV. SCI. LAW 423, 432 (2014).

significance[549] coupled with low self-esteem,[550] and personal uncertainty.[551] Social factors are the unsatisfied need to belong, the need for status and affection,[552] the desire for fame and recognition,[553] the identification of oneself with charismatic leadership,[554] and gang dynamics in which prison gangs influence and protect vulnerable prisoners.[555] Institutional factors are the overcrowding[556] and understaffing of prisons,[557] high staff and inmate change,[558] and harsh confinement conditions.[559] The risk of prisoner radicalization does not necessarily exist in all cases, but the combination of these factors may trigger its emergence.

According to Maslow's hierarchy of needs, human motivation is grounded upon five stages of basic needs: physiological needs, safety needs, love needs, esteem needs, and need for self-actualization.[560] These needs are in sequence as if in a pyramid, which means that the satisfaction of the most basic need would generate a desire for the latter. In this sense, prisoners who satisfy their physiological needs are more prone to radicalization, as they would have the motivation to meet the second and third level needs of safety and belongingness in Maslow's hierarchy of needs.[561]

Since prison conditions generate an environment with limited autonomy and security along with violence and conflict between inmates,[562] group membership is often seen as the source of

[549] Bertjan Doosje et al., *Terrorism, Radicalization and De-radicalization*, 11 CURRENT OPINION IN PSYCHOL. 79, 81 (2016); VELDHUIS, *supra* note 545, at 42; Dugas & Kruglanski, *supra* note 548, at 423, 425.
[550] Sinai, *supra* note 544, at 38.
[551] Doosje et al., *supra* note 549; Dugas & Kruglanski, *supra* note 548, at 423, 432; VELDHUIS, *supra* note 545, at 42, 48; Sinai, *supra* note 544, at 38.
[552] VELDHUIS, *supra* note 545, at 44, 48, 49.
[553] *Id.* at 42; Dugas & Kruglanski, *supra* note 548, at 423, 425.
[554] VELDHUIS, *supra* note 545, at 47, 48.
[555] *Id.* at 42, 49; Khosrokhavar, *supra* note 545, at 284, 292.
[556] VELDHUIS, *supra* note 545, at 44; Khosrokhavar, *supra* note 545, at 284, 292; Sinai, *supra* note 544, at 38.
[557] Khosrokhavar, *supra* note 545, at 284, 292.
[558] Khosrokhavar, *supra* note 545, at 284, 292.
[559] VELDHUIS, *supra* note 545, at 42, 43, 44; Sinai, *supra* note 544, at 38.
[560] Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 372-382 (1943).
[561] *Id.* at 380.
[562] VELDHUIS, *supra* note 545, at 43, 44.

satisfying the deprived needs of safety and belonging. Further, membership in groups may affect a prisoner's self-esteem and personal uncertainty regarding approved and disapproved behaviors,[563] which is a way to meet the fourth need of esteem. Prisoners generate a sense of worth in prison groups with which they share common ideological or religious values. After the satisfaction of the esteem needs in a particular group, prisoners search for a meaning and goal for their life in order to meet their last basic need of self-actualization. They identify the prison group's ideology as theirs, and the realization of the group's purpose becomes their life goal. This is basically how the radicalization process develops.

Prisoners who are susceptible to violent extremist ideologies and those subjected to humiliation are more prone to get radicalized in prisons, especially if a charismatic extremist leader exists. If an accepted ideology and a group encourage violence, there is an increased probability of violent prison radicalization.[564] Conversely, if the group and its leader do not support violence for political objectives, it is likely that any prison radicalization would be non-violent.[565]

Prisoner re-integration programs developed by prison managements could be helpful to loosen the commitment to the radical group and its ideological appeal for a prisoner. Prisons thereby could in some cases de-radicalize terrorists and re-integrate them into society. Yet, the risk assessment, which is a pre-emptive security measure,[566] should still be employed to make sure that terror prisoners do not pose any threat to the society when they are released from prisons.

A risk assessment of radicalization is required to determine the dangerousness of an individual prisoner. The analysis must be based upon; a) a prisoner's ideology, b) capability (experience and training), c) political and social environment, d) affiliations, e) emotional factors

[563] *Id.* at 45.
[564] *Id.* at 43.
[565] *Id.*
[566] ZEDNER, *supra* note 321, at 78.

such as grievance, injustice and anger, f) a prisoner's behavior in custody, g) disengagement factors such as aging, experiencing a turning point event, delayed deterrence, the expression of changed priorities, among others.[567]

The sources of information when determining on these risk analysis factors would be; a) prisoner interviews, b) specialized testing methods designed for terrorist prisoners,[568] and c) third

[567] Andrew Silke, *Risk Assessment of Terrorist and Extremist Prisoners*, *in* PRISONS, TERRORISM, AND EXTREMISM: CRITICAL ISSUES IN MANAGEMENT, RADICALIZATION AND REFORM 113-115 (Andrew Silke ed., 2014).

[568] For example, the Violent Risk Assessment Protocol (Version 2) is being used in high security prison facilities in several countries for convicted terrorists in sentencing, correctional classification, placements, program interventions and release determinations. The protocol measures the risk of radicalization of each terrorist prisoner considering various indicative factors. The basic structure of this protocol is as follows:

a) BELIEFS AND ATTITUDES — Low Moderate High
- Commitment to ideology justifying violence
- Perceived victim of injustice and grievances
- Dehumanization/demonization of identified targets of injustice
- Rejection of democratic society and values
- Feelings of hate, frustration, persecution, alienation
- Hostility to national collective identity
- Lack of empathy, understanding outside own group

b) CONTEXT AND INTENT
- Seeker, consumer, developer of violent extremist materials
- Identification of target (person, place, group) for attack
- Personal contact with violent extremists
- Anger and the expressed intent to act violently
- Willingness to die for cause
- Expressed intent to plan, prepare violent action
- Susceptible to influence, authority, indoctrination

c) HISTORY AND CAPABILITY
- Early exposure to pro-violence militant ideology
- Network (family, friends) involved in violent action
- Prior criminal history of violence
- Tactical, paramilitary, explosives training
- Extremist ideological training
- Access to funds, resources, organizational skills

d) COMMITMENT AND MOTIVATION
- Glorification of violent action
- Driven by criminal opportunism
- Commitment to group, group ideology
- Driven by moral imperative, moral superiority
- Driven by excitement, adventure

party information such as "court reports, prison reports, and other prison documentation, police reports, assessments by prison and probation staff".[569] When determining whether a prisoner is radicalized in prison, an all or nothing approach must not be adopted. Instead, an individualistic analysis should be made considering various indicative factors under the totality of circumstances.

2) Prison Radicalization in Turkey

The existence of radicalization in Turkish prisons must be determined under an individualistic analysis for each terrorist prisoner considering various personal, social and institutional factors. Risk assessments must be conducted for each individual. Although there is no statistical information on radicalization currently held by the Turkish government, it is possible to consider whether Turkish prisons are likely to generate radicalized terrorists.

According to Turkish law, convicts are required to be classified on many factors: the types of crimes, dangerousness levels, the duration of incarceration, recidivism, age, mental and physical conditions, and hierarchical status in an organization.[570] Terrorists are isolated from ordinary criminals or other organized crime members. Terror convicts are classified in four categories: the

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e) PROTECTIVE ITEMS
- Re-interpretation of ideology less rigid, absolute
- Rejection of violence to obtain goals
- Change of vision of enemy
- Involvement with non-violent, de-radicalization, offence related programs
- Community support for non-violence
- Family support for non-violence

D. Elaine Pressman & John Flockton, *Violent Extremist Risk Assessment: Issues and Applications of The VERA-2 In A High-Security Correctional Setting*, *in* PRISONS, TERRORISM, AND EXTREMISM: CRITICAL ISSUES IN MANAGEMENT, RADICALIZATION AND REFORM 122, 128 (Andrew Silke ed., 2014).

[569] Silke, *supra* note 567, at 116-119.

[570] [I.K.] art. 24; GÖZLEM VE SINIFLANDIRMA MERKEZLERİ YÖNETMELİĞİ [GSMY] [THE REGULATION ON CENTERS FOR OBSERVATION AND CLASSIFICATION], art. 22-27 (Turk.).

leaders of a terrorist organization, active members in a terrorist organization, those who have left from a terrorist organization, and non-partisan or neutral convicts.[571]

Prisoner radicalization is a matter of fact in Turkish prisons, according to a security official in the Counterterrorism Department as well as a corrections judge in Ankara. The security official complained that:

> We detain terrorists at the stage of membership in a terrorist organization at a young age. Yet, they get out of jail in their mid-ages as professional terrorists ready for new attacks when the head of the organization demands. They get more radicalized in jail through interaction with more experienced terrorists.

The corrections judge's experience suggests the following as contributing factors to radicalization in prisons:

1- Crowded prison conditions: The prison population was profoundly increased in the last 10 years, from 90,837 in 2007 to 230,519 in 2017.[572] According to 2017's latest governmental statistics,[573] 62,924 out of 230,519 prisoners have been jailed for terror crimes. The number of detainees includes both convicted offenders and pre-trial detainees.[574] Among the 62,924 inmates, 49,455 of them have been detained for FETO, 10,193 for PKK, 1234 for ISIS, 1545 for leftist extremists, and 497 for rightist extremists. Thus, Turkey's prisons are overcrowded. The over-crowdedness eases the interaction of prisoners from different levels in the organizational hierarchy and the emergence of a charismatic leader who would direct a group into an extremist ideology.

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[571] *Id.* art. 27.
[572] The prison population was increased rapidly especially after the July 2016 coup attempt, from 187,647 in 2016 to 230,519 in 2017.
[573] The new statistics were obtained from a confidential governmental source. The online statistics of the Turkish Ministry of Justice shows only total detainees according to years, without distinguishing terror crimes. According to the 2017 online statistics, the number of total detainees are 228,993, 140,248 of which are convicted and 88,745 are pre-trial detainees. The website does not contain any specific information on terror detainees. Republic of Turkey Ministry of Justice-General Directorate of Prisons and Detention Houses, Prison Population Statistics, http://www.cte.adalet.gov.tr (last visited Aug. 22, 2018).
[574] Convicted offenders: 143,473; Pre-trial detainees: 87,046.

2- The understaffing of prisons: There are 53,552 personnel in the Corrections Department for 230,519 inmates.[575] It shows that each corrections officer is responsible for taking care of four prisoners. In U.K.,[576] Spain,[577] Germany,[578] Italy,[579] Holland[580] and France,[581] in comparison, one corrections officer is responsible for one to two inmates.[582]

3- The placement of terrorists in 10 to 20 capacity rooms instead of the legally required 1 to 3 capacity rooms.[583]

4- Occasional ill-treatment of terrorists by security officials in the 1980s, and terrorists' abuse of these memories to radicalize others

5- Firm organizational discipline and hierarchy, which makes it difficult to loosen terrorist bonds and to prevent radicalization.

6- Age: Younger prisoners are more likely to get radicalized than 30-35 years old prisoners are.

7- The authoritarian and submissive Middle Eastern culture prevailing especially in the Southeast. This culture generates a human profile who is willing to hand his free-will and autonomy to another person or a group, and ready to fulfill the orders or wishes of an authoritarian leader. The main reason for terrorist violence in Turkey is thus not self-actualization but submission to a leader.

8- The attitudes of the corrections staff towards prisoners, and the effectiveness and expeditiousness of judicial remedies in case of an ill-treatment.

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[575] According to the statistics obtained from a confidential source.
[576] In U.K., 84,537 (2017) prisoners are taken care of by 43,370 (2015) corrections officers.
[577] In Spain, 58, 950 (2017) prisoners are taken care of by 29,342 (2015) corrections officers.
[578] In Germany, 64,223 (2017) prisoners are taken care of by 36,263 (2015) corrections officers.
[579] In Italy, 57,608 (2017) prisoners are taken care of by 44,351 (2015) corrections officers.
[580] In Holland, 10,102 (2017) prisoners are taken care of by 10,634 (2015) corrections officers.
[581] In France, 68,574 (2017) inmates are taken care of by 36,311 (2015) corrections officers.
[582] According to the statistics obtained from a confidential source.
[583] [I.K.] art. 9.

The interviewed corrections judge reveals that the Turkish corrections department uses risk assessment factors only to measure the likelihood of recidivism if released on parole.[584] Risk assessment is used to determine whether an offender is in 'good condition' and thus should be released on parole.[585] Risk assessment factors are the same for convicts of ordinary crimes and terror crimes. There are no risk assessment factors specifically designed to measure violent extremist radicalization. There is also no statistical data on whether terror convicts get radicalized in prisons. In his opinion, it is hard -if not impossible- to measure prison radicalization certainly in mathematical numbers.

The judge might be right that it is hard to measure the likelihood of radicalism precisely in numbers. Yet, on the other hand, he accepts that radicalization is very likely to occur in Turkish prisons. Therefore, in my opinion, Turkey must determine particular personal, social and institutional indicators of radicalization for post-sentence detention purposes, and make a risk assessment accordingly. The radicalization analysis must be made individualistically and be based upon interviews with terrorists, court reports, the reports of corrections officers and prison psychologists, prison intelligence, and the specific radicalization tests designed solely for terrorists. In conclusion, Turkey must assure, through the enactment of post-sentence detention, that radicalized terrorists must not be released after their serving of sentences.

[584] The judge also added that "Even though a terrorist is not released on parole due to the risk of recidivism after a risk assessment, he is required to be released when he serves his sentence."
[585] According to the Turkish law, the eligibility of parole for ordinary offenders is after the serving of 2/3 of sentence, while it is ¾ for terror offenders. For terrorists who received a life sentence, there is no release on parole. [I.K.] art. 107-2, 4, 15; [ T.M.K.] art. 17-4.

b. Mental Disorder

A mental disorder is a "clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning".[586] Some researchers assert that there may be a relationship between terrorist involvement and mental disorder. These studies suggest that terrorist involvement was either the cause or the result of a particular mental disorder if coupled with recent stressors, and that there was ample evidence of mental disorder among terrorists.[587]

To begin with, terrorist engagement can be either the "driving force",[588] or the "byproduct" of a mental disorder if coupled with recent stressors.[589] That is, exposure to violent and traumatic situations in terrorist organizations may lead to psychological problems such as posttraumatic stress disorder (PTSD). Additionally, the experience of mental health problems may act as a background risk factor towards terrorist radicalization if combined with proximal stressors.[590]

According to research, among 153 lone actor terrorists, 8.5% suffered from schizophrenia, 7.2% depression, 6.5% unspecified personality disorder, 3.9% bipolar disorder, 3.3% PTSD, 3.3% autism spectrum disorder, 2.0% delusional disorder 1.3% traumatic brain injury, 1.3% unspecified anxiety disorder, 1.3% obsessive-compulsive disorder, 0.7% drug dependence, 0.7%

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[586] AMERICAN PSYCHIATRIC ASSOCIATION, DESK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-5 4 (2013).
[587] *See infra* notes 588-590.
[588] Emily Corner, Paul Gill, and Oliver Mason, *"Mental Health Disorders and the Terrorist: A Research Note Probing Selection Effects and Disorder Prevalence*, 39 STUD. IN CONFLICT &TERRORISM 560-568 (2016). For example, a study found that 24 % of juveniles who are exposed to various aspects of gang related life style developed PTSD following the exposure. Further, autobiographical evidence from former terrorist actors explains how roles and experiences within an organization affects their psychological health. Paul Gill and Emily Corner, *There and Back Again: The Study of Mental Disorder and Terrorist Involvement,* 72 AM. PSYCHOLOGIST 231, 236 (2017).
[589] Alison Russell, *Mental Disorder, Violent Radicalization, and Terrorist Behavior*, 4 AM. J. OF MED. RES. 185 (2017); Gill & Corner, *supra* note 588, at 236, 237. In the Islamic State context, for example, many perpetrators develop mental health problems as a byproduct of terrorist involvement instead of the driver of it. Emily Corner and Paul Gill, *Is there a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?,* 10 CTC SENTINEL 1, 6 (2017).
[590] Gill & Corner, *supra* note 588, at 237.

schizoaffective disorder, 0.7% psychotic disorder, 0.7 % dissociative disorder, and 0.7% unspecified sleep disorder.[591]

Various studies have been conducted to determine which type of terrorists are more likely to have a mental disorder. For instance, one study conducted on 119 lone-actor terrorists and 428 group-based actors shows that lone wolf actor terrorists are 13.5 times more likely to have mental illness than group-based terrorists.[592] In the Islamic State context -for instance- mental health problems are more prevailing among individual terrorists inspired by ISIS than those directed by it.[593]

Another study demonstrates the rates of mental disorders within various terrorist types as follows: 50% for mass casualty offenders, slightly more than 40% for lone actor terrorists, 20% for solo-actor terrorists (who conducted an act of terrorism by themselves but were directed and controlled by a larger terrorist organization), over 5% for lone dyads (a group of two terrorists), and less than 3% for terrorist group members.[594] Another study comparing suicide bombers against other terrorists and non-political criminals shows that; suicide bombers are 43% more likely to have avoidant-dependent personality disorder, 45% more likely to have depressive symptoms, and 40% more likely to have suicidal tendencies.[595]

In conclusion, researchers suggest that there is a nexus between terrorist engagement and mental disorder even though more research needs to be done for more clear and determinative

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[591] *Id.*
[592] Emily Corner and Paul Gill, *A False Dichotomy? Mental Illness and Lone-Actor Terrorism,* 39 LAW & HUM. BEHAV. 23-34 (2015).
[593] Corner & Gill, *supra* note 589, at 1, 6.
[594] *Id.* at 1, 2.; Corner et al, *supra* note 588, at 562.
[595] ARIEL MERARI, DRIVEN TO DEATH: PSYCHOLOGICAL AND SOCIAL ASPECTS OF SUICIDE TERRORISM (2010); Ariel Merari, Ilan Diamant, Arie Bibi, Yoav Broshi &Giora Zakin, *Personality Characteristics of "Self Martyrs"/"Suicide Bombers" and Organizers of Suicide Attacks*, 22 TERRORISM AND POL. VIOLENCE 87-101 (2009); Ariel Merari et al., Making Palestinian *"Martyrdom Operations"/"Suicide Attacks": Interviews With Would-Be Perpetrators and Organizers*, 22 TERRORISM AND POL. VIOLENCE 102-119 (2009); Gill & Corner, *supra* note 588, at 238.

analysis.[596] What we know for now is that mental disorder can be the cause (if coupled with a recent stressor) or the result of terrorist engagement, depending on the situation. For these reasons, in the determination of post-sentence detention, judges should consider expert opinions on whether a particular terrorist detainee has a mental disorder and whether this mental disorder would make him attracted to mass violence via terrorist involvement.

### c. Prison Intelligence

Prison intelligence is a useful tool to ensure prison security and to detect potential organized criminals or terrorist groups existing in the prison system.[597] It can also be used as a means to determine whether a terrorist continues to be dangerous in prisons and would likely commit further terror crimes when released. Prison intelligence is comprised of various sources of information:

- Covert surveillance such as "recording of telephone calls", "interception of post/mail", "the use of listening devices", "tracking devices", "dedicated surveillance teams", "photographic surveillance", "video surveillance", "covert search of letters, packages and parcels", the "use of tracking and positioning devices"[598]
- Prisoner informants,[599]
- Information obtained from prison staff: correction officers, prison psychologists, teachers, health and rehabilitation officials, prison reports[600]

[596] Corner et al, *supra* note 588, at 562; Gill & Corner, *supra* note 588, at 238; John G. Horgan, *Psychology of Terrorism: Introduction to the Special Issue,* 72 AMERICAN PSYCHOLOGIST 199, 202 (2017).
[597] UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON DYNAMIC SECURITY AND PRISON INTELLIGENCE 44 (2015).
[598] *Id.* at 53.
[599] *Id.* at 54.
[600] *Id.* at 59.

- Visitor data: "visits from family, friends and associates"[601]
- Communications data: the monitoring of "internal communications between prisoners", and "external communications between prisoners and their contacts outside of the prison"[602] (monitoring of letters and telephone conversations by the prison administration).

Judges must utilize these prison intelligence sources in post-sentence detention determinations, particularly to determine whether a terrorist convict continues to be in a committed relationship with a terrorist organization and to determine whether he is still dangerous to society.

### d. Personal and Criminal Background

Every person bears the traces of his past. Our past is what makes us who we are today. It is a sign of our tendencies, capabilities, motivations, and future conducts. It is mainly comprised of our personal and criminal history. For this reason, personal and criminal history can be used for counterterrorism purposes to anticipate future propensity to violence.

Personal background factors include character, age, health, psychological profile, physical and mental condition, family, social environment, employment history, education level, financial resources, the length of residence in a community, community ties, past conduct, and drug or alcohol abuse history.[603] Intelligence reports may be used to support these personal background factors.

Criminal background factors include past criminal history, court reports in prior proceedings, the nature and circumstances of prior offenses.[604] In assessing the nature and

[601] *Id.* at 60.
[602] *Id.* at 60, 61.
[603] 18 U.S.C. § 3142-g-3-A.
[604] *Id.*

circumstances of previous offenses, courts may utilize general sentencing factors. These factors are the means used to commit prior crimes, their location and time, the significance and value of a subject matter, the seriousness of the harm or the danger posed by those crimes, the motivation for those crimes, and the culpability of the intent. [605]

Additional personal and criminal background factors specific to terror crimes should be taken into account when determining the likelihood of future terrorist acts upon release. I propose the following factors be taken into account:

- A terrorist's hierarchical level in the organization,
- The patterns of behavior of a particular terrorist organization, and a terrorist's commitment to those patterns,
- His prior target selections,
- The number of terror attacks that he participated in,
- His level of commitment to the terrorist cause,
- His contributions to the growth of an organization,
- Any detachment factors such as a turning point event or changing priorities,
- His behavior in prison, and
- Whether he retained capability (experience and training) after discharge from prison.

[605] [T.C.K.] art. 61-1.

### ii. The Level of Cause for Dangerousness

The determination of appropriate levels of cause is an issue of balancing, which is conducted under the reasonableness standard[606] in the United States and the proportionality standard in Europe. The balancing test used in each standard demands that public interest is weighed against individual interests, and the suitable level of cause is determined as a result of this balance. The greater an individual right intrusion is, the higher the level of cause should be.

The rationale in setting levels of cause in European practice and the United States law rests on the balancing test. Yet, states other than the United States (including the ECtHR jurisdiction) have not created a clear hierarchy among different levels of cause in their statutes or case law.[607] No jurisdiction other than the U.S. uses precise and consistent terms when assessing whether a restrictive measure satisfied the required cause threshold. Since the only jurisdiction that generated an accurate hierarchy among levels of cause is the United States, this chapter will be based upon the standards set by the U.S.

There are five levels of cause used in the United States:

1) Reasonable suspicion: Reasonable suspicion means "a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity."[608] It is used in stop and frisk cases.[609] The scope of reasonable suspicion in U.S. law and Turkish law are similar. According to U.S. law, reasonable suspicion requires the police to rely on "their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that

[606] U.S. Const. amend. IV; Terry v. Ohio, 392 U.S. 1 (1968).
[607] For example, The ECHR only states one level of cause for all liberty restrictions regardless of arrest or pre-trial detention, which is reasonable suspicion (of having committed an offense). [E.C.H.R.] art. 5-1-c.
[608] BLACK'S LAW DICTIONARY, *supra* note 501, at 1585.
[609] *Terry*, 392 U.S. 1; [P.V.S.K.] art. 4-A-2.

'might well elude an untrained person.' "[610] Under Turkish law, reasonable suspicion is based on professional experience of a police officer and his interpretations of particular behaviors of a suspect signaling that a crime is or has been afoot.[611]

2) Probable cause: Probable cause demands a "fair probability" or a "substantial chance" of criminal activity. [612] It is used for search and seizure cases.[613] According to U.S. law, probable cause is more than a bare suspicion, and exists "where the facts and circumstances within knowledge of the officers and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed".[614] According to Turkish law, probable cause stems from general life experience. In deciding on probable cause, the place and time of search, the condition and manners of the person who will be searched, the features of effects that the suspect carries must be taken into consideration. There must be corroborating indications supporting tips. The suspicion must be based upon specific facts. There must be particular facts showing that evidence or person being searched may be found in the place under search.[615]

3) The preponderance of evidence (more likely than not): It refers to "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is

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[610] JOSHUA DRESSLER & ALAN C. MICHAEL, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 273 (2010); United States v. Arvizu, 534 U.S. 266, 273 (2002) (*quoting* United States v. Cortez, 449 U.S. 411, 418 (1981)).
[611] ADLI VE ÖNLEME ARAMALARI YÖNETMELIGI [A.Ö.A.Y] [THE REGULATION ON INVESTIGATIVE AND ADMINISTRATIVE SEARCHES] art. 27/2.
[612] Illinois v. Gates, 462 U.S. 213, 238, 295 (1983).
[613] U.S. CONST. amend. IV; [C.M.K.] art. 116; Brinegar v. United States, 338 U.S. 160 (1949).
[614] *Brinegar*, 338 U.S. at 175, 176. Carroll v. United States, 267 U.S. 132, 162 (1925). The scope of 'probable cause' in the U.S. system is same as the ECHR's 'reasonable suspicion'. Only their denomination differs. The ECtHR explanation of "reasonable suspicion" is as follows: "the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence. What may be regarded as 'reasonable' will however depend upon all the circumstances." Fox, Campbell and Hartley v. United Kingdom, App. Nos. 12244/86-12245/86- 12383/86, para. 32. (1991), available at http://hudoc.echr.coe.int/eng?i=001-57721; Erdagoz v. Turkey, 1997-VI Eur. Ct. H. R. para. 51, available at http://hudoc.echr.coe.int/eng?i=001-58108.
[615] [A.Ö.A.Y] art. 6-1, 2, 3, 4, 5.

still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."[616] The standard is used in civil trials as a burden of proof.[617]

4) Clear and convincing evidence (substantially more likely than not): It refers to the "evidence indicating that the thing to be proved is highly probable or reasonably certain".[618] The concept is used for pre-trial detention.[619] Clear and convincing evidence standard is the middle burden of proof between the preponderance of evidence and proof beyond a reasonable doubt standards.[620]
5) Proof beyond a reasonable doubt: It refers to "proof that precludes every reasonable hypothesis except that which it tends to support".[621] This standard is used to decide on conviction in criminal cases.[622]

The issue before us is which level of cause is more proportional or reasonable for post-sentence detention of terrorists. In *Addington v. Texas,*[623] the United States Supreme Court determined that the suitable level of suspicion for involuntary civil confinement of the mentally ill was clear and convincing evidence. The Court found that the preponderance of evidence would fall short of satisfying the due process clause, while 'proof beyond a reasonable doubt' would be too burdensome for a civil proceeding.[624] The Court reasoned that the preponderance of evidence required for civil cases would not be protective enough in involuntary civil commitment case of

[616] BLACK'S LAW DICTIONARY, *supra* note 501, at 1301.
[617] *Id.*; Addington v. Texas, 441 U.S. 418, 433 (1979).
[618] BLACK'S LAW DICTIONARY, *supra* note 501, at 636.
[619] *Salerno*, 481 U.S. 739; [C.M.K.] art. 100.
[620] BLACK'S LAW DICTIONARY, *supra* note 501, at 223, 636; *Addington*, 441 U.S. at 426, 431- 432; Foucha v. Louisiana, 504 U.S. 71, 76 (1992).
[621] BLACK'S LAW DICTIONARY, *supra* note 501, at 1334.
[622] In re Winship, 397 U.S. 358 (1970); [C.M.K.] art. 223-5; *Addington*, 441 U.S. at 427, 428.
[623] *Addington*, 441 U.S. 418.
[624] *Id.* at 426, 431- 432.

the mentally ill especially considering the high intrusion on the right to liberty.[625] On the other hand, the Court concluded that the proof beyond a reasonable doubt standard applied in criminal cases was a poor fit for civil confinement especially because the uncertainties of psychiatric diagnosis makes it harder to prove that medical treatment is needed.[626]

In *Addington*, the Court gave a hint on how to set the right standard of cause. The Court stated that "when the possible injury to the individual is significantly greater than any possible harm to the state", "the individual should not be asked to share equally with society the risk of error".[627] The Court thereby decided that the equal share of risk of error through adoption of the preponderance of evidence standard was acceptable only when there was a possibility of greater harm to the state. The Court implied that the preponderance of evidence standard could be deemed reasonable in a case where there was a greater state interest prevailing over the right to liberty.

In deciding on whether the preponderance of evidence or the clear and convincing evidence standard is more reasonable for the post-sentence detention of convicted terrorists, the same logic will be used. The state interest in protecting society from terror attacks is greater than a convicted terrorist's liberty interests. This is so for two reasons: the greater state interest in counterterrorism in Turkey, and the diminished liberty intrusion in rehabilitation centers. First, the state interest is greater in terror crimes than in regular violent crimes (or in involuntary confinement of the mentally ill), for the lives of the mass are at stake in terror cases. Further, the preservation of national security, public safety and order is the most fundamental social norm prevailing over individual liberty in Turkey. The Turkish history showed that the state –instead of individuals- was the sole protector of the democratic culture and individual rights. Without a state that is governed

[625] *Id.* at 427.
[626] *Id.* at 432.
[627] *Id.* at 427.

by the rule of law and that ensures security and public order, democracy would be undermined and chaos would emerge.

Second, the manner of liberty intrusion is not as intrusive as in regular detainment since post-sentence detainees will be held --- under my proposal --- in rehabilitation centers instead of high security prisons. Rehabilitation centers provide more dignified conditions of confinement than crowded high security prisons. For one thing, rehabilitation centers will be governed by the Ministry of Health instead of the Ministry of Justice. These centers would lack the authoritarian environment of prisons. They will be administered by medical and educational personnel who are trained to nurse, instead of the corrections officers who are trained to ensure security and use coercion when necessary. Second, rehabilitation centers would provide more intense educational courses, employment skills, and psychological treatment than prisons. Third, rehabilitation centers will provide more freedom of movement than prisons in which prison cells are separated with dungeons. Rehabilitation centers in this sense are more akin to hospitals than prisons. Their primary purpose is not retribution or deterrence, but to restore innate humane abilities in a former terrorist and to reintegrate him into society. Fourth, treatment in rehabilitation centers would be more individualized and goal-oriented than in prisons that pursue general re-integration policies.

Since the public interest in national security, public safety and public order in Turkey outweighs the diminished liberty interest in rehabilitation centers, the suitable level of cause in post-sentence detention is the preponderance of evidence standard. If the detention period extends, however, the level of cause must be raised to the clear and convincing evidence standard.[628] This is because the liberty intrusion would be greater as time passes, and the preponderance of evidence

[628] A similar idea was followed by the U.S. Supreme Court in *County of Riverside v. McLaughlin*. The Court shifted the burden of proof from defendant to government considering that the arrest period was longer than 48 hours. County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).

standard would not sufficiently justify a greater liberty intrusion. Thus, a higher standard is needed for a lengthier intrusion on liberty. The burden of proof rests upon the government.

### iii. The Length of Detention

The threshold period necessary for further detention under the clear and convincing evidence standard could be determined in two ways. First, we may calculate the average rehabilitation period in Turkish prisons, and set the permissible detention period under the preponderance standard accordingly. The average rehabilitation period has not yet been calculated by Turkish authorities.[629] It should be approximately determined, and the standard of proof should be raised to clear and convincing evidence after the passing of that duration. This suggestion is worth trying but is hard to implement due to difficulties in the assessment of highly individualized rehabilitation results.

Second, we may determine a bright line rule and set a certain period of time as a limit. I suggest that after three years of detention under the preponderance standard, judges review the case file under the clear and convincing evidence standard. If the latter standard is not satisfied, the detainee should be released.

Post-sentence detention decision must be automatically reviewed by courts every six months at a hearing. Any decision extending the detention should be corroborated with expert opinions.

There is a fair concern that terrorist offenders who refuse to receive rehabilitation treatments will permanently stay in prisons. It is unfortunately the case, as there is a potential that somebody will always present a risk.[630] It would not be wise to release persons who have the

[629] This information was obtained from a government source.
[630] For example, *see* Kansas v. Hendricks, 521 U.S. 346 (1997).

propensity to commit terror crimes, and give them the opportunity to harm innocents. Otherwise, the state would be responsible for any attacks as it recklessly opened the way for terrorists.

c) Conclusion

Interviews with officials in counterterrorism practice suggest that there is a need for prevention-oriented detention laws in Turkey. In order to address this issue, this chapter has made two proposals: pre-trial detention on dangerousness grounds and the post-sentence detention of dangerous terrorists.

Turkish law should add dangerousness or propensity to commit a new crime as another reason for pre-trial detention. This enactment would prevent judges from pre-textually using other reasons for pretrial detention (destruction of evidence, witness tampering and flight risk) just to protect society from further attacks. Such an amendment would contribute to the preservation of judicial integrity and the restoration of public trust in the Turkish judicial system.

The post-sentence detention of terrorists complies with the European standards, especially because it satisfies the principle of proportionality in Turkey's circumstances and there can be adequate safeguards against arbitrariness. The post-sentence detention of terrorists meets the proportionality standard as it is implemented for the *proper purposes* of protecting Turkish national security, public safety, and public order, and it is *necessary* to protect the public from terrorism. Post-sentence confinement in rehabilitation centers is also the *least restrictive suitable option* compared to other measures. Rehabilitation conditions must of course be designed to infringe on individual dignity and liberty as little as reasonably possible.

Post-sentence detention can also satisfy the *balancing test*, which is the core of the proportionality analysis. The public interest overrides the individual interest for two reasons: First, Turkey's special circumstances require national security to be the foremost social norm. Second, individual liberty interest is diminished in this case because the detention would be conducted in rehabilitation centers instead of prisons.

Safeguards against arbitrariness must be imposed --- specifically a required showing of future dangerousness and a precise level of cause. The dangerousness analysis required that judges consider various scientific reports on: 1) whether a prisoner is radicalized in a prison by the influence of more experienced and professional detainees, 2) whether a prisoner had a mental disorder generating a propensity for violence, 3) whether a prisoner continued to be in contact with his terrorist organization, and 4) whether his personal and criminal background suggested any inclination towards violence. Judges would decide on post-sentence detention only if there was preponderance of evidence. If the detention period is prolonged to three years, judges would look for clear and convincing evidence regarding dangerousness.

Post-sentence detention of the dangerous might not be acceptable by the ECtHR, although there are jurisdictions like Germany applying it. The ECtHR would perhaps need to renovate its case law to allow post-sentence detention in member states where there was a continuous high risk of terror like in Turkey. If post-sentence detention is enacted in Turkey and the measure goes before the Court, I suggest that the Court considers Turkey's enduring national security, public safety and order concerns in determining its validity.

Post-sentence detention in rehabilitation centers may raise concerns such as potential mistreatments in these facilities, biased and politically influenced judgments, or attempts to silence dissidents through continued detention. These are fair arguments, but they are also valid for the

application of any legal rule affecting individual liberties. If a state does not have effective oversight mechanisms to oversee the implementation of its rules, these concerns may come true in the application of any rule. For this reason, what matters at the end is the honesty of government officials as well as their commitment to the rule of law.

## **B.** LIMITED PROCEDURAL RIGHTS DURING POLICE INTERROGATION

This section explains the procedural rights of suspects during police interrogation in the U.S. and ECtHR jurisdictions, their legal groundings, the situation in Turkish law, and its gaps. It makes two proposals to Turkish law, which are based on the comparison of U.S. and ECtHR jurisdictions as well as on interviews with Turkish counterterrorism officials. The first proposal is that Turkish judges consider relevant ECtHR decisions on the compelling reasons exception to the right to counsel and the right to be informed of procedural rights. The second proposal is that Turkey enacts a law that allows the exclusion of a defense lawyer from a police interrogation when there is reasonable suspicion (under the professional experience of the police and public prosecutor) that the lawyer; 1) participates in the same criminal activity or is engaged in the same terrorist organization with his client, or 2) abuses his communication with his client to commit crimes or to protect the terrorist organization and its structure, or to jeopardize the security of a prison.

### 1. Procedural Rights in Police Interrogation in the U.S. and ECtHR Jurisdictions

In democratic countries, individuals are granted with certain procedural rights that are designed to ensure fairness and to prevent arbitrary government action in police interrogation. These rights are the right to counsel, the right to silence, and the right to be informed of these

procedural rights (including that anything said can and will be used against the individual in court and that a lawyer will be appointed to him if he is indigent).[631] This sub-chapter will explain the U.S. and European understandings of these common rights, and will discuss whether developments in the U.S. law affected the European perspective.

According to the U.S. law, the right to counsel, the right to silence, and the right to be notified of defense rights in police interrogation derive from the Fifth Amendment's privilege against self-incrimination.[632] The Fifth Amendment to the U.S. Constitution states that no one "shall be compelled in any criminal case to be a witness against himself".[633] The landmark case of *Miranda v. Arizona*[634] held that the privilege was applicable to the "inherently compelling" in-custody police questioning.[635] The privilege against self-incrimination is a measure to determine the proper scope of government power over its citizens.[636] The privilege thereby demands respect

[631] *Miranda*, 384 U.S. at 444, 469-473, 479; Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R. paras. 270-273, *available at* http://hudoc.echr.coe.int/eng?i=001-166680 . For more information, *see* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE V.2 784, 785 (2015).

[632] In *Escobedo v. Illinois*, the U.S. Supreme Court first decided that the right to counsel before the initiation of the formal charging stemmed from the Sixth Amendment right to counsel. Escobedo v. Illinois, 378 U.S. 478 (1964). But the Court changed course in *Moran v. Burbine* and ruled that the Sixth Amendment right to counsel was applicable only after the initiation of adversary proceedings. That is to say, the Sixth Amendment right to counsel is no longer the applicable rule in police interrogation when a suspect is not yet formally charged by a court. Rather, the Fifth Amendment privilege against self-incrimination governs the right to counsel in custodial interrogation. STEPHEN A. SALTZBURG & DANIEL CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 853- 855 (2014). The purpose of the right to counsel in pre-charge detention is "to guarantee full effectuation of the privilege against self-incrimination". Moran v. Burbine, 475 U.S. 412, 429, 430 (1986).

[633] U.S. CONST. amend. V.

[634] Miranda v. Arizona, 384 U.S. 436 (1966).

[635] *Id.* at 461, 467. Miranda warnings are required in custodial interrogation cases. A person is deemed to be in custody when he is "deprived of his freedom of action in any significant way". *Id.* at 477. *See* also Orozco v. Texas, 394 U.S. 324 (1969) and Beckwith v. United States, 425 U.S. 341 (1976). A custodial interrogation refers to the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". *Miranda,* 384 U.S. at 444.
*Rhone Island v. Innis* decision extended the scope of an interrogation from Miranda's express questioning to include the functional equivalent of an express questioning. That is, under *Rhone Island v. Innis*, "'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect". This determination should be based "primarily upon the perceptions of the suspect, rather than the intent of the police". Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). *See* also Arizona v. Mauro, 481 U.S. 520 (1987).

[636] *Miranda*, 384 U.S. at 460.

for dignity and integrity of citizens as well as for their free will.[637] The right to counsel and the right to be informed of these rights do not explicitly exist in the U.S. Constitution. They instead were created by the U.S. Supreme Court as necessary safeguards for the operation of the privilege against self-incrimination.[638]

The European Convention on Human Rights, somewhat differently, does not explicitly contain the privilege against self-incrimination, the right to silence, or the right to be informed of procedural rights. It only provides the right to counsel in the text of its Article 6-3-c. Yet, although they are not explicitly written in the Convention, the case law of the ECtHR suggests that the privilege against self-incrimination and the right to silence as well as the right to be informed of procedural rights all derive from the right to a fair trial of Article 6.

The ECHR Article 6-3 states that:

> Everyone **charged with** a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

According to the ECtHR, a suspect is entitled to these rights at the very beginning of the charging of a criminal offense. Under the Court's most recent case law, *"*a 'criminal charge' exists

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[637] *Id.*

[638] *See Moran*, 475 U.S. at 429, 430 for the right to counsel; *Id.* at 444, 458, 469-473, for the right to counsel, the right to silence, and the right to be informed of these rights. SALTZBURG & CAPRA, *supra* note 632.

from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him."[639] The right to a fair trial thus is effective not only in trial but also in pre-trial proceedings such as during the police interrogation of a charged suspect.

The privilege against self-incrimination, the right to silence, and the right to be informed of the right to counsel and silence are regarded as the byproducts of as well as the means of effectively fulfilling the right to a fair trial.[640] In more detail, the ECtHR interpreted the right not to incriminate oneself and the right to silence as internationally recognized standards that "lie at the heart of a fair procedure under Article 6".[641] In *Saunders v. United Kingdom,*[642] the Court determined that the right to silence and the right not to incriminate oneself "lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art. 6)." [643] In terms of the right to be notified of procedural rights, the Court ruled that in order for the right to silence and the right to a lawyer be practical and effective rather than theoretical and illusory,[644] a suspect must be made aware of his rights. Further, the right to be notified of procedural rights

[639] Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R. paras. 249, *available at* http://hudoc.echr.coe.int/eng?i=001-166680, *citing* Deweer v. Belgium, App. No. 6903/75 at paras. 42-46 (1980), *available at* http://hudoc.echr.coe.int/eng?i=001-57469 ; Eckle v. Germany, App. No. 8130/78 (1982), *available at* http://hudoc.echr.coe.int/eng?i=001-57476; McFarlane v. Ireland, App. No. 31333/06 (2010), *available at* http://hudoc.echr.coe.int/eng?i=001-100413.
[640] Salduz v. Turkey, 2008-V Eur. Ct. H. R. 59, 77 at para. 53, *available at* http://hudoc.echr.coe.int/eng?i=001-89893.
[641] Saunders v. United Kingdom, 1996-VI Eur. Ct. H.R. 2044, 2064 at para. 68.
[642] *Id.*
[643] *Id.*
[644] Dvorski v. Croatia, 63 Eur. H. R. Rep. 311, 337, para. 82 (2016), *available at* http://hudoc.echr.coe.int/eng?i=001-158266; *Salduz,* at para. 51.

was inherent in the existence of the privilege against self-incrimination, the right to silence and the right to counsel.[645]

Since Europe and the U.S. accord similar procedural rights to suspects in police interrogation, one might wonder whether the American *Miranda* rule has been exported to the ECtHR jurisprudence. There is no clear-cut answer to this question. This is because there is no explicit reference to the *Miranda* case in ECtHR's rulings.[646] Yet, when ECtHR's relevant decisions are compared with that of the U.S. Supreme Court, there is evidence that European judges have been influenced by the U.S. law.[647] That is not to say that ECtHR judges reached the same conclusion as the U.S. Supreme Court in every single case. Their opinions sometimes differ in the same issues arising from these procedural rights.[648] But the European Court does refer to American law as a relevant comparison. In *Ibrahim and Others v. the United Kingdom,*[649] for example, ECtHR compared the European approach with other countries such as the United States and Canada. *Ibrahim* is the only case the Court explicitly touched upon the *Miranda* decision. Further, we can also assume that ECtHR judges are familiar with the U.S. law especially because of their distinguished legal background with knowledge of foreign legal developments, including the U.S.[650] All these factors demonstrate that although defense rights in a police interrogation are

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[645] Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R. para. 272, *available at* http://hudoc.echr.coe.int/eng?i=001-166680.
[646] Charles D. Weisselberg, *Exporting and Importing Miranda,* 97 B.U. L. REV. 1235, 1285 (2017).
[647] For example, the ECtHR in *Pishchalnikov* was influenced by U.S. Supreme Court's Edwards decision. *See* Pishchalnikov v. Russia, App. No. 7025/04 (2009), *available at* http://hudoc.echr.coe.int/eng?i=001-94293 ; Edwards v. Arizona, 451 U.S. 477 (1981).
[648] Such as in cases of ECtHR's *Dvorski* and the U.S. Supreme Court's *Burbine*. In the former case, the ECtHR ruled that the police had to inform the suspect of the fact that his family hired another lawyer for him, and the lack of this knowledge deprived the suspect of informed choice of a lawyer and defense rights. In the latter case, however, the U.S. Supreme Court ruled that the police did not have the obligation to inform the applicant of the presence of a lawyer in the stationhouse. *Dvorski,* 63 Eur. H. R. Rep. 311; *Moran*, 475 U.S. at 429, 430.
For more information, *see* Weisselberg, *supra* note 646, at 1262.
[649] *Ibrahim and Others,* at paras. 228-233.
[650] Weisselberg, *supra* note 646, at 1284, 1285.

not exported from the U.S. to Europe, there is evidence that U.S. Supreme Court decisions influenced the European approach at a certain level.

### 2. Turkish Law, Its Gaps, and Suggestions Based On Comparative Law and Interviews

Turkish law requires mandatory counsel in cases when the minimum statutory punishment is 5 years of imprisonment.[651] Since terror crimes (except terrorist propaganda) require at least 5 years of incarceration, the presence of counsel during interrogation and trial stages is mandatory in most of the terror cases.[652] The law also requires that, regardless of the minimum incarceration period, a statement obtained in police interrogation without the presence of counsel may not be used as primary evidence in court if the defendant objects.[653] This rule generates an incentive in the police to provide counsel no matter how serious a crime is just to make sure that a statement be considered as evidence at trial. Thus, we may conclude that there is an implied mandatory counsel for all criminal cases.[654]

A terror suspect thus cannot be deprived of his mandatory right to counsel during investigation and trial stages, with one exception: the right to counsel can be restricted for 24 hours by a judicial order issued upon request of a public prosecutor. Yet, even in that case, the police cannot interrogate the suspect.[655] Any police interrogation without the presence of counsel is strictly prohibited in Turkish law. The number of counsels is limited to three in all cases during police interrogation, and in terror cases during trial.[656]

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[651] [C.M.K.] art. 150-3; YENİSEY & NUHOĞLU, *supra* note 420, at 201; CENTEL & ZAFER, *supra* note 420, at 173; SOYASLAN, *supra* note 289, at 184, 185.
[652] [C.M.K.] art. 150-3 requires a mandatory counsel if the incarceration period of a crime is 5 years or more.
[653] [C.M.K.] art. 148-4.
[654] SOYASLAN, *supra* note 289, at 184, 185.
[655] [C.M.K.] art. 154-2.
[656] [C.M.K.] art. 149-2. *See* also FERİDUN YENİSEY, KOLLUK HUKUKU [THE LAW OF POLICE FORCES] 581 (2015); YENİSEY & NUHOĞLU, *supra* note 420, at 198. CENTEL & ZAFER *supra* note 420, at 177.

Under Turkish law, the police are required to warn suspects of the right to counsel, the right to silence, the right to inform relatives about detention, and of the right to demonstrate the evidence in favor of him to clear any suspicion against him.[657] These rights are required to be reminded at the beginning of the police's and prosecutor's interrogation as well as at trial stages.[658] Both the U.S. Supreme Court and the ECtHR have developed a public safety exception that allows unwarned custodial interrogation when necessary to address an urgent public safety interest.[659] But no such exception exists in Turkey. Thus, unwarned statements, even in cases of imminent danger, are inadmissible in Turkish courts.[660]

This chapter proposes two types of amendments to Turkish law: 1) A public safety exception to the right to counsel and the right to be informed of procedural rights, and 2) The exclusion of defense lawyers in certain limited circumstances. While the former suggestion fills a legal hole in the Turkish system when compared to ECHR and U.S. jurisdictions, the latter is developed as a legal solution to a problem stated by the interviewed counterterrorism officials. First, the public safety exception should be adopted that would allow unwarned custodial interrogation, outside the presence of counsel, in cases when there is an urgent need to protect the

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[657] [C.M.K.] art. 147- 1- c, d, e, f; YENİSEY, *supra* note 656, at 489-493; YENİSEY & NUHOĞLU, *supra* note 420, at 619-623; CENTEL & ZAFER, *supra* note 420, at 215-217; SOYASLAN, *supra* note 289, at 345-347.

[658] [C.M.K.] art. 147.

[659] New York v. Quarles, 467 U.S. 649 (1984); Salduz v. Turkey, 2008-V Eur. Ct. H. R. 59, 77 at para. 55, *available at* http://hudoc.echr.coe.int/eng?i=001-89893.; Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R. para. 249, *available at* http://hudoc.echr.coe.int/eng?i=001-166680.

[660] 1982 CONST. art. 38-6 (Turk.); [C.M.K.] art. 289-1-i; ÖZTÜRK ET AL, *supra* note 420, at 398; CENTEL & ZAFER, *supra* note 420, at 217; SOYASLAN, *supra* note 289, at 348, 349.
The Turkish High Court of Appeals (*Yargıtay*) ruled in two cases that the lack of Miranda warnings at the beginning of trial proceedings, as required by [CMK] art. 147 (then art. 135), constituted a reason for *vacate and remand decision* even in cases when the defendant was acquitted by the trial court. Scholars found this holding contrary to the primary purposes of criminal procedure law, which are to protect defendant rights and to ensure a fair trial. They were of the opinion that Miranda warnings were generated to protect defendant rights, and that the incompliance with Miranda should not have been interpreted against a defendant's interest. SOYASLAN, *supra* note 289, at 349. The two cases were with regard to fraud and counterfeit charges. In each case, procedural rights were not reminded by the Court that acquitted the defendant. C.G.K. 19.12.1994 E. 1994/6-322 K. 1994/343, *available at* http://www.kazanci.com/kho2/ibb/files/cgk-1994-6-322.htm ; C.G.K. 24.10.1995 E.1995/6-238 K. 1995/305, *available at* http://www.kazanci.com/kho2/ibb/files/cgk-1995-6-238.htm. (The dissent in the second case mentioned the U.S. Supreme Court's *Quarles* decision as an example, yet could not receive enough support from the majority.)

life and bodily integrity of third persons. That is, in exceptional cases when there is "an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person",[661] there is a sufficient and compelling reason to dispense with warnings and counsel.

Second, the exclusion of defense lawyers is proposed to counter the issue of unscrupulous counsel, whose aim is to obstruct the administration of justice by either coercing terror suspects to remain silent or facilitating an exchange of information between a terrorist organization and a terror suspect or between suspects. The sub-chapters below examine the two proposals of the public safety exception and the exclusion of defense lawyers, and provide some relevant information on foreign laws when necessary.

a) The Limitation of Procedural Rights in the Investigative Stage in Cases of a Public Safety Threat

This sub-chapter will first explain the U.S. and European laws regarding procedural rights in emergency conditions, which allow the temporary restrictions on the right to counsel and the right to be informed of procedural rights in these situations. Emergency conditions refer to cases when there is an urgent public safety need to protect the life, liberty and physical integrity of the public. Then, it will explain the relevant Turkish law and make suggestions to it.

[661] *Ibrahim and Others,* at paras. 210, 259, 300.

(1) The United States

The U.S. Supreme Court established a public safety exception to *Miranda* rights in *New York v. Quarles.*[662] Under the public safety exception, *Miranda* rights need not be provided to a suspect when information must be obtained to protect against an imminent threat to the safety of others. The evidence obtained therefrom thus would not be regarded as illegally obtained and would be admissible.[663]

In *Quarles*, a police officer did not caution an arrestee when he detained him and immediately asked the whereabouts of a gun after seeing the empty holster on the suspect. The suspect pointed him to the gun. The U.S. Supreme Court determined that un-Mirandized statements obtained to prevent a danger to public were admissible at trial. The Court ruled that the police "were confronted with immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket". More strikingly, the Court emphasized that the primary reason for added *Miranda* protections in the expense of fewer convictions was to effectuate the Fifth Amendment privilege against self-incrimination. The *Miranda* Court bore the burden of fewer convictions to protect the privilege against self-incrimination. In this case, however, the cost would be more than a simple failure to obtain evidence useful to build a case against Quarles for his conviction. The cost would be substantial danger to the public,[664] thus changing the balance between individual and public interests that the *Miranda* Court had struck.

[662] *Quarles*, 467 U.S. 649.
[663] *Id.*
[664] *Id.* at 652, 657.

(2) The European Court of Human Rights

The ECtHR permits temporary restrictions on the exercise of the right to counsel and the right to be informed of the right to silence in cases when there are compelling reasons such as a threat against public safety.[665] Compelling reasons thus would justify any failure to inform the suspect of his rights during interrogation. Similar to the U.S. Supreme Court's *Quarles* decision establishing a public safety exception to Miranda warnings, ECtHR also established a "compelling reasons" exception to the exercise of the right to counsel via the *Salduz* and *Ibrahim* cases, and the right to be informed of the right to silence via the *Ibrahim* case. Turkey also should establish an exception to Miranda rights in exceptional cases of urgent public interest, when it would be lawful for the police to question a person without warnings and without a lawyer present.

In *Salduz v. Turkey,*[666] a minor was arrested on suspicion of participating in an illegal demonstration supporting the imprisoned leader of the PKK and accused of hanging an illegal banner from a bridge. He was later convicted of aiding and abetting the PKK. The minor was not provided with a lawyer during police interrogation. The Court held that there had been a violation of Article 6 § 3 (c) (the right to legal assistance of one's own choosing) in conjunction with Article 6 § 1 (right to a fair hearing) of the Convention, given the applicant's lack of legal assistance as a minor during police custody.[667] The Court further stated that the right to access to a lawyer could be denied only when there were compelling reasons for a restriction. Such denial nevertheless could not unduly prejudice the right to a fair trial under Article 6. The important part of the decision is as follows:

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[665] Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R., *available at* http://hudoc.echr.coe.int/eng?i=001-166680. For other cases regarding legitimate restrictions on the right to counsel due to compelling reasons, *see* Salduz v. Turkey, 2008-V Eur. Ct. H. R. 59, 77 at para. 55, *available at* http://hudoc.echr.coe.int/eng?i=001-89893 and Borg v. Malta, App. no. 37537/13 (2016), *available at* http://hudoc.echr.coe.int/eng?i=001-159924.
[666] Salduz v. Turkey, 2008-V Eur. Ct. H. R. 59, 77, *available at* http://hudoc.echr.coe.int/eng?i=001-89893.
[667] *Id.* at paras. 57-63

> in order for the right to a fair trial to remain sufficiently "practical and effective", … access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that **there are compelling reasons to restrict this right.** Even where **compelling reasons may exceptionally justify denial of access to a lawyer**, **such restriction** – whatever its justification – **must not unduly prejudice the rights of the accused under Article 6**. The rights of the defense will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[668]

*Ibrahim and Others v. the United Kingdom*[669] is a leading and relatively new decision holding that in cases of danger to public safety or if urgencies of the situation require, it is lawful to temporarily restrict the exercise of the right to counsel and the right to be informed of the right to silence. Compelling reasons exist when there is "an urgent need to avert serious adverse consequences for life, liberty or physical integrity of the public."[670]

In *Ibrahim*, the Court specifically evaluated whether safety interviews with a terror suspect can be conducted without counsel present in the interrogation room for the purposes of obtaining information that would preserve and secure public safety. The purpose of a safety interview is to determine the whereabouts of other known accomplices, identities and unknown accomplices involved in the commission, preparation and instigation of acts of terrorism, and the presence of other explosive devices or materials likely to cause danger.[671] Safety interviews are conducted in cases when delaying an interview would involve "immediate risk of harm to persons or serious loss of, or damage to, property", or "the alerting of other persons suspected of committing a terrorist offence but not yet arrested".[672]

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[668] *Id.* at para. 55.
[669] Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R., *available at* http://hudoc.echr.coe.int/eng?i=001-166680.
[670] *Id.* at. para. 276.
[671] *Id.* at. paras. 28, 40.
[672] *Id.* at. para. 43.

The *Ibrahim* case involved four applicants who were suspected of detonating four bombs which failed to explode on the London transportation system on 21 July 2005. Three of them were immediate suspects of a terror investigation involving a detonation of a bomb which failed to explode. The fourth applicant was initially a witness but subsequently became a suspect for sheltering one of the main perpetrators. The first three applicants received warnings and were then interviewed by the police (safety interviews) without a counsel present. The fourth applicant was questioned first as a witness, and then as a suspect after he made self-incriminating statements. Yet, he was not reminded of his rights and was not provided with a counsel when he began incriminating himself during questioning as a witness.

The ECtHR discussed whether compelling reasons would justify the lack of a counsel in the first three applicants' case, and the lack of a counsel and of any notification of his procedural rights (regarding privilege against self-incrimination)[673] in the fourth applicant's case. Regarding the first three applicants' questioning, the Court ruled that there was an urgent need to avert serious adverse consequences to the life, liberty or physical integrity of the public. Since a similar type of an attack in the transportation facilities of London killed more than 50 people two weeks earlier, the police had every reason to think that London was subjected to a wave of terror attacks, and that there were other accomplices to the current attempt or that other explosive devices were planted somewhere else. The Court thus ruled that compelling reasons to protect the public from further suicide attacks justified the temporary deprivation of the right to counsel. Regarding the fourth applicant, who was initially questioned as a witness but then as a suspect, the Court was not satisfied under the circumstances of the case that there were compelling reasons to deprive him his

[673] *Id.* at paras. 271, 295, 299, 303.

right to counsel as well as procedural warnings.[674] In sum, the gist of the *Ibrahim* case is the determination that the temporary restriction of the right to counsel and the right to be notified of procedural rights would be lawful if compelling, safety-based reasons exist.[675]

(3) A Suggestion to the Turkish System

Examining the U.S. and ECtHR jurisdictions, I realized that a public safety exception to the right the counsel and the right to be informed of procedural rights was absent in the Turkish system. Although the Turkish system is party to the European Convention and ECtHR decisions are binding for Turkish authorities, Turkish administrative and judicial officials are unaware of the existence of such an exception in the ECtHR law. They would know of the exception only if a similar type of issue came before the Turkish Constitutional Court, and the Constitutional Court applied the ECtHR precedents of *Salduz* and *Ibrahim*. The other way to raise awareness could be a statutory amendment to the Turkish Criminal Procedure Code, which would recognize un-Mirandized statements and statements obtained without the presence of a counsel as admissible if obtained under emergency conditions.

The balancing test between the privilege against self-incrimination and the heightened state interest in protecting the lives, liberty and physical integrity of third persons weighs in favor of the latter social interest. This outcome is the reason to establish a public safety exception to the privilege against self-incrimination which demonstrates itself through the right to counsel, the right to silence, and the right to be notified of these rights. The right to counsel and the right to be

[674] *Id.* at. paras. 14-57, 276, 300. It is worth noting that the Court cited the U.S. Supreme Court's *Miranda* and *Quarles* decisions to support its compelling reasons exception. *Id.* at. paras. 229, 230, 259.
[675] *See* Tom Barkhuysen, Michiel van Emmerik, Oswald Jansen & Masha Fedorova, *Right to a Fair Trial (Article 6), in* PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 631-633 (2018).

notified of procedural rights thus should be limited in exceptional emergency conditions when the protection of the life, liberty and physical integrity of the innocents justifies the practice.

b) The Exclusion of Defense Counsel

An interviewed security official, a public prosecutor and a judge all claimed that the presence of counsel was necessary during police interrogation for three reasons: First, his presence clears the doubts of coercion or inhuman treatment by the police. Second, the police make sure with a lawyer's presence that warnings are given about procedural rights. Third, it ensures the voluntariness of a statement. Having said that, these counterterrorism officials stated that it is fairly common for a defense counsel to have a relationship with terrorist organizations that goes beyond client defense. According to the interviewees, there are occasions when defense lawyers act to obstruct justice and hinder effective counterterrorism efforts. Examples include coercing their clients to remain silent, or facilitating the exchange of information between a terrorist organization and a suspect or between suspects. These attempts not only impede the administration of justice but also preserve and promote a terrorist organization.[676]

The solution to counter these problems in the Turkish system is not to deprive a terror suspect from legal advice. It is to ensure that the lawyer is not engaged in the criminal activity of the accused, does not threaten the suspect, and does not facilitate information exchange. For this

[676] For instance, according to the interviewees, in PKK cases, young militants admit to talk to the police regarding terrorist activities. Yet, the lawyer sent by the PKK to defend him threatens a militant with his life and coerces him to not to give any statement to security officials. Moreover, in some cases, the lawyer is a member of the terrorist organization and defends many terror suspects at the same time. This creates the risk that a suspect's statement will be transferred to other suspects to ensure consistent statements, which might lead to fabricated but uniform stories obstructing justice.

reason, defense lawyers who are suspected of; 1) engaging in the same criminal activity with the accused, or 2) coercing the suspect, or 3) facilitating information exchange between the organization and the suspect or between suspects, or 4) aiming to obstruct justice or hinder counterterrorism efforts in other ways, should be excluded from the proceedings in the Turkish system. Turkish law needs an enactment allowing the exclusion of defense lawyers in these four circumstances. The exclusion should be made via a magistrate court order, after a hearing, on a showing of reasonable suspicion.

This chapter will first analyze German law, which authorizes the exclusion of defense counsel in cases of attempts to obstruct justice. It will then consider possible amendments to the Turkish law that would follow the German model.

(1) The Exclusion of Defense Counsel under German Law

The German Criminal Procedure Code Article 138a permits the exclusion of defense counsel from proceedings in cases when counsel aims to obstruct justice. The article states that:

> (1) Defense counsel shall be excluded from participation in proceedings if he is strongly suspected, or suspected to a degree justifying the opening of the main proceedings,
>
> 1. **of being involved in the offence which constitutes the subject of investigation**,
> 2. **of abusing communication with an accused who is not at liberty for the purpose of committing criminal offences or substantially endangering the security of a penal institution**, or
> 3. of having committed an offence which in the event of the conviction of the accused would constitute accessoryship after the fact, obstruction of justice or handling stolen goods.
>
> (2) Defense counsel shall also be excluded from participation in proceedings the subject of which is a criminal offence pursuant to section 129a, also in conjunction with section 129b subsection (1) of the Criminal Code, if **certain facts substantiate the suspicion that** he has committed or is committing one of the acts designated in subsection (1), numbers 1 and 2.

The exclusion of defense counsel is allowed in every stage of proceedings both in regular crimes (138a-1) and terror crimes (138a-2, 129a that refers to terror offenses under German Criminal Code). While *strong suspicion* or *suspicion to a degree justifying the opening of the main proceedings* is required for regular crimes, *a simple level of suspicion* is enough for the exclusion of lawyers in terror cases. Indeed, in terror cases, the Code only requires that certain facts substantiate the suspicion that a lawyer 1) is involved in the criminal activity of the accused, or 2) abuses his communication with the accused in order to commit criminal offences or endanger the security of a penal institution.[677]

(2) A Suggestion to the Turkish System

According to the Turkish Criminal Procedure Code Article 151-3&4, defense counsel can be prohibited via a judicial order from defending a terror suspect, defendant or a convict, if there is an ongoing investigation or prosecution against him for any terror crimes.[678] The ban on defense counsel can be imposed in every stage of criminal proceedings. The judicial order can be issued upon request of a public prosecutor, and will only be issued for the terror crime that is the subject of the accusation. The initial ban is for a year, but it can be extended for six months, two times,

[677] STRAFPROZEßORDNUNG [STPO] [CRIMINAL PROCEDURE CODE], § 138a-1, 2 (Ger.); OEHMICHEN, *supra* note 52, at 243, 252. Germany adopted two more new laws as a reaction to; 1) the large number of defense lawyers who seemed to obstruct the trial, and 2) the fact that the defense of several accused persons by the same lawyer seemed to facilitate information exchange between those accused. According to these enactments, the defense counsel chosen by a defendant were limited to three, and lawyers could no longer defend more than one person accused of the same deed. [STPO], § 137-1. The German Federal Constitutional Court later regarded this limitation as constitutional, finding that it did not conflict with the right to an effective defense or the right to a fair trial. The Court reiterated that the purpose of the limitation was "to impede the accused from delaying the proceedings by using several defense lawyers, so that it served the objective to ensure a due procedure and to maintain the functioning of the criminal justice system as required by the rule of law". The right to a fair trial can be exercised with up to three defense counsels, even in "extraordinary heavy and protracted proceedings". OEHMICHEN, *supra* note 52, at 244.
Turkey also limited the number of lawyers to three in the adjudication of terror crimes in 2016. [C.M.K.] art. 149-2. In addition, the Turkish Advocacy Code obliges lawyers to refrain from defending persons with conflicting interests in the same case. Avukatlık Kanunu [A.K.] [Advocacy Code] art. 38-1-b.

[678] *See* also CENTEL & ZAFER, *supra* note 420, at 191; SOYASLAN, *supra* note 289, at 188, 189.

depending on the circumstances of a terror offense. The ban may be contested by the banned lawyer. It automatically gets lifted, if; 1) the lawyer's objection is found reasonable by the court, or 2) the prosecutor decides not to prosecute after the investigation, or 3) the lawyer is not convicted at the trial stage.

Turkish law allows the exclusion of a defense lawyer only in a case when the lawyer himself is under an investigation or prosecution for a terror crime. The current statutory rule does not focus on the fact that a defense lawyer may be furthering the criminal activity of the accused without an ongoing investigation or prosecution of the lawyer, or the fact that a defense lawyer might be facilitating the exchange of information between the accused and his terrorist organization or between suspects. The rationale of the current statute is to prevent lawyers who are accused of terror crimes from defending terror suspects. The existence of an investigation or prosecution is thus the condition of such an exclusion. But that limitation fails to address the other dangers that defense counsel might create.[679]

Turkish law needs an amendment similar to German law, in order to assure that any attempt to block the administration of justice or to further terrorism, at the hands of defense counsel, are thwarted. A defense lawyer who aims to obstruct justice through abusing his communication with a terror suspect or to secretly assist a terrorist organization under the name of defending his client, should be immediately prevented from frustrating trial fairness and counterterrorism efforts. The state should not wait for an investigation or a prosecution to be formed, as the police would need to act swiftly to counter any efforts that dishonor proper investigation and effective

[679] The interviewed public prosecutor stated that the lawyers of a terrorist organization were not excluded from interrogation in practice. The current version of the statute is not being applied by prosecutors to exclude defense lawyers as it requires an investigation and in most of the cases there is no ongoing investigation against these lawyers. What prosecutors literally do in these cases is to postpone the organization's lawyer's meeting with the terror suspect as much as possible. He also added that Turkish law needed such an amendment allowing the instant exclusion of a lawyer when there was some reasonable basis that the lawyer was also a member of a terrorist organization or misused his relationship with the accused.

counterterrorism. When a lawyer is excluded, another lawyer should be appointed in his place, and the police interrogation must cease until the newly appointed lawyer arrives at the interrogation room.

The magistrate judge on duty at the time of police interrogation can be authorized to issue the orders of exclusion. The conditions of a hearing should be determined by the legislature, but I suggest that it be an ex-parte and in camera hearing. This is particularly because of potential confidential intelligence information indicating the abuse of relationship as well as membership. Access to this intelligence information by the lawyer would disclose intelligence gathering activities as well as intelligence sources. The exclusion order should be revoked when its pre-conditions no longer exist or when no investigation or prosecution have been opened for the lawyer within one year after exclusion.

The suitable level of cause in enactment should be determined under a balancing test. Under the balancing test, the appropriate level of cause is to be set by comparing conflicting individual rights and state interests. The individual interest in this particular case is the right to counsel of one's choice. While choice is important, the right to a fair trial would not be substantially infringed by the appointment of another lawyer, as the suspect would be represented by and be given the assistance of a lawyer during interrogation. So long as the appointed lawyer is not prejudiced against the suspect and protects the suspect's interests, there would not be a significant individual rights infringement --- that is to say, the right to counsel of choice must give way to the state interest in protecting against terrorism. Since there is a lesser intrusion on individual rights, as opposed to the considerable state interest in this case, the use of a simple level of suspicion should suffice. Reasonable suspicion (in the U.S. sense) that derives from the

professional experience of the police and prosecutors should be enough for excluding lawyers from interrogation.

The concrete evidence necessary for the establishment of the probable cause standard could be a hard burden on authorities. This is because it might be difficult to obtain concrete evidence right away at the very instance of interrogation. Thus, I suggest that when the police and public prosecutor suspect under their experience and knowledge that the lawyer aims to obstruct justice and hinder counterterrorism efforts, he should be replaced with another lawyer via a magistrate court order.[680]

More specifically, a prospective enactment may rule that a defense lawyer might be excluded from police interrogation if there is a basic level of suspicion (reasonable suspicion) under the professional experience of the police and public prosecutor that the lawyer;

1) participates in the same criminal activity or is engaged with the terrorist organization of an accused, or

2) abuses his communication with his client to commit crimes or to protect the terrorist organization and its structure, or to jeopardize the security of a prison.

This amendment has many advantages: First, it would contribute to the realization of justice by preventing the fabrication of false but consistent statements by terror suspects. Second, it would prevent a terrorist organization's lawyer from protecting the leader cadre as well as the structure of the organization in the guise of defending a suspect. Third, it would help authorities to better spot the hierarchy, organizational structure and future plans of an organization thanks to more effective police interrogation. And fourth, it might also hamper any efforts to kidnap a terror

[680] The City Bar Association must provide a list of available lawyers, and the magistrate should appoint a lawyer from the list.

suspect from a prison facility like a stationhouse, by limiting the physical interaction between an organization's lawyer and a terror suspect.

(3) The Proposal's Compatibility with Relevant ECtHR Decisions

The European Convention on Human Rights requires in Article 6-The Right to a Fair Trial/3-c that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing". The relevant issue in this proposal is whether the exclusion of a selected counsel and the appointment of a new counsel by a magistrate court violates Article 6.

The ECtHR has ruled in many cases that the right of an accused to be defended by a counsel of "his own choosing" is not absolute. The defendant's wishes can be overridden "when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."[681] Thus, the right to counsel of one's own choosing can be limited if the interests of justice demand that the accused is defended by a court-appointed counsel.[682]

With regard to the current proposal, the issue before us is whether any efforts of obstruction of justice by a selected counsel would amount to "sufficient grounds" to conclude that it is "necessary in the interests of justice" to disregard the right to counsel of one's choice. In order to address that issue, we must first consider the precedents of the Court. The Court ruled that there were sufficient grounds to disregard an accused's wishes in cases when;

[681] Croissant v. Germany, App. No. 13611/88 at para. 29 (1992), *available at* http://hudoc.echr.coe.int/eng?i=001-57736. *See* also Martin v. Estonia, App. No. 35985/09 at. para. 90 (2013), *available at* http://hudoc.echr.coe.int/eng?i=001-119973 ; Meftah and others v. France, 2002-VII Eur. Ct. H. R. 265, 285, para 45, *available at* http://hudoc.echr.coe.int/eng?i=001-60638 ; Dvorski v. Croatia, 63 Eur. H. R. Rep. 311, 336, 337 at para. 79, 82 (2016), *available at* http://hudoc.echr.coe.int/eng?i=001-158266.
[682] *Croissant*, at para. 29.

a) a lawyer did not have the qualifications of a licensed advocate, ruling that such qualifications were required to ensure "the efficient defense of a person" and "the smooth operation of the justice system",[683]

b) the defendant requested to be defended by his mother and sister, and the court ruled that they were not qualified as professional advocates and would not have been able to "ensure efficient defense in compliance with the procedure",[684]

c) the defendant requested his uncle to be his representative even though he was already represented by an advocate of his choosing,[685]

d) there was a conflict of interest between suspects/defendants represented by the same counsel,[686]

e) the adequate representation of a suspect required the appointment of different counsel, considering the length, size and the complexity of a case, and the possession of certain qualifications needed for a case.[687]

In sum, the Court finds that there are sufficient grounds in the interests of justice to appoint a lawyer against a suspect's (or defendant's) wish in cases when; 1) a suspect's interests in trial fairness and an effective defense required so, or 2) the representation by a selected lawyer would contradict with professional responsibility and ethical rules.[688]

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[683] Zagorodniy v. Ukraine, App. No. 27004/06 at para. 53 (2011), *available at* http://hudoc.echr.coe.int/eng?i=001-107561 ; *Meftah*, at para 45.
[684] Mayzit v. Russia, App. No. 63378/00 at para. 68 (2005), *available at* http://hudoc.echr.coe.int/eng?i=001-68067.
[685] Popov v. Russia, App. No. 26853/04 at para. 174 (2006), *available at* http://hudoc.echr.coe.int/eng?i=001-76341.
[686] *Croissant*, at para. 30. *See* also Martin v. Estonia, App. No. 35985/09 at. para. 90 (2013), *available at* http://hudoc.echr.coe.int/eng?i=001-119973.
[687] *Croissant*, at para. 28.
[688] The U.S. law recognizes the right to counsel of one's own choice as a constitutional right under the Sixth Amendment. Similar to the ECtHR, the U.S. Supreme Court generated some exceptions to the constitutional right to counsel. A person cannot be represented by a counsel of his choice in cases when a) there is a conflict of interest between two defendants, b) an advocate is not the member of the Bar, c) he cannot afford the representation by an

My proposal requires a court-appointed counsel in cases when there is reasonable suspicion that a lawyer representing a terror suspect is associated with the same terrorist organization, or facilitates information exchange between the suspect and the terrorist organization or between terror suspects. The proposal serves many functions. First, it ensures that a suspect is defended by a lawyer who puts his client's interests first rather than the interests of a terrorist organization or another suspect. Second, it furthers counterterrorism and security efforts of the state by hampering information exchange between arrested members and the leader cadre of a terrorist organization. Third, it assures that a lawyer who violates advocacy principles does not take part in the criminal proceedings, and thereby protects the integrity of the criminal justice system. The proposal for these reasons is in compliance with the rationale developed by the Court, and would meet the *relevant and sufficient grounds in the interests of justice* standard.

### 3. Conclusion

Turkey's counterterrorism efforts will be promoted, if Turkish law a) recognizes a public safety exception to procedural warnings in police interrogation, and b) excludes the defense counsel that aim to obstruct justice at the very instance of interrogation.

The former proposal implies that Turkish courts should abandon their shallow understanding of the warning requirement, and should instead make a profound balancing analysis between individual and social interests at stake. They must acknowledge that the warning

attorney, d) the attorney declines to represent the client for other reasons. Wheat v. United States, 486 U.S. 153, 159, 160 (1988). The right to counsel of one's choice is thus not absolute, and is subject to a balancing test between competing interests.
It is likely that the U.S. Supreme Court deems it constitutional to exclude the defense counsel who are engaged in terrorism, if a similar counterterrorism need as in Turkey emerges in the U.S. Therefore, the right to counsel of one's choice would be succeeded by counterterrorism needs under the U.S. balancing test as well.

requirement is not absolute, and emergency circumstances may justify abandoning the rule for a short period of time.

The latter proposal implies that in cases when a state needs to take a swift action to protect the administration of justice, its determination could be honored via a grounded judicial decision. This is the case with dishonest and unethical lawyers who aim to coerce a suspect and hamper counterterrorism efforts. This suggestion implies that corruptness is unacceptable in any legal profession with no exception to lawyers. It reflects the society's expectation of virtue and professional responsibility from lawyers.

### **C.** COUNTERTERRORISM COURTS

This Section explains the benefits of having counterterrorism courts, along the lines of the French system of centralized and specialized counterterrorism courts, while taking a lesson from Turkey's previous counterterrorism court attempts. It also compares American and Turkish judges' views on whether counterterrorism courts are necessary. It finally proposes that a counterterrorism court system, which is comprised of judges and prosecutors with special knowledge and expertise on Turkey's national security priorities and the characteristics of terrorist organizations, is necessary to ensure more effective counterterrorism and to better protect individual rights. The section also acknowledges with great regret that the Turkish judiciary would not meet the ECtHR's independence standard after the 2017 Constitutional Referendum changes,[689] and urges the Constitutional Court to declare the referendum null under Article 2 of the Turkish Constitution.

[689] The latest constitutional referendum in 2017 made fundamental changes to the Turkish Constitution. It substantially amended the Article 159 of the Constitution, which is about the formation of the Council of Judges and Prosecutors that appoints prosecutors and judges in the whole country. *See infra* for further information.

### 1. Why are Counterterrorism Courts Needed?

Successful counterterrorism is a demanding task that requires the coordinated work of two state departments: security and judiciary. A strong security department is crucial to break the structure of a terrorist organization, to anticipate and prevent future terrorist attacks, and to provide peaceful living conditions. An objective and efficient judiciary is essential to complement the security department in ensuring peace in a society. The judiciary in this sense has three main functions. First, it is the oversight authority over potential unwarranted and arbitrary human rights intrusions by security officials. Second, it is the legitimizing authority over preventive and investigative police activities as well as over the incarceration of convicted terrorists. Third, it is the adjudicating authority over terror suspects, and serves as a means to protect the public from the dangerous and to meaningfully realize the retribution, rehabilitation and incapacitation purposes of criminal law.

The judiciary takes part in counterterrorism in three main stages: the prevention, investigation, and adjudication of terror crimes. *In the prevention stage,* magistrate judges work with intelligence agencies, and issue electronic surveillance orders to obtain information that might prevent terror attacks. *In the investigation stage,* magistrate judges issue investigative electronic surveillance orders, search and seizure warrants and pre-trial detention orders, upon request of public prosecutors or the police, depending on the legal system. *In the adjudication stage,* trial judges determine whether a terror crime is committed pursuant to proof beyond a reasonable doubt, and decide on a just sentence that would fulfill the purposes of criminal law.[690] Trial judges play an important role in rehabilitating and incapacitating terrorists and in deterring future terror

[690] Judges do this because there is no right to a jury trial in the Turkish system.

suspects. A sentence suitable to the circumstances of each terror case and proportional to the culpable intent would prevent recidivism and contribute to counterterrorism efforts.

Specialization on counterterrorism requires deep knowledge of: the priorities of national security, the essential dynamics of national security, the constitutional foundations of a state, theoretical and historical background on terrorism, the networks and structures of terrorist organizations, their logistics, the particular patterns of conducting attacks, extensive knowledge on terror crimes and how they are committed, and the preparatory acts of terrorism.

Some level of expertise in counterterrorism has many benefits in the preventive, investigative and adjudicatory stages of counterterrorism. For one thing, magistrate judges who have such information would issue preventive and investigative orders more accurately, error-free and quick. This is because they would know precisely what to look for in a warrant application as well as potential deceitful factors that may be used by the police. Thus, they would also be more alert to counter unnecessary human rights intrusions. For another thing, trial judges' expertise would ensure consistency between different terror sentences and prevent sentencing disparities. This is because terror judges would be more accurate in comparing a terrorist's position within the hierarchy of a terrorist organization, their level of culpability, the seriousness of their crimes, and their level of objective contribution to the realization of an attack.

The possible disadvantages of having expert judges are potential biases against suspects, subjective determinations, security oriented thinking, and rubber stamping. Yet, these concerns may not by themselves be the direct results of specialization in the counterterrorism field. They may well stem from the lack of competency and particular character of a judge, instead of the enactment of specialized courts. The problem thus derives from the practice and the improper application of rules, not from the rules themselves. An experienced and responsible judge most

likely be very alert to unnecessary human rights intrusions and would be far from being a rubber stamp. For these reasons, the benefits of having specialized courts outweigh its disadvantages, and specialized expert courts are necessary for successful counterterrorism.

### 2. The French Example

In France, the investigation, prosecution and trial proceedings are centralized in Paris by a 1986 Law,[691] which was legislated upon request of four magistrate judges that investigated the Islamist terrorist attacks by Georges Ibrahim Abdallah.[692] The Paris public prosecutor, the investigating (magistrate) judge and the Assize Court exercise their authority over the whole French territory.[693] Counterterrorism trials are conducted by the Assize Court in Paris, which is comprised of seven professional judges.[694] Lay persons were replaced with professional judges in terror cases. This is because the experience showed that lay persons were frequently threatened by terrorist groups which led to requests to be excused from jury service, obstructing the timely judicial process.[695]

The centralization of the investigation and prosecution of terror cases in Paris received praise from French scholars and criticisms from human rights advocates. Scholars supported the 1986 amendment on the grounds that magistrate judges became as competent as intelligence agencies and thereby became crucial in preventing terror attacks.[696] They even tended to specialize

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[691] CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 17-1, 706-16 (Fr.). For more detailed information, *see* LEEUWEN, *supra* note 58, at 82, 83.
[692] Antoine Garapon, *Is There a French Advantage in the Fight Against Terrorism?,* Real Instituto Elcano de Estudios Internacionales y Estratégicos ARI No.110/2005 pp. 5 (1.09.2005).
[693] [C. PÉN.] art. 706-17-3; OEHMICHEN, *supra* note 52, at 299, 300.
[694] [C. PÉN.] art. 698-6, 706-25.
[695] OEHMICHEN, *supra* note 52, at 300.
[696] An investigating magistrate's duty is to conduct an impartial investigation to determine whether a crime worthy of a prosecution has been committed. After such a determination, the investigative magistrate hands the case over to a

in a particular type of a terrorist organization such as separatist or Islamic.[697] The French experience showed that the handling of terror cases by the same magistrates ensured that they had holistic and cultural understanding of the Islamic movement. Such knowledge turned out to be critical "to reduce the time of the investigations, to more quickly arrest the members of a network, and thus to better prevent attacks".[698] Two magistrate judges from Paris also pointed out the advantages of specialization as follows: "the specific accumulated knowledge, the more global overview on the subject, and the fact that the small number of competent judges facilitated international collaboration."[699]

On the other hand, human rights activists criticized the centralization on the grounds that the small group of prosecutors and magistrate judges can act autocratically. The activists recommended that pre-trial detention decisions be issued by an independent investigating court instead of a single judge.[700] There were also allegations that some defense counsel experienced unjustified arrests with lack of substance. [701]

In practice, the 1986 Law profoundly increased France's judicial capacity to prevent terror attacks and to fight against terrorism.[702] While French authorities could not even correctly identify the perpetrators of a terror attack in Paris in October 1980, they showed a marked improvement in the ability to anticipate and prevent terror attacks in the late 1990s.[703] The Law solved a problem

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prosecutor and a defense attorney. Investigating magistrates are authorized to issue search and seizure warrants, wiretaps and subpoenas. Shapiro & Suzan, *supra* note 230, at 78.

[697] *Id*.

[698] *Id.* at 82.

[699] OEHMICHEN, *supra* note 52, at 301.

[700] *Id.*

[701] *Id.*

[702] Shapiro & Suzan, *supra* note 230, at 91.

[703] *Id.* at 68. In 1980, French authorities misidentified the perpetrators of a terror attack on a Jewish target as a neo-Nazi movement, which turned out to be a Middle Eastern terrorist movement. The enactment of the 1986 Law increased the collaboration between magistrate judges and the domestic intelligence agency. French authorities were later able to prevent various terrorist attacks such as the World Cup attack in 1998, the Strasburg Cathedral attack in 2000 and the American Embassy attack in Paris. *Id.*

previously encountered in the French counterterrorism practice: the lack of coordination and centralization of anti-terrorist policies, and the politicization of the struggle against terrorism.[704]

The Law, which both centralized counterterrorism in Paris and generated specialized prosecutors and magistrates within the Paris Court, had many positive outcomes. First, it minimized the danger of reprisals against local officials, posed especially by separatists terror groups in Corsica.[705] Second, it generated competency within magistrate judges that almost amounted to an intelligence agency. Magistrates even tended to specialize in specific types of terrorist organizations such as separatist or Islamic.[706] Third, specialized and experienced judges have been able to connect the dots by processing all relevant data including intelligence information. They more easily recognized the existence and identity of a terrorist network.[707] Fourth, the specialized investigating magistrates ensured statutory independence from political authorities, and de-politicized anti-terrorism.[708] Fifth, specific knowledge on terrorist organizations allowed quicker and more effective investigations against terrorist networks as well as success in destroying terrorist networks and preventing attacks.[709] Sixth, a continuing relationship and confidence between magistrate judges and the French domestic intelligence agency (DST) were established. The confidence especially stemmed from the fact that the judges came to understand the concerns of the DST: the protection of intelligence sources, and the threat that judicial procedures pose to intelligence operations. Magistrates had the power to convert an intelligence investigation into a judicial investigation, provided that the intelligence obtained

[704] *Id.* at 75.
[705] *Id.* at 77.
[706] *Id.* at 78.
[707] HUMAN RIGHTS WATCH, PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE 14 (2008), https://www.hrw.org/reports/2008/france0708/france0708web.pdf.
[708] Shapiro & Suzan, *supra* note 230, at 78.
[709] *Id.* at 82, 83, 84.

indicates a criminal act.[710] For these reasons, the French experience showed that successful counterterrorism requires cooperation between the judiciary and intelligence agencies.[711]

### 3. Turkey's Counterterrorism Court Attempts

Turkey has long endeavored to adjudicate terror crimes under a special regime for more effective counterterrorism. It respectively established state security courts and special courts. These courts were later abolished for concerns over independence and impartiality as well as for abuse of power. This sub-chapter will shed some light on these efforts in order to draw conclusions from previous experiences and to help shape the proposed counterterrorism court system.

#### a) The Abolished State Security Courts and Relevant ECtHR Decisions

Turkey had national security courts for terrorism and other crimes against state security and constitutional order until they were abolished in 2004 for E.U. integration purposes.[712] The State Security Court was comprised of three judges, one of whom was a military judge.[713] The European Court of Human Rights ruled in several cases that the existence of a military judge did not comply with the independence and impartiality requirements of the ECHR Article 6, violating the right to a fair trial.

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[710] *Id.* at 83. *See* also HUMAN RIGHTS WATCH, *supra* note 707, at 34, 35.
[711] *Id.* at 91. *See* also HUMAN RIGHTS WATCH, *supra* note 707, at 34.
[712] CEZA MUHAKEMELERI USULÜ KANUNUNDA DEĞIŞIKLIK YAPILMASI VE DEVLET GÜVENLIK MAHKEMELERININ KALDIRILMASINA DAIR KANUN [THE CODE AMENDING THE CRIMINAL PROCEDURE CODE AND ABOLISHING STATE SECURITY COURTS], *available at* https://www.tbmm.gov.tr/kanunlar/k5190.html (Turk.).
[713] DEVLET GÜVENLIK MAHKEMELERININ KURULUŞ VE YARGILAMA USULLERI HAKKINDA KANUN [THE CODE ON THE ESTABLISHMENT AND JUDICIAL PROCEEDINGS OF STATE SECURITY COURTS] art. 3, 5, *available at* http://www.mevzuat.gov.tr/Metin1.Aspx?MevzuatKod=5.5.2845&MevzuatIliski=0&sourceXmlSearch=&Tur=5&Tertip=5&No=2845 (Turk.). (Abolished, Code No: 2845).

ECHR Article 6[714] states that everybody has the right to a fair trial held by an independent and impartial tribunal. The elements of independence and impartiality principles were determined by ECtHR decisions. Independence must be from both the executive and the parties.[715] In its independence determination, the Court took into consideration various criteria on judges: "the manner of appointment of its members", "the duration of their term of office", "the existence of guarantees against outside pressures" and "the question whether the body presents an appearance of independence".[716] Safeguards of the independence of judges are based on many factors such as whether the appointment is made for a fixed period of time or on a purely ad hoc basis, the manner of promotion or advancement of judges, the security of a judge's tenure, their irremovability, and freedom from outside instructions or pressure.[717]

With regard to impartiality, the Court established subjective and objective impartiality standards. First, subjective or personal impartiality referred to the personal conviction or bias of a judge, and a judge was presumed to be impartial unless proven otherwise.[718] Second, objective impartiality meant that a judge must appear impartial from an objective viewpoint, and "offer sufficient guarantees to exclude any legitimate doubt in this respect".[719] Objective impartiality

[714] The Right to a Fair Trial-Article 6-1:
"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal* established by law…"
[715] Ringeisen v. Austria, App. No. 2614/65 at para. 95 (1971), *available at* http://hudoc.echr.coe.int/eng?i=001-57565; Campbell and Fell v. the United Kingdom, App. nos. 7819/77; 7878/77 at para.78 (1984), *available at* http://hudoc.echr.coe.int/eng?i=001-57456.
[716] *Campbell and Fell,* at para.78; Findlay v. the United Kingdom, 1997-I Eur. H. R. Rep. at. para. 73, *available at* http://hudoc.echr.coe.int/eng?i=001-58016. ; Morris v. the United Kingdom, 2002-I Eur. Ct. H. R. 387, 410, para. 58, *available at* http://hudoc.echr.coe.int/eng?i=001-60170.
[717] Galstyan v. Armenia, App. No. 26986/03, at para. 62 (2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83297.; *Campbell and Fell,* at para.78 (1984); *Morris*, at para. 69, 70.
[718] *Galstyan*, at para. 79; Micallef v. Malta, 2009-V Eur. Ct. H. R. 289, 311 at. para. 71, 72 (2008), *available at* http://hudoc.echr.coe.int/eng?i=001-95031 ; Khodorkovskiy and Lebedev v. Russia, App. Nos. 11082/06 and 13772/05 at. para. 538 (2013), *available at* http://hudoc.echr.coe.int/eng?i=001-122697.
[719] Findlay v. the United Kingdom, 1997-I Eur. H. R. Rep. at. para. 73, *available at* http://hudoc.echr.coe.int/eng?i=001-58016 ; *Morris*, at para. 58.

demands that courts assure confidence in the public and the accused.[720] The main criteria when deciding on objective impartiality were "whether the judge offered guarantees sufficient to exclude any legitimate doubt" on impartiality, whether there are ascertainable facts that may raise doubts as to impartiality, and whether the accused's fear of impartiality was objectively justified.[721]

The ECtHR ruled that the existence of military judges in Turkish National Security Courts violated the independent and impartial tribunal requirements of the right to a fair trial of Article 6. In *Incal v. Turkey,*[722] the Court reasoned that although the military judges received same professional training and enjoyed similar constitutional safeguards with their civilian counterparts, they were subject to military discipline and their assessment reports were prepared by the army. Secondly, their appointment decisions were made by the army and other administrative authorities. Thirdly, their term of office was only four years and could be renewed. [723] For these reasons, the independence requirement was not met. The Court also noted that there were justifiable doubts on impartiality which left the objective impartiality requirement unsatisfied.[724] The Court thus concluded that the applicant had legitimate reasons to fear that a military judge would be influenced by causes other than the nature of the case, which would objectively prejudice the independence and impartial appearance of a tribunal.[725] The Court in *Ciraklar v. Turkey,*[726]

[720] For a similar argument, *see* Incal v. Turkey, 1998-IV Eur. H.R. Rep., at. para. 71 (1998), *available at* http://hudoc.echr.coe.int/eng?i=001-58197 ; *Micallef*, at. para. 75.
[721] Fey v. Austria, App. No. 14396/88, at para. 28, 30 (1993), available at http://hudoc.echr.coe.int/eng?i=001-57808 ; *Findlay,* at. para. 72,76, 80; Khodorkovskiy and Lebedev v. Russia, App. Nos. 11082/06 and 13772/05 at. para. 538 (2013), *available at* http://hudoc.echr.coe.int/eng?i=001-122697.
[722] Incal v. Turkey, 1998-IV Eur. H.R. Rep. (1998), *available at* http://hudoc.echr.coe.int/eng?i=001-58197.
[723] *Id.* at. para. 67, 68.
[724] *Id.* at. para. 71.
[725] *Id.* at. para. 72, 73.
[726] Ciraklar v. Turkey, 1998-VII Eur. H.R. Rep. paras. 40, 41 (1998), *available at* http://hudoc.echr.coe.int/eng?i=001-58253.

*Baskaya and Okcuoglu v. Turkey,*[727] *Surek v. Turkey,*[728] *Karatas v. Turkey,*[729] *Sener v. Turkey,*[730] *Sadak and Others v. Turkey,*[731] and *Satik v. Turkey*[732] ruled with the same reasons that the presence of a military judge violated the independence and impartiality requirements of the Article 6- the right to a fair trial.

Following these decisions of ECtHR, and in order to satisfy Copenhagen criteria for E.U. membership, Turkey abolished the National Security Courts in 2004.[733]

b) Special Courts for Organized Crimes and Crimes Against State Security

The new Criminal Procedure Code enacted in 2005 assigned the investigation and prosecution of particular crimes to specific courts established in various cities in Turkey.[734] These crimes are: a) organized crimes involving narcotics production and drugs trafficking, b) crimes committed within the scope of an organization and involves coercion or threat, and c) crimes against state security. Terror crimes were prosecuted by these special courts from 2005 until they were abolished in 2012.[735]

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[727] Başkaya and Okçuoğlu v. Turkey, 1994- IV Eur. Ct. H. R. 261, 289 at para. 78 (1999), *available at* http://hudoc.echr.coe.int/eng?i=001-58197.
[728] Sürek v. Turkey, 1999-IV Eur. Ct. H.R. 353, 387, at paras. 75, 76 (1999), *available at* *http://hudoc.echr.coe.int/eng?i=001-58279*.
[729] Karatas v. Turkey, 1999-IV Eur. Ct. H.R. 81, 112, at para. 62 (1999), *available at* *http://hudoc.echr.coe.int/eng?i=001-58274*.
[730] Sener v. Turkey, App. No. 26680/95 at. paras. 57, 58 (2000), *available at* http://hudoc.echr.coe.int/eng?i=001-58753.
[731] Sadak and Others v. Turkey, 2001-VIII Eur. Ct. H. R. 267, 279, 280, at paras. 39, 40 (2001), *available at* http://hudoc.echr.coe.int/eng?i=001-59594.
[732] Satik v. Turkey, App. No. 60999/00 at paras. 48, 49 (2008), *available at* http://hudoc.echr.coe.int/eng?i=001-58851.
[733] AVRUPA BIRLIĞI GENEL SEKRETERLIĞI (GENERAL SECRETARIAT OF EUROPEAN UNION), AVRUPA BIRLIĞI UYUM YASA PAKETLERI (EUROPEAN UNION LAW PACKAGES) 2 (2007); Abolishing Code no: 5190, *see supra* note 712.
[734] [C.M.K.] art. 250, 251 (repealed).
[735] YARGI HIZMETLERININ ETKINLEŞTIRILMESI AMACIYLA BAZI KANUNLARDA DEĞIŞIKLIK YAPILMASI VE BASIN YAYIN YOLUYLA İŞLENEN SUÇLARA İLIŞKIN DAVA VE CEZALARIN ERTELENMESI HAKKINDA KANUN [THE CODE ON AMENDMENT ON SOME CODES FOR THE PURPOSE OF JUDICIAL SERVICE EFFECTIVENESS AND ON THE POSTPONEMENT

The special courts received high criticism from the public since Gulenist prosecutors and judges prosecuted secular military officials with coup charges and convicted them with fake evidence.[736] The breaking point leading to the abolition was the call of the head of the National Intelligence Agency to testify about secret talks with the PKK.[737] The main reason why the special courts were abolished was first, the Gulenist officials' plot against secular military officials, and second, their efforts to arrest the head of the National Intelligence Agency.

c) Regular Courts Adjudicating Terror Crimes

With the end of special courts, regular assize courts responsible for serious crimes automatically assumed jurisdiction. Yet, there is a wide concern among lawyers about the independence of regular assize courts. This is because the Council of Judges and Prosecutors,[738]

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OF CASES AND SENTENCES REGARDING CRIMES COMMITTED THROUGH PRESS] art. 105, *available at* https://www.tbmm.gov.tr/kanunlar/k6352.html (Turk.). The Code repealed the articles 250, 251, 252 of the Criminal Procedure Code.

[736] For example, FETO members in the public prosecutor's office and the police department generated fake evidence for coup-preparation charges to prosecute secular military officials. These military officials were sentenced to life in prison by FETO judges. Around 2000 secular military personnel were fired from Turkish army as a result. İpek Yezdani, *Ne kadar sızarlarsa sızsınlar Türk ordusunun ana gövdesi Atatürkçü ve laiktir [No matter how they infiltrate, the main body of the Turkish Army is pro-Atatürk and secular]*, HURRIYET (Jan. 21, 2017), http://www.hurriyet.com.tr/gundem/ne-kadar-sizarlarsa-sizsinlar-turk-ordusunun-ana-govdesi-Atatürkcu-ve-laiktir-40342865;
Odatv, "FETÖ Davası" başladı [The Feto Case Has Begun], (Oct. 15, 2015 3.35 PM), https://odatv.com/feto-davasi-basladi-1510151200.html; Anadolu News Agency, *supra* note 255;
Haberturk, *FETÖ'nün tarihçesi - 15 Temmuz Darbe Girişimi Raporu [The History of FETO- The Report of July 15th Coupt Attempt]*, (May 26, 2017), https://www.haberturk.com/gundem/haber/1508856-fetonun-tarihcesi-15-temmuz-darbe-girisimi-raporu;
NTV, *Gülen'e 10 yıl hapis istemiyle dava [The Case Against Gulen with the Request of 10 years of Imprisonment]*, http://arsiv.ntv.com.tr/news/26589.asp (last visited Aug. 22, 2018);
Ruşen Çakır, *Gülen Cemaati: Nereden nereye?[ The Gulen Community]*, AL JAZEERA TURK (Aug. 10, 2010 3.51 PM), http://www.aljazeera.com.tr/gorus/gulen-cemaati-nereden-nereye.

[737] For more information, *see* Hürriyet Daily News, *Turkish Parliament abolishes special courts* (July 2, 2002 2.00 AM), http://www.hurriyetdailynews.com/turkish-parliament-abolishes-special-courts-24507; Hürriyet Daily News, *Turkey abolishes special courts as part of new democratization move,* (Jan. 29, 2014 1.30 PM), http://www.hurriyetdailynews.com/turkey-abolishes-special-courts-as-part-of-new-democratization-move-61715.

[738] 1982 CONST. art. 159- 1, 2, 3 (Turk.).

which unfortunately has become more vulnerable to influence from the executive branch after the 2017 constitutional referendum, has the authority to distribute terror cases to particular assize courts in each city.[739] The Referendum has made many fundamental constitutional amendments,[740] including the Article 159 that sets the structure of the Council.[741]

According to the new law, the head of the Council is the Minister of Justice. The Council is comprised of thirteen members, who are selected for a four year term that may be renewed one

[739] Hakimler Savcılar Kurulu Kanunu [H.S.K.K.] [The Statute on the Council of Judges and Prosecutors] art. 4-1-b-2.
[740] For English translations on the comparison of previous and current versions of the constitutional amendment, *see* Zeynep Yanasmayan & Canan Pour-Norouz, *2017 Amendment Proposal to the Turkish Constitution,* POL. L. TURK., https://politicsandlawinturkey.wordpress.com/publications/contributions-of-fellows/2017-amendment-proposal-to-the-turkish-constitution/ (last visited Aug. 22, 2018). For the Turkish version, *see* Türkiye Barolar Birliği [Turkish Bar Association], *Anayasa Değişikliği Teklifinin Karşılaştırmalı ve Açıklamalı Metni [The Descriptive and Comparative Text of the Proposed Constitutional Amendment],* http://anayasadegisikligi.barobirlik.org.tr/Anayasa_Degisikligi.aspx (last visited Aug. 22, 2018).
[741] The former version of the Turkish Constitution Art. 159-1,2,3,4,5 is as follows:

> (1) The High Council of Judges and Prosecutors shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of the tenure of judges.
> (2) The High Council of Judges and Prosecutors shall be composed of twenty-two regular and twelve substitute members; shall comprise three chambers.
> (3) The President of the Council is the Minister of Justice. The Undersecretary to the Ministry of Justice shall be an ex-officio member of the Council. For a term of four years, four regular members of the Council, the qualities of whom are defined by law, shall be appointed by the President of the Republic from among members of the teaching staff in the field of law, and lawyers; three regular and three substitute members shall be appointed by the General Assembly of the High Court of Appeals from among members of the High Court of Appeals; two regular and two substitute members shall be appointed by the General Assembly of the Council of State from among members of the Council of State; one regular and one substitute member shall be appointed by the General Assembly of the Justice Academy of Turkey from among its members; seven regular and four substitute members shall be elected by civil judges and public prosecutors from among those who are first category judges and who have not lost the qualifications required for being a first category judge; three regular and two substitute members shall be elected by administrative judges and public prosecutors from among those who are first category judges and who have not lost the qualifications required for being a first category judge. They may be re-elected at the end of their term of office.
> (4) Election of members to the Council shall be held within sixty days before the expiry of the term of office of the members. In case of vacancies for members appointed to the Council by the President of the Republic prior to the expiry of the term of office, new members shall be appointed within sixty days following the vacancy. In case of vacancy for other members, the remaining term of office shall be completed by the substitute.
> (5) In the elections in which every member shall vote for the members to be elected to the High Council by general assemblies of the High Court of Appeals, the Council of State and the Justice Academy of Turkey and in which every judge and prosecutor shall vote for the members to be elected to the High Council from among first category judges and public prosecutors of civil and administrative courts; the candidates receiving the greatest number of votes shall be elected as regular and substitute members respectively. These elections shall be held once for each term and by secret ballot. [TBMM], *supra* note 299, for the Turkish Constitution before the 2017 amendment.

more time.[742] Four of the members are selected by the President (from among first category administrative and civil judges and public prosecutors), while seven of them are selected by the Parliament (from among members to the High Court of Appeals and to the Council of State, and professors and lawyers).[743] The two other members of the Council are the Minister of Justice and the Undersecretary of the Ministry of Justice. Since the majority of the Parliament is highly likely to be from the President's party under the so-called Presidential system (established by another amendment to the Constitution through the 2017 referendum), it is likely that the President himself will select all the members of the Council.[744] This way of composition raises concerns over the independence of the Council as well as the whole judicial body appointed by it. Critics argue that political influence in appointment and career advancement of judges would be unavoidable in the Turkish practice under such a system.[745]

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[742] 1982 CONST. art. 159-4 (Turk.).

[743] The ECtHR took a different approach in *Galstyan v. Armenia* case, and ruled under the circumstances of the case that:

> [A]ccording to the Constitution at the material time, the authority responsible for the appointment of judges, namely the Council of Justice, was presided over by the President of Armenia. However, *the fact that members of a tribunal are appointed by the executive does not in itself call into question its independence*. The Court notes that judges were appointed to their posts on the basis of a special proficiency test. Furthermore, safeguards of the independence of judges, such as security of judge's tenure, their irremovability and freedom from outside instructions or pressure, were guaranteed by the Constitution and the implementing legislation. In the Court's opinion, these safeguards were sufficient to exclude the applicant's misgivings about the independence of the tribunal in his case.

Galstyan v. Armenia, App. No. 26986/03, at para. 62 (2007), *available at* http://hudoc.echr.coe.int/eng?i=001-83297. The Court basically ruled that the appointment of judges by the executive did not by itself show a lack of independence. Independence must be evaluated in consideration of other factors such as proficiency tests, the security of a judge's tenure, freedom from outside pressures, and their irremovability.

[744] Gülşen Solaker &Daler Butler, Turkish MPs elect judicial board under new Erdogan constitution, REUTERS (May 17, 2017 4:31 AM), https://www.reuters.com/article/us-turkey-politics/turkish-mps-elect-judicial-board-under-new-erdogan-constitution-idUSKCN18D0T9;
Human Rights Watch, *Q & A: Turkey's Elections* (June 7, 2018 8:AM), https://www.hrw.org/news/2018/06/07/q-turkeys-elections.

[745] Birce Bora, *Turkey's constitutional reform: All you need to know*, AL JAZEERA (Jan. 17, 2017), https://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html.

The Council of Judges and Prosecutors assigns terror cases to specific enumerated Assize Courts in every city.[746] Chief-prosecutors of each city (which are appointed by the Council) assigns prosecutors to terror cases.[747] This information suggests that the distribution of terror cases to enumerated Assize Courts and the assignment of prosecutors are done either on a random or a political basis, instead of considering any expertise or experience in counterterrorism.

The Turkish special courts experience and developments after their abolishment suggest that what matters is not how we name the courts but how these courts are composed and how they function. Whether judges are impartial and independent, and to what extent the appointment of judges is free from executive pressure, should be the main concerns. The fact that the name tag of "special" is removed (as done in 2012) does not mean that judges become more protective of human rights instantly. Regular judges can also be harsh on individual rights and protect the personal interests of the head of the government in the name of national security, especially considering the high political influence fueled by the latest Turkish referendum. And this is a sign of autocracy. Therefore, the independence and impartiality of judges matter more than how we name the court. Sensitivity towards human rights and devotion to the concept of the rule of law are all that matters.

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[746] Hakimler ve Savcılar Kurulu [HSKK] [The Council of Prosecutors and Judges], *Ağır Ceza Mahkemelerinin Görev Alanına Giren Bir Kısım Suçlarda İhtisaslaşmaya Gidilmesine İlişkin Hâkimler ve Savcılar Yüksek Kurulu Birinci Dairesinin 12/02/2015 Tarihli ve 224 Sayılı Kararı [The HSKK Decision Regarding Specialization on Certain Crimes within the Jurisdiction of Assize Courts],* http://www.hsk.gov.tr/DuyuruOku/627_-agir-ceza-mahkemelerinin-gorev-alanina-giren-bir-kisim-suclarda-ihtisaslasmaya-gidilmesine-iliskin-.aspx.

[747] ADLI YARGI İLK DERECE MAHKEMELERI İLE BÖLGE ADLIYE MAHKEMELERININ KURULUŞ, GÖREV VE YETKILERI HAKKINDA KANUN [THE CODE ON THE ESTABLISHMENT, DUTIES, AND AUTHORITIES OF TRIAL COURTS AND DISTRICT APPELLATE COURTS (FOR CIVIL AND CRIMINAL JURISDICTION)] arts. 18-1-2, 20-1-2, *available at* http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5235.pdf (Turk.).

## 4. Interviews

Turkish and American judges' view differ on whether counterterrorism courts are needed. Turkish judges, in interviews conducted for this thesis, state that specialization is necessary for effective counterterrorism, while U.S. judges assert that it is unnecessary because regular judges have no difficulty in understanding terror crimes and terrorist structures. This chapter will provide information about the interviews conducted with Turkish and American judges and analyze the reasons for differing opinions between the two countries' officials.

Turkish judges support the proposal of counterterrorism courts for three main reasons: security concerns, the different nature of counterterrorism investigations and prosecutions, and location concerns due to public safety reasons. First, effective judicial mechanism demands that the security concerns of judicial officials are met by the government. An interviewed judge adjudicating terror cases stated that judges like him worked under high threat against their life, and not every judge received the benefit of protective measures such as a bodyguard. If special counterterrorism courts were established, all judicial officials including prosecutors would receive protection, and state resources might be more efficiently and accurately directed to terror judges.

Second, the nature of counterterrorism demands that judges and prosecutors know; a) the ideological backgrounds, goals, hierarchy, network, logistics, financial sources, and the equipment of terrorist organizations, b) messages directed to the public through attacks, c) the ways of militant acquisition, d) the indications of a prospective terrorist act, e) the means of propaganda, f) target population, and g) each terrorist organization's patterns of attacks.[748] According to the judge, these features of assessment differ for each terrorist organization. Without specific knowledge about

[748] For the different characteristics of terrorist organizations, *see* Table 1.

organizations, it would be hard to recognize the signs of upcoming terrorist attacks, to predict future attacks and to disclose the terrorist network chain.

Further, an interviewed public prosecutor stated that the interrogation of terror suspects must be conducted differently from that of regular criminals. A public prosecutor and a judge must be trained on how to communicate with terrorists. This issue gets more complicated for different terrorist organizations, with Islamist, separatist, or communist ideological radical views. It requires different qualities such as expressive self-confidence, technical information on terrorist structures, some level of vision and incorporation of intuitions, and more direct and strict interrogation methods.

Moreover, the interviewees argued that expert courts will provide many benefits in the preventive, investigative and adjudicatory stages. *In the preventive stage*, regular magistrate judges are too protective of human rights and too slow on some occasions when reflexive decision-making is crucial to protect innocent lives. Regarding *the investigative stage's* benefits, the expertise of magistrate courts would lead to quality investigations by more accurate search warrants and scrupulously prepared evidence packaged in a case file. It would also decrease false positive warrants. This is because expert judges would know what to look for when authorizing search or electronic surveillance, depending on the characteristics of a terrorist organization. The police discretion and arbitrariness in search and surveillance would also be limited in this way.

*In the adjudicatory stage*, a sentence should fit the *actus reus* and *mens rea* of a terror act under the specific conditions of a case. An interviewed prosecutor added that the determination of a sentence was a tricky and delicate task that required mastership. For example, a terror suspect who was coerced under the hierarchy of a terrorist organization to plant a bomb somewhere or to facilitate the commission of a terror attack by other means is not as culpable as another one who

internalized the ideology of the organization and would fulfill his task no matter what happens. Another terror suspect who was coerced by one of the organizations to conduct an attack, but tried to limit the casualties as much as possible, should be considered differently as well. For these reasons, experience and competency very much matters in an effective fight against terrorism.

Third, the interviewees argued that the location of counterterrorism courts must be different than regular courts due to public safety reasons. The large amount of terror suspects that are currently being tried in regular courts in cities generates security concerns for the public, since these suspects might try to escape and endanger the general public while they are in transit to the courthouse. Further, the outside manipulation of the adjudication of terrorists through violent protests, propaganda in front of courthouses, manipulation attempts through terror attacks on the way to courthouses would all put the public in danger. That is why establishing permanent counterterrorism courts that operate from one particular location would contribute to the security interests of a society.

In contrast to Turkish judges, some interviewed American judges are opposed to the idea of counterterrorism courts for many reasons. First, they believe that there is nothing special about terror crimes that would test the competence of regular judges. Second, specialized judges could end up becoming biased against suspects and over-restrictive of individual rights. Third, repeat players might become rubber stamp judges, automatically authorizing search, seizure and electronic surveillance.

American judges could be right in making these arguments in the U.S. system, which is occasionally under threat by ISIS at its homeland. Turkey, however, deals with more than six terrorist organizations at the same time at his homeland:[749] PKK, ISIS, FETO, DHKPC, TKPML,

[749] Let alone its international military operations against terrorists in Iraq and Syria.

Hezbollah, besides their sub-branches in different names. And according to what Turkish judges say, judging in this environment requires specialized knowledge of the various dimensions of state security and the terrorist framework. Further, Turkey's and U.S.'s terrorism problems have different structures. While U.S. has more international-oriented terrorism for which its solutions are mostly military, Turkey's terrorism is both domestic and international oriented. Turkey thus needs to fight terrorism through both military and judicial means.[750] And lastly, the U.S. follows the Anglo-Saxon tradition while Turkey is among the Continental European legal family. Traditionally, the Anglo-Saxon legal system does not institutionally separate civil cases from criminal cases, which might explain the lack of a specialized court culture in the U.S. I conclude that Turkish and American judges' views are understandable and supportable considering their legal backgrounds and the system that they are coming from.

## 5. Suggestions for Turkey: A Counterterrorism Court System with Civilian Judges and Prosecutors with Specific Knowledge and Experience on Counterterrorism

### a) The Proposed Counterterrorism Court System

The counterterrorism court system should be established in seven districts of Turkey. It should include prosecutors, magistrate court judges, and trial (and appellate) court judges. Prosecutors and judges should receive specific information and training for a year or two before being appointed to the specialized court system. This training should basically be on the national

[750] France, for example, has domestic terrorism, and uses judiciary more than military as a means for counterterrorism. We may conclude that while states with domestic terrorism (like France) uses judiciary to counter terrorism, states with international terrorism (like the U.S.) uses its military for that purpose. Shapiro & Suzan, *supra* note 230, at 88-92.

security priorities of Turkey, delicate constitutional values with effects on national security, theoretical and historical background on terrorism, the structures and characteristics of each terrorist organization, the particular patterns of attacks, extensive knowledge on terror crimes and how they are committed, and the preparatory acts of terrorism.

The benefits of a counterterrorism court system are briefly as follows: First, prosecutors specialized in counterterrorism would be more alert to spot any terrorist involvement and the signs of future attacks. Second, magistrate judges who have some expertise in counterterrorism would more quickly respond to the pressing moments that require reflexive decision-making through preventive and investigative measures. And third, trial (and appellate courts) would better determine a fitting incarceration period to each terror suspect under many factors. These factors are a terrorist's level of hierarchy in a terrorist organization, his level of commitment to the terrorist cause compared to other terrorists, and his particular *mens rea* and *actus reus* in the commission of a terror act. In this way, sentencing disparities between different terror suspects would also be prevented as much as possible.

b) Counterterrorism Courts under the ECtHR's Independence and Impartiality Standards

According to the ECHR Article 6 (The right to a fair trial), everyone is entitled to a fair and public hearing by an independent and impartial tribunal. Since the current Turkish judiciary does not satisfy the independence requirement, this study will propose a new way of appointment

for the proposed counterterrorism court system.[751] It will later assess whether the counterterrorism court system would comply with the objective impartiality standard.

When determining a suitable procedure of appointment, the goal should be to have an independent process that could lead to an efficient and highly specialized court system. Accordingly, this paper recommends that a panel of experts on counterterrorism should appoint judges and prosecutors in the counterterrorism court system. This panel should be determined by the state bureaucracy instead of politicians. This might help prevent the politicization of terrorism prosecutions.

The panel should be comprised of representatives of state institutions that take part in counterterrorism and the protection of individual rights. The panel should heavily be made up of seniors from the legal profession, but must also include members appointed by security departments. The High Court of Appeals (*Yargıtay*), The Council of State (*Danıştay*), the Office of the Chief Prosecutor (*Yargıtay Cumhuriyet Başsavcılığı*), trial court judges and prosecutors, the Turkish Bar Association, and the Board of Higher Education (*Yükseköğretim Kurulu*) should each appoint one representative from among individuals with 20 years of professional experience. These representatives should be knowledgeable on the constitutional priorities of Turkey, its national security interests, the essentials of counterterrorism, the structure of terrorist organizations, and the importance of protection of individual rights in preventing terrorism. The police, gendarmerie, and military should also send their representatives. The incorporation of security officials in this process will ensure that practitioners' experience and concerns are taken into consideration in judicial appointments. This panel of nine people should have the same duties as those of the current

[751] This paper focuses on the appointment of judicial officials in counterterrorism court system only. Proposals for the appointment of the whole judicial body will be made in another article.

Council of Prosecutors and Judges regarding appointment, promotion, and disciplinary punishment.

Objective impartiality means that a judge must appear impartial from an objective viewpoint, and must provide sufficient protections to eliminate any legitimate doubts regarding impartiality.[752] The issue before us is whether judicial officials specialized in counterterrorism would appear to be impartial from an objective standpoint. This issue has no abstract or theoretical answer that can be given right away. Objective impartiality should be determined on a case by case basis. If any legitimate doubts or ascertainable facts that raise doubts on the impartiality of counterterrorism judges appear in individual cases, then objective impartiality standard would not be met.

The concern that may arise in terror cases is that judges might feel like they are appointed to protect state interest over individual interest all the time. Thus, they might be overly restrictive of individual rights. This result may or may not occur, depending on how competent and professional a judge is. Some factors to be considered in this determination are his law school background, the extent to which he is fitting to the requirements of the job, and the extent to which he gets affected by any biased public view.

Judges should be trained before getting appointed to counterterrorism courts. They should be taught that the protection of individual rights is also part of effective counterterrorism. State interest is not necessarily in conflict with the individual interest at all times. This is because states have an interest in promoting individual rights, for too much restriction on human rights can prove to be counterproductive. Therefore, counterterrorism judges must internalize the notion that

[752] Findlay v. the United Kingdom, 1997-I Eur. H. R. Rep. at. para. 73, *available at* http://hudoc.echr.coe.int/eng?i=001-58016.; Morris v. the United Kingdom, 2002-I Eur. Ct. H. R. 387, 410, para. 58, *available at* http://hudoc.echr.coe.int/eng?i=001-60170.

effective counterterrorism requires a proportional balance between individual rights and state interests, and that too much restriction would raise additional terror problems in the future. Only then will courts dispel doubts about impartiality and assure public confidence in the judicial system.

c) Conclusion

The ECtHR would not interfere with the necessity of a special court system in a country so long as the trial is fair enough to satisfy Article 6.[753] Special counterterrorism courts with civilian judges would thus satisfy Article 6 so long as they are formed in a way meeting the independence and impartiality requirements in practice. As for the current composition of courts, it is impossible to conclude that Turkish judiciary is independent from the executive branch. The Counterterrorism Court system could be legalized in Turkey only if the 2017 Referendum is declared null by the Constitutional Court on the grounds of unconstitutionality for violating the principle of "the state of law" protected under the Article 2 of its Constitution. If it is not annulled, a new way of appointment should be enacted specifically for the proposed counterterrorism court system in order to lessen the effect of politics on the counterterrorism judiciary. This paper asserted that a nine-person panel comprised of senior bureaucrats with expertise on counterterrorism could be established to ensure the independence of at least the counterterrorism judiciary.

Objective impartiality cannot be presumed to be absent, just because these courts would be specialized in counterterrorism cases. Specialization, knowledge and experience in one field does

[753] *Incal*, at. para. 70, *available at* http://hudoc.echr.coe.int/eng?i=001-58197 , emphasizing that the Court's "task is not to determine *in abstracto* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial."

not per se mean that state interests will be protected over individual interests in every single case and that judges would be biased against the accused. Judges should be aware of the circumstances in which individual interests would need to be protected over that of the state. They also should know that there is a dangerous possibility of being a tool for protecting the head of the government's own personal interests in the name of protecting state interest. To raise such awareness among judges, they should be given some knowledge on the fundamentals of national security and counterterrorism, and the role of protecting human rights for more effective counterterrorism. This may help judges to appear impartial from an objective viewpoint and to assure confidence in the public, leading the way to satisfying the objective impartiality standard in each case.

## III.CONCLUSION

This study is important in the sense that it made a multidisciplinary analysis and brought together counterterrorism laws and practitioners in one piece of work. It provided necessary information on the national and international scope of terrorism, and the evolution of terrorism. It also provided substantial information to the reader about the history and constitutional structure of Turkey, and why counterterrorism and national security had paramount importance for the exercise of individual rights in its territory.

This study concluded that Turkey need not go beyond international human rights standards in order to more effectively fight against terrorism. This was because those standards were already considered as national security interests and were enacted by the states that need it. The proposed amendments did not suggest anything that did not exist in European and American laws. Some of these proposals were designed for exceptional circumstances and had a limited use in these

jurisdictions. But they exist. Turkey may also make these amendments. Yet, it should still need to consider the way judicial and security officials apply these rules.

This study made five precise suggestions that already exist in some European countries and the United States in some ways. 1) pre-trial detention on general dangerousness grounds, 2) post-sentence detention on general dangerousness grounds, 3) a public safety exception to the right to counsel and the right to be informed of procedural rights, 4) the exclusion of defense counsel from police interrogation if they aim to obstruct the administration of justice, 5) a counterterrorism court system that consists of judicial officials with special knowledge and training on Turkey's national security priorities, constitutional foundations, and the features of terrorist organizations. These proposals would not completely solve the Turkish terror problem right away in one day. Yet, they would surely contribute to the efforts of counterterrorism officials.

This multi-disciplinary study taught me many important lessons. First, fundamental human rights standards are similar in democratic states. What differs is the weight of a social norm over another internationally recognized norm in different states. The weighing of norms in balancing scales differs according to the constitutional structure of a state, and its historical and cultural backgrounds. Second, the opinions of practitioners are important to enact concrete laws that are suitable to the needs of the officials in the field. Third, the truthful application of rules is as important as the enactment of just laws. The sincere application of existing rules unfortunately has come into question in recent years in Turkey. Fourth, the commitment to democratic international human rights standards is necessary to ensure peace in a society. We must keep in mind that good laws may be used inappropriately in the hands of the bad-intended and the dishonest. What is important to protect a democracy is the honesty and reliability of state officials, and their commitment to the principle of the rule of law.

Turkey has made many human rights improvements since its establishment. The incorporation of European democratic constitutional and statutory principles and the proper application of these rules by state officials paved the way for individual and social development. Yet, the politicization of state bureaucracy in the last decade harmed the constitutional system and its neutral functioning. The 2017 Referendum that changed the Parliamentarian system to a Presidential system made the condition even worse, as it boosted the influence of the ruling party in both executive and judicial branches in many ways. Turkish democracy was profoundly harmed as a result. There is no promising sign of a firmer commitment to the rule of law at the moment.

With an idealist state of mind, I have suggested many proposals that could be applicable if Turkey restored its commitment to the rule of law. Once again, all that matters are individuals applying the rules, more than the rules themselves. These proposals could be well-applicable in Turkey, if the state and its officials were more dedicated to protecting individual rights. As an initial step in this direction, the Turkish Constitutional Court should declare the 2017 Constitutional Referendum void, and Turkey should go back to the previous Parliamentary System and to the pre-amendment version of the Turkish Constitution. And the next step should be to emancipate the state authority from partisanship.

In sum, with these five legal proposals in mind, we must acknowledge that successful counterterrorism in a state depends on the commitment to democratic principles and the rule of law. The effectiveness of counterterrorism in Turkey can be increased not solely by legal amendments, but also reinstating democracy and the rule of law once again.

# BIBLIOGRAPHY

## Constitutions, Statutes, and Regulations


Adli ve Önleme Aramalari Yönetmeligi [A.Ö.A.Y] [The Regulation on Investigative and Administrative Searches]
Adlî Yargi İlk Derece Mahkemeleri İle Bölge Adliye Mahkemelerinin Kuruluş, Görev ve Yetkileri Hakkında Kanun [The Code on the Establishment, Duties, and Authorities of Trial Courts and District Appellate Courts (for civil and criminal jurisdiction)]
Avukatlık Kanunu [A.K.] [Advocacy Code]
Ceza Kanunu [T.C.K.] [Penal Code] (Turk.)
Ceza Muhakemesi Kanunu [C.M.K.] [Criminal Procedure Code] (Turk.)
Ceza Muhakemeleri Usulü Kanununda Değişiklik Yapılması ve Devlet Güvenlik Mahkemelerinin Kaldırılmasına Dair Kanun [The Code Amending the Criminal Procedure Code and Abolishing State Security Courts]
Code de Procédure Pénale [C. pr. pén] [Criminal Procedure Code] (Fr.)
Code Pénal [C. pén.] [Penal Code] (Fr.)
Counter-Terrorism Act 2008 (Gr. Brit.)
Devlet Güvenlik Mahkemelerinin Kuruluş ve Yargılama Usulleri Hakkında Kanun [The Code on The Establishment and Judicial Proceedings of State Security Courts]
Gözlem ve Sınıflandırma Merkezleri Yönetmeliği [GSMY] [The Regulation on Centers for Observation and Classification] (Turk.).
Grundgesetz [GG] [Basic Law] (Ger.)
Hakimler Savcılar Kurulu Kanunu [H.S.K.K.] [The Statute on the Council of Judges and Prosecutors]
Infaz ve Güvenlik Tedbirlerinin Uygulanması Hakkında Kanun [I.K.] [The Code on the Execution of Punishment and Security Measures Article] (Turk.)
Kansas Statute Ann. § 59
La Constitution [1958 Const.] (Fr.)
Police and Criminal Evidence Act 1984 (Gr. Brit.)
Polis Vazife ve Salâhiyet Kanunu [P.V.S.K.] [The Code on Police Duties and Authorities]
Strafgesetzbuch [StGB] [Penal Code] (Ger.)
Strafprozeßordnung [StPO] [Criminal Procedure Code] (Ger.)
Terrorism Act 2000 (Gr. Brit.)
Terrorism Act 2006 (Gr. Brit.)
Terörle Mücadele Kanunu [ T.M.K.] [Counterterrorism Code] (Turk.)
The Anti-Terrorism, Crime and Security Act 2001 (Gr. Brit.)
The Bail Act 1976 (Gr. Brit.)
The Human Rights Act 1998 (Gr. Brit.)
The Prevention of Terrorism Act 2005 (Gr. Brit.)
T.C. Anayasası [1982 Constitution] (Turk.)
U.S. Constitution
8 U.S.C. (1952)
18 U.S.C. (1948)
Yabancılar ve Uluslararası Koruma Kanunu [Y.K.] [Aliens and International Protection Code] (Turk.).
Yargı Hizmetlerinin Etkinleştirilmesi Amacıyla Bazı Kanunlarda Değişiklik Yapılması ve Basın Yayın Yoluyla İşlenen Suçlara İlişkin Dava ve Cezaların Ertelenmesi Hakkında Kanun [The Code on Amendment on Some Codes for the Purpose of Judicial Service Effectiveness and on the Postponement of Cases and Sentences regarding crimes Committed through Press]

## Books


Ágoston, Gábor & Masters, Bruce, Encyclopedia of the Ottoman Empire (2009)
Alexander, Yonah, Brenner, Edgar H. & Tütüncüoğlu Krause, Serhat, Turkey: Terrorism, Civil Rights and The European Union (2008)
American Psychiatric Association, Desk Reference to the Diagnostic Criteria from DSM-5 (2013)
Arai-Takahashi, Yutaka, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (2002)
Ashworth, Andrew & Zedner, Lucia, Preventive Justice (2014)
Avrupa Birliği Genel Sekreterliği (General Secretariat of European Union), Avrupa Birliği Uyum Yasa Paketleri (European Union Law Packages) (2007)
Azak, Umut, Islam and Secularizm in Turkey: Kemalism, Religion and the Nation State (2010)
Barak, Aharon, Human Dignity: The Constitutional Value and The Constitutional Right (2015)
Barak, Aharon, Proportionality: Constitutional Rights and Their Limitations (2012)
Black's Law Dictionary (2009)
Bingham, Tom, The Rule of Law (2010)
Cane, Peter & Conaghan, Joanne, The New Oxford Companion to Law (2009)
Chaliand, Gérard & Blin, Arnaud, The History of Terrorism: From Antiquity to Al Qaeda (2007)
Centel, Nur & Zafer, Hamide, Ceza Muhakemesi Hukuku [Criminal Procedure Law] (2013)
Chemerinsky, Erwin, Constitutional Law (2011)
Chemerinsky, Erwin & Levenson, Laurie L., Criminal Procedure: Adjudication (2008)
Combs, Cindy C. & Slann, Martin, Encyclopedia of Terrorism (2007)
Condé, H. Victor, An Encyclopedia of Human Rights in the United States V.1 (2011)
Demirel, Emin, Afganistan: Taliban, El Kaide- Ladin ve Paylaşılamayan Ülke Afganistan [Afghanistan: Taliban, Al Al Qaeda-Ladin and the Unshared State Afghanistan (2002)
Dressler, Joshua & Michael, Alan C., Understanding Criminal Procedure: Investigation (2010)
Dycus, Stephen, Banks, William C. & Hansen, Peter Raven, Counterterrorism Law (2012)
Ekinci, Hüseyin & Sağlam, Musa, 66 Soruda Bireysel Başvuru [Individual Applications in 66 Questions] (2015)
Encyclopedia Britannica, Britannica Concise Encyclopedia (2006)
Elagaab, Omer & Elagaab, Jeehan, International Law Documents Relating to Terrorism (2007)
Fleet, Kate, Faroqhi, Suraiya N. & Kasaba, Reşat, The Cambridge History of Turkey: Byzantium to Turkey 1071-1453 V.1 (2008)
Fleet, Kate, Faroqhi, Suraiya N. & Kasaba, Reşat, The Cambridge History of Turkey: Turkey in the Modern World V.4 (2008)
Fleet, Kate, Faroqhi, Suraiya N. & Kasaba, Reşat, The Cambridge History of Turkey: The Ottoman Empire as a World Power V.II (2013)
Finlay, Christopher J., Terrorism and the Right to Resist: A Theory of Just Revolutionary War (2015)
Gross, Emanuel, The Struggle of Democracy against Terrorism: Lessons from the United States, the United Kingdom, and Israel (2006)
Haberfeld, M.R., King, Joseph F. & Lieberman, Charles Andrew, Terrorism Within Comparative International Context: The Counter-Terrorism Response and Preparedness (2009)
Hobbes, Thomas, Leviathan (ed. J. C. A. Gaskin, 1996)
Hughes, Edel, Turkey's Accession to the European Union: The Politics of Exclusion? (2011)
Human Rights Watch, Preempting Justice: Counterterrorism Laws and Procedures in France (2008)
Institute for Economics & Peace, Global Terrorism Index (2015)
İnalcik, Halil, Atatürk ve Demokratik Türkiye [Atatürk ve Democratic Turkey] (2016)
Kadish, Sanford H., Schulhofer, Stephen J., Steiker, Carol S. & Barkow, Rachel E., Criminal Law and Its Processes: Cases and Materials (2012)
Kant, Immanuel, The Groundwork of Metaphysics of Morals (2006)
Kinross, Lord, Atatürk: Bir Milletin Yeniden Doğuşu [Atatürk: The Rebirth of a Nation] (2016)
Klatt, Matthias & Meister, Moritz, The Constitutional Structure of Proportionality (2012)
Law, Randall D., Terrorism: A History (2009)
Law, Randall D., The Routledge History of Terrorism (2015)

LaFave, Wayne R., Israel, Jerold H., King, Nancy J. & Kerr, Orin S., Criminal Procedure V.2 (2015)
Leeuwen, Marianne van, Confronting Terrorism: European Experiences, Threat Perceptions and Policies (2003)
Lewis, Bernard, The Emergence of Modern Turkey (1968)
Lewy, Guenter, The Armenian Massacres in Ottoman Turkey: A Disputed Genocide (2005)
Luna, Erik & McCormack Wayne, Understanding The Law of Terrorism (2015)
Lutz, Brenda J. & Lutz, James M., Terrorism in America (2007)
Lutz, James M. & Lutz, Brenda J., Global Terrorism (2004)
Lutz, James M. & Lutz, Brenda J., Terrorism: Origins and Evolution (2005)
Mango, Andrew, Atatürk (1999)
Mango, Andrew, Turkey: The Challenge of a New Role (1994)
Mango, Andrew, Turkey and The War On Terror: For Forty Years We Fought Alone (2005)
McCarthy, Justin, Death and Exile: The Ethnic Cleansing of Ottoman Muslims 1821-1922 (2004)
Murphy, Cian C., EU Counter-terrorism Law (2012)
McCarthy, Justin, Turan, Ömer & Taşkıran, Cemalettin, SASUN: The History of an 1890s Armenian Revolt (2014)
McCarthy, Justin, Arslan, Esat, Taskıran, Cemalettin & Turan, Ömer, The Armenian Rebellion at Van (2006)
Merari, Ariel, Driven to Death: Psychological and Social Aspects of Suicide Terrorism (2010)
Oehmichen, Anna, Terrorism and Anti-Terror Legislation: The Terrorized Legislator?: A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France (2009)
Ørberg, Hans H., Latin-English Vocabulary II (1998)
O'Kane, Rosemary H. T., Terrorism (2007)
Oxford Dictionary of Law (2003)
Öztürk et al, Ceza Muhakemesi Hukuku [Criminal Procedure Law] (2015)
Pati, Roza, Due Process and International Terrorism: An International Legal Analysis (2009)
Raz, Joseph, The Morality of Freedom (1988)
Roach, Kent, Comparative Counter-terrorism Law (2015)
Ronczkowski, Michael R., Terrorism and Organized Hate Crime: Intelligence Gathering, Analysis, and Investigations (2007)
Rosen, Michael, Dignity: Its History and Meaning (2012)
Saltzburg, Stephen A. & Capra, Daniel J., American Criminal Procedure: Cases and Commentary (2014)
Saul, Ben, Terrorism: Documents in International Law (2012)
Schabas, William A., The European Convention on Human Rights: A Commentary (2015)
Shaw, Stanford J. & Shaw, Ezel Kural, History of the Ottoman Empire and Modern Turkey: Volume II: Reform, Revolution, and Republic: The Rise of Modern Turkey 1808-1975 V.II (2005)
Shue, Henry, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (1996)
Shaw, Stanford J., History of The Ottoman Empire and Modern Turkey Volume I: Empire of the Gazis: The Rise and Decline of the Ottoman Empire 1280-1808 xiv (2002)
Schmid, Alex P., The Routledge Handbook of Terrorism Research (2011)
Schurman, Jacob Gould, The Balkan Wars: 1912-1913 (2008)
Soyaslan, Doğan, Ceza Hukuku: Özel Hükümler [Criminal Law: Special Provisions] (2016)
Soyaslan, Doğan, Ceza Muhakemeleri Usulü Hukuku [Criminal Procedure Law] (2016)
Sullivan, E. Thomas & Massaro, Toni M., The Arc of Due Process in American Constitutional Law (2013)
Stigall, Dan E., Counterterrorism and the Comparative Law of Investigative Detention (2009)
Taylor, Robert, The History of Terrorism (2002)
Türkiye Barolar Birliği [The Turkish Bar Association], Türkiye ve Terörizm [Turkey and Terrorism] (2006)
United Nations Office on Drugs and Crime, Handbook on Dynamic Security and Prison Intelligence (2015)
Veldhuis, Tinka M., Prisoner Radicalization and Terrorism Detention Policy: Institutionalized Fear or Evidence-Based Policy Making? (2016)
Webber, Diane, Preventive Detention of Terror Suspects: A New Legal Framework (2016)
Wilkinson, Paul, Terrorism Versus Democracy: The Liberal State Response (2006)
Wilkinson, Paul, Terrorism and The Liberal State (1977)
Yenisey, Feridun, Kolluk Hukuku [The Law of Police Forces] (2015)
Yenisey, Feridun & Nuhoğlu, Ayşe, Ceza Muhakemesi Hukuku (2015)
Zafer, Hamide, Ceza Hukukunda Terrorizm [Terrorism in Criminal Law] (1999)
Zedner, Lucia, Security (2009)
Zurcher, Eric J., Turkey: A Modern History (2003)

## Unpublished Theses

Akdağlı, Deniz, Türk Hizbullahının Yakın Gelecekte Türkiye'nin Ulusal Güvenliğine Etkilerinin Analizi [The Effects of Turkish Hizbullah on Turkey's National Security in the Near Future] (2010) (M.A. thesis, Turkish Military Academy)
Bozkurt, Ihsan, Terör, PKK ve Dış Destek [Terror, PKK and External Support] (2013) (M.A. thesis, Celal Bayar University)
Gücenmez, Bekir, Terörizmin Finansmanı: PKK, ETA ve IRA Terör Örgütlerinin Karşılaştırılması [The Financing of Terrorism: The Comparison of PKK, ETA and IRA Terrorist Organizations] (2014) (M.A. thesis, Turkish Military Academy)
Şen, Osman, Dini Terör Çerçevesinde El Kaidenin Yeri ve Uluslararası Eylemlerinin Değerlendirilmesi [The Place of Al Qaeda within the Framework of Religious Terrorism, and the Assessment of its International Acts] (2011) (M.A. thesis, Gazi University)

## Articles in Journals and Books

Ashworth, Andrew & Zedner, Lucia, Punishment Paradigms and the Role of the Preventive State, in Liberal Criminal Theory: Essays for Andreas Von Hirsh 10 (AP Simester et al. eds., 2014)
Awan, Imran, Muslim Prisoners, Radicalization and Rehabilitation, 33 J. of Muslim Minority Aff. 371 (2013)
Barkhuysen, Tom, Emmerik, Michiel van, Jansen, Oswald & Fedorova, Masha, Right to a Fair Trial (Article 6), in Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, Theory and Practice of the European Convention on Human Rights (2018)
Barak, Aharon, Human Dignity: The Constitutional Value and the Constitutional Right, in Understanding Human Dignity (Christopher McCrudden ed., 2014)
Bleichrodt, Edwin, Right to Liberty and Security (Article 5), in Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, Theory and Practice of the European Convention on Human Rights (2018)
Cassel, Douglass, Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law, 98 J. Crim. L. & Criminology 811 (2008)
Cohen-Eliya, Moshe & Porat, Iddo, American Balancing and German Proportionality: The Historical Origins, 8 Int.'l J. of Const. L. Issue 263 (2010)
Costa, Jean-Paul, Human Dignity in the Jurisprudence of the European Court of Human Rights, in Understanding Human Dignity 398 (Christopher McCrudden ed., 2014)
Corner, Emily & Gill, Paul, A False Dichotomy? Mental Illness and Lone-Actor Terrorism, 39 Law & Hum. Behav. 23 (2015)
Corner, Emily & Gill, Paul, Is there a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?, CTC Sentinel 1 (2017)
Corner, Emily, Gill, Paul, & Mason, Oliver, "Mental Health Disorders and the Terrorist: A Research Note Probing Selection Effects and Disorder Prevalence, 39 Stud. in Conflict &Terrorism 560 (2016)
Doosje et al., Bertjan, Terrorism, Radicalization and De-radicalization, 11 Current Opinion in Psychol. 79 (2016)
Dreier, Horst, Human Dignity in German Law, in The Cambridge Handbook of Human Dignity 375-385 (Marcus
Dugas, Michelle & Kruglanski, Arie W., The Quest for Significance Model of Radicalization: Implications for the Management of Terrorist Detainees 32 Behav. Sci. Law 423 (2014)
Earle, Edward Mead, The New Constitution of Turkey, 40 Pol. Sci. Quarterly 73 (1925)
Eissen, Marc-André, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, in The European System for the Protection of Human Rights (1993) (R. St. J. Macdonald et al. eds., 1993)
Feest, Johannes, Pre-trial Detention in Germany: Factual Reduction and Legal Confusion, in Pre-trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law (P.H.P.H.M.C. van Kempen ed., 2012)
Garapon, Antoine, Is There a French Advantage in the Fight Against Terrorism?, Real Instituto Elcano de Estudios Internacionales y Estratégicos ARI No.110/2005 pp. 5 (1.09.2005)
Gill, Paul, & Corner, Emily, There and Back Again: The Study of Mental Disorder and Terrorist Involvement, 72 Am. Psychol. Ass'n. 231 (2017)

Grimm, Dieter, Dignity in A Legal Context: Dignity as an Absolute Right, in Understanding Human Dignity 381 (Christopher McCrudden ed., 2014)
Gunter, Michael M., Ermeni Terörizminin Çağdaş Görünümü [The Contemporary Appearance of Armenian Terrorism], in Ankara Üniversitesi [Ankara University], Uluslararası Terrorizm ve Uyuşturucu Madde Kaçakçılığı [International Terrorism and Drugs Trafficking] (1984)
Henry, Leslie Meltzer, The Jurisprudence of Dignity, 160 U. Pa. L. Rev. 169 (2012)
Hennette-Vauchez, Stéphanie, Human Dignity in French Law, in The Cambridge Handbook of Human Dignity (Marcus Düwell et al. eds., 2014)
Hoffman, Bruce, Filistin Terörizminde Son Gelişmeler [Last Developments in Palestine Terrorism], in Ankara Universitesi [Ankara University], Uluslararası Terrorizm ve Uyusturucu Madde Kaçakçılığı [International Terrorism and Drug Trafficking] (1984)
Horgan, John G., Psychology of Terrorism: Introduction to the Special Issue, 72 Am. Psychol. Ass'n 199 (2017)
Insanity Defense Work Group, American Psychiatric Association Statement on the Insanity Defense, 140 Am. J. Psychiatry 681 (1983)
Jacoby, Nicole, Redefining the Right to Be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States, 35 Ga. J. Int'l & Comp. L. 433 (2007)
Kevorkyan, Dikran, Uluslararası Terörizm Bünyesinde Ermeni Terörizmi [Armenian Terrorism within the Structure of International Terrorism], in Ankara Üniversitesi [Ankara University], Uluslararası Terrorizm ve Uyuşturucu Madde Kaçakçılığı [International Terrorism and Drugs Trafficking] (1984)
Khosrokhavar, Farhad, Radicalization in Prison: The French Case, 14 Pol., Religion & Ideology (2013)
Kiknadze, Tamara, Terrorism as a Social Reality, in Understanding Terrorism: Analysis of Sociological and Psychological Aspects (Süleyman Özeren et al. eds., 2007)
Lavrysen, Laurens, System of Restrictions, in Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, Theory and Practice of the European Convention on Human Rights (2018)
Martinico, Giuseppe, Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts, 23 Ejil 401 (2012)
Maslow, Abraham H., A Theory of Human Motivation, 50 Psychol. Rev. 370 (1943)
McCarthy, Justin, Zehir ve Panzehir Olarak Tarih [History as a Poison and Antidote], in Ankara Üniversitesi [Ankara University], Uluslararası Terrorizm ve Uyuşturucu Madde Kaçakçılığı [International Terrorism and Drugs Trafficking] (1984)
Merari, Ariel, Diamant, Ilan, Bibi, Arie, Broshi, Yoav & Zakin, Giora, Personality Characteristics of "Self Martyrs"/"Suicide Bombers" and Organizers of Suicide Attacks, 22 Terrorism and Pol. Violence 87 (2009)
Merari et al., Ariel, Making Palestinian "Martyrdom Operations"/ "Suicide Attacks": Interviews With Would-Be Perpetrators and Organizers, 22 Terrorism and Pol. Violence 102 (2009)
Mueller, Tim Nikolas, Preventive Detention as a Counterterrorism Instrument in Germany, 62 Crime L. Soc. Change 323 (2014)
Pressman, D. Elaine & Flockton, John, Violent Extremist Risk Assessment: Issues and Applications of The VERA-2 In A High-Security Correctional Setting, in Prisons, Terrorism, and Extremism: Critical Issues in Management, Radicalization and Reform (Andrew Silke ed., 2014)
Russell, Alison, Mental Disorder, Violent Radicalization, and Terrorist Behavior, 4 Am. J. of Med. Res. 185 (2017)
Schlink, Bernhard, Proportionality (1), in Michel Rosenfeld & András Sajó, The Oxford Handbook of Comparative Constitutional Law (2012)
Shapiro, Jeremy & Suzan, Bénédicte, The French Experience of Counter-terrorism, 45 The Int'l Inst. for Strategic Stud. 68 (2003)
Shute, Stephen Cameron & Mora, Paul David, Pre-trial Detention, the Treatment of Terror Suspects, and the Human Rights Act: A Critical Analysis of the Position in England and Wales, in Pre-trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law (P.H.P.H.M.C. van Kempen ed., 2012)
Silke, Andrew, Risk Assessment of Terrorist and Extremist Prisoners, in Prisons, Terrorism, and Extremism: Critical Issues in Management, Radicalization and Reform 113 (Andrew Silke ed., 2014)
Silke, Andrew & Veldhuis, Tinka, Countering Violent Extremism in Prisons: A Review of Key Recent Research and Critical Research Gaps Perspectives on Terrorism, 11 Persp. on Terrorism 2 (2017)
Sinai, Joshua, Developing a Model of Prison Radicalization, in Prisons, Terrorism, and Extremism: Critical Issues in Management, Radicalization and Reform (Andrew Silke ed., 2014)
Snead, Carter, Human Dignity in U.S. Law, in The Cambridge Handbook of Human Dignity (Marcus Düwell et al. eds., 2014)
Spielmann, Dean, Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe,

in Michel Rosenfeld & András Sajó, The Oxford Handbook of Comparative Constitutional Law (2012)
Viano, Emilio C., Pre-trial Detention in the United States of America: A Multiple Problem Crisis, in Pre-trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law (2012) (P.H.P.H.M.C. van Kempen ed.)
Walen, Alec, A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists, 70 Md. L. Rev. 871 (2011)
Weisselberg, Charles D., Exporting and Importing Miranda, 97 B.U. L. Rev. 1235 (2017)

## Cases

### The United States Supreme Court

Addington v. Texas, 441 U.S. 418 (1979)
Arizona v. Mauro, 481 U.S. 520 (1987)
Beckwith v. United States, 425 U.S. 341 (1976)
Blockburger v. United States, 284 U.S. 299 (1932)
Brinegar v. United States, 338 U.S. 160 (1949)
Carroll v. United States, 267 U.S. 132 (1925)
Crist v. Bretz, 437 U.S. 28 (1978)
Edwards v. Arizona, 451 U.S. 477 (1981)
Escobedo v. Illinois, 378 U.S. 478 (1964)
Foucha v. Louisiana, 504 U.S. 71 (1992)
Hudson v. United States, 522 U.S. 93 (1997)
In re Winship, 397 U.S. 358 (1970)
Kansas v. Crane, 534 U.S. 407 (2002)
Kansas v. Hendricks, 521 U.S. 346 (1997)
Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963)
Lochner v. New York, 198 U.S. 45 (1905).
New York v. Quarles, 467 U.S. 649 (1984).
Mathews v. Eldridge, 424 U. S. 319 (1976)
Mever v. Nebraska, 262 U.S. 390 (1923)
Miranda v. Arizona, 384 U.S. 436 (1966)
Moran v. Burbine, 475 U.S. 412 (1986)
Orozco v. Texas, 394 U.S. 324 (1969)
Rhode Island v. Innis, 446 U.S. 291 (1980)
Sutton v. City of Milwaukee, 672 F. 2d 644 (1982)
Terry v. Ohio, 392 U.S. 1 (1968)
United States v. Arvizu, 534 U.S. 266 (2002)
United States v. Salerno, 481 U.S. 739 (1987)
United States v. Ursery, 518 U.S. 267 (1996)
Youngberg v. Romeo, 457 U.S. 307 (1982)
Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)
Zadvydas v. Davis, 533 U.S. 678 (2001)

### The Turkish High Court of Appeals (*Yargıtay*)

C.G.K. 19.12.1994 E. 1994/6-322 K. 1994/343
C.G.K. 24.10.1995 E.1995/6-238 K. 1995/305

## The European Court of Human Rights


Başkaya and Okçuoğlu v. Turkey, 1994- IV Eur. Ct. H. R. 261
Bergman v. Germany, App. No. 23279/14 (2016)
Blokhin v. Russia, 2016 Eur. Ct. H. R.
Boman v. Finland, App. No. 41604/1117 (2015)
Borg v. Malta, App. no. 37537/13 (2016)
Brusco v. France, App. No. 1466/07 (2010)
Campbell and Fell v. The United Kingdom, App. nos. 7819/77; 7878/77 (1984)
Chahal v. The United Kingdom, 1996-V Eur. Ct. H. R.
Ciraklar v. Turkey, 1998-VII Eur. H.R. Rep.
Croissant v. Germany, App. No. 13611/88 (1992)
Deweer v. Belgium, (App. No. 6903/75) (1980)
Dvorski v. Croatia, 63 Eur. H. R. Rep. 311 (2016)
Eckle v. Germany, App. No. 8130/78 (1982)
Erdagoz v. Turkey, 1997-VI Eur. Ct. H. R.
Engel and Others v. the Netherlands, App. nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (1976)
Ezeh and Connors v. the United Kingdom, 2003-X Eur. Ct. H.R. 101
Fey v. Austria, App. No. 14396/88 (1993)
Fox, Campbell and Hartley v. United Kingdom, App. Nos. 12244/86-12245/86- 12383/86 (1991)
Gallardo Sanchez v. Italy, 2015 Eur. Ct. H.R.
Galstyan v. Armenia, App. No. 26986/03 (2007)
Geisterfer v. the Netherlands, App. No. 15911/08 (2014)
Glien v. Germany, App. No. 7345/12 (2014)
Goral v. Poland, App. No. 38654/97 (2004)
Guzzardi v. Italy, App. no. 7367/76 (1980)
Haidn v. Germany, App. No. 6587/04 (2011)
Halis v. Turkey, App. No. 30007/96 (2005)
Handyside v. United Kingdom, App. No. 5493/72 (1979)
Ibrahim and Others v. the United Kingdom, 2016 Eur. Ct. H. R.
Igor Tarasov v. Ukraine, App. No. 44396/05 (2016)
Incal v. Turkey, 1998-IV Eur. H.R. Rep.
J.N. v. The United Kingdom, 64 Eur. H. R. Rep. 491 (2016)
Jussila v. Finland, 2006-XIV Eur. Ct. H.R. 1
Karatas v. Turkey, 1999-IV Eur. Ct. H.R. 81
Khamroev and others v. Ukraine, App. No. 41651/10 (2016)
Khodorkovskiy and Lebedev v. Russia, App. Nos. 11082/06 and 13772/05 (2013)
Khoronshenko v. Russia, 2015 Eur. Ct. H.R.
Kudła v. Poland, 2000-XI Eur. Ct. H.R. 197
Labita v. Italy, 2000-IV Eur. Ct. H.R. 99
Letellier v. France, App. No. 12369/86 (1991)
Martin v. Estonia, App. No. 35985/09 (2013)
Mayzit v. Russia, App. No. 63378/00 (2005)
McFarlane v. Ireland, App. No. 31333/06 (2010)
McKay v. The United Kingdom, 2006-X Eur. Ct. H.R. 325
Meftah and others v. France, 2002-VII Eur. Ct. H. R. 265
Micallef v. Malta, 2009-V Eur. Ct. H. R. 289
Milenković v. Serbia, App. No. 50124/13 (2016)
Morris v. the United Kingdom, 2002-I Eur. Ct. H. R. 387
M. v. Germany, 2009-VI Eur. Ct. H. R. 169
Nada v. Switzerland, 2012-V Eur. Ct. H. R. 213
Panchenko v. Russia, App. No. 45100/98 (2005)
Petschulies v. Germany, App. No. 6281/13 (2016)
Pishchalnikov v. Russia, App. No. 7025/04 (2009)

Popov v. Russia, App. No. 26853/04 (2006)
Quinn v. France, App. no. 18580/91, 21 Eur. H.R. Rep. 529 (1995)
Ringeisen v. Austria, App. No. 2614/65 (1971)
Sadak and Others v. Turkey, 2001-VIII Eur. Ct. H. R. 267
Salduz v. Turkey, 2008-V Eur. Ct. H. R. 59
Saunders v. United Kingdom, 1996-VI Eur. Ct. H.R. 2044
Satik v. Turkey, App. No. 60999/00 (2008)
Sener v. Turkey, App. No. 26680/95 (2000)
Sergey Zolotukhin v. Russia, 2009-I Eur. Ct. H.R. 291
Šimkus v. Lithuania, App. No. 41788/11(2017)
Sürek v. Turkey, 1999-IV Eur. Ct. H.R. 353
S. v. Germany, App. No. 3300/10 (2012)
S.Z. v. Greece, App. No. 66702/13 (2018)
The Sunday Times v. The United Kingdom (No.1) (1979)
Varbanov v. Bulgaria, 2000-X Eur. Ct. H.R. 225, 240 (2000)
Winterwerp v. the Netherlands, App. No. 6301/73 (1979)
Zagorodniy v. Ukraine, App. No. 27004/06 (2011)
Z.A. and Others v. Russia (2017)

## International agreements

Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, October 22, 2015, C.E.T.S. No. 217
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178
Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 10, 1970, 860 U.N.T.S. 106
Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 125
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 168
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222
Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Sept. 10, 2010
Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196
European Convention on Human Rights [ECHR] Nov. 4, 1950, E.T.S. 005
European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. No. 90
International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 206
International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256
International Convention for the Suppression of the Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S.
International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229
League of Nations Convention for the Prevention and Punishment of Terrorism, art. 1-1, Nov. 16, 1937, League of Nations Doc. C.94.M.47.1938.V (never entered into force)
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474
Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, Sept. 10, 2010
Protocol to Amend the Convention on Offenses and Certain Acts Committed on Board Aircraft, Apr. 4, 2014
Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Oct. 14, 2005
The Mudros Armistice, Gr. Brit.- The Ottoman Empire, Oct. 30, 1918
The Peace Treaty of Lausanne, Turk.- Brit. Fr., It., Japan, Greece, the Serb-Croat-Slovena State, U.S., July 24, 1923
The Protocol amending the European Convention on the Suppression of Terrorism, May 15, 2003, E.T.S. No.190
The Statute of the Council of Europe, May. 5, 1949, E.T.S. 1
The Treaty of Sevres, Allied and Assoc. Powers- Turkey (The Ottoman Empire), Aug. 10, 1920.

U.N. Draft Comprehensive Convention on International Terrorism, U.N. Doc. A/59/894, (Feb.11, 2002)
U.N. G.A. Res. 217A (Dec. 10, 1948)
U.N. G.A. Res. 51/210, (Dec. 17, 1996)

## Internet sources

Al Jazeera, Timeline of attacks in Turkey, (Feb. 19, 2017), http://www.aljazeera.com/indepth/interactive/2016/06/timeline-attacks-turkey-160628223800183.html
Anadolu News Agency, What is FETO: An overview of the terrorist organization, (Aug. 10, 2016), https://www.aa.com.tr/en/vg/video-gallery/what-is-feto-an-overview-of-the-terrorist-organization
BBC-History, Good Friday Agreement, http://www.bbc.co.uk/history/events/good_friday_agreement
BBC-News, Berlin attack: So-called Islamic State claims responsibility, (Dec. 20, 2016), https://www.bbc.com/news/world-europe-38385961
BBC-Newsround, What was the Good Friday Agreement?, (Apr. 10, 2018) http://www.bbc.co.uk/newsround/14118775
BBC, Profile: Turkey's Marxist DHKP-C, (Feb 2, 2013) https://www.bbc.com/news/world-europe-21296893
Beauchamp, Zack, 18 things about ISIS you need to know, VOX (Nov.17, 2015 10:25 AM), https://www.vox.com/cards/things-about-isis-you-need-to-know/what-is-isis
Bora, Birce, Turkey's constitutional reform: All you need to know, AL JAZEERA (Jan. 17, 2017), https://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html
CNN, September 11 Terror Attacks Fast Facts, (Aug. 5, 2018), https://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html
Council Decision 2017/1426, annex- II, 12, 2017 O.J. (L 204) 95, 98 (2017) (E.U.), https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32017D1426&from=EN
Council of Europe, Chart of signatures and ratifications of Treaty 005, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures
Council of Europe, Complete list of the Council of Europe's treaties, https://www.coe.int/en/web/conventions/full-list
Council of Europe, Conventions on Counter-Terrorism, https://www.coe.int/en/web/counter-terrorism/conventions
Council of Europe, Details of Treaty No.005, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005
Council of Europe, European Court of Human Rights, http://www.coe.int/en/web/tirana/european-court-of-human-rights
Council of Europe Parl. Ass., Situation of Human Rights in Turkey, EUR. PARL. ASS. RES. 985, art. 4-1, 4-5 (June 30, 1992), available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16396&lang=en
Counter Extremism Project, Al-Qaeda, http://www.counterextremism.com/threat/al-qaeda
Counter Extremism Project, Hezbollah, http://www.counterextremism.com/threat/hezbollah
Counter Extremism Project, ISIS, https://www.counterextremism.com/threat/isis
Counter Extremism Project, ISIS-Key Leaders, https://www.counterextremism.com/threat/isis#keyleaders
Counter Extremism Project, ISIS-Overview, https://www.counterextremism.com/threat/isis#overview
Çakır, Ruşen, Gülen Cemaati: Nereden nereye?[ The Gulen Community], AL JAZEERA TURK (Aug. 10, 2010 3.51 PM), http://www.aljazeera.com.tr/gorus/gulen-cemaati-nereden-nereye
Çölaşan, Emin, Dünden Bugüne Fethullah Olayı [The Fethullah Case from Yesterday to Today], SÖZCÜ (July 25, 2016), https://www.sozcu.com.tr/2016/yazarlar/emin-colasan/dunden-bugune-fetullah-olayi-1409780/
Daily Sabah, Charity sold donated goods to funnel money to FETÖ, (April 1, 2018), https://www.dailysabah.com/investigations/2018/04/02/charity-sold-donated-goods-to-funnel-money-to-feto-1522616386
Engel et al., Richard, Manchester Bomb Suspect Said to Have Had Ties to al Qaeda, Terrorism Training Abroad, NBC NEWS, (May 23, 2017 3.38 PM)
https://www.nbcnews.com/storyline/manchester-concert-explosion/manchester-bomb-suspect-said-have-had-ties-al-qaeda-terrorism-n763691

European Court of Human Rights, Press Country Profile: Turkey, http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf
Haberturk, FETÖ'nün tarihçesi - 15 Temmuz Darbe Girişimi Raporu [The History of FETO- The Report of July 15th Coupt Attempt], (May 26, 2017), https://www.haberturk.com/gundem/haber/1508856-fetonun-tarihcesi-15-temmuz-darbe-girisimi-raporu
Haberturk, Terör örgütü IŞİD'in Türkiye'ye yönelik gerçekleştirdiği saldırılar [ISIS attacks in Turkey], (July 11, 2016 9.34 AM), http://www.haberturk.com/gundem/haber/1264903-teror-orgutu-isidin-turkiyeye-yonelik-gerceklestirdigi-saldirilar
Hakimler ve Savcılar Kurulu [HSKK] [The Council of Prosecutors and Judges], Ağır Ceza Mahkemelerinin Görev Alanına Giren Bir Kısım Suçlarda İhtisaslaşmaya Gidilmesine İlişkin Hâkimler ve Savcılar Yüksek Kurulu Birinci Dairesinin 12/02/2015 Tarihli ve 224 Sayılı Kararı [The HSKK Decision Regarding Specialization on Certain Crimes within the Jurisdiction of Assize Courts], http://www.hsk.gov.tr/DuyuruOku/627_-agir-ceza-mahkemelerinin-gorev-alanina-giren-bir-kisim-suclarda-ihtisaslasmaya-gidilmesine-iliskin-.aspx
Hanna, Jason, The London train explosion is the latest of 5 terror incidents in 2017 in the UK, CNN (Sept. 15, 2017 1.11 PM ), https://www.cnn.com/2017/09/15/world/uk-terror-events-2017/index.html
HISTORY, 2005-IRA Officially Disarms, https://www.history.com/this-day-in-history/ira-officially-disarms
Human Rights Watch, Q & A: Turkey's Elections (June 7, 2018 8:AM), https://www.hrw.org/news/2018/06/07/q-turkeys-elections
Hürriyet Daily News, Turkey abolishes special courts as part of new democratization move, (Jan. 29, 2014 1.30 PM), http://www.hurriyetdailynews.com/turkey-abolishes-special-courts-as-part-of-new-democratization-move-61715
Hürriyet Daily News, Turkey has evidence of US arming 'terror' groups: Ministry (18 Nov. 2017), http://www.hurriyetdailynews.com/turkey-has-evidence-of-us-arming-terror-groups-ministry-122615
Hürriyet Daily News, Turkish Parliament abolishes special courts (July 2, 2002 2.00 AM), http://www.hurriyetdailynews.com/turkish-parliament-abolishes-special-courts-24507
International legal instruments, https://www.un.org/sc/ctc/resources/international-legal-instruments/
Khazan, Olga, Turkey bombing: What is the DHKP/C terrorist group?, WASH. POST (Feb. 1, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/02/01/turkey-bombing-what-is-the-dhkpc-terrorist-group/?utm_term=.dfa365597f91
Lewis, Bernard, What Went Wrong?, THE ATLANTIC (JAN. 2002), https://www.theatlantic.com/magazine/archive/2002/01/what-went-wrong/302387/
Liam Stack, Terrorist Attacks in Britain: A Short History, the N.Y. TIMES (June 4, 2017), https://www.nytimes.com/2017/06/04/world/europe/terrorist-attacks-britain-history.html
Lister et al, Tim, ISIS goes global: 143 attacks in 29 countries have killed 2,043, CNN (Feb. 12, 2018), https://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html
Mandıracı, Berkay, Turkey's PKK Conflict: The Death Toll, INT.'L CRISIS GRP. (July 20, 2016), https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-pkk-conflict-death-toll
North Atlantic Treaty Organization, Member Countries, https://www.nato.int/cps/en/natohq/topics_52044.htm
NTV, Gülen'e dava manşetlerde [The Case against Gulen is on Headlines], (Sept. 1, 2000 4.10 PM), http://arsiv.ntv.com.tr/news/27486.asp
NTV, Gülen'e 10 yıl hapis istemiyle dava [The Case Against Gulen with the Request of 10 years of Imprisonment], http://arsiv.ntv.com.tr/news/26589.asp
Nurtsch, Ceyda, "There is a lack of democratic culture in Turkey", (April 25, 2014), https://en.qantara.de/content/interview-with-elif-shafak-there-is-a-lack-of-democratic-culture-in-turkey
RT, Year of terror: Timeline of ISIS attacks in Great Britain, (Sept. 16, 2017) https://www.rt.com/uk/403529-london-attack-tube-parasons/
Odatv, "FETÖ Davası" başladı [The Feto Case Has Begun], (Oct. 15, 2015 3.35 PM), https://odatv.com/feto-davasi-basladi-1510151200.html
OXFORD UNIVERSITY PRESS, OXFORD LIVING DICTIONARIES (2018), available at https://en.oxforddictionaries.com/definition/liberty
OXFORD UNIVERSITY PRESS, OXFORD LIVING DICTIONARIES (2018), available at https://en.oxforddictionaries.com/definition/security
OXFORD UNIVERSITY PRESS, OXFORD LIVING DICTIONARIES (2018), https://en.oxforddictionaries.com/definition/radicalization

OXFORD UNIVERSITY PRESS, OXFORD LIVING DICTIONARIES (2018), https://en.oxforddictionaries.com/definition/terror
Ozcuhadar, Tunca, 'FETO disguised as charitable education organization', Anadolu News Agency (July 16, 2018), https://www.aa.com.tr/en/analysis-news/-feto-disguised-as-charitable-education-organization/1205599
PEARSON EDUC. LTD., LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH (2018), http://www.ldoceonline.com/dictionary/terror
Republic of Turkey Ministry of Foreign Affairs, Council of Europe, http://www.mfa.gov.tr/council-of-europe.en.mfa
Republic of Turkey, Ministry of Foreign Affairs, DHKP-C, http://www.mfa.gov.tr/dhkp_c.en.mfa
Reuters, Turkey says U.S. support for Syrian Kurdish YPG 'not befitting' of an ally (May 31, 2017), https://www.reuters.com/article/us-mideast-crisis-turkey-usa-idUSKBN18R2TA
Republic of Turkey Ministry of Foreign Affairs, Human Rights, http://www.mfa.gov.tr/İnsan-hakları.en.mfa
Republic of Turkey Ministry of Justice-General Directorate of Prisons and Detention Houses, Prison Population Statistics, http://www.cte.adalet.gov.tr
Solaker, Gülşen & Butler, Daler, Turkish MPs elect judicial board under new Erdogan constitution, REUTERS (May 17, 2017 4:31 AM), https://www.reuters.com/article/us-turkey-politics/turkish-mps-elect-judicial-board-under-new-erdogan-constitution-idUSKCN18D0T9
Sözcü, FETÖ'ye dokunan iki isim 2002'de yanmıştı [Two officials touching FETO was burned in 2002], (Sept. 13, 2016 7:01 AM), http://www.sozcu.com.tr/2016/gundem/fetoye-dokunan-iki-isim-2002de-yanmisti-1390710/ (Re: Gulenist state officials persecuted the prosecutor and police chief who disclosed the Gulenist organization)
The American Declaration of Independence, http://www.constitution.org/us_doi.pdf
The Committee of Ministers' Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, available at https://rm.coe.int/16806eebf0
The Guardian, Isis leader behind Turkey nightclub attack is killed by US forces in secretive raid, (Apr. 21, 2017 11.44 PM), https://www.theguardian.com/world/2017/apr/22/isis-leader-behind-turkey-nightclub-attack-killed-by-us-forces#img-1
The Library of Congress-World Digital Library, Convention for the Prevention and Punishment of Terrorism, https://www.wdl.org/en/item/11579/
The map of the Treaty of Sevres, https://www.themaparchive.com/treaty-of-sevres-1920.html
The New York Times, U.S. Weapons, Given to Iraqis, Move to Turkey (Aug. 30, 2007), https://www.nytimes.com/2007/08/30/washington/30contract.html
The Straits Times, A timeline of terror attacks in France, (Apr. 21, 2017 2.46 PM), https://www.straitstimes.com/world/europe/a-timeline-of-terror-attacks-in-france
The Washington Post, Trump tells Turkish president U.S. will stop arming Kurds in Syria (Nov. 24, 2017), https://www.washingtonpost.com/world/national-security/trump-tells-turkish-president-us-will-stop-arming-kurds-in-syria/2017/11/24/61548936-d148-11e7-a1a3-0d1e45a6de3d_story.html?noredirect=on&utm_term=.71a29ef3ee88
TRT World, What is FETO?, (July 10, 2017), https://www.trtworld.com/turkey/what-is-feto--8654
TRT World, 51 Turkish companies raided over links to FETO, (Aug. 16, 2016) https://www.trtworld.com/turkey/over-50-companies-raided-over-funding-feto-166224
Türkiye Barolar Birliği [Turkish Bar Association], Anayasa Değişikliği Teklifinin Karşılaştırmalı ve Açıklamalı Metni [The Descriptive and Comparative Text of the Proposed Constitutional Amendment], http://anayasadegisikligi.barobirlik.org.tr/Anayasa_Degisikligi.aspx
Türkiye Büyük Millet Meclisi [TBMM] [Grand National Assembly of Turkey], Constitution, translation at https://global.tbmm.gov.tr/docs/constitution_en.pdf
Türkiye Büyük Millet Meclisi [TBMM] [Grand National Assembly of Turkey], The Reasonings for Relevant Statutory Changes, http://mevzuat.tbmm.gov.tr/mevzuat/faces/maddedetaylari?_adf.ctrl-state=w0o6rev36_54&psira=92492&psorgukriteri=, http://mevzuat.tbmm.gov.tr/mevzuat/faces/maddedetaylari?_afrWindowMode=0&_afrLoop=1937792748417023&psira=16936&_adf.ctrl-state=w0o6rev36_69., http://mevzuat.tbmm.gov.tr/mevzuat/faces/maddedetaylari?psira=16937&_afrWindowMode=0&_afrLoop=1937386553070424&_adf.ctrl-state=w0o6rev36_64
U.K. Treason Acts from 1351 to 1945, http://www.legislation.gov.uk/all?title=treason#top
United Nations, Founding Member States, http://www.un.org/depts/dhl/unms/founders.shtml
United Nations, The Universal Declaration of Human Rights, http://www.un.org/en/universal-declaration-human-rights/ (last visited Aug. 25, 2018)

United Nations, Turkey, http://www.un.org/depts/dhl/unms/turkey.shtml
U.S. Department of State, Country Reports on Terrorism 2015, https://www.state.gov/j/ct/rls/crt/2015/257523.htm
U.S. Department of State, Foreign Terrorist Organizations, https://www.state.gov/j/ct/rls/other/des/123085.htm
Yanasmayan, Zeynep & Pour-Norouz, Canan, 2017 Amendment Proposal to the Turkish Constitution, POL. L. TURK., https://politicsandlawinturkey.wordpress.com/publications/contributions-of-fellows/2017-amendment-proposal-to-the-turkish-constitution/
Yezdani, İpek, Ne kadar sızarlarsa sızsınlar Türk ordusunun ana gövdesi Atatürkçü ve laiktir [No matter how they infiltrate, the main body of the Turkish Army is pro-Atatürk and secular], Hurriyet (Jan. 21, 2017), http://www.hurriyet.com.tr/gundem/ne-kadar-sizarlarsa-sizsinlar-turk-ordusunun-ana-govdesi-ataturkcu-ve-laiktir-40342865