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Published in:
European Human Rights Law Review

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Final author's version (accepted by publisher, after peer review)

Publication date:
2016

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Rachovitsa, A. (2016). On the Sidelines of the Failed Coup d' État in Turkey: Can Greece Extradite the Eight Turkish Military Officers to Turkey? *European Human Rights Law Review*, 2016(6), 645-655.

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**On the Sidelines of the Failed Coup d' État in Turkey:
Can Greece Extradite the Eight Turkish Military Officers to Turkey?**

Dr Adamantia Rachovitsa*

This is the Author's Final Version of the article published in (2016) **European Human Rights Law Review** 645-655. This version accounts for revisions following the peer review process but does not account for the publisher's editorial input.

Abstract

The article discusses the pending extradition case of eight Turkish military officers who, on the night of the recent failed coup d' état in Turkey, defected and resorted to Greece. The analysis addresses the public emergency in Turkey, insofar it is relevant for the extradition case, against the European Convention on Extradition, the European Convention on Human Rights and the Greek Supreme Court's case law. The discussion finds that, according to the circumstances currently prevailing in Turkey, there are substantial grounds for believing that the eight Turkish military officers will run a real risk of treatment contrary to art.3 ECHR, a real risk of a flagrant denial of justice and a risk of being subjected to the death penalty. The article concludes that it will be ill-advised for Greek authorities to grant Turkey's extradition request.

Introduction

On the night of the failed coup d' état in Turkey, eight Turkish military officers hijacked a Black Hawk helicopter and made an emergency landing near the Greek-Turkish border. The 'eight', who were subsequently identified as three majors, three captains and two sergeants major, were immediately arrested. They applied for political asylum, arguing that they were afraid for their lives if returned to Turkey.¹ They claim that they were following orders to transport injured people from the streets of Istanbul via helicopter to ambulances elsewhere when they came under fire by police. They insist that they had no involvement in the attempted coup, but fled to Greece because they were afraid for their lives. In August 2016 they received a two-month suspended prison sentence for illegal entry into Greece, with the recognition of mitigating circumstances of having acted while under serious threat. While the 'eight' remain in administrative detention, the asylum applications of seven of them were recently rejected.²

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¹ B. Bell, "Turkey coup attempt: Greek dilemma over soldiers who fled" (July 19, 2016), *BBC*, <http://www.bbc.com/news/world-europe-36824862> [Accessed October 2, 2016].

² (July 21, 2016), *Kathimerini*, <http://www.kathimerini.gr/868292/article/epikairohta/ellada/ypo-krathsh-oi-8-toyrkoi-stratiwtikoi-mexri-thn-apofash-asyloy> (in Greek) [Accessed October 2, 2016]; R. Maltezos, "Greece rejects asylum requests from more Turkish soldiers" (October 11, 2016), *eKathimerini*,

Meanwhile, the issue of the ‘eight’ has given rise to a diplomatic row between Greece and Turkey. Turkey immediately demanded the return of the “traitors” and it officially requested their extradition in August 2016.³ They seem to be accused of attempting to overthrow the government of the Turkish Republic.⁴ Turkey's ambassador to Athens stated that “not extraditing the eight Turkish soldiers [...] would not help bilateral relations between the two neighbours”.⁵ The Greek foreign ministry took a more balanced position, maintaining that, while the issue will be examined based on Greek and international law, it will be borne very seriously in mind that the arrested parties stand accused in their country of violating constitutional legality.⁶ The present analysis examines the question of whether Greece should grant Turkey’s extradition request for the eight Turkish officers. The discussion assesses the public emergency situation in Turkey, insofar it is relevant for the extradition case, against international law, the European Convention on Human Rights (ECHR)⁷ and the Greek Supreme Court’s case law.

1. The Public Emergency in Turkey

On 15 July 2016, a coup d'état was attempted in Turkey. During the coup, over 300 people were killed and 2,100 were injured. The Turkish government accuses the coup leaders of being linked to the Gülen movement, which is designated as a terrorist organization by the Republic of Turkey and led by Fethullah Gülen, a Turkish businessman and cleric who lives in the USA. In the aftermath of the failed coup, Turkey’s government declared a three-month state of emergency which was endorsed by the Parliament. The emergency powers allow the Council of Ministers to rule by decrees with little parliamentary oversight and to make decisions that escape review by the Turkish Constitutional Court. Subsequently, Turkey

<http://www.ekathimerini.com/212749/article/ekathimerini/news/greece-rejects-asylum-requests-from-more-turkish-soldiers> [Accessed October 14, 2016].

³ “Turkey asks Greece to extradite military asylum seekers” (August 18, 2016), *Al Jazeera*, <http://www.aljazeera.com/news/2016/08/turkey-asks-greece-extradite-military-asylum-seekers-160818134003719.html> [Accessed October 2, 2016].

⁴ “6,000 detained from Turkish army, judiciary in probe into failed coup attempt” (July 15, 2016), *Hurriyet Daily News*, <http://www.hurriyetdailynews.com/6000-detained-from-turkish-army-judiciary-in-probe-into-failed-coup-attempt.aspx?pageID=238&nID=101669&NewsCatID=341> [Accessed October 2, 2016].

⁵ R. Maltezou, “Not returning Turkish soldiers will not help relations with Greece: Turkish ambassador” (July 19, 2016), *Reuters*, <http://www.reuters.com/article/us-turkey-security-greece-idUSKCN0ZZILT> [Accessed 2 October 2016].

⁶ Greek Ministry of Foreign Affairs, “Foreign Minister Kotzias and Turkish Foreign Minister Mevlüt Çavuşoğlu talk again by telephone” (July 16, 2016), <http://www.mfa.gr/en/current-affairs/statements-speeches/foreign-minister-kotzias-and-turkish-foreign-minister-mevlut-cavusoglu-talk-again-by-telephone.html> [Accessed 2 October 2016].

⁷ European Convention on Human Rights 1953.

notified official derogations from the ECHR⁸ and the International Covenant on Civil and Political Rights (ICCPR).⁹

States and inter-governmental organisations called for respect of the democratic institutions in Turkey and its elected officials, while expressing grave concern over the need to return to rule of law.¹⁰ During the last three months, thousands of people have been investigated and detained on account of their imputed political views and affiliations.¹¹ Justice Minister confirmed that Turkish courts have placed 32,000 suspects under arrest and that more than 70,000 people have been investigated on charges of links to Gülen's network.¹² There is also an ongoing unprecedented crackdown on independent media and thousands of judges and prosecutors have been suspended, removed or arrested. The Secretary General of the United Nations urged Turkish authorities to ensure that international human rights law is fully respected.¹³ The Council of Europe Commissioner for Human Rights has openly expressed his fears over detention conditions, allegations of serious ill-treatment and the erosion of judicial control.¹⁴ The declared state of emergency is due to expire in mid-October 2016. The Turkish President has expressed his intention to extend it by another three months¹⁵ amid serious concerns raised by Turkey's opposition leader that the

⁸ Turkey - Derogation to the Convention on the Protection of Human Rights and Fundamental Freedoms, Notification - JJ8187C Tr./005-191 (July 22, 2016), <https://wcd.coe.int/ViewDoc.jsp?p=&id=2436803&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true> [Accessed October 2, 2016].

⁹ International Covenant on Civil and Political Rights 1966; ICCPR – Turkey: Notification under Article 4 (3), Reference: C.N.580.2016.TREATIES-IV.4 (July 21, 2016), <https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf> [Accessed October 11, 2016].

¹⁰ J. Kanter, “E.U. and U.S. Urge Erdogan to Show Restraint After Coup Attempt in Turkey” (July 18, 2016), *New York Times*, <http://www.nytimes.com/2016/07/19/world/europe/eu-turkey-coup-erdogan.html?smid=fb-nytimes&smtyp=cur&r=2> [Accessed October 2, 2016]; “Germany expresses concern over Turkey's state of emergency” (July 21, 2016), *AP*, <http://www.foxnews.com/world/2016/07/21/germany-expresses-concern-over-turkey-state-emergency.html> [Accessed October 2, 2016].

¹¹ S. Osborne, “Turkey coup attempt: Government had list of arrests prepared before rebellion, EU commissioner says” (July 18, 2016), *Independent*, <http://www.independent.co.uk/news/world/europe/turkey-coup-attempt-erdogan-government-arrests-military-uprising-eu-commissioner-a7142426.html> [Accessed October 14, 2016].

¹² “Turkey: 32,000 jailed for links to group ‘behind’ coup” (September 28, 2016), *Al Jazeera*, <http://www.aljazeera.com/news/2016/09/turkey-32000-jailed-links-group-coup-160928090832760.html> [Accessed October 2, 2016].

¹³ “Ban urges Turkish authorities to respect constitutional order, human rights amid state of emergency” (July 21, 2016) http://www.un.org/apps/news/story.asp?NewsID=54524&Cr=Turkey&Cr1=#.V_7CW9waXBK [Accessed October 2, 2016].

¹⁴ Council of Europe Commissioner for Human Rights, “Turkey: Nils Muižnieks expresses fears over state of emergency measures” (July 27, 2016) <http://www.humanrightseurope.org/2016/07/turkey-nils-muiznieks-expresses-fears-over-measures-taken-under-the-state-of-emergency/> [Accessed October 2, 2016].

¹⁵ M. Srivastava, “Turkey to extend state-of-emergency by 90 days” (October 3, 2016), *Financial Times*, <https://www.ft.com/content/5bc96cf8-8981-11e6-8aa5-f79f5696c731> [Accessed October 14, 2016].

government is misusing its emergency powers by applying extremely wide and indiscriminate administrative powers affecting core human rights.¹⁶

2. The Role of Greek Courts

There is no bilateral extradition treaty between Greece and Turkey. Both States are, however, bound by the European Convention on Extradition (ECE).¹⁷ The ECE establishes the general obligation to extradite while prescribing certain exceptions. Such exceptions take the form of (a) leaving discretion to States on whether to extradite (when the requesting State retains the death penalty); (b) prohibiting extradition (political crimes); and (c) conditioning extradition (military crimes and fiscal offences). In the present case, Greek courts will decide on the extradition request by applying the ECE and, complementarily, arts 436-456 of the Greek Code of Criminal Procedure (GCCP).¹⁸ The GCCP provides for the following procedure: The extradition request is brought to a hearing before the Athens Court of Appeal sitting in council, which rules for or against the extradition. The requested person may appeal the decision within 24 hours. The appeal will be heard by the Supreme Court (*Areios Pagos*) acting as a second instance court. If the Supreme Court denies the extradition, the procedure is terminated and the requested person is released. In the event that the Supreme Court grants the extradition request, the Minister of Justice makes the final decision. The Minister's decision is subject to cancellation before the Administrative Supreme Court. Extradition procedures usually take up to five or six months to complete.

Besides any grounds barring extradition, under the ECE and Greek legislation, it is generally accepted that specific human rights concerns may qualify as obstacles to extradition.¹⁹ Greece (and Turkey) is a member State to the ECHR. Since *Soering* the European Court of Human Rights (hereinafter Strasbourg Court or Court) has established that extradition by a member State may give rise to issues under arts 2, 3 and 6 of the ECHR and, hence, engage international responsibility.²⁰ Consequently, Greek courts will also have to examine whether there are any human rights grounds for refusing Turkey's extradition

¹⁶ Fraser and C. Kiper, "Opposition leader: Turkey is misusing its emergency powers" (September 30, 2016) *Washington Post*, https://www.washingtonpost.com/world/middle_east/turkey-12-tv-stations-closed-for-alleged-security-threat/2016/09/30/122aaa74-86e0-11e6-b57d-dd49277af02f_story.html [Accessed 2 October 2016].

¹⁷ European Convention on Extradition 1960.

¹⁸ Presidential Decree 258/1986 of 8 July 1986 (Greece) (Προεδρικό Διάταγμα).

¹⁹ J. Quigley, "The Rule of Non-Inquiry and the Impact of Human Rights in Extradition Law" (1990) 15 N.C.J. Int'l. L. & Comp. Reg. 401; J. Dugard and C. van den Wyngaert, "Reconciling Extradition with Human Rights" (1998) 92 AJIL 187.

²⁰ *Soering v United Kingdom* (1989) 11 E.H.R.R. 439. See also Human Rights Committee, *Ng v Canada* (Communication No.496/1991) U.N. Doc. CCPR/C/49/1991 (1994).

request. More specifically, domestic courts will have to determine whether the ‘eight’ will run a real risk of being subjected to treatment contrary to arts 2, 3 and 6 ECHR. In doing so, Greek courts will assess the general situation in Turkey as well as the specific circumstances of said individuals. Pronouncing, even indirectly, on a series of questions concerning the ongoing situation in Turkey puts Greek courts in a profoundly uneasy position. From a legal point of view, however, there is no question of adjudicating on the responsibility of Turkey. What is under discussion is the potential liability incurred by Greece against the ECHR and international law.²¹

A point of interest in the present case is the application of the real risk test in light of the public emergency in Turkey and the derogation from the ECHR and the ICCPR. The very fact that Turkey derogated from the ECHR means that Turkish authorities enjoy a wide margin of appreciation on deciding the measures necessary to avert the emergency. Although these measures need to be a genuine response to, and strictly required by, the exigencies of the situation,²² the Strasbourg Court accords deference to Member States. This, in turn, means that the level of scrutiny of State’s acts and omissions during derogation is lower. As far as Greek courts are concerned the crucial question is whether the public emergency situation should weigh in their assessment. In other words, is the derogation relevant in adopting a lower standard of assessment with regard to the existence of a real risk if the eight military officers are extradited to Turkey? The answer seems to be in the negative. The pending case before Greek courts is an extradition case and not a case on deciding the lawfulness and necessity of the measures adopted by Turkish authorities. Therefore, Greek courts cannot accord deference to Turkey; the primacy focus lies on whether the ‘eight’ will run a real risk if extradited. In fact, public emergency is an aggravated factor, thereby increasing this risk.

3. Prohibition of Extradition for Military and Political Crimes

Article 4 of the ECE and Article 438 (c) of the GCCP prohibit extradition for offences that are characterised as military. The information available thus far indicates that the extradition of the ‘eight’ is being requested only in relation to the crime of attempting to overthrow the government of the Turkish Republic, which is not a military crime. Therefore, Article 4 of the ECE is not relevant in the present circumstances.

²¹ *Ismoilov and Others v Russia* (2009) 49 E.H.R.R. 42 at [67]. Cf Y. Shany, *Questions of Jurisdiction and Admissibility before International Courts* (Cambridge: CUP, 2016), pp.154-155.

²² *A. and Others v United Kingdom* (2009) 49 E.H.R.R. 29 at [184].

Similarly, the political crime exception to extradition does not appear to come into play. According to Article 3 (1) of the ECE, extradition shall not be granted, if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected to a political offence. It is highly unlikely that the eight military officers will make such an argument, since they deny any involvement in the failed coup. Still, it would have been a great opportunity to have a judicial ruling on whether any of the crimes committed by military officers in the context of the failed coup could qualify as political crimes. Interestingly, the Greek Supreme Court has recently denied extradition requests from Turkey on the ground that the crime of attempting to overthrow the Turkish government (by being a member of the armed terrorist organisation the Communist Party of Turkey/Marxist–Leninist) was considered to be political.²³

4. Prejudicing the Position of the ‘Eight’ on Account of Their Imputed Political Opinions

Article 3 (2) of the ECE stipulates that extradition shall not be granted, if there are substantial grounds for believing that the requested person’s position may be prejudiced on account of his political opinions. Although the ‘eight’ do not claim to hold a particular political opinion, what matters is that their position will be prejudiced due to their *imputed* political opinions. It should be recalled that Turkey’s Minister of Foreign Affairs referred to the ‘eight’ as traitors who participated in the failed coup, which is a prejudicial statement by a State authority.²⁴ Given the present situation in Turkey, where thousands of people are being arrested and detained on account of their imputed political views and affiliations, the position of the ‘eight’ will be seriously prejudiced.

National courts, including the Supreme Court, in Greece have previously found that, regardless of the seriousness of the crimes in respect of which individuals are requested, their position would be prejudiced on account of their political opinions (or religion), if extradited to Turkey.²⁵ Such cases specifically concerned the extradition of Turkish nationals accused

²³ Greek Supreme Court 186/2015. Also, the Athens Court of Appeal (sitting in council) 2/1998 denied the extradition to Italy of a former member of the Red Brigades, who was charged with attempting to overthrow the government. All judgements by Greek courts mentioned herein are available at *NOMOS* electronic database (in Greek and subject to subscription fees).

²⁴ *Ergashev v Russia* (App. No.12106/09), judgment of 20 December 2011 at [165]-[173].

²⁵ Greek Supreme Court 186/2015 (the individual was requested for attempting to overthrow the government of the Turkish Republic by being a member of the armed terrorist organisation, the Communist Party of Turkey/Marxist–Leninist); Greek Supreme Court 199/2013 (the Court held that the requested person - an Orthodox Christian - ran the risk of ill-treatment in a Turkish prison); Athens Court of Appeal (sitting in council) 3/1986 (the request concerned a Turkish journalist); East Crete Court of Appeal (sitting in council)

of, or charged with, participating in terrorist organisations in Turkey and/or attempting to overthrow the government.²⁶ The Supreme Court examines the issue of prejudging one on account of his political view thoroughly and asks regularly for supplementary clarifications from Turkish authorities (Article 13 of the ECE and Article 444 of the GCCP).

5. The Real Risk of Ill-treatment Prohibited under Article 3 ECHR

If there are substantial grounds for believing that the eight military officers, if extradited, will be subjected to torture or inhuman or degrading treatment in Turkey, Greece is under the obligation not to authorise the extradition. The assessment of this risk is heavily reliant on the availability of credible information regarding the practice of Turkish authorities. Yet access to such information is challenging at the moment. This is mainly due to the fact that there is a crackdown on independent media in Turkey. The Turkish Journalists' Association decries that any journalist who does not share the views of the government is being targeted. The operation of many media has been banned or suspended.²⁷ More than 100 journalists have been arrested; 2500 journalists have lost their jobs and hundreds have their press credentials cancelled.²⁸

Photographs circulated online in the aftermath of the attempted coup depict half-naked individuals being held in unacceptable conditions. Many detainees are being arbitrarily held in informal places of detention, including sport centres or stables. Prison cells hold double the number of inmates they are supposed to and detainees sleep in turns because of overcrowding.²⁹ Furthermore, Amnesty International's reports,³⁰ collaborated by lawyers from the Ankara Bar Association's human rights commission,³¹ found that Turkish police in Ankara and Istanbul held detainees in stress positions for up to 48 hours, denied them food,

4/2014; cf. however Greek Supreme Court 1088/2015 (the Court did not accept that a Turkish national who was Kurdish in origin and an Alawite by religion would not be at risk if extradited to Turkey). Also, Greek Supreme Court 447/2015 denying extradition to Georgia.

²⁶ Greek Supreme Court 1088/2015; Greek Supreme Court 533/2015; Greek Supreme Court 1328/2014; Greek Supreme Court 327/2010.

²⁷ Article 19, "Turkey: International civil society condemn crackdown on freedom of expression" (September 6, 2016), <https://www.article19.org/resources.php/resource/38464/en/turkey:-international-civil-society-condemn-crackdown-on-freedom-of-expression> [Accessed October 2, 2016].

²⁸ Fraser and Kiper, "Opposition leader: Turkey is misusing its emergency powers".

²⁹ I. Tharoor, "Turkey plans to build dozens of new jails after post-coup crackdown", (September 15, 2016), *Washington Post*, <https://www.washingtonpost.com/news/worldviews/wp/2016/09/15/turkey-plans-to-build-dozens-of-new-jails-after-post-coup-crackdown/> [Accessed October 2, 2016].

³⁰ Amnesty International, "Turkey: Independent monitors must be allowed to access detainees amid torture allegations" (July 24, 2016), <https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/> [Accessed October 2, 2016].

³¹ L. Morris, "'Law is suspended': Turkish lawyers report abuse of coup detainees" (July 24, 2016), *Washington Post*, https://www.washingtonpost.com/world/law-is-suspended-turkish-lawyers-report-abuse-of-coup-detainees/2016/07/24/dc240998-4e9f-11e6-bf27-405106836f96_story.html [Accessed October 2, 2016].

water and medical treatment and verbally abused and threatened them. There are also allegations that many have been subjected to severe beatings and torture, including rape and sexual assault. Turkish lawyers described how people are brought before prosecutors for interrogation with their clothes covered in blood.³² These forms of ill-treatment amount at least to intense physical or mental suffering aimed at humiliating and debasing the detainees, and fall indisputably under the scope of Article 3 ECHR.

The absence of independent monitoring (either by a national or international body) of detention centres³³ and the great length of pre-trial detention with no access to judicial review and legal assistance, as it will be discussed below, increase substantially the risk of ill-treatment contrary to Article 3 ECHR.

6. The Real Risk of a Flagrant Denial of Justice

Examining the claim that the requested individual will be subject to a real risk of a flagrant denial of justice, if extradited to the requesting State, was not considered, until recently, a valid argument in extradition cases since it fell under the rule of non-inquiry. The rationale for this approach was twofold. First, the conduct of criminal proceedings is a matter falling within the *domain réservé* of States and, therefore, domestic courts of the requested State in the interest of international comity would not pronounce on whether the requesting State provides fair trial guarantees.³⁴ Second, accepting a flagrant denial of justice claim in extradition proceedings entails that the individual will not be brought before justice for his/her alleged crimes (as it is rare for States to prosecute persons whose extradition has been denied).³⁵ Against this background, it does not come as a surprise that few member States to the ECE raised similar concerns when ratifying the Convention. Luxemburg and The Netherlands reserved their right to grant extradition requested for the purpose of executing a judgment pronounced by default against which no remedy remains open, if such extradition might have the effect of subjecting the person claimed to a penalty without this person's right of defence complied with. It is only Portugal and San Marino that specifically reserved their

³² Amnesty International, "Turkey: Independent monitors must be allowed to access detainees amid torture allegations".

³³ Amnesty International, "Turkey crackdown by the numbers: Statistics on Brutal Backlash After Failed Coup" (July 26, 2016), www.amnestyusa.org/news/press-releases/turkey-crackdown-by-the-numbers-statistics-on-brutal-backlash-after-failed-coup [Accessed October 2, 2016].

³⁴ Quigley, pp.414-415.

³⁵ C. van den Wyngaert, "Applying the European Convention on Human Rights to Extradition: Opening the Pandora's Box?" (1990) 39 ICLQ 757, 771.

right to deny extradition generally in cases that the requested individuals will not be afforded fair trial guarantees complying with international standards.

International human rights law, however, has come to influence the application of extradition treaties and domestic legislation. Since the *Soering* judgment in 1989, the Strasbourg Court holds that a member State must deny extradition if there is a real risk of a flagrant denial of the justice in the requesting State.³⁶ In situations of public emergency, like the current state of affairs in Turkey, the right to a fair trial can be derogated from. Nevertheless, it is arguable that certain core elements of the right to a fair trial are non-derogable. The principle of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency, including the presumption of innocence and the right to challenge one's detention.³⁷

In assessing whether the flagrant denial of justice test has been met, the Strasbourg Court applies the same standard and burden of proof as in Article 3 ECHR expulsion cases. It is for the applicant to adduce sufficient evidence that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a *real risk* of being subjected to a flagrant denial of justice.³⁸ Admittedly the Court sets an exceptionally high threshold for substantiating this claim. In fact, the threshold is so high that the Court has found only once - in the *Othman (Abu Qatada)* case³⁹ - that the applicant proved the existence of a real risk. Flagrant denial of justice is considered synonymous with a trial which is manifestly contrary to the principles embodied in Article 6 ECHR. Mere irregularities or lack of safeguards in the trial proceedings do not establish the risk. It must be demonstrated that there is a fundamental breach of the principles of fair trial, in a way that destroys the essence of the right.⁴⁰ The Court has elucidated certain relevant criteria: the use of evidence obtained as a result of a breach of Article 3 of the ECHR;⁴¹ systematic refusal of access to a lawyer while in police custody;⁴² a trial conducted with total disregard for the right to a defence;⁴³ or lack of access to an impartial and independent court.⁴⁴

³⁶ Dugard and Wyngaert, p.204.

³⁷ Human Rights Committee, General Comment 29, 'States of Emergency (Article 4)', U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at [11], [16].

³⁸ B. Rainey, E. Wicks, C. Ovey, *Jacobs, White & Ovey – The European Convention on Human Rights* (Oxford: OUP, 2014), pp.261, 277.

³⁹ *Othman (Abu Qatada) v United Kingdom* (2012) 55 E.H.R.R. 1 at [259]-[262].

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Al-Moayad v Germany* (App. No.35865/03), decision of 20 February 2007 at [101].

⁴³ *Bader and Kanbor v Sweden* (2008) 46 E.H.R.R. 13 at [47].

⁴⁴ *Al-Moayad* case at [101].

Interestingly, the Greek Supreme Court appears to apply the test of a flagrant denial of justice in a less stringent fashion to the Strasbourg Court.⁴⁵ There seems nothing to preclude a national court from applying a less strict test since from a human rights law point of view it is more favourable to the individual.⁴⁶ In the similar vein, the Irish High Court refused an extradition request made by the USA on the grounds that solitary confinement at ADX Florence, a super-max prison in Colorado (US), is inhuman and degrading treatment.⁴⁷ The Irish court respectfully disagreed with the finding of the European Court of Human Rights that prison conditions in ADX Florence did not breach Article 3 ECHR.⁴⁸ Consequently, the Greek Supreme Court's approach increases the chances that a flagrant denial of justice argument gets accepted in the case of the eight Turkish military officers. A last point to be underlined is that the question of a flagrant denial of justice usually concerns the extraterritorial effect of Article 6 ECHR in cases where the individual runs the risk of being extradited to a third State - outside the protective scope of the ECHR. Drawing a distinction between extradition requests from ECHR member States and those from third States is reasonable since there is a presumption that member States will respect ECHR standards. This presumption, however, is rebuttable and judicial practice evidences that claims regarding a flagrant violation of Article 6's standards are examined in relations between ECHR parties.⁴⁹ For instance, the Westminster Magistrates' court has denied extradition to Ukraine⁵⁰ and English courts have systematically refused extradition requests made by Russia.⁵¹ In other areas, the Strasbourg Court refuted in the *MSS* case the presumption that member States will provide a safe return in the cases of asylum.⁵² The German Higher Regional Court of Schleswig-Holstein recently found that extradition requests from Turkey are not admissible in the current circumstances due to the real risk of

⁴⁵ Greek Supreme Court 1410/2010 (extradition to Serbia would give rise to a risk of a flagrant denial of justice due to the individual's religious and political opinions).

⁴⁶ See Article 53 ECHR.

⁴⁷ High Court of Ireland, *Attorney General v Damache* [2015] IEHC 339 (21 May 2015).

⁴⁸ *Babar Ahmad and Others v United Kingdom* (2013) 56 E.H.R.R. 1.

⁴⁹ Van den Wyngaert, pp.771-772.

⁵⁰ "London Court Denies Extradition of the Suspect Charged with Embezzlement of 6 billion US Dollars due to the Declarations Made by Ukrainian State Official" (March 9, 2016), *Lexology*, <http://www.lexology.com/library/detail.aspx?g=9a846f48-70b8-4b3c-b297-1557757eed9a> [Accessed October 2, 2016].

⁵¹ "The Vintskevich Extradition and its Implications for UK/Russian Relations" (March 12, 2013), *Lexology*, <http://www.lexology.com/library/detail.aspx?g=6f705e4a-55b7-40d4-a114-520b308f6e78> [Accessed 2 October 2016]; "From the Iron Curtain to Détente: the Slow Thawing of UK-Russian Extradition Relations" (June 9, 2015), *Lexology*, <http://www.lexology.com/library/detail.aspx?g=71b30c27-152f-49f8-bf88-b8344ce9b997> [Accessed October 2, 2016].

⁵² *MSS v Belgium and Greece* (2011) 53 E.H.R.R. 2.

an unfair trial; the High Court of Justice Queen's Bench Division recently denied extradition to Greece due to the appalling detention conditions in Greek prisons.⁵³

Greek authorities need to take the following considerations into account in their assessment of the flagrant denial of justice question.

6.1 Impartiality and Independence of the Judiciary

According to reports, at least 2745 judges and prosecutors have been suspended thus far in Turkey. 2277 judges and prosecutors have been detained, of whom 1270 are in pre-trial detention and 730 are in pre-charge detention.⁵⁴ The massive crackdown on judges and prosecutors casts doubt on the credibility of the judicial process as a whole.⁵⁵ Dismissal and suspension of judges by the executive should only take place for serious reasons and in accordance with fair procedures.⁵⁶ The UN High Commissioner for Human Rights highlighted that the mass suspension or removal of judges in Turkey is cause for serious alarm.⁵⁷ The Greek Association of Judges and Prosecutors has also issued a statement urging the Turkish authorities to free and reinstate the judges until there is substantial evidence against them.⁵⁸ The very fact of an ongoing radical reform in the judicial sector can be a reason to deny extradition. For example, the Westminster Magistrates' court found that the requested individual would have been subjected to a flagrant denial of justice if returned to Ukraine where a systemic judicial reform was underway.⁵⁹ The widening crackdown in the judicial sector in Turkey without following prompt procedures undermines the impartiality

⁵³ Decision, Reference No 1 Ausl (A) 45/15 (41/15) (22 September 2016), <http://www.gesetze-rechtsprechung.sh.juris.de/jportal/portal/t/r51/page/bsshoproduct.psm1?doc.hl=1&doc.id=KORE222992016&documentnumber=1&numberofresults=68&doctyp=juris-r&showdoccase=1&doc.part=L¶mfromHL=true#focuspoint> [Accessed on 18 November 2016] and High Court of Justice Queen's Bench Division Administrative Court, Cases Nos CO/5174/2015, CO/6572/2015 [2016] EWHC 1801 (Adm) 20 July 2016 respectively.

⁵⁴ "Turkey attempted coup: 1,500 jail staff suspended", (October 1, 2016), *Al Jazeera*, <http://www.aljazeera.com/news/2016/09/turkey-attempted-coup-1500-jail-staff-suspended-160930145945031.html> [Accessed October 2, 2016]; Amnesty International, "Turkey: State of emergency must not roll back human rights" (July 21, 2016) <https://www.amnesty.org/en/latest/news/2016/07/turkey-state-of-emergency-must-not-roll-back-human-rights/> [Accessed October 2, 2016].

⁵⁵ Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. E/CN.4/2004/60 (31 December 2003) at [27].

⁵⁶ Human Rights Committee, General Comment 32, 'Article 14: Right to equality before courts and tribunals and to a fair trial', (2007) at [20].

⁵⁷ UN High Commissioner for Human Rights, "Zeid: Turkey's response to attempted coup must be grounded in human rights and rule of law" (July 19, 2016) www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=20282&LangID=E [Accessed October 2, 2016].

⁵⁸ (July 22, 2016), *Kathimerini*, <http://www.kathimerini.gr/868459/article/epikairothta/ellada/etaireia-ellhnwn-dikastikwn-na-epistreyoyn-stis-8eseis-toys-oi-2745-toyrkoi-dikastikoi> (in Greek) [Accessed October 2, 2016].

⁵⁹ "London Court Denies Extradition of the Suspect Charged with Embezzlement of 6 billion US Dollars due to the Declarations Made by Ukrainian State Official".

and independence of the judiciary. First, the pervasive climate of intimidation adversely affects the independence of judges. Second, the fact that the failed coup has polarised Turkish society brings to the fore the question of impartiality. It will not be an easy exercise for a judge not to allow his/her judgment to be influenced by personal bias or prejudice. That is not to say of course that any trial conducted would be by definition unfair. Yet for the impartiality requirement to be fulfilled not only a judge must be impartial but also he/she must *seem to be* impartial to an objective observer.⁶⁰ It is doubtful whether an objective observer gets this impression at the moment.

6.2 Erosion of Judicial Control in Pre-Trial Proceedings

Although the rights in pre-trial proceedings are distinct to the right to a fair trial, the overall effect of restrictions imposed on rights on the pre-trial stage may seriously engage the rights of defence, as set out in Article 6 ECHR. In certain circumstances, the rights of legal representation under Article 6 (3)(c) ECHR or the fair trial guarantees under Article 6 (1) ECHR are capable of applying pre-trial precisely because they may seriously impact the fairness of the proceedings as a whole.⁶¹ For this reason, when discussing whether there is a real risk to a flagrant denial of justice, if the extradition of the eight military officers is granted, one needs to take also into consideration whether and, if yes, how Turkish authorities apply the rights of defence in pre-trial proceedings.

The first decree, adopted within the framework of the declared state of emergency, authorises pre-charge detention without access to a judge for up to thirty days. This clearly indicates an erosion of judicial review.⁶² Article 5 (4) ECHR requires that pre-trial detention should be challenged speedily before a court. The thirty-day period currently prescribed by Turkish legislation is exceptionally long. The Strasbourg Court found in the *Aksoy* case that holding a suspect for fourteen days without judicial supervision was not necessary even during public emergency.⁶³

Although the Article 5 (4) ECHR procedure need not necessarily be attended by the same guarantees as those required under Article 6 ECHR, it must have a judicial character and provide effective and speedy remedy of habeas corpus.⁶⁴ The Strasbourg Court's

⁶⁰ S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (Oxford: OUP, 2013), p.459.

⁶¹ Rainey, Wicks and Ovey, p.292.

⁶² **Council of Europe Commissioner for Human Rights, “Turkey: Nils Muižnieks expresses fears over state of emergency measures”.**

⁶³ *Aksoy v Turkey* (1997) 23 E.H.R.R. 553 at [78].

⁶⁴ *A. and Others* case at [203].

approach is that the stricter the limitations imposed on one's right to liberty the more effective the safeguards need to be. In the *A. and Others v United Kingdom* case, the Court proclaimed that due to the dramatic impact of the lengthy deprivation of liberty on the applicants' fundamental rights, Article 5 (4) must import substantially the same fair-trial guarantees as Article 6 (1).⁶⁵ Moreover, one should not lose sight of the fact that judicial review of detention underpins the need, and is the means, to minimise the risk of arbitrariness and, hence, to detect and prevent ill-treatment.⁶⁶ In this sense, judicial control of interferences with the right to personal liberty is an essential feature of the rule of law and arguably a non-derogable aspect of the right to liberty.

Finally, establishing reasonable suspicion for one's detention is a necessary requirement for the lawfulness of the detention.⁶⁷ A lower standard of reasonable suspicion may be acceptable during public emergency, but this does not imply that no reasonableness is required. For instance, Turkish police considers evidence of complicity to crimes and reasonable suspicion the use of encrypted online communications (e.g. ByLock digital messaging app) or having financial arrangements with specific banks (e.g. Bank Asya).⁶⁸ Pre-charge detention applies in Turkey not only to those suspected of involvement in overthrowing the government but also to anybody remotely suspected of an alleged affiliation with the Gülenist movement. The Turkish government has used the emergency laws to issue decrees to detain, arrest, suspend and fire thousands of soldiers, teachers, journalists, academics and civil servants.⁶⁹ In many instances, there is little, if any, individualised evidence of involvement in criminal acts. Detainees are even brought to court in groups making it difficult for lawyers to prepare a defence on an individual basis.

6.3 No Effective Access to Legal Assistance

Article 6 ECHR is relevant in the pre-trial stage if, and insofar as, the fairness of the trial is likely to be seriously prejudiced. The manner in which Article 6 paragraphs (1) and (3)(c) are applied during the investigation depends on the circumstances.⁷⁰ The general situation in Turkey evidences that core aspects of the right to a defence under Article 6 ECHR are undermined. Article 6 requires that, subject to specific restrictions, the accused is allowed to benefit from the assistance of a lawyer from the initial stages of police

⁶⁵ Ibid. at [217].

⁶⁶ *Aksoy* case at [76].

⁶⁷ *A. and Others* case at [204].

⁶⁸ Article 19, "Turkey: International civil society condemn crackdown on freedom of expression".

⁶⁹ "Turkey attempted coup: 1,500 jail staff suspended".

⁷⁰ *Öcalan v Turkey* (2005) 41 E.H.R.R. 45 at [131].

interrogation. The Ankara Bar Association and Amnesty International sketch an alarming picture. In the majority of the cases detainees are held pre-charge for many days without being allowed to contact a lawyer. It is only shortly before being brought to court or being interrogated by prosecutors that lawyers can speak to their clients.⁷¹ Detainees are not given the right to have legal assistance of their own choice either. Private lawyers are not generally allowed to represent detainees, who were all assigned bar association legal aid lawyers only.⁷² This is all the more concerning since the complex nature of the charges and the serious offences accused of require skilled legal assistance thereby raising serious concerns regarding the quality and impartiality of the legal assistance provided. Access to lawyers is also heavily restricted. Contact is not regular even after the court hearings and while individuals are remanded in pre-trial detention. Crucially, Turkish officials can observe or even record meetings between detainees and lawyers in breach of the right of an accused to communicate with his legal representative out of the hearing of a third person (Article 6 (3)(c) ECHR).⁷³

6.4 Presumption of Innocence

The presumption of innocence is also arguably a non-derogable dimension of the right to a fair trial.⁷⁴ An example of how Turkish authorities frustrate the presumption of innocence is that they have recently set up crisis management centres where people can submit their written defences and prove that they or their relatives are wrongly arrested.⁷⁵ Asking people to prove their innocence reverses in effect the presumption of innocence not to mention that such centres do not meet judicial guarantees.

In addition to the general situation, the presumption of innocence of the ‘eight’ has been already seriously compromised. The statement of Turkey’s Minister of Foreign Affairs labelling the ‘eight’ as traitors who participated in the failed coup is a prejudicial statement in violation of the presumption of innocence.⁷⁶ Having one of the most senior member of the Turkish government referring to the eight military officers, without any qualification, as the

⁷¹ Morris, “‘Law is suspended’: Turkish lawyers report abuse of coup detainees”.

⁷² Amnesty International, “Turkey: Independent monitors must be allowed to access detainees amid torture allegations”.

⁷³ *Öcalan* case at [133].

⁷⁴ General Comment 29 [11], [16]; M. Scheinin, “Turkey’s Derogation from the ECHR – What to Expect?” *EJILtalk!* (July 27, 2016) www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/ [Accessed October 6, 2016].

⁷⁵ P. Kenyon, “Victims of Turkey’s Post-Coup Purge Invited To Prove Their Innocence” (October 3, 2016) <http://www.npr.org/sections/parallels/2016/10/03/495639482/victims-of-turkeys-post-coup-purge-invited-to-prove-their-innocence> [Accessed October 5, 2016].

⁷⁶ *Ergashev* case at [165]-[173].

traitors who took part in the unsuccessful coup is a declaration of guilt in breach of Article 6 (2) ECHR. Such statements encourage the public to believe them guilty and, prejudice the assessment of the facts by the competent judicial authority.⁷⁷

6.5 Setting Up Special Courts

Finally, of particular relevance is whether Turkey will set up a special court for trying the alleged coup plotters, including the eight Turkish military officers.⁷⁸ There is no clear indication on when or how the trials will take place.⁷⁹ It should not go unnoticed that twenty-one (out of fifty) member States to the ECE have explicitly reserved their right to deny extradition, if the requested person will stand trial before an extraordinary court in the requesting State.⁸⁰ Although Greece has not entered such a reservation, Greek courts must assess how an *ex post facto* court weakens due process guarantees insofar the ‘eight’ are concerned.⁸¹

7. The Risk of Exposing the ‘Eight’ to the Death Penalty

Turkey’s president seems determined to bring the death penalty issue before the Turkish parliament.⁸² Reinstating the death penalty would be in violation of Turkey’s commitments under the 6th and 13th Additional Protocol to the ECHR from which no derogation is permitted.⁸³ Even if it is assumed that Turkey reinstates the death penalty, applying it retroactively to the crimes allegedly committed on the night of the failed coup, would be arbitrary and unlawful pursuant to the principle of legality (Article 7 ECHR) which is non-derogable during public emergency.

Although it seems unlikely that Turkey will reinstate capital punishment, things are in a state of flux. If Greece were to extradite the ‘eight’, there would be substantial grounds for believing that the ‘eight’ would face a real risk of being condemned to the death penalty and

⁷⁷ *Allenet de Ribemont v France* (1995) 20 E.H.R.R. 557 at [41].

⁷⁸ “Turkish National Security Council meeting ends” (July 20, 2016), *Hurriyet Daily News*, <http://www.hurriyetaidailynews.com/turkish-national-security-council-meeting-ends-.aspx?pageID=238&nID=101848&NewsCatID=338> [Accessed October 2, 2016].

⁷⁹ “Turkey: 32,000 jailed for links to group ‘behind’ coup”.

⁸⁰ See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/declarations?p_auth=muDmQYJs [Accessed October 2, 2016].

⁸¹ Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. HRC/11/41 (24 March 2009) at [35]-[36].

⁸² “Erdoğan says Turkish gov’t will discuss reintroduction of death penalty with opposition” (July 17, 2016), *Hurriyet Daily News*, <http://www.hurriyetaidailynews.com/erdogan-says-turkish-govt-will-discuss-reintroduction-of-death-penalty-with-opposition.aspx?pageID=238&nID=101734&NewsCatID=338> [Accessed October 2, 2016].

⁸³ European Convention on Human Rights Protocol 6 1983; European Convention on Human Rights Protocol 13 2003.

executed. Greece would violate the 13th Additional Protocol to the ECHR.⁸⁴ A viable alternative could be if Greek courts and/or the Minister of Justice decide to grant the extradition request on the explicit condition, and after having received effective and reliable assurances from Turkey, that capital punishment will not be imposed on the ‘eight’.⁸⁵

Conclusion

Although there is no doubt that those deemed to be responsible for the crimes committed during the attempted coup need to be brought to justice, full adherence to the rule of law is a non-negotiable condition to this end. Given the circumstances currently prevailing in Turkey, it will be ill-advised for Greek authorities –both courts and the Minister of Justice - to grant Turkey’s extradition request. The analysis demonstrated that there are substantial grounds for believing that, if extradited, the position of the ‘eight’ may be prejudiced on account of their imputed political opinions and that they will run a real risk of treatment contrary to Article 3 ECHR, a real risk of a flagrant denial of justice and a risk of being subjected to the death penalty.

⁸⁴ *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 E.H.R.R. 9 at [123], [137].

⁸⁵ *Olaechea Cahuas v Spain* (2009) 48 E.H.R.R. 24; *Al-Saadoon and Mufdhi* case at [189].