AN ASSESMENT OF THE 15th JULY 2016 COUP ATTEMPT IN TERMS OF INTERNATIONAL LAW AND TURKISH CONSTITUTION

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INTRODUCTION

On the evening of 15th July 2016, there was an attempted coup against the democratically elected government of Turkey; an attempt to subvert the constitutional order and bring down the Republic of Turkey. Broadcast channels were raided and taken over; air control towers at airports were tried to bring under control; main roads were blocked. The Turkish Grand National Assembly (TGNA), the Presidential Palace, public institutes under the Ministry of Interior (such as Special Operation Commands, Security General Directorate, police stations), and other public institutes were directly bombed and targeted military warplanes and arms. Military Centres were targeted: The Chief of the Armed Forces, the Chief of the General Staff, and other high level commanders were taken hostage. Some blameless soldiers were deceived into action with the information that they were in a military exercise, or that they were preventing a crime.

Many citizens took to the streets; their purpose was to protect the unity and continuity of the country, and to protest against the coup.

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Tragically, many such innocent citizens were mercilessly killed and bombed[1]. The people spilled out onto the streets to protect the national will even though they were faced with tanks and armoured vehicles. 243 of our citizens were martyred, and 2186 citizens were injured. As a result of this combined effort from the people and the security forces to resist the coup, democracy was protected, and the national will continued to be expressed, and the attempted coup was defeated. On 21st July 2016, a state of emergency was declared throughout the country for 90 days.

In this paper, the normative rules and values adopted by international law, the 1982 Constitution, and the Turkish Criminal Code will be evaluated within the context of the attempted coup of 15th July 2016.

[1] www.afyonbaro.org.tr/wp-content/uploads/2016/07/sikayt.docx. E.T.24.08.2016.

I. AN EVALUATION OF THE MILITARY COUP ATTEMPT FROM THE PERSPECTIVE OF INTERNATIONAL LAW

The terrorist attack launched on 15th July 2016, which caused panic and fear amongst the public through the use of violence, outraged national and international peace by targeting civilians and officials. This coup attempt, which was stated by media and the government, to have been supported by external powers, and must be considered in terms of international and humanitarian law[2]. First to be examined will be the articles of international acts violated by the coup attempt as a military intervention into a sovereign state's domestic affairs in order to bring down the democratically elected government. Then, actions such as the opening of fire on civilians, bombing the Presidential Complex, the Turkish Grand National Assembly (TGNA), and the Department of Special Operations will be examined.

Even though it may happen in practice, the illegality of intervention or meddling in the domestic affairs of a state is a settled rule in international law[3]. This rule is regarded as a fundamental principle because it is the inevitable consequence of the independence of a state, and a principle of sovereign equality[4]. Article 2 paragraph 4 of the Charter of the United Nations states that, "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."* The rule stated here is regarded as a compulsory rule (*jus cogens*) for all member nations, and it is impossible to agree to a

[2] Emre ÖKTEM, *Terorism: Humanitarian Law and Human Rights* (Terörizm: İnsancıl Hukuk ve İnsan Hakları*)*, Derin, İstanbul, 2007, p.67.
[3] Müge KINACIOĞLU, "Foreign Democracy: Is Military Intervention for Regime Change Permissible," **All-Azimuth,** C.1., S.1., 2012, s. 31.
[4] Melda SUR, *Fundamentals of International Law* (Uluslararası Hukukun Esasları*)*, Beta, İstanbul, 2006, p. 110.

different interpretation to that stated in settled international law and court decisions[5].

The United Nations (UN) Secretary General, in his report presented at the Panel on Threats, Challenges and Change, stressed that the "*United Nations provides mechanisms to hinder democratically elected government from being taken over with unconstitutional measures and to protect democracy.*"[6] The UN General Assembly and Commission of Human Rights imposes sanctions against those taking over a democratically elected government[7].

The Universal Declaration of Human Rights 1948, Article 3 which regulates the right to life and personal freedoms, states "*Everyone has the right to life, liberty and security of person*". The International Covenant of on Civil and Political Rights 1966, article 6, which regulates the right to life states "*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*" This unconditionally guaranteed right, the right to life of the civilians killed on the 15th July coup attempt, was violated.

The bombing of the Presidential Complex *(Cumhurbaskanligi Kulliyesi*) and TGNA is a severe attack against the national will and sovereignty. According to the 1977 Additional Protocol I to the Geneva Convention of 1949, article 51, civilians cannot be targeted by any attack or retaliation. According to article 50 of the related Protocol, civilian targets are any targets other than armed targets. The Presidential Complex and TGNA, which were targeted on July 15th

[5] *Nicaragua v. United States*, 1986, I.C.J., 14, par. 190.

[6] UN Panel on Threats, Challenges and Changes, *A More Secure World: Our Common Responsibility*, (BM Tehditler, Meydan Okumalar ve Değişim Yüksek Paneli, Daha Güvenli Bir Dünya: Ortak Sorumluluğumuz*)*, 94, U.N. Doc. A/59/565 (2.12.2004).

[7] UN General Assembly Resolution, (BM Genel Kurul Kararı) 55/96 U.N. Doc. SN106/4/00 Rev. 4, 3-4th April 2000.

are civilian targets and so, the related international article has been violated. The places bombed are where the national will is realised and the *sine qua non* places of the Turkish State. The importance of the Presidency Office for the Republic is obvious and there is no need to express it additionally. Besides, the importance of Turkish Grand National Assembly for the Turkish state and nation is unquestionable. Bombing the two civilian targets has left the coup attempters in a weak position before international law.

The coup attempt targeted the Department of Special Operation and Police Aviation Department that are located in Golbasi/Ankara. Forty-two police officers died during these attacks. The Department of Special Operation is established under the General Directorate of Police, and it is tied to the Ministry of Domestic Affairs. This department has the mission to hinder the armed activities of terrorist organisations in residential or rural areas[8]. One of the basic rules of international humanitarian law is that the Offices responsible for security are regarded as civilian, unless they act in accordance with armed forces. It is also stated in article 43 that those who are not combatants are regarded as civilians[9]. The intervention to the police violates the articles 43 and 52 of the Additional Protocol.

Undoubtedly, the bombed places in the coup attempt are the basics institutions of Turkish constitutional order. There has been a violation of constitutional order. The bloody intervention on democracy is undoubtedly a "*danger that threatens the existence of the nation*". On the night of July 15th 2016, and the days following, the national will - which is constitutionally recognised - and the principles mentioned

[8] https://www.egm.gov.tr/Sayfalar/Özel-Harekat-Daire-Başkanlığı.aspx, (Çevrimiçi) E.T. 20.08.2016.

[9] Feyzullah YEŞİL, *Armed Conflicts in International Law and Non- State Actors*, (Uluslararası Hukukta Silahlı Çatışmalar ve Devlet Dışı Aktörler), The Grand National Assembly of Turkey Expertise Dissertation (TBMM Uzmanlık Tezi), Ankara, 2015, p. 17.

above were disregarded by the coup attempters in a comprehensive and organised way.

II. AN EVALUATION OF MILITARY COUP ATTEMPT FROM THE PERSPECTIVE OF THE 1982 CONSTITUTION

Specifically, in the context of the 15th July coup attempt, Article 120 of the 1982 Constitution should be examined. In accordance with this article;

"In the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, after consultation with the National Security Council, may declare a state of emergency in one or more regions or throughout the country for a period not exceeding six months."

Within the context of aforementioned abominable attack, the reason of a political depression, like insurrection, terror etc. is significant. During the time of this depression, it is the objective to form a foggy atmosphere so that constituent elements of the government can be targeted, and the rights and freedoms of citizens deprived[10]. Therefore, there is a valid reason to declare a state of emergency under such circumstances. This is because the Council of Ministers (CoM) had announced a state of emergency for 90 days from 21st July 2016, 0100hrs. This decision was made by the CoM, chaired by the

[10] Ergun ÖZBUDUN, *Constitutional Law* (Anayasa Hukuku), Yetkin, Ankara, 2005, s. 345; Selin ESEN, *State of Emergency Regime in Turkey and Comperative Law* (Karşılaştırmalı Hukukta ve Türkiye'de Olağanüstü Hal Rejimi), Adalet Yayınevi, Ankara, 2008, p. 39.

President, and on the recommendation of the National Security Council. After the declaration, it was published in the Official Gazette and ratified by the TGNA. A state of emergency was declared across the country as a part of the constitutional procedure. It was also notified to the Secretariat General for European Union Affairs by including measures, reasons and its duration within the scope of a state of emergency.

A state of emergency is one of the crucial subjects at the heart of constitutional law and consists of three different types. The first one is a *"Constitutional Model"* which is seen in Turkey and the other continental European countries[11]. In this system, there is a provision on a state of emergency in the constitution, and a government may declare a state of emergency on the basis of this constitutional rule. The second system is a *"Legislative Model"* which is implemented in the United States and the United Kingdom[12]. When there is a state of emergency, a parliament extends powers of the executive by making laws in this system. The final system is an *"Extra- Legem Measures Model"*[13]. In this system, even if there is no legal procedure for a state of emergency, a government may take precautions which are not contrary to fundamental principles of government.

A state of emergency is an exceptional situation under a temporary system of rules in order to deal with an extraordinary period. It is not possible to govern under ordinary laws during this period. However, it does not mean that it is an arbitrary period. In democratic models, a state of emergency as stated in the first two types above *(a constitutional model and a legislative model)* must be based on valid reasons.

[11] ESEN, p. 26.
[12] ESEN, s. 29.
[13] ESEN, s. 31.

In the 1982 Constitution, there is *"Extraordinary Administration Procedures"* as a general classification. Also these procedures include three different levels which are: *states of emergency, martial law, mobilisation and state of war*.

As known, a declaration of a state of emergency is a precaution to protect democracy and the rule of law when there is a grave threat against them. A state of emergency can be viewed as the quickest treatment of a disease. It is a bordered "legal order" which is outside the ordinary legal rules. As mentioned before, continental European countries and Turkey adopt a constitutional model when declaring a state of emergency. This is because there are specific rules on a state of emergency in Article 15 of the European Convention on Human Rights, and in the 1982 Constitution[14]. The 1982 Constitution, Article 119, includes a declaration of a state of emergency due to natural disaster or serious economic crisis, and Article 120 regulates a declaration of a state of emergency due to widespread acts of violence and serious deterioration of public order[15].

Article 15 of the European Convention on Human Rights is about a state of emergency. It provides that, *"In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*

[14] Bülent TANÖR, Necmi YÜZBAŞIOĞLU, *Turkish Constitutional Law according to the 1982 Constitution* (*1982 Anayasasına Göre Türk Anayasa Hukuku)*, Beta, İstanbul, 2012, p. 413.
[15] ÖZBUDUN, s. 344.

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

Article 15 of the 1982 Constitution entitled, *"Suspension of the exercise of fundamental rights and freedoms"* states, *"In times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated,"* and regards restrictions on rights as consistent with the constitution, unless obligations under international law are violated.

In this context it should be noted that the declaration mentioned in Art. 15/3 ECHR has been utilised by Turkey. At this stage, the important point in terms of international law is whether the state of emergency declaration has been made against "*a danger that threatens the nation's life"* or not.

To accept the existence of "public emergency threatening the life of the nation" mentioned in Art. 15/1 ECHR, the existing danger must be actual or imminent. "A threat to the life of the nation" means having much bigger and important emergency problems than small scale unrests, inner conflicts, or suchlike problems[16]. To be able to talk about a public emergency threatening the life of the nation, we should

[16] M. Semih GEMALMAZ, *A Distinction between De Facto- De Jure in the context of Supranational Standards of State of Emergency* (Olağanüstü Rejimin Ulusal üstü Ölçütleri Bağlamında De Facto-De Jure Ayrımı), Mülkiyetler Birliği Vakfı, No: 9, Ankara, 1990, p. 224.

look at the "*Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights".* Hereunder, a threat to the life of the nation is one that:

"affects the whole of the population and either the whole or part of the territory of the state; threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant."

The European Courts of Human Rights also defines this threat in the case of *Lawless v. Ireland* as:

"an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed"[17].

Also, according to the ECtHR decision in *Denmark, Norway, Sweden v. Greece*, a public emergency should carry the following conditions:

"(1) It must be actual or imminent,

(2) Its effects must involve the whole nation,

(3) The continuance of the organised life of the community must be threatened,

(4) The crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the

[17] ***Lawless v. İrlanda***, ECtHR, 332/57, 01.07.1961, par. 58.

maintenance of public safety, health and order, are plainly inadequate[18]*".*

III. ASSESMENT OF THE COUP ATTEMPT WITH REGARD TO TURKISH CRIMINAL LAWS

National military aircrafts, tanks and guns were used in the bloody coup attempt of July 15th. This attempted coup was to replace the elected government, removing, blocking and replacing the constitutional order with force and violence; removing and *de facto* restraining the functioning of the TGNA with force and violence; removing and *de facto* restraining the performance of the executive branch with force and violence. These blameworthy actions fall into the scope of the most serious crimes with regard to Turkish Criminal Code (TCC). The TCC prohibits these actions in its specific provisions. The fifth section of the forth chapter regulating "Crimes against the State and the Nation" of the Second Book of TCC is devoted to "Crimes against Constitutional Order and Its Performance". The actions of coup plotters constitute crimes set by Articles 309 (Contravention of the Constitution), 310 (Assassination and Attack against the President), 311 (Crime against the Legislative Organ), 312 (Crime against the Government), 313 (Armed Rebellion against the Government of the Turkish Republic), 314 (Armed Crime Organization), 315 (Supplying of Arms) of the TCC.

Article 312 of the TCC states as follows:

"Whoever attempts to remove the government of Turkish Republic or restrain its performance partly or wholly via force and violence shall be punished by aggravated life imprisonment."

[18] ***Denmark, Norway, Sweden and Holland v. Greece***, ECtHR 3321/67, 3322/67, 3323/67, 3344/67, 05.11.1969, par. 153.

As it states in the explanatory text of the article, the aim of this provision is to prevent the build-up of force and violence and such movements orientated towards the removal of the Cabinet, which holds the executive authority and duty according to Article 8 of the 1982 Constitution, and thereby the government which represents one of the three elements of sovereignty[19]. Yet the explanatory text reveals that the legal benefit protected by this offense is to assure the continuity of the performance of the government in accordance with the 1982 Constitution and laws[20]. The expression *"removing"* in Article 312 means dismissal of the government, and "restraining its performance" means breaking down or deactivating the government[21]. The expression *"via force and violence"* refers to any other means other than those projected by law for the takeover[22]. To commit this crime, it requires the use of as much violence and force as necessary for removing the government or restraining its performance - partly or wholly[23]. Certain exceptional takeover methods which do not involve violence or force are disposed by the 1982 Constitution and they are legitimate. Any real person may be the perpetrator of the crime. However, in the case where there is a criminal organization for committing the crimes against constitutional order, the application of Article 314 of TCC is implemented[24]. Paragraph 3 of Article 314

[19] İzzet ÖZGENÇ, *Turkish Criminal Law The Gazi Comment- General Provisions,* (Türk Ceza Kanunu Gazi Şerhi- Genel Hükümler) Seçkin, Ankara, 2005, p. 1102.

[20] Sami GÖREN, *Turkish Criminal Law numbered 5237: with Explanations and Case Law in the light of the Latest Amendments* (En Son Değişikliklerle Açıklamalı-İçtihatlı; 5237 Sayılı Türk Ceza Kanunu), Yetkin, Ankara, 2012, p.1539.

[21] Ali PARLAR, Muzaffer HATİPOĞLU, *An Interpretation of Turkish Criminal Law* (Türk Ceza Kanunu Yorumu), Seçkin, Ankara, 2008, p. 4196.

[22] Abdullah Pulat GÖZÜBÜYÜK, *Turkish Criminal Law The Gözübüyük Comment* (Türk Ceza Kanunu Gözübüyük Şerhi), *2nd Vol.*, Kazancı Hukuk, İstanbul, 1988, p. 199.

[23] PARLAR, HATİPOĞLU, p.4195-4196.

[24] PARLAR, HATİPOĞLU, s. 4195. İsmail MALKOÇ, *Turkish Criminal Law with Explanations (The Latest Amendments and Case Law* (Açıklamalı Türk Ceza Kanunu- Son Değişiklikler ve İçtihatlarla), *4th Vol.*, 2013, Ankara, p. 4810.

makes reference to Article 220 of TCC disposing the crime of forming a criminal organization:

"The provisions for the crime of forming a criminal organization are applied for this crime too."

The crime of armed crime organization can be committed when there are at least three perpetrators. This crime is differentiated from the crime of forming a criminal organization in Article 220 by involvement of arms.

The actions perpetrated on 15th July involved more than one crime against the constitutional order and thus the joiner of crimes comes into question.

"In case that any other crime is committed while committing this crime, also the related provisions of these crimes are applied separately" according to the paragraph 2 of Article 312 of the TCC. The explanatory text revokes that it is likely that the offences of murder, injury (including aggravated forms of the crime), damaging public property or damaging property of third persons are committed while committing this crime. Paragraph 2 of the Article rules that these crimes shall be separately punished[25].

Furthermore, the Anti-Terror Law (ATL) requires aggravation of the punishment of these crimes. The crimes against constitutional order are labeled as terror crimes by Article 3 of the ATL. More specifically, the crimes in articles 309 (Breaking the Constitution), 310 (Assassination and Attack against the President), 311 (Crime against the Legislative Organ), 312 (Crime against the Government), 313 (Armed Rebellion against the Government of the Turkish Republic), 314 (Armed Crime Organization), 315 (Supplying Arms) of the TCC are terror crimes. Imprisonment and judicial fines for

[25] ÖZGENÇ, p. 1101-1102.

these crimes shall be aggravated according to the Article 5 of the ATL.

CONCLUSION

During the coup attempt of July 15th the fundamental institutions of the Turkish Republic were bombed, 243 people were killed, and 2.186 were wounded. It is obligatory to admit that this bloody attack against democracy is a danger and a threat to the existence of the nation. Besides, it is clearly stated in the preamble of the Constitution that:

"The absolute supremacy of the will of the nation, the fact that sovereignty is vested fully and unconditionally in the Turkish Nation and that no individual or body empowered to exercise this sovereignty in the name of the nation shall deviate from the liberal democracy indicated in the Constitution and the legal system instituted according to its requirements."

As mentioned above, public buildings, the Presidential Palace and Complex, and the National Assembly Building were amongst the first places, and civilians were targeted by heavy weapons of the National Army. The right to life, and obligation to not to harm civilians under the protection of international treaties were violated. These actions constitute many of the crimes against national order, as well as crimes against the government. In this context, this coup attempt harmed the absolute supremacy of the will of the nation; is contrary to international law, the 1982 Constitution and the Turkish Criminal Code.

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