

RESEARCH ARTICLE

Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system

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Abstract

States of emergency pose the most significant challenges to the safeguarding of fundamental rights and civil liberties. Crises are generally characterized by a strengthening of the executive to the detriment of judicial authority and parliamentary oversight. One of the immediate consequences of emergencies is the absence of effective domestic mechanisms of supervision of the executive. The gradual replacement of the judicial role with police operations represents a symptom of how prolonged emergencies prompt the eclipse of legal certainty and lead to the rapid and irreversible degradation of public institutions.

This Article addresses the difficult compromise between defending national interests and protecting individual rights during public emergencies. It analyzes the common features across the recent derogations and exceptional measures of Ukraine, France, and Turkey. The derogations submitted by the three countries in question, together with the exceptional measures adopted for counter-terrorism purposes, substantially restrict several fundamental rights enshrined in the European Convention on Human Rights (Convention). In particular, preventive detention measures, with the suspension of the habeas corpus otherwise approved by the three States, not only enable police forces to use arbitrary and unlimited use of force, but also seriously affect the protection of absolute and non-derogable rights. The Article concludes that, as the recent emergency laws and their widespread and apparently indiscriminate implementation present the risk of destabilizing the whole European system of protection, it becomes ever more necessary that the European Court of Human Rights depart from its previous jurisprudence and adopt a more rigorous and principled scrutiny of the derogation conditions under Article 15 of the Convention.

Keywords: state of emergency; derogation; human rights; Turkey; France; Ukraine

*“C’est une expérience éternelle que tout homme
qui a du pouvoir est porté à en abuser:
il va jusqu’à ce qu’il trouve des limites . . .
Pour qu’on ne puisse abuser du pouvoir,
il faut que, par la disposition des choses,
le pouvoir arrête le pouvoir.”¹
- Montesquieu, 1758*

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¹MONTESQUIEU, DE L’ESPRIT DES LOIS, at Chapter 4, 190 (1748).

A. Introduction

On May 21, 2015, the Ukrainian Parliament adopted Resolution No. 462-VIII, which declared a derogation from the European Convention of Human Rights (Convention).² The Ukrainian authorities held that the military intervention of Russian forces within Ukrainian territory constituted a public emergency that threatened the life of the nation under Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 15(1) of the Convention.³ On November 13, 2015, in the aftermath of terrorist attacks that occurred in Paris, France submitted its own derogation to its obligations under the Convention.⁴ France argued that declaring a state of emergency, together with the attending adoption of exceptional measures, was necessary to prevent the commission of future terrorist attacks.⁵ On July 21, 2016, Turkey took a similar decision by communicating a derogation from the Convention to the Secretary General of the Council of Europe.⁶ The decision to announce a state of emergency was taken immediately after a failed military coup that, according to the Turkish authorities, posed significant dangers to public security and constituted a threat to the life of the nation.⁷

These three scenarios place into question the applicability of fundamental rights within the context of an alleged public emergency. Article 15 of the Convention allows the governments of the contracting States to derogate from their obligations under the Convention during exceptional circumstances. Such derogation may only be carried out if it is temporary in duration, limited in scope, and done under the supervision of the Secretary General of the Council of Europe. Furthermore, the emergencies that trigger Article 15 necessarily involve an acute conflict between national interests and the protection of human rights. The rationale underlying Article 15 is to strike a proper balance between a contracting State's interest in overcoming the emergency and safeguarding those fundamental rights that may be significantly limited in situations of crisis.

This study addresses the difficult compromise between defending national interests and protecting individual rights during public emergencies. Accordingly, this study critically assesses the law and practice concerning the suspension of the Convention's guarantees. In the past, Article 15 has been used almost exclusively by two countries: The United Kingdom (UK) in its relations with North Ireland, and Turkey in its dealings with the Kurdish Separatist Movement in the south-east region of the country.⁸ Even after the September 11th attack in the United States, when there existed a concrete risk that an increasing number of States would declare a state of public emergency, the UK was the only contracting State to submit a derogation of the Convention to the Secretary General of the Council of Europe.⁹ Although the behavior of contracting States over the last three years suggests a general reluctance to rely on Article 15, Turkey is not the only

²Eur. Consult. Ass., *Note Verbale*, JJ7979C Tr./005-185 (June 10, 2015) (reporting Ukraine's reservations from the Convention). On June 5, 2015, Ukraine also submitted to the United Nations Secretary General its derogation from the International Covenant on Civil and Political Rights (ICCPR) under Article 4(3). See *Reservations and Declarations for Treaty No.005-Conventions for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations> (last visited Dec. 27, 2018).

³Eur. Consult. Ass., *supra* note 2.

⁴Eur. Consult. Ass., *Note Verbale*, JJ8045C Tr./005-191 (Nov. 25, 2015) (reporting France's reservations from the Convention). On December 3, 2015, French authorities communicated to the United Nations the French derogation from the ICCPR.

⁵Eur. Consult. Ass., *supra* note 4.

⁶Eur. Consult. Ass., *Note Verbale*, JJ8187C Tr./005-191 (July 22, 2016) (reporting Turkey's reservations from the Convention). On August 11, 2016, the United Nations published Turkey's notification of derogation from the ICCPR.

⁷See Eur. Consult. Ass., *supra* note 6.

⁸With regard to the British derogation, see, *inter alia*, Ireland v. UK, App. No. 5310/71 (Jan. 18, 1978), <http://hudoc.echr.coe.int/>; Brannigan and McBride v. UK, App. No. 14553/89, 14554/89 (May 26, 1993), <http://hudoc.echr.coe.int/>. With respect to Turkey, see *inter alia* Aksoy v. Turkey, App. No. 21987/93 (Dec. 18, 1996), <http://hudoc.echr.coe.int/>; Demir and others v. Turkey, App. No. 71/1997/855/1062-1064 (Sep. 23, 1998), <http://hudoc.echr.coe.int/>; Nuray Şen v. Turkey, App. No. 41478/98 (June 17, 2003), <http://hudoc.echr.coe.int/>; Bilen c. Turqui, App. No. 34482/97 (Feb. 21, 2006), <http://hudoc.echr.coe.int/>.

⁹See A. and others v. UK, App. No. 3455/05 (Feb. 19, 2009), <http://hudoc.echr.coe.int/>.

State that has reintroduced the state of exception.¹⁰ Other States that have submitted respective derogations include Ukraine,¹¹ which had never invoked Article 15 before, and France,¹² whose last and sole suspension of the Convention goes back to 1961.¹³

Scholarship—as well as the jurisprudence of the European Court of Human Rights (ECHR) dealing with the existence of a state of emergency—has already extensively analyzed the conditions for derogation under Article 15.¹⁴ Nonetheless, the decisions of three different States to confront alleged emergencies by relying on the derogation clause found in Article 15 of the Convention ensure the topicality of this Article. More specifically, this study aims to further the discussion by critically analyzing derogations from the Convention in the context of the recent declarations of state of emergencies by Ukraine, France, and Turkey. This research assesses the challenges that the special measures adopted by these countries pose to the European system of protection of human rights. Section B provides a brief overview of the substantive and procedural conditions for derogation, as interpreted and applied by the Strasbourg judges. Section C examines contracting States' derogations from the Convention, with a focus on the main exceptional measures entered into force by Ukraine, France, and Turkey. In this regard, the ECHR has only addressed applications that concern the implementation of special laws in Turkey. Section D examines the complaints as evidence of the ECHR's formalistic approach to the initial applications submitted after the coup in Turkey. Section E analyzes the common features across the recent derogations and exceptional measures of Ukraine, France, and Turkey. Section F provides a general investigation on whether and to what extent it is possible to provide a prognosis on the ECHR's stance with respect to contemporary emergencies. Section G, in turn, discusses how the measures adopted by the three countries create tension with Article 5 of the Convention that subsists even when derogation is justified. By way of conclusion, this study reflects on the limits of the ECHR's approach to public emergencies and emphasizes the necessity for the ECHR to depart from its previous jurisprudence in order to ensure the integrity of the protective system as a whole.

B. Conditions for the derogation from the European system of protection of human rights: a general overview

Like the ICCPR, the Convention recognizes the existence of emergency situations that may require domestic authorities to take measures normally diverging from the standard human rights protections afforded under the European system. Such deviation enables governments to overcome temporary crises without affecting fundamental rights that do not permit any derogation. In the interpretation and application of Article 15, European judges have held that their

¹⁰Communication from the Permanent Representation of Turkey Registered at the Secretariat General on 24 July 2016 - *or. Engl.*, COUNCIL OF EUROPE, <http://www.coe.int/> (last visited Dec. 27, 2018). The recent derogation marks the first time that Turkey has submitted derogations that are not formally linked to the Kurdish Separatist Movement.

¹¹Eur. Consult. Ass., *supra* note 2.

¹²Eur. Consult. Ass., *supra* note 4.

¹³Press Unit, European Court of Human Rights, Derogation in Time of Emergency (August 2018), http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

¹⁴See inter alia, DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 2014); Giuseppe Cataldi, *Art. 15*, in *COMMENTARIO BREVE ALLA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO* 555 (Sergio Bartole et al. eds., 2012); Jan-Peter Loof, *Crisis Situations, Counter-Terrorism and Derogation from the European Convention of Human Rights: A Threat Analysis*, in *MARGINS OF CONFLICT: THE ECHR AND TRANSITIONS TO AND FROM ARMED CONFLICT* 35 (Antoine Buyse ed., 2010); Stefan Kirchner, *Human Rights Guarantees During States of Emergency: The European Convention on Human Rights*, 3 *BALTIC J.L. & POL.* 1 (2010); Peter Duffy, *Note on Article 15 of the European Convention on Human Rights*, in *DROITS INTANGIBLES ET ETATS D'EXCEPTION* 203, 206–07 (Daniel Prémont ed., 1996); Christoph Schreuer, *Derogation of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights*, *YALE J. WORLD PUB. ORD.* 113 (1982); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies – A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 *HARV. INT'L. L. REV.* 1 (1981).

approaches must take into account the “need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights...”¹⁵ Accordingly, Article 15 uniquely permits High Contracting Parties to the Convention to deviate from their obligations under the Convention if they satisfy a number of substantive and procedural conditions.

A State may take derogating measures only in time of war or some other public emergency that threatens the life of the nation. War refers to both international and non-international armed conflicts,¹⁶ whereas the notion of “other public emergency,” as interpreted by the Strasbourg Court, refers to “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 Furthermore, an emergency may only amount to a ground for derogation from the Convention’s guarantees if: (1) It is current or imminent; (2) concerns the whole nation; (3) threatens the organized life of the community; and (4) is exceptional.¹⁸ In other words, the nature of a qualifying emergency is one which conventional legislative measures would not provide an effective response for. In the *A. and others v. UK* case, the ECHR—sitting as a Grand Chamber—rejected Lord Hoffmann’s view that a “threat to the organized life of the community” requires more than a threat of serious physical damage and loss of life.¹⁹ The Grand Chamber held that justifying a derogation does not require that the threat posed reach the level of imperiling the institutions of the State.²⁰

The ECHR has arguably delegated to governments the authority to establish whether the life of the nation is threatened by a “public emergency” and, if so, determining the extent of measures that are necessary to overcome the crisis.²¹ This deferential stance means that the Strasbourg judges do not make their own inquiries into or evaluations of the notion of “public emergency.” Instead, judges provide contracting States with a wide margin of discretion to ascertain for themselves the existence of a state of emergency under Article 15.²² In particular, the Strasbourg judges have emphasized how “the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it.”²³ On the basis of this extensive margin of discretion, the European Commission of Human Rights and the ECHR have generally appeared quite reluctant to challenge the validity of States submissions that concern states of emergency.²⁴ In fact, they have thus far only rejected a national authorities’ claim of a public emergency in the *Greek* case, whereby the military junta had called for a derogation from the Convention by arguing the existence of an emergency state.²⁵

Nevertheless, the discretion of High Contracting Parties under Article 15 is not unlimited. The ECHR must still assess whether a State acts in a manner that exceeds the “extent strictly required by the exigencies” of the situation. The ECHR thus retains a supervisory role over

¹⁵Fox, Campbell and Hartley v. UK, App. No. 12244/86; 12245/86; 12383/86, para. 28 (Aug 30, 1990), <http://hudoc.echr.coe.int/>.

¹⁶Cataldi, *supra* note 14.

¹⁷See, *inter alia*, Lawless v. Ireland (No. 3), App. No. 332/57, para. 28 (July 1, 1961), <http://hudoc.echr.coe.int/>.

¹⁸COUNCIL OF EUROPE, THE GREEK CASE: REPORT TO THE SUB-COMMISSION 70 (Greek Case) (1969), Vol. I, Part I, http://www.echr.coe.int/Documents/Denmark_v_Greece_I.pdf.

¹⁹See *A. and others*, App. No. 3455/05 at para. 179.

²⁰*Id.* at para. 179–80.

²¹See *Brannigan*, App. No. 14553/89, 14554/89 at para. 43; *Aksoy*, App. No. 21987/93 at para. 68; *Demir*, App. No. 71/1997/855/1062–1064 at para. 43; *Ireland*, App. No. 5310/71 at para. 207; *Lawless*, App. No. 332/57 at 85.

²²See *Ireland*, App. No. 5310/71 at para. 207.

²³*Id.*

²⁴See in particular Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

²⁵See *GREEK CASE*, *supra* note 18, at 18.

the proportionality of exceptional measures, evaluating the measures based on the gravity of the situation. Emergency measures must be both necessary and proportionate to the situation. In *A. and others v. UK*, the European judges stated that the Court “is required to examine the measures that have been adopted in derogation of the Convention rights in question and. .. weigh them against the nature of the threat to the nation posed by the emergency.”²⁶ In exercising its supervision, the ECHR takes into account relevant factors including the nature of the rights affected by the derogation, the circumstances leading to the emergency situation, and the duration of the emergency situation.²⁷

In addition, any derogation may not conflict with the State’s other obligations under international law.²⁸ The Convention prevents contracting States from adopting measures that could be justified under Article 15, but would otherwise violate other obligations that the State may have under international law. This condition has received little attention by the Strasbourg judges so far.²⁹ The ECHR rejected the submissions of Mr. Brannigan and Mr. McBride, who argued that the UK had violated its obligations under international law because the national authorities had not officially proclaimed the state of emergency as required under Article 4 of the ICCPR.³⁰

Article 15 of the Convention also provides that not all fundamental rights can be derogated. This is true in relation to the fundamental rights mentioned in Article 15(2) and Protocols 6 and 13 of the Convention. Article 15(2) prevents States from derogating from the right to life under Article 2, except in the context of lawful acts of war; the prohibition of torture and inhuman or degrading treatment or punishment under Article 3; the prohibition of slavery and servitude under Article 4; and the principle of *nullum crimen sine lege* under Article 7.

Finally, the Convention also imposes a procedural condition: The State availing itself of the right of derogation must “keep the Secretary General of the Council of Europe fully informed of the measures it has taken. ..”³¹ This condition significantly differs from the requirements for derogation set forth in the ICCPR. Article 4(3) of the ICCPR compels any State Party to immediately inform other contracting States about the provisions from which it has derogated. Comparatively, Article 15 of the Convention simply requires High Contracting Parties to inform the Secretary General of the Council of Europe, without any mention of the expeditiousness or content of such a communication.

C. The state of emergency in practice: the recent derogations before the European Court

In the past, Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, and the UK have invoked Article 15 of the Convention.³² Among these States, UK, Turkey, Greece, and Ireland are the only countries that the European Commission of Human Rights or the ECHR have called to justify the measures taken. The first British derogation relates to the governance of Cyprus in 1950.³³ Since the 1970s, the UK has suspended the application of the Convention several times in response to

²⁶See *A. and others*, App. No. 3455/05 at para. 185.

²⁷See, *inter alia*, *Ireland*, App. No. 5310/71 at para. 207; *Brannigan and McBride*, App. No. 14553/89; 14554/89, para. 43; *Aksoy*, App. No. 21987/93 at para. 68.

²⁸See Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(1), Dec. 10, 1948, 213 U.N.T.S. 221 [hereinafter Convention].

²⁹See HARRIS, *supra* note 14, at 844.

³⁰See *Brannigan and McBride*, App. No. 14553/89, 14554/89 at paras. 68–73.

³¹Convention art. 15(3).

³²See Press Unit, *supra* note 13.

³³See *Greece v. UK*, App. No. 176/56, (1959) <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-75361&filename=001-75361.pdf>.

different circumstances linked to emergency situations in Northern Ireland.³⁴ For their part, Irish authorities have also submitted a derogation in connection to the violence in Northern Ireland.³⁵ In Greece, the military junta made the decision to limit the application of fundamental rights following the coup d'état that took place in 1967.³⁶

Turkey has heavily relied on the derogation clause in relation to the Kurdish Separatist Movement operating in the southeast part of the country.³⁷ Turkish authorities have invoked the derogation clause for substantive periods between June 1970 and July 1987, including an especially lengthy period that lasted from September 1980 until May 1987.³⁸ In August 1990, Turkey, which—until recently—had been arguing for the necessity of suspending some of the obligations under the Convention in order to deal with the situation in the southeast region, again invoked Article 15.

Therefore, since the establishment of the European Commission of Human Rights, only a small number of countries have invoked the derogation. Furthermore, even after the September 11th attacks, which represented a concrete risk that several States would declare states of public emergency, only the UK submitted a derogation to the Secretary General of the Council of Europe.³⁹ Nevertheless, the reluctance of States to use the derogation clause may be dimming. This is not to say, however, that a massive proliferation of suspension requests will follow the recent ISIS attacks throughout different European countries. As was the case after the September 11th attack, States need not rely on the derogation clause to face terrorism because a large number of provisions in the Convention already contain limitation clauses that allow restrictions to the applicability of rights. The Convention already provides contracting States with a sufficient degree of flexibility in the application of human rights standards.⁴⁰ Such flexibility allows the implementation of special counter-terrorism measures that are in line with the Convention standards and do not require the use of a state of emergency under Article 15. Nevertheless, as the next subsection explains, declarations of emergencies appear to be gaining more popularity among contracting States.

I. Ukraine

On May 21, 2015, the Ukrainian Parliament declared a derogation from the Convention.⁴¹ The Ukrainian authorities argued that the military intervention of Russian forces within Ukrainian territory constituted a public emergency under Article 4(1) of the ICCPR and Article 15(1) of the ECHR that threatened the life of the nation.⁴² One year before the imposition of the state of emergency, the Ukrainian Parliament had already amended domestic legislation on terrorism by introducing several measures affecting the scope of the applicability of some fundamental rights of the Convention—for example, those fundamental rights under Articles 5, 6, 8, and 13.⁴³ The derogation and domestic changes were justified in light of “the armed aggression of the Russian Federation and actions of the terrorist groups backed by the Russian Federation.”⁴⁴ The most significant change introduced by the legislation adopted in the aftermath of the Russian intervention

³⁴See *Brannigan and McBride*, App. No. 14553/89, 14554/89 at paras. 30–32.

³⁵See *Lawless*, App. No. 332/57 at para. 17.

³⁶See *Greek Case*, *supra* note 18.

³⁷See *Aksoy*, App. No. 21987/93 at paras. 8–9, 31.

³⁸See *Gross & Ni Aolain*, *supra* note 24, at 646.

³⁹See *A. and others*, App. No. 3455/05 at para. 103.

⁴⁰Colin Warbrick, *The Principles of the ECHR and the Response of States to Terrorism*, 3 EUR. HUM. RTS. L. REV. 287, 311 (2002).

⁴¹See Eur. Consult. Ass., *supra* note 2, at 3.

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.*

was the extension of the maximum duration of preventive detention of alleged terrorists from 72 hours to 30 days.⁴⁵ According to the amendments to the Law on Combating Terrorism, a prosecutor may decide to limit personal liberty for a period of 30 days without any authorization from a competent judicial authority.⁴⁶

The Parliament also amended the Code of Criminal Procedure by introducing a special regime of pre-trial investigation under martial law during states of emergency or in the anti-terrorist operation area. Prosecutors have been provided with the authority to issue decisions, that are normally attributed to investigating judges, relating to custodial measures, access of property, searches, and wiretapping.⁴⁷ Within the areas of Donetsk and Luhansk, further exceptional measures issued since 2014 have also entrusted military and civil administrations with the power to restrict freedom of movement by imposing curfews and the power to conduct security searches, checks, and other measures to allegedly protect public safety.⁴⁸ Finally, the Parliament has also modified the territorial jurisdiction of court cases and investigative jurisdiction for criminal offenses committed in the anti-terrorist area.⁴⁹

II. France

On November 13, 2015, a series of coordinated terrorist attacks occurred in Paris, where 130 people were killed and 413 were injured.⁵⁰ In the aftermath of these attacks, France decided to apply Law 55-385 of 3 April 1955 on the state of emergency, which had initially been adopted in the Algerian situation.⁵¹ The fundamental rights significantly affected by the exceptional measures can only be derived from reading the text of the law and its amendments because the derogation does not explicitly indicate which provisions are derogated. As with Turkey and Ukraine, France has also notified the Secretary General of the Council of Europe of several extensions of the emergency situation.

The emergency measures authorized the French executive to impose house arrest without judicial control and conduct property searches without a judicial warrant⁵² when there are serious reasons to believe that a certain place is frequented by a person whose behavior constitutes a threat to public safety and order.⁵³ The exceptional powers, therefore, affected the application of several provisions within the European Convention, including the rights to liberty, freedom of movement, privacy, and freedoms of association and expression.⁵⁴ With respect to Article 5 of the

⁴⁵*Id.*

⁴⁶REP. ON THE HUMAN RIGHTS SITUATION IN UKRAINE, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS para. 17 (2016), <https://www.ohchr.org/Documents/Countries/UA/Ukraine15thReport.pdf>.

⁴⁷Eur. Consult. Ass., *supra* note 2, at 3.

⁴⁸*Id.* Military and civil administrations may:

[S]et limits on remaining on the streets and in other public places within a period of 24 hours without specific documents; to temporarily restrict or prohibit the movement of vehicles and pedestrians on the streets, roads and terrain areas; to organize the checking of identification documents of individuals; and, if necessary, the searching of personal belongings, vehicles, baggage and cargo, office premises and private dwellings of citizens . . .

⁴⁹*Id.*

⁵⁰Eur. Consult. Ass., *supra* note 4.

⁵¹Loi No. 55-385 du 3 avril 1955 relative à l'état d'urgence [Law No. 55-385 of 3 April 1955 on the State of Emergency], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>. For a detailed examination of the French Emergency Law, see Rémi Barrue-Belou, Causes of Historical Precedents for Implementing the State of Emergency, 1 JOURNAL DU DROIT ADMINISTRATIF (2016).

⁵²Loi No. 55-385 du 3 avril 1955 relative à l'état d'urgence [Law No. 55-385 of 3 April 1955 on the State of Emergency], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>; France: New Emergency Powers Threaten Rights. Parliament Should Ensure New Powers Not Misused, HUMAN RIGHTS WATCH (Nov. 24, 2015), <https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights>.

⁵³Administrative searches stopped in May 2016; see Eur. Consult. Ass., *supra* note 4. Nevertheless, searches have been reintroduced with judicial review in July 2016.

⁵⁴France: New Emergency Powers Threaten Rights. Parliament Should Ensure New Powers Not Misused, *supra* note 52.

Convention, the emergency law granted the Minister of Interior the power to order the house arrest of a person, in a place of the Minister's choosing, if there are serious reasons to believe that his behavior constitutes a threat to public security and public order.⁵⁵ The emergency law did not determine the maximum length of the house arrest that the Minister of Interior could impose without any judicial oversight. It is only in December 2016—when France notified a further extension of the emergency status—that the length of house arrest was limited to a maximum of twelve months.⁵⁶ Furthermore, the Minister of Interior could extend the house arrest for an additional three months with judicial authorization.⁵⁷

In addition, French special measures restricted the application of Article 8 of the Convention. The law on the state of emergency authorized administrative authorities to seize any computer files they found and block websites without prior judicial review.⁵⁸ Law No. 2015-1556 (November 30th) also extended the power of the government to collect, analyze, and store communications content or metadata without requiring prior judicial review.⁵⁹ Under Article 8 of the law on the state of emergency, the Minister of the Interior may also order the closure of theaters, drinking, and meeting places of any nature.

The French authorities notified the Council of Europe of their decision to extend the emergency status until July 15, 2017.⁶⁰ Nevertheless, despite the end of the application of Article 15, France adopted a new anti-terrorism bill that human rights organizations and community groups promptly accused of normalizing the exercise of exceptional measures and thereby creating a perpetual state of emergency.⁶¹ In particular, without any prior judicial authorization, the Prefect, as the government's representative, may close places of worship⁶² and can also create designated security zones where the police can stop and search persons and vehicles.⁶³ In addition, the Minister of Interior has the authority to limit the freedom of movement of every individual by preventing any person from moving outside any specific geographical area, and designating his place of residence.⁶⁴

⁵⁵Loi No. 55-385 du 3 avril 1955 relative à l'état d'urgence [Law No. 55-385 of 3 April 1955 on the State of Emergency], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>.

⁵⁶Eur. Consult. Ass., *Notification de Déclaration*, JJ8285C Tr./005-202 (Dec. 21, 2016) (providing France's communication to the Secretary General of the Council of Europe regarding the extension of the state of emergency that the French government first declared in November 24, 2015).

⁵⁷*Id.* See also *Les assignations à résidence hors état d'urgence du projet de loi antiterroriste votées à l'Assemblée*, HUFFINGTON POST (Sept. 27, 2017), http://www.huffingtonpost.fr/2017/09/27/les-assignations-a-residences-hors-etat-durgence-du-projet-de-loi-antiterroriste-votees-a-lassemblee_a_23224161/.

⁵⁸Loi No. 55-385 du 3 avril 1955 relative à l'état d'urgence [Law No. 55-385 of 3 April 1955 on the State of Emergency], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>.

⁵⁹Loi No. 2015-1556 du 30 novembre 2015 relative aux mesures de surveillance des communications électroniques internationales [Law No. 2015-1556 of November 30th, 2015 Relating to the Measures of Surveillance of the International Electronic Communications], http://www.legifrance.gouv.fr/affichTexte.do?sessionId=998EACDA05B79BB46ECB1B480CC1846E.tpdila07v_2?cidTexte=JORFTEXT000031549747&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000031549744.

⁶⁰See Eur. Consult. Ass., *supra* note 56 ("This is why the state of emergency was extended by Act No. 2016-1767 of 19 December 2016 extending the application of the Act No. 55-385 of 3 April 1955 regarding the state of emergency until 15 July 2017").

⁶¹Loi 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme [Law 2017-1510 of October 30, 2017 Strengthening Domestic Security and the Fight Against Terrorism] <https://www.legifrance.gouv.fr/eli/loi/2017/10/30/INTX1716370L/jo/texte>. For a critical analysis of the new French Anti-Terrorism Law, see Erika Asgeirsson, *French Anti-terror Bill Threatens to Extend State of Emergency Abuses*, JUST SECURITY (Aug. 2, 2017), <https://www.justsecurity.org/43771/french-anti-terror-bill-threatens-normalize-state-emergency/>.

⁶²Loi 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme [Law 2017-1510 of October 30, 2017 Strengthening Domestic Security and the Fight Against Terrorism] <https://www.legifrance.gouv.fr/eli/loi/2017/10/30/INTX1716370L/jo/texte>.

⁶³*Id.* at art. 1.

⁶⁴*Id.* at art. 3.

The French Constitutional Court has stated that house arrest established in the new anti-terrorism bill is in line with the Constitution.⁶⁵ On the basis of emergency law, authorities placed an applicant under house arrest for a period of two years. Then, despite the end of the state of emergency, the applicant remained held under house arrest under the new anti-terrorism law. The applicant complained about the lack of transitional arrangements in favor of persons who were already under house arrest on the basis of the Law of 3 April 1955. The Court rejected the applicant's claims, which had highlighted similarities between the emergency legislation and the security laws entered into force on November 1, 2017. The Court clarified that after the end of the state of emergency, the measure could only be applied if: (i) Its purpose is the prevention of the commission of an act of terrorism; (ii) the Minister of the Interior establishes that there are serious reasons to believe that the person constitutes a threat to security and order public; and (iii) the suspect has relations with terrorist organizations or adheres to their theses.⁶⁶

III. Turkey

In July 2016, an attempted military coup in the Republic of Turkey and the subsequent response of the government and President Erdoğan led to over 300 deaths and 2,000 injured people among members of the military, police officers, and civilians.⁶⁷ Following the failed coup, the government detained thousands of soldiers and dismissed thousands of police officers, teachers, judges, and prosecutors accused of being followers of the US-based cleric Fethullah Gülen—the alleged mastermind of the failed coup.⁶⁸ According to the Turkish authorities, the attempted coup and its aftermath posed significant dangers to public security and constituted a threat to the life of the nation.⁶⁹ In the immediate aftermath, Turkey declared a state of emergency under article 120 of the Constitution and Law 2935 on State of Emergency.⁷⁰ The Turkish Constitution enables the Government to issue a law that establishes the state of emergency and further requires that the recognition of a state of emergency be immediately brought before the Parliament for approval.⁷¹

The emergency measures adopted by the Turkish authorities significantly restrict the scope of many guarantees of the Convention and ICCPR. One of the most significant provisions reducing the applicability of the Convention is Article 6(1) of national Decree 667. This Article extended the period of preventive detention up to 30 days, excluding the period of time required to bring the suspect before a competent judicial authority.⁷² On January 23, 2017, Decree 684 reduced the period of custody to seven days from the time of the arrest, again excluding the period of time required to bring the suspect before a competent judicial authority.⁷³

Turkey has also enacted significant limitations that affect the right to a fair trial under Article 6 of the Convention. Decree 667 establishes, *inter alia*, the possibility to record interviews and

⁶⁵See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2017-691QPC, Feb. 16, 2018 (Fr.). The Court decided to extend the period of time granted by the legislator to the person affected by the measure to challenge the house arrest before the administrative court.

⁶⁶*Id.* at para. 15.

⁶⁷Lizzie Dearden, *Turkey dismisses 7,400 more police, soldiers and public sector workers a year after failed coup*, INDEPENDENT (July 15, 2017), <https://www.independent.co.uk/news/world/europe/turkey-coup-attempt-recep-tayyip-erdogan-one-year-anniversary-7400-dismissed-gulen-purge-latest-a7842606.html>.

⁶⁸*Turkey: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/turkey> (last visited Dec. 28, 2018).

⁶⁹See Eur. Consult. Ass., *supra* note 6.

⁷⁰*Id.* The last communication of the notice of derogation for a further three months was submitted on January 19, 2018; see Council of Europe, *Notification of Declaration*, JJ8592C Tr./005-217 (Jan. 19, 2018).

⁷¹See TURK. CONST. arts. 120–21.

⁷²Decree on Measures to be Taken Under State Emergency, Law No. 667, (July 22, 2016) (Turk.), <https://rm.coe.int/168069661d>.

⁷³See Decree Law No. 684 Dated 23 January 2017 on Specific Regulations Under the State of Emergency, art. 10 (Turk.), <https://rm.coe.int/16806fab6b>.

phone calls between a detainee and his or her defense counsel; the presence of officers during interviews between a detainee and his or her lawyer in order to monitor the interview; the capacity of judges to ban the detainee from consulting his or her lawyer; and the seizure of any documents exchanged between a detainee and his or her lawyer.⁷⁴

D. Military coup and special legislation: the Turkish derogation in European jurisprudence

At the time of this writing, with regard to the three States that recently declared a state of emergency, the ECHR has only examined those applications that concern the situation in Turkey. Strasbourg judges have received complaints that detail alleged violations of the Convention that occurred in the aftermath of the failed military coup. Thus far, the ECHR has scrutinized six applications from Turkish nationals that concern the post-putsch emergency legislation. Four complaints have been rejected under Article 35 of the Convention for non-exhaustion of domestic remedies prior to applying to the Strasbourg Court.⁷⁵

In *Mercan*, a Turkish judge had been removed from her role and placed in preventive detention.⁷⁶ She claimed that the conditions of her detention constituted a violation of Article 3 of the Convention.⁷⁷ She also argued that the Turkish authorities had breached Articles 5 and 6 of the Convention because of the length of her preventive detention and the lack of evidence against her.⁷⁸ In the *Zihni* case, a schoolteacher had been fired and his passport had been suspended.⁷⁹ The applicant alleged, *inter alia*, violations of his presumption of innocence under Article 6 and the legality principle prohibiting the retroactive application of criminal norms under Article 7 of the Convention.⁸⁰

The ECHR found both cases inadmissible for non-exhaustion of domestic remedies,⁸¹ noting that the applicants should have appealed to the Turkish Constitutional Court before bringing their cases to Strasbourg.⁸² In their unanimous decisions, the European judges referred to Article 148 of the Turkish Constitution, as amended by Law no. 5982 in 2010, which provides that every individual must first apply to the Constitutional Court “on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities.”⁸³ Moreover, the European judges held that the applicants’ arguments were not sufficient to question the effectiveness of the individual complaints before the Constitutional Court.⁸⁴ The ECHR had previously rejected a number of cases against Turkey, holding that the applicants had not availed themselves of the possibility of applying to the Constitutional Court.⁸⁵

⁷⁴See Decree on Measures to be Taken Under State Emergency, Law No. 667, art. 6(1)(d) (July 22, 2016) (Turk.), <https://rm.coe.int/168069661d>.

⁷⁵European judges have recently found that the fundamental rights of two Turkish individuals that were arrested after the attempted coup were violated.

⁷⁶*Mercan v. Turkey*, App. No. 56511/16 (Nov. 17, 2016), <http://hudoc.echr.coe.int/>.

⁷⁷*Id.* at para. 15.

⁷⁸*Id.* at paras. 13–14, 16.

⁷⁹*Zihni v. Turkey*, App. No. 59061/16 (Dec. 8, 2016), <http://hudoc.echr.coe.int/>.

⁸⁰*Id.* at para. 18.

⁸¹See *Mercan*, App. No. 56511/16 at paras. 30–34; *Zihni*, App. No. 59061/16 at paras. 29–31.

⁸²*Mercan v. Turkey*, App. No. 56511/16, paras. 26–27 (Nov. 17, 2016), <http://hudoc.echr.coe.int/>; and *Zihni*, App. No. 59061/16 at paras. 26–28.

⁸³*Mercan*, App. No. 56511/16 at para. 21; *Zihni*, App. No. 59061/16 at paras. 10, 11, 25.

⁸⁴*Zihni*, App. No. 59061/16 at para. 29.

⁸⁵*Özkan v. Turkey*, App. No. 28745/11 (Oct. 1, 2013), <http://hudoc.echr.coe.int/>; *Leyla Zana v. Turkey*, App. No. 58756/09 (Oct. 1, 2013), <http://hudoc.echr.coe.int/>; *Schmick v. Turkey*, App. No. 25963/14 (Apr. 7, 2015), <http://hudoc.echr.coe.int/>; *X v. Turkey*, App. No. 61042/14 (May 19, 2015), <http://hudoc.echr.coe.int/>; *Duran v. Turkey*, App. No. 79599/13 (May 19, 2015), <http://hudoc.echr.coe.int/>; *Berker and others v. Turkey*, App. No. 54769/13 (Oct. 20, 2015), <http://hudoc.echr.coe.int/>.

The ECHR reached the same conclusion in the other two more recent cases. Ms. Catal was a Turkish judge working at the Employment Court in Ankara who was arrested and placed in detention for four days.⁸⁶ Nevertheless, criminal proceedings were not started against her. On August 26, 2016, Ms. Catal was one of 3,390 judges that the Supreme Judicial Council fired based on their alleged membership or affiliation with terrorist organizations involved in the coup.⁸⁷ On the basis of Articles 6 and 13 of the Convention, the applicant complained that she did not have access to a court and did not have an effective remedy before a national authority to assert her rights with respect to her dismissal.⁸⁸ The applicant also alleged that her dismissal constituted a breach of Article 5 because of the length of her pre-trial detention, as well as a violation of her right to an effective remedy because she had been unable to meaningfully challenge her continued pre-trial detention.⁸⁹ In addition, she claimed the revocation of her position as judge on the basis of an alleged membership or affiliation with terrorist organizations, structures, or groups infringed on her right to privacy under Article 8 of the Convention.⁹⁰ Nevertheless, the ECHR noted that the recently adopted Decree-Law No. 685 of January 2, 2017, provided the possibility of appealing directly to the Turkish High Court—the Council of State—regarding dismissals from public roles.⁹¹ The ECHR rejected the applicant’s submissions in stating that the remedy introduced by Legislative Decree No. 685 constituted an *a priori* accessible remedy that could have been used by Ms. Catal prior to her submitting her application to the Strasbourg judges.⁹²

Similarly, Mr. Koksall, a primary school teacher at the time of the military coup, was fired because of his alleged membership in or links to terrorist organizations.⁹³ The applicant argued that his revocation breached, *inter alia*, Articles 6 and 7 of the Convention.⁹⁴ In rejecting his complaint, the Court highlighted that national Decree 685 had recently established a commission with the competence to address appeals relating to emergency measures, including dismissals from public positions.⁹⁵ Therefore, the ECHR rejected the applicant’s submission because he had not exhausted all accessible domestic remedies.⁹⁶

In these four cases, the Strasbourg judges adopted a rather formalistic approach that has since paved the way for the summary rejection of more than 27,000 applications.⁹⁷ These applications, mainly from journalists and judges, have been held inadmissible because the complainants had not exhausted domestic remedies because they did not appeal to the Constitutional Court or to the *ad hoc* Commission set up in January 2017.⁹⁸ Scholarship has supported the Strasbourg judges’ strict formalistic stance on the subsidiary nature of the ECHR under Article 35(1) of the Convention by emphasizing that domestic courts “must first be given the opportunity to examine allegations of human rights violations.”⁹⁹ Nevertheless, the ECHR’s conclusions of inadmissibility do not appear very persuasive. European judges have ignored the fact that Turkish authorities

⁸⁶Çatal v. Turkey, App. No. 2873/17 (Mar. 10, 2017), <http://hudoc.echr.coe.int/>.

⁸⁷*Id.* at para. 9. See also 543 More Judges, Prosecutors Dismissed in Coup Attempt Probe, HURRIYET DAILY NEWS (Sept. 1, 2016), <http://www.hurriyetdailynews.com/543-more-judges-prosecutors-dismissed-in-coup-attempt-probe-103468>.

⁸⁸See Çatal, App. No. 2873/17 at para. 22.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.* at para. 28.

⁹²*Id.*

⁹³Koksall v. Turkey, App. No. 2873/17 (June 12, 2017), <http://hudoc.echr.coe.int/>.

⁹⁴*Id.* at para. 19.

⁹⁵*Id.* at para. 29.

⁹⁶*Id.* at para. 30.

⁹⁷EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT OF THE EUROPEAN COURT OF HUMAN RIGHTS 8 (2017), https://www.echr.coe.int/Documents/Annual_report_2017_ENG.pdf.

⁹⁸*Id.*

⁹⁹Michael O’Boyle, *Can the ECtHR Provide an Effective Remedy Following the Coup d’état and Declaration of Emergency in Turkey?*, EJILTALK (Mar. 19, 2018), <https://www.ejiltalk.org/can-the-ecthr-provide-an-effective-remedy-following-the-coup-detat-and-declaration-of-emergency-in-turkey/>.

have failed to ensure the impartiality of the judiciary during the state of emergency. This absence of impartiality has combined with a more general climate of intimidation that has plagued the judicial power's work since the coup attempt.¹⁰⁰ The ECHR has not taken into account the fact that many judges not in line with the government have been dismissed. The same Constitutional Court has dismissed two of its members without providing any evidence and solely on the basis of "the information from the social circle," and "the common conviction formed by the members of the Constitutional Court."¹⁰¹

In addition, exceptional measures in Turkey have not been subject to any judicial scrutiny by an independent body. Indeed, in several cases discussed shortly after the attempted putsch, the same Constitutional Court announced that it lacked the competence to determine whether the decree-laws approved during the state of emergency are compatible with the Turkish Constitution.¹⁰² This decision reveals how the application of the Constitution has been *de facto* suspended in Turkey. The same Constitutional Court has thus far been slow to examine the hundreds of thousands of individual applications that have been filed since the submission of the derogation.¹⁰³

Strasbourg judges have also stated that the appeal before the recently established national Commission constitutes an effective remedy under the Convention.¹⁰⁴ The ECHR has labeled the Commission as an "excellent initiative."¹⁰⁵ Nonetheless, the European judges overlooked the fact that the Commission is not a judicial body, and that its independence and impartiality are highly questionable considering that the majority of its members—five out of seven—are directly appointed by the government¹⁰⁶ and that the Prime Minister may dismiss any member of the Commission.¹⁰⁷

The ECHR also neglected the narrow mandate of the same Commission. The Commission does not have the competence to address all the emergency measures adopted or all types of violations of fundamental rights caused by the implementation of the special legislation. Paradoxically, the ECHR dismissed Koksals' submission by establishing that the applicant should have appealed to the Commission, despite the fact that the Commission had yet to become operational when the case was decided.¹⁰⁸

In declaring the inadmissibility of these cases, the European judges have also missed an important opportunity to shed light on the existence itself of the state of emergency in Turkey, namely, whether a threat to the life of the nation under Article 15 of the Convention continues to exist. The ECHR avoided expressing its authoritative views on the proportionality and necessity of the

¹⁰⁰Tuvan Gumrukcu & Gulsen Solaker, *Turkey Dismisses 45 More Judges and Prosecutors in Post-Coup Probe*, REUTERS (Apr. 3, 2017), <https://www.reuters.com/article/us-turkey-security-judges/turkey-dismisses-45-more-judges-and-prosecutors-in-post-coup-probe-aa-idUSKBN17523R>.

¹⁰¹See DECISION OF THE CONSTITUTIONAL COURT IN ITS PLENARY SITTING (August 4, 2016), <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/pdf/2016-12.pdf>. See also, 2 *Constitutional Court Judges Arrested in Turkey, All Military Judges Suspended*, RT (July 20, 2016), <https://www.rt.com/news/352349-turkey-judges-prosecutors-coup-crackdown/>.

¹⁰²See *Zihni*, App. No. 59061/16 at para. 15.

¹⁰³The Venice Commission has reported that individual applications to the Constitutional Court are not available to public officials who have been dismissed under Emergency Decrees; in this regard, see generally Eur. Consult. Ass., *Opinion on Emergency Decree Laws Nos. 667–676 Adopted Following the Failed Coup of 15 July 2016*, Opinion No. 865/2016 (July 15, 2016), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e).

¹⁰⁴See *Koksals*, App. No. 2873/17 at para. 29.

¹⁰⁵See EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 97, at 12.

¹⁰⁶Three members are appointed by the Prime Minister from public officials, a member by the Minister of Justice from judges and prosecutors in the Ministry of Justice, a member by the Minister of the Interior from the directors of the public administration, and two members by the Superior Council of the Judiciary.

¹⁰⁷See KEREM ALTIPARMAK, IS THE STATE OF EMERGENCY INQUIRY COMMISSION, ESTABLISHED BY EMERGENCY DECREE 685, AN EFFECTIVE REMEDY? (Feb. 23, 2017), <http://www.ihop.org.tr/en/wp-content/uploads/2017/03/IS-THE-STATE-OF-EMERGENCY-INQUIRY-COMMISSION.pdf>.

¹⁰⁸The *Koksals* decision was issued by the Court on June 12, 2017, while the rules of procedure of the Commission were published on July 12, 2017 and the Commission could start to receive applications on July 17, 2017.

widespread antiterrorist measures that have targeted, *inter alia*, a huge number of political opponents including judges, prosecutors, and academics. The Strasbourg decisions in these cases also entail the risk of providing international legitimacy to measures that are allegedly targeting individuals that were not involved in the failed coup.¹⁰⁹ The Council of Europe Commissioner argued that the dismissal of judges and prosecutors had not been done on a case-by-case basis, but rather that the “decisions included in their operative part only a universal, stereotypical and non-individualised reasoning to which two [separate] lists of 2[,]845 and 543 names were simply appended.”¹¹⁰ These dismissals have been labeled as arbitrary, unfair, and politically motivated.¹¹¹ None of the individuals affected by this measure have been provided with any explanation of the reason for their dismissal or any evidence of their alleged personal wrongdoing.¹¹² Dismissal decisions have only offered the vague and generalized motivation that “all the individuals listed in them were ‘part of, connected to or in communication with a terrorist organization.’”¹¹³ Lack of individualized justification makes any judicial review ineffective.

It is only as of March 20, 2018, that the ECHR found for the first time violations of the Convention in cases related to the failed putsch. In particular, the Strasbourg judges held that the imprisonment of two journalists for terrorism offenses constituted a breach of their right to personal liberty and security under Article 5(1) and freedom of expression under Article 10 of the Convention.¹¹⁴ The European judgments followed decisions issued by the Turkish Constitutional Court. Indeed, despite lacking the authority to scrutinize those exceptional measures that led to alleged breaches of human rights, the Constitutional Court accepted the applications of the two journalists for violation of the right to liberty and freedom of expression.¹¹⁵ Nevertheless, two first instance criminal courts refused to implement these decisions, holding that the Constitutional Court exceeded its scope of competence when assessing the reason for the pre-trial detention of the journalists.¹¹⁶ The lower courts argued that the Constitutional Court’s judgments were not in compliance with the law and amounted to usurpation of power.¹¹⁷

Alpay and *Altan* thus constitute a welcome development in European jurisprudence, especially in light of the strong climate of repression against journalists after the attempted coup. Nevertheless, it should also be noted that the ECHR adopted a very acritical and deferential approach to the evaluation of the existence of the same state of emergency that provides domestic authorities with a wide margin of discretion to assess the presence of the emergency and the nature and scope of the derogations necessary to avert it.¹¹⁸ In line with its previous jurisprudence, the ECHR held that “[t]he national authorities are in principle better placed than the international judge to decide. .. on the presence of such an emergency. . . .”¹¹⁹ On the basis of this submissive

¹⁰⁹VALENTINA RITA SCOTTI, IL GOLPE IN TURCHIA E LA CORTE EUROPEA DEI DRITTI UMANI: BREVI NOTE CRITICHE SULLE DECISIONI DI IRRICEVIBILITÀ PER IL MANCATO PREVIO ESPERIMENTO DEI RINCORSI INTERNI (2017) <https://www.osservatorioaia.it/images/rivista/pdf/Scotti%20definitivo.pdf>.

¹¹⁰MEMORANDUM ON THE HUMAN RIGHTS IMPLICATIONS OF THE MEASURES TAKEN UNDER THE STATE OF EMERGENCY IN TURKEY para. 29 (Oct. 7, 2016), [https://rm.coe.int/ref/CommDH\(2016\)35](https://rm.coe.int/ref/CommDH(2016)35).

¹¹¹AMNESTY INTERNATIONAL, NO END IN SIGHT: PURGED PUBLIC SECTOR WORKERS DENIED A FUTURE IN TURKEY 4 (May 22, 2017), <https://www.amnesty.org/download/Documents/EUR4462722017ENGLISH.PDF>.

¹¹²*Id.* at 7.

¹¹³*Id.* at 4.

¹¹⁴*Alpay v. Turkey*, App. No. 16538/17 (Mar. 20, 2018), <http://hudoc.echr.coe.int/>; and *Altan v. Turkey*, App. No. 13237/17 (Mar. 20, 2018), <http://hudoc.echr.coe.int/>.

¹¹⁵Massimo Frigo, *The Constitutional Conflict in Turkey: Is There Still an Effective Remedy for Human Rights Violations?*, OPINIOJURIS (Jan. 26, 2018), <http://opiniojuris.org/2018/01/26/the-constitutional-conflict-in-turkey-is-there-still-an-effective-remedy-for-human-rights-violations/>.

¹¹⁶See Başak Çalı, *Will Legalism be the End of Constitutionalism in Turkey*, VERFASSUNGSBLOG (Jan. 22, 2018), <https://verfassungsblog.de/will-legalism-be-the-end-of-constitutionalism-in-turkey/>.

¹¹⁷*Id.* See *Alpay*, App. No. 16538/17 at para. 39.

¹¹⁸See *Alpay*, App. No. 16538/17 at para. 75; *Altan*, App. No. 13237/17 at para. 91.

¹¹⁹See *Alpay*, App. No. 16538/17 at para. 75; *Altan*, App. No. 13237/17 at para. 91.

stance, the ECHR appears to share the views of Turkish authorities that, even after almost two years, the failed coup continues to constitute a threat to the life and existence of the nation.¹²⁰

Questionably, the ECHR also confirmed its formalistic interpretation of the exhaustion of domestic remedies for admissibility purposes by explicitly stating that it “will not depart from its previous finding that the right to lodge an individual application with the Constitutional Court constitutes an effective remedy. . . .”¹²¹ In this way, the Court appears to ignore the fact that the refusal of lower courts to implement the Constitutional Court’s judgments strengthens the perception of the poor effectiveness of domestic recourses in cases linked to the failed putsch. The European judges overlook doubts over the existence of an effective domestic remedy for individuals that have been claiming a violation of their fundamental rights since the declaration of the public emergency. In the interpretation and application of Article 35 of the Convention, European jurisprudence has established that a national recourse must be “available and sufficient to afford redress in respect of the breaches alleged.”¹²² According to the ECHR, in order to satisfy these requirements of accessibility and effectiveness, domestic remedies must be sufficiently certain not only in theory but also in practice.¹²³ Considering the fearful judicial context of post-coup Turkey where 4,238 judges have been ousted thus far, it is unclear to what extent an individual complaint before the Turkish Constitutional Court or the Council of State may be certain and effective in practice.¹²⁴ Even a judge sitting in the Mechanism for International Criminal Tribunals has been arrested despite his diplomatic immunity granted by the United Nations.¹²⁵

In previous decisions satisfying the admissibility test against Turkey, the ECHR had given significant weight to the general legal and political context in which formal remedies operated. In declaring cases admissible—despite domestic remedies not having been formally exhausted¹²⁶—the judges had held that “there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. . . .”¹²⁷ By contrast, the excessive formalism characterizing the Strasbourg approach to the recent cases related to the coup in Turkey manifests itself as judicial neglect of the overall setting in which domestic judicial bodies assess alleged violations of fundamental rights.

E. The common thread across current derogations from the European convention

Different security situations in France, Ukraine, and Turkey have prompted national authorities to submit derogation to the Convention and the ICCPR. The Ukrainian state of emergency was declared within the context of an armed conflict limited to specific regions of the country, while in France the derogation was invoked in order to tackle the threat posed by fundamentalist religious groups. In Turkey, as discussed above, the adoption of special measures followed a failed military coup that attempted to overthrow President Erdogan’s regime. Nevertheless, despite the substantially dissimilar types of emergencies facing the national authorities, it is still possible to identify certain common elements across these derogations.

The first common element among the three different derogations is the considerable length of the state of emergency. None of these countries have found the initial three-month derogation

¹²⁰See *Alpay*, App. No. 16538/17 at paras. 76–77; *Altan*, App. No. 13237/17 at paras. 93–94 (Mar. 20, 2018).

¹²¹See *Alpay*, App. No. 16538/17 at para. 121; *Altan*, App. No. 13237/17 at para. 142.

¹²²*Akdivar and others v. Turkey*, App. No. 21893/93, para. 66 (Sept. 16, 1996), <http://hudoc.echr.coe.int/>; *Dalia v. France*, App. No. 154/1996/773/974, para. 38 (Feb. 19, 1998), <http://hudoc.echr.coe.int/>.

¹²³See *Akdivar*, App. No. 21893/93 at para. 66.

¹²⁴*Turkey Sacks 107 Judges, Prosecutors Over Links to Failed Coup*, REUTERS (May 5, 2017), <https://www.reuters.com/article/us-turkey-security-court/turkey-sacks-107-judges-prosecutors-over-links-to-failed-coup-media-idUSKBN1811P4>.

¹²⁵SCF, *Turkish Court Releases UN Judge Arrested Over Alleged Gülen Links*, STOCKHOLM CENTER FOR FREEDOM, (June 14, 2017), <http://stockholmcf.org/turkish-court-releases-un-judge-arrested-over-alleged-gulen-links/>.

¹²⁶See, *inter alia*, *Akdivar*, App. No. 21893/93; *Aksoy*, App. No. 21987/93.

¹²⁷*Akdivar*, App. No. 21893/93. at para. 67.

period sufficient to face the public emergency: Each country extended their exceptional status several times. At present—almost four years since the adoption of the emergency legislation—Ukraine is still arguing for the necessity of using special measures approved at the beginning of the armed conflict with Russia.¹²⁸ Almost two years since the failed coup, Turkish authorities have yet to show any intent to end the emergency. On January 19, 2018, Turkey notified the Secretary General of the Council of Europe of its decision to extend the derogation from the Convention for an additional three months.¹²⁹ In France, the state of emergency has lasted exactly two years, with the domestic authorities only having recently decided to end the use of the derogation for counter-terrorism purposes.¹³⁰

The recent emergencies in Ukraine, France, and Turkey led to a considerable increase of powers in the hands of governments and the consequent restraint of individual freedoms and liberties. This is not a sole peculiarity of these settings as crises are generally characterized by a strengthening of the executive to the detriment of judicial authority and parliamentary oversight.¹³¹ One of the immediate consequences of emergencies is the absence of effective domestic mechanisms of supervision of the executive. The three distinct features of public emergencies classified by Fitzpatrick are the recurrent invasion of absolute rights, heavier limitations on other fundamental rights, and concentration of power in the executive arm of the government.¹³²

The second common element to the emergencies is in Ukraine, Turkey, and France is the significant restriction on judicial oversight. In Ukraine and Turkey, special statutes eliminated the power of the judicial body to authorize preventive detention lasting up to 30 days.¹³³ In Turkey, the judiciary has been subjected to a more direct attack as more than 4,000 judges have been fired after the putsch.¹³⁴ In Ukraine, a special regime of pre-trial investigation in relation to anti-terrorist activities has been introduced, resulting in the transfer to prosecutors of the powers normally attributed to investigating judges, including making decisions concerning custodial measures, access to property, searches, and wiretapping.¹³⁵ In France, the extraordinary laws transferred the authority to impose a house arrest without any judicial review into the hands of the government, initially for an unlimited period, then for a maximum of twelve months.¹³⁶ Similarly, during the emergency, judicial control was not required in cases where the executive power wished to collect, assess, and retain communications content or metadata.¹³⁷

The use of administrative detention is also well-known within the contexts of crises, where governments normally confer upon themselves the power to order detention without trial and limit the access to judicial review. Closely linked to the weakening of the judiciary, the third

¹²⁸The last extension of the derogation was submitted by Ukrainian authorities on February 3, 2017; see Eur. Consult. Ass., *Notification of Declaration*, JJ8218C Tr./005-205 (Feb. 3, 2017).

¹²⁹Eur. Consult. Ass., *supra* note 6.

¹³⁰See Eur. Consult. Ass., *supra* note 4.

¹³¹See Marie-Laure Basilien-Gainche, *Etat d'urgence et lutte contre le terrorisme. La mécanique de l'entropie*, JOURNAL DU DROIT ADMINISTRATIF (2016) <http://www.journal-du-droit-administratif.fr/?p=447>.

¹³²JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 19–31 (1994).

¹³³Turkey has reduced the length of preventive detention without judicial control to seven days; see Eur. Consult. Ass., *Notification of Declaration*, JJ8338 Tr./005-206 (Mar. 6, 2017) (introducing Decree Law No. 684 on Specific Regulations under the State of Emergency).

¹³⁴Gumrukcu, *supra* note 100.

¹³⁵Eur. Consult. Ass., *supra* note 2, at 3.

¹³⁶Loi No. 55–385 du 3 avril 1955 relative à l'état d'urgence [Law No. 55–385 of 3 April 1955 on the State of Emergency], art. 11, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>.

¹³⁷Loi No. 2015–1556 du 30 novembre 2015 relative aux mesures de surveillance des communications électroniques internationales [Law No. 2015–1556 of November 30th, 2015 Relating to the Measures of Surveillance of the International Electronic Communications], http://www.legifrance.gouv.fr/affichTexte.do?sessionId=998EACDA05B79BB46ECB1B480CC1846E.tpdila07v_2?cidTexte=JORFTEXT000031549747&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000031549744.

common element to the emergencies in Ukraine, Turkey, and France includes the adoption of measures that notably reduce the scope of applicability of the right to liberty under Article 5 of the Convention. The overall purpose of this provision is to ensure that no one should be deprived of his liberty in an “arbitrary fashion.”¹³⁸ The ECHR stated that Article 5 addresses “both the protection of physical liberty of the individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.”¹³⁹ The three different countries in question have significantly extended the length of preventive detention that lacks any judicial control. Indeed, the French measure of unlimited house arrest—subsequently reduced to twelve months—constitutes a significant limitation of the guarantees enshrined in Article 5 of the Convention. Similarly, even within the context of a recognized state of emergency, the possibility of detaining a suspect for thirty days without judicial supervision in Ukraine and Turkey strongly conflicts with the protection afforded by the right to liberty in the Convention.

Fourth, national requests for derogation from the Convention appear quite vague. This is particularly true in relation to the notifications submitted by France and Turkey, which have omitted to inform the Council of Europe about the fundamental rights that will be derogated from. Consequently, both Turkish and French authorities do not clarify how limiting the provisions of the Convention would be instrumental in tackling the terrorism threat and thus safeguarding the life of the nation. The French communication only reported that the adoption of the emergency measures was necessary to prevent the commission of future attacks.¹⁴⁰ The Turkish notification to the Council of Europe includes Decree Laws that only provide that the exceptional measures are necessary within the scope of the attempted coup and fight against terrorism.¹⁴¹ In both of these situations, only a reading of the adopted exceptional legislation reveals which human rights are affected by the crisis. The Turkish Decree Laws provide a significant deviation from the ordinary procedural guarantees found in both administrative and criminal law. In particular, these measures limit several fundamental rights enshrined in the Convention, including the rights to liberty, fair trial, privacy, family, freedom of expression, and freedom of movement.¹⁴²

F. A prognosis on the jurisprudence of the European Court?

Predicting the ECHR’s position regarding the recent declarations of public emergency would be a hasty and speculative endeavor, especially considering that the ECHR has not, thus far, assessed any cases related to the exceptional measures adopted by France and Ukraine, and only superficially evaluated the validity of the Turkish derogation under Article 15 of the Convention.¹⁴³ In addition, as argued by McDonald, “[t]he exact width of the margin of appreciation in any particular case is difficult to specify in advance because it varies in accordance with the precise balance of the principles that the Court thinks is appropriate in the case at hand.”¹⁴⁴

¹³⁸See *inter alia*, *El Masri v. Macedonia*, App. No. 39630/09 paras. 230–33 (Dec. 13, 2012), <http://hudoc.echr.coe.int/>; *Guzzardi v. Italy*, App. No. 7367/76, para. 92 (Nov. 6, 1980), <http://hudoc.echr.coe.int/>; *Amuur v. France*, App. No. 19776/92, para. 42 (June 25, 1996), <http://hudoc.echr.coe.int/>.

¹³⁹*Kurt v. Turkey*, App. No. 24276/94, para. 123 (May 25, 1998), <http://hudoc.echr.coe.int/>.

¹⁴⁰Eur. Consult. Ass., *supra* note 4.

¹⁴¹Eur. Consult. Ass., *supra* note 6.

¹⁴²See Decree on Measures to be Taken Under State Emergency, Law No. 667, (July 22, 2016) (Turk.), <https://rm.coe.int/168069661d>.

¹⁴³See *Alpay*, App. No. 16538/17 at para. 72; *Altan*, App. No. 13237/17 at para. 88.

¹⁴⁴Ronald St. John McDonald, *The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights*, in *INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERT AGO* 187, 207 (A. Giuffrè ed. 1987).

A forecast of the way in which the ECHR will deal with exceptional situations generally constitutes a vain endeavor not only because emergencies are not all of the same type,¹⁴⁵ but also because European judges have rarely strived to define the exact content of the principle of “exceptional threat.”¹⁴⁶ Whether and to what degree States can deviate from the protection of human rights during public emergencies remains a case-specific inquiry.¹⁴⁷ Ascertaining the existence of the state of emergency and the necessity of adopted measures involves not only the evaluation of a wide range of criteria, including the social context, but also a certain amount of political evaluation. Similar emergency measures adopted in different contexts have been subject to a double standard approach by European judges. Scholars have already examined how in the evaluation of the exceptional threat to the life of the nation, the ECHR has implicitly made a distinction between countries held to have a strong democratic tradition, as is the case with the UK, while at the same time adopting a more rigorous approach in relation to other countries, like Greece and Turkey.¹⁴⁸

Nevertheless, without any intent to be exhaustive, it remains seemingly possible—on the basis of previous European jurisprudence—to provide some general reflections on the potential weight of some of the elements characterizing the recent derogations before the ECHR. In light of the strong effect that exceptional measures have on the protection of fundamental rights, it seems highly probable that the ECHR will receive several applications against the countries that have derogated from the European Convention since 2015. The likelihood that the ECHR will receive many complaints connected to the emergencies may also increase as the special legislation in the states of emergency reaches more widespread application. At the time of this writing, the ECHR has approximately 26,000 outstanding applications related to the state of emergency in Turkey.¹⁴⁹

Under Article 15 of the Convention, the Strasbourg judges will be called to ascertain the existence of a state of emergency. This study has already investigated how the ECHR has always recognized a wide margin of discretion for States evaluating the existence of a state of emergency. The delegation of such authority to contracting States constitutes a consolidated practice in Strasbourg case law.¹⁵⁰ This submissive approach has also been confirmed in the *Alpay* and *Altan* cases against Turkey.¹⁵¹ Therefore, thus far, European case law has not shown any intent to revise the generous margin of discretion afforded to States in the evaluation of the public emergency. In the application of such a margin of discretion, the ECHR has also accepted government submissions on emergencies in situations that lack any violent acts. The ECHR has indeed acknowledged that the mere threat of serious terrorist attacks could justify a derogation from the Convention.¹⁵² European judges clearly emphasized that “[t]he requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it.”¹⁵³ With respect to the disturbances between the security forces and the Kurdistan Workers’ Party (PKK) in south-east Turkey, the ECHR accepted national authorities’ submissions on the presence of a public emergency threatening the life of the nation.¹⁵⁴ It reiterated that it is within the competences of contracting States to establish whether the life of the

¹⁴⁵Gross & Ni Aolain, *supra* note 24, at 636.

¹⁴⁶Eva Brems, *The Margin of Appreciation in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 230, 240 (1996).

¹⁴⁷Evan Criddle, *Protecting Human Rights During Emergencies: Delegation, Derogation and Deference*, 45 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 197, 206 (2014).

¹⁴⁸Gross & Ni Aolain, *supra* note 24, at 285–86. See also Loof, *supra* note 14, at 708–09.

¹⁴⁹See EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 97, at 8.

¹⁵⁰See *Brannigan and McBride*, App. No. 14553/89, 14554/89 at para. 43; *Aksoy*, App. No. 21987/93 at para. 68; *Demir and others*, App. No. 71/1997/855/1062–1064 at para. 43; *Ireland*, App. No. 5310/71 at para. 207.

¹⁵¹See *Alpay*, App. No. 16538/17 at para. 75; *Altan*, App. No. 13237/17 at para. 91.

¹⁵²*A. and others*, App. No. 3455/05 at para. 177.

¹⁵³*Id.* at para. 177.

¹⁵⁴*Aksoy*, App. No. 21987/93 at paras. 69–70.

nation has been threatened by a “public emergency.”¹⁵⁵ In light of this consolidated, quasi-abdication of the evaluation of the public crisis to States, it seems unlikely that the ECHR would take on the responsibility of questioning whether a state of emergency actually threatens the life of the nation in the three different scenarios or in any future case.

Similarly, European jurisprudence does not seem to give weight to claims concerning the vague nature of the derogation notification to the Council of Europe. Under Article 15(3), contracting States have to “keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor.”¹⁵⁶ This procedural condition imposes upon High Contracting Parties to the Convention the simple obligation to inform the Council of Europe about the nature of the measures taken. Therefore, unlike the ICCPR and the American Convention on Human Rights which impose upon governments a requirement to specify the provisions of the respective treaties they want to derogate, the Convention does not require contracting States to clarify which Articles of the Convention they intend to derogate from. In the *Lawless* case, the Commission admitted the adequateness of the Irish notification of derogation from the Convention despite the government’s letter to the Council of Europe which did not provide a detailed account of the reasons.¹⁵⁷ Specifically, the letter did not include what had led the domestic authorities to take the measures of derogation or what Convention provisions were being derogated from.¹⁵⁸ The Commission also found that the letter was a sufficient notification for the purposes of Article 15 despite not having the character of a notice of derogation and not having been submitted by the government for the purpose of registering a formal notice of derogation.¹⁵⁹ In the *Alpay* and *Altan* cases, the ECHR found that the procedural condition required by Article 15(3) was satisfied even though the Turkish derogation simply stated that “measures taken *may* involve derogation from the obligations under the Convention” without explicitly mentioning which Articles of the Convention would form the subject of the derogation.¹⁶⁰

In Turkey, Ukraine, and France, where the derogation has been extended several times, a concrete risk of a prolonged state of emergency exists. The ECHR may be called to ascertain whether the requirements under Article 15 are satisfied during the entire period in which the State decides to maintain the emergency situation. The duration of the state of emergency is one of the factors that the ECHR takes into account in the evaluation of the necessity of the special measures.¹⁶¹ Nevertheless, the significant length of the state of emergency may not constitute *per se* a ground for the ECHR to deprive the derogation of its validity. This notion is confirmed by the *Ireland v. UK* case where the ECHR held that the British derogation did not breach the Convention notwithstanding the emergency state lasting for more than five years—from August 1971 until December 1975.¹⁶² The ECHR stated that in light of “the longest and most violent terrorist campaign witnessed in either part of the island of Ireland,”¹⁶³ the extrajudicial powers of arrest, detention, and internment exercised by the British authorities did not amount to a breach of the Convention.¹⁶⁴ Further, in the *A. and others* case, the ECHR clarified that the Human Rights Committee’s position that derogation from the ICCPR be “exceptional and temporary” is not a requirement under Article 15 of the Convention.¹⁶⁵ Accordingly, as the cases of the UK and Turkey demonstrate, a public emergency lasting for many years can be compatible with

¹⁵⁵*Ireland*, App. No. 5310/71 at para. 207.

¹⁵⁶Convention art. 15(3).

¹⁵⁷See *Lawless*, App. No. 332/57 at para. 47.

¹⁵⁸*Id.*

¹⁵⁹*Id.* at para. 44–47.

¹⁶⁰See *Alpay*, App. No. 16538/17 at para. 73 (emphasis added); *Altan*, App. No. 13237/17 at para. 89 (emphasis added).

¹⁶¹See *Brannigan and McBride*, App. No. 14553/89, 14554/89 at para. 43.

¹⁶²See *Ireland*, App. No. 5310/71 at para. 11.

¹⁶³*Id.*

¹⁶⁴*Id.* at para. 243.

¹⁶⁵*A. and others*, App. No. 3455/05 at para. 178.

Article 15 of the Convention. In the *Marshall* case, the ECHR held that detaining the applicant without judicial intervention in 1998 on the basis of a derogation submitted by British authorities ten years prior did not amount to a breach of Article 5.¹⁶⁶

Article 15 also requires that emergency measures be strictly necessary to address the exigencies of the situation. In relation to the crises in Turkey and France, the substantive condition of establishing a proportionality test for the special legislation could play a key role in future European jurisprudence that may result from the widespread application of Turkish and French special laws.

In Turkey, domestic institutions have enacted emergency decrees that significantly limit the fundamental rights of any person who is a member of, affiliated with, otherwise connected to, or in any way in contact with terrorist organizations or structures, organizations, or groups that the National Security Council has identified as carrying out activities against the national security of the State.¹⁶⁷ On the basis of such a remote requirement like mere contact with the alleged terrorist organization, the exceptional regime has been used against individuals who were barely involved with planning, executing, or contributing to the putsch in any form. Therefore, the measures have been applied to dismiss a substantial number of individuals from public service through a process that lacks any procedural requirements. Reports indicate that the emergency measures have significantly targeted political opponents of the governments and that the government has exploited the emergency state to close televisions and newspapers.¹⁶⁸ It is further estimated that, as of May 2017, Turkey fired about 145,000 civil servants, security personnel, and academics.¹⁶⁹ Associations, schools, and universities have been closed and their assets seized by the State.¹⁷⁰ Human Rights Watch reported that there were 144 journalists in pre-trial detention as of November 2016 because of their writing and journalistic activity.¹⁷¹ The same NGO also stated that many reporters and columnists accused of being linked to Gülen were arrested without evidence.¹⁷² According to Amnesty International, Turkish authorities have arbitrarily detained thousands of people with no involvement in the coup attempt.¹⁷³

Turkey has not only applied emergency laws to individuals accused of being connected to Gülen organization, which the Government identified as the association behind the coup, but also to individuals like journalists and writers accused of having contact with an organization—the PKK—but no links to the coup. Several journalists have been arrested merely for taking part in a solidarity campaign with a pro-Kurdish newspaper (*Özgür Gündem*) that had been closed down by domestic authorities.¹⁷⁴ Lecturers have been dismissed simply because they had signed a petition for the peaceful solution to the conflict with the Kurdish movement; similarly, the government has suspended the activities of 370 NGOs, including three lawyers' associations with a human rights focus, and women's rights and humanitarian organizations in the southeast.¹⁷⁵ The government has also applied emergency legislation to 10,000 teachers, terminating their employment because of their participation in a strike organized by a lawfully established trade union.¹⁷⁶

¹⁶⁶*Marshall v. UK*, App. No. 41571/98 (July 10, 2001), <http://hudoc.echr.coe.int/>.

¹⁶⁷See, *inter alia*, Decree on Measures to be Taken Under State Emergency, Law No. 667, art. 5 (July 22, 2016) (Turk.), <https://rm.coe.int/168069661d>.

¹⁶⁸Constanze Letsch, *Turkey Shuts 15 Media Outlets and Arrests Opposition Editor*, THE GUARDIAN (Oct 31, 2016), <https://www.theguardian.com/world/2016/oct/30/turkey-shuts-media-outlets-terrorist-links-civil-servants-press-freedom>.

¹⁶⁹*Turkey Sacks 107 Judges, Prosecutors Over Links to Failed Coup*, *supra* note 124.

¹⁷⁰Constanze Letsch, *Turkey's President Orders Closure of 1,000 Private Schools Linked to Gülen*, THE GUARDIAN (July 23, 2016), <https://www.theguardian.com/world/2016/jul/23/turkey-erdogan-closure-of-1000-private-schools-gulen>.

¹⁷¹See *Turkey: Events of 2016*, *supra* note 68.

¹⁷²*Id.*

¹⁷³*Amnesty International USA Board Writes to Secretary of State*, AMNESTY INTERNATIONAL (June 21, 2017), <https://humanrightsturkey.org/2017/06/21/amnesty-international-usa-board-writes-to-secretary-of-state/>.

¹⁷⁴*Turkey: Events of 2016*, *supra* note 68.

¹⁷⁵*Id.*

¹⁷⁶ASYLUM RESEARCH CONSULTANCY, *TURKEY COUNTRY REPORT—UPDATE 177* (Jan. 25, 2017), https://www.ecoi.net/en/file/local/1325304/1226_1486117831_5890c8d84.pdf.

France has also made wide use of the emergency laws, applying them to situations that go beyond efforts to tackle the alleged terrorist threat. Similar to the Turkish situation, the law on the state of emergency presents a broad scope of application because it refers to “any person in respect of whom there are serious reasons to believe that his behavior constitutes a threat to public safety and order.”¹⁷⁷ As previously emphasized, the ambiguous and indefinite concept of “serious reasons to believe” not only heralds legal uncertainty, but also paves the way for arbitrary and politically-targeted implementation of the special laws.¹⁷⁸ Domestic authorities have used exceptional legislation against climate activists accused of flouting a ban on organizing protests during the week after the Paris climate summit.¹⁷⁹ Similarly, the state of emergency has also been invoked to impede activists that demonstrate against the government’s labor reform, to evict squatters, to apprehend suspected drug traffickers, and to question irregular migrants.¹⁸⁰ Quantitative data also confirms the widespread reliance on special legislation. It has been reported that since the declaration of the emergency status, 752 people have been placed under house arrest for an average of 266 days per individual, while 4,457 houses were raided by police using emergency powers and without authorization by a judge.¹⁸¹ Human Rights Watch reported that of the 3,600 house searches carried out in the first seven months since the declaration of the emergency, only six resulted in terrorism-related criminal proceedings.¹⁸²

G. State of emergency and preventive detention

In the near future, the emergency laws and their widespread implementation, particularly in France and Turkey, may lead to a rapid and substantial increase in applications related to violations of Article 5 of the Convention. Indeed, the restriction of the right to liberty within a context of crisis is not novel. As evidenced by the ECHR’s practice concerning previous exceptional contexts, fundamental rights in ‘criminal’ proceedings are generally the first sacrificial victims on the altar of a public emergency. This is particularly true in relation to Article 5 of the Convention, whose derogation is generally seen by governments as a necessary tool to protect the life and security of the nation under threat.¹⁸³ Since the establishment of the European Commission of Human Rights, the UK and Turkey have made frequent use of administrative detention to confront public emergencies. In the *Ireland v. UK* case, the Irish government stated that the British extrajudicial measures of deprivation of liberty constituted a breach of Article 5 of the Convention.¹⁸⁴ In regard to the emergency situation in Turkey in the aftermath of the clashes between the government and members of the Kurdistan’s Workers Party in 1990, there have been

¹⁷⁷See Loi No. 55-385 du 3 avril 1955 relative à l’état d’urgence [Law No. 55-385 of 3 April 1955 on the State of Emergency], <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>.

¹⁷⁸Giorgio Agamben, *De l’Etat de droit à l’Etat de sécurité*, LE MONDE (Dec. 27, 2015), http://www.lemonde.fr/idees/article/2015/12/23/de-l-etat-de-droit-a-l-etat-de-securite_4836816_3232.html.

¹⁷⁹Arthur Neslen, *Paris Climate Activists Put Under House Arrest Using Emergency Laws*, THE GUARDIAN (Nov. 27, 2015), <https://www.theguardian.com/environment/2015/nov/27/paris-climate-activists-put-under-house-arrest-using-emergency-laws>.

¹⁸⁰Tony Cross, *France’s State of Emergency Used to Ban Activists from Labour Law Protests*, RFI (May 16, 2016), <http://en.rfi.fr/france/20160516-frances-state-emergency-used-ban-activists-labour-law-protests>; see also MariePierre Cauchard, *Manifestations et maintien de l’ordre (public)*, JOURNAL DU DROIT ADMINISTRATIF (2016), <http://www.journal-du-droit-administratif.fr/?p=225>; Basilien-Gainche, *supra* note 131.

¹⁸¹This is What Happened During France’s State of Emergency, THE LOCAL (Oct. 31, 2017), <https://www.thelocal.fr/20171031/what-exactly-happened-during-frances-state-of-emergency>.

¹⁸²France: Prolongation de l’état d’urgence, menace pour les droits humains, HUMAN RIGHTS WATCH (July 22, 2016), <https://www.hrw.org/fr/news/2016/07/22/france-prolongation-de-letat-durgence-menace-pour-les-droits-humains>.

¹⁸³Thus far, the four countries that the ECHR has called on to justify special legislation approved under the state of emergency have all adopted measures of preventive detention.

¹⁸⁴See *Ireland*, App. No. 5310/71 at para. 145.

different cases before the ECHR concerning the detention of suspects without judicial oversight.¹⁸⁵ Similarly, with regard to the derogations during 1957–1962 and 1976–1977, the Republic of Ireland notified the Council of Europe of exceptional measures that mainly included detention without trial.¹⁸⁶

The ECHR's acceptance of the existence of public emergencies does not mean that domestic authorities enjoy unlimited discretion in the limitation of personal liberty. Detention without trial for up to thirty days in Ukraine and Turkey¹⁸⁷ or unlimited house arrest in France¹⁸⁸ would still be subject to the ECHR scrutinizing whether the States have acted in a manner that exceeds the extent strictly required by the exigencies of the crisis. When a valid derogation has been submitted, domestic authorities may hold suspects without judicial intervention for a longer period or on a lower standard of proof than would be expected in a time of normalcy. Nevertheless, individuals still retain their right to challenge the lawfulness of detention.¹⁸⁹ The United Nations Human Rights Committee considers the right to a prompt judicial review of the lawfulness of detention to be non-derogable,¹⁹⁰ as required to protect rights explicitly designated as non-derogable.¹⁹¹ Accordingly, deprivation of liberty must not, even in the event of a public emergency and a valid derogation from Article 9, be “unreasonable or unnecessary under the circumstances.”¹⁹² The ECHR could be called to assess the proportionality of these measures on a case-by-case basis by taking into account all the relevant factors. Even within an emergency, prolonged preventive detention without judicial control should be examined in relation to Article 5(3) of the Convention. This provision requires that “everyone arrested or detained in accordance with the provisions of... this Article shall be brought *promptly* before a judge or other officer authorised by law to exercise judicial power . . .”¹⁹³

The ECHR has clarified that within an ordinary context, the requirement of promptness imposes a maximum of four days.¹⁹⁴ This limit has been applied by the ECHR to cases dealing with terrorist offenses where no derogation has been submitted by the State.¹⁹⁵ Indeed, with regard to the terrorist threat in Northern Ireland, the ECHR concluded that even a detention of four days and six hours without judicial control under such circumstances violated Article 5 of the Convention.¹⁹⁶ By contrast, within the same situation, in another case—the *Brannigan and*

¹⁸⁵See *Aksoy*, App. No. 21987/93; *Demir and others*, App. No. 71/1997/855/1062–1064; *Nuray Şen*, App. No. 41478/98 at para; *Bilen*, App. No. 34482/97.

¹⁸⁶1955–1957 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 50; 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 72–74; 1971 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 32; 1973 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 24–28; 1975 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 18; 1978 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) 22.

¹⁸⁷As discussed above, Turkey has reduced detention without judicial control to up to seven days. See Decree Law No. 684 Dated 23 January 2017 on Specific Regulations Under the State of Emergency (Turk.), <https://rm.coe.int/16806fab6b>.

¹⁸⁸By putting an end to the state of emergency, France has abrogated this special measure from November 1, 2017; see Eur. Consult. Ass., *supra* note 56.

¹⁸⁹Fiona de Londras, *Counter-Terrorist Detention and International Human Rights Law*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 401 (Ben Saul ed., 2014).

¹⁹⁰Hum. Rts. Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), para. 66, CCPR/C/GC/35 (Dec. 16, 2014) (“The fundamental guarantee against arbitrary detention is non-derogable . . .”); *Id.* at para. 67 (“In order to protect non-derogable rights . . . the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.”).

¹⁹¹Hum. Rts. Comm., General Comment No. 29: States of Emergency (Article 4), para. 16, CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). The non-derogability of the right to challenge the lawfulness of detention was affirmed by the Inter-American Court of Human Rights and is expressly stipulated under Article 4(2) of the Arab Charter on Human Rights. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R., paras. 35–6 (Jan. 30, 1987).

¹⁹²Hum. Rts. Comm., *supra* note 191, at para. 66.

¹⁹³Convention art. 5(3) (emphasis added).

¹⁹⁴*McKay v. UK*, App. No. 543/03, paras. 33, 40 (Oct. 3, 2006), <http://hudoc.echr.coe.int/>.

¹⁹⁵See, *inter alia*, *Oral et Atabay c. Turquie*, App. No. 39686/02, para. 43 (June 23, 2009), <http://hudoc.echr.coe.int/>.

¹⁹⁶*Id.* at para. 62.

McBride case—on the basis of the valid derogation submitted by the UK, the ECHR found that the detention of seven days without judicial intervention did not amount to a violation of the Convention because it was strictly required by the exigencies of the situation.¹⁹⁷

Nevertheless, European jurisprudence finding that Turkish authorities had violated Article 5 by administrative detention within the ambit of a valid emergency¹⁹⁸ could constitute a set of evaluative principles for future cases dealing with preventive detention in the recent derogation contexts. The ECHR held that the particular problems linked to the investigation of terrorist offenses “cannot absolve the authorities from the obligation to bring any person arrested in accordance with Article 5 § 1 (c) ‘promptly’ before a judge”¹⁹⁹ Therefore, in the *Nuray Sen* case, the ECHR concluded that, despite the validity of the state of emergency, the detention of the applicant in police custody for eleven days without any judicial intervention was a breach of Article 5(3) of the Convention.²⁰⁰ Similarly, in the *Aksoy* case, the ECHR found that the state of emergency could not justify an incommunicado detention for fourteen days.²⁰¹ The Strasbourg judges held that the exceptionally long period of detention without judicial intervention was not necessary to meet the exigencies of the situation and also left the applicant vulnerable to acts of torture.²⁰²

This jurisprudence shows the significance of Article 5 in providing guarantees against the arbitrary limitation of personal liberty even when a valid emergency exists. Accordingly, it is difficult to reconcile the implementation of the Ukrainian and Turkish special legislation on preventive detention of thirty days, without judicial intervention, with the protection afforded by Article 5. It is true that Turkey has enacted more recent legislation establishing a maximum of seven days for incommunicado detention. Nevertheless, a number of cases exceeding the seven-day detention without judicial control have been reported after the adoption of the new law.²⁰³ Further breaches of Articles 5 and 10 of the Convention will most likely result from the several outstanding applications submitted by journalists who have been imprisoned by Turkish authorities after the coup. Violations of Article 5 could also arise from the implementation of French law regarding the special measure of house arrest. In the past, the ECHR has indeed stated that even house arrest would amount to a deprivation of the personal liberty for the purposes of Article 5(1)(c) of the Convention.²⁰⁴

H. Conclusion

States of emergency pose the most significant challenges to the safeguarding of fundamental rights and civil liberties. The policies adopted by Ukraine, France, and Turkey risk undermining the foundations of a democratic State that is based on the rule of law and separation of powers. Such risk is perhaps best evidenced by the substantial weakening of the judiciary during the emergency in the three countries in question. The significant increase in the discretionary margin of the police, combined with the marginalization of the judiciary, reveals how the state of security created to face the crisis presents features of a police State.²⁰⁵ The gradual replacement of the judicial role with police operations represents a symptom of how prolonged emergencies prompt

¹⁹⁷*Brannigan and McBride*, App. No. 14553/89, 14554/89, at para. 52–4.

¹⁹⁸*See, inter alia*, *Nuray Şen*, App. No. 41478/98 at para. 29; *Bilen*, App. No. 34482/97 at para. 54; *Aksoy*, App. No. 21987/93 at para. 37.

¹⁹⁹*Demir and others*, App. No. 71/1997/855/1062–1064 at para. 41.

²⁰⁰*Nuray Sen*, App. No. 41478/98 at para. 24, 29.

²⁰¹*Aksoy*, App. No. 21987/93 at para. 84.

²⁰²*Id.* at para. 78.

²⁰³Wanda Marra, *Gabriele Del Grande rischia di rimanere in carcere in Turchia per un anno*, IL FATTO QUOTIDIANO (Apr. 23, 2017), <https://www.ilfattoquotidiano.it/premium/articoli/altro-che-giorni-del-grande-rischia-di-stare-dentro-6-mesi>.

²⁰⁴*Mancini v. Italy*, App. No. 44955/98, para. 17 (Dec. 12, 2001).

²⁰⁵*See* Agamben, *supra* note 178.

the eclipse of legal certainty and lead to the rapid and irreversible degradation of public institutions.²⁰⁶

The recent derogations submitted by Ukraine, France, and Turkey, together with the exceptional measures adopted for counter-terrorism purposes, substantially restrict several fundamental rights enshrined in the Convention. The shift and concentration of authority and power away from the judiciary into the government's hands constitutes a direct and profound attack upon the central values of the Convention. In particular, preventive detention measures, with the suspension of habeas corpus otherwise approved by the three States, not only enable police forces to use arbitrary and unlimited use of force—*jus puniendi*—but also seriously affect the protection of absolute and non-derogable rights like the prohibition of torture and inhumane or degrading treatment under Article 3 of the Convention. Indeed, the right to have detention subject to review must be read in the light of the essential prohibitions on arbitrary detention and ill-treatment.²⁰⁷ In this context, judicial review constitutes the procedural avenue that incorporates the remedy of habeas corpus, which represents a fundamental protection of the right to liberty and the right to physical integrity. Thus, the reviewing body must play a twofold role. First, the designated body must determine the lawfulness of internment. Such confinement may only continue if a reviewing body, upon periodical and individualized review of detention, is satisfied that the State provided appropriate justification for the individual to be kept in detention.²⁰⁸ Second, the reviewing body, through habeas corpus, “performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.”²⁰⁹ In this context, the right of detainees to appear in person before a court is central to prevent or ascertain the occurrence of torture or ill-treatment.²¹⁰

As the recent emergency laws and their widespread and apparently indiscriminate implementation present the risk of destabilizing the whole European system of protection, it becomes ever more necessary that the ECHR adopt a more rigorous and principled scrutiny of the derogation conditions under Article 15 of the Convention. Unfortunately, thus far, the ECHR has almost completely abdicated the authority to evaluate the existence of a public emergency under the derogation clause to national governments. By relying on the unproven axiom that States are better placed to decide on the presence of an emergency and on the nature and scope of the derogations necessary to avert it, European judges have adopted a deferential approach that has left the discretion to interpret Article 15 of the Convention to national authorities. In this context, rather than striking an appropriate balance between national interests and the protection of human rights, the ECHR has appeared more inclined to privilege national security over the safeguarding of fundamental guarantees. To date, the Greek situation in the 1960s constitutes the only case where the ECHR decided to put aside this interpretative posture and intervened in the evaluation of the existence of the state of emergency.²¹¹ The Strasbourg Court’s uncritical attitude towards derogation conditions presents an image of a court that has renounced its role as guardian of the fundamental individual safeguards enshrined in the Convention. This “judicial passivism” might also lead to a weakening of human rights standards in all of the contracting States of the Council of Europe, which may in turn further tempt other countries to suspend the Convention when confronting an alleged terrorist threat.

²⁰⁶*Id.*

²⁰⁷The Venice Commission has denounced cases of ill-treatment and even torture exercised by Turkish authorities against those arrested after the coup. See Eur. Consult. Ass., *supra* note 103, at para. 174.

²⁰⁸Hum. Rts. Comm., Commc’n No. 560/1993, para. 9.4, UN Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997).

²⁰⁹Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R., para. 35 (Jan. 30, 1987). See also Hum. Rts. Comm., *supra* note 191, at paras. 56, 58.

²¹⁰See Hum. Rts. Comm., *supra* note 190, at para. 42.

²¹¹See *GREEK CASE*, *supra* note 18.

Strasbourg's most recent cases against Turkey seemingly confirm that European judges are far from moving beyond the detached attitude with respect to whether to evaluate the validity of an emergency state and the special measures adopted by national authorities. The ECHR's departure from its previous jurisprudence on Article 15 would provide meaningful supervision of fundamental rights in contexts where they are most at risk. If the ECHR is called to assess applications concerning violations of fundamental rights that allegedly occurred during the states of emergency in Ukraine, France, and Turkey, a truly effective supervisory role would first require that the ECHR reaffirm itself as the primary judge on Article 15 conditions, moving beyond the overly generous margin of discretion given to contracting States. Scholars have already persuasively argued how the deferential approach of the ECHR reflected in the margin of discretion has led European judges to accept—without sufficient independent scrutiny—a government's submissions.²¹² With regard to future applications linked to the Ukrainian, French, and Turkish situations, further delegating to States the interpretation of Article 15 conditions, under a broad grant of discretion, would confirm the ECHR's reluctance to establish clear and objective criteria for derogation in the event of an exceptional threat. Reliance on a wide margin of discretion would also further evidence the ECHR's abdication of its responsibility to deal with difficult and intricate cases.²¹³ By contrast, in determining the presence of a public emergency and the scope of the derogation required to avert it, stricter scrutiny of the requirements under Article 15 would enhance the ECHR's authority vis-à-vis domestic authorities. In so doing, by claiming its competence over the primary assessment of the existence of an emergency and special laws adopted by States, the ECHR would also represent to governments that national interests may be safeguarded through less radical and non-emotional measures that do not require drastic derogations from the Convention.

A substantive scrutiny of the conditions for the derogation from the Convention obligations would also require a more critical approach towards the length of the state of emergency. Despite prolonged crises presenting the greatest threats to the protection of fundamental rights in the ECHR's jurisprudence, a long-lasting emergency does not automatically deprive a derogation of its validity. The ECHR has argued that the duration of the state of emergency is only one of the factors that it takes into account in the evaluation of the necessity of the special measures.²¹⁴ Nevertheless, in determining the conditions under Article 15, it has not given excessive weight to long-term crises. European judges have considered significantly long-lasting emergencies in both the UK and Turkey to fall in line with the requirements of the derogation clause.²¹⁵ In the *Marshall* case, the ECHR found that the detention of the applicant without judicial intervention in 1998 was not a breach of Article 5 because British authorities had submitted a derogation ten years before.²¹⁶ This study has shown how one of the common elements to the situations in Turkey, Ukraine, and France, is that derogations have been renewed several times. Ukraine has indeed not shown any intent to end the emergency, which started four years ago. On January 19, 2018, Turkey notified the Council of Europe of an additional three-month extension of the emergency, which began in 2016. With regard to the situation in Turkey after the failed coup, the Venice Commission highlighted the risk of a "permanentisation" of those special measures that have a strong effect on the protection of fundamental rights.²¹⁷ In France, despite the public emergency ending after two years, the recently adopted counter terrorism measures present a risk of normalizing the state of emergency. Avoiding the paradoxical existence of quasi-permanent states of emergency²¹⁸

²¹²Fionnuala Ní Aolain, *The Emergence of Diversity Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L. L.J. 101, 115 (1995).

²¹³Gross & Ní Aolain, *supra* note 24, at 628.

²¹⁴*Brannigan and McBride*, App. No. 14553/89, 14554/89 at para. 43.

²¹⁵*See Marshall*, App. No. 41571/98; *Aksoy*, App. No. 21987/93 at paras. 69–70.

²¹⁶*Marshall*, App. No. 41571/98.

²¹⁷Eur. Consult. Ass., *supra* note 103, at para. 155.

²¹⁸On the permanent state of emergency, see GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Univ. of Chi. Press 2005).

requires a stricter approach to the derogation clause that would prevent national authorities from abusing their faculty to suspend human rights norms while simultaneously emphasizing that an emergency should only be temporary and limited.

Another note concerns the procedural condition of the notification to the Council of Europe. French and Turkish derogations appear extremely vague, as they avoid informing the Council of Europe about the fundamental rights to be derogated and why the adopted special measures are strictly required by the exigencies of the situation. As evidenced by the widespread application of exceptional measures in both Turkey and France, overly broad derogations constitute a *carte blanche* for the executive power to vest itself with a huge discretionary authority in the limitation of fundamental rights.²¹⁹ Nevertheless, the vagueness of a derogation submission does not appear to have any relevance before the European Commission of Human Rights and the ECHR. The same Commission found that the letter from Irish authorities was a sufficient notification for the purposes of Article 15 although it did not have the character of a notice of derogation and had not been submitted by the government for the purpose of registering a formal notice of derogation. On the contrary, only detailed and exhaustive communications of the special measures, a clear indication of the reasons why those measures are necessary to tackle the public emergency, and a list of the fundamental rights affected by the exceptional legislation may ensure meticulous oversight by the European judicial body.

Finally, an effective supervision in a context of crisis should entail that the ECHR reviews its formalistic approach to ascertain an admissibility requirement, notably, the exhaustion of all domestic remedies. On the basis of this strict interpretation of the subsidiary nature of the ECHR, European judges rejected more than 27,000 applications related to the Turkish coup. The main reason behind the ECHR's conservative interpretation of Article 35 appears to be the intent to significantly reduce the overwhelming number of pending cases.²²⁰ In addition, it should not be overlooked that the massive character of this rejection is politically motivated, as these decisions seemingly constitute a concession to strong pressures from contracting States that are reluctant to accept Strasbourg's interference, particularly in a situation of emergency. Indeed, the Strasbourg position underestimates the difficult context in which the judicial power has been working since the coup attempt. These decisions further overlook the fact that after almost two years of a state of emergency in Turkey, there has been a systematic failure to provide effective domestic remedies to individuals affected by special measures that are free from any judicial review.

In interpreting Article 35 of the Convention, the European jurisprudence has established that a national recourse must be "available and sufficient to afford redress in respect of the breaches alleged."²²¹ Domestic remedies, according to the ECHR, must be sufficiently certain not only in theory, but also in practice, in order to satisfy the requisite accessibility and effectiveness.²²² Nevertheless, such an interpretation of Article 35 risks being a purely rhetorical exercise in situations of emergency if the ECHR does not halt its overall disengagement. In contrast, an appropriate interpretative position would give proper weight to the context in which judicial or quasi-judicial bodies must assess alleged violations of fundamental rights. The ECHR cannot rely on an interpretation of Article 35 that is confined to ascertaining whether there are domestic recourses for the applicant without strictly addressing the key question of whether and to what extent these remedies are effective. The Turkish context confirms that in an emergency, domestic

²¹⁹With regard to France, see in particular Vasiliki Saranti, *L'état d'urgence en droit international : qu'est-ce qui a changé depuis « la guerre contre le terrorisme »?*, JOURNAL DU DROIT ADMINISTRATIF (2016), <http://www.journal-du-droit-administratif.fr/?p=118>.

²²⁰Emre Turkut, *The Köksal Case Before the Strasbourg Court: A Pattern of Violations or a Mere Aberration?*, STRASBOURG OBSERVERS (Aug. 2, 2017) <https://strasbourgobservers.com/2017/08/02/the-koksal-case-before-the-strasbourg-court-a-pattern-of-violations-or-a-mere-aberration/>.

²²¹*Akdivar and others*, App. No. 21893/93 at para. 66; *Dalia*, App. No. 154/1996/773/974 at para. 38.

²²²*Akdivar*, App. No. 21893/93 at para. 66.

courts are unwilling and/or unable to ensure effective oversight of special measures that significantly affect the protection of fundamental rights and civil liberties. During crises, domestic judges may even have a complacent attitude towards a government's discretionary exercise of power.

Therefore, to conclude, in evaluating the accessibility and effectiveness of domestic remedies, Strasbourg judges should take into account the general legal and political contexts, particularly, whether judicial bodies work in a climate of intimidation and political pressure that prevents them from examining individual complaints in an independent and impartial way. In light of the fragility of the domestic judiciary, Strasbourg may constitute the only counter-power capable of limiting abuses by the State perpetrated under the umbrella of national security.