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UNTANGLING THE EXTRADITION CASE OF FETO

HASAN YÜCEL





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ABSTRACT

The extradition of Fetullah Gulen has been a controversial issue in the bilateral relations between the United States and Turkey. This paper focuses on the bilateral extradition treaty as well as the national and international law to analyze the extradition process. First, it presents the background information and the role of the perpetrator on the coup attempt on 15 July 2016 based on the prosecution's case in Turkey. This paper aims to discuss the ramifications of the Fetullahist Terror Organization (hereinafter 'FETO') as well as the legal and political measures taken by the Turkish authorities against this organization both before and after the coup attempt. The influence of the leader of this organization over the coup plotters is crucial to understand the chain of command inside the organization. By referring to the evidence presented by the Turkish prosecutors, this paper shows the direct responsibility of the head of the organization in the commission of the most heinous crimes on 15 July 2016. Second, the paper focuses on the extradition treaty as the legal basis of the extradition process in international law. It also concludes why it is not possible and recommendable to acknowledge the actions of FETO as political crimes. At this point in the extradition process, the Department of Justice of the United States still examines the case with regard to whether the head of FETO and other members are extraditable. The Turkish government expects that the Department of Justice will grant the extradition request and refer to a local court. However, there are fundamental consequences that are measured in the short and long term, if the United States authorities refuse to hand over to a local court in order to take a step in the extradition process.



The analysis focuses on the bilateral extradition treaty between the United States and Turkey as well as the national and international law to analyze the extradition process of Fetullah Gulen.

INTRODUCTION

The extradition of Fetullah Gulen has been a contentious and politically toxic issue in the bilateral relations between the United States and Turkey.¹ This paper has a twofold objective in relation to this extradition case. First, it presents the background information and the role of the perpetrator on the coup attempt on 15 July 2016 based on the prosecution's cases in Turkey. Second, it endeavors to explain the obligations of both countries on the issue of extradition arising from the bilateral extradition treaty as well as the national and international law.

The proper definition of the concept of extradition offers a starting point in this discussion. The term “extradition” (or often used as “rendition”) is described as a legal concept. It is defined as “the surrender of a criminal by a foreign state to which he has fled for refuge from prosecution to the state within whose

1. David Kenner, “The Public Trial of Fetullah Gulen”, *Foreign Policy*, 18 July 2016. [What's clear enough is that the question could be a central issue in U.S.-Turkish relations for years to come.]

jurisdiction the crime was committed, upon the demand of the latter state, so that he may be dealt with according to its laws.”² It is essential to briefly introduce the legal nature of this term. At first glance, an extradition is a sovereign act of a State; therefore, the authority to decide an extradition request rests with the national authorities of the requested State. However, States should also take into account the commitments to the international norms and agreements in relation to extradition in addition to bilateral agreements, if any exists. The effectiveness of the criminal justice is the key point in understanding the concept of extradition. For instance, the International Law Commission, one of the authoritative sources in international law, identifies the aim of extradition as “a means to ensure the effectiveness of criminal jurisdiction.”³

Although many suggest that this issue must be dealt with under the US law, it is important to analyze the extradition process by examining the obligations of the state parties arising from a particular extradition treaty under international law. Turkey and the US signed an international agreement (also known as a treaty⁴) on this issue. The “Treaty on Extradition and Mutual Assistance in Criminal Matters” was signed in Ankara on 7 June 1979.⁵ In the following section, the applicable provisions of this Treaty will be analyzed in light of the crimes committed on 15 July 2016 as alleged by Turkish prosecutors.

2. “What is EXTRADITION?”, The Law Dictionary, <http://thelawdictionary.org/extradition/>, (Accessed: 16 November 2017); “9-15.700 Foreign Extradition Requests.” U.S. Department of Justice, <https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters>.

3. “The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)”, Final Report of the International Law Commission, 2014 .p. 4

4. ‘International agreement’, ‘treaty’ or ‘convention’ are generally used interchangeably in international law. See Luban, David. *International and transnational criminal law*. Wolters Kluwer Law & Business, 2014, p. 43-44.

5. The Treaty on Extradition and Mutual Assistance in Criminal Matters between the United States of America and the Republic of Turkey, Entered into force on 1 January 1981, 32 U.S.T. 3111.

This paper will analyze the case of one of the subjects of the extradition case between the US and Turkey. The criminal or the prime suspect⁶ is Fetullah Gulen, who has been living in self-imposed exile in the US for 17 years, and Turkey is the state demanding the US to extradite him because of the crimes committed by him or his organization, Fetullahist Terror Organization (hereinafter ‘FETO’). This paper aims to discuss the ramifications of the FETO case as well as the legal and political measures taken by the Turkish authorities against this organization.

The analysis in this paper mainly relies on primary legal sources, official statements, interviews and scholarly works. For instance, Turkish judiciary has been working extensively to bring justice, ascertaining the facts in connection with the coup attempt. Turkish public prosecutors in different parts of Turkey (hereinafter “prosecution”) have issued several indictments charging a number of crimes committed on 15 July 2016. Some of the evidence presented in these indictments will be explained in the following sections. Also, this research made use of the judgments delivered by the Turkish Court. Moreover, several interviews were conducted to obtain details in relation to the extradition process from officials of the Ministry of Justice in Turkey. The credibility and reliability of the evidence collected by the prosecution, the facts of the coup attempt which were established by the judgments of the High Courts in Turkey, and the information given by the officials serve as an important source in the methodology of this analysis.

6. The *trial in absentia* of Fetullah Gulen begins in several cases prosecuting the accused of coup attempt in Turkey. This paper will refer him as ‘accused’, ‘prime suspect’, ‘criminal’ interchangeably since the prosecutors in Turkey ranked him as the first suspect for the crimes committed on the night of July 15. As noted in the following section, the facts related to FETO were established before national courts and the High Court (Court of Cassation) in Turkey upheld this judgment.

FETO AS THE PERPETRATOR OF THE JULY 15 COUP ATTEMPT

Legal and Political Measures against the FETO before the Coup Attempt

This section attempts to explain how Turkish authorities had treated FETO before the coup attempt. It starts by presenting a brief history of the term FETO by focusing on the decisions and statements of the high-level Turkish authorities, including from the National Intelligence Organization, the Presidency, the National Security Council and the Judiciary. Then, it will conclude that the name ‘FETO’ was coined and in use before the coup attempt, indicating that the designation of FETO as a terror organization was the product of a long legal and political process.

FETO introduced itself under various different concepts; such as “*hizmet* (service),” “*hizmet hareketi* (movement)” “*cemaat* (religious community),” or “*camia* (group).” Although the group used to call itself “*cemaat*”, it generally went to great lengths to prevent itself from being named as a legal entity established and recognized as such in Turkish law. To some degree, it was difficult to conceptualize FETO, both legally and politically, not only for Turkish society but also for international audiences. However, the Turkish judiciary has acknowledged from the evidence presented before the courts that the legal nature of this organization is, in fact, a terrorist organization.

The indictment presented in a criminal trial named as Çatı case laid out a list of reasons underlining that FETO has the capacity to engage in terrorist acts. First, terror acts had been committed by a group of people sympathizing with the ideology of Fetullah Gulen. Second, the prosecution frequently drew attention to the hierarchical nature of the organization, in which members are divided into a number of groups based

on their tasks. Third, this structure maintains a high level of secrecy to prevent their actions – especially their illegal activities inside state institutions – from being public. As it will be discovered in the following paragraphs, the illegality of these actions is shown on the account that it harms the relationships between the officials in the chain of command in the army or in other state institutions. In other words, the order given by a Gulenist official is unlawful because it is based on another motivation rather than a legal basis. Undoubtedly, the July 15 coup attempt is the greatest example identifying this organization as a terrorist organization since FETO targeted civilians indiscriminately in an attempt to accomplish its goal to overturn the state system.

The leader of FETO, Fetullah Gulen, has faced criminal trials several times in Turkey. First, Gulen was arrested during the military coup in 1971 and then, six months later, he was released.⁷ In 1986, he was arrested and released afterwards. Another development on his criminal record was noted as the investigation initiated by the Ankara Public Prosecution Office in 1999 when he fled to the US. In 2000, his trial began after the he was indicted with establishing and leading a terror organization was presented. However, all of these charges were dropped in 2008 because of the amendment on the anti-terror law adopted in 2006.⁸

Several conclusions can be made from these earlier cases. First, it should be noted that Gulen fled from Turkey to the US soon before his trial began in Turkey without informing the US authorities that there was an ongoing criminal investigation on his organizational activities. Also, it is observed that the Turkish prosecutors

started to maintain his criminal records at the time. These developments play an important role when analyzing the cases against Gulen in relation to the July 15 coup attempt. After the coup attempt, the Turkish prosecutors have referred to the evidence collected in these early cases.

The structure of FETO has complex ramifications. According to the prosecution, one part of this structure operates “under a legal entity,” and the other part functions as “a parallel state” without being subject to any legal inspections or oversight. In this twofold structure inside the organization, it is essential to understand the concept of the parallel state in which the members of FETO are receiving orders from their unofficial and illegal chief or “*abi*” (brother) and not from their legally appointed superiors, as part of a structure designed by the FETO organization itself.

FETO’s influence on state authorities as a parallel state means that the organization is “trying to co-opt Turkish institutions to [Gulen’s] own ends.”⁹ This influence diminished after 17 December 2013 when their political attempt failed to take down the elected government by launching several synchronized corruption investigations against high-level government officials. This was the moment when the civilian government began to combat FETO activities and intensified its operations after the November 1 elections by making administrative decisions against Gulenist officials. Firstly, the financial sources of the organization were cut down. Secondly, the high-level Gulenist¹⁰ officials who were in critical positions were reassigned to other offices or removed from office. In fact, these measures were considered as one of the primary motivations of the coup attempt since it was understood that the only option for FETO to keep its power was to organize a coup. Other motivations may have

7. Murat Bilginçan, “Everything you’ve ever wanted to know about Fethullah Gulen, Turkey’s most controversial cleric”, *Al-Monitor*, <http://fares.al-monitor.com/pulse/en/originals/2016/04/turkey-fethullah-gulen-cleric-opposition-erdogan-akp.html>, (Accessed: 21 November 2017).

8. Court of Cassation of Turkey, General Board of Criminal Department, 24.06.2008, E. 2008/82 K. 2008/181.

9. David Kenner, “The Public Trial of Fethullah Gulen”, *Foreign Policy*, 18 July 2016.

10. The word ‘Gulenist’ indicate the people who affiliate or become loyal to Fethullah Gulen.

played a significant role in the planning of the coup but the leading one was certainly the desire to take over the government and the state. The government's plan to remove high-level military officials from the military probably accelerated their plans to undermine and takeover the government.

Following the 17 December 2013 operations, high-level Turkish authorities acknowledged them as 'actions against the government.' The most crucially, the National Security Council defined the parallel state as a "threat to the national security" by referring to the Gulen organization in 2014.¹¹ The Turkish President emphasized the need to combat this group.¹² The Turkish state bureaucracy as a whole acted together to fight against this threat. The Turkish security forces labeled the group as a terror organization in 2015.¹³ The Turkish executive authority promptly reacted to this potential threat.

A Turkish criminal court issued a warrant for the arrest of Fetullah Gulen on 19 December 2014. Turkish judiciary introduced this organization as a terror organization for the first time in the indictment presented by the prosecution in 2015.¹⁴ Therefore, the term FETO or any definition of this organization within a concept of a terror organization is dated back before the coup attempt on 15 July 2016. This is significant because the terror designation for this group was not simply the result of the July 15 failed coup attempt but the result of prior legal cases and Turkish National Security Council's declarations.

11. Serkan Demirtaş, "MGK: Paralel Yapı Ulusal Güvenliğe Tehdit", *BBC Türkçe*, http://www.bbc.com/turkce/haberler/2014/02/140226_mgkkarari_analiz, (Accessed on 21 November 2017).

12. "MGK'da Paralel Devlet Yapılanması ve İlegal Oluşumlara Karşı Mücadele Vurgusu", *Türkiye Cumhuriyeti Cumhurbaşkanlığı*, <https://tccb.gov.tr/haberler/410/32237/mgkda-paralel-devlet-yapilanmasi-ve-illegal-olusumlara-karsi-mucadele-vurgusu.html>, (Accessed on 21 November 2017).

13. "İstanbul Emniyeti İlk Kez 'FETÖ' dedi", *Hürriyet*, 21 February 2015.

14. "Fetullahçı Terör Örgütü kabul", *Hürriyet*, 10 April 2015.

Judicial Developments in Turkey on FETO Following the July 15 Coup Attempt

The investigations and trial proceedings have been conducted in a two manners. The first one includes the types of cases concentrating on the crimes committed on the night of 15 July 2016. The subjects of these early investigations and trials were the soldiers who actively joined the coup attempt, and the prosecution in Ankara initiated the investigation process at 11:20 AM on 15 July 2016. As time passed the number of soldiers in this investigation increased.

In the Akıncı indictment, one of the most prominent indictments, the prime suspect Fetullah Gulen was charged with 13 counts.

The second one is called "combatting FETO" with a particular focus on its parallel structure in the state institutions in Turkey. The Gulenist suspects in these cases included, among others, police officers, academics, judges, and prosecutors. The group of cases in relation to the non-military structure started with the investigations about the people who prepared and conducted the aforementioned operations against the government on 17 December 2013. Although the initial cases were brought before July 15, the coup attempt led the type of cases to broaden in scope, including more accused people tied to Gulen.

The prosecution has collected evidence to reach a guilty verdict of Gulen beyond reasonable doubt for many grave and heinous crimes, including acts of terrorism. In the *Akıncı indictment*, one of the most prominent indictments, the prime suspect Fetullah Gulen was charged with 13 counts including violation of the constitution, attempt to assassinate the president, at-

tempt to oust the government, leading an armed terrorist organization, taking over the military command structure, deliberate killings, damage to property and public goods, endangering the security of people, damaging places of worship, and deprivation of liberty.

Over 50,000 people including police officers, military officers, judges, and prosecutors have been arrested.¹⁵ Approximately 160 different cases were brought against coup plotters and people allegedly linked to FETO.¹⁶ For the past 15 months, the judiciary has expended efforts to try these people for the crimes linked to FETO. Certain cases were finalized and appellate courts in Turkey upheld the final judgment.¹⁷ Having reviewed the conviction of several military members, the Court of Cassation, as the appellate court, upheld the judgment delivered by the local court in Erzurum, Turkey.¹⁸ Thus, the evidence against FETO and its members was confirmed by the Court of Cassation as the appellate court at the highest level.

The Direct Evidence Proving the Involvement of FETO in the Coup Attempt

First, the involvement of FETO could be explained by describing the influence of Gulen and the Gulenists over the coup plotters. The influence of Gulen's followers in the Turkish military dates back to the 1970s. The Çatı indictment noted the beginning of the early investigations in 1982 in which around 90 students were expelled from a military high school (*Kuleli Askeri Lisesi*) based on their affiliations with the Gulen movement. This decision was later reversed and some of them continued their studies. The *Cati* indictment further noted that six of these students

were later actively involved in the July 15 coup. The influence of FETO in state institutions, businesses, public and private sector increased in the following years. Evidence was fabricated by Gulen followers in the police and the judiciary to prosecute individuals with the aim to reduce the influence of Gulen in the army. However, it was revealed that targeting those individuals one of the means to deepen FETO's influences in the military by removing non-Gulenist officials. Consequently, this paved the way for FETO's influence in the Turkish army to dramatically increase from 1970s to 2010s.

Secondly, FETO participated in the commission of the aforementioned crimes on 15-16 July 2016. The prosecution stated that Fetullah Gulen led and organized the coup attempt before Turkish national courts presenting evidence, including video recordings and witness testimonies. The Chief of Staff General Hulusi Akar stated that one of the coup plotters, Hakan Evrim, said, "I can put you in contact with our opinion leader Fetullah Gulen" on the night of 15 July.¹⁹ The prosecution considered this evidence as authentic and credible, a view also supported by experts.²⁰ Moreover, many of the coup plotters were linked to the FETO and the prosecution revealed that these coup planners joined meetings organized by the followers of Fetullah Gulen. Dani Rodrik, an economist at Harvard University, summarizes this substantial influence as follows:

What's more important is the degree to which Gulenists have been able to control key points: they have been in charge of the legal department of the military for example, and their sympathizers are disproportion-

15. "50,000 arrested, 55,000 released pending trial in fight against FETÖ", *Daily Sabah*, 14 June 2017.

16. "Batmaz en az Öksüz kadar önemlidir", *Milliyet*, 20 October 2017.

17. "FETÖ/PDY davasında 2 ceza kesinleşti", *Hürriyet*, 31 April 2015.

18. Court of Cassation, 16th Penal Chamber, E. 2017/1779, K. 2017/4841.

19. In the *Akıncı* indictment, the Prosecution acknowledges this written statement as evidence. However, Hakan Evrim challenged this part of the statement in his trial.

20. Jared Malsin, "How Erdogan United Turkey Against Fethullah Gulen", *Time*, 28 July 2016. [Dani Rodrik, an economist at Harvard's Kennedy School who has studied Gulenist involvement in the Turkish state, says it is possible that the documentation of Akar's testimony could have been doctored, but it appears authentic in his view.]

onately represented among aides-de-camp of the most senior generals. There is good reason to believe that a majority of the officers promoted after 2008-2009 have been Gulenists.²¹

In some cases, alleged perpetrators have pleaded guilty before courts by stating their ties with FETO. Lieutenant Colonel Levent Türkkan admitted to taking orders from ‘brother’ as a member of FETO.²² Brigadier General Özkan Aydoğdu, who worked as the commander of the 2nd Armored Brigade in Istanbul, stated that “I have been raised to follow orders and I strive to fulfill orders. I followed an order that I believed to be legitimate.”²³ Oğuz Haksal, who served as a non-commissioned officer, joined the team raiding the Moda Social Club during the coup attempt, and he pleaded guilty by stating that he conducted this operation under instructions from FETO member Yılmaz Bahar.²⁴ Confessing his ties in the organization, Gursel Aktepe, who served as a Turkish deputy police chief in Ankara, revealed the plans for the coup attempt as follows:

We received messages via a messaging app called Tango... The message read: ‘The coup is underway. Everybody should go out for support, stay close to their former workplaces and get in touch with General Mehmet.’²⁵

The involvement of FETO permeates within different branches of the Turkish Army. For example, in the Gendermerie, Major Erhan Karlıdağ, who served as a former head of the intelligence unit at the Gendarmerie’s provincial

headquarters in Ankara, stated that “FETO orchestrated the coup attempt. We received word that a list of 3,000 people had been compiled [by the authorities] and that we would be discharged at the Supreme Military Council [YAŞ] meeting in August 2016.”²⁶ As to the involvement in the judiciary, Ebubekir Başel, a former judge at the Council of State, expressed his ties in detail, admitting the role that he played to facilitate the admission of followers into military schools.²⁷ In other governmental institutions, Mustafa Koçyiğit, who served as a specialist at the Prime Minister’s office, told the investigators that he provided secret information on state affairs to ‘brothers.’²⁸

Moreover, certain FETO members were working to provide external support to the coup attempt. For instance, Kemal Isikli, who was an expert at the Banking Regulation and Supervision Agency, served as a ‘brother’ taking care of the SAT (Turkish Navy Special Forces) staff.²⁹ It was later revealed that some of the staff members were among those who raided President Erdoğan’s hotel in Marmaris on July 15.³⁰

As to the criminals responsible, this involvement could further be explained by referring to the notion of ‘co-perpetration.’ Other high-level FETO members joined the preparation, organization and perpetration of the coup. Therefore, it is important to introduce these high-level members who are accused of these serious crimes.

Based on the evidence collected from eyewitnesses,³¹ the most significant meeting was held in a villa in Ankara Konutkent where the

21. Ibid.

22. “Details of July 15 failed coup emerge as testimonies of soldiers exposed”, *Daily Sabah*, 29 July 2016.

23. İbrahim Kalın, “New political consensus after coup in Turkey”, *Daily Sabah*, 3 August 2016.

24. Yunus Emre Kavak, Halit Turan, “FETÖ emretti biz yaptık”, *Sabah*, 29 July 2016.

25. Sedat Ergin, “When will the judgment be made in the most important Turkey coup attempt case?”, *Hürriyet Daily News*; “Eski İstihbarat Daire Başkan Yardımcısı Gürsel Aktepe itirafçı oldu”, *Habertürk*, 24 July 2016.

26. İbrahim Kalın, “New political consensus after coup in Turkey”, *Daily Sabah*, 3 August 2016.

27. “Danıştay hakiminden sarsıcı itiraflar”, *Hürriyet*, 23 July 2016.

28. “Mustafa Koçyiğit’ten fuatavni itirafı”, *A Haber*, 26 July 2016.

29. Hale Türkes, “Testimonies reveal Gulen’s role in Turkey’s failed coup”, *Anadolu Agency*, 28 July 2016; <http://aa.com.tr/en/todays-headlines/testimonies-reveal-gulen-s-role-in-turkeys-failed-coup/617638>; (Accessed: 21 November 2017).

30. Ibid.

31. The Izmir Courts later identified these eyewitnesses as Halil İbrahim Yıldız and Hakan Bıyık who were former military officials.

main coup plotters gathered with Adil Öksüz. He organized these meetings on 6, 7, 8 and 9 July 2016 to plan the coup. Most importantly, Öksüz had a phone call with Fetullah Gulen during these meetings and then conveyed messages from Fetullah Gulen to the participants. Öksüz was unequivocally a high-level FETO member as an “air force imam” who connected the Turkish Air Force to Fetullah Gulen. Even Fetullah Gulen admits Öksüz visiting compound where Gulen lives in Pennsylvania.³²

The prosecution collected different types of evidence proving the allegations, including direct, documentary, and physical evidence. One important piece of evidence proving the direct influence of FETO in the coup attempt is security camera footage from the Akıncı Military Base showing Adil Öksüz and Kemal Batmaz, two key coup figures, walking freely inside the military base’s command floor. Öksüz even received a military salute from a military officer. Both Öksüz and Batmaz are civilians and they should not be allowed to move freely in the corridors of a military base, let alone receive salutes from military personnel. Consequently, their substantial participation in the coup attempt is evident in the Akıncı case.

The civilian part of this organized attack is worth exploring for a complete understanding of the coup attempt since it links to the FETO organization. As listed above, Adil Öksüz, Kemal Batmaz, Nurettin Oruc, Hakan Cicek, and Harun Binis were taken into custody at the Akıncı base following the failure of the coup attempt. They had no official affiliation with the Army, however they went to the Akıncı base to lead the coup. Each of them had a specific role in preparation and operation of the plan. Once more, Öksüz and other civilian imams provided a direct link for communication between coup

plotters from the military and Fetullah Gulen. Kemal Batmaz, another high-level imam, went to the Akıncı base on the night of July 15. Hakan Cicek, the Land Forces imam, was also apprehended in the Akıncı base. Nurettin Oruc, the Gendarmerie imam, spent the night in the Akıncı base as well.

The US authorities confirmed a critical piece of evidence linking the coup plotters to Gulen himself. The US Customs and Border Protection Agency (USCBP) conducted a security interview with Kemal Batmaz about his multiple arrivals in the US. The intimate link between the leader of the FETO and Kemal Batmaz who was seen at the base on 15 July 2016 was established as follows in an interview report written by the USCIS:

The subject was also bringing \$7,000 USD into the USA, which he states is for his personal use... He [Batmaz] will stay the first night at Riviera Hotel: 169 Clinton Ave Newark NJ. The rest of the time he will stay with Imam Muhammed Fethullah Gulen in Pennsylvania. Subject stated his friend, Ismail Celik, will pick him up tonight and take him to his hotel. He stated his other friend, Yavuz Ulusoy, will take him to the home of Muhammed Fetullah Gulen.³³

According to this note, it is safe to say that there was a clear relationship between Batmaz, a civilian who happened to be at the Akıncı Military Base and the prime suspect of the coup attempt, Fetullah Gulen. This is expected to help the judicial authorities to resolve the puzzle of the coup attempt in the criminal cases in Turkey.³⁴

This section has examined the question of the involvement of FETO in the organization, preparation and perpetration of the crimes committed on the night of July 15. The methodology employed in its study is based on the evidence brought by the prosecution in Turkey and the of-

32. “Exclusif : Gülen a rencontré un homme lié au coup d’État, mais rejette les accusations d’Erdogan”, *France 24*, 18 July 2017.

33. “Kemal Batmaz, mastermind of July 15 coup bid, stayed as a guest in Gülen’s US residence, the document reveals”, *A Haber*, 4 October 2017.

34. Sedat Ergin, “Kemal Batmaz stayed with Gülen in Pennsylvania”, *Hürriyet Daily News*, 5 October 2017.

ficial documents submitted by the US authorities. They were examined chronologically.

Based on the evidence presented above, this section observes the highly developed Gulenist chain of command within the different branches of the State. The influential role of FETO increased throughout the years, reaching a level that allowed it to attempt to take down the government, and therefore committing a number of serious crimes. Preponderance of evidence renders it impossible to rule out that the leader of FETO did not know or approve of the coup plan.

Criminal Responsibility of Fetullah Gulen

In the *Akıncı* indictment and other cases, the prosecution charges that Fetullah Gulen, as the mastermind of the coup attempt, bears individual criminal responsibility for his principle involvement in the coup under Article 37 of the Turkish Criminal Code.³⁵ The observation of the prosecution in the *Darbe Çatı* indictment further details the criminal responsibility of Fetullah Gulen and the coup plotters.

First, the prosecution identifies the applicable law as Article 309 of the Turkish Criminal Code penalizing the violation of the constitution. The protected value in this provision is the ‘constitutional order’ which is similar to the concept of ‘crimes against the government’ in the US legal system. A perpetrator must deliberately use available means to abolish, replace or prevent the implementation of the constitutional order by using force and violence. The prosecution found evidence in regards to three specific counts of crimes committed against the constitutional order: “attempt to violate the constitu-

tion,” “attempt to assassinate the President,” and “attempt to abolish the Turkish Grand National Assembly.” The protected values in these types of crimes violate constitutional order, constitutional principles and operation of constitutional rules. The victims of these crimes are, among others, the President and the Turkish Parliament. The prosecution’s account is instructive here to understand the legal basis of the coup d’etat.

In all the cases related to the coup attempt, it was found that the offenses were committed through the Turkish Army by using arms. Moreover, the chief of General Staff and many others were taken hostage during the coup. The prosecution undoubtedly considers the arms used as an available means to commit these crimes, particularly utilizing helicopters and F-16s.

Before the national courts in Turkey, the prosecution provided evidence, including video recordings and testimonies, that Fetullah Gulen led and organized the coup attempt.

As to the criminal responsibility of the accused plotters, the prosecution argues that these crimes amount to the Turkish term *fikri ictima*,³⁶ which is translated as ‘formal aggression’ or ‘conceptual aggression.’ The Turkish Criminal Code excluded an accumulation of different charges, if a crime against the constitutional order is committed. It requires that the rest of the crimes are dealt with individually.³⁷ For this reason,

35. Article 37 of the Turkish Criminal Code. [(1) Any person who jointly performs and act prescribed by law as an offence shall be culpable as the offender of that act. (2) Any person who uses another as an instrument for the commission of an offence shall remain culpable as an offender. The penalty of a person who uses another as an instrument who lacks the capacity of acting with fault shall be increased by one-third to one-half. (Non-official translation from Turkish)]

36. See Ansay, Tuğrul, and Don Wallace, *Introduction to Turkish law*. Kluwer law international, 2011, page 202. [According to Article 44, a person who commits more than one offence through a single act shall only be sentenced for the crime which requires the heaviest punishment.]

37. Article 309 (2): Where any other offenses are committed during the commission of this offence, an additional penalty for such offenses shall be imposed according to the relevant provisions.

the prosecution separately analyzes “intentional killing,” “attempt to murder,” and “deprivation of liberty” as different from crimes committed against the constitutional order.

The prosecution also examined whether additional crimes are charged as crimes against the constitutional order. The crime of “establishing armed organization” is also mentioned as an individual count. The prosecution also brings another count of “damaging the property,” referring to the jurisprudence of the Court of Cassation. The prosecution did not charge the accused people for “usurping military command” in the Çatı case, while, in the *Akıncı* case, they were charged on an indictment containing this count.

The idea in this section is to illustrate that the extent of the accusations against the plotters was not limited to the crimes committed against the constitutional order, which is frequently referred to as a political crime. Fetullah Gulen and many other high-level coup plotters had significant roles in the commission of other serious and violent crimes apart from those related to the violation of constitutional order.

Extraditable Crime under the Treaty

It is necessary to focus on FETO’s attempt to murder or assassinate the head of the state as one of the grounds for extradition. This special emphasis will reveal the organizational aspects of the coup attempt. Moreover, the plan plays a significant role in the extradition process, as it will be discussed in the following section. First, it is necessary to elaborate on the behaviors within the scope of “attempt to assassinate” to understand the actions of the organization to aim to kill the president, and then the discussion will turn into a brief explanation why the head of FETO would be held responsible.

To begin with the preparation process, the photos of the hotel and its environs in which the president stayed in Marmaris were taken in the air on 12 July 2016. On the day of the coup at-

tempt, it was reported that the coup plotters used these photos and coordinates to conduct an operation for the assassination. President After Erdogan was informed of the coup attempt he flew to Dalaman by helicopter then flew to Istanbul by plane. The goal of the plotters was to prevent the president’s flight from landing in Ankara. For this reason, it was noted in the indictment that several F-16s took off at 12:20 AM to chase the president’s plane.

On the day of the coup attempt, the hotel in Marmaris where President Erdogan was staying was shelled by a helicopter, and a group of around 15 soldiers captured the hotel at 4:42 AM on 16 July 2016. Former Brigadier Gen. Gokhan Sahin Sonmezates, one of the main coup plotters, led this group of soldiers. A firefight took place between the police at the hotel and the soldiers, leaving two police officers dead and several more wounded. The raid on the hotel occurred after President Erdogan had already left.

Prosecutors in Muğla initiated the investigation into the organization of this attack. Four months after the beginning of the investigation, the prosecution submitted an indictment with 211 pages charging 47 suspects for, among others, the crime of assassination of the President of the Turkish Republic.³⁸ The first trial was held on 20 February 2017 and the conviction came on 4 October 2017. While Lieutenant Colonel Hüseyin Yılmaz was acquitted from all charges, 40 accused people were given life sentence. Since the criminal courts cannot render a conviction of any suspect who has not been previously interrogated by a judge, the court ordered the separation of the files of Fetullah Gulen and several others from this case prosecuting the crime of assassination of the President. After this conviction, it is beyond the reasonable doubt that FETO attempted a crime of assassinating the president.

38. “Erdoğan’a suikast timinin yargılanmasına 20 Subat’ta başlanacak”, *Sputnik*, 20 December 2016.

The Extradition Process of FETO

In the history of US-Turkey relations, both countries have initiated extradition processes. Some of them resulted in extradition, according to the figures that were shown by the Ministry of Justice for the period of 2007-2016. Under the extradition Treaty, the US authorities requested extradition for three people in the scope of terrorism and Turkish authorities granted one of them.³⁹ In this period, Turkish authorities made an application for the extradition of eight suspects in the scope of terrorism. Only one of them was denied, none have been granted yet.⁴⁰ In 2016, Turkey requested six extraditions from the US based on terrorism charges and other crimes.⁴¹

Following the operations against the government on 17 December 2013, the Turkish President called for the deportation of Fetullah Gulen. From that date, President Erdogan and President Obama had the first dialogue in a phone conversation on 19 February 2014. Later, the two leaders agreed in the NATO Summit in Wales in September 2014 that the Turkey's National Intelligence Organization (MIT) and the US Central Intelligence Agency (CIA) would cooperate on the issues related to the organization of FETO which was regarded as a threat against Turkey in 2014.⁴² The following meeting was held in Antalya, Turkey under the umbrella of the G20 summit. President Erdogan urged the US authorities to deport Gulen.⁴³

The judicial extradition process commenced with the decisions delivered by local courts in Turkey. Mevlut Cavusoglu, the foreign minister of the Turkish Republic, briefly explained the judiciary process as follows:

39. T.C. Adalet Bakanlığı, Strateji Geliştirme Başkanlığı, *2016 Yılı Bakanlık Faaliyet Raporu*, (Ankara: 2016), p. 144.

40. Ibid., p. 143.

41. Ibid., p. 145.

42. "Turkey-US intel to cooperate, deportation of Gulen requested", *Daily Sabah*, 7 September 2014.

43. Merve Aydoğan, "Merkel, Obama asked to extradite fugitive prosecutors, Gulen", *Daily Sabah*, 17 November 2015.

... the Turkish Justice Ministry sent a request to the U.S. attorney general on July 19, four days after the coup, for the temporary arrest of Gulen based on four prosecutions in progress since 2014 and 2015. Fifty-one files of evidence collected during these investigations were also submitted to U.S. authorities on July 22, together with a request for Gulen's extradition to Turkey. An additional provisional arrest warrant was communicated to U.S. authorities on September 12, this time flowing from the judicial investigation of July 15 coup plot.⁴⁴

The process began in different stages based on different crimes committed by Gulen and other FETO members. To begin with, one of the early extradition requests were made before the coup attempt on grounds of the charges from four different cases, including the *Darbe Çatı* case.⁴⁵ In May 2016, a file, which charges Gulen on ground of eight different counts, was sent to the US authorities and these counts included aggravated fraud, forgery of official documents, defamation and illegal wiretapping.⁴⁶

Following the coup attempt, the extradition issue became one of the most important issues in Turkey since the new charges were issued by the Turkish prosecution. Four days after the coup attempt, the Ministry of Justice of Turkey sent four dossiers to the US authorities, officially requesting extradition of Gulen and demanding his provisional arrest.⁴⁷ The White House confirmed the formal request from Turkey on 19 July 2016.⁴⁸ The Justice Department of the US sent another letter on 7 August 2016, suggesting a meeting between delegations either in Ankara or Washington and

44. Mevlut Cavusoglu, "The United States Should Extradite Fetullah Gulen", *Foreign Policy*, 15 May 2017.

45. Interview with a Former Senior Official from the Directorate General for International Law and Foreign Relations, Republic of Turkey, the Ministry of Justice, 22 September 2017.

46. "Fetullah Gulen'in iade dosyası Adalet Bakanlığı'nda", *Hürriyet*, 15 July 2016.

47. "FETÖ elebaşı Gulen'in iade sürecinin bir yılı", *Anadolu Agency*, 11 July 2017.

48. "Turkey Formally Requests Extradition of Exiled Cleric Fetullah Gulen From US, Prime Minister Says", *ABC News*, 19 July 2016.

the Turkish authorities replied affirmatively, inviting a group delegation from the US.⁴⁹ Several meetings were held between officials on 22 and 23 August 2016 and each of these meetings lasted 8 or 9 hours.⁵⁰ The president repeatedly emphasized the vast amount of evidence by stating that the Turkish authorities submitted “85 boxes of documents regarding FETO’s activities before July 15.”⁵¹ These 85 boxes consist of four different cases and each of these cases was sent with three copies, one in Turkish and the other two in English.⁵²

On 23 August 2016, the Department of State clarified the extradition request from Turkey, stating that the evidence was not based on the coup attempt.⁵³ Then on 10 September 2016, the Turkish authorities made another extradition request based on charges related to the July 15 coup attempt, demanding his provisional arrest.⁵⁴ Additionally, a number of high-level meetings between the Turkish Justice Ministry and Department of Justice have been held since then. In particular, President Erdogan has talked to President Trump on this issue several times. It is argued that the diplomatic process will continue until the Department of Justice makes a decision.

The Ministry of Justice in Turkey plans to make another extradition request from the US authorities after the judgment of the Marmaris case has been delivered.⁵⁵ In this case, two groups of pro-coup troops were prosecuted because they

were sent to Marmaris to assassinate President Erdogan.

The future of the extradition of Fetullah Gulen remains uncertain. Officials from the Department of Justice refrain from commenting on this issue.⁵⁶ The only information that has been made public so far is the fact that the Department of Justice is currently examining the case.⁵⁷ The public and the international community are not well informed concerning the extradition process. This questions the belief that two countries are in fact part of an alliance in a number of matters, including the cooperation in criminal matters.

TREATY OBLIGATIONS IN THE EXTRADITION PROCESS

Extradition Treaty between the US and Turkey

As the legal basis of the extradition process in international law, the Treaty on the extradition between the US and Turkey belongs to the realm of international law in which there is no international constabulary. In this respect, international law should not be conceived of as a national legal system. The enforcement of rules under international law is a controversial issue in its nature. In most cases, it is not certain what sanctions are applicable if a state violates the international law.⁵⁸

Both parties of the Treaty need to take into account that the Treaty is a source of public international law and as a binding instrument accepted in Turkish-American relations. This section aims to introduce the Treaty encompassing

49. “FETÖ elebaşı Gulen’in iade sürecinin bir yılı”, *Anadolu Agency*, 11 July 2017.

50. Ibid.

51. “Our biggest priority is the extradition of FETO leader as soon as possible”, *Presidency of the Republic of Turkey*, 24 August 2016.

52. Interview with a Former Senior Official from the Directorate General for International Law and Foreign Relations, Republic of Turkey, the Ministry of Justice, 22 September 2017.

53. Mark C. Toner, “Daily Press Briefing”, *U.S. Department of State*, 23 August 2016, <https://2009-2017.state.gov/t/pa/prs/dpb/2016/08/261220.htm>. (Accessed: 27 November 2017). [So we can confirm now that Turkey has requested the extradition of Mr. Gulen, but I wouldn’t characterize the request as relating to the coup attempt. In fact, they don’t relate to the 2016 attempted coup.]

54. “FETÖ elebaşı Gulen’in iade sürecinin bir yılı”, *Anadolu Agency*, 11 July 2017.

55. “Batmaz en az Öksüz kadar önemlidir”, *Milliyet*, 20 October 2017.

56. Laura Koran, “Turkey senses ‘willingness’ from Trump admin to take action against Gulen”, *CNN Politics*, 14 July 2017. <http://www.cnn.com/2017/07/14/politics/turkey-trump-gulen/index.html>. (Accessed: 27 November 2017).

57. Interview with a Former Senior Official from the Directorate General for International Law and Foreign Relations, Republic of Turkey, the Ministry of Justice, 22 September 2017.

58. For a detailed discussion questioning as to whether international law is real, see Luban, David. *International and transnational criminal law*. Wolters Kluwer Law & Business, 2014.

provisions on the extradition issue and mutual assistance on criminal matters.

Political Offense Exception

Political considerations of offences that are allegedly committed play a significant role in determining whether the extradition request is granted. It is argued that Gulen could not escape the political exception since the crimes that he is responsible for should not be considered within the scope of political crimes. However, many articles and reports do not support this opinion, favoring the political character of his alleged criminal accusations under Turkish law.⁵⁹ This section aims to explore to what extent he could be considered a political criminal.

59. Danny Cevallos, “After failed Turkey coup, must U.S. extradite cleric?”, *CNN Opinion*, 18 July 2016. <http://www.cnn.com/2016/07/18/opinions/gulen-turkey-coup-erdogan-cevallos/index.html>. (Accessed: 27 November 2017). [Would the Pennsylvania imam be entitled to political protection? Gulen has steadfastly denied any involvement in the coup. Turkey’s accusations could run the gamut though. Imagine, just for example a Turkish national in the United States provided moral encouragement and speech supportive of a coup in Turkey. That feels more like a purely political crime, and denying extradition would feel justified. After all, the United States does not like punishing speech in general, and particularly doesn’t like punishing political speech.]; Michael Werz, Max Hoffman, “The Process Behind Turkey’s Proposed Extradition of Fethullah Gulen”, *Center for American Progress*, 7 September 2016. [This exception would be relevant only if U.S. authorities were to determine that the extradition request was for a political offense—meaning that it would fall in a category such as treason or sedition, as opposed to violations of other provisions of criminal law—or if the extradition were sought on account of the political opinions of the fugitive, as opposed to bona fide reasons related to criminal law.]; Christopher Brennan, “Turkey pushes for extradition of controversial Poconos cleric”, *New York Daily News*, 16 May 2017, <http://www.nydailynews.com/news/world/turkey-pushes-extradition-controversial-poconos-cleric-article-1.3168530>, (Accessed: 27 November 2017). [Attorney and international extradition expert Douglas McNabb told the News that a potential legal battle would likely focus on a part of the U.S.-Turkey treaty that allows exceptions to extradition requests when offenses are of a “political character.” Charging Gulen with actions related to the coup would seem to fit in that political exception, and McNabb says that Turkey is more likely to succeed by charging him with a “regular” crime.]; Masood Farivar, “What Would it Take for US to Extradite Muslim Cleric to Turkey?”, *Voice of America*, 22 July 2016. <https://www.voanews.com/a/united-states-extradition-muslim-cleric-gulen-turkey/3430014.html>, (Accessed: 27 November 2017). [The way McNabb reads that language, an “offense committed or attempted against a Head of State or Head of Government” means a plot solely aimed at taking out a foreign leader. . . .”That’s not what occurred here,” McNabb said. “What occurred here was an uprising against the government and as part of that, there is an allegation that he tried to have him [Erdogan] assassinated.”]

The rule is to fulfill the obligation to extradite or prosecute (*aut dedere aut judicare*) criminals or suspects who committed serious crimes, provided that it satisfies the other technical requirements. Although the customary law status of this rule has been debated,⁶⁰ this rule has found strong support from states when concluding international agreements. The Extradition Treaty between the US and Turkey is one of them requiring extradition of criminals and suspects between these countries. As an exception of this general rule, political criminals are not extradited to the countries where they were treated as criminals on grounds of their political opinions and actions. The discussion on the political nature of the actions of FETO and the leader of this organization serves a principle role in the outcome of the extradition request. The applicable law regarding the political offense exception is laid down in Article 3 of the Treaty as follows:

(1) Extradition shall not be granted:

If the offense for which extradition is requested is regarded by the Requested Party to be of a political character or an offense connected with such an offense; or if the Requested Party concludes that the request for extradition has, in fact, been made to prosecute or punish the person sought for an offense of a political character or on account of his political opinions.

There are two forms of understanding of political crime as “purely political” or “relatively political offense.” The U.S. District Court for the Eastern District of New York explains this division as follows:

Pure political offenses are often specifically excluded from the list of extraditable crimes in a treaty (*Quinn v. Robinson*, 783 F.2d at 794). Even if the treaty is silent, courts generally agree that they do not provide a basis for extradition because the purpose of the political offense exception is to protect individuals’ rights to foster political change through relatively peaceful political activity.

60. “The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)”, Final Report of the International Law Commission, 2014, pp 16-17.

Petitioner's alleged offense of killing a civilian bus driver was not such an act...An act may be a "relative" political offense when it is an otherwise common crime committed as a political act or for political motives or in a political context.⁶¹

In this regard, a leading international criminal scholar, Cherif Bassiouni gives another significant understanding of this division:

When the law that was violated embodies the protection of sociopolitical structures and the actor, moved by a commitment to differing ideological values or beliefs, harms those interests without committing a "common crime," the offense is said to be "purely political." However, if such an offense also involves the commission of a "common crime," usually a private wrong, it ceases to be a purely political offense and could then be labeled either a "relative political offense" or a "common crime."⁶²

Undoubtedly, purely political crimes are not at issue in Gulen's extradition process according to aforementioned explanations from the case law and the scholarly works. This section will examine whether the crimes in question can be considered as relatively political crimes.

There are significant tests determining whether the claim of political crime can be maintained. First, the Anglo-American legal system focused on this notion of relatively political crime, applying certain tests when dealing with extradition cases. One of the tests is called 'incident test' which deems a crime political in character, "if they are incidental to and committed in the furtherance of a political disturbance."⁶³ The US could potentially refer to this test in the subsequent phase of the extradition process. In

this case, the existence of a political disturbance could be assumed because of the coup attempt. Once again, it is fair to say that the harm done to society by the crimes Gulen committed clearly were not incidental to the political disturbance in Turkey on 15 July 2016, given the fact that approximately 250 people were intentionally killed by indiscriminate attacks.

Another significant test "Swiss test" concentrates on the proportionality of crimes committed to reach an "ultimate goal," and it examines the means to reach an alleged political offender's aim by committing these crimes.⁶⁴ Clearly in this consideration, one cannot defend the murders of 250 people as a means to take over the government. There is no link that could be established to explain the ultimate goal of taking over the government when considering the death of 250 people. The Turkish society has witnessed several coups in its history; however, none of them resulted in such a mass atrocity.

One may argue that the fact that Fetullah Gulen aims to establish a system of ideas and ideology could be regarded as purely political in character. However, it is not possible to sustain this claim on the account of the fact that he is the prime suspect in a number of common crimes, including crimes of murder and damaging property. These crimes are sufficiently serious, excluding any possibility of ignoring such aspects of the coup attempts.

The political nature of the crimes committed on July 15 is essential in this analysis. It has been observed that these crimes cannot be considered as purely political crimes at first glance. Further requirements are necessary to ascertain the political status. The widely accepted tests, namely 'incident' and 'proportionality,' are key to understand the controversial idea of political offence completely. This section concludes that the simple assertions advocating the political na-

61. Ahmad v. Wigen, 726 F. Supp. 389 (Eastern District of New York), *Justia*, 26 September 1989, <http://law.justia.com/cases/federal/district-courts/FSupp/726/389/1739945/>, (Accessed: 27 November 2017).

62. M. Cherif Bassiouni, *Legal Responses to International Terrorism: U.S. Procedural Aspects*, (Oxford University Press, New York: 2014), p. 675.

63. Thomas E. Carbonneau, Terrorist Acts – Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases, 3 *Hastings Int'l & Comp. L. Rev.* 265 (1980). Pages 270-271.

64. Geoff Gilbert, *Responding to international crime*. (Martinus Nijhoff, Leiden: 2006), page 279.

ture of these crimes in question fail to explain the objective interpretations of these test results.

Exception to the Political Offense Exception: Offenses Attempted Against a Head of States

Certain clauses were adopted in several international agreements to limit the scope of “political exceptions.” In other words, states agreed to uphold exceptions to the exception. These exceptions include the committing of an act that is deemed an international crime, an act of genocide or an act related to air piracy.⁶⁵ The concept of political offense is highly controversial, and the trend is to “undo the protection offered by the exception” since the number of these “exceptions to the exception” is gradually increasing.⁶⁶

Under Article 3, the authorities of both countries shall not consider any crime committed against their Head of States as “an offense of a political character.” The full text of the provision is as follows:

However, any offense committed or attempted against a Head of State or a Head of Government or against a member of their families shall not be deemed to be an offense of a political character.

The provisions of this paragraph shall not affect any obligation of the Contracting Parties which has already been undertaken or may subsequently be undertaken by them under any multilateral international agreement.

Such exception is widely accepted in international law as ‘*clause d’attentat*.’ For example, states agreed to this clause in the European Convention on Extradition as a general principle. Therefore, this positive norm does not allow a margin of maneuver for the state parties when considering the political nature of the alleged actions.

65. M. Cherif Bassiouni, *Legal Responses to International Terrorism: U.S. Procedural Aspects*, (Oxford University Press, New York: 2014), p. 209-210.

66. Ibid.

Short-Term Legal Measures under the Treaty

Most of the modern international extradition treaties provide certain short-term legal measures in order to enhance the cooperation in criminal matters in certain circumstances. This section will briefly present the significant provision that the Turkish government has argued in the extradition process.

Article 9 obliges the parties to the Treaty to “take all necessary measures,” including detaining the accused:

The Contracting Parties shall take all necessary measures after the information and documents related to the request for extradition have been received, including a search for the person sought. When located, the person sought shall be detained until the competent authorities of the Requested Party reach their decision. If the request for extradition is granted, the detention shall be continued until surrender.

Once more, it is noted that the Turkish government delivered the information and documents to support the grounds for the extradition request to the US. On 23 August 2016, the Deputy Spokesperson Mark C. Toner clarified that the US had “received a formal extradition request” from Turkey.⁶⁷ Thus, the first sentence of this paragraph is not disputed.

It is assumed that competent authorities, including the US authorities, know the location of Fetullah Gulen. Therefore, the second phrase of this provision must be taken into account as an applicable law. It should also be considered that this provision does not leave any discretion to the US authorities at this point.

Another significant provision is Article 10 of the Treaty. Under this article, Turkey may request from the US to “provisionally arrest” an accused “in cases of urgency”:

67. Mark C. Toner, “Daily Press Briefing”, *U.S. Department of State*, 23 August 2016, <https://2009-2017.state.gov/r/pa/prs/dpb/2016/08/261220.htm>. (Accessed: 27 November 2017).

(1) In cases of urgency, either Contracting Party may apply for the provisional arrest or detention of the person sought before the request for extradition has been submitted to the Requested Party through diplomatic channels. The request for provisional arrest or detention may be made either through diplomatic channels or directly between the Department of Justice of the United States and the Ministry of Justice of Turkey.

Ankara made the demand for a ‘provisional arrest’ on 13 September 2016.⁶⁸ Also, the US law on the “procedure when provisional arrest is requested” is sufficiently clear on this issue.⁶⁹ However, no concrete action has been taken in relation to this demand.

Reasons for Rejection of the Extradition Request

The requested state must reach a conclusion in relation to the outcome of the extradition process. Turkey will likely dispute the conclusion if the US authorities do not decide to extradite Gulen. In the case of a denial by US authorities, another relevant treaty obligation is laid down in Article 11, paragraph 1 as follows:

The Requested Party shall promptly communicate to the Requesting Party the de-

cision on the request for extradition. The Requested Party shall give the reasons for any complete or partial rejection of the request for extradition.

Under this provision, US authorities shall describe and list all of their considerations on a possible rejection. Until now, they have not reached a decision yet. There seem to be two options available in this process at the moment. The Department of Justice either declines the request or continues with court proceedings in which a magistrate judge is assigned in a US district court in Pennsylvania. The latter option would be a promising step for the Turkish government, as former Minister of Justice Bozdog stated that “we feel confident in our case.”⁷⁰

In case of refusal, the Department of Justice is obliged to give a satisfactory reason for this decision. The Department of Justice may possibly state that the evidence was not satisfactory to believe the causal link between the accused people and the crimes committed in Turkey. However, this would mean that the US authorities would ignore the large amount of evidence submitted by the Turkish authorities to prove the direct link, particularly the link to the crimes of murder and the attempt to assassinate the president.

To be acquitted from all of the allegations with regard to the crimes committed on July 15th, Gulen may argue for the absence of fair trials in Turkey.⁷¹ However, the fact that the exercise of the right to fair trial of individuals in Turkey is often criticized but this does not give discretion to the US authorities to deny the extradition under the Treaty. The Treaty does not explicitly refer to any issue related to the conditions of the possible trial of an accused person. Moreover, the Department of Justice is not obliged to consider whether a fair trial would occur in Turkey since

68. “Expectation for Gulen’s extradition, trials continue on anniversary of July 15”, *Daily Sabah*, 15 July 2017, <https://www.dailysabah.com/war-on-terror/2017/07/15/expectation-for-gulens-extradition-trials-continue-on-anniversary-of-july-15>, (Accessed: 27 November 2017).

69. Offices of the United States Attorneys, “Procedure When Provisional Arrest is Request”, United States Department of Justice, <https://www.justice.gov/usam/criminal-resource-manual-615-procedure-when-provisional-arrest-requested>, (Accessed: 27 November 2017). [A. Provisional arrest is appropriate when the country making the demand for extradition believes that there is a risk the fugitive will flee. Requests for provisional arrest must be handled quickly for the United States to fulfill its treaty obligations. After receiving a request for provisional arrest, the Office of International Affairs (OIA) contacts the prosecutor in the district where the fugitive is located. OIA provides information about the name, identity and whereabouts of the fugitive, the crime with which he or she has been charged, the foreign warrant issued for the fugitive’s arrest and the demand for provisional arrest. This information will be confirmed in writing, but in urgent cases, the prosecutor immediately drafts a complaint for provisional arrest and executes it before a magistrate judge or district judge in the district where the fugitive is located. The judicial officer issues a warrant under the authority of the treaty and 18 U.S.C. § 3184.]

70. “Bozdağ: ABD terörist başının dosyasını hala mahkemeye göndermedi”, *Star*, 11 January 2017.

71. “Turkey coup attempt: Fethullah Gulen urges US to reject extradition bid, around 50,000 people targeted”, *ABC News*, 20 July 2016.

the actual decision to extradite the accused is not made in this process. Even if the US authorities are particularly concerned with the conduct of trials in Turkey, adequate guarantees could be conditioned, such as the guarantee to appear for trial and other defined rights.⁷² Also, fair trial considerations are related to a completely different question other than the evidence proving the responsibility of FETO. Therefore, it is safe to say that the relevance of the current political and legal environment in Turkey is low in the extradition process.

CONCLUSION

This study has analyzed the coup attempt under international and national criminal law instruments, particularly the issue of extradition of the coup plotters. There are several significant conclusions in this regard. First, the judiciary in Turkey is convinced by evaluating the evidence that the main perpetrator of the coup attempt was the FETO terror organization led by Fetullah Gulen. Second, the extradition of the coup plotters has been an issue since the beginning of several cases that were brought prior to the July 15 coup attempt. Third, the law on extradition is not limited to the national law of the US, and the Treaty signed between these countries provides the legal basis for this request. According to this treaty, there is no absolute ground for refusal for the extradition of the coup plotters.

Since the extradition process involves several authorities having political functions, it is not a pure legal process exercised by court jurisdiction. Namely, these authorities are the Department of State and the Department of Justice. As of now, the case has not been forwarded to a district court nor concluded whether the probable cause was established. Thus, it is difficult to defend the legal nature of this process since the Department

of Justice has been examining the case for more than a year without proceeding to the next phase of the extradition process. It does not grant the extradition request nor does it decline it by providing a valid reason for denial.

The consequences of the extradition process on US-Turkey relations are examined according to its effect in different time periods. The first alternative would be the case in which the Department of Justice grants the request and refers to the local court. Even if the final outcome of these court proceedings may not be positive for the Turkish government in the future, such decision from the Department of Justice would be considered by the Turkish government as an act in good faith. Then-Minister of Justice Bozdağ's aforementioned statement would support this idea. However, it is hard to anticipate the final outcome of this long process which involves hearings and court proceedings.

The second possibility would be the denial of the request by the Department of Justice. As to the short-term consequences, the US authorities need to make the reasons crystal clear for the sake of the extradition mechanism between the two countries. Otherwise, the denial will likely hamper extradition practice, when observing the recent official statements.⁷³ In the long-term, the US political and legal authorities need to address FETO in a way to re-establish the ties between the two countries.

A third option might be a refusal similar to 'pocket veto' by taking no action as to finalize the process. Since it could be understood in the long-term, the political relationship between two countries will continue moderately as it was for the past year, unless a radical action was taken by the countries. However, the long-term relationship would be harmed as a denial would "poison the Turkish-American cooperation."⁷⁴

72. Interview with a Former Senior Official from the Directorate General for International Law and Foreign Relations, Republic of Turkey, the Ministry of Justice, 22 September 2017.

73. Cansu Çamlıbel, "Hostage situation further frays Turkey-US ties", *Hürriyet Daily News*, 7 October 2017.

74. "FETÖ could 'poison' US-Turkey ties if US doesn't take action: FM", *Daily Sabah*, 13 July 2017.

The extradition of Fetullah Gulen has been a controversial issue in the bilateral relations between the United States and Turkey. This paper focuses on the bilateral extradition treaty as well as the national and international law to analyze the extradition process. First, it presents the background information and the role of the perpetrator on the coup attempt on 15 July 2016 based on the prosecution's case in Turkey. This paper aims to discuss the ramifications of the FETO as well as the legal and political measures taken by the Turkish authorities against this organization both before and after the coup attempt. The influence of the leader of this organization over the coup plotters is crucial to understand the chain of command inside the organization. By referring to the evidence presented by the Turkish prosecutors, this paper shows the direct responsibility of the head of the organization in the commission of the most heinous crimes on 15 July 2016. Second, the paper focuses on the extradition treaty as the legal basis of the extradition process in international law. It also concludes why it is not possible and recommendable to acknowledge the actions of FETO as political crimes. At this point in the extradition process, the Department of Justice of the United States still examines the case with regard to whether the head of FETO and other members are extraditable. The Turkish government expects that the Department of Justice will grant the extradition request and refer to a local court. However, there are fundamental consequences that are measured in the short and long term, if the United States authorities refuse to hand over to a local court in order to take a step in the extradition process.



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