

IN THE EUROPEAN COURT OF HUMAN RIGHTS

TANER KILIÇ v. TURKEY App No. 208/18

Third Party Intervention: The Turkey Litigation Support Project, Human Rights Watch and the International Commission of Jurists

I. Introduction

1. The Third Party Interveners (the Interveners) submit these written comments by leave of the President of the Second Section of the Court granted on 5 July 2019.
2. The present case epitomises some of the most fundamental human rights challenges in Turkey today. These involve widely documented restrictions on freedom of expression, association, and assembly of human rights defenders (HRDs) and rapidly closing civil society space.¹ These restrictive measures have involved detention and criminal prosecutions of HRDs, including under vague and expansively applied anti-terrorism laws.²
3. Against this background, this submission will outline: the factual context of the situation facing HRDs in Turkey (Section II); international and comparative standards governing obligations towards HRDs relevant to the Court's interpretation of the European Convention on Human Rights (the Convention) (Section III), including the limits prescribed by Article 18 (Section IV); key principles necessary for a rule of law approach to the application of the criminal law, against the legal and practical pattern of excessive resort to criminal law against HRDs in Turkey today (section V).

II. The Context: Human Rights Defenders in Turkey and beyond

4. The situation in Turkey unfolds in the regional and global context of a burgeoning crisis in respect of the protection of HRDs and the exploitation of the coercive power of the criminal law.³ Multiple reports of international and regional human rights bodies have expressed extreme and growing concern regarding attacks on a range of HRDs, including NGOs,⁴ in Turkey specifically, and the inevitable chilling effect

¹ See further below and *e.g.* UN Special Rapporteur on the situation of human rights defenders (UN Special Rapporteur on human rights defenders), World Report on the Situation of Human Rights Defenders, Dec. 2018, <https://www.protecting-defenders.org/sites/protecting-defenders.org/files/UNSR%20HRDs-%20World%20report%202018.pdf>; Council of Europe (CoE), Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions, Mar. 2019, <https://rm.coe.int/hr-defenders-in-the-coe-area-current-challenges-and-possible-solutions/168093aabf>; Front Line Defenders, Global Analysis 2018, January 2019, https://www.frontlinedefenders.org/sites/default/files/global_analysis_2018.pdf

² Dunja Mijatović, The Commissioner for Human Rights of the Council of Europe, Press Release 8 July 2019: <https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders>; AI, Weathering the Storm, Defending Human Rights in Turkey's Climate of Fear, 26 Apr. 2018, <https://www.amnesty.org/download/Documents/EUR4482002018ENGLISH.PDF>; Human Rights Watch, World Report 2019, p.592, <https://www.hrw.org/world-report/2019/country-chapters/turkey>; Civil Rights Defenders, When Exceptions Become the New Norm, March 2018, <https://crd.org/wp-content/uploads/2018/04/CRD-6700-Rapport-Turkiet.pdf>; Joint statement by three UN Special Rapporteurs and a Chair-Rapporteur, 14 Jul. 2017, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21875&LangID=E>; Memorandum on freedom of expression and media freedom in Turkey, Nils Muižnieks Former Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, 15 Feb. 2017, para. 65.

³ AI, Laws Designed to Silence: The Global Crackdown on Civil Society Organisations, 21 Feb. 2019, <https://www.amnesty.org/download/Documents/ACT3096472019ENGLISH.PDF>; PACE, Protecting human rights defenders in Council of Europe member States, Resolution 2225 (2018), 26 Jun. 2018, para. 3, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24932&lang=en>.

⁴ European Parliament Committee on Foreign Affairs, Report on the 2018 Commission Report on Turkey, 26 Feb. 2019, p. 8. para. 9, http://www.europarl.europa.eu/doceo/document/A-8-2019-0091_EN.pdf; the Commissioner for Human Rights of the Council of Europe, Third Party Intervention in Mehmet Osman Kavala v. Turkey 20 Dec. 2018, paras. 5-17, <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-cas/1680906e27>.

on rights protection, democratic participation and freedom of expression, including dissent.⁵ Successive Council of Europe (CoE) Commissioners for Human Rights, among others, have criticized the widespread abuse of over-broad criminal legislation, and specifically anti-terror laws.⁶ Widespread and unwarranted pre-trial detention and prosecutions on the basis of such laws have been described as instruments of “judicial harassment.”⁷ The lack of reasonable suspicion to justify detention, or of sufficient evidence linking suspects or accused persons with a terrorist organisation despite terror-related charges, have resulted in findings of violations of Article 5(1) of the Convention in a number of judgments before this Court.⁸

5. It is well recognised that during the state of emergency (SoE) the situation seriously deteriorated. In 2017 alone, 183,121 people were indicted for crimes against the constitutional order,⁹ including terrorism related crimes, and thousands were detained on this basis.¹⁰ The number of HRDs charged with membership of terrorist organisations, ‘propagandising’ or providing support for such organisations increased dramatically; in many cases charges were based on opinions deemed to be even loosely aligned with a proscribed organisation’s stance or to lend support to its cause.¹¹
6. This stigmatisation and criminalisation of HRDs as members of terrorist organisations¹² is illustrated by the July 2017 arrest of 10 HRDs including Amnesty International Turkey Director Idil Eser and Özlem Dalkiran from the Citizens’ Assembly, accused of membership of, or aiding, terrorist organisations. 8 of the suspects were detained for 112 days before being released on bail in prosecutions known as the “Büyükada Trial”.¹³ Moreover, 16 HRDs, including prominent academics and civil society actors were detained in relation to the 2013 Gezi Park Protests and charged with “attempting to overthrow the Government” based on alleged support for the protests and links to civil society organisations such as Anadolu Kültür and Açık Toplum Vakfı (Open Society Foundation (OSF)).¹⁴ The President and Cabinet Ministers are complainants in the indictment and prosecutors have requested approximately 47,520 years’ imprisonment for the defendants. One of the common features of these cases has been the associated smear

⁵ European Union Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, January 2018, p. 8 and 49.

⁶ The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, Report on administration of justice in Turkey, CommDH(2012)2 p.9; and 5 years later: Nils Muižnieks, the Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para.46; *see also* UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur on terrorism), E/CN.4/2006/98, para. 14; CoE European Commission for Democracy Through Law (Venice Commission), Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL-AD(2016)002, 11-12 Mar. 2016.

⁷ The Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, Section II.

⁸ ECtHR, *Ayşe Yüksel & Ors. v. Turkey*, App. No. 55835/09 et.al., 31 May 2016; *Mergen v. Turkey*, App. No. 44062/09 et.al., 31 May 2016; *Mehmet Hasan Altan v. Turkey*, App. No. 13237/17, 20 March 2018; *Şahin Alpay v. Turkey*, App. No. 16538/17, 20 Mar. 2018.

⁹For Official Statistics of the Ministry of Justice, see <www.adlisicil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf>, p. 38.

¹⁰ 154,000 people have been prosecuted and 50,000 detained on remand for pending proceedings for the first ten months of the SoE: Bianet news, ‘Number of People Detained Reached 50 Thousand under 15 Jul. 2016 Operations’, 28 May 2017, <https://bianet.org/bianet/insan-haklari/186881-15-temmuz-sorusturmalarinda-tutuklu-sayisi-50-bin-136>.

¹¹ AI, Weathering the Storm, Defending Human Rights in Turkey’s Climate of Fear, p.10.

¹² AI, Turkey: One year since the imprisonment of Taner Kılıç, demands for his release will not be silenced, 6 Jun. 2018, <https://www.amnesty.org/en/latest/news/2018/06/turkey-one-year-since-the-imprisonment-of-taner-kilic-demands-for-his-release-will-not-be-silenced/>.

¹³AI, Turkey: Court releases HRDs including Amnesty International’s Turkey Director, 25 Oct. 2017, <https://www.amnesty.org/en/latest/news/2017/10/turkey-court-releases-human-rights-defenders-including-amnesty-internationals-turkey-director/>.

¹⁴Front Line Defenders, Police operation against civil society and academics, <https://www.frontlinedefenders.org/en/case/police-operation-against-civil-society-and-academics-1>.

campaign conducted against these HRDs by senior government officials and pro-government media, accusing them of being “foreign agents” or “spies” acting against the national interest.¹⁵

7. Attacks on HRDs have also taken the form of the widespread closure of human rights NGOs. For example, by an emergency decree, authorities closed hundreds of NGOs including national and local human rights organizations, women’s rights groups and lawyers’ associations.¹⁶ Authorities have revoked foreign NGOs’ registration that allowed them to operate in Turkey, forcing them to shut down operations.¹⁷ The work of NGOs has also been seriously curtailed by unlawful restrictions on freedom of association and assembly; reports document provincial governors citing powers under the SoE to justify blanket bans on peaceful assembly.¹⁸ Although the SoE ended in July 2018, many exceptional measures prolonging detention and restricting freedom of movement and assembly have been enshrined in ordinary laws,¹⁹ normalising and perpetuating the effects of the SoE.²⁰
8. The targeting of NGOs has been accompanied by the arbitrary detention and prosecution of a broad range of related actors. One report documents the prosecution of hundreds of lawyers for terrorism-related crimes, among them 17 human rights lawyers from the “Progressive Lawyers’ Association” (Çağdas Hukukçular Derneği).²¹ The CoE Commissioner for Human Rights notes that in relation to judicial harassment of journalists “detention is the most visible and chilling form that this harassment has taken.”²² According to the UN Special Rapporteur on human rights defenders, since the beginning of the SoE, about 300 journalists have been arrested on the grounds that their publications contained “apologist sentiments regarding terrorism” or other “verbal act offences” or for “membership” of terrorist organisations.²³ In turn, during the SoE, 5,822 academics were dismissed from universities while over 600 have been subject to criminal proceedings for allegedly disseminating ‘terrorist propaganda’, aiding, or being a member of, an armed terrorist organisation due to their signing of the ‘Peace Petition’.²⁴

¹⁵ See UN Special Rapporteur on human rights defenders, World Report on the Situation of Human Rights Defenders, Dec. 2018, p.380 and 382., Selen Girit, “Buyukada Trial: My friends and I are not spies”, BBC Turkce, 25 Oct. 2017, <https://www.bbc.com/turkce/41744958>.

¹⁶ AI, Urgent Action: Turkey Permanently Closes Hundreds of NGOs, 23 Nov. 2016. <https://www.amnesty.org/download/Documents/EUR4452082016ENGLISH.pdf>.

¹⁷ See for one example among others, OSF, the Open Society Foundations in Turkey Ceases its Operations, 26 Nov. 2018 stating it had ceased operations in Turkey due to baseless accusations and the increasingly hostile political environment.

¹⁸ AI, Turkey 2017/2018 Report, <https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/>.

¹⁹ Law No. 7145 Amending Some Laws and Decree Laws, published 31 Jul. 2018, conferring wide powers to provincial governors to restrict movement in districts and ban people from certain areas for 15 days.

²⁰ Human Rights Watch, Turkey: Normalizing the State of Emergency, 20 Jul. 2018, <https://www.hrw.org/news/2018/07/20/turkey-normalizing-state-emergency>; Reporters Without Borders, Turkey: a permanent state of emergency by any name is no substitute for respecting human rights, 20 Aug. 2018, <https://rsf.org/en/news/turkey-permanent-state-emergency-any-name-no-substitute-respecting-human-rights>; NGOs joint recommendation, <https://euomedrights.org/wp-content/uploads/2018/09/NGOs-joint-recommendations-after-the-lifting-of-state-of-emergency-in-Turkey.pdf>; ICJ, Justice Suspended: Access to Justice and the State of Emergency in Turkey, p.10: <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>; Law No. 7145 entered into force on 31 July 2018 restricting rights and effectively prolonging the SoE.

²¹ Human Rights Watch, Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey, Apr. 2019, p.35, <https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey>.

²² The Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, 15 Feb. 2017, para. 79.

²³ UN Special Rapporteur on human rights defenders, World Report on the Situation of Human Rights Defenders.

²⁴ As of May 2019, over 184 academics were sentenced to prison terms ranging from 15 months to 36 months and the Assize Courts decided to postpone the announcement of the verdict for 148 more academics. Some convictions have been already upheld on appeal (e.g. Prof. Dr. Füsün Üstel was sent to prison in May 2019 to serve a 15 month term). On 26 July 2019, the Turkish Constitutional Court (TCC) held that the rights of nine of the academics, including Prof. Üstel had been violated, *see* App. No. 2018/17635, <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/17635>.

9. Finally, measures taken against judges have had serious consequences both for the Convention rights of judges themselves and for the capacity of the judiciary to protect the Convention rights of others.²⁵ As of 20 March 2018, over 4,000 active judges and prosecutors had been summarily dismissed under the SoE based on unclear grounds of association with, or support for, terrorism.²⁶ Several observers, including the ICJ²⁷ and Venice Commission,²⁸ have raised concerns regarding the chilling impact of dismissals and prosecutions of judges on the independence of judges who remain in office and their decision-making,²⁹ as well as the impact on the effectiveness, competence and fairness of the justice system of large numbers of new and relatively inexperienced judicial appointees. This is compounded by the constitutional reform of 16 April 2017 of the institution responsible for the self-governance of judges and prosecutors, the Council of Judges and Prosecutors (CJP),³⁰ increasing executive influence on the judicial system, and undermining institutional guarantees that would allow it to withstand political influence, with significant impact on judicial independence.³¹ More than 8,000 judges and prosecutors have been appointed since the beginning of the SoE, after the conditions of appointment were in turn modified to allow for judicial interns to be appointed as judges or prosecutors before the end of their internship³² and to lower the requirements for judicial appointment of lawyers.³³
10. The adverse human rights and rule of law context in Turkey set out in the previous section underscores the importance of the Convention being interpreted consistently with stringent international and regional standards on HRDs, addressed in the following section.³⁴

²⁵ The influence of the President’s speech on the judiciary, resulting in “accelerat[ed]” prosecution of the leader of an opposition party is referred in the case of *Selahattin Demirtaş v. Turkey (No.2)*, 14305/17, 20 Nov. 2018.

²⁶ ICJ, *Justice Suspended : Access to Justice and the State of Emergency in Turkey*, Jul. 2018, p. 3, <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>; Press Release of the TCC in English, paras. 35-38, <http://www.judiciaryof turkey.gov.tr/pdf/ler/anayasa-Alparslan%20ALTAN%20and%20Erdal%20TERCAN.PDF>.

²⁷ See ICJ, *Justice Suspended – Access to Justice and the State of Emergency in Turkey*; and ICJ, *The Turkish Criminal Peace Judgeships and International Law*, Jan. 2019, <https://www.icj.org/wp-content/uploads/2019/02/Turkey-Judgeship-Advocacy-Analysis-brief-2018-ENG.pdf>.

²⁸ Venice Commission, *Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the attempted Coup D’état of 15 July 2016*, CDL-AD(2016)037, Dec. 2016, para. 148.

²⁹ Many judges have been removed from office, decisions have not been implemented and the apex TCC has been criticised by government officials following decisions on the unlawful detention of journalists Erdem Gül, Can Dündar, Şahin Alpay and Mehmet Hasan Altan. Recently, the President stated that he would not recognise the ECtHR judgment in *Selahattin Demirtaş v. Turkey (No.2)* see: <https://www.globalrights.info/2018/11/release-selahattin-demirtas-turkey-european-court-of-human-rights/>. See also the Commissioner for Human Rights of the Council of Europe, CommDH(2017)5, para.50 on this issue. OSCE Guidelines stress the need to strengthen the independence of judiciary and prosecutors to prevent politically motivated investigations: *Guidelines on the Protection of Human Rights Defenders*, Jun. 2014, <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders>, para.27.

³⁰ Of 13 members, 6 are now effectively appointed by the President. The remaining 7 members are appointed by the National Assembly. None of the members of the Council is appointed by judges or public prosecutors. Under the new constitutional regime, the President of the Republic no longer has a neutral role but may maintain political party affiliations.

³¹ “The decisions of the Council, other than dismissal from the profession, shall not be subject to judicial review.” Article 159, para. 10, Law No. 2709, Constitution of the Republic of Turkey.

³² Article 3.2, State of Emergency Decree no. 667 stated that regardless of the period of their internship all interns could be appointed as judges. The Decree enacted into Law (see Law no. 6749).

³³ The Regulation Concerning the Internship of Judge and Prosecutor Candidates (*Hakim ve Savcı Adaylarının Meslek Öncesi Eğitimlerine İlişkin Yönetmelikte Değişiklik Yapılmasına Dair Yönetmelik*) was amended on 3 April 2018 (Official Gazette Publication no. 30380): instead of the previous 17-month internship, attorneys can be recruited as judges after an only 3 months. During the SoE, the threshold of 70/100 for passing the exam as judge and prosecutor was eliminated. It has been reinstated by Law no. 7165 in February 2019, after thousands of judges had been recruited without this requirement.

³⁴ UN Declaration on Human Rights Defenders, Article 18; Inter-American Commission on Human Rights, Report on Situation of Human Rights Defenders in Americas, OEA/Ser.L/V/II.124 Doc. 5 rev. 1, paras 1 and 23; *Human Rights Defender et al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, IACtHR.

III. International and Comparative Legal Standards in Relation to HRDs

11. The interveners recall that, under the Convention and other international human rights treaties to which Turkey is party and standards, states have both negative and positive obligations to both respect and protect the human rights of those within their jurisdiction. The interveners recall the general obligations of states to i) refrain from any act that violates the Convention rights of all persons in their jurisdiction, including HRDs, particularly their rights to freedom of expression and assembly and to exercise due diligence to protect HRDs and others from abuses by private actors. The interveners submit that, in the particular context of HRDs, the Convention should be interpreted to make clear the specific obligation take proactive steps to promote the realisation of the rights of HRDs, including to create an enabling environment for them to fulfil their roles and pursue their activities.³⁵
12. These general obligations are reflected in some detail in universal³⁶ and regional³⁷ instruments specifically directed towards the protection of HRDs, which inform the interpretation of the Convention. For example, the UN Declaration on Human Rights Defenders (the Declaration), adopted in 1999 by consensus resolution of the UN General Assembly, reflects, reinforces and clarifies in part the content of the general duty on States to, inter alia, “take all necessary measures to ensure the protection...against any violence, threats, retaliation...adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the ... Declaration.”³⁸ This necessarily includes the state’s obligation to refrain from undue interference, through the judiciary or other means, with HRDs’ rights to freedom of opinion, expression, peaceful assembly and association, which are essential for the promotion and protection of their own and other peoples’ human rights.³⁹ As the Inter-American Court of Human Rights (IACtHR) has noted, “the defense of human rights can be exercised freely only when the persons engaged in it are not victims of any threats or any type of physical, psychological or moral aggression or other forms of harassment.”⁴⁰ Thus, the utmost importance attaches to the protection or those at risk of interference both by authorities and non-state actors due to their human rights work.
13. *Creation of an Enabling Environment:* The obligation to ensure an enabling environment is reflected, for example, in the Declaration⁴¹ and various Resolutions of the UN General Assembly and Human Rights Council, and developed in the work of the UN Special Rapporteur on human rights defenders.⁴² The Special Rapporteur has identified the elements to include removing legal and formal obstacles as well as

³⁵ The Commissioner for Human Rights of the Council of Europe, Third Party Intervention in Svetlana Khusainovna Estremirova v. the Russian Federation, Appl. No. 42705/11, <https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/16806dabe2>, paras 4, 17, 21, 27, 36; OSCE Guidelines, para 41.

³⁶ UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Hereinafter “UN Declaration on Human Rights Defenders”), United Nations General Assembly [on the report of the Third Committee (A/53/625/Add.2)] 53/144, 8 Mar. 1999, <https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>; The UN Special Rapporteur on human rights defenders was established in 2000 to support implementation of the Declaration globally.

³⁷ At CoE level, the Committee of Ministers’ Declaration on CoE Action to Improve the Protection of Human Rights Defenders and Promote their Activities (Hereinafter, “CoE Declaration”), adopted on 6 February 2008. Article 2 of the Declaration makes a specific call on member states to create an environment conducive to the work of human rights defenders by taking measures to protect, promote and respect HRDs. See: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3e52; The CoE Parliamentary Assembly Resolution on Protecting human rights defenders in Council of Europe member States, Resolution 2225 (2018), 26 Jun. 2018, at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24932&lang=en>; See also OSCE, Guidelines on the Protection of Human Rights Defenders, 2014.

³⁸ Article 12 of the Declaration.

³⁹ Articles 5 and 6 of the Declaration.

⁴⁰ IACtHR, *Human Rights Defender et al. v. Guatemala*, Judgment, (ser. C) No. 283, paras 142, 28 Aug. 2014.

⁴¹ Articles 2, 9, 12, 14 and 15 of the Declaration.

⁴² Report of the UN Special Rapporteur on human rights defenders, Margaret Sekaggya, Human Rights Council Twenty-fifth session, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, 23 Dec. 2013.

ensuring the existence of a safe, enabling environment in practice.⁴³ According to the former UN High Commissioner, the obligation includes: adopting “a robust legal framework compliant with international standards and a strong national human rights protection system that safeguards individual security and public freedoms, including freedom of expression and assembly, and effective access to justice; a political environment conducive to civil society work; access to information; avenues for participation by civil society in policy development and decision-making processes; and long-term support and resources for civil society.”⁴⁴

14. Within the CoE, it has been noted that States should “create an environment conducive to the work of HRDs, enabling individuals, groups and associations to freely carry out activities, on a legal basis, consistent with international standards, to promote and strive for the protection of human rights and fundamental freedoms without any undue restrictions”.⁴⁵ Regionally, the OSCE has suggested that States, among other measures, should publicly acknowledge the important and legitimate role HRDs play, and adopt judicial and administrative measures to protect HRDs and to guarantee the right to defend rights⁴⁶ “without undue limitations.”⁴⁷ As a CoE Committee of Ministers recommendation reflects, this entails respecting the legal status of NGOs, and protecting their ability to operate effectively.⁴⁸ Undue interference with and effective criminalisation of human rights defence, to which we turn, is plainly antithetical to the creation of such a safe, secure environment.
15. *Protection from arbitrary detention and prosecution*: Resort to criminal investigation and prosecution, and detention of HRDs for the exercise of rights such as freedom of expression, assembly and association, is a particularly coercive and invidious form of interference with the rights of HRDs and their defence of the rights of others. This is reflected in the Declaration and other standards, such as the OSCE Guidelines which provide that HRDs “must not be subjected to judicial harassment by unwarranted legal and administrative proceedings or any other forms of misuse of administrative and judicial authority, or to criminalization, arbitrary arrest and detention.”⁴⁹ Criminal sanctions may have a particularly chilling effect on their critical human rights work.
16. Likewise, the jurisprudence of this Court has emphasized repeatedly the “public watchdog” role of HRDs and called for the strictest scrutiny of measures which may have discouraging effects.⁵⁰ Paying close regard to context, it has noted the chilling effect on civil society “who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights.”⁵¹ It has expressed concern that measures such as arrest and pre-trial detention have been used to silence and punish HRDs and prevent them from working on human rights issues: “states must focus on the protection of critics of the government, civil society activists and human rights defenders against arbitrary arrest and detention,”

⁴³ UN Special Rapporteur on the situation of human rights defenders, 23 Jul. 2018, para 19.

⁴⁴ UN High Commissioner on Human Rights, Practical Recommendations for the Creation and Maintenance of a Safe and Enabling Environment for Civil Society based on Good Practices and Lessons Learned, para 4, U.N. Doc. A/HRC/32/20 (2016).

⁴⁵ CoE Committee of Ministers, Declaration of the CoE action to improve the protection of HRDs and promote their activities, (n..) para. 2(i). The IACtHR in *Nogueira de Carvalho et.al. v. Brazil*, recognised *inter alia* that “the duty of states to create the necessary conditions to effectively respect and guarantee the human rights of everyone under their jurisdiction is intrinsically linked to a recognition of the role played by HRDs and their protection” See judgement of 28 Nov 2006, paras. 74-77, http://www.corteidh.or.cr/docs/casos/articulos/seriec_161_ing.pdf.

⁴⁶ OSCE, Guidelines on the Protection of Human Rights Defenders, paras. 3 and 4.

⁴⁷ *Ibid*, para 41.

⁴⁸ Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of NGOs in Europe, 10 Oct. 2007, adopted at the 1006th meeting of the Ministers’ Deputies.

⁴⁹ OSCE, Guidelines on the Protection of Human Rights Defenders, para. 23.

⁵⁰ ECtHR, *Sdruženi Jihočeské Matky v. Czech Republic*, App. No. 19101/03, 10 July 2006; *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, 14 Apr. 2009; *Magyar Helsinki Bizottság v. Hungary* [GC], App. No. 18030/11, 8 Nov. 2016

⁵¹ ECtHR, *Aliyev v Azerbaijan*, App. No. 15172/13, 22 May 2014, paras. 213, 223.

taking measures to “ensure the eradication of retaliatory prosecutions and misuse of criminal law” against these vulnerable groups.⁵²

17. *‘Reinforced’ duty of protection:* While states’ obligations apply to all within its jurisdiction, it has been recognised that the significance of protecting HRDs gives rise to ‘particular’, ‘heightened’ or ‘reinforced’ duties of protection towards HRDs and the need for rigorous oversight.⁵³ Such obligations may also derive from the heightened vulnerability of HRDs as a result of their work, as Section II makes clear.⁵⁴ This Court consistently reflects the need for ‘enhanced scrutiny’ of any measure that restricts the fundamental freedoms of persons from these groups, finding that the “state’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.”⁵⁵ The Court has taken note of the existence of broad international consensus on the need for special protection of vulnerable groups, as evidenced in international instruments and the jurisprudence and commentary of international bodies.⁵⁶ The same rationale applies to the protection of HRDs in contexts such as the present one where their rights – and those of others – are rendered particularly vulnerable by the arbitrary use of criminal law.
18. *Strict justification for restrictions on HRD rights:* The regime governing the limitations of rights under the Convention requires they be prescribed by law, pursue a legitimate aim, and are necessary and proportionate to achieve such aim. This applies equally to the rights and freedoms of HRDs, but the UN Special Rapporteur on human rights defenders has underlined that any restriction to their rights must be justified by “a very high standard.”⁵⁷ Assessing the aim of the measures is relevant to Article 18 (below), but also to whether restrictive measures meet the test of pursuing a legitimate aim under the Convention. The nature of the impact of such measures – including the chilling impact of resort to criminal law on HRDs and on the defence of human rights more broadly – may also be relevant to the necessity and proportionality analysis.
19. In relation to emergency restrictions specifically, the UN Special Rapporteur on human rights defenders has noted that “even where some rights or freedoms are restricted in a situation of emergency or to protect public order, the right to associate, advocate and protest in relation to the restrictions, in effect to monitor and debate the restrictions, can neither be restricted nor suspended.”⁵⁸ As the UN Human Rights Committee (UNHRC) has noted, national security, public order or the “continued struggle for unity” of a state “cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.”⁵⁹ The UNHRC found limitations of free expression could never be justified as legitimate where the applicant’s unlawful detention and prosecution resulted from his advocacy of multi-party democracy and the expression of opinions inimical to the government.⁶⁰

IV. Article 18 of the Convention and Unlawful Pre-trial Detention and Prosecutions of HRDs

20. Where criminal law is used to impede HRD activities, various human rights issues may arise with regard to the lawfulness of detention, and the legitimacy of interference with rights such as free expression,

⁵²Ibid., para. 226.

⁵³ *Human Rights Defender et al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-American Court of Human Rights, (ser. C) No. 283, paras 141–42, 157, 263, 28 Aug. 2014.

⁵⁴ *Human Rights Defender et al. v. Guatemala*, *ibid.*, paras 141–42, 157, 263, 28 Aug. 2014.

⁵⁵ ECtHR, *Alajos Kiss v. Hungary*, App. no. 38832/06, 20 May 2010, para. 42.

⁵⁶ ECtHR, *M.S.S. v. Belgium and Greece*, App. no. 30696/09, 21 Jan. 2011.

⁵⁷ UN Special Rapporteur on human rights defenders, *Situation of Human Rights Defenders*, 23 Jul. 2018, para 24.

⁵⁸ Ibid., para. 62.

⁵⁹ *Albert Womah Mukong v. Cameroon* (1994) UN Doc. CCPR/C/51/D/458/1991.

⁶⁰ Ibid.

assembly and association. In addition, Article 18 provides an invaluable framework to address the true nature and specificities of what may constitute a misuse of state power against HRDs.⁶¹

21. This Court has held that Article 18 is violated when “the restriction of [an] applicant’s right or freedom was applied for an ulterior purpose” and this purpose played a fundamental role in the case. Where “there was a plurality of purposes,” the Court would base its determination on the dominant purpose.⁶² In a scenario where a HRD’s rights are interfered with by a State and a dominant (if not exclusive) purpose was to impede their work, punishing them or deterring others, Article 18 has been violated.⁶³
22. Proof of abusive restrictions by the State will follow “from the combination of the relevant case-specific facts”, as the Court found in *Ilgar Mammadov v Azerbaijan*.⁶⁴ In *Rasul Jafarov v Azerbaijan* and *Aliyev v Azerbaijan*, the totality of circumstances led the Court to conclude in both cases that “the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights.”⁶⁵ In these cases, and the recent case of *Selahattin Demirtaş v. Turkey (No 2)*, the Court has pointed to several indicators or factors that may, in all the circumstances, point to such an ulterior purpose. These have included, for example, “statements by high-ranking officials and articles published in the pro-government media” targeting NGOs and their leaders; reports of NGOs and monitoring mechanisms on the general human rights situation in the country; evidence showing a “larger campaign to crack down on human rights defenders,” a “general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding,” a practice of stifling dissent by using criminal law measures in particular and a lack of judicial independence.⁶⁶
23. The Interveners submit that these factors have obvious resonance in the context of the detention and prosecution of HRDs in Turkey today, in light of the information and standards referred to above.

V. International and Comparative Criminal Standards and their Abusive Application in Turkey

General principles:

24. The prevention of terrorism is part of the positive human rights obligations of States to “ensure” respect for rights within their jurisdiction, as this Court recalled in the *Beslan School Siege* case of 2017.⁶⁷ In appropriate circumstances the criminal law has a role to play in prevention, provided the authorities respect international human rights law, and the fundamental constraining principles of criminal law inherent in a rule of law approach.
25. These include the fundamental principle of legality, requiring that the material and mental elements of crimes are defined in law with sufficient precision and clarity to ensure foreseeability and meet the requirements of *nullum crimen sine lege* reflected in Article 7 of the Convention.⁶⁸ The law must be “formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”⁶⁹ The Court has noted that a strict approach to legal certainty is particularly important where deprivation of

⁶¹ Joint partly dissenting opinion of Judges Nicolaou, Keller and Dedov, ECtHR, *Navalnyy and Ofitserov v Russia*, App. Nos. 46632/13 and 28671/14, 23 Feb. 2016.

⁶² ECtHR, *Merabishvili v. Georgia* [GC], App. No. 72508/13, 28 Nov. 2017, para. 291 and 309.

⁶³ ECtHR, Guide on Article 18 - Limitations on Use of Restrictions on Rights, 31 Aug. 2018, para.22.

⁶⁴ ECtHR, *Ilgar Mammadov v Azerbaijan*, App. No. 15172/13, 22 May 2014, para. 142.

⁶⁵ *Ibid* para. 162.

⁶⁶ ECtHR, *Selahattin Demirtaş v. Turkey (No. 2)*, App. No. 14305/1, 20 Nov. 2018, *Rasul Jafarov v Azerbaijan*, App. No. 69981/14, 17 Mar. 2016, paras. 159-162; *Aliyev v Azerbaijan*, App. No. 15172/13, 22 May 2014, paras. 206-216.

⁶⁷ ECtHR, *Tagayeva and Others v Russia*, App. No. 26562/07, 13 Apr. 2017.

⁶⁸ ECtHR, *Ciulla v. Italy*, 22 February 1989, para. 40.

⁶⁹ ECtHR, *Öztürk v Turkey*, App. No. 22479/93, 28 Sep.1999, para. 54.

liberty is concerned.⁷⁰ In turn, the criminal law must be strictly applied and restrictively interpreted; it cannot be interpreted by analogy and any ambiguity should be resolved in favour of the accused.⁷¹

26. Where individuals are prosecuted or detained under terrorism charges with no adequate basis in law or fact, or prosecuted by courts unable or unwilling to assess all relevant facts and law, both the principle of legality and the presumption of innocence are jeopardised.⁷² The proscription of certain organisations by the executive must not – as a matter of law or practice – reduce the critical role of criminal courts in the determination of guilt and punishment.
27. As this Court and others have reflected, resort to criminal law should be exceptional and restrained: “the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings” in response to criticism.⁷³ In particular, given the implications for those involved and the wider societal chilling effect, where rights defence, political expression or debate on matters of public interest are at stake, restrictions placed on free expression or association through criminal law require the most compelling justification of necessity and proportionality.

The pattern in Turkey:

28. Unfolding law and practice in Turkey stands in sharp contrast to these core principles. The expansive interpretation of anti-terrorism laws in Turkey has been condemned by this Court in numerous cases as contravening the principles of ‘foreseeability’ and ‘proportionality.’⁷⁴ These cases illustrate how participation in a public march, funeral or demonstration, or expression of opinion of a non-violent nature, have been construed as acting “on behalf of” or “aiding” an illegal organization or led to convictions for “membership” of illegal organisations under Article 220/6 or 7 of the Criminal Code.
29. Examples include *Bakır and Others v. Turkey* where the applicant was convicted under Article 220/7, which provides that “[a]nyone who aids an (illegal) organisation knowingly and willingly, even if he does not belong to the hierarchical structure of the organisation, shall be punished as a member of the organisation”. This Court found a violation, as the law “tie[d] the status of membership of an illegal organisation to the mere facts of a person having acted “on behalf” of that organisation and “aided an illegal organisation knowingly and willingly” respectively, without the prosecution having to prove the material elements of actual membership”.⁷⁵ Similarly, in *Işıkırık v. Turkey*, the Court held that article 220/6 did not meet the requirement of the quality of law prescribed in the Convention. These cases are reflected in a Venice Commission opinion which concludes that Turkish law concerning membership of terrorist organisations is vague and unforeseeable.⁷⁶
30. Although in principle for membership charges to be sustained “continuity, diversity and intensity” in the relationship to the organisation must be proved, recent jurisprudence of the Turkish courts shows that this standard is treated so broadly as to lack the rigorous restraint required of criminal law: having a bank account at a certain bank, membership of trade unions, downloading an encrypted messaging service, tweeting against the government have all been deemed as evidence of this organic relationship.⁷⁷ Recently, in the case of *Alparslan Altan v. Turkey*, when examining the lawfulness of the initial detention of an applicant charged with membership of an armed terrorist organisation, the Court stressed the importance

⁷⁰ ECtHR, *Sahin Alpay v. Turkey*, para.116.

⁷² UN Special Rapporteur on terrorism, E/CN.4/2006/98, para. 42.

⁷³ E.g. ECtHR, *Karatas v Turkey*, App. No. 23168/94, 8 July 1999, para.50.

⁷⁴ Eg., ECtHR, *Yılmaz and Kılıç v Turkey*; *Gül and or. v Turkey*; *Gülcü v Turkey*, App. no. 17526/10, 19 Jan.2016; *Işıkırık v Turkey*, App. no. 41226/09, 14 Nov,2017; *İmret v Turkey*; *Bakır and Others v. Turkey*, App. 46713/10, 10 Jul. 2018.

⁷⁵ *Bakır and Others v. Turkey*, App. 46713/10, 10 Jul. 2018, para. 58.

⁷⁶ Venice Commission, CDL AD(2016)002,15 Mar. 2016, p.25.

⁷⁷ UN High Commissioner on Human Rights, Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, Mar. 2018, para. 65, https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf; Venice Commission, CDL AD(2016)002,15 Mar. 2016, para.102.

of “sufficient objective elements” proving an individual’s criminal conduct.⁷⁸ In other cases, the Court found that there was an insufficient factual basis to establish that the person had acted on behalf of an illegal organization.⁷⁹ Thus, the broad definition of terrorism offences, coupled with the practice of reliance on weak evidence, raise fundamental problems with regard to the legality and legitimacy of criminal prosecutions.

31. The vagueness of anti-terror legislation is closely interconnected with the “judicial harassment” of HRDs, journalists and politicians. As mounting practice shows, since the scope of Article 220 and 314 of the Turkish Criminal Code is ill-defined, activities of HRDs that are perceived to challenge the government in some way can be categorised as membership of, or support for, terrorist organisations.⁸⁰ The UN special rapporteur on human rights defenders is deeply concerned with broad, vaguely worded anti-terrorism laws which are used to silence HRDs and any individual expressing a dissenting opinion.⁸¹ Several UN Special Rapporteurs have criticised the frequent citation of security grounds or the fight against terrorism to justify targeting dissents and curtailing individual’s rights to freedom of expression, assembly and association.⁸²

Conclusion

32. In conclusion, Turkey has consistently been criticised by international organisations, due to the misappropriation of criminal law to impede the legitimate exercise of rights, and the crucial work of HRDs.⁸³ As the Court noted in its *Demirtaş* judgment, this has led to “stifling pluralism and limiting freedom of political debate.”⁸⁴ The criminalisation of HRDs requires particularly rigorous oversight by the Court, given its impact on an array of rights, including in this case Articles 5, 10, 11 and 18, on the authority of criminal law and on the ability to defend human rights in Turkey.

⁷⁸ ECtHR, *Alparslan Altan v. Turkey*, App. No. 12778/17, 16 Apr. 2019, para.136.

⁷⁹ ECtHR, *Şahin Alpay*, App. No. 16538/17, 20 Mar. 2018, para. 107; *Mehmet Hasan Altan v. Turkey*, App. No. 13237/17, 20 Mar. 2018.

⁸⁰ Press Release of 8 Jul. 2019 after Country Visit by Dunja Mijatović, the Commissioner for Human Rights of the Council of Europe, <https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders>.

⁸¹ UN Special Rapporteur on human rights defenders, World Report on the Situation of Human Rights Defenders, Dec. 2018, p.381.

⁸² Joint statement by three UN Special Rapporteurs and a Chair-Rapporteur, 14 Jul. 2017, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21875&LangID=E>.

⁸³ The Venice Commission recommended that membership of an armed organisation under Article 314 must be applied strictly; Venice Commission, CDL-AD(2016)002, para. 106; the Commissioner for Human Rights of the Council of Europe recommended that the Anti-Terror Law should be reviewed completely in order to make it ECHR-compliant; the Commissioner for Human Rights of the Council of Europe, CommDH (2017)5, para. 124. The UNHRC criticised the vagueness of the definition of a terrorist act in Turkish law; UNHRC, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (13 Nov. 2012), UN Doc. CCPR/C/TUR/CO/1, para.16. See also Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, UN Doc. A/HRC/35/22/Add.3, adopted 7 Jun. 2017.

⁸⁴ ECtHR, *Demirtaş v. Turkey (no.2)*, App. No. 14305/17, 20 Nov. 2018, para. 273.