

## IN THE EUROPEAN COURT OF HUMAN RIGHTS

### MEHMET OSMAN KAVALA v. TURKEY App No. 28749/18

#### Third Party Intervention: Turkey Litigation Support Project and PEN International

##### I. Introduction

1. The Third Party Intervenors (the Intervenors) submit these written comments by leave of the President of the Second Section of the Court granted on 7 December 2018 pursuant to Article 36 (2) of the European Convention on Human Rights (the Convention) and Rule 44(3)(a) of the Rules of the Court.
2. Since the 15 July 2015 coup attempt in Turkey, the targeting of freedom of expression, association, assembly, and movement of human rights defenders (HRDs) and their arbitrary detention and prosecution has been intense and well documented.<sup>1</sup> The 2018 World Report by the UN Special Rapporteur on the situation of human rights defenders (UN Special Rapporteur on HRDs) for example, records attacks on HRDs expressing views critical of the State on an array of issues from the state of emergency and the Kurdish situation to women's rights, sexual orientation and gender identity.<sup>2</sup>
3. As the Court is aware, the case of Mehmet Osman Kavala v. Turkey concerns the October 2017 arrest of the applicant, a highly regarded civil society leader, publisher and HRD, and his on-going pre-trial detention. The case is emblematic of prevalent trends in Turkey, and therefore raises human rights issues of broader significance. These include the human rights implications of closing civil society space and repression of HRDs and expansive approaches to criminal law as a key tool to this end.
4. This submission will firstly outline the relevant factual context in respect of the situation of HRDs in Turkey and beyond (Section II). While it does not address the particular facts of the case, it reminds the Court of the context within which those facts emerge, notably the prevalence in Turkey today of attacks of myriad types against HRDs, including of the sort raised by the case. This is relevant to the Court's understanding of the facts and its assessment of the law, including in respect of Article 18. The submission will then focus on international and comparative standards relevant to the interpretation of the Convention in this context. Section III addresses international standards governing the nature of states obligations towards HRDs. Section IV reflects on some of principles of human rights and criminal law that constrain a rule of law approach to resort to criminal law.

##### II. The Context: Human Rights Defenders in Turkey and Beyond

5. In recent years, reports of international and regional human rights bodies are replete with expressions of concern regarding attacks on HRDs in Turkey. Successive Council of Europe (CoE) Commissioners for Human Rights, among others, have criticized in strident terms the widespread abuse of over-broad criminal legislation, in particular anti-terror laws.<sup>3</sup> Excessive use of pre-trial detention and prosecution on this basis are described as instruments of "judicial harassment."<sup>4</sup> The absence of reasonable suspicion to justify detention, or of sufficient evidence linking suspects or accused persons with a terrorist

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<sup>1</sup> See further below and eg. UN Special Rapporteur on HRDs, 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>

<sup>2</sup> Ibid.

<sup>3</sup> U.N. 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 March 2016.

<sup>4</sup> Thomas Hammarberg, CoE Commissioner for Human Rights, Report on administration of justice in Turkey, CommDH(2012)2, p.9; and 5 years later: Nils Muižnieks, CoE Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para.46.

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.<sup>5</sup>

6. Although not a new phenomenon, the situation seriously deteriorated during the state of emergency (SoE). In 2017 alone, 183,121 people were indicted for crimes against the constitutional order,<sup>6</sup> including terrorism related crimes, and thousands detained on this basis.<sup>7</sup> The SoE saw a dramatic rise in the number of HRDs charged with membership of terrorist organisations, or ‘propagandising’ or support for such organisations, for example where their opinions were deemed to even loosely align with a proscribed organisation on selected issues or to lend support to its cause.<sup>8</sup>
7. The case of Taner Kiliç, the Chair of Amnesty International (AI) Turkey who was held in pre-trial detention from June 2017 to July 2018 is one well-known example of the much broader number of HRDs charged with membership of a terrorist organisation.<sup>9</sup> In July 2017, 10 HRDs including AI Turkey Director Idil Eser and Özlem Dalkiran from the Citizens’s Assembly were arrested, and 8 of them detained for 112 days before being released on bail.<sup>10</sup> In November 2018, 13 HRDs, including prominent academics and civil society actors, were taken into custody and questioned, as in this case, about their involvement in the Gezi Park Protests of 2013 and links to civil society organisations such as Anadolu Kültür and Açık Toplum Vakfı (Open Society Foundation (OSF)).<sup>11</sup>
8. The targeting of HRDs has also been given blatant expression through the widespread closure of human rights NGOs. For example, on 22 November 2016, 375 NGOs were closed down by emergency decree; the target groups included national and local human rights organizations, women’s rights groups and lawyers’ associations.<sup>12</sup> The Turkish Government also revoked the registration of foreign NGOs that allowed them to operate in Turkey, forcing them to shut down operations. On 26 November 2018, the OSF announced that it had ceased operations in Turkey due to the increasingly hostile political environment and baseless accusations.<sup>13</sup>
9. Reports document provincial governors, citing powers under the SoE, in turn imposing blanket bans severely curtailing the right to peaceful assembly.<sup>14</sup> Examples include the 19 November 2017 indefinite ban on any public events concerning LGBTI rights in Ankara.<sup>15</sup>

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<sup>5</sup> *Ayşe Yüksel & Ors. v. Turkey*, 55835/09 et.al., 31 May 2016; *Mergen v. Turkey*, 44062/09, et.al., 31 May 2016; *Mehmet Hasan Altan v. Turkey*, 13237/17, 20 March 2018; *Şahin Alpay v. Turkey*, 16538/17, 20 March 2018.

<sup>6</sup>For the Official Statistics of the Ministry of Justice, see [www.adliscil.adalet.gov.tr/istatistik\\_2017/istatistik2017.pdf](http://www.adliscil.adalet.gov.tr/istatistik_2017/istatistik2017.pdf), 38.

<sup>7</sup> 154,000 people have been prosecuted and 50,000 people were placed in detention on remand for pending proceedings for the first ten months of the SoE: Bianet news, ‘Number of People Detained Reached 50 Thousand under 15 July 2016 Operations’, published on 28 May 2017: <https://bianet.org/bianet/insan-haklari/186881-15-temmuz-sorusturmalarinda-tutuklu-sayisi-50-bin-136>.

<sup>8</sup> AI, *Weathering the Storm, Defending Human Rights in Turkey’s Climate of Fear*, 26 April 2018: <https://www.amnesty.org/download/Documents/EUR4482002018ENGLISH.PDF>, p.10.

<sup>9</sup> AI, *Turkey: One year since the imprisonment of Taner Kiliç, demands for his release will not be silenced*, 6 June 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/>.

<sup>10</sup> AI, *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/>

<sup>11</sup> Front Line Defenders, *Police Operation against civil society and academics*, <https://www.frontlinedefenders.org/en/case/police-operation-against-civil-society-and-academics-1>

<sup>12</sup> AI, *Urgent Action: Turkey Permanently Closes Hundreds of NGOs*, 23 Nov. 2016. <https://www.amnesty.org/download/Documents/EUR4452082016ENGLISH.pdf>

<sup>13</sup> OSF, *The Open Society Foundations in Turkey Ceases its Operations*, 26 Nov. 2018. <https://www.opensocietyfoundations.org/press-releases/open-society-foundation-turkey-ceases-its-operations>

<sup>14</sup> AI Turkey 2017/2018 at <https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/>

<sup>15</sup> Independent, *Turkey bans all LGBT events in capital to ‘protect public security’*, 19 Nov. 2017.

10. A broad range of HRDs and civil society actors have been targeted for detention and arbitrary prosecution. One report documents 1546 lawyers prosecuted for terrorism-related crimes between 2016 and 2018,<sup>16</sup> among them 17 human rights lawyers from the “Progressive Lawyers’ Association” (Çagdas Hukukçular Derneği).<sup>17</sup> In respect of journalists who are “among the most affected by the various forms of judicial harassment,” the CoE Commissioner for Human Rights notes that “detention is the most visible and chilling form that this harassment has taken.”<sup>18</sup> According to the UN Special Rapporteur on HRDs, 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” in terrorist organisations.<sup>19</sup> Already by the end of 2017, emergency decrees had resulted in the closure of almost 200 media outlets, including 67 newspapers, 37 TV channels, 6 news agencies, and 41 radio stations.<sup>20</sup>
11. During the SoE, 5822 academics were dismissed from universities by SoE decrees, among them the Academics for Peace who signed a petition in January 2016 protesting state violence in the Kurdish region and demanding that peace negotiations resume. Criminal proceedings against them for disseminating terrorist propaganda are ongoing.
12. The stigmatisation of HRDs and dissenting voices has been a source of deep concern.<sup>21</sup> The negative portrayal of HRDs or other dissenters as “foreign agents” or “terrorists” by high officials impacts on all segments of the society, including the judiciary.<sup>22</sup> The deterioration of judicial independence in Turkey is manifest in multiple ways and has had detrimental effects on human rights protection for all, in particular those vocally critical of the government and its policies.<sup>23</sup> The erosion of judicial independence is an HRD concern in itself, and precludes access to effective justice for the many other categories of defenders currently under attack in Turkey.
13. The nature of the present case, and its implications, should not therefore be understood in isolation, but as part of the broader context of repression of HRDs in Turkey and beyond, in particular through arbitrary and retaliatory prosecution and detention.<sup>24</sup> Moreover, it is worthy of brief note that the situation in Turkey unfolds in the regional and global context of a burgeoning crisis in respect of the protection of HRDs.<sup>25</sup>

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<https://www.independent.co.uk/news/world/europe/lgbt-events-banned-turkey-ankara-protect-public-security-governors-office-health-and-morality-a8063526.html>

<sup>16</sup> Arrested Lawyers Initiative, Report: Incarceration of Turkish Lawyers, Unjust Arrest and Convictions (2016-2018), 20 Nov. 2018. <https://arrestedlawyers.org/2018/11/20/report-incarceration-of-turkish-lawyers-unjust-arrests-and-convictions-2016-2018/>

<sup>17</sup> Arrested Lawyers Initiative, 17 Turkish lawyers are under police custody, 8 Nov. 2017. <https://arrestedlawyers.org/2017/11/08/17-turkish-lawyers-are-under-police-custody/>

<sup>18</sup> CoE Commissioner for Human Rights, CommDH (2017)5, (n4), para. 79.

<sup>19</sup> UN Special Rapporteur on HRDs, World Report on the HRDs (n1)

<sup>20</sup> Civil Rights Defenders, A State in Emergency, March 2018. <https://crd.org/wp-content/uploads/2018/04/CRD-6700-Rapport-Turkiet.pdf>

<sup>21</sup> Commissioner Memorandum, CommDH(2017)5, (n4), para.17.

<sup>22</sup> 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.

<sup>23</sup> Many judges have been removed from office, decisions have not been implemented and the apex Turkish Constitutional Court 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 the *Selahattin Demirtaş v. Turkey (No.2)*. Commissioner Memorandum, CommDH(2017)5, (n4), para.50. The OSCE Guidelines stress the importance of strengthening the independence of judiciary and prosecutors to prevent politically-motivated investigations: OSCE Guidelines 2014, para.27.

<sup>24</sup> On relevance to Article 18 see Section IV below.

<sup>25</sup> PACE, Protecting human rights defenders in Council of Europe member States, Resolution 2225 (2018), 26 June 2018, para. 3, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24932&lang=en>

14. The situation facing HRDs in Turkey and globally has insidious implications for human rights and the rule of law. It not only violates the rights of HRDs and hinders the protection of others, it also impacts on the public's perception of human rights, with an inevitable chilling effect on rights protection, democratic participation and dissent.<sup>26</sup> The Turkish and international context enhances the significance of this case and the role of the Court in interpreting the Convention consistently with the high standards of protection enshrined in the international and regional developments on HRDs addressed below.<sup>27</sup>

### III. International and Comparative Legal Standards in Relation to HRDs

15. *Development of HRD Standards:* The trends and challenges set out above have prompted the international community, working at the universal and regional level (including CoE), to develop an ample body of standards, backed up by mechanisms of oversight, interpretation and enforcement. The result is an elaborate body of international standards directed specifically towards the rights of HRDs and the duties of states of relevance to the interpretation of the Convention in an evolving field.
16. The key instrument reflecting states' obligations with regard to the protection of HRDs is the UN Declaration on Human Rights Defenders (Declaration).<sup>28</sup> The UN Special Rapporteur on HRDs was established in 2000 to support implementation of the Declaration globally. While the Declaration does not purport to be a binding document, or to introduce new rights for HRDs, it gives specific expression to - and interpretation of - the rights of HRDs enshrined in existing international instruments such as the Convention and the International Covenant on Civil and Political Rights (ICCPR). As such it can play a valuable role in informing the interpretation of the Convention.
17. The Declaration forms part of a growing body of instruments across systems that similarly enumerate or clarify state obligations owed to HRDs. At CoE level, the Committee of Ministers' (CoM) Declaration on CoE Action to Improve the Protection of Human Rights Defenders and Promote their Activities (CoE Declaration) and subsequent Parliamentary Assembly resolutions<sup>29</sup> have closely referenced the UN Declaration as part of the overarching framework governing protection of HRDs in the region.<sup>30</sup> The CoE 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.<sup>31</sup> The importance of the issue has been repeatedly reiterated by the CoE Commissioner of Human Rights whose mandate includes support of HRDs.
18. Also at the European level, the Organization for Security and Cooperation in Europe (OSCE) monitors, reports on and supports the situation of HRDs through the national human rights institutions of the Office for Democratic Institutions and Human Rights (ODIHR) and a Focal Point for HRDs.<sup>32</sup> The OSCE Guidelines on the Protection of HRDs (OSCE Guidelines) provide a useful reference point for the interpretation of states obligations,<sup>33</sup> and have been previously relied on by this Court.<sup>34</sup>

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<sup>26</sup> European Union Agency for Fundamental Rights, *Challenges facing civil society organisations working on human rights in the EU*, January 2018, p. 8 and 49.

<sup>27</sup> 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

<sup>28</sup> United Nations General Assembly [on the report of the Third Committee (A/53/625/Add.2)] 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

<sup>29</sup> For example: PACE Resolution, Resolution 2225 (n24)(2018).

<sup>31</sup> CoE Committee of Ministers, Declaration of the Committee of Ministers on CoE action to improve the protection of human rights defenders and promote their activities, 6 February 2008, Article 2

<sup>32</sup> OSCE, *Human rights defenders in the OSCE region: Challenges and good practices*, April 2017-April 2008, p. 4, <https://www.osce.org/odihr/35652?download=true>.

<sup>33</sup> OSCE, [Guidelines on the Protection of Human Rights Defenders](#), 2014.

<sup>34</sup> ECtHR, *Aliyev v Azerbaijan*, 68762/14 and 71200/14, 20 September 2018.

19. European developments reflect regional and international cooperation elsewhere. The Inter-American Commission on Human Rights (IACHR) has established a Rapporteurship on HRDs and, in cooperation with the UN, a Joint Action Mechanism on the Protection of HRDs in the Americas.<sup>35</sup> The African regional systems joined these efforts with a multitude of resolutions focusing on HRDs.<sup>36</sup> These resolutions, which are overseen by for example a Special Rapporteur on HRDs and a Focal Point on Reprisals,<sup>37</sup> call upon States to implement relevant international standards, including the UN Declaration. Although not the focus of this brief, many states around the globe have responded to these developments with meaningful laws, policies and practices to give effect to their obligations.<sup>38</sup>
20. *Positive obligations of States towards HRDs*: This brief will not address the obligations of states under the Convention, of which the Court is fully cognizant. Suffice to recall that under the Convention and other international human rights treaties, as fleshed out by jurisprudence, states have negative and positive obligations to respect, protect and fulfil human rights in order to give them meaningful effect in particular contexts. To discharge these duties in the context of HRDs, states must i) refrain from any act that violates the rights of HRDs, ii) protect HRDs from abuses by third parties and exercise due diligence in doing so, and iii) take proactive steps to promote the realisation of the rights of HRDs.<sup>39</sup>
21. These general obligations are reflected in the HRD instruments above. For example, the UN Declaration reflects and reinforces 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.”<sup>40</sup> This necessarily includes refraining from and preventing judicial or other interference with legitimate HRD activities. As the Inter-American Court of Human Rights (IACtHR) 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.”<sup>41</sup>
22. Complementing rights and obligations enshrined in the Convention and other human rights treaties, the Declaration is the first instrument to enshrine the right to *be* a HRD - to promote, protect, and defend human rights, at the national and international level. For the most part it recognizes that the key rights already reflected in general human rights treaties are fundamental for their activities, and vice versa. The rights referred to include the rights of HRDs to be protected and to seek the realisation of human rights; to freedom of opinion and expression; to freedom of association and peaceful assembly; to be free from violence; to seek, obtain, receive and hold information regarding human rights; to develop and discuss new human rights ideas; to a remedy; to access and communicate with international bodies; to procure funds and utilise these for their human rights work.<sup>42</sup>

<sup>35</sup> IACHR, [Press Release 167/2017 UN Human Rights Office, Inter-American Commission Launch Joint Action Plan on Protection of Human Rights Defenders in the Americas](#), Oct. 25, 2017. Functions include overseeing measures adopted by states and a manual of best practices to protect human rights defenders. See also IACHR, [Press Release 191/2017, IACHR Convenes Public Consultation on IACHR-OHCHR Joint Action Mechanism to Contribute to the Protection of Human Rights Defenders](#), Nov. 28, 2017 on public consultations on risk factors and solutions.

<sup>36</sup> See eg Resolution on the Situation of HRDs in Africa - ACHPR/Res. 376 (LX) 2017/1999, Grand Bay Declaration and Plan of Action and 2003 Kigali Declaration.

<sup>37</sup> Established by resolution 69 at the 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 21<sup>st</sup> May to 4<sup>th</sup> June 2004, <http://www.achpr.org/mechanisms/human-rights-defenders/>

<sup>38</sup> See eg. Eguren, E., and M. Martin. 2011. Protection of Human Rights Defenders: Best Practices and Lessons Learnt. Brussels: Protection International. <http://protectioninternational.org/publication/protection-of-human-rights-defenders-bestpractices-and-lessons-learnt>, p.14-22.

<sup>39</sup> OSCE Guidelines, (n33).

<sup>40</sup> Article 12 of the Declaration.

<sup>41</sup> *Human Rights Defender et al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, IACtHR, (ser. C) No. 283, paras 142, 28 August 2014.

<sup>42</sup> Articles 1, 5, 6, 7, 8, 9, 11, 12 and 13 of the Declaration.



23. *Creation of an Enabling Environment*: The positive obligation on states mentioned above includes the creation of conditions within which HRDs can carry out their work; this includes removing legal and formal obstacles as well as ensuring the existence of a safe, enabling environment in practice.<sup>43</sup>
24. The obligation to ensure an enabling environment is reflected, for example, in the Declaration<sup>44</sup> and the work of the UN Special Rapporteur on HRDs.<sup>45</sup> In practice this obligation has various essential elements, which have been found by the former UN High Commissioner to include: adopting “a robust legal framework compliant with international standards and a strong national human rights protection system that safeguards public freedoms 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.”<sup>46</sup>
25. Regionally, 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”.<sup>47</sup> The IACHR reflects that the obligation to create a safe environment for HRDs involves effective legislative, administrative, cultural, political and educational tools as well as risk analysis methods.<sup>48</sup> As the IACtHR recognised, “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.”<sup>49</sup>
26. Among many other measures, the OSCE has suggested that this requires States to publicly acknowledge the important and legitimate role HRDs play, to adopt judicial and administrative measures to protect HRDs and to guarantee everyone’s legitimate right to act as a defender.<sup>50</sup> As such, states are obliged to create an environment empowering HRDs to pursue their activities “without undue limitations.”<sup>51</sup> This entails particular obligations in respect of NGOs; for example, a CoE CoM recommendation<sup>52</sup> underscores the particular legal status of NGOs, and proclaims the rights and freedoms of NGOs to act effectively as HRDs.
27. *Protection from arbitrary detention and prosecution*: Detention or prosecution for their HRD activities is plainly at odds with these obligations. Resort to criminal investigation and prosecution, and detention of HRDs, is a particularly coercive and problematic form of interference with HRDs own rights 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

<sup>43</sup> UN Special Rapporteur on the Situation of HRDs, Situation of human rights defenders, 23 July 2018, para 19.

<sup>44</sup> Articles 2, 9, 12, 14 and 15 of the Declaration.

<sup>45</sup> Report of the Special Rapporteur on the situation of HRDs, 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.

<sup>46</sup> U.N. 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).

<sup>47</sup> CoE Committee of Ministers (COM), Declaration of the CoE action to improve the protection of human rights defenders and promote their activities, 6 Feb. 2008, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d3e52](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d3e52), para. 2(i)

<sup>48</sup> IACHR, Toward a Comprehensive Policy to Protect Human Rights Defenders, 28 Feb. 2018 < <http://www.oas.org/es/cidh/informes/pdfs/Proteccion-Personas-Defensoras.pdf>>

<sup>49</sup> IACtHR, Nogueira de Carvalho and others vs Brazil, 28 Nov. 2006, preliminary waivers, para. 74 onwards, cited in Euren, E., and M. Martin. 2011. Protection of Human Rights Defenders: Best Practices and Lessons Learnt. Brussels: Protection International. <http://protectioninternational.org/publication/protection-of-human-rights-defenders-bestpractices-and-lessons-learnt>, p.7.

<sup>50</sup> OSCE, Guidelines, (n33), paras. 3 and 4.

<sup>51</sup> *Ibid.*, para 41.

<sup>52</sup> 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)

and administrative proceedings or any other forms of misuse of administrative and judicial authority, or to criminalization, arbitrary arrest and detention.”<sup>53</sup>

28. It is also reflected in the jurisprudence of this Court. The Court has emphasized repeatedly the “public watchdog” role of HRDs and called for the strictest scrutiny of measures which may have discouraging effect.<sup>54</sup> Paying close regard to context, it has noted the chilling effect on the civil society “who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights.”<sup>55</sup> It has expressed concern that measures such as arrest and pre-trial detention have been used to silence, punish and prevent HRDs: “states must focus on the protection of critics of the government, civil society activists and human rights defenders against arbitrary arrest and detention,” taking measures to “ensure the eradication of retaliatory prosecutions and misuse of criminal law” against these vulnerable groups.<sup>56</sup>
29. *‘Reinforced’ duty of protection:* While states obligations apply to all within a state’s jurisdiction, recognition of the significance for human rights systems of failing to protect HRDs gives rise to ‘particular’, ‘heightened’ or ‘reinforced’ duties of protection towards HRDs and the need for rigorous oversight.<sup>57</sup> Such obligations may also derive from the heightened vulnerability of HRDs as a result of their work, as Section II makes clear.<sup>58</sup> This Court consistently reflects the need for ‘enhanced scrutiny’ of any measures that restrict the fundamental freedoms of 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.”<sup>59</sup> The Court has taken note of the existence of broad international consensus on the need of special protection for vulnerable groups, as evidenced in international instruments and the activities of relevant international bodies.<sup>60</sup> 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 arbitrary use of criminal law.
30. *Strict justification for restrictions on HRD rights:* Likewise, although the regime governing the limitations of rights under the Convention applies to rights and freedoms of HRDs, the UN Special Rapporteur on HRDs describes the need for any restriction to their rights to be justified according to “a very high standard.”<sup>61</sup> Assessing the aim of the measures is relevant to Article 18 below, as well as potentially to whether measures pursue a legitimate aim under the Convention. The impact of such measures – including the chilling impact of resort to criminal law on HRDs and the defence of human rights more broadly – may also be relevant to the necessity and proportionality analysis.
31. In relation to emergency restrictions specifically, it has been 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.”<sup>62</sup> 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.”<sup>63</sup> The

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<sup>53</sup> OSCE Guidelines , (n33), para. 23.

<sup>54</sup> *Sdruženi Jihočeské Matky v. Czech Republic*, App. No. 19101/03, 10 July 2006; *Társaság a Szabadságjogokért v. Hungary*, App. 37374/05, 14 April 2009; *Magyar Helsinki Bizottság v. Hungary [GC]*, App. 18030/11, 8 Nov. 2016

<sup>55</sup> *Aliyev v Azerbaijan*, (n34), paras. 213, 223.

<sup>56</sup> *Ibid.*, paras. 226.

<sup>57</sup> *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 August 2014

<sup>58</sup> *Human Rights Defender et al. v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-American Court of Human Rights (IACtHR), (ser. C) No. 283, paras 141–42, 157, 263, 28 August 2014

<sup>59</sup> *Alajos Kiss v. Hungary*. Para 42.

<sup>60</sup> *M.S.S v Belgium and Greece*

<sup>61</sup> United Nations Special Rapporteur on HRDs, *Situation of human Rights Defenders*, 23 July 2018, (n43), para 24.

<sup>62</sup> *Ibid.*, para. 62.

<sup>63</sup> *Albert Womah Mukong v. Cameroon* (1994) UN Doc. CCPR/C/51/D/458/1991.

UNHRC found the legitimate limitations of free expression could never be justified 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.

#### **IV. Article 18 of the Convention in relation to unlawful investigations and prosecutions of HRDs**

32. 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 and private life. In addition, Article 18, recently invoked by the Court in several cases, provides an invaluable framework to address the true nature and specificities of this form of misuse of state power against HRDs.<sup>64</sup>
33. 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.<sup>65</sup> Therefore, 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.<sup>66</sup>
34. While applying these standards, as the Court found in *Ilgar Mammadov v Azerbaijan*, proof of abusive restriction by the State will follow “from the combination of the relevant case-specific facts.”<sup>67</sup> In *Rasul Jafarov v Azerbaijan* and *Aliyev v Azerbaijan*, the totality of circumstances led the Court to conclude that in both cases “the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights.”<sup>68</sup> 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 defender,” 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.<sup>69</sup>
35. The Interveners submit that these factors have obvious resonance in the context of the detention and prosecution of HRDs in Turkey today, light of the information referred to in Section II.

#### **V. International and comparative standards: the role, and limits of criminal law**

36. 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.<sup>70</sup> States are not only entitled, but in some circumstances obliged, to take preventive measures to protect security, including in appropriate circumstances through the criminal law. However, in doing so the authorities must respect international human rights law, and the fundamental constraining principles of criminal law inherent in a rule of law approach. In Turkey, as elsewhere, the criminal law targeting of HRDs is closely linked to tensions arising in respect of these core principles.

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<sup>64</sup> Joint partly dissenting opinion of Judges Nicolaou, Keller and Dedov, ECHR, *Navalnyy and Ofitserov v Russia*, App. Nos. 46632/13 and 28671/14, 23 February 2016.

<sup>65</sup> *Merabishvili v. Georgia [GC]*, App. No. 72508/13, 28 Nov. 2017, para. 291 and 309.

<sup>66</sup> ECtHR, Guide on Article 18 - Limitations on Use of Restrictions on Rights, 31 August 2018, para.22.

<sup>67</sup> *Ilgar Mammadov v Azerbaijan*, App. No. 15172/13, 22 May 2014, para. 142.

<sup>68</sup> *Ibid* para. 162.

<sup>69</sup> ECtHR, *Selahattin Demirtaş v. Turkey (No. 2)*,(n22); *Rasul Jafarov v Azerbaijan*, 69981/14, 17 March 2016, paras. 159-162; *Aliyev v Azerbaijan*, (n34), paras. 206-216.

<sup>70</sup> ECtHR, *Tagayeva and Others v Russia*,26562/07, 13 April 2017.



37. First, issues arise as to the fundamental principle of legality. States must define the material and mental elements of crimes with sufficient precision and clarity to meet the requirements of *nullum crimen sine lege* enshrined across human rights treaties, including Article 7 of the Convention. In addition, any permissible restrictions on human rights – arising from the prosecution of crimes involving free expression - must have a clear legal basis. The law must be “is 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.”<sup>71</sup> As the UNHRC reflects in its general comment, extreme care is due in the craft and application of sedition and national security laws in particular to ensure that rule of law principles are respected.<sup>72</sup> UN Special Rapporteurs and CoE Commissioners have expressed concern that “terrorism” is not confined to “conduct that is of a genuinely terrorist nature,”<sup>73</sup> and “overly broad and vague language of the counter-terrorism offences allows for subjective interpretation.”<sup>74</sup> The abuse of criminal law to target HRDs is linked to the overbreadth of criminal provisions, providing flexible tool inherently susceptible to abuse.
38. As noted in Section II, deep and wide-ranging concern attends the scope of anti-terrorism related offences in Turkey. Offences such as propagandising for terrorism, provoking the public to hatred and hostility, membership of an armed organisation, aiding and abetting a terrorist organisation raise fundamental issues with the principle of legality under criminal law and the permissible limits of restrictions under human rights law, and were inherently susceptible to abuse.<sup>75</sup>
39. Second is the principle of individual criminal responsibility for criminal harm and the limits of preventive prosecutions. Criminal law requires a sufficiently proximate connection between the “conduct” and “intent” of an individual - the basic elements of any crime – and foreseeable harm.<sup>76</sup> In general the commission of a crime implies harm caused, and only in exceptional circumstances does criminal law punish harm that has not yet materialised, e.g. in relation to direct incitement to violence and hate speech.<sup>77</sup> The law cannot punish abstract danger, but harm caused, or at a minimum risk of ‘serious disturbance’ to public order,<sup>78</sup> through the conduct of individuals possessing the relevant intent. The expansion of criminal law to embrace ideas, associations or activities deemed to represent abstract threats to the state fall foul of these basic principles.
40. Third, the fundamental presumption of innocence cannot be displaced. Individuals charged with links to terrorist organisation must be prosecuted by independent criminal courts able to assess all relevant facts

<sup>71</sup> ECtHR, *Öztürk v Turkey*, 22479/93, 28 September 1999, para. 54.

<sup>72</sup> UNHRC General Comment no.34, para.30

<sup>73</sup> UN Special Rapporteur on Terrorism, E/CN.4/2006/98, para 42

<sup>74</sup> Thomas Hammarberg, CommDH(2012)2, (n4).

<sup>75</sup> See eg *ibid*, para.63-70; Muznieks, CommDH(2017)5, (n4), para.124; as well as Venice Commission, CDL-AD(2016)002, (n3), para.107.

<sup>76</sup> For underlying principles, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014), p. 109; Duffy and Pitcher, *Inciting Terrorism? Crimes of Expression and the Limits of the Law*, B. Gould and L. Lazarus, *Security and Human Rights* (Hart Bloomsbury Publishing, 2018) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3156210](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156210)

<sup>77</sup> Eg the UN Secretary General’s report limits incitement to terrorism to speech that “directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action”. Similar limitations on the financing of terrorism entailing a “double intent requirement”: “Report of the Secretary General” (28 August 2008), UN Doc. A/63 Office of the United Nations High Commissioner for Human Rights, Factsheet on Human Rights, Terrorism and Counter-Terrorism, p. 42, [www.ohchr.org/Documents/Publications/Factsheet32EN.pdf](http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf); UNODC handbook p44.

<sup>78</sup> IACtHR, *Francisco Uson Ramirez v Venezuela*, IACtHR Series C no. 207, Judgment of 20 Nov. 2009, para. 89. eg. ECtHR, *Zana v Turkey*, 18954/91, 25 Nov. 1997; ECtHR, *Sürek v Turkey* (no.1), 26682/95, 8 July 1999; ECtHR, *Sürek v Turkey* (no. 3), 24735/94, 8 July 1999; ECtHR, *Medya FM Reha Radyo ve Dileşim Hizmetleri A v Turkey*, 32842/02, Decision on admissibility of 14 Nov. 2006. See also Guidelines of the COE Committee of Ministers on protecting freedom of expression and information in times of crisis, 26 September 2007, adopted 1005th meeting of the Ministers’ Deputies, Guideline IV, para. 19.

and law: the nature of the impugned activities – whether it amounts to terrorism or threatens the national security – and the role and culpability of the individual.<sup>79</sup> The proscription of certain organisations or initiatives by the executive must not – as a matter of law or in practice – reduce the critical role of criminal courts in determining guilt and punishment.

41. Fourthly, given the implications for the individuals involved, as well as the chilling effect on others, a strict approach to the application – and the interpretation – of criminal law is essential. The principle of restraint reflects the fact that resort to criminal law should be exceptional. It has been noted by a judge of the IAtCHR that in democratic systems resort to criminal law operates as a measure of last resort (*ultima ratio*, where harm to society or individuals cannot be addressed effectively by less severe measures) whereas in autocratic regimes it becomes the tool of choice.<sup>80</sup> Particularly where rights defence, political expression or debate on matters of public interest are at stake, restrictions on free expression or association through criminal law require the most compelling justification of necessity and proportionality. The Court has reflected this need for restraint, noting that “the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings” in response to criticism.<sup>81</sup>
42. Finally, there is the principle that criminal law should be strictly applied and restrictively interpreted. It cannot be interpreted by analogy and any ambiguity should be resolved in favour of the accused.<sup>82</sup>
43. In conclusion, the issues at stake in the present case reflect issues on which 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,<sup>83</sup> as the Court noted in its *Demirtas* judgment, “stifling pluralism and limiting freedom of political debate.”<sup>84</sup> The criminalisation of HRDs requires particularly rigorous oversight by the Court, given its impact on an array of rights, including Articles 7, 8, 10 and 18, on the authority of criminal law and on the defence of human rights in Turkey at a crucial time.

**Respectfully submitted,**



**Helen Duffy**

**On behalf of the Turkey Human Rights Litigation Support Project and PEN International**

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<sup>79</sup> UN Special Rapporteur on Terrorism, E/CN.4/2006/98, para. 42

<sup>80</sup> Concurring Separate Opinion of J Ramirez in IACHR, *Ulloa v. Costa Rica*, Merits, Reparations and Costs, (Series C No 107, IHRL 1490) 200, para. 16

<sup>81</sup> Eg. ECtHR, *Karatas v Turkey*, 23168/94, 8 July 1999, para.50;

<sup>82</sup> See e.g. ECtHR, *Başkaya and Okçuoğlu v Turkey*, nos. 23536/94 and 24408/94, 8 July 1999, para. 36; ECtHR, *Capeau v Belgium*, 42914/98, 13 January 2005, para. 25; Jeremy McBride, *Human rights and criminal procedure: The case law of the European Court of Human Rights* (Council of Europe Publishing 2009), p. 184.

<sup>83</sup> The Venice Commission recommended that the elements of membership of an armed organisation under Article 314, which are used for prosecuting membership of a terrorist organisation, must be applied strictly; Venice Commission, CDL-AD(2016)002(n3), para. 106; CoE Commissioner for Human Rights recommended that the Anti-Terror Law should be reviewed completely in order to make it ECHR-compliant; Muižnieks, CommDH(2017)5, (n4), 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 June 2017

<sup>84</sup> ECtHR, 14305/17, 20 Nov. 2018, para.273.