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President of the Second Section
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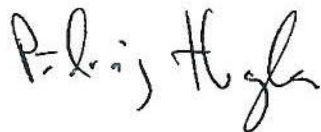
20 October 2017

Re: Written comments in the case of *Mehmet Murat Sabuncu and others v. Turkey* (Application No. 23199/17)

Dear President Spano,

Pursuant to leave granted on 8 September 2017, please find enclosed the written comments of the Association of European Journalists, the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, Human Rights Watch, Index on Censorship, the International Federation of Journalists, the International Press Institute, the International Senior Lawyers Project, the Media Legal Defence Initiative ("MLDI"), PEN International, and Reporters Without Borders (together the "Interveners") in relation to the above-mentioned case.

Yours sincerely,



Padraig Hughes
Legal Director
MLDI (on behalf of the Interveners)

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App No. 23199/17

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

MEHMET MURAT SABUNCU AND OTHERS
Applicants
-and-

THE REPUBLIC OF TURKEY
Respondent

(1) ARTICLE 19
(2) ASSOCIATION OF EUROPEAN JOURNALISTS
(3) COMMITTEE TO PROTECT JOURNALISTS
(4) EUROPEAN CENTRE FOR PRESS AND MEDIA FREEDOM
(5) EUROPEAN FEDERATION OF JOURNALISTS
(6) HUMAN RIGHTS WATCH
(7) INDEX ON CENSORSHIP
(8) INTERNATIONAL FEDERATION OF JOURNALISTS
(9) INTERNATIONAL PRESS INSTITUTE
(10) INTERNATIONAL SENIOR LAWYERS PROJECT
(11) MEDIA LEGAL DEFENCE INITIATIVE
(12) PEN INTERNATIONAL
(13) REPORTERS WITHOUT BORDERS

Third Party Interveners

JOINT WRITTEN COMMENTS OF THE THIRD PARTY INTERVENERS

Introduction and Background

1. The Third Party Interveners ('the Interveners')[1] note that in the aftermath of the attempted military coup on 15-16 July 2016, the Respondent declared a state of emergency on 20 July 2016 and, the following day, notified the Secretary General of the Council of Europe of the Respondent's intention to invoke Article 15 of the Convention in order to derogate from the Convention. Also on 21 July 2016, the Respondent similarly gave notification under Article 4 of the International Covenant on Civil and Political Rights ('the ICCPR') that it may derogate from the provisions of the ICCPR.[2]

2. Media freedoms in Turkey have always been of particular concern to the international community, but have deteriorated significantly since the attempted coup. Reports on the number of journalists detained by the State have varied from around 80 to 259 journalists.[3] Prosecutions against journalists together with other measures taken against them and media outlets critical of the Government, including shutting down of around 140 media outlets, censorship towards internet and social media, and cancellation of accreditation of many, has seriously affected and undermined press freedom. [4]

3. By this intervention, the Interveners draw upon their expertise as organisations specialising in international human rights law and/or working with international networks of media professionals to make the following three submissions to the Court:

   3.1. The detention of a journalist for the exercise of the right to freedom of expression should be subject to the strictest scrutiny, and can only be justified in extreme and exceptional cases under Article 10 of the Convention;

   3.2. The deliberate and arbitrary use of the criminal law to target journalists and other media for exercise of freedom of expression and opinion that may be critical of government for the ulterior purpose of punishing and preventing dissemination of critical opinions amounts to a violation of Article 18 of the Convention in relation to the rights unduly restricted; and

   3.3. That only an exceptional legal and factual situation will enable States to rely upon Article 15 of the Convention to derogate from its human rights obligations under the Convention.

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[1] The Third Party Interveners ('the Interveners') submit these written comments pursuant to leave granted by the President of the Second Section under Rule 44 § 3 of the Rules of the Court, as set out in the letter dated 8 September 2017 from the Section Registrar, Mr S. Naismith.

[2] See Secretary-General of the United Nations, *Turkey: Notification under Article 4(3)*, UN Doc. C.N.580.2016.TREATIES-IV.4 (Depositary Notification) (21 July 2016),

[3] See Roy Greenslade, *Record Number of Journalists in Jail Globally after Turkey Crackdown* (13 December 2016), available at https://www.theguardian.com/media/greenslade/2016/dec/13/turkey-has-81-of-the-worlds-259-jailed-journalists-behind-bars.

[4] Human Rights Watch, *Silencing Turkey's Media: the Government's Deepening Assault on Critical Journalism* (15 December 2016), available at https://www.hrw.org/report/2016/12/15/silencing-turkeys-media/governments-deepening-assault-critical-journalism.

Submission I: The Detention of a Journalist for the Exercise of the Right to Freedom of Expression Can Only Be Justified in Extreme and Exceptional Cases

4. The media plays a crucial role in a democratic society by facilitating and fostering the public's right to receive and impart information and ideas.[5] This is also the case during times of heightened tension or conflict. As has been observed by the United Nations Human Rights Committee ('UN HRC'), '[t]he media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities.'[6] When considering the restrictions imposed on the media in such contexts, the Interveners submit that this Court ought to bear in mind the weight of international legal opinion to the effect that criminal proceedings and the deprivation of liberty can only amount to a justified restriction on the right to freedom of expression in extreme and exceptional circumstances.

5. This Court has recognised that pre-trial detention, pursuant to criminal charges that are brought against an individual for exercising their right to freedom of expression, is a 'real and effective constraint' on Article 10 of the Convention.[7] Therefore, pre-trial detention can amount to an interference with the right even in cases where no final conviction has been imposed.[8] If such a measure is taken against a journalist, this can create a climate of self-censorship for the individual journalist as well as other journalists planning to carry out similar work in the future.[9]

6. As with the imposition of custodial sentences, pre-trial detention can involve the deprivation of liberty for a considerable length of time. This Court has consistently stated that depriving an individual of their right to liberty for exercising their right to freedom of expression under Article 10 of the Convention can only be justified in exceptional circumstances. In *Murat Vural v. Turkey*, the Court reasoned that 'peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence.'[10] In *Cumpănă and Mazăre v. Romania*, the Court emphasised that:

   > *'the imposition of a prison sentence for a press offence will be compatible with [...] Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.'*[11]

7. This is consistent with the approach adopted by other regional human rights courts. The Inter-American Court of Human Rights, for example, has clearly stated that criminal prosecutions

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[5] *Magyar Helsinki Bizottság v. Hungary* [GC], Application No. 18030/11, par. 165. See also *Bladet Tromsø and Stensaas v. Norway* [GC], Application No. 21980/93, par. 59 and 62.

[6] UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of Opinion and Expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 46.

[7] *Şık v. Turkey*, Application No. 53413/11, par. 85; *Nedim Şener v. Turkey*, Application No. 38270/11, par. 96.

[8] *Id.* See also *Dilipak v. Turkey*, Application No. 29680/05, par. 44.

[9] *Şık v. Turkey*, Application No. 53413/11, par. 111; *Nedim Şener v. Turkey*, Application No. 38270/11, par. 122.

[10] *Murat Vural v. Turkey*, Application No. 9540/07, par. 66.

[11] *Cumpănă and Mazăre v. Romania* [GC], Application No. 33348/96, par. 115.

for the exercise of the right to freedom of expression may only be brought in exceptional cases where there is an absolute necessity to resort to such measures.[12] It has also highlighted that the burden of proof is on the party commencing criminal proceedings to demonstrate that such a need exists.[13] In *Kimel v. Argentina*, the Inter-American Court explained that criminal proceedings will usually be an unnecessary and disproportionate response to expression because criminal law 'is the most restrictive and harshest means to establish liability for an illegal conduct.'[14] It went on to hold that, in order to avoid abuse, the punitive power of the criminal law should only be exercised 'to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them.'[15]

8. The Interveners note that the Inter-American Commission on Human Rights has taken the view that:

> *'the threshold of State intervention with respect to freedom of expression is necessarily higher [than in respect of other rights] because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when a State brings to bear the coercive power of its criminal justice system to curtail expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances where there is an obvious and direct threat of lawless violence.'*[16]

9. The African Court on Human and Peoples' Rights has held that custodial sanctions for speech will amount to a violation of the right to freedom of expression except in 'serious and very exceptional circumstances ... for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion, or nationality.'[17]

10. As can be observed from the jurisprudence of this Court, as well as its Inter-American and African counterparts, criminal proceedings and the deprivation of liberty can only amount to justified interferences with the right to freedom of expression in exceptional cases where there has been a very serious impairment of the fundamental rights of others, such as where the accused is responsible for hate speech or incitement to violence.

11. In cases where the State alleges that criminal proceedings and the deprivation of liberty are necessary to prevent crime or protect national security, public safety or public order, this Court must apply strict scrutiny to ensure that the authorities have reached this conclusion on

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[12] Inter-American Court of Human Rights, *Kimel v. Argentina*, Judgment of May 2, 2008 (Merits, Reparations and Costs), par. 78.

[13] *Id.*

[14] *Id.*, par. 76.

[15] *Id.*

[16] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights*, Ref OEA/Ser.L/V.88 (1994), p. 211.

[17] African Court on Human and Peoples' Rights, *Lohé Issa Konaté v. The Republic of Burkina Faso*, Application No. 004/2013, par. 165.

an 'acceptable assessment of the relevant facts'.[18] For instance, the Court must assess the measure adopted by the State in light of (a) the content of the expression made by the applicant, (b) the context in which it was made, and (c) the real effect that such expression might likely produce.[19] In *Gül and Others v. Turkey*, a case where the Government relied on the legitimate aim of protecting national security or public order to justify the imposition of a criminal sanction on non-violent protestors, this Court stated that it will not be necessary in a democratic society to bring the weight of the criminal law to bear on those who have not incited or called for violence, armed resistance, an uprising, or injury or harm to any person.[20] The Court reached this decision despite the fact that the expression adopted had a 'violent tone'.[21] In finding a violation of Article 10 of the Convention in that case, the Court noted that there was no indication 'that there was a *clear and imminent danger* which required interference such as the lengthy criminal prosecution faced by the applicants.'[22]

12. The Interveners note that the European Union's legislative approach to combating terrorism has long proceeded on the basis that, with respect to expression, only *public provocation to commit terrorist crimes* falls within the proper scope of State counter-terrorism actions, and that expression of views, even radical or controversial ones, ought *not* to be controlled through criminal law.[23] The UN Human Rights Committee has indicated that where a State alleges a legitimate ground for restricting freedom of expression, 'it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.'[24] Applying this to the counter terrorism context, the UN Special Rapporteur has stated that 'protection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.'[25]

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[18] *Döner and Others v. Turkey*, Application No. 29994/02, par. 100.

[19] *Şık v. Turkey*, Application No. 53413/11, par. 106; *Nedim Şener v. Turkey*, Application No. 38270/11, par. 117. See also *Karataş and Others v. Turkey*, Application No. 46820/09.

[20] *Gül and Others v. Turkey*, Application No. 4870/02, par. 41 and 42. See also *Sürek and Özdemir v. Turkey* [GC], Application Nos. 23927/94 and 24277/94, par. 51 and 61; *Erdoğdu v. Turkey*, Application No. 25723/94, par. 71: ('[w]here a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media').

[21] *Gül and Others v. Turkey*, Application No. 4870/02, par. 41.

[22] *Id.*, par. 42 [emphasis added].

[23] See European Union Parliament and Council, *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA* (2017) Vol. 60 Official Journal of the European Union L88, pp. 6-21; and, before it, European Union Parliament and Council, *Council Framework Decision 2008/919/JHA Amending Framework Decision 2002/475/JHA on Combating Terrorism* (2008), Vol. 51 Official Journal of the European Union L 330, pp21-23.

[24] UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (12 September 2011), par. 35.

[25] UN Special Rapporteur on Freedom of Opinion and Expression, *Report on Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. A/HRC/17/27 (16 May 2011), par. 36. See also *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1996), Principle 6.

13. Accordingly, the consistent position at international law is that any attempt by the State to impose detention as a sanction to the exercise of free expression is subject to review which applies the strictest scrutiny. Such restrictions will only be lawful in the most exceptional circumstances, typically requiring specific proof that the relevant publications *directly incited* violence.

Submission II: The Deliberate and Arbitrary Use of the Criminal Law to Target Media Amounts to a Violation of Article 18

14. The origins of Article 18 in light of the *Travaux Préparatoires* to the Convention are considered in *Navalnyy and Ofitserov v. Russia*:

    '... it was drafted as a defence against abusive limitations of Convention rights and freedoms and thus to prevent the resurgence of undemocratic regimes in Europe. Article 18 of the Convention was intended to provide Europe with the new approach needed in the "battle against totalitarianism", premised on the understanding that States could always and would always find excuses or reasons to limit, restrict, and ultimately hollow out individual rights and freedoms: the public interest in "morality, order, public security and above all democratic rights" can all be abused for this purpose.'[26]

15. Article 18 requires that States act at all times in good faith. As this Court set out in the case of *Khordokovskiy and Lebedev v. Russia*, there is a '*rebuttable assumption*' that States act in good faith, but it is open to an applicant to prove that *'the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context).'*[27]

16. The presumption that States act in good faith will be rebutted where the circumstances demonstrate that State authorities have in fact exercised their powers for ulterior purposes. This Court has found violations of Article 18 in circumstances where pre-trial detention enacted by a State has *in fact* been used for a purpose other than the strict role of pre-trial detention,[28] namely the '*purpose of bringing [a person] before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.*'[29]

17. In many of those cases, violations of Article 18 took place on the basis of political motives, where the State sought to 'control or punish opposition political movements or civil dissent'.[30]

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26 *Navalnyy and Ofitserov v. Russia*, Application Nos. 46632/13 and 28671/14, joint partly dissenting opinion of Judges Nicolaou, Keller and Dedov.

27 *Khodorkovskiy and Lebedev v. Russia*, Application Nos. 11082/06 and 13772/05, par. 899. See also *Lutsenko v. Ukraine*, Application No. 6492/11, par. 106.

28 See, for instance, *Merabishvili v Georgia*, Application No. 72508/3, par. 106; *Gusinskiy v Russia*, Application No. 70276/01, par. 76; *Tymoshenko v Ukraine*, Application No. 49872/1, pars. 299-301; *Cebotari v Moldova*, Application No. 35615/06, par. 53; *Lutsenko v Ukraine*, Application No. 6492/11, par. 108; *Ilgar Mammadov v. Azerbaycan*, Application No 15172/13; *Rasul Jafarov v. Azerbaijan*, Application No 69981/14).

29 ECHR, Article 5(1)(c).

30 Basak Cali, *Coping with Crisis: Towards a Variable Geometry in the Jurisprudence the European Court of Human Rights* (2017) (forthcoming) Wisconsin Journal of International Law, p. 21.

More recently, this Court has communicated a number of cases focusing on the question of whether there had been a violation of Article 18 in relation to Article 10 of the Convention.[31]

18. This Court's assessment of burden of proof in establishing the improper intent of the State has been towards a more flexible test. While the Court stated in *Khodorkovskiy and Lebedev v. Russia* that 'in each new case where allegations of improper motives are made the Court must show particular diligence',[32] in *Ilgar Mammadov v. Azerbaycan,* it went on finding that 'it can be established to a sufficient degree that proof of improper reasons follows the combination of relevant case-specific facts.'[33]

19. Moreover, in its recent judgment of *Jafarov v. Azerbaijan* concerning, among others, Article 18, the Court has employed a more structured approach and, taking into account the facts of each case, applied a three part test in its consideration of whether or not the State has failed to act in good faith in the actions taken against the applicants.[34] First, the Court has examined '*the general context of the increasingly harsh and restrictive legislative regulation*' concerning the right allegedly violated in that country. Secondly, it has examined the statements of high-ranking state officials together with the articles published in the pro-government media relevant to the matter in issue. Thirdly, it has examined whether a pattern has emerged where individuals in the same position as the applicant have been targeted in the same or similar terms to the applicant. In applying this three part test, in *Jafarov*, this Court has found the State to have violated Article 18.

Increasingly Harsh and Restrictive Legislation

20. Where prosecution of journalists takes place under national security or emergency decree laws, or problematic criminal laws which are increasingly restrictive towards fundamental rights and freedoms (for example in situations of ongoing state of emergency or ongoing crackdown against certain groups), the totality of the facts might lead this Court to find violation of Article 18. Due account must also be given to the requirement that those laws must not be overbroad, vague or open to arbitrary application in a way that affects the rights and freedoms protected under the Convention. This Court has considered the application of such laws against journalists in a number of cases relating to Turkey, all concerning a less challenging environment than the present one.[35]

Commentary from High-Ranking State Officials and Pro-Government Media

21. Analysis of commentary from high-ranking state officials and pro-government media can assist in identifying the actual motivation of the State in pursuing the prosecution of individuals. Speeches, articles and other commentary by high ranking state officials and

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[31] *Miroslava Stefanova Todorova v. Bulgaria*, Application No. 40072/13; *Vasiliy Nikolayevich Bokin v. Russia*, Application No. 30635/13; *Anton Valeryevich Podchasov v. Russia*, Application No 14856/16.
[32] *Khodorkovskiy and Lebedev v. Russia*, Application Nos. 11082/06 and 13772/05, par. 898.
[33] *Ilgar Mammadov v. Azerbaycan,* Application No.15172/13, par. 142.
[34] See *Jafarov v. Azerbaijan*, Application no. 17276/07, paras. 159-162.
[35] See *Demirel and Ates v. Turkey*, Application No. 31080/02; *Üstün v. Turkey*, Application. No. 37685/02; *Dink v. Turkey*, Application. No. 2668/07; *Sik v. Turkey*, Application. No. 53413/11.

others in positions of power should be scrutinized in order to assist the Court in drawing *reasonable inferences* as to a State's aims in such circumstances. This Court should have regard to the circumstances in which journalists critical of the State are targeted by state forces because of that criticism; are continuously accused of being traitors, terrorists and contributing to activities against the state because of their legitimate journalistic activities; and when there is a link between the ongoing criminal procedures and those commentaries.

An Emerging Pattern with Respect to the Human Rights Situation

22. In assessing whether there is an emerging pattern of restrictions on human rights, this Court should have regard to the general situation in the State including, *inter alia*, judicial independence and impartiality, the treatment of journalists critical of that State, and the reports of the prominent human rights monitoring mechanisms and NGOs concerning that State. A paradigm example of a situation where a State has decided to undermine human rights protections would include the mass closure of civil society organisations, the re-introduction of incommunicado detention and torture, the shutdown of newspapers, radio stations and TV channels critical of the Government and the imposition of censorship of the internet. That is the situation in Turkey now, where arbitrary detention of individuals, including journalists, critical of the State is also commonplace. This situation was described by the Council of Europe Commissioner for Human Rights as "judicial harassment" against freedom of expression and the media.[36]

23. The restriction of free expression, including political criticism, is *not* one of the legitimate purposes of pre-trial detention enumerated in Article 5. If this Court is satisfied that the Respondent's actions in the present case *in fact* pursue that aim by restricting the free expression of persons actually engaged in journalism (whether or not they are 'accredited' according to the Respondent), they are a 'part of a larger campaign to "crack down ..."' on journalists[37] and in totality the circumstances around the case "indicates that the actual purpose of the impugned measures was to silence and punish the applicant[s] for [their] activities in the area of" critical journalism,[38] as noted in paragraph 17, then, it is open to this Court to conclude that Article 18 has been violated.

Submission III: The Legal and Factual Situation Justifying Derogation under Article 15

24. The extent to which the Respondent may, in respect of this case, seek to rely upon its expressed intention to derogate from the Convention in justifying its actions is as yet unknown. The Interveners set out the following submission so as to assist this Court in the event the Respondent seeks to rely on that expressed intention to derogate.

25. The Convention is a crucial safeguard against breaches of human rights during periods of conflict or other public emergency. Any derogation must meet the strict requirements of

36 Council of Europe Commissioner for Human Rights, *Memorandum on Freedom of Expression and Media Freedom in Turkey* (15 February 2017).

37 See *Jafarov v. Azerbaijan*, Application no. 17276/07, para. 161.

38 See *Jafarov v. Azerbaijan*, Application no. 17276/07, para. 162.

Article 15. To be valid, there must be a formal effective declaration of derogation, [39] and three substantive conditions must be satisfied: (a) the derogation must occur in 'time of war or other public emergency threatening the life of the nation'; (b) the measures taken in response must not go beyond the 'extent strictly required by the exigencies of the situation'; and (c) the measures must not be 'inconsistent with [the State's] other obligations under international law.' [40] The Interveners consider those substantive conditions in turn.

Public Emergency Threatening the Life of the Nation

26. As a starting point with respect to Article 15, while the Court has typically afforded States a wide margin of appreciation 'to determine whether [the life of the nation] is threatened by a "public emergency,"' [41] it is clear that States 'do not enjoy an unlimited power in this respect.'[42] Indeed, in the landmark decision in the *Greek Coup* case, the European Commission on Human Rights clarified that it is the State government's burden to prove the existence of the alleged 'public emergency,'[43] and that the Treaty bodies have the final jurisdiction to decide whether or not that burden of proof has in fact been discharged.[44]

27. As the Court set out in *Lawless v. Ireland (No 3)*, the term 'public emergency threatening the life of the nation' refers to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.' [45] Such a crisis must be 'actual or imminent', [46] and the 'continuance of the organised life of the community must be threatened.'[47] The Commission in the *Greek Coup* case made clear that this is a high threshold: demonstrations, civil disobedience, and general strikes would not qualify where they did not indicate 'serious disorganisation ... of vital supplies, utilities or services' as a result. [48]

28. While genuine, ongoing, and imminent threat of co-ordinated violent attacks – such as in Northern Ireland[49] and the ongoing PKK insurgency in south-eastern Turkey[50] – have previously been held by the Court to qualify as a 'public emergency threatening the life of the nation' capable of justifying a derogation under Article 15, the Interveners recall the decision of the Commission in the *Greek Coup* case. In that case, it was determined that, while Communists and their allies in Greece were clearly opposed to the Greek military regime,

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39 See ECHR, Article 15(3); *Cyprus v. Turkey*, Application Nos. 6780/74 and 6950/75, para. 527.

40 ECHR, Article 15(1).

41 *Ireland v. United Kingdom*, Series A No. 25, 18 January 1978, para. 207.

42 *Id.*, para. 207. See also *A and Others v United Kingdom* [GC], Application No. 3455/05, para. 173.

43 *Denmark v Greece*, Application No. 3321/67; *Norway v. Greece*, Application No. 3322/67; *Sweden v. Greece*, Application No. 3323/67; and *Netherlands v. Greece*, Application No. 3344/67 (Decision of the Sub-Commission) ('*Greek Coup*').

44 *Greek Coup*, para. 114.

45 *Id.*, para. 117-25.

46 *Lawless v. Ireland* (No 3), Series A No. 3, 1 July 1961, para. 28.

47 *Greek Coup*, para. 113, noting that the French text of the *Lawless v. Ireland (No 3)* judgment (which is the authentic version), explicitly defines the public emergency as 'une situation de crise ou de danger exceptionnel et imminent qui affect l'ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l'Etat'.

48 *Greek Coup*, para. 113.

49 *Brannigan and McBride v. United Kingdom*, Series A No. 258-B, 26 May 1993, para. 47.

50 *Aksoy v. Turkey*, Application Nos. 28635/95 and 2 others, para 70.

there was no indication that 'public disorder would be fomented and organised to a point beyond the powers of the police to control' and, on the contrary, an uprising of Communists and their allies had, as a matter of fact, been speedily neutralized by the Greek military authorities.[51] Accordingly, the Interveners submit that, if a State is unable to convince the Court that there continues to exist an imminent threat of violent uprising actually of a nature and extent beyond the capacity of the State authorities to neutralize it, then this Court ought not to accept a State's submission that there exists a public emergency sufficient to justify derogation, under Article 15, from Convention protections in the first place.

Extent Strictly Required by the Exigencies of the Situation

29. Even in the event that a State is able to discharge its burden of proving the existence of a qualifying public emergency threatening the life of the nation, this Court has made clear that a State is only entitled to respond to such an emergency by taking actions which are 'strictly required by the exigencies of the situation.'[52] As this Court noted in the case of *A and Others v United Kingdom*:

   '[i]n particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency, and that adequate safeguards were provided against abuse.'[53]

30. Where a State fails to provide any detail in its notice of derogation as to which rights it seeks to derogate from, in which manner and why, that failure leaves it open for the State arbitrarily and retrospectively to invoke Article 15 with respect to any given measure when challenged, without the need to make the case when introducing or applying the measure that it is demanded by the exigencies of the situation. The Interveners submit that this legal uncertainty undermines the very essence of the protection of Convention rights, and the Court should require States' Article 15 notification to explicitly articulate to which rights the derogation applies and which precise measures it is taking in the extraordinary situation that are necessitated by the exigencies of the situation.

31. The importance of the right to liberty, and the requirement that it remain respected even in circumstances of derogation from Convention, has similarly been recognized by the UN HRC. The HRC, in its General Comment 29 regarding derogation from the ICCPR pursuant to Article 4 of that Covenant in respect of a public emergency, stated that the right of '[a]ll persons deprived of their liberty [to] be treated with humanity and with respect for the inherent dignity of the human person' cannot lawfully be derogated from since that right 'expresses a norm of general international law not subject to derogation.'[54]

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[51] *Greek Coup*, para 124.

[52] *Ireland v. United Kingdom*, Series A No. 25, 18 January 1978, para 207.

[53] *A and Others v. United Kingdom* [GC], Application No. 3455/05, para. 184.

[54] UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4),* UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 13.

32. As demonstrated by this Court's decisions in the cases of *Brannigan and McBride v. United Kingdom* and *Aksoy v. Turkey*, a key factor going to the adequacy of the safeguards provided against abuse when States detain persons while derogating from ordinary Convention protections is the nature and extent of any judicial oversight of that detention. In *Aksoy v. Turkey*, for instance, this Court concluded that, 'despite the serious terrorist threat in South-East Turkey, the measure which allowed the applicant to be detained for at least fourteen days without being brought before a judge or other officer exercising judicial functions ... could not be said to be strictly required by the exigencies of the situation.'[55] In circumstances where prolonged pre-trial detention is imposed, it will be for the State to convince this Court that any such lengthy pre-trial detention was strictly required in the circumstances.

Measures must not be inconsistent with other international obligations

33. Any derogation must not be 'inconsistent with [a State's] other obligations under international law'. This is an important component of the derogation regime and in determining whether derogation is valid, the Court must examine whether the State has notified its intention to derogate from its other relevant obligations under the ICCPR. In circumstances where the State has failed to derogate from its other obligations, it will fail to comply with the test.[56]

Conclusion

34. As set out above, the Interveners provide an overview of the legal principles to be applied in cases concerning the rights guaranteed under Articles 10, 15 and 18 of the Convention. The proper application of these principles is critical in periods where essential components of a democratic society, such as a free press, are under threat. Cases such as the present one represent an important opportunity for the Court to apply the strictest of scrutiny in such a context to ensure that journalists, bloggers, and outspoken critics are not subject to charges that are politically-motivated, unjustified with reference to the exigencies of the situation, and repugnant to the obligations set out under Convention.

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[55] *Aksoy v. Turkey*, Application Nos. 28635/95 and 2 others, para 81.

[56] EJIL Talk, *Turkey's Derogation from Human Rights Treaties: An Update* (18 August 2016), available at https://www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/.