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President Robert Spano
European Court of Human Rights
Second Section
Council of Europe
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Via fax: +33 3 8841 2730

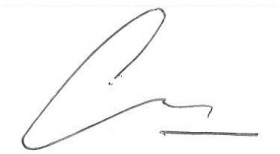
26 October 2017

Re: Written comments in the case of Ahmet Hüsrev Altan v. Turkey (Application No. 13237/17) and Mehmet Hasan Altan v. Turkey (Application No. 13252/17)

Dear President Spano,

Pursuant to leave granted on 18 September 2017, please find enclosed the written comments of PEN International, ARTICLE 19, 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, International Senior Lawyers Project, and Reporters Without Borders (together the "Proposed Interveners") in relation to the above-mentioned case.

Yours sincerely,



Carles Torner
Executive Director
PEN International (on behalf of the Proposed Interveners)

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BETWEEN:

AHMET HÜSREV ALTAN (Application No.13237/17)

MEHMET HASAN ALTAN (Application No. 13252/17)

Applicants

- and -

TURKEY

Respondent Government

WRITTEN SUBMISSIONS ON BEHALF OF THIRD PARTY INTERVENERS

I. INTRODUCTION

1. The Third Party Interveners (PEN International, ARTICLE 19, Committee to Protect Journalists, European Centre for Press and Media Freedom, European Federation of Journalists, Human Rights Watch, Reporters, Index on Censorship, International Federation of Journalists, International Press Institute, International Senior Lawyers Project and Reporters Without Borders, ("the **Interveners**") are grateful to the Court for granting permission to file written submissions in these applications pursuant to Rule 44 §3 of the Rules of Court.

2. Both applications concern the arrest and pre-trial detention of prominent journalists and intellectuals following the attempted military coup in Turkey on 15-16 July 2016. While restrictions on media freedom and dissenting expression in Turkey have been a longstanding subject of concern amongst the international community, those concerns have significantly deepened as a result of the restrictive measures implemented by the Respondent in the aftermath of the failed coup. Respected independent observers have highlighted the serious adverse effect of those measures for freedom of expression and democratic pluralism in Turkey (see paragraphs 5 to 16 below).

3. The Interveners are all organisations with particular experience of international human rights law and/or experience of working with international networks of media professionals to defend and protect the rights of journalists and a free and independent media. By this intervention, the Interveners draw upon that experience to make three overarching submissions to the Court:

   a. 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 under Articles 5 and 10 ECHR in extreme and exceptional cases;

   b. The arbitrary and unwarranted use of the criminal law to target journalists and other media 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

c. Only an exceptional legal and factual situation will enable a State to invoke Article 15 of the Convention in order to derogate from its human rights obligations under the Convention.

4. The Internevers address each of these submissions in turn at paragraphs 17 to 47 below.

II. CONTEXT OF THE APPLICATIONS: RESTRICTIVE MEASURES TAKEN BY THE RESPONDENT SINCE THE FAILED COUP

5. The measures taken by the Respondent in response to the attempted coup have been the subject of extensive commentary by independent international observers. In order to assist the Court in understanding the wider context in which these applications arise, the Interveners briefly highlight some of the most relevant commentary below.

Restrictions imposed following the attempted coup in July 2016

6. One month after the failed coup, a group of 19 United Nations special rapporteurs expressed serious concern about the "*escalation of detentions and purges, in particular in the education, media, military and justice sectors*" in Turkey, noting that "*the Government's steps to limit a broad range of human rights guarantees go beyond what can be justified in light of the current situation*".[1]

7. In April 2017 the European Parliament published a detailed report on *The functioning of democratic institutions in Turkey*[2] in the aftermath of the attempted coup. The report describes how the Respondent has implemented "*unprecedented mass dismissals, investigations, arrests, and closures of media and institutions*" (§31) which have resulted in:

- *150 000 thousand people dismissed, including in approximately 96 000 cases, persons dismissed as a direct consequence of the publication of their name on an appendix to the decree laws;*
- *100 000 people facing investigations, out of which 44 000 are imprisoned pending trial.*
- *3 994 judicial professionals were suspended, while 3 659 were dismissed by state of emergency decrees […]*
- *188 media outlets were shut down, including a large number of pro-Kurdish media, but also Kemalist or left-wing media. Internet access restrictions have increased;*
- *more than 150 journalists are reportedly detained, this includes the Editor-in-Chief of the opposition newspaper Cumhuriyet, Murat Sabuncu, the Chairperson and executive members of the Cumhuriyet Foundation, […];*
- *2 500 journalists have lost their jobs since 15 July 2016 and many more apply self-censorship in order to protect themselves*
- *approximately 1 800 associations and foundations have been shut down, including 370 civil society organisations accused of alleged links to "terrorism" on 11 November, of which 199 represent Kurdish civil society […]*

8. The effect of these measures on freedom of expression has been particularly pronounced. According to a report[3] by the Council of Europe's Commissioner for Human Rights published in February 2017, "*the deterioration of media freedoms and freedom of expression in Turkey, which…had already*

reached seriously alarming levels, has intensified even further under the state of emergency". In particular, "*the measures taken by the authorities confer an almost limitless discretionary power to the Turkish executive to apply seriously sweeping measures without differentiation not only to the public sector, but also to the media or NGOs, and to do so without any evidentiary requirements or judicial control and on the basis of vague criteria of "connection" to a terrorist organization*" (§20).

9. Restrictions on media freedom "*have become significantly more pronounced and prevalent*" (§21) since the failed coup. The present situation is "*characterized by numerous, blatant violations of principles enshrined in the ECHR, the case-law of the European Court of Human Rights, standards of the Council of Europe, as well as other relevant international standards*". These "*violations*" have had "*a distinct chilling effect*" which leads directly to "*self-censorship in the remaining media*" and among ordinary citizens. The result is "*an extremely unfavourable environment for journalism and an increasingly impoverished and one-sided public debate*" (§22).

10. The Commissioner goes on to explain that his "*overwhelmingly negative assessment*" of the position in Turkey reflects "*countless examples of undue restrictions of media freedom and freedom of expression*" (§23). In particular, the Respondent's reaction to the failed coup has been characterized by "*a significant decrease in the commitment of the Turkish authorities to improve freedom of expression and compliance with the ECHR*" (§132). The Commissioner concludes that the Respondent's actions since the failed coup have placed Turkey on "*a very dangerous path, where legitimate dissent and criticism of government policy is vilified and repressed*" (§135). The "*deterioration*" in media freedom is so severe that it now represents "*an existential threat to Turkish democracy*" (§123).

Turkey's prior track record of Article 10 violations

11. Prior to the recent crackdown in the aftermath of the failed coup, Turkey had a long track record of Article 10 violations arising from its treatment of journalists and media outlets that publish material critical of the government. Between 1959 and 2016 the Court delivered 656 judgments concerning Article 10. Of those judgments, 40% (265) were in applications brought against Turkey.[4] According to the COE Commissioner for Human Rights[5], the "*pattern of persistent violations by Turkey of Article 10*" is partly explained by the fact that, "*prosecutors and courts in Turkey often perceive dissent and criticism as a threat to the integrity of the state, and see their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals*" (§8).

12. In the last decade the Court has found violations of Article 10 in a large number of cases concerning restrictions on journalistic expression in Turkey. Those judgments include *Demirel and Ates v Turkey* (App. No. 31080/02, 29 November 2007) (prosecution of editor and owner of a newspaper which published an interview critical of Turkey's policies concerning the Kurdish problem); *Üstün v Turkey* (App. No. 37685/02, 10 May 2007) publication of a politicized biography of a left-wing cinema artist which *"[did] not encourage violence, armed resistance or insurrection, and [did] not constitute hate speech*"); *Dink v Turkey* (App. No. 2668/07, 14 September 2010) (editor of Turkish-Armenian newspaper convicted of "*denigrating Turkishness*"); *Dilipak v Turkey* (App. No. 29680/05, 15 September 2015) (prosecution of journalist for criticizing senior members of the Turkish military); and *Belek v Turkey* (App. No. 44227/04, 6 October 2015)(prosecution of owner and editor of daily newspaper for publishing articles containing a statement by members of the Kurdistan Worker's Party that did not incite violence, armed resistance or rebellion).

13. Several months before the attempted coup, the Council of Europe Commissioner for Human Rights stated that respect for human rights in Turkey had "*deteriorated at an alarming speed in recent months in the context of Turkey's fight against terrorism*".[6] The United Nations High Commissioner for Human Rights similarly observed that before the attempted coup Turkey "*ha[d] an alarming number of journalists and other media operatives either already convicted, or awaiting trial*".[7]

14. Just one month before the attempted coup, the Parliamentary Assembly of the Council of Europe issued Resolution 2121 (2016) which highlighted "*the alarming scale of recourse to an overly wide notion of terrorism to punish non-violent statements and criminalization of any message that merely coincided with the perceived interests of a terrorist organisation*". It added that, "*the extensive interpretation of the anti-terror law…contradicts Council of Europe standards*" (§20).

15. The Assembly stated that it was "*deeply concerned about the prosecution of investigative journalists following investigations into topics of general interest*" and was "*appalled by the harsh prison sentences issues against these journalists*" (§24). It added that, "*investigations, prosecutions and the interpretation of the Criminal Code by domestic courts, have a chilling effect on the media. Attacks on journalists and media outlets, seizure of media holdings (which undermines property rights), pressure on journalists and punishment of journalists doing their job lead to self-censorship"* (§27). The Assembly concluded that, "*developments pertaining to freedom of the media and expression…constitute a threat to the functioning of democratic institutions of the country and its commitments to its obligations towards the Council of Europe*" (§36).

16. The measures adopted by the Respondent following the failed coup therefore continue a long track record of official suppression of media freedom and non-violent dissent throughout Turkey.

III. SUBMISSIONS

Submission I: The Detention of Journalists on the Basis of the Content of Their Publications Requires the Strictest Scrutiny

17. 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.[8] This is also the case during times of heightened tension or conflict. As the United Nations Human Rights Committee has observed, *"[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 penalized for carrying out their legitimate activities.*"[9] 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.

18. The Court's case law has long recognised the importance of protecting all forms of non-violent political expression. The Court has stressed that: "*Freedom of the press…affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention*" (*Lingens v Austria* (App. No. 9815/82, 8 July 1986) at §42).

19. The Court's recognition of the importance of facilitating and protecting political debate and dissenting expression has been underscored in a series of cases involving Turkey. In *Surek v Turkey*

(App. No. 24735/94, 8 July 1999) the Grand Chamber emphasised the importance of facilitating public scrutiny of the government (at §37):

> "In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries."

20. Similarly, in *Altug Taner Akçam v Turkey* (Application no. 27520/07, 25 October 2011) the Court said that since "*thought and opinions on public matters are of a vulnerable nature*", it followed that "*the very possibility of interference by the authorities or by private parties acting without proper control or even with the support of the authorities may impose a serious burden on the free formation of ideas and democratic debate and have a chilling effect*" (§81). Accordingly, the Court has stressed that: "*there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance […] – or in matters of public interest*" (*Egitim Ve Bilim Emekcileri Sendikasi v Turkey* (App. No. 20641/05, 25 September 2012 at §69).

21. 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.[10] Therefore, pre-trial detention can amount to an interference with the right even in cases where no final conviction has been imposed.[11] 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.[12]

22. 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.*"[13] 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."[14]

23. Accordingly – and consistently with the Court's established case law – when considering the restrictions imposed on the media contexts such as the present applications, 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.

24. 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 an "*acceptable assessment of the relevant facts*".[15] 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.[16]

25. In *Gül and Others v. Turkey*, 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.[17] The Court reached this decision despite the fact that the expression adopted had a "*violent tone*".[18] 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.*"[19]

26. 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.[20] 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.*"[21] 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.*"[22]

27. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, compiled by eminent international lawyers as a statement of State practice and general principles of international law, and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression,[23] record that free expression may lawfully be subject to criminal sanction *only* upon satisfaction of the cumulative criteria that *"the expression is intended to incite imminent violence*," that the expression is *"likely to incite such violence*," and that *"there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence*."[24] More generally, the UN Special Rapporteur has noted that the use of imprisonment under criminal law to punish expression is *"reprehensible and out of proportion to the harm suffered by the victim [of any such publication]. In all such cases, imprisonment as punishment for peaceful expression of an opinion constitutes a serious violation of human rights*."[25]

28. Accordingly, the consistent position under international law is that any attempt by the State to impose detention as a sanction to the exercise of free expression by journalists must be subject to the strictest scrutiny. Such detention will only be lawful in the most exceptional circumstances, typically requiring that the relevant publications *directly incite* likely terrorist violence.

Submissions II: The Arbitrary and Unwarranted Use of the Criminal Law to Suppress the Media Amounts to a Violation of Article 18

29. Article 18 requires that States act at all times in good faith. For these purposes, 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).*"[26]

30. 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 has *in fact* been used for a purpose other than the strict role of pre-trial detention,[27] 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.*"[28]

31. 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*".[29] 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. [30]

32. For the purpose of establishing improper intent, the Court has adopted a test of whether "*it can be established to a sufficient degree that proof of improper reasons follows the combination of relevant case-specific facts.*"[31] Moreover, in its recent judgment of *Jafarov v. Azerbaijan* the Court 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 had failed to act in good faith in the actions taken against the applicants. [32] First, the Court examined "*the general context of the increasingly harsh and restrictive legislative regulation*" concerning the right allegedly violated in that country. Secondly, it 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 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.

(a) Increasingly Harsh and Restrictive Legislation

33. Where prosecution of journalists takes place under national security or emergency decree laws, or 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. As noted above, the 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.[33]

(b) Commentary by High-Ranking State Officials and Pro-Government Media

34. 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 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. (By way of example, in March 2017 President Erdoğan

described the list of detained journalists in Turkey as "*murderers, burglars, child molesters, thieves and more*".[34])

(c) An Emerging Pattern with Respect to the Human Rights Situation

35. 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* (i) judicial independence and impartiality; (ii) the treatment of journalists critical of that State; and (iii) 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.[35] The effect of these measures is even more acute in light of the huge number of dismissals of judges and prosecutors.

36. The restriction of free expression, including political criticism, is <u>not</u> 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 <u>in fact</u> pursue that aim by restricting the free expression of persons actually engaged in journalism, that, they are a "*part of a larger campaign to "crack down on journalists"* and that 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*",[36] then this Court should conclude that Article 18 has been violated.

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

37. The extent to which the Respondent may seek to rely upon its expressed intention to derogate from the Convention in justifying its actions in the present cases is as yet unknown. The Interveners set out the following submission so as to assist this Court in the event that the Respondent elects so make such reliance.

38. 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 Article 15. To be valid, there must be a formal effective declaration of derogation,[37] and three substantive conditions must be satisfied, namely: (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.*" [38]

(a) Public Emergency Threatening the Life of the Nation

39. 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*,"[39] it is clear that States *"do not enjoy an unlimited power in this respect.*"[40] Indeed, in the landmark decision in the *Greek Coup* case[41] the European Commission on Human Rights clarified that the burden is on

the State to prove the existence of the alleged *"public emergency*,"[42] and that the Convention bodies have the final jurisdiction to decide whether or not that burden of proof has in fact been discharged.[43]

40. 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.*"[44] Such a crisis must be *"actual or imminent*"[45] and the *"continuance of the organised life of the community must be threatened.*"[46] 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.[47]

41. While genuine, ongoing, and imminent threat of co-ordinated violent attacks – such as the Northern Ireland troubles[48] and the ongoing PKK insurgency in south-eastern Turkey[49] – 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, 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.[50]

42. Accordingly, the Interveners note 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 from Convention rights. This question must be judged at the time the derogation has effect. It is no answer to continuing detention or suppression of freedom of expression to assert that a state of emergency was justified in the immediate aftermath of the failed coup in July 2016. The official 'state of emergency' in Turkey continues with the latest three-month extension announced by the Respondent on 17 October 2017. In order to ibvoke Article 15, the Respondent must be able to justify the continuance of a state of emergency more than15 months after the coup was successfully resisted.

(b) Extent Strictly Required by the Exigencies of the Situation

43. Even where 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.*"[51] 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."[52]

44. 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 a State's 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.

45. The importance of the right to liberty, and the requirement that it remain respected even in circumstances of derogation from Convention, has similarly been recognised by the UN Human Rights Committee. In its General Comment 29 regarding derogation from the ICCPR pursuant to Article 4 of that Covenant in respect of a public emergency, the HRC 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.*"[53]

46. As demonstrated by this Court's decisions in *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.*"[54] In circumstances where prolonged pre-trial detention is imposed, it will be for the State to convince the Court that any such lengthy pre-trial detention was strictly required in the circumstances.

(c) Measures must not be inconsistent with other international obligations

47. 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.[55]

EDWARD CRAVEN

Matrix Chambers

26 October 2017

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1 Statement by group of 19 UN Special Rapporteurs dated 19 August 2016 (http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394&LangID=E).

2 *The functioning of democratic institutions in Turkey* (Explanatory memorandum by Ms Ingebjørg Godskesen and Ms Marianne Mikko, co-rapporteurs), Report Doc. 14282, 05 April 2017, (http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23525&lang=en).

3 Council of Europe Commissioner for Human Rights, *Memorandum on freedom of expression and media freedom in Turkey* (15 February 2017) CommDH (2017)5.

4 Overview 1956-2016 ECHR, p. 6 (http://www.echr.coe.int/Documents/Overview_19592016_ENG.pdf). In recent years there are "*extremely few cases against Turkey amounting to non-violations of Article 10 (usually on significant*

incitement to hatred issues) and this only after pronounced disagreements within the Court" (E. Polymenopoulou, Human Rights Law Review (2016) 16(3) 511).

5 Council of Europe Commissioner for Human Rights, *Memorandum on freedom of expression and media freedom in Turkey* (15 February 2017) CommDH (2017)5.

6 *Turkey: security trumping human rights, free expression under threat* (14 April 2016) (http://www.coe.int/en/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat).

7 *Turkey: Zeid concerned by actions of security forces and clampdown on media* (1 February 2016) (http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17002&LangID=E).

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

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

10 *□ık v Turkey*, Application No. 53413/11, §85; *Nedim □ener v Turkey*, Application No. 38270/11, §96.

11 *Id.* See also *Dilipak v Turkey*, Application No. 29680/05, §44.

12 *□ık v Turkey*, Application No. 53413/11, §111; *Nedim □ener v Turkey*, Application No. 38270/11, §122.

13 *Murat Vural v Turkey*, Application No. 9540/07, §66.

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

15 *Döner and Others v Turkey*, Application No. 29994/02, §100.

16 *□ık v Turkey*, Application No. 53413/11, §106; *Nedim □ener v Turkey*, Application No. 38270/11, §117. See also *Karata□ and Others v Turkey*, Application No. 46820/09.

17 *Gül and Others v Turkey*, Application No. 4870/02, §§41 and 42. See also *Sürek and Özdemir v Turkey* [GC], Application Nos. 23927/94 and 24277/94, §§51 and 61; *Erdo□du v Turkey*, Application No. 25723/94, §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*").

18 *Gül and Others v Turkey*, Application No. 4870/02, §41.

19 *Id.*, §42 (emphasis added).

20 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, pp. 21-23.

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

22 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), §36. See also *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1996), Principle 6.

23 UN Special Rapporteur on Freedom of Opinion and Expression, *Report on Promotion and Protection of the Right to Freedom of Opinion and Expression* (22 March 1996), UN Doc. E/CN.4.1996/39, §154.

24 Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996), Principle 6.

25 UN Special Rapporteur on Freedom of Opinion and Expression, *Annual Report to the UN Commission on Human Rights* (18 January 2000), UN Doc. E/CN.4/2000/63, §205.

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

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

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

29 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.

30 *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.

31 *Ilgar Mammadov v Azerbaycan,* Application No.15172/13, §158.

32 See *Jafarov v Azerbaijan*, Application no. 17276/07, §§159-16.

[33] 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.

[34] See for example: *Erdogan's blacklist: Voices of Turkey's purge* (Financial Times, 4 May 2017 https://ig.ft.com/vj/turkey-purge-victims-voices/) *Erdogan: 'All detained journalists in Turkey are terrorirsts, criminals and child molesters'* (BirGün Daily, 22 March 2017 https://www.birgun.net/haber-detay/erdogan-all-detained-journalists-in-turkey-are-terrorists-criminals-and-child-molesters-152291.html).

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

[36] See *Jafarov v Azerbaijan*, Application no. 17276/07, §104.

[37] See ECHR, Article 15(3); *Cyprus v Turkey*, Application Nos. 6780/74 and 6950/75, §527.

[38] ECHR, Article 15(1).

[39] *Ireland v United Kingdom* [1978] ECHR 1; (1978) 2 EHRR 25, §207.

[40] *Ireland v UK*, §207. See also *A & Others v United Kingdom* [2009] ECHR 301; (2009) 49 EHRR 29, §173.

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

[42] *Greek Coup*, §114.

[43] *Greek Coup*, §§117-125.

[44] *Lawless v Ireland (No 3)* [1961] ECHR 2; (1961) 1 EHRR 15, §28.

[45] *Greek Coup*, §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 <u>et imminent</u> qui affect l'ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l'Etat*' (emphasis added).

[46] *Greek Coup*, §113.f

[47] *Greek Coup*, §121.

[48] *Brannigan and McBride v United Kingdom* [1993] ECHR 21; (1994) 17 EHRR 539, §47.

[49] *Aksoy v Turkey* [1996] ECHR 68; (1997) 23 EHRR 553, §70.

[50] *Greek Coup*, §124.

[51] *Ireland v United Kingdom*, §207.

[52] *A and Others v United Kingdom*, §184.

[53] UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4),* UN Doc. CCPR/C/21/Rev1/Add.11 (2001), §13.

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

[55] 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/.