IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application Nos. 66763/17, 66767/17 and 15891/18

BETWEEN:

Telek, Şar, Kıvılcım

Applicants

- and –

Turkey

Respondent

- and –

Turkey Litigation Support Project,
Amnesty International, ARTICLE 19 and PEN International
Interveners

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS

I. Introduction

1. These submissions are made by the Turkey Litigation Support Project, Amnesty International, ARTICLE 19 and PEN International pursuant to leave granted by the President of the Section on 29 January 2019, in accordance with Rule 44 § 3 of the Rules of Court.

2. These cases concern the cancellation of passports of three academics who, together with more than two thousand others, supported a "Petition for Peace" and as a result were prosecuted, dismissed from academic institutions and banned from public service under state of emergency legislation in Turkey. Despite the state of emergency having come to an end in July 2018, the applicants, like others, are still deprived of a valid passport, unable to travel or to engage in academic work at home or abroad, and have had no opportunity to challenge the lawfulness of the measures taken against them. Their case forms part of what has been described as a severe blow to academic freedom and democratic institutions in Turkey in recent years.[1]

3. Part II of this submission focuses on international law standards in relation to academic freedom, in particular its relationship with the right to private life under Article 8 of the European Convention on Human Rights (Convention). Part III addresses the impact of derogation on relevant obligations, specifically the non-derogable core of the right to an effective remedy under Article 13 of the Convention. Part IV considers the practice of domestic mechanisms in Turkey in cases concerning emergency measures.

II. International Standards on Academic Freedom and the Right to Private Life

4. The nature and importance of academic freedom, and its constituent elements, are recognised in a growing body of international law and practice. In this respect, international treaties,[2] jurisprudence including by this Court[3] and soft law instruments including a number by the Council of Europe,[4] as well as several national constitutions,[5] recognize a number of fundamental human rights principles that underpin academic freedom.

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[1] *Eg.* the European Commissioner's Memorandum on Freedom of Expression, paras.62-64; Parliamentary Assembly of the Council of Europe (PACE) resolution on functioning democratic institutions in Turkey, para.20 on the systemic stifling of dissent including of academics, "*jeopardising the foundations of a democratic society*."

[2] Article 15(3) of the International Covenant on Economic Social and Cultural Rights (ICESCR) and Article 13 Charter of Fundamental Rights of the European Union (EU Charter).

[3] On freedom of academic expression under Article 10 *see: eg. Sorguc v Turkey*, App no. 17089/03, 23 June 2009; *Mustafa Erdoğan v. Turkey*, App no. 346/04 and 39779/04, 27 May 2014; *Hasan Yazıcı v. Turkey*, App no. 40877/07, 15 April 2014; on denying entry to academics *Cox v. Turkey*, ECtHR, Appl. no. 2933/03, 20 May 2010; *also Good v. Republic of Botswana*, Comm. No. 313/05, 26 May 2010, paras. 196–200, African Commission on Human and Peoples' Rights.

[4] *Eg.* Recommendation CM/Rec(2012)7 of the Council of Europe (COE) Committee of Ministers (COM) to member States on the responsibility of public authorities for academic freedom and institutional autonomy; Recommendation (2007)6 of the COM on the public responsibility for higher education and research; PACE Recommendation 1762 (2006) on "Academic freedom and university autonomy"; Recommendation R (97)1 of the COM on the Recognition and Quality Assessment of Private Institutions of Higher Education, 4 February 1997; Magna Charta (signed by 388 rectors and university heads across Europe 18 September 1988); Declaration on Academic Freedom and Autonomy of Institutions of Higher Education ("Lima Declaration"), (10 September 1988); UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, 11 November 1997; European Parliament recommendation 29 November 2018 on Defence of Academic Freedom in the European Union's (EU) external action (2018/2117(INI)), 29 November 2018; UNESCO World Declaration on Higher Education for the 21st Century: Vision and Action, 1998; UNESCO Recommendation on Science and Scientific Researchers 2017.

[5] These include *eg.* the constitutions of South Africa, Kenya, Dominican Republic, El Salvador, Japan, Germany, Spain, Portugal, Greece, Albania, and Turkey. Article 27 of the Turkish Constitution stipulates that "*everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely*." The French Constitutional Council Decision no. 83-165 DC, 20 January 1984, recognised academic independence as a 'fundamental principle'.

5. While academic freedom is not subject to precise definition, these standards highlight its overlapping institutional, individual, and public dimensions.[6] Judges of this Court, like others, have noted that "*although academic freedom refers, first and foremost, to institutional autonomy…scholars' institutional autonomy is meaningful only if they enjoy personal freedom of research that entails unimpeded communication of ideas within, but not exclusively within, the scholarly community*."[7] As the Parliamentary Assembly of the Council of Europe (PACE) has noted, university staff and students must "be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution."[8]

6. The public dimension reflects academic freedom as "an essential condition for the search for truth,"[9] "serving the common good of democratic societies",[10] not only "to advance, create and disseminate knowledge" but "to educate for citizenship and for active participation in society." [11] As the separate concurring opinion of three judges in the *Mustafa Erdoğan* case put it, "there can be no democratic society without free science and free scholars."[12] In this vein academia has been described as lending "intellectual authority, to identify, forecast and address issues that affect the well-being of communities, nations and global society... and speak out on ethical, cultural and social problems."[13] The role cannot then be artificially confined to 'academic issues' or to the classroom, but "need[s] to be close enough to society to be able to contribute to solving fundamental problems."[14] That academic freedom must protect both speech and action[15] has also been affirmed by the UN Human Rights Committee.[16]

7. These standards recognise various facets of the academic role, including research and publication, intellectual leadership and innovation, education and exchange with fellow academics, as well as advancing public democratic discourse.[17] As such, restrictions on academic freedom may often entail interference with a range of rights, including freedom of thought, of expression (where it has most often been recognised by this Court), of association, the right to education, liberty and security, freedom of movement, and the right to private life at the centre of this case. Academic freedom may thus be seen as a composite right, embracing multiple rights and enshrining a value that is more than the sum of its parts.[18]

Academic Freedom and Article 8 of the Convention

8. One of the main substantive rights affected when the freedom of movement of an academic is restricted is the right to respect for private life. This Court has affirmed that the right

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[6] *Eg.* UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 13 on the Right to Education, 8 December 1999, paras.38-40; UNESCO Rec. (1997), (fn 4), paras. 13 and 27; UNESCO World Declaration on Higher Education for the 21st Century: Vision and Action, 9 October 1998, Articles 1 and 2; UNESCO Recommendation on Science and Scientific Researchers 2017, para. 10. See further below.

[7] *Mustafa Erdoğan v. Turkey*, (fn 3) Joint concurring opinion of Judges Sajó, Vučinič and Kūris, para. 4.

[8] PACE, Recommendation 7 (2012) on responsibility for academic freedom and institutional autonomy, para 5.

[9] *Eg*. Utrecht Declaration on Academic Freedom, 3 September 2016.

[10] COE COM /Rec (2007)6 (fn 4).

[11] UNESCO, World Declaration on Higher Education for the 21st Century, (fn 6) Art.1 (b)-(c).

[12] *Mustafa Erdoğan v. Turkey*, (fn 3) para 6.

[13] UNESCO, World Declaration on Higher Education for the 21st Century, (fn 6) Art.2.

[14] PACE Rec. 1762 (2006), (fn 4) para. 4.4.

[15] "*Academic freedom should guarantee freedom of expression and of action [to] distribute knowledge and truth without restriction*." PACE Rec. 1762 (2006), (fn 4) Art.4.1.

[16] *Eg. Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo,* Communications Nos. 422/1990, 423/1990 and 424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990(1996). The UN Human Rights Committee (UNHRC) noted the importance of academic freedom to enable citizens "*to inform themselves about alternatives to the political system/parties in power [..to..] openly and publicly evaluate their Governments*."

[17] *See eg*. UNESCO World Declaration (fn 6).

[18] CESCR General Comment 13, (fn 6), para.39.

to a private life includes "*the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature*."[19]

9. Similarly, this Court has recognised that it is impossible to distinguish professional life from the other aspects of Article 8, namely personal, social and intellectual autonomy, identity and self-development.[20] Article 8 guarantees respect for "*multiple aspects of the person's physical and social identity,*"[21] as well as *"the right to self-fulfilment, whether in the form of personal development [or] relationships with other human beings and the outside world*."[22] In this context, it is recognised that *"it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world and others*."[23] Likewise, the Court acknowledges that "*especially in the case of a person exercising a liberal profession… it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not*."'[24]

10. This is evidently true of the academic community, where measures such as cancellation of passports, strike at the heart of the ability of academics to function as professionals.[25] It curtails their ability to research individually and collectively, to debate and share ideas, to cooperate with academic communities within the state and beyond, 'participat[e] in international gatherings'[26] and to 'build and strengthen intellectual, cultural and scientific cooperation across borders' recognised as a paramount goal for academia in Europe.[27] On this basis, restrictions on academics' freedom of movement between states impedes the 'interplay of ideas and information among higher education personnel throughout the world'[28] and may represent an "attack" on academic freedom,[29] requiring strict judicial scrutiny.[30]

Legal Framework of Obligations and Restriction of Academic Freedom

11. This Court has affirmed that states have both positive and negative obligations under Article 8.[31] Similarly, international standards on academic freedom acknowledge that states have obligations not just to refrain from restricting such freedom but also to create and maintain a "*conducive environment*" in which scholars can operate and fulfil their multiple roles without restraint.[32] Most recently within the European Union (EU), the Parliament called on member states to "*proactively protect higher education institutions, academics and students from attacks*",

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[19] *Niemietz v. Germany*, App no 13710/88, 16 December 1992, para. 29; The Court also recognized the right to a "*private social life*" in *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, App nos. 48151/11 and 77769/13, 18 January 2018, para. 153.

[20] *See eg, Fernández Martínez v. Spain*, App no. 56030/07, 12 June 2014, para. 126; *A.-M.V. v. Finland*, App no.53251/13, 23 March 2017, para. 76; *Brüggemann and Scheuten v. Germany*, no. 6959/75, Commission report 12 July 1977, Decisions and Reports 10, p. 115, para. 55.

[21] *Aksu v Turkey* [GC], App nos. 4149/04 and 41029/04, 15 March 2012, para. 58.

[22] *Cox v. Turkey*, (fn 3) para. 38.

[23] *Bărbulescu v. Romania*, [GC] App no. 61496/08, 5 Sept.2017, para. 71; *Niemietz v. Germany*, (fn 19) para. 29.

[24] *Niemetz v Germany*, (fn 19) para. 29.

[25] Lima Declaration affirms that academics must enjoy "*the freedom to maintain contact with their counterparts*", (fn 4).

[26] UNESCO Recommendation on the Status of Higher-Education Teaching Personnel, 1997, (fn 4), para 13.

[27] Joint declaration of the European Ministers of Education, ("Bologna Declaration") 19 June 1999; UNESCO World Declaration, Art. 15 (fn 6) and EU Parliament Recommendation (fn 4); joint concurring opinion of judges sajó, vučinič and kūris, *Mustafa Erdoğan v. Turkey,* (fn 3), para 4.

[28] UNESCO Recommendation concerning the Status of Higher Education Teaching, 1997, (fn 4), para 13.

[29] *See eg*, Scholars at Risk Report, Free to Think 2018, p.4 and 35; Utrecht Declaration (fn 9).

[30] In *Cox v. Turkey* this Court recognised that the denial of entry to a country with an aim of restricting or punishing academic content or conduct requires "the most careful scrutiny"; (fn 3) para. 38.

[31] *Bédat v. Switzerland* [GC], App no. 56925/08, 29 March 2016, para. 73; *Lozovyye v. Russia*, App no. 4587/09, 24 April 2018, para 36; *Hämäläinen v. Finland* [GC] App no. 37359/09, 16 July 2014, para. 62.

[32] UNESCO Rec, 1997, (fn 4), para.27.

"*to create mechanisms for monitoring and reporting undue restrictions on higher education and individual scholars*" and "*to support programmes and placements for academics at risk.*"[33]

12. Moreover, given the interconnection between academic freedom and the rights of others, academics have also been recognised as 'human rights defenders' (HRDs).[34] As such, relevant standards on the duty to create an 'enabling environment' for HRDs may also apply.[35]

13. In the assessment of the necessity and proportionality of an interference with rights, including under Article 8, due regard should be paid to its full impact. It is consistent with the Court's case-law and international standards,[36] to submit restrictions on academic freedom to particularly rigorous scrutiny, given the multi-dimensional nature of this impact.[37] This includes the direct consequences for multiple rights of the individuals most affected, for the rights of others, for institutions' ability to discharge their educational mandate, and potentially for creative, scientific and social development more broadly. The chilling effect and self-censorship that can arise where academic freedom is stifled and public information is neutered, should also be considered.[38] As the Inter-American Court of Human Rights (IACtHR) reflected, "*it can be said that a society that is not well informed is not a society that is truly free*."[39] It is therefore important that the strict approach to justifying restrictions on academic freedom, recognised by the Court in relation to Article 10 of the Convention, should therefore apply in similar contexts in relation to Article 8.

14. Finally, the obligations under the Convention do not cease to have its effect when states derogate from them pursuant to Article 15. As the IACtHR notes, derogation is not a full suspension of rights but a suspension of their full exercise.[40] Rule of law constraints must always be respected,[41] including legality,[42] legitimacy,[43] necessity and proportionality.[44]

15. Even in a public emergency, restrictions on academic freedom must be clear in law, be "*strictly required by the exigencies of the situation*" and be accompanied by basic safeguards.[45] To assess the proportionality of emergency measures, this Court gives appropriate weight to a range of factors such as the nature of the rights affected, surrounding circumstances and the duration of

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[33] The 2018 EU Parliament recommendation encourages recognition of academics and students as human rights defenders under attack, requiring a robust response by state authorities, (fn 4), (para Q, generally C-P).
[34] *See eg.* Art.2 of the UNESCO World Declaration (fn 6). Human Rights Defenders: Protecting the Right to Defend Human Rights, Fact Sheet 29 (2004) Office of the UN High Commissioner for Human Rights, p 6 – 8.
[35] Art. 2 Declaration of the COM on CoE action to improve the protection of human rights defenders and promote their activities, 6 February 2008, Art.2 of the UNESCO World Declaration (fn 6).
[36] *See Aksu v. Turkey* [GC], (fn 21), para. 71; *Mustafa Erdoğan v. Turkey*, (fn 3), para. 40; ACommHPR (fn 3).
[37] Utrecht Declaration states that "*intimidation and oppression of researchers, teachers and students violates their human rights. This does not only endanger the independence of academic research and teaching, but also free and democratic societies as a whole*", (fn 9).
[38] European Parliament Rec. 29 November 2018, (fn 4).
[39] IACtHR, *Advisory Opinion*, OC-5/85 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism November 13, 1985, para 70.
[40] IACtHR, *Advisory Opinion* OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, p. 37, para. 18.
[41] PACE notes that "*no State has the right to disregard the principle of the rule of law, even in extreme situation*." PACE, Recommendation 1713 (2005) Democratic oversight of the security sector in member states, 23 June 2005.
[42] UNHRC General Comment 29 on States of Emergency (Article 4) requiring that constitutions and other laws govern the proclamation and exercise of emergency powers. U.N.Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.2.
[43] States are bound by the reasons and goals of declaration of a public emergency and the restoration of a state of normalcy must be the predominant objective of derogation; UNHRC General Comment No 29, *ibid*, para.1.
[44] IACtHR, *Advisory Opinion* OC-8-87 (fn 40).
[45] Article 4 of the ICCPR and Article 27 of the American Convention UNHRC; General Comment No 29, (fn 42), para.4.

the emergency.[46] It takes into account whether impugned measures are a genuine response to an emergency, and used for the purpose for which they were adopted.[47] Restrictions by administrative authorities to avert perceived threats to public order or national security should be "*directed to an actual, clear, present or imminent danger*"[48] and be based on sufficient evidential basis. Emergency measures applied as a blanket rule without being based on individualised assessments of personal circumstances or the rights affected are unlikely to be justified under this test.[49]

16. As emergency measures are "*exceptional and temporary*",[50] they must cease to be applied when the public emergency is over. Measures taken – or which remains in effect - after derogation is withdrawn should be examined by the Court on the basis that the Convention is fully applicable.[51] A strict approach is required to avoid of the normalisation of emergency measures, or slippage into a permanent state of emergency.[52] Finally, as addressed further below, effective independent oversight of the emergency measures must be enabled to prevent arbitrary and abusive use of emergency powers and protect the rule of law.

III. Derogation and the Right to an Effective Remedy

17. The right to an effective remedy is recognised in international treaty and customary law,[53] including Article 13 of the Convention and Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR).[54] Across systems, the right is recognised as a right in itself, and as fundamental to the effective realisation of all rights recognised under human rights protection regimes.[55]

18. Remedies must be timely, accessible and effective in law and in practice.[56] An effective remedy must provide for challenge before an appropriate, independent and effective national authority with the power to deal with the substance of the complaint, order cessation of the violation and provide reparation.[57] Although the remedy may not in all circumstances have to be

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[46] *Brannigan and McBride v. the United Kingdom*, App nos. 14553/89 14554/89, 26 May 1993, para. 43; *A. and Others v. the United Kingdom* [GC], App no 3455/05, 19 February 2009, para. 173.
[47] *Lawless v. Ireland* (no.3), App no. 332/57, 1 July 1961, para. 38.
[48] *See,* the Siracusa Principles on the Limitation and derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4), principle 9.
[49] Venice Commission Opinion on Emergency Decree Laws Nos.667-676 Adopted Following the Failed Coup of 15 July 2016, CDL-AD(2016)037, 12 December 2016, paras. 131-139.
[50] UNHRC, General Comment No. 29, (fn 42), para.2.
[51] App nos. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1998, para. 48.
[52] *Eg*. Report of Special Rapporteur on counter-terrorism and human rights, 'the human rights challenge of states of emergency in the context of countering terrorism', Fionnuala Ní Aoláin (2018); UN Economic and Social Council, Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency, 27 July 1982, paras 112-117, http://hrlibrary.umn.edu/Implications%20for%20human%20rights%20siege%20or%20emergency_Questiaux.pdf.
[53] UN Working Group on Arbitrary Detention, Opinion No. 52/2014 (Australia and Papua New Guinea), A/HRC/WGAD/2014/52, para 52; M. Cherif Bassiouni, International Recognition of Victims' Rights, Human Rights Law Review 6:2 (2006), 203-279, p. 204.
[54] Article 25(1) of the Inter-American Convention, Article 8 of the Universal Declaration of Human Rights, Article 14 of the Convention Against Torture, Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination, Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples, Article 47 Charter of Fundamental Rights of the European Union, Article 25(1) of the American Convention Articles 9 and 13, Declaration on the Protection of All Persons from Enforced Disappearance, Article 9 Arab Charter on Human Rights Art. 9 Declaration on Human Rights Defenders expressly provide for the right to an effective remedy.
[55] Report of the Special Representative on Human Rights Defenders, UN Doc A/56/341 (2001), para 9; Report of the Special Rapporteur on Violence against Women on Cultural Practices in the Family that are Violent towards Women, UN Doc E/CN.4/2002/83 (2002), para 116.
[56] *Metropolitan Church of Bessarabia and others v Moldova*, App no. 45701/99, 13 December 2001.
[57] *Hatton v the United Kingdom*, App no. 36022/97, 8 July 2003.

judicial, "*judicial remedies ... furnish strong guarantees of independence, access for the victim and family, and enforceability of awards in compliance with the requirements of Article 13*."[58] Non-judicial remedies have to "*offer sufficient procedural safeguards for the purposes of Article 13*,"[59] consistent with an effective challenge which offers "*adequate guarantees of independence and impartiality*." [60] The effectiveness of a remedy does not depend on the certainty of a favourable outcome,[61] but it must offer a reasonable prospect of success. To be considered effective, decisions of the independent decision-maker must, of course, be implemented.[62]

19. The Court is urged to recognise that the right to a remedy is a rule of law principle, applicable at all times. The Court has noted the need for "*permanent review of the necessity of emergency measures,*"[63] and that safeguards are particularly crucial in the assessment of necessity and proportionality.[64] Scrutiny over the executive's action by an independent judicial authority has been described by the Venice Commission as one of the main safeguards of the rule of law, even in times of emergency.[65] Such review should be independent, meaningful and substantive review of whether measures comply with all aspects of the relevant legal tests.

20. The fundamental nature of the right to an effective remedy, and its applicability at all times, has been recognised in a growing body of international practice. It has thus been suggested that the right has come to be accepted as a non-derogable right.[66] In affirming this in relation to the ICCPR, the UN Human Rights Committee considers that while "*Article 2, paragraph 3, of the Covenant .... is not mentioned in the list of non-derogable provisions in Article 4, paragraph 2, [...] it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, ... may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, ... to provide a remedy that is effective.*"[67] The IACtHR for its part stresses the importance of ensuring that remedies such as writs of habeas corpus and of "amparo" are available at all times. The Court has reasoned that as such remedies are essential in guaranteeing non-derogable rights under the American Convention, and required by the principle of legality, they are themselves applicable in situations of emergency.[68]

21. Soft law principles lend further weight to this approach. The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR provide that effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.[69] The Paris Minimum Standards of Human Rights Norms in a State of Emergency sets down the importance of the right to an effective remedy and an independent and impartial judiciary '*particularly* in time of emergency'.[70]

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[58] *Klass and Others v. Germany*, App no. 5029/71, 6 September 1978, para. 67.
[59] *Chahal v United Kingdom* [GC], App no. 70/1995/576/662, 15 November 1996, para. 155.
[60] *Al-Nashif v. Bulgaria*, App no. 50963/99, 20 June 2002, para.133; *see also M. and Others v. Bulgaria*, App no. 41416/08, 26 July 2011.
[61] *Costello-Roberts v UK*, App nos. 89/1991/341/414, 25 March 1993, para. 40.
[62] *Wille v. Liechtenstein* [GC], App no. 28396/95, 28 October 1999, para. 75.
[63] *Brannigan and McBride v. the United Kingdom*, (fn 46) para. 54.
[64] *Ireland v. the United Kingdom*, App no. 5310/71, 18 January 1978, paras. 216-219; *Lawless v. Ireland* (no. 3), para. 37 (fn 47); *Brannigan and McBride v. the United Kingdom*, (fn 46) paras. 61-65; *Aksoy v. Turkey*, App no. 21987/93, 18 December 1996, paras. 79-84. Venice Commission, Opinion on Emergency Decree Laws Nos.667-676, (fn 49), para. 156.
[65] Venice Commission Opinion on Emergency Decree Laws Nos.667-676, (fn 49) para. 219.
[66] Human Rights in States of Emergency in International Law, Jaime Oraa, Oxford University Press, 1992, p. 101-16, cited in Alberta Law Review [VOL. XXXII, NO. 1 1994], Book Reviews, ps. 195-198 https://www.albertalawreview.com/index.php/ALR/article/download/1187/1177
[67] UNHRC, General Comment No. 29 (fn 42), para. 14.
[68] IACtHR, Advisory Opinion, (fn 40), paras. 38-40.
[69] Siracusa Principles (fn 48).
[70] Minimum Standards of Human Rights in a State of Exception, adopted at the 61st Conference of the international Law Association (1984), ILA Rep. 1984, p. 56; 79 AJIL 1072, 1985, Article 16.

22. In relation to Turkey specifically, the Venice Commission states that "… *Turkey under the ECHR and the ICCPR cannot derogate from "fundamental principles of fair trial" or the prohibition on arbitrary detention, and cannot deny remedies against human rights violations*."[71] PACE has similarly stressed that the "*fundamental safeguard of the rule of law, in particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency*."[72]

23. The UN Office of the High Commissioner for Human Rights underscores that, even after derogation, independent and impartial courts must continue functioning without interference, overseeing the necessity of the emergency measures in question.[73] It is the duty of the judiciary to ensure that human rights are effectively protected, and principles of legality and the rule of law are observed by the governments even – or arguably especially – in times of strain including national states of emergency. The fact that the right to a remedy and to reparation are recognised under both human rights and international humanitarian law lends further weight to arguments in support of the absolute nature of the right to an effective remedy in international law.[74]

IV. The Right to an Effective Remedy in the Turkish Context

24. During the state of emergency, the Turkish government issued 32 executive decrees with the force of law. Among the decreed measures with direct impact on individuals were: (a) dismissing and banning for life individuals from public service, (b) dismissing students in higher education, (c) revoking the ranks of retired military personnel, and (d) closing non-governmental organisations (such as foundations, associations and trade unions) and private institutions (such as universities, student accommodation, hospitals, and media outlets) with links to organisations or groups deemed by the government to pose a risk to national security. Passport cancellations were listed in executive decrees as "additional measures" to be taken against dismissed public sector employees identified in attachments to executive decrees.

Administrative Courts

25. As the Council of Europe Commissioner for Human Rights has explained, following the declaration of the state of emergency, there was "*a great deal of confusion as to the remedies available to different groups and categories, including among legal professionals*".[75] As a result, persons affected by emergency measures, including those dismissed from academia by executive decrees, resorted to various judicial and administrative procedures to challenge their dismissal and subsequent related measures, such as passport cancellations.

26. Several cases directly litigated before the Council of State (prior to the establishment of the State of Emergency Measures Inquiry Commission) were rejected on the ground that it was

[71] Venice Commission Opinion on Emergency Decree Laws Nos.667-676, (fn 49), para. 160.
[72] PACE Resolution 2209 (2018) State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights, adopted on 24 April 2018, para.3.
[73] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, p. 884, https://www.ohchr.org/Documents/Publications/training9chapter16en.pdf; on role of the justice sector in states of emergency, *see also* UN Special Rapporteur on Independence of Judges and Lawyers, A/HRC/35/31 (2017), paras. 102-103.
[74] UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : Resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147; On reparation, see Jean-Marie Henckaerts and Louise Doswald-Beck, International Committee of Red Cross, Customary International Humanitarian Law, Volume I: Rules, p. 537.
[75] COE Commissioner for Human Rights, Memorandum on the Human Rights Implications of the Measures Taken Under the State of Emergency in Turkey, 7 October 2016, para.44: https://rm.coe.int/16806db6f1.

the *administrative* courts that were competent to hear those cases.[76] The cases brought before the administrative courts, on the other hand, were rejected on the ground that dismissals and associated measures by executive decrees were legislative acts, while administrative courts had competence to determine the lawfulness of administrative (not legislative) acts.[77] Requests for stay of executions were also rejected on the ground that the executive decrees explicitly precluded such orders for acts carried out and decisions taken under the relevant decrees.[78]

27. Complaints by the dismissed public sector workers based *only* on the cancellation of their passports were rejected by the administrative courts on the grounds that the cancellation was lawful as it was provided for by executive decree on the basis that the applicants were deemed by the governmental authority to have links to proscribed groups. These court decisions do not assess whether the applicant indeed had any such links or there was any evidence to support such a conclusion. Nor do they assess whether the indefinite passport cancellation was a necessary and proportionate measure, even if any such links or suspicion were established.

Constitutional Court

28. Like the administrative courts, the Constitutional Court has not reviewed the merits of the applications of public sector workers challenging dismissals and subsequent restrictions either. In its inadmissibility decisions, the Constitutional Court found that the applicants had not exhausted other remedies that must be invoked prior to the Constitutional Court.[79] The Court subsequently referred those applicants to the administrative courts and/or to the Inquiry Commission. The Constitutional Court also rejected challenges brought by the main opposition party against the executive decrees both before they were approved by the parliament[80] and after.[81] More recently, the Constitutional Court has reportedly rejected applications concerning *only* cancellations of passports under the state of emergency on the grounds that Turkey has not ratified Protocol No 4 of the Convention[82]. In so doing the Constitutional Court appears to have indicated that it does not provide a domestic remedy to be exhausted in relation to passport cancellations under the state of emergency in Turkey.

State of Emergency Measures Inquiry Commission

29. Following recommendations by the Venice Commission[83] and other Council of Europe institutions, the Government adopted the Emergency Decree Law No 685 on 23 January 2017,

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[76] 3 Council of State decisions were analysed by Human Rights Joint Platform ("Insan Haklari Ortak Platformu", IHOP) in its report "the Emergency State Measures" dated 23 February 2017, p. 50, http://www.ihop.org.tr/wp-content/uploads/2017/02/OHAL-%C5%9Eubat2017-raporu.pdf.

[77] 320 decisions from different administrative courts were analysed by IHOP, *ibid,* p. 50.

[78] *See for example*, Article 10 (1) of Decree Law No. 667; Article 38 (1) of Decree Law No. 668.

[79] The Court's own figures suggest that as of 4 August 2017, 70,771 applications regarding emergency measures were referred to the Inquiry Commission and others to the administrative courts. *See Remziye Duman*, 2016/25923, 20 July 2017; *See also* http://www.anayasa.gov.tr/icsayfalar/duyurular/detay/65.html.

[80] Arguing that it had no jurisdiction on reviewing constitutionality of the emergency measures under Article 148 of the Constitution, *eg*, judgment no 2016/159 on the file no 2016/166, 12 October 2016; judgment no 2016/160 on the file no 2016/167, 12 October 2016; judgment no 2018/191 on the file no 2018/114, 25 September 2018.

[81] Arguing that the arguments put forward by applicant did not provide enough ground to nullify the laws challenged and that the procedure in which the laws were adopted did not violate the Constitution, *eg*. judgment no 2018/48 on the file no 2018/42, 31 May 2018; judgment no 2018/41 on the file no 2016/168, 31 May 2018; judgment no 2018/54 on the file no 2018/48, 31 May 2018.

[82] *Eg.* App no 2018/13499, decision of 22 January 2019 and App no 2018/6576, decision of 7 January 2019.

[83] Venice Commission recommended Turkey to establish a temporary *ad hoc* body to examine individual cases of dismissals of public servants and associated emergency measures to provide individualised treatment in all cases, which *"would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the status quo ante, and/or, where appropriate, to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body."* Venice Commission Opinion on Emergency Decree Laws Nos.667-676, (fn 49), para. 222; PACE similarly described the ability to make prompt, transparent

establishing the State of Emergency Measures Inquiry Commission. The Inquiry Commission was considered by this Court as, in principle, a viable domestic remedy to be exhausted, before the Inquiry Commission started receiving applications on 17 July 2017.[84] Administrative law mechanisms have referred applications to the Inquiry Commission without differentiating between dismissals and linked measures such as the cancellation of passports.

30. However, the Inquiry Commission does not have competence to consider the lawfulness of the cancellation of passports. According to Article 2 of the Emergency Decree Law No 685, the Inquiry Commission's mandate is limited to the examination and decisions on dismissals from public service, dismissal from studentship in universities, closure of associations (trade unions, media outlets, educational institutions etc.) and annulment of ranks of retired personnel. Article 10(3)(f) of the Rules and Procedures of the Inquiry Commission published on Official Gazette on 12 July 2017[85] clearly states that applications concerning cancellation of passports, which constitute one of the "additional measures" prescribed under executive decrees are to be rejected by the Inquiry Commission as inadmissible. Despite this, the administrative law mechanisms have been referring pending applications to the Inquiry Commission. They did not differentiate between dismissals from public service and other measures linked to these dismissals such as the cancellation of passports.

31. Moreover, even if the Inquiry Commission had the mandate, serious concerns also arise as to its failure to meet the criteria for an effective remedy. [86] Firstly the Inquiry Commission is marred by a lack of institutional independence reflected in provisions for appointments and dismissals.[87] All of its members are appointed by Governmental bodies[88] and can be dismissed by the executive simply by establishing an 'administrative investigation' on the basis of suspicion of links to proscribed groups.[89] Secondly, the procedure before the Inquiry Commission lacks important safeguards to ensure that it provides applicants a meaningful opportunity to rebut the allegations against them. [90] They are not allowed to give oral testimony, to call witnesses, to see evidence against them in advance of their application or to respond to allegations.[91]

32. Third, the Inquiry Commission's assessment raises serious legality concerns stemming from the lack of clarity as to the grounds for its determinations. Broad and ill-defined criteria – focused on whether there is suspicion that the applicants have *any relationship* with proscribed organisations – are applied by reference loose and indeterminate information.[92]

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and independent decisions as critical to effectiveness: Functioning of Democratic Institutions in Turkey, 8 March 2017, para. 21(3): http://website-pace.net/documents/19887/3258251/20170308-TurkeyInstitutions-EN.pdf/bbd65de5-86d4-466f-9bc1-185d5218bce7

[84] *Köksal v. Turkey*, App no. 70478/16, 12 June 2017.

[85] http://www.resmigazete.gov.tr/eskiler/2017/07/20170712M1-1.htm.

[86] For detailed comments on the Inquiry Commission *see* the UN High Commissioner for Human Rights, Report on the Impact of the State of Emergency on Human Rights in Turkey, Including an Update on the South-East, March 2018, Second_OHCHR_Turkey_Report.pdf ; s*ee also* PACE report (fn 83).

[87] Amnesty International, Turkey: Amnesty International's Brief on the Human Rights Situation, 1 February 2019: https://www.amnesty.org/download/Documents/EUR4497472019ENGLISH.PDF.

[88] Three members are appointed by the President, one by Minister of Justice and one by Minister of the Interior, while the remaining two by the Board of Judges and Prosecutors (HSK) under the control of the executive.

[89] *Eg*. UN High Commissioner for Human Rights report (fn 86); PACE report (fn 83).

[90] Amnesty International, Purged Beyond Return? No Remedy for Turkey's Dismissed Public Sector Workers, 2018: https://www.amnesty.lu/uploads/media/PURGED_BEYOND_RETURN_TURKEY.PDF.

[91] The Bar Human Rights Committee of England and Wales, The International Bar Association's Human Rights Institute and The Law Society of England and Wales**,** Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches Concerning the Independence of Legal Profession in Turkey, 18 September 2018: https://www.ibanet.org/Document/Default.aspx?DocumentUid=deaf1861-f198-4352-b570-7d08e5c0c53a.

[92] Interveners have analyzed 193 decisions from the Commission; they reveal information based on e.g. intelligence agents, confidential witness statements, colleague witnesses, or research into the person's social life.

33. Analysis of the Inquiry Commission's decisions also reveals that the reasons provided by it for upholding dismissals lack substance and grounding in law. [93] Lawful activities, such as interactions with institutions - including schools, as well as banks, charities, trade unions, media outlets, and civil society organizations - perceived to be associated with proscribed groups, are frequently used as proof of 'links' to such groups. In practice, the implementation of such a low threshold for evidence of 'links' effectively inverts the burden of proof onto the applicant to prove the absence of links or associations with a proscribed group. It denies those affected a meaningful opportunity to challenge the extreme restrictions on the exercise of their academic freedom and other rights.

V. Conclusion

34. The rights at stake, and the direct and indirect implications of restrictions on academic freedom, call for a strict interpretation of permissible restrictions under the Convention, including any restriction that falls under Article 8. Moreover, certain rule of law principles limit permissible derogations under the Convention; clarity, necessity and proportionality, and the applicability of essential safeguards, apply at all times. The right to an effective remedy is one of the basic rule of law guarantees that cannot be dispensed with even in an emergency and the interveners respectfully invite this Court to confirm the non-derogable nature of the right to an effective remedy under Article 13 of the Convention. The interveners further invite the Court to consider the remedial framework in place in Turkey, and the lawfulness of restrictions on academic freedom that arise in the case, in light of the international standards set out in this brief and the common concerns of the international community that underpin them.

Respectfully submitted,

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[93] By 31 December 2018, the Inquiry Commission had received 125.600 applications. Between 22 December 2017 and 31 December 2018, it concluded 50.500 applications, 46.750 against applicants and 3.750 in favour. *see* State of Emergency Inquiry Commission, 2018 Annual Report, p. iii: https://ohalkomisyonu.tccb.gov.tr/docs/OHAL_FaaliyetRaporu_2018.pdf.