IN THE ISTANBUL 21ST PENAL COURT OF FIRST INSTANCE
Case No. 2020/559 E.

Between:

Republic of Turkey

Public Prosecutor's Office of Istanbul
Terror Crimes Investigation Office

Prosecution

- and –

Adil Can Ocak, Ahmet Karaca, Ahmet Süleyman Benli and 43 others

Defendants

THE "SATURDAY MOTHERS/PEOPLE" CASE:

EXPERT OPINION ON INTERNATIONAL HUMAN RIGHTS LAW AND THE RIGHT TO PROTEST

Introduction

1. The Bar Human Rights Committee of England and Wales ("**BHRC**") and ARTICLE 19: Global Campaign for Free Expression ("**ARTICLE 19**") submit this expert legal opinion in the case of Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, in accordance with Article 67/6 of the Turkish Code of Criminal Procedure (Law No. 5271). This case concerns the prosecution of 46 members of a political protest movement, known as the "Saturday Mothers" (or, in some contexts, the "Saturday People"[1]) movement, for their involvement in a protest on 25 August 2018. We have

[1] For convenience, this expert opinion uses the term "Saturday Mothers" to refer equally to all people who participate in the movement.

been asked by Kerem Altıparmak, lawyer representing defendants Deniz Koç, Besna Koç and Maside Ocak Kışlakçı, on behalf of all Defence lawyers instructed in this case, to provide an expert opinion on international and European law and standards on the right to protest and the relevance of those standards (which are binding on Turkey as a matter of international law) in the context of the prosecution of the defendants in the case currently pending before the Istanbul 21st Penal Court of First Instance. We understand that this opinion will be relied upon by the defendants in this case, although it is not the role of this expert opinion to express a view on what the outcome of this case should be beyond the fact that it should comply with Turkey's human rights obligations.

2. In the sections that follow, this expert opinion: (i) provides the factual background to the case; (ii) summarises relevant principles of international and European human rights law relevant to the right to protest (principally related to the right to freedom of peaceful assembly); and (iii) identifies what the authors understand to be the significance of those principles in the context of Case No. 2020/559.

About the Bar Human Rights Committee of England and Wales

3. BHRC is the independent, international human rights arm of the Bar of England and Wales. It is dedicated to promoting justice and respect for human rights through the rule of law. Its members (including the authors of this expert opinion) offer their services *pro bono*, alongside their independent legal practices and teaching commitments.[2]

4. BHRC's mission is to protect and promote international human rights through the rule of law, by using the international human rights law expertise of some of the United Kingdom's most experienced human rights barristers.[3]

5. BHRC has conducted a number of independent trial observations in Turkey over recent years and has had a long-term close working history with the legal community and civil society in Turkey.

About ARTICLE 19

6. ARTICLE 19 is an international non-governmental organisation that advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and the implementation of such standards in domestic legal systems. ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best practice on issues ranging from freedom of expression and national security to

[2] The BHRC members who authored the present expert opinion wish to thank Schona Jolly QC, Chair of BHRC, and Steve Cragg QC, Vice Chair of BHRC, for their valuable feedback on a draft of this opinion.
[3] The BHRC website is available at https://www.barhumanrights.org.uk.

access to information and the right to protest. On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation regularly intervenes in domestic and regional human rights court cases, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work carried out since 1998 as a means of supporting positive law reform efforts worldwide frequently leads to substantial improvements in proposed domestic legislation.

7. ARTICLE 19 has specific expertise in the area of counter-terrorism legislation that affects freedom of expression. This includes the publication of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles),[4] the analysis of the terrorism offences contained in the penal codes of countries such as the United Kingdom,[5] Tunisia[6] and Russia[7] and interventions in a number of high profile national security cases.[8] In May 2016, ARTICLE 19 delivered training for Turkish judges on 'International Standards for Promoting Freedom of Expression while Countering Terrorism' at an international workshop in Antalya for the Turkish High Level Courts organised by the Council of Europe and the European Union.

Factual background[9]

8. The "Saturday Mothers" protest movement consists of relatives of missing persons as well as other human rights defenders.

9. The Saturday Mothers group gathered for the first time on 27 May 1995, in Galatasaray Square in Istanbul. The first meeting, which followed a call by the Chairman of the Human Rights Association and President of the Human Rights Foundation of Turkey, was a protest following the discovery of the body of Hasan Ocak, who had disappeared on 21 March 1995, and who had been tortured to death. The group's purpose was to demand "*an end to disappearances in custody; the uncovering of the fate of the disappeared; and the apprehension and prosecution of those responsible*".[10]

10. The protest, which took the form of a sit-in, continued on a weekly basis, except for between 1999 and 2009 when it was forcibly interrupted as a result of heavy police

[4] ARTICLE 19, Johannesburg Principles: National Security, Freedom of Expression and Access to Information, 1996.
[5] ARTICLE 19, UK: Counter Terrorism and Border Security Bill could criminalise expression and opinions, 09 October 2018
[6] ARTICLE 19, Tunisia: Counter-terror law endangers rights, 31 July 2015
[7] ARTICLE 19, Rights in extremis: Russia's anti-extremism practices from an international perspective, 23 September 2019.
[8] See, e.g., ARTICLE 19, UK: ARTICLE 19 intervenes in Miranda Case, 16 December 2015.
[9] The following statement of facts and arguments is based on unofficial translations of the indictment against the Defendants (no. 2020/19431) dated 12 October 2020 issued by Public Prosecutor's Office of Istanbul, Terror Crimes Investigation Office and the Defence and hearing records provided by the Defence lawyers in this case.
[10] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Defence, para. 1.

intervention. Its demands continued to be information about the fate of those who were forcibly disappeared in custody or were the victims of unsolved political murders in the 1990s and that those responsible for the enforced disappearances be held accountable.

11. The 700th week of the protest was due to be held on 25 August 2018. On that date, the Beyoğlu District Governor's Office adopted decision no. 2018/1757 ("**the Governor's Decision**"), pursuant to Articles 10 and 17 of the Law on Meetings and Demonstration Marches (Law No. 2911) ("**Law No. 2911**"). Article 17 of Law No. 2911 allows a governor to prohibit a meeting (or to postpone it for a maximum period of one month) on grounds of national security, public order, the prevention of crime, the protection of public health and morality or the rights and freedoms of others, provided there is a clear and imminent danger that an offence will be committed if the meeting is allowed to proceed. In this case, the Governor's Decision banned "*all gatherings*" in the Beyoğlu District. The justification put forward for the Governor's Decision was that: (i) the prospective protesters had not made a notification to law enforcement authorities in respect of their intended sit-in, contrary to Article 10 of Law No. 2911; and (ii) there were (unspecified) "grounds of national security; public order; the prevention of crime; the protection of public health and morality, and the rights and freedoms of others" that justified the exercise of the power under Article 17.[11]

12. On the same date, approximately 50 people gathered at the Galatasaray Square at around 10:00am to carry out the 700th week of protest.[12] According to the indictment issued by the Istanbul Chief Public Prosecutor's Office, the group was warned to disperse through an audio device and the persons who refused to disperse were arrested and detained.[13] The defendants in the present case ("**the Defendants**") have described the police using excessive force in order to disperse the protest, including, for example, individuals being pushed to the ground or punched in the body, elderly women being dragged along the ground, and the use of tear gas and rubber bullets.[14] According to the Human Rights Foundation of Turkey, 12 of the protesters sustained injuries.[15]

13. The day after the protest, the Interior Minister of Turkey, Süleyman Soylu, stated that the purpose of the ban on the protest was to bring an end to "*hypocritical deception*"

[11] Indictment No. 2020/19431, 12 October 2020, p. 2.
[12] *Ibid*.
[13] *Ibid*., pp. 2–3.
[14] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Transcript of hearing in Istanbul 33rd High Criminal Court on 25 March 2021, pp. 15, 18.
[15] Amnesty International, "*Public Statement — Turkey: Authorities must ensure relatives of forcibly disappeared can continue with their peaceful weekly vigil*" (29 August 2018).

and to terrorist organisations "*abus*[ing] *the concepts such as motherhood, state, and nation*".[16]

14. On 12 October 2020, 46 of the participants in the protest of 25 August 2018 were charged with participating, unarmed, in an unlawful meeting and march and refusing to disperse on their own accord despite being warned to do so, under Article 32/1 of Law No. 2911 and Articles 53/1 and 63 of the Turkish Penal Code (Law No. 5237).[17] If convicted, the participants may face possible terms of imprisonment of between 6 months and 3 years. On 18 November 2020, the Istanbul 21st Criminal Court of First Instance accepted the indictments.

15. On 25 March 2021, a first hearing was held in the criminal proceedings before the Istanbul 21st Criminal Court of First Instance. At the hearing, several of the Defendants presented testimony as to the peaceful aims of the 700th week protest and the violent dispersal of the that protest, and requested that they be acquitted pursuant to paragraph 9 of Article 223 of the Turkish Code of Criminal Procedure. Their reasons included that it was against Turkish law for the 700th week sit-in, a peaceful protest, to be banned, and further that the ban was not notified 24 hours in advance as is required under Article 18 of Law No. 2911. Judge Naim Atan rejected the request for an acquittal.[18]

16. A second hearing in the case occurred on 12 July 2021 at the 27th High Criminal Court, at which several of the Defendants provided further testimony as to the purposes of, and what had happened at, the protest. The hearing was adjourned following interruptions to the Defendants' legal case, and an unsuccessful application by the Defendants that the presiding judge be recused from the case. The next hearing will be held on 24 November 2021.

17. In parallel to the prosecution of the Defendants, the Governor's Decision has also been the subject of a challenge before Turkey's administrative courts. On 19 October 2018, the Turkish Human Rights Association sought the annulment of the Governor's Decision before the Istanbul 6th Administrative Court (Case No. 2018/1964 E). The challenge has since been escalated to the Constitutional Court of Turkey, where an individual application was filed on 6 August 2021 and where proceedings are currently pending. According to the Defendants' Defence in the criminal prosecution, documents disclosed in the course of those proceedings sought to justify the Governors' Decision on the following grounds.

    (a) Initially, the respondent sought to justify the Governor's Decision on the basis of "*the absence of prior notification and the concern that the 700th week protest would be*

[16] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Defence, para. 9.
[17] Indictment No. 2020/19431, 12 October 2020, p. 2.
[18] "*We were subjected to violence, the state should have been put on trial*", *bianet* (25 March 2021).

overcrowded due to the fact that many political parties and non-governmental organisations made calls on social media".[19]

(b) Later, disclosure from the Istanbul Provincial Directorate of Security suggested that some documents seized during a security operation indicated that the Haneef brigade, an armed wing of ISIS, was planning an attack in Istanbul — but the documents did not make any link to the 700th week of protest of the Saturday Mothers.[20] The disclosure also included references to an anonymous statement on Twitter, apparently by a person who objected to the message of the protest,[21] apparently giving rise to a concern that the protest risked 'offending' non-participants.[22]

18. The authors understand that the Saturday Mothers protests have not resumed in Galatasaray Square since the arrests on 25 August 2018.

Relevant principles under international human rights law

19. This section identifies principles of human rights law, drawn from the Council of Europe and United Nations human rights systems to which Turkey is a party, which are relevant to the right to protest in the context of Case No. 2020/559. It focuses primarily on instruments in the Council of Europe and United Nations human rights systems to which Turkey is a party, before addressing more briefly authorities from other domestic human rights regimes from which guidance may be derived.

20. In the human rights systems addressed in this expert opinion, the 'right to protest' involves the exercise of numerous fundamental human rights, chief among them the right to freedom of peaceful assembly (which is therefore the focus of this opinion), as well as the right to freedom of association, the right to freedom of expression, the right to political participation and, in certain cases where protesters are subject to forcible dispersal and/or action by law enforcement authorities, the rights to life and to freedom from arbitrary arrest, detention and inhuman and degrading treatment and punishment.

(i) Case law of the European Court of Human Rights

21. Article 11(1) of the European Convention on Human Rights ("**ECHR**") enshrines the right to freedom of peaceful assembly. According to Article 11(2), this right shall not be subject to any restrictions "*other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and*

[19] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Defence, para. 5.
[20] *Ibid.*, para. 8.
[21] *Ibid.*, para. 7.
[22] *Ibid.*, para. 60.

freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

22. The European Court of Human Rights ("**the ECtHR**") has characterised the right to freedom of assembly as a fundamental right in a democratic society and, in common with the right to freedom of expression with which it is often linked (and which is guaranteed by Article 10 of the ECHR), one of the foundations of such a society.[23] Indeed, as the ECtHR emphasised in *Freedom and Democracy party (ÖZDEP) v Turkey*,[24] notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.[25]

23. The ECtHR has repeatedly emphasised the crucial role that the right to freedom of assembly plays in advancing democracy and pluralism.[26] Upholding the right to freedom of peaceful assembly protects the expression or support of an idea which is expressed through the very presence of a group of people at a place accessible to the general public.[27] The object of Article 11 of the ECHR is to guard against arbitrary interference by public authorities with the exercise of the rights protected. Article 11 also imposes on State authorities positive obligations to secure the effective enjoyment of these rights.[28] It protects both individual participants as well as the persons organising a gathering.[29]

24. The ECtHR found in the case of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* that:

> "*Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles — however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be — do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, political ideas which challenge the existing order and whose*

[23] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 91.
[24] *Freedom and Democracy party (ÖZDEP) v Turkey* [GC], no. 23885/94, 8 December 1999, para. 37.
[25] *Ezelin v. France*, no. 11800/85, 26 April 1991, para. 37.
[26] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95, 29225/95, 20 October 2001, para. 88.
[27] *Tatar and Faber v. Hungary*, nos. 26005/08 and 26160/08, 12 June 2012, para. 38.
[28] *Oya Ataman v. Turkey*, no. 74552/01, 5 December 2006, para. 36.
[29] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 91.

realization is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means."[30]

25. The ECtHR has interpreted the ECHR as requiring heightened protection of political speech or expressions related to serious matters of public interest.[31] Further, in almost all circumstances authorities are not permitted to interfere with a protest on the grounds that they disagree with its message. In *Primov and others v. Russia* the ECtHR held that:

> "*public events related to political life in the country or at a local level must enjoy strong protection under* [Article 11]*, and rare are the situations where a gathering may be legitimately banned in relation to the substance of the message which its participants wish to convey. The Government should not have the power to ban a demonstration because they consider that the demonstrators' 'message' is wrong. It is especially so where the main target of criticism is the very same authority which has the power to authorise or deny the public gathering. … Content-based restrictions on freedom of assembly should be subjected to the most serious scrutiny by this Court.*"[32]

26. The rights set out in each of Articles 10(1) and 11(1) are qualified rights, such that they can be restricted in accordance with Articles 10(2) and 11(2), respectively. The term "*restrictions*" in Article 11(2) has been interpreted by the ECtHR as including both measures taken before or during a protest, including measures to disperse a gathering or the arrest of participants, as well as those taken afterwards, such as punitive measures against participants in an assembly.[33] Such restrictions will constitute a breach of Article 11 unless they are "*prescribed by law*", pursue a legitimate aim falling under the exhaustive grounds enumerated in Article 11(2), and are "*necessary in a democratic society*" for the achievement of the aim in question.[34] In this respect, the Court requires national authorities to apply standards compatible with the principles guaranteed by Article 11 and ensure that their decisions are based on an acceptable assessment of the relevant facts.[35]

27. Where the time and place of an assembly carry particular significance for its participants, an order to change the time or place may constitute an interference with their freedom of assembly.[36]

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[30] *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, para. 98.

[31] *Primov and others v. Russia*, no. 17391/06, 12 June 2014, para. 134. See also *Sürek v. Turkey (no. 1)*, no. 26682/95, para. 61.

[32] *Primov and others v. Russia*, no. 17391/06, 12 June 2014, para. 135. See also *Navalnyy v. Russia*, nos. 29580/12, 36847/12, 11252/13, 15 November 2018, para. 136.

[33] *Ibid.*, para. 100.

[34] *Vyerentsov v. Ukraine*, no. 20372/11, 11 April 2013, para. 51.

[35] *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, 30 January 1998, para. 47.

[36] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, paras. 79, 80.

28. The fact that a protest takes place in the absence of official notification or authorisation does not lead it to be deprived of the protection of Article 11(1).[37] A requirement for prior notification, while not automatically incompatible with the ECHR, "*should not represent a hidden obstacle to the freedom of peaceful assembly*".[38] The ECtHR has repeatedly emphasised that "*an unlawful situation does not justify an infringement of freedom of assembly*"[39] and that the enforcement of rules requiring prior notification "*cannot become an end in itself*".[40] In circumstances where demonstrators do not engage in acts of violence, public authorities are required to show a degree of tolerance. To disperse a peaceful demonstration solely because of the absence of prior notice may well be disproportionate.[41]

29. The settled jurisprudence of the ECtHR has established that the lack of prior authorisation or notification for a protest does not give *carte blanche* to the authorities in dispersing the protest. The ECtHR has held that the authorities must identify the basis on which the demonstration was not authorised, the public interest at stake, and risks that the demonstration posed.[42] An interference with an assembly taking the form of its dispersal may only be justified on specific and averred substantive grounds that require the authorities to establish a significant risk provided by law.[43] Further, the methods used by the police for dispersing the demonstration are an important factor in assessing the proportionality of an interference.[44] Dispersal of an assembly can only take place after the participants are given sufficient opportunity to manifest their views.[45]

30. The lack of a foreseeable risk of violent action and/or incitement to violence and/or any other form of rejection of democratic principles constitute a strong indication that a ban on an assembly was not justified.[46] To enjoy the protection of Article 11 of the ECHR, it must be assessed whether: (i) an assembly was intended to be peaceful and whether the organisers had violent intentions; (ii) whether a particular participant whose right had been subject to an interference had violent intentions when joining the assembly; and/or (iii) whether the charges against a particular participant involved

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[37] *G. v. Germany*, no. 13079/97, Commission decision of 6 March 1989, DR 60, p. 256.
[38] *Samut Karabulut v. Turkey*, no. 16999/04, 27 January 2009, para. 35; *Balcik and Others v. Turkey*, no. 25/02, 29 November 2007, para. 49.
[39] *Oya Ataman v. Turkey*, no. 74552/01, 5 December 2006, para. 39; *Samüt Karabulut v. Turkey*, no. 16999/04, 27 January 2009, para. 35.
[40] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 150.
[41] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 150; *Bukta and Others v. Hungary*, no. 25691/04, 17 July 2007, paras. 35, 36; *Berladir and Others v. Russia*, no. 34202/06, 10 July 2012, para. 43.
[42] *Primov and others v. Russia*, no. 17391/06, 16 June 2014, para. 119.
[43] *Navalnyy v. Russia*, nos. 29580/12, 36847/12, 11252/13, 15 November 2018, para. 137.
[44] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 151.
[45] *Eva Molnar v. Hungary*, no. 10346/05, 7 October 2008, paras. 42, 43.
[46] *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, 2 October 2001, paras. 97, 98; *Ivanov and Others v. Bulgaria*, no. 46336/99, 24 February 2005, para. 64.

infliction of bodily harm.[47] The burden of proving violent intentions held by the organisers lies with the authorities.[48]

31. Arrest and criminal prosecution for participation in a peaceful assembly constitute an interference with Article 11.[49] Criminal sanctions for organising or participating in unauthorised assemblies require "*particular justification*".[50] Public authorities are required to show a certain degree of tolerance towards peaceful gatherings, where demonstrators do not engage in acts of violence, if the freedom of assembly guaranteed by Article 11 is not to be deprived of all substance.[51] The ECtHR has been firm in holding that peaceful demonstrations should not be subject to the threat of a criminal sanction and deprivation of liberty and that it will examine with "*particular scrutiny*" cases involving deprivation of liberty for non-violent conduct.[52] In assessing the proportionality of an interference, its "*chilling effect*" must be considered. Measures such as the use of force to disperse an assembly, the arrests, detention and prosecution of organisers and participants may discourage participation in similar events or even silence the expression of the opinions in question.[53]

32. In addition to the prohibition of arbitrary interference with the exercise of the right to peaceful assembly, Article 11 imposes an obligation to investigate violent incidents affecting the exercise of freedom of assembly and prosecute those who commit offences against demonstrators.[54] It also imposes a duty to ensure the peaceful conduct of an assembly, prevent disorder, and secure the safety of all citizens involved. The authorities are obliged to communicate with assembly leaders in the course of an assembly as a way of avoiding escalations.[55]

33. Restrictions on freedom of expression or association, as well as unlawful detentions, may lead to a finding that there has been a violation by the State of Article 18 of the ECHR, which provides that "*the restrictions permitted under* [the] *Convention … shall not be applied for any purpose other than those for which they have been prescribed*". A finding of

[47] *Gülcü v. Turkey*, no. 17526/10, 19 January 2016, para. 97.
[48] *Christian Democratic People's Party v. Moldova (no. 2)*, no. 25196/04, 2 February 2010, para. 23.
[49] *Mkrtchyan v. Armenia*, no. 6562/03, 11 January 2007, para. 37; *Galstyan v. Armenia*, no. 26986/03, 15 November 2007, para. 102; *Osmani v. Former Yugoslav Republic of Macedonia*, no. 50841/99 (dec.), 11 October 2001; *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11, 15 October 2015, para. 50; *Gülcü v. Turkey* no. 17526/10, 19 January 2016, para. 102.
[50] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 146; *Rai and Evans v. the UK* (dec.), nos. 26258/07 and 26255/07, 7 September 2009.
[51] *Balcik and Others v. Turkey*, no. 25/02, 29 November 2007, para. 52; *Zakharov and Varzhabetyan v. Russia*, nos. 35880/14 75926/17, 13 October 2020, 2020, para. 90.
[52] *Kudrevičius and Others v. Lithuania*, no. 37553/05, 15 October 2015, para. 146.
[53] *Balçik and Others v. Turkey*, no. 25/0229 November 2007, para. 41.
[54] *Promo Lex and Others v. Moldova*, no. 42757/09, 24 February 2015, para. 23; *Alekseyev v. Russia*, nos. 4916/07, 25924/08, 14599/09, 21 October 2010, para. 76.
[55] *Frumkin v. Russia*, no. 74568/12, 5 January 2016, para. 129 (where the Court made reference to the Venice Commission's Guidelines on Freedom of Peaceful Assembly).

an Article 18 violation is a grave finding as to the State's motivation for the substantive Convention violation.[56]

34. In two critical cases involving Turkey, the ECtHR has found a violation of Article 18 whereby the authorities had pursued a predominant ulterior purpose. In *Kavala*, the ECtHR held that the "*the measures taken against* [Osman Kavala] *pursued an ulterior purpose, namely to reduce him to silence as an NGO activist and human-rights defender, to dissuade other persons from engaging is such activities and to paralyse civil society in the country*".[57] In *Demirtaş*, the ECtHR held that:

> "*the applicant's initial and continued pre-trial detention not only deprived thousands of voters of representation in the National Assembly, but also sent a dangerous message to the entire population, significantly reducing the scope of free democratic debate. These factors enable the Court to conclude that the purposes put forward by the authorities for the applicant's pre-trial detention were merely cover for an ulterior political purpose* [and] *… pursued the ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society.*"[58]

35. It is therefore axiomatic that the State cannot restrict Article 11 free assembly or expression rights in order to silence, discourage or punish participants for their individual or collective (critical) views which they are seeking to express peacefully in a public form.

36. The authors note finally that domestic courts of Council of Europe Member States play an important role in ensuring that their own procedures and substantive decisions comply with ECHR standards, including in relation to criminal cases implicating the right to protest. For example, in 2021, the Supreme Court of the United Kingdom set aside the convictions of numerous individuals who had obstructed a highway in the course of protesting against the arms trade, given that the convictions were held to constitute a disproportionate interference with the individuals' right to freedom of expression and of assembly, especially in light of their peaceful intentions. In doing so, the Supreme Court confirmed that the relevant provision of domestic criminal law must be read compatibly with the ECHR.[59]

(ii) Other Council of Europe materials

a. Guidelines on Freedom of Peaceful Assembly

37. In July 2020, the European Commission for Democracy through Law ("**the Venice Commission**") and the OSCE Officer for Democratic Institutions and Human Rights

[56] *Navalnyy v. Russia*, nos. 29580/12, 36847/12, 11252/13, 15 November 2018, para. 165.
[57] *Kavala v. Turkey*, no. 28749, 11 May 2020, para. 224.
[58] *Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, 22 December 2020, paras. 436–437.
[59] *Director of Public Prosecutions v. Ziegler and Ors* [2021] UKSC 23, [2021] 3 WLR 179, paras. 80–87.

published the third edition of their Guidelines on Freedom of Peaceful Assembly ("**the Guidelines**").[60] The Guidelines recognise that the right to freedom of peaceful assembly is "*one of the foundations of a democratic, tolerant and pluralist society*" and a mechanism for ensuring the accountability of public authorities and government officials.[61]

38. According to the Guidelines, an assembly must be presumed to be peaceful unless there is "*convincing evidence of intent to use or incite violence*".[62] Further, an assembly may be peaceful (and therefore protected under international human rights law) even if it annoys or offends others, and even if it is 'unlawful' under domestic law.[63]

39. An assembly may be subject to restrictions which "*have a formal basis in law*", are based on one or more explicitly enumerated grounds (which must be "*narrowly interpreted*"), and are necessary for and proportionate to achieving a legitimate aim.[64] It is impermissible for a State to impose a restriction based on "*the content of the message(s) that* [an assembly] *seek*[s] *to communicate*" or "*the authorities' own disagreement with the merits of a particular protest*".[65]

40. According to the Guidelines, law enforcement authorities must not use force at assemblies unless doing so is "*strictly unavoidable*".[66]

41. The Guidelines highlight limitations on a State's entitlement to impose penalties on organisers of and participants in a peaceful assembly. They emphasise that mass arrests should be avoided, and further that any offence relating to a failure to give notice of an assembly should not be punishable with prison sentences or heavy fines.[67] Participants in a peaceful assembly should not be subject to criminal sanctions, let alone to deprivations of liberty, merely for participating in the assembly.[68] Further, "[u]*nnecessary or disproportionately harsh sanctions*" should be avoided as they may have a chilling effect on the exercise of the right to freedom of peaceful assembly and related rights.

b. Council of Europe Committee of Ministers and Parliamentary Assembly

42. The *Oya Ataman* group of cases concerns violations of the applicants' right to freedom of assembly and/or their ill-treatment or the death of their relatives when excessive

[60] European Commission for Democracy through Law and OSCE Officer for Democratic Institutions and Human Rights, *Guidelines on Freedom of Peaceful Assembly* (3rd edition, 15 July 2020).
[61] *Ibid.*, paras. 1–2.
[62] *Ibid.*, para. 19.
[63] *Ibid*.
[64] *Ibid.*, paras. 28–29.
[65] *Ibid.*, para. 30.
[66] *Ibid.*, para. 31.
[67] *Ibid.*, para. 36.
[68] *Ibid.*, para. 226.

force was used to disperse peaceful demonstrations by the Turkish law enforcement authorities.

43. The Council of Europe Committee of Ministers identified a structural problem in this respect. In its Decision adopted at its 1411th meeting on 14–16 September 2021 it underlined that, "*legislative reform is indispensable to ensure the enjoyment of freedom of peaceful assembly in Turkey*", and further that it "*expressed regret about the fact that no proposal for legislative amendment has been made since the last examination of these groups of cases, despite the clear indications of the Committee in this regard and strongly urged the authorities to amend the Law no. 2911 to ensure that its provisions are fully in line with the principles set out in the case law of the European Court and the Constitutional Court*".[69] The Committee also invited the authorities to review the 2016 directive on the use of tear gas and other crowd control weapons.[70]

44. It also invited the authorities to continue to provide detailed information concerning: (i) the interventions by law enforcement officers to disperse demonstrations and meeting in which tear gas and other crowd control weapons were used; (ii) those protests that were allowed to take place without police intervention although they failed to comply with the requirements of Law No. 2911; and (iii) the number of criminal and administrative prosecutions and convictions linked to breaches of Law No. 2911.[71]

c. <u>European Commission's Report on Turkey 2020</u>

45. In its report dated 6 October 2020, the European Commission noted that the legislative framework related to freedom of assembly and its implementation are in breach of the Turkish Constitution, European standards and international conventions that are binding on Turkey. In particular, it noted that there have been recurrent bans, disproportionate interventions and excessive use of force in peaceful demonstrations, investigations, administrative fines and prosecutions against demonstrators on charges of "*terrorism-related activities*".[72]

(iii) United Nations standards

a. <u>United Nations Human Rights Committee</u>

46. Article 21 of the International Covenant on Civil and Political Rights ("**ICCPR**") (which Turkey ratified on 23 September 2003) states:

> "*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are*

[69] Committee of Ministers Decision adopted at 1411th meeting, 14–16 September 2021, para. 5.
[70] *Ibid.*, para. 6.
[71] *Ibid.*, para. 8.
[72] SWD(2020)355, 6 October 2020, p. 37.

necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

47. On 23 July 2020, the United Nations Human Rights Committee ("**UNHRC**") published its General Comment No. 37 (2020) on the right to peaceful assembly (Article 21)[73] — which is a recent and authoritative consolidated declaration of its views on the scope of this right and States' concomitant obligations to protect the right.[74] General Comment No. 37 describes the human right of peaceful assembly as part of "*the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism*" and states that "[f]*ailure to respect and ensure the right of peaceful assembly is typically a marker of repression*".[75]

48. In General Comment No. 37, the UNHRC stated that, given that "*political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection*".[76] Peaceful assemblies are protected even if they "*pursue contentious ideas or goals*".[77]

49. For the purposes of Article 21 of the ICCPR, an assembly is "*peaceful*" provided that it is non-violent, in the sense that it does not involve the participants using "*physical force against others that is likely to result in injury or death, or serious damage to property*".[78] Assemblies must be presumed to be peaceful.[79]

50. Article 21 imposes on the State a 'negative duty' not to interfere with peaceful assemblies, including by (for example) prohibiting or dispersing peaceful assemblies "*without compelling justification*".[80] Any interference must be "*content-neutral*" in the sense that it is not directed against the assembly on the basis of the message that the assembly seeks to convey.[81]

51. Article 21 sets out grounds for potential restrictions on the right to peaceful assembly. These grounds are exhaustive and "*must be narrowly drawn*".[82] In order to be lawful, an interference with the right to peaceful assembly must meet the requirement of legality, and must be both necessary for achieving at least one of the expressly enumerated

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[73] UN Doc. CCPR/C/GC/37 (17 September 2020).
[74] General Comment No. 37 also reflects views stated separately by the Special Rapporteur on the rights to freedom of peaceful assembly and of association: see, e.g., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/23/39 (24 April 2013), paras. 43–78.
[75] UNHRC, General Comment No. 37 (2020) on the right to peaceful assembly (Article 21), UN Doc. CCPR/C/GC/37 (17 September 2020), paras. 1–2.
[76] *Ibid.*, para. 32.
[77] *Ibid.*, para. 7.
[78] *Ibid.*, para. 15.
[79] *Ibid.*, para. 17.
[80] *Ibid.*, para. 23.
[81] *Ibid.*, para. 26.
[82] *Ibid.*, paras. 8, 41.

permissible grounds for restrictions (responding to "*a pressing social need*").[83] Further, any interference with the right must be proportionate, "*which requires a value assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the resultant benefit to one of the grounds for interfering*".[84] Prohibition of an assembly must be considered "*a measure of last resort*" and less intrusive measures must always be applied first.[85] Likewise, an assembly may be dispersed only in exceptional circumstances, such as if it is no longer peaceful or if "*there is clear evidence of an imminent threat of serious violence*" that cannot be addressed by more proportionate measures.[86]

52. According to the UNHRC, assemblies cannot be limited "*solely because of their frequency*", especially when the timing or frequency of a protest may "*play a central role in achieving its objective*".[87] Likewise, it is not permissible to restrict the places in which a peaceful assembly may occur in the absence of a specific justification.[88]

53. Restrictions must not "*impair the essence of the right, or be aimed at discouraging participation in assemblies or causing a chilling effect*".[89] They should not be used as a pretext to "*stifle expression of … challenges to authority*".[90] A criminal sanction cannot be imposed to suppress conduct protected under the ICCPR, and must in any event be proportionate.[91]

54. It is permissible for a State to have requirements concerning notification to the extent necessary to assist the authorities in facilitating the smooth conduct of peaceful assemblies. However, a notification requirement "*must not be misused to stifle peaceful assemblies*".[92] A failure to notify authorities of an upcoming assembly does not render participation in the assembly unlawful and cannot be used as a basis for dispersing the assembly or imposing penalties on the participants.[93]

55. The possibility that an assembly may provoke adverse reactions, or even violence, by non-participants does not justify restricting the right of peaceful assembly. The State authorities have a positive duty to take reasonable measures to protect the participants in the exercise of their rights.[94]

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[83] *Ibid.*, paras. 36, 40.
[84] *Ibid.*, para. 40.
[85] *Ibid.*, para. 37.
[86] *Ibid.*, para. 85.
[87] *Ibid.*, para. 54.
[88] *Ibid.*, paras. 55–56.
[89] *Ibid.*, para. 36.
[90] *Ibid.*, para. 49.
[91] *Ibid.*, para. 67.
[92] *Ibid.*, para. 70.
[93] *Ibid.*, para. 71.
[94] *Ibid.*, para. 27.

56. The UNHRC considers that the right to peaceful assembly overlaps with other human rights, such as the right to freedom of expression, which is protected in Article 19 of the ICCPR.[95] In its General Comment No. 34 on Article 19: Freedoms of opinion and expression, the UNHRC affirmed that any restrictions on the right to freedom of expression must not "*put in jeopardy the right itself*" and must — like restrictions on the right of peaceful assembly — be "*provided by law*", be imposed pursuant to a specifically enumerated ground of justification, and "*conform to the strict tests of necessity and proportionality*".[96]

b. Other United Nations bodies

57. The Human Rights Council of the United Nations has adopted various resolutions concerning the right to protest. For example, in a resolution of July 2020 entitled "*The promotion and protection of human rights in the context of peaceful protests*",[97] the Council expressed concern at "*the criminalization, in all parts of the world, of individuals and groups solely for having organized or taken part in peaceful protests*"[98] and at "*instances in which peaceful protests have been met with repression, including the unlawful use of force by law enforcement officials, arbitration arrests and detention*".[99] It called upon States to:

> "*promote a safe and enabling environment for individuals and groups to exercise their rights to freedom of peaceful assembly, of expression and of association, both online and offline, including by ensuring that domestic legislation and procedures relating to the rights to freedom of peaceful assembly, of expression and of association are in conformity with their international human rights obligations and commitments, to clearly and explicitly establish a presumption in favour of the exercise of these rights, and that they are effectively implemented*".[100]

58. In 2016, the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions submitted a joint report on the proper management of assemblies to the Human Rights Council.[101] This joint report confirmed that:

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[95] Article 19(2) states: "*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*"

[96] UN Doc. CCPR/C/GC/34 (12 September 2011), paras. 21–22.

[97] United Nations General Assembly Human Rights Council, "*The promotion and protection of human rights in the context of peaceful protests*", UN Doc A/HRC/44/L.11 (13 July 2020).

[98] *Ibid.*, preamble.

[99] *Ibid.*, para. 2.

[100] *Ibid.*, para. 4.

[101] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66 (4 February 2016). See also Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, UN Doc. A/HRC/23/39 (24 April 2013), paras. 43–78.

(a) International law recognises "*an inalienable right to take part in peaceful assemblies*", and that the freedom of peaceful assembly is "*a right and not a privilege*";[102]

(b) The exercise of this freedom should not be subject to a notification requirement that function as a de facto requirement for official authorisation or is a pretext for content-based regulation of assemblies;[103]

(c) "*No person should be held criminally, civilly or administratively liable for the mere act of organizing or participating in a peaceful protest*";[104]

(d) Any restrictions on the right must be compatible with the requirements of human rights law and "*must not impair the essence of the right*";[105]

(e) When security or public order concerns are invoked in order to restrict an assembly, the State must "*prove the precise nature of the threat and the specific risks involved*";[106] and

(f) Any mass arrest of protest participants must be subject to particular scrutiny. Specifically:

> "*No one may be subject to arbitrary arrest or detention. … Arrest of protestors to prevent or punish the exercise of their right to freedom of peaceful assembly, for example on charges that are spurious, unreasonable or lack proportionality, may violate these protections. Similarly, intrusive pre-emptive measures should not be used unless a clear and present danger of imminent violence actually exists. 'Mass arrest' of assembly participants often amounts to indiscriminate and arbitrary arrests*".[107]

Relevance of the legal principles to the present case

59. The previous section has highlighted international and European human rights standards which Turkey has undertaken to meet, including in respect of criminal proceedings such as the present case. In this section, although the authors make clear that they are not privy to all the material before the Prosecution and Defence, they set out how these standards, which are legally binding on Turkey, are relevant to the Court's disposal of these proceedings.

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[102] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, UN Doc. A/HRC/31/66 (4 February 2016), paras. 18, 21.
[103] *Ibid.*, para. 21.
[104] *Ibid.*, para. 27.
[105] *Ibid.*, para. 29.
[106] *Ibid.*, para. 31.
[107] *Ibid.*, para. 45.

60. The authors note that a large number of reputable and independent Turkish and international human rights associations have condemned the prosecution of the Defendants as a violation of their right to freedom of peaceful assembly and have called for their acquittal, as well as calling for an investigation into the excessive use of police force at the 700th week protest.[108] The Council of Europe Commissioner for Human Rights has also drawn attention to the Turkish authorities' interferences with the 700th week protest as a "*telling illustration of* [Turkey's] *reduced tolerance*" of "*non-violent protests*".[109] In a similar vein, in the context of describing a "*backsliding in the area of freedom of assembly and association*" in Turkey, the European Commission has observed that "[t]*he peaceful gatherings of the 'Saturday Mothers' who held weekly meetings in Galatasaray Square in Istanbul, have remained banned, forcing the gathering to take place in a side street. A blanket ban remains imposed on all protests in the square*".[110] In addition, a special procedure communication of several United Nations human rights mandate-holders, issued in May 2021, expressed "*concern about the continued judicial harassment of members of the Saturday Mothers/People protest movement*", as well as "*the excessive use of force used against the 46 participants*" in the 700th week protest, which the mandate-holders considered "*may be representative of … a systematic restriction*[] *on the right to peaceful assembly and to freedom of expression*" which they feared could have a "*chilling effect … on all those seeking to uphold and defend international human rights law in Turkey*".[111] At the very least, the authors consider that these views, expressed by well-regarded domestic and international bodies, illustrate that there are serious concerns regarding the compatibility of the Turkish authorities' conduct in relation to the Defendants with Turkey's human rights obligations which merit careful consideration by the Court.

(i) The applicability of the right to freedom of peaceful assembly

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[108] See, e.g., Statement by 11 human rights organisations, "*Turkey: Stop Harassment of Saturday Mothers / People*" (23 March 2021), available at: https://www.nhc.nl/turkey-stop-judicial-harassment-of-saturday-mothers-people/; Joint Public Statement of Amnesty International, Human Rights Watch and Front Line Defenders, "*Turkey: Authorities should Seek Acquittal of all in the Saturday Mothers/People Trial*" (24 March 2021), available at: https://www.hrw.org/sites/default/files/media_2021/03/Public%20Statement_Sat%20mothers_24032021.pdf; International Commission of Jurists, Letter to Commissioner for Human Rights of the Council of Europe (21 September 2018), available at: https://www.icj.org/wp-content/uploads/2018/09/ICJ-Letter-SaturdayMothers-CoEComm-Turkey-2018-ENG.pdf.

[109] *Kavala v. Turkey*, no. 28749/18, Third Party Intervention by the Council of Europe Commissioner for Human Rights (20 December 2018), para. 24, available at: https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-cas/1680906e27.

[110] SWD(2020)355, 6 October 2020, p. 37, available at: https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/turkey_report_2020.pdf.

[111] Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Special Procedure Communication to Turkey: Information received concerning participants of the Saturday Mothers/People (CurmatesiAnneleri/Insanlari) (12 May 2021).

61. The first question is whether the 700th week protest attracted the protection of Article 11 of the ECHR (and Article 21 of the ICCPR) — in other words, whether the Defendants were exercising their right to freedom of peaceful assembly. In our view, there are obvious indicators that it did. There does not appear to be any doubt that the gathering of protesters constituted an "*assembly*". Further, the authors are not aware of any credible and reported basis to suggest that the assembly was not "*peaceful*" or that the Defendants had anything other than peaceful intentions. There is no evidence that the protesters intended to engage in or incite violence. To the contrary, their Defence refers to the fact that the Saturday Mothers protests had been carried out peacefully and with the accompaniment of law enforcement officers for 699 weeks.[112] In this context, it is relevant to recall from the legal analysis above that: (i) there is a presumption that assemblies are peaceful, and consequently evidence is required to support an allegation that it is non-peaceful; and (ii) the fact that the message of an assembly is controversial or may cause offence to non-participants is not a ground for characterising it as non-peaceful.

62. In addition, there appears to be a clear basis for characterising the message of the 700th week protest as 'political' in nature, given that the protest was intended to draw attention and object to the alleged involvement of Turkish authorities in forced disappearances and their failure to provide information on the fate of the disappeared persons, as well as to hold accountable those responsible. As set out above, political speech is entitled to a heightened level of protection.

63. There is also evidence that both the place and the time of the 700th week protest were significant to its message. The Defendants have pleaded that "*the fact that the protest has been constantly held in the same place and its centrality also determine the meaning of the assembly*".[113] Naturally, the fact that the Saturday Mothers movement was reaching its 700th week may be seen as an important milestone. This fact renders relevant the principles set out above that it is generally impermissible to restrict the timing and location of a protest, absent appropriate justifications (as addressed below).

64. The above considerations appear to provide a strong foundation that the Defendants' conduct falls within the scope of Article 11(1) of the ECHR and Article 21 of the ICCPR. If the Court were to reach that conclusion, it would be relevant to consider whether there has been an interference with or restriction on the Defendants' exercise of their right to freedom of peaceful assembly.

(ii) The existence of any interferences with the right to freedom of peaceful assembly

[112] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Defence, para. 39.
[113] *Ibid.*, para. 21.

65. The authors consider that there are various examples of conduct by the Turkish authorities which would appear to constitute such an interference, including:

(a) The Governor's Decision which was intended to prevent the 700th week protest from occurring at its intended time and location;

(b) The forcible dispersal of the 700th week protest by law enforcement authorities;

(c) The arrest and detention of the Defendants; and

(d) The prosecution of the Defendants on the basis of their involvement in the 700th week protest, as well as the potential imposition of criminal penalties (including terms of imprisonment) if they are convicted.

66. If the Court were to determine that there had been an interference with the Defendants' rights under Article 11 of the ECHR and/or Article 21 of the ICCPR, the Court would need to determine whether such interference could be justified in accordance with the restrictions provided by the applicable human rights instruments.

(iii) The lawfulness of any interferences with the right to freedom of peaceful assembly

67. The Defendants' prosecution provides the immediate context for the present expert opinion. However, the lawfulness of the prosecution (and the Defendants' potential subsequent criminal liability) as an interference on their right to freedom of peaceful assembly must also be considered in light of the lawfulness of the other interferences referred to above, given the interrelatedness of the various interferences. In particular, given that the Defendants have been charged with offences relating to their participation in an unlawful protest and their refusal to disperse, it must be considered whether the Governor's Decision which purported to ban the protest under Turkish law, as well as the steps taken to disperse the protest, were in themselves compatible with international human rights law.

68. Any interference with the freedom of assembly must:

(a) Be prescribed by law;

(b) Have a legitimate aim; and

(c) Be necessary in a democratic society and otherwise proportionate.

a. <u>Prescribed by law</u>

69. In order to meet the first (and threshold) requirement of international human rights law, any interference with the right to protest must be in accordance with Turkish law. The authors are not experts in Turkish law and do not profess an opinion on the same.

70. However, the Court's attention is drawn to the question of whether in fact Turkish law had been complied with in the first instance in respect of: (i) the Governor's Decision, pursuant to Article 17 of Law No. 2911, to prohibit the 700th week protest; (ii) whether the requirements for the ban of a protest set out in Article 17 of Law No. 2911 have been satisfied; and (iii) the Decision adopted by the Council of Europe Committee of Ministers at its 1411th meeting on 14–16 September 2021 and the Report of the European Commission dated 6 October 2020 which call for indispensable reform of Law No. 2911 to ensure that its provisions are compatible with the ECHR, international conventions that are binding on Turkey and the case law of the Turkish Constitutional Court.[114] Whether the decisions were in accordance with law is a critical requirement of the justification exercise, which will no doubt be addressed by the Defence team.

b. Legitimate aim

71. An interference will be lawful only if it pursues one (or more) of the legitimate aims which are expressly enumerated in the applicable treaty provisions. There are numerous grounds for questioning whether the apparent interferences in this case satisfy this requirement.

72. First, the Governor's Decision (and the subsequent interferences which have flowed from it) appear to have been based on the protestors' failure to provide advance notification of the 700th week protest. In this respect:

(a) It is critical to recall the principle, applied consistently across international and regional human rights systems, that a notification requirement cannot be used as a means of stifling the right to protest. The requirement of prior notice of an assembly is meant to allow the authorities to protect demonstrators and third parties and facilitate peaceful protest. It cannot be allowed to function as covert means of requiring individuals to obtain authorisation to carry out a peaceful protest.

(b) In this case, the authorities had prior knowledge of the protest which was taking place at the same time and place for 699 weeks. There would appear to be a basis for saying that, on the basis of that repetition, the authorities could take any necessary precautions that the requirement of notification is intended to facilitate. An interference with the right to protest on the basis of the absence of *formal* notification does not pursue one of the permissible legitimate aims.

73. Secondly, the reference in the Governor's Decision to other reasons for banning the 700th week protest ("national security; public order; the prevention of crime; the

[114] Committee of Ministers Decision adopted at 1411th meeting, 14–16 September 2021, para. 5; SWD(2020)355, 6 October 2020, p. 37.

protection of public health and morality, and the rights and freedoms of others") is so vague that it needs to be rigorously scrutinised. In particular:

(a) The Governor's Decision does not identify any imminent danger or other pressing need justifying the ban, let alone the interferences that followed (the immediate dispersal of the assembly despite the absence of any violence, the arrest and detention of its organisers and participants, and the ensuing criminal proceedings against them).

(b) It is also not apparent what "offence" (if any) was anticipated if the assembly was allowed to proceed.

(c) There is no evidence to suggest that the group presented a danger to public order or that it posed any threat to violence, meaning that the requirement of clear evidence of an imminent threat of serious violence appears not to have been satisfied.

(d) The protesters, consistently with the long history of the Saturday Mothers movement, wanted to protest against unlawful disappearances in Turkey and the lack of accountability in this respect. The protest was organised under the authority of the Human Rights Association. Its legitimacy appears to have previously been openly accepted by senior government officials of the Turkish state.[115]

(e) The protest took the form of a peaceful and orderly sit-in.

74. Third, the authors understand that the Turkish authorities have, in the separate administrative challenge to the Governor's Decision, put forward other justifications for the Decision. However, these grounds also require close scrutiny.

(a) The fact that individuals (including anonymously and/or on Twitter) have expressed objection to a protest, or that the protest could offend others,[116] is not a basis for interfering with the protest. It is not legitimate to interfere with the right to freedom of peaceful assembly on the grounds that the assembly's message may be controversial or even offensive to others.

(b) Further, the claimed possibility, alluded to in documents disclosed in the administrative proceedings referred to above, of a terrorist attack being carried out against protesters[117] is not a justification for banning a protest. States have a

[115] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Transcript 25 March 2021, Defence ("*This protest of Saturday Mothers and the Human Rights Association was recognised by Mr. Recep Tayyip Erdogan, who was the Prime Minister at the time, and thus, a meeting was held at the Dolmabahce Prime Ministry Office with Mothers and the IHD Istanbul Branch in February 2011*").
[116] Case No. 2020/559 before the Istanbul 21st Penal Court of First Instance, Defence, paras. 7, 60.
[117] *Ibid.*, para. 8.

positive obligation to protect the right to freedom of peaceful assembly, which includes a duty to protect protesters from harm by third parties. Otherwise, individuals seeking to exercise their basic rights are punished for unlawful threats by third parties. In any event, the evidence in support of any interference based on such a threat would need to be closely scrutinised. In this case, the Defendants have pointed out that the intelligence in question appears to have predated the Governor's Decision by up to two years and three months,[118] which naturally raises questions about whether it was being used as a pretext for banning the assembly.

75. There are serious concerns that, in the present case, the various interferences with the Defendants' right to engage in a peaceful assembly have been motivated by a desire to suppress the message of their protest,[119] contrary to both Articles 11 and 18 of the ECHR. These concerns arise, in part, from the apparent absence of any other robust justification for the interferences. Further, the public statement of the Interior Minister the day following the Defendants' arrest and detention (see paragraph 12 above) is an example of evidence supporting this concern. If such a motivation did contribute to the authorities' conduct, this would plainly be contrary to the requirement that any interference with the right to freedom of peaceful assembly be "*content-neutral*": it is not legitimate to ban an assembly based on the (peaceful) substantive message that the assembly intends to communicate.

c. Necessary in a democratic society and proportionate

76. Any interference must be necessary in a democratic society and proportionate. It must employ the least restrictive means available. We consider that there is serious doubt as to whether the requirements of necessity and proportionality have been met.

77. The aim of the 700th week protest was to demand an end to disappearances in custody, uncover the fate of the disappeared and prosecute those responsible. The form of the protest was a sit-in in which, according to the Defendants' testimony, all participants intended to proceed with the utmost respect for everyone involved including the authorities. Its form, a sit-in repeated at the same day, time, and location on a weekly basis, was deliberately chosen to reflect its peaceful intentions. The protest was organised under the auspices of the Human Rights Association, and was attended by victims of gross human rights violations and many human rights defenders.

[118] *Ibid.*, para. 56.

[119] See, e.g., *ibid.*, para. 33 (referring to "[t]*he abrupt obstruction of the protest for reasons that have underlying political aims*").

78. The Governor's Decision was wide in scope, banning as such all gatherings in the district where the weekly sit-in was taking place, and indefinite in duration, and (as set out above) was purported to be justified in extremely vague terms.

79. There remain serious questions as to whether the lack of formal notification, which was the main concrete reason that featured in the Governor's Decision, justifies the severity of the restrictions on the right to protest. In this case, the protest had taken the form of a repeated sit-in at the same time and place over the course of 700 weeks. This repetition alone gave sufficient notice of the Saturday Mothers' intention to hold their vigil at their usual time and place. It is not apparent what pressing social need rendered the draconian interference with the right to protest that the Governor's Decision represented necessary. In any event, in the context of the present case, it is notable to recall the principles emerging consistently from various human rights jurisdictions that: (i) it will rarely be permissible to penalise all participants for a failure to notify; and (ii) disproportionately harsh sanctions, including heavy fines or any term of imprisonment, should not be imposed for a mere failure to notify. It is difficult to see that the potential penalties which the Defendants in the present case may face if convicted — namely, terms of imprisonment of between 6 months and 3 years — could be compatible with these principles.

80. There appears to be evidence in this case that the Turkish authorities did not satisfy the specific requirements of an interference in the form of dispersal of a protest set out above. It appears that the Defendants were not given sufficient notice of the Governor's Decision prohibiting their protest in advance of their planned vigil. There are also indications that they were not properly informed of the police order to disperse. They were forced to disperse immediately without any effort being made to communicate directly with the organisers of the protest.

81. The use of force to disperse an assembly must always remain proportionate to the legitimate and specific aims requiring its dispersal and the existence of a concrete threat or risk.[120] The Defendants complain of the use of tear gas and rubber bullets and the use of excessive and unjustified force against even elderly and frail participants. Such means require concrete justification.[121] The indiscriminate use of tear gas and rubber bullets cannot be justified.[122] In this context, the authors note that Turkey's obligations under Article 11 of the ECHR and Article 21 of the ICCPR entail a positive duty to protect individuals seeking to exercise their right to freedom of peaceful assembly. In this case, that positive duty would extend to investigating accusations that excessive and disproportionate force was used in dispersing the 700th week

[120] *Oya Ataman v. Turkey*, no. 74552/01, 5 December 2006, paras. 41-43.
[121] *Egitim ve Bilim Emekcileri Sendikasi and Others v. Turkey*, no. 20641/05, 25 September 2016, para. 108.
[122] *Süleyman Çelebi and Others v. Turkey (no. 2)*, nos. 22729/08 and 10581/09, 12 December 2017, para. 111.

protest and arresting the Defendants and holding accountable any individuals who are found to have acted unlawfully in banning and policing the protest.

82. Finally, the authors recall the important principle that any restrictions on the right to freedom of peaceful assembly should not be so severe as to have a 'chilling effect' on protest. In this case, it is notable that, following the Governor's Decision, the dispersal of the 700th week protest, and the arrest, detention and prosecution of the Defendants, the Saturday Mothers protest has not resumed in Galatasaray Square. This would appear to give rise to grave concerns regarding the 'chilling effect' of this conduct on the part of Turkish authorities in respect of the exercise of the right.

Conclusion

83. We appreciate the opportunity to file this expert opinion in this important case, given the significant matters of international human rights law which are implicated. We stand ready to assist the Court in any further way.

On behalf of the Bar Human Rights Committee of England & Wales:

LETO CARIOLOU
Barrister, Associate Member, Garden Court Chambers, London
BHRC Member

NAOMI HART
Barrister, Essex Court Chambers, London
BHRC Member

On behalf of ARTICLE 19: Global Campaign for Freedom of Expression

JUDr BARBORA BUKOVSKÁ
Senior Director for Law and Policy, ARTICLE 19

10 November 2021