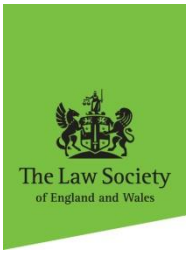

Lawyers' Rights Watch Canada

Amicus Curiae Brief

Case No. 2016/9808, Constitutional Court of Turkey (applicants: Ayse Acinikli and Ramazan Demir)

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I. Introduction

1. Lawyers' Rights Watch Canada (LRWC), founded in 2000, is a Canadian organization of lawyers and other human rights defenders who promote the implementation of international human rights around the world. LRWC produces legal analyses of national and international laws and standards relevant to human rights of lawyers and other human rights defenders. LRWC has special consultative status at the United Nations (UN) Economic and Social Council (ECOSOC).

2. The Law Society of England & Wales is an independent professional body representing more than 166,000 solicitors. Its aims include upholding the independence of the legal profession, the rule of law and human rights throughout the world.

3. This Amicus brief sets out international standards and clarifies the nature and scope of Turkey's international legal obligations relating to the protection of the rights of lawyers and human rights defenders, specifically their rights to freedom of expression and assembly, to participate in public affairs, to liberty and security of the person, to pre-trial release, as well as rights related to a fair trial, such as the presumption of innocence.

4. Under the principle of *pacta sunt servanda* and general principles governing the law of treaties, Turkey is bound to apply in good faith those international treaties to which it is a party.[1] Furthermore, Turkey may not rely on provisions of its internal law to justify failures to meet treaty obligations.[2]

5. Turkey is a party to the *Charter of the United Nations* (*UN Charter*).[3] Turkey has been a party to the *UN Charter* since becoming a member of the UN on 24 October 1945. A fundamental purpose of the UN, as stated in Article 1(3) of the *UN Charter*, is "[t]o achieve international co-operation in … promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

6. The *Statute of the International Court of Justice* (*Statute of the ICJ*) is an integral part of the *UN Charter* and as such is binding on all members of the UN, including Turkey.[4] The *Statute of the ICJ* sets out the sources of international law, which include: treaties, customary

[1] United Nations (UN) Human Rights Committee (HR Committee), General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 3; Article 26 of the *Vienna Convention on the Law of Treaties*. The Human Rights Committee is the body of independent experts established by the *International Covenant on Civil and Political Rights* (ICCPR), and mandated to monitor States Parties' implementation of the ICCPR. The interpretations of the HR Committee and other treaty monitoring bodies of relevant treaties (including through general comments, recommendations to states parties following examination of their periodic reports on implementation under and jurisprudence, are authoritative. See Judgment of the International Court of Justice (30 November 2010), paras. 66-68, http://www.icj-cij.org/docket/files/103/16244.pdf. Also see *infra* note 3.

[2] Articles 26-27 of the *Vienna Convention on the Law of Treaties*, adopted in May 1969 at the UN Conference on the Law of Treaties; see HR Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 4; General Comment No. 31, *supra* note 1.

[3] UN, *Charter of the United Nations* (*UN Charter*), 24 October 1945, 1 UNTS XVI http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html.

[4] *UN Charter*, 24 October 1945, 1 UNTS XVI, Articles 92 and 93, http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html.

international law, general principles of international law (general principles), and the "teachings of the most highly qualified publicists of the various nations."[5] Turkey is bound to adhere to the norms of customary international law and general principles binding on all States.[6]

7. Turkey signed the *International Covenant on Civil and Political Rights* (ICCPR)[7] on 15 August 2000 and ratified the ICCPR on 23 September 2003 with one reservation concerning Article 27 on the rights of minorities.[8] Turkey ratified the *Optional Protocol to the International Covenant on Civil and Political Rights* on 24 November 2006 and the *Second Optional Protocol to the International Covenant on Civil and Political Rights* on 2 March 2006. Both Optional Protocols entered into force on 24 February 2007. As a State Party to the ICCPR, Turkey is obligated to guarantee, *inter alia*:

    a. fair trial rights under Article 14, including the presumption of innocence under Article 14(2) and pre-trial release under Article 9(3);
    b. freedom of opinion and expression under Article 19;
    c. freedom from arbitrary arrest or detention under Article 9;
    d. the right to have criminal charges and the right to pre-trial release determined by a competent, impartial and independent tribunal under Articles 9 (3) and 14(1); and

8. The responsibility to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the executive branch of government, but must also effectively be discharged by Turkey's judiciary. For example, in its General Comment 34 on the nature and scope of freedom of expression under the ICCPR, the UN Human Rights Committee (HR Committee) has affirmed:

> All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.[9]

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[5] UN, *Statute of the International Court of Justice*, 18 April 1946, Article 38, http://www.refworld.org/docid/3deb4b9c0.html. The teachings of the most highly qualified publicists of the various nations include general comments, concluding observations and jurisprudence of the UN HR Committee and other UN treaty bodies. See *supra* note 1.

[6] *UN Charter*, 24 October 1945, 1 UNTS XVI, Articles 92 and 93, http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html; United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 38, http://www.refworld.org/docid/3deb4b9c0.html; UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 27, http://www.refworld.org/docid/3ae6b3a10.html. This treaty is generally considered to be customary international law. See Karl Zemanek, "Vienna Convention on the Law of Treaties" Vienna, 23 May 1969, UN Audiovisual Library of International Law, http://legal.un.org/avl/ha/vclt/vclt.html.

[7] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, http://www.refworld.org/docid/3ae6b3aa0.html [accessed 13 May 2016].

[8] "The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes."

[9] HR Committee, General Comment No. 34: Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, para. 7, http://www.refworld.org/docid/4ed34b562.html [accessed 19 July 2016]. See also HR Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), paras. 4 and 8.

9. Turkey is also bound by the *European Convention on Human Rights* (ECHR),[10] which it ratified on 10 March 1954. As a Contracting State, Turkey is obligated to ensure, *inter alia*:

   a. fair trial rights under ECHR Article 6, including the right to presumption of innocence under Article 6(2) and pre-trial release under Article 5(3);
   b. freedom of expression under Article 10;
   c. freedom from arbitrary arrest or detention under Article 5; and
   d. the right to have criminal charges and the right to pre-trial release determined by an impartial and independent tribunal under Articles 6(1) and 5(3).

II. The Obligation to Respect and Guarantee the Right to Freedom of Expression; Impermissible Restrictions

A. The United Nations Human Rights system

10. One of the resolutions adopted by the UN General Assembly in its first session in 1946 declared that freedom of information, which includes freedom to impart and receive information, "is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[11]

11. On 10 December 1948, The UN General Assembly adopted the *Universal Declaration of Human Rights* (UDHR), which states in Article 19:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

12. The ICCPR, binding on Turkey since its ratification on 23 September 2003, guarantees the right to freedom of expression and information. Article 19 of the ICCPR states:

> 1. Everyone shall have the right to freedom of opinion.
> 2. 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.

The UN Human Rights Committee (HR Committee) has determined in General Comment No. 34 that Article 19 "includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others…" including "discussion of human rights."

13. All States Parties to the ICCPR have the international law obligation to ensure that all people within the state's territory, including lawyers and human rights defenders, enjoy the rights protected by the treaty. Article 2 states:

[10] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, http://www.refworld.org/docid/3ae6b3b04.html [accessed 26 July 2016].
[11] UN General Assembly Resolution 59(I), 14 December 1946.

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individual within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

14. While in certain circumstances a State may restrict the right to freedom of expression, any such restrictions must be strictly limited in accordance with ICCPR, Article 19(3), which states:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

15. The HR Committee has determined that any such restriction on freedom of expression must meet a strict three-part test: [12]

    a. The restriction imposed must be provided by law, which is clear and accessible to everyone;[13] in particular, the law must be "formulated with sufficient precision to enable the citizen to regulate his conduct" (emphasis added).[14]

    b. The restriction must be proven as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals (emphasis added); [15] and

    c. The restriction must be proven as the least restrictive and proportionate means to achieve the purported aim (emphasis added).[16]

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[12] HR Committee, General Comment No. 34: Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, http://www.refworld.org/docid/4ed34b562.html [accessed 5 June 2016].
[13] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, 4 June 2012, A/HRC/20/17, http://www.refworld.org/docid/5008134b2.html.
[14] *Ibid*, citing *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).
[15] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, 4 June 2012, A/HRC/20/17, http://www.refworld.org/docid/5008134b2.html.
[16] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to*

16. With regard to the establishment of restrictions in domestic legislation on the right to freedom of expression, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that laws that prohibit incitement to national, racial or religious hatred must be formulated in a way that makes clear that the law's sole purpose is to protect individuals from hostility, discrimination or violence, rather than to protect belief systems, religions or institutions from criticism.[17] He observed that:

> [t]he right to freedom of expression implies that it should be possible to scrutinize, openly debate and criticize, even harshly and unreasonably, ideas, opinions, belief systems and institutions, including religious ones, as long as this does not advocate hatred that incites hostility, discrimination or violence against an individual or a group of individuals.[18]

17. Specifically, with regard to criminal laws that prohibit incitement to terrorism, the UN Special Rapporteur elaborated on the three-part test of restrictions to the right of freedom of expression described above, stating that such laws:

> (a) must be limited to the incitement of conduct that is truly terrorist in nature, as properly defined; [footnote omitted] (b) must restrict the right to freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals; (c) must be prescribed in law in precise language, including by avoiding reference to vague terms such as "glorifying" or "promoting" terrorism; (d) must include an actual (objective) risk that the act incited will be committed; (e) should expressly refer to two elements of intent, namely intent to communicate a message and intent that this message incite the commission of a terrorist act; and (f) should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to "unlawful" incitement to terrorism.[19]

18. The HR Committee has stated that offences such as "encouragement of terrorism"[20] and "extremist activity"[21] included in domestic legislation allow for arbitrary interferences with the right to freedom of expression. It should be noted in this regard that Turkey's *Law on the Fight Against Terrorism* defines "terrorism" as:

> Any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the

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freedom of opinion and expression, Frank La Rue, 4 June 2012, A/HRC/20/17, http://www.refworld.org/docid/5008134b2.html.

[17] *UN General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue on Promotion and Protection of the right to freedom of opinion and expression, A/66/290 (10 August 2011),* para. 30, http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf.

[18] *Ibid.*

[19] UN General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue on Promotion and Protection of the right to freedom of opinion and expression*, A/66/290 (10 August 2011), para. 34.

[20] HR Committee, *Concluding observations on the United Kingdom of Great Britain and Northern Ireland*, 30 July 2008, CCPR/C/GBR/CO/6, para. 26.

[21] HR Committee, *Concluding observations on Russia*, 29 October 2009, CCPR/C/RUS/CO/6, para. 24.

> State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health…[22]

19. The HR Committee, in its Concluding Observations on Turkey's periodic report of 2012,[23] criticized Turkey's Anti-Terrorism Law, stating:

> 16. The Committee is concerned that several provisions of the 1991 Anti-Terrorism Law (Law 3713) are incompatible with the Covenant rights. The Committee is particularly concerned at: (a) the vagueness of the definition of a terrorist act; (b) the far-reaching restrictions imposed on the right to due process; (c) the high number of cases in which human rights defenders, lawyers, journalists and even children are charged under the Anti-Terrorism Law for the free expression of their opinions and ideas, in particular in the context of non-violent discussions of the Kurdish issue. (arts. 2, 14 and 19).[24]

20. With regard to the invocation of provisions in domestic legislation to restrict the right to freedom of expression, especially when the justification pertains to national security or public order, the HR Committee in its General Comment No. 34 held that it is not compatible with *ICCPR* Article 19(3) to invoke provisions relating to national security to suppress, or withhold from the public, information of legitimate public interest that does not harm national security, or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.[25] The HR Committee, furthermore, stated:

> Any restrictions to their exercise must conform to the strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[26]

21. In deciding upon individual cases submitted to it, the HR Committee has consistently found that when reasons related to national security or public order are invoked in order to justify the restriction of the right to freedom of expression, statements of a general nature do not suffice. Rather, a State "must demonstrate in specific fashion the precise nature of the threat" to such national security that is "caused by the author's conduct", as well as why measures taken to restrict the right to freedom of expression were necessary. In the absence of such an "individualized justification", a violation of Article 19(2) ICCPR will be found.[27]

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[22] *Law on Fight Against Terrorism* (Apr. 12, 1991, as amended in 2010), art. 1, http://legislationline.org/download/action/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf [This article was not changed by the 2012 amendments].

[23] HR Committee, Concluding observations on the sixth periodic report of Turkey, adopted by the Committee at its 106th session, 15 October to 2 November, http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-TUR-CO-1.doc.

[24] Please note that the July 2012 amendments of the Anti-Terrorism Law did not change the definition of "terrorism", so the criticisms of the HR Committee apply to the Law as amended.

[25] HR Committee, General Comment No. 34: Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34, para. 30 [footnotes omitted]. See HR Committee, *Concluding Observations on the Russian Federation*, 1 December 2003, CCPR/CO/79/RUS, para. 24.

[26] *Ibid*, para. 22.

[27] HR Committee, *Hak—Chul Shin v. Republic of Korea*, Communication No. 926/2000, U.N. Doc.

22. The onus is on the State to justify why a restriction of the right to freedom of expression is necessary in a particular case. As the HR Committee has found:

> it is for the State party to show that the restrictions on the author's right under article 19 are necessary and that even if a State party may introduce a system aiming to strike a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant.[28]

23. With regard to a State imposing restrictions on the exercise of freedom of expression on the basis of national security when that right had - according to the State - been exercised "without regard to the country's political context", the HR Committee established that:

> the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise.[29]

B. The European Human Rights System

24. The right to freedom of expression is established in Article 10(1) of the *ECHR*:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

25. Article 10(2) of the *ECHR* identifies similar requirements as those contained in the ICCPR for legitimate restrictions on the right to freedom of expression:

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

CCPR/C/80/D/926/2000 (2004), para. 7.3; *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992, U.N. Doc. CCPR/C/54/D/518/1992 (1995), para. 10.4.

[28] HR Committee, *Vladimir Schumilin v. Belarus*, Communication No. 1784/2008, U.N. Doc. CCPR/C/105/D/1784/2008 (2012), para. 9.4; HR Committee, *Viktor Korneenko v. Belarus*, Communication No. 1226/2003, U.N. Doc. (2012), para. 10.8.

[29] HR Committee, *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9.7.

26. The European Court of Human Rights (ECtHR) has consistently held that restrictions on the right to freedom of expression must answer a "pressing social need", be "proportionate to the legitimate aim pursued" and be grounded in reasons for justification that are "relevant and sufficient."[30] With regard to the requirement that restrictions on freedom of expression be "prescribed by law", the ECtHR has accepted that common-law rules[31] or principles of international law[32] could, under certain circumstances, constitute a legal basis for the interference with the right to freedom of expression. However, these circumstances seem to be limited. For example, under the *ECHR*, a permissible restriction on the right to freedom of expression that was recognized by the European Commission on Human Rights pertained to the dissemination of ideas promoting racism and Nazi ideology, and inciting to hatred and racial discrimination.[33]

27. The ECtHR has elaborated a test to determine the legitimacy of restrictions claimed as "necessary" pursuant to Article 10(2). In the *Case of Handyside v. the United Kingdom*,[34] the ECtHR found that it was impossible to find in the domestic law of the various Contracting States a uniform European conception of morals. Therefore, States should be left a margin of appreciation in interpreting whether a particular measure is "necessary." However, the ECtHR also stressed that the test of "necessity" is a strict one:

> [W]hilst the adjective "necessary," within the meaning of [*ECHR*] Article 10 para. 2 …is not synonymous with "indispensable"… the words "absolutely necessary" and "strictly necessary"…, neither has it the flexibility of such expressions as "admissible," "ordinary"… "useful"… "reasonable"… or "desirable."[35]

28. The ECtHR further stated that the court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society." The Court held that:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [ECHR] paragraph [10]2…, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society." This means, amongst other things, that every "formality," "condition," "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[36]

29. The ECtHR has also ruled that the law must be adequately accessible and be formulated with sufficient precision to enable the citizen to regulate his or her conduct so as to avoid

[30] See, for example, ECtHR, *Nikula v. Finland*, Application No. 31611/96, 21 March 2002, para. 24.
[31] ECtHR, *Case of the Sunday Times v. the United Kingdom*, App. no. 6538/74, Judgment of 26 April 1979, para. 47.
[32] ECtHR, *Case of Groppera Radio Ag and Others v. Switzerland*, Application no. 10890/84, Judgment of 28 March 1990, para. 68.
[33] European Commission of Human Rights (Eur. Comm. HR), *Kühnen v. the Federal Republic of Germany*, Application No. 12194/86, Judgment (admissibility) of 12 May 1988.
[34] ECtHR, *Case of Handyside v. the United Kingdom,* App. no. 5493/72, Judgment of 7 December 1976.
[35] *Ibid*, para. 48.
[36] *Ibid*, para. 49.

contravention. For example, in *Altug Taner Akcam v Turkey*,[37] the ECtHR found Turkey in violation of *ECHR* Article 10 because the legislation prohibiting expression (Article 301 of the Turkish Criminal Code) was so broad and vague that it did not enable individuals "to regulate their conduct or to foresee the consequences of their acts."[38] Such broad and vague legislation violates the principle of legality (*nulla poena sine lege*), which provides that there must be no punishment for any act or omission that does not constitute a clearly specified criminal offence under national or international law at the time when it was committed. It is a general principle of international law that "it must be possible for an individual to know, beforehand, whether his acts are lawful or liable to punishment."[39]

III. The Right to Freedom of Expression in Relation to the Right to Participate in Public Affairs and the Right to Freedom of Assembly

A. The United Nations Human Rights System

30. The right of everyone, including lawyers and human rights defenders, to participate directly or indirectly in political and public affairs is a fundamental human right intimately connected to rights to peaceful assembly and association, as well as freedom of expression.[40]

31. In this regard, ICCPR Article 21 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 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.

Article 25 of the ICCPR guarantees "the right and the opportunity … without unreasonable restrictions" to "(a) take part in the conduct of public affairs, directly or through freely chosen representatives".

32. In *General Comment No. 25* on ICCPR Article 25, the HR Committee stated:

> In order to ensure the full enjoyment of rights protected by [ICCPR] article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed

[37] European Court of Human Rights (ECtHR), *Case of Altug Taner Akcam v Turkey,* App. no. 27520/07, Judgment of 25 January 2012 (Final), para. 93, 95. In that case Mr. Akcam was prosecuted for the offence of "insulting Turkishness" under section 301 of Turkey's Penal Code after he used the term "genocide" in a publication discussing the systematic massacre of Armenians during World War I. The ECtHR ruled that the Turkish laws against "denigrating Turkishness" were a violation of freedom of expression.
[38] *Ibid*, para. 93.
[39] Permanent Court of International Justice, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City [Advisory Opinion of 4 December 1935], page 57, available at: http://www.icj-cij.org/pcij/serie_AB/AB_65/01_Decrets-lois_dantzikois_Avis_consultatif.pdf
[40] HR Committee, *CCPR General Comment No. 25 Article 25 (Participation in Public Affairs and the Right to Vote)*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 26.

> in articles 19, 21 and 22 of the [ICCPR], including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas (emphasis added).[41]

Similarly, in *General Comment No. 34* on ICCPR Article 19, the HR Committee stated that "free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential." [42]

B. The European Human Rights System

33. The right to freedom of assembly and association is established in *ECHR* Article 11, which provides:

> 11. (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights 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 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.

34. The right to take part in public affairs has been addressed by the ECtHR with reference to the right to freedom of expression. The Court found that there is a "narrower margin for any restriction of political debate or discourse on matters of public interest."[43] The Court has observed that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the [*ECHR*]."[44] Rulings of the ECtHR indicate that, in matters of public controversy or public interest, or where criticism is aimed at government, strong words and harsh criticism is tolerated to a greater degree by the ECtHR.[45] In this regard, the ECtHR ruled that "[t]here is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest."[46]

35. For example, in the Case of *Arslan v. Turkey*,[47] the ECtHR recalled that

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[41] *Ibid*, para. 26.
[42] HR Committee, *CCPR General Comment No. 34, Article 19: Freedoms of opinion and expression,* 12 September 2011, CCPR/C/GC/34, [footnotes omitted], para. 20.
[43] ECtHR, *Case of Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* App. nos. 29221/95 and 29225/95, Judgment of 2 January 2002 (Final), para. 88.
[44] ECtHR, *Case of Lingens v. Austria,* App. no. 9815/82, Judgment of 8 July 1986, para. 42.
[45] See, for example, ECtHR, *Case of Thorgeir Thorgeirson v. Iceland*, App. no. 13778/88, Judgment of 25 June 1992; ECtHR, *Case of Jersild v. Denmark*, App. no. 15890/89, Judgment of 23 September 1994.
[46] ECtHR, Otegi *Mondragon v. Spain*, Application no. 2034/07, 15 March 2011, para. 50.
[47] ECtHR, *Case of Arslan v. Turkey,* App. no. 23462/94, Judgment of 8 July 1999.

> the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.[48]

36. In the Case of *Incal v. Turkey*, the ECtHR added that "the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries."[49]

IV. Duties of States to Respect and Guarantee the Work of Lawyers and Human Rights Defenders

37. The UN *Basic Principles on the Role of Lawyers* (*Basic Principles*)[50] were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on 7 September 1990. These principles were subsequently welcomed by the UN General Assembly in its resolution no. 45/166 on "Human rights in the administration of justice", adopted by consensus on 18 December 1990, in which it invited Governments to respect these principles and to take them into account within the framework of their national legislation and practice.

38. The *Basic Principles* preamble states that the aim of the principles is to assist UN Member States "in their task of promoting and ensuring [that] the proper role of lawyers should be respected." The *Basic Principles* identify certain preconditions that are widely accepted as necessary for States to guarantee the right to representation by ensuring the independence and safety of lawyers and protecting them from interference by State authorities and other actors. Compliance with the *Basic Principles* is fundamental to ensure compliance of the State obligation to respect and guarantee the human rights of persons under its jurisdiction and equal access to – and protection by – the law.

39. In this regard, principle 16 of the *Basic Principles* states:

> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

40. In recognition of the fact that many hindrances and threats to lawyers originate in a lack of recognition of their professional independence and through the identification of lawyers with their clients, principle 18 of the *Basic Principles* stipulates that "[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

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[48] *Ibid*, para. 46.
[49] ECtHR, *Incal v. Turkey*, 41/1997/825/1031, 9 June 1998, para. 57; *Castells v. Spain*, Application no. 11798/85, 23 April 1992, para. 46.
[50] Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

41. The UN *Declaration on the Right and Responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms* (UN *Declaration on Human Rights Defenders*)[51] was adopted in 1999 by consensus of the General Assembly. Article 9 provides that "[i]n the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration … everyone has the right, individually and in association with others, *inter alia*: […] c) [t]o offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms."

42. The UN High Commissioner for Human Rights has expressed that status as a human rights defender is determined by the person's actions and not by other qualifications. Human rights defenders can be any person or group of persons working to promote human rights.[52] Similar views have been expressed by the Council of the European Union,[53] the Parliamentary Assembly of the European Union,[54] the Inter-American Commission (IACHR) on Human Rights,[55] and the Inter-American Court on Human Rights (IACtHR).[56]

43. Lawyers who, in carrying out their professional duties, provide legal assistance for the defense of human rights and fundamental freedoms are, therefore, also human rights defenders. Article 12(2) of the *UN Declaration on Human Rights Defenders* establishes the duty of the State to protect such defenders against different forms of threats and retaliation:

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[51] UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly*, 8 March 1999, A/RES/53/144, http://www.refworld.org/docid/3b00f54c14.html.

[52] Office of the UN High Commissioner for Human Rights, *Human Rights Defenders: Protecting the Right to Defend Human Rights, Fact Sheet No. 29*, UN publications, Geneva, 2004, page 8, http://www.ohchr.org/Documents/Publications/FactSheet29sp.pdf; Special Rapporteur on the Situation of the Human Rights Defenders, "Who is a Defender", http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx.

[53] The European Union Guidelines on Human Rights Defenders have defined the term human rights defenders as "persons, groups and institutions of society that promote and protect universally recognized human rights and fundamental freedoms." See *Council of the European Union. European Union Guidelines on Human Rights Defenders*, December 8, 2008, para. 3, http://www.consilium.europa.eu/uedocs/cmsUpload/16332-re02.es08.pdf.

[54] The Parliamentary Assembly of the Council of Europe has stated that "Human Rights Defenders are all those persons who, individually or jointly, act to promote or protect human rights. Their activities in this field define them as human rights defenders." See *Parliamentary Assembly of the Council of Europe, The situation of human rights defenders in Council of Europe Member States*, Resolution 1660, April 28, 2009, point 2, http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17727&lang=en.

[55] Inter-American Commission on Human Rights (IACHR), *Report on the Situation of Human Rights Defenders in the Americas*. OAS/Ser.L/V/II.124 Doc. 5 rev. 1 March 7, 2006, para. 13, http://www.IACHR.org/countryrep/defensores/defensorescap1-4.htm#UNIDAD, and Second Report on the Situation Human Rights Defenders in the Americas, OAS/Ser.L/V/II. Doc.66, para. 12, http://www.oas.org/es/IACHR/defensores/docs/pdf/defensores2011.pdf.

[56] Inter-American Court of Human Rights (IACtHR), *Case of Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para. 129; Cf. *Case of Nogueira de Carvalho et al. v. Brazil*. Preliminary Objections and Merits. Judgment of November 28, 2006. Series C No. 161, para. 77, and *Case of Luna López v. Honduras*, para. 123.

a. the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

44. On 17 December 2015, Turkey voted in favour of Resolution A/RES/70/161, adopted by the UN General Assembly, entitled "Human rights defenders in the context of the *Declaration on the Right and Responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.*"[57] This resolution affirms the *Declaration on Human Rights Defenders* and expresses grave concern that "national security and counter-terrorism legislation… are in some instances misused to target human rights defenders or hinder their work, endangering their safety in a manner contrary to international law." The resolution also expresses concern about "abuses against human rights defenders in countries where they face threats, harassment and attacks and suffer insecurity, including through restrictions on the rights to freedom of opinion, expression, association or peaceful assembly, abuse of criminal or civil proceedings…" (preamble, emphasis added). In paragraph 2, the Resolution directs all States "to take all measures necessary to ensure the rights and safety of human rights defenders who exercise the rights to freedom of opinion, expression, peaceful assembly and association, which are essential for the promotion and protection of human rights." All States are further encouraged in paragraph 10:

> to create and maintain a safe and enabling environment for the realization of human rights and specifically to ensure that: (a) The promotion and protection of human rights are not criminalized or met with limitations in contravention of the obligations and commitments of States under international human rights law (emphasis added).

45. The State's duty to protect human rights defenders and their work has also been recognized by the IACtHR, which demonstrates that this duty is recognized as an international obligation in different jurisdictions around the world. The IACtHR has considered that the work of human rights defenders is "fundamental for the strengthening of democracy and the Rule of Law."[58] The Court has, furthermore, established that:

> the defense of human rights can be exercised freely only when the persons engaged in it are not victims of any threats or any type of physical, psychological or moral aggression, or other forms of harassment. Therefore, it is the State's obligation not only to create the legal and formal conditions, but also to ensure the real conditions in which human rights defenders can freely carry out their work. Furthermore, the States should provide the necessary means for persons who are defenders of human rights or who perform a public function, so that when they encounter threats or situations of risk or report human rights violations, they can freely carry out their activities; protect them when they receive threats so as to prevent attacks on their lives and integrity; create conditions to eradicate

[57] UN General Assembly, A/RES/70/161, 17 December 2015, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/161

[58] IACtHR, *Case of Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para. 28; *Case of Valle Jaramillo et al. v. Colombia*. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C. 192, para. 87, and *Case of Castillo González, Merits*. Judgment of November 27, 2012. Series C No. 256, para. 124.

violations by State agents or private individuals; refrain from hindering their work, and thoroughly and effectively investigating violations committed against them, combating impunity. Finally, the State's obligation to guarantee the rights to life and personal integrity of an individual is increased in the case of a human rights defender.[59]

V. The Right to Freedom of Expression of Lawyers and Human Rights Defenders[60]

46. The obstacles that prevent lawyers and human rights defenders from carrying out their professional duties often take the form of restrictions on their rights to freedoms of expression, association or assembly. In recognition of this fact, principle 23 of the *Basic Principles* refers specifically to the right to freedom of expression and association of lawyers and establishes that:

> [l]awyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

47. Furthermore, Recommendation No. R(2000)21 of the Committee of Ministers of the Council of Europe establishes in its principle I.3 that:

> [l]awyers should enjoy freedom of belief, expression, movement, association, and assembly, and, in particular, should have the right to take part in public discussions on matters concerning the law and the administration of justice and suggest legislative reforms.[61]

This principle is preceded in the Recommendation by a preamble, which states that the Committee of Ministers is:

> [c]onscious of the need for a fair system of administration of justice which guarantees

[59] IACtHR, *Case of Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, para. 142; See also, Resolutions 1818/01 of May 17, 2001 and 1842/02 of the General Assembly of the Organization of American States, Human Rights Defenders in the Americas: Support for the Work of Individuals, Groups and Civil Society Organizations for the Promotion and Protection of Human Rights in the Americas, of June 4, 2002 which resolved "[t]o urge Member States to step up their efforts to adopt the necessary measures, in keeping with their domestic law and with internationally accepted principles and standards, to safeguard the lives, personal safety and freedom of expression of human rights defenders."

[60] This section was prepared on the basis of research carried out by M. Brilman and R. Taveri for a forthcoming publication, for citation: The Law Society of England & Wales, "The Independence of the Legal Profession under International Human Rights Law" (forthcoming).

[61] Committee of Ministers of the Council of Europe, Recommendation No. R(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer, 25 October 2000.

the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

48. Similarly, the *UN Declaration on Human Rights Defenders* establishes in Article 5 that:

> [f]or the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:
>
> (a) To meet or assemble peacefully;
> (b) To form, join and participate in non-governmental organizations, associations or groups;

49. In Article 6, the *UN Declaration on Human Rights Defenders* provides that:

> Everyone has the right, individually and in association with others:
>
> […] (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
> (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

50. In Article 3(a), the *UN Declaration on Human Rights Defenders* provides that persons have a right:

> [t]o complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay.

51. With regard to the exercise by human rights defenders of their right to freedom of expression, as established in Article 19 of the ICCPR, the HR Committee held in the case of *Kivenmaa v. Finland*, regarding a human rights defender's distribution of leaflets and use of a banner during a gathering that was critical of the human rights record of a visiting head of State, that "[t]he right for an individual to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by article 19 of the Covenant."[62]

52. Similarly, the ECtHR has ruled in several cases that lawyers, in their professional capacity when representing a client, but also as private citizens, can take part in public affairs and that their right to freedom of expression needs be respected and guaranteed by the States under whose jurisdiction they find themselves.

[62] HR Committee, *Kivenmaa v. Finland*, Communication No. 412/1990, UN Doc. CCPR/C/50/D/412/1990, 9 June 1994, para. 9.3.

53. For example, with regard to the right to freedom of expression of lawyers while representing their clients, the ECtHR found a violation of this right in *Steur v. The Netherlands*. This case involved a statement made by a lawyer in his professional capacity and in the course of judicial proceedings. This statement led to a disciplinary complaint against him, which was upheld by the relevant professional disciplinary body. The lawyer was admonished by this disciplinary body, but no sanction was imposed. Nevertheless, the ECtHR established a violation of the lawyer's right to freedom of expression, considering that the lawyer

> was censured, that is, he was formally found at fault in that he had breached the applicable professional standards. This could have a negative effect on the applicant, in the sense that he might feel restricted in his choice of factual and legal arguments when defending his clients in future cases. It is therefore reasonable to consider that the applicant was made subject to a "formality" or a "restriction" on his freedom of expression.[63]

The ECtHR added that:

> [i]t is true that no sanction was imposed on the applicant but, even so, the threat of an *ex post facto* review of his criticism with respect to the manner in which evidence was taken from his client is difficult to reconcile with his duty as an advocate to defend the interests of his clients and could have a "chilling effect" on the practice of his profession.[64]

54. The ECtHR explained this "chilling effect" of sanctions imposed on lawyers and the consequences for the practising of their profession as follows:

> [t]hey might for instance feel constrained in their choice of pleadings, procedural motions, etc., during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation.[65]

55. In this regard, the ECtHR suggested that an impermissible restriction of a lawyer's right to freedom of expression would not only result in a violation of Article 10 of the *ECHR* with regard to the lawyer, but could also give rise to a violation of Article 6 of the *ECHR* with regard to his or her client:

> [t]he imposition of a prison sentence on defence counsel can in certain circumstances have implications not only for the lawyer's rights under Article 10 but also the fair trial rights of the client under Article 6 of the Convention. It follows that any "chilling effect" is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.[66]

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[63] ECtHR, *Steur v. The Netherlands*, Application No. 39657/98, 28 October 2003, para. 29.
[64] *Ibid*, para. 44; *Nikula v. Finland*, Application No. 31611/96, 21 March 2002, para. 54; ECtHR, *Kyprianou v. Cyprus*, Application No. 73797/01, 15 December 2005, para. 85.
[65] ECtHR, *Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, para. 175.
[66] ECtHR, *Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, para. 175; ECtHR, *Steur v. The Netherlands*, Application No. 39657/98, 28 October 2003, para. 37; ECtHR, *Nikula v. Finland*, Application No. 31611/96, 21 March 2002, para. 26.

56. The ECtHR regards the imposition of sanctions on lawyers as potentially negatively affecting the administration of justice, because of the "special status of lawyers" or the "special nature of the profession practised by members of the Bar", which the ECtHR described as follows:

> [i]n their capacity as officers of the court, they are subject to restrictions on their conduct, which must be discreet, honest and dignified, but they also benefit from exclusive rights and privileges that may vary from one jurisdiction to another – among them, usually, a certain latitude regarding arguments used in court.[67]

57. Therefore, with regard to any restrictions imposed on the right to freedom of expression of a lawyer, specifically restrictions that take the form of a criminal penalty, the ECtHR established the exceptionality of the circumstances under which such a restriction could possibly be deemed permissible:

> [a]rticle 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. Moreover, a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right. Nonetheless, even if in principle sentencing is a matter for the national courts, the Court refers to its case-law to the effect that it is only in exceptional circumstances that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society.[68]

58. In other cases, the ECtHR has ruled on the restrictions imposed on the right to freedom of expression of lawyers who were not legally representing their clients at the moment they exercised such right. For example, when persons who are lawyers by profession engage in political activities or participate in public affairs. In the case of *Incal v. Turkey*, regarding the distribution by the applicant – who was a lawyer and member of a political party – of leaflets that expressed criticism of local authorities, without inciting to "the use of violence, hostility or hatred between citizens", the ECtHR ruled that it could not be inferred that the applicant "was in any way responsible for the problems of terrorism in Turkey."[69]

59. The right to freedom of expression of lawyers has also been recognized in other jurisdictions. For example, the African Commission on Human and Peoples' Rights (ACHPR), in a case where a lawyer had been invited to give a public lecture on human rights but was prohibited from travelling, threatened and arrested by State authorities (apparently on the basis of a perceived threat to national security), found that:

> [s]uch actions and expressions [to promote the protection of human rights in his country] are among the most important exercises of human rights and as such should be given

[67] ECtHR, *Steur v. The Netherlands*, Application No. 39657/98, 28 October 2003, para. 38; ECtHR, *Nikula v. Finland*, Application No. 31611/96, 21 March 2002, para. 22.
[68] ECtHR, *Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, para. 174.
[69] ECtHR, *Incal v. Turkey*, 41/1997/825/1031, 9 June 1998, paras. 50, 52.

substantial protection that do not allow the State to suspend these rights for frivolous reasons and in a manner that is thus disproportionate to the interference with the exercise of these fundamental human rights.[70]

60. In the same case, the ACHPR found that the lack of proportionality of the actions by State authorities were evidenced by the fact that:

> the government has not offered [the victim] an alternative means of expressing his support for human rights in each instance. Instead the Respondent State has either prohibited [the victim] from exercising his human rights by issuing threats, or punished him after summary trial, without considering the value of his actions for the protection and promotion of human rights.[71]

61. The ACHPR considered that the State's failure to meet the proportionality and necessity tests was further evidenced by "the fact that [the victim] advocates peaceful means of action and his advocacy has never caused civil unrest." Similar to the ECtHR's statements regarding the possible "chilling effect" that sanctions imposed on lawyers have, the ACHPR observed that the actions taken by State authorities had "a seriously discouraging effect on others who might also contribute to promoting and protecting human rights in Sudan."[72]

62. In another case, *Monim Elgak, Osman Hummeida and Amir Suliman v. Sudan*, in which human rights defenders had been arrested for their human rights work and because of alleged links with the office of the prosecutor of the International Criminal Court, the ACHPR found that these alleged links had been "the only reason" for which their right to freedom of expression had been restricted by State authorities. Since it had not been shown that such links, even if they existed, had "endangered the lives of others, national security, morality, common interest or caused any other legitimate prejudice", the ACPHR found a violation of the right to freedom of expression of the human rights defenders.[73]

VI. Right to Liberty and Security of the Person: Freedom from Arbitrary Arrest and Detention

A. "Arbitrariness" and "Reasonable Suspicion"

63. The HR Committee has held that the obligation to ensure the security of the person includes an obligation to protect non-detained individuals from threats made by persons in authority.[74] This is an important determination when it pertains to threats against lawyers for representing clients who are not favourably regarded by State authorities.

64. All persons in Turkey have an internationally protected right to liberty and security of the person, which includes the right to be free from arbitrary arrest and detention. To be lawful

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[70] African Commission on Human and Peoples Rights (ACHPR), *Law Offices of Ghazi Suleiman v. Sudan*, Communication No. 228/99, 29 May 2003, para. 62.
[71] *Ibid*, para. 63.
[72] *Ibid*, para. 65.
[73] ACHPR, *Monim Elgak, Osman Hummeida and Amir Suliman v. Sudan*, Communication No. 379/09, 14 March 2014, para. 115.
[74] HR Committee, Communication No. 449/1991, *Barbarin Mojica v. Dominican Republic*, at para. 5.4; Communication No. 314/1988, *Bwalya v. Zambia*, para. 6.4.

under international human rights law, arrests and detentions must be carried out in accordance with both formal and substantive rules of domestic and international law, including the principle of non-discrimination, and must not be arbitrary.

65. The prohibition against "arbitrary" detention requires that the circumstances and procedures under which a person can be lawfully detained must be enshrined in domestic law and detentions take place in accordance with such laws. In this regard, ICCPR Article 9(1) states:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

The HR Committee has reiterated in several cases that the grounds for arrest and detention must be clearly established by domestic legislation.[75]

66. Similarly, the ECtHR has held that the requirements set out in Article 5(1) of the *ECHR* that arrest or detention be "lawful" and "in accordance with a procedure prescribed by law" means that the arrest or detention must

> … not only [be in] full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary... In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of "lawfulness" set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail…[76]

The principle that arrest and detention needs to take place in accordance with the law is repeated in several other instruments.[77]

67. With respect to the "arbitrariness" of arrest and detention, the HR Committee has explained that:

> The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[78]

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[75] HR Committee, Communication No. 702/1996, *Clifford McLawrence v. Jamaica*, at para. 5.5; Communication No. 770/1997, *Dimitry L. Gridin v. Russian Federation*, para 8.1.

[76] ECtHR, *Steel and Others v. the United Kingdom* (App. No.67/1997/851/1058), para. 54.

[77] See, for example: *Body of Principles*, Principles 9, 12, 13, 36(2); *The Tokyo Rules*, Rule 3; *Havana Rules*, Rule 68 and 70; *ECHR*, Article 5; *Council of Europe Recommendation (2006)13*, para. 8(1); *Council of Europe Recommendation (2008)11*, para. 3

[78] HR Committee, Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, at para. 9.8, reaffirmed, *inter alia*, in Communication No. 1085/2002, *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar*

68. One example of "arbitrariness" is excessive length of pre-trial detention (when the length of such period is determined automatically or depends on the length of the potential sentence to be imposed after conviction).[79] In *Salim Abbassi v. Algeria*, the HR Committee recalled its jurisprudence that "in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification."[80] Also, instances where individuals were arrested without a warrant and kept in detention without a court order have been found to violate the right to freedom from arbitrary arrest and detention under Article 9(1).[81] The case-law indicates that pre-trial detention should not be of a punitive character.[82]

69. The ECtHR has stated that the requirement that there be a "reasonable suspicion" for an arrest to be made forms an essential safeguard against arbitrary arrest and detention:

> having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.[83]

70. With regard to cases where there is a lack of reasonable suspicion, the ECtHR has held that "improper reasons cannot always be proven by pointing to a particularly inculpatory piece of evidence which clearly reveals an actual reason (for example, a written document, as in the case of *Gusinskiy*) or a specific isolated incident".[84]

71. For example, in the Case of *Rasul Jafarov v. Azerbaijan*, involving the arrest and detention of a human rights defender, the ECtHR observed that proof of improper reasons follows, "the combination of relevant case-specific facts."[85] The ECtHR stated that the applicant's case could not "be viewed in isolation" and took into account, among other things, that several human rights activists in the country had been "arrested and charged with serious criminal offences entailing heavy imprisonment sentences."[86]

72. From the totality of circumstances of the case, the ECtHR established in *Rasul Jafarov v. Azerbaijan*, that:

> the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights. In the light of these considerations, the Court finds that the restriction of the applicant's liberty was imposed for purposes other than bringing him before a competent legal authority on reasonable suspicion of having

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Yousfi v. Algeria, at para. 8.3, and Communication No. 1128/2002, *Rafael Marques de Morais v. Angola*, at para. 6.1 [footnote omitted].

[79] HR Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), para. 14.

[80] HR Committee, Communication No. 1172/2003, *Salim Abbassi v. Algeria*, para. 8.4.

[81] HR Committee, Communication No. 90/1981, *Luyeye Magana ex-Philibert v. Zaire*, para. 8.

[82] *de Morais v. Angola*, *supra* note 79, para. 6.1.

[83] ECtHR, *Fox, Campbell and Hartley v. The U.K.* (App no. 12244/86, 12245/86, 12383/86), para. 32.

[84] ECtHR, *Rasul Jafarov v. Azerbaijan*, Application no. 69981/14, 17 March 2016, para. 158.

[85] *Ibid*, para. 158.

[86] *Ibid*, para. 161.

committed an offence, as prescribed by Article 5 § 1 (c) of the Convention.[87]

73. With regard to the requirement of "reasonable suspicion" for arrest and detention of members of the legal profession, the ECtHR stated in the *Case of Elci and others v. Turkey* that large-scale arrests and detentions would be subject to "especially strict scrutiny" by the ECtHR because of the role that lawyers fulfill in the administration of justice:

> The Court would emphasise the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.[88]

B. The Right to Be Informed of Reasons for Arrest and Charges

74. Articles 9(2) and 14(3) of the ICCPR establish that States are obligated to inform persons arrested, at the time of the arrest, of the reasons for their arrest and to inform them promptly of charges brought against them and the reason for such charges in a language that they understand and in sufficient detail so as to enable them to commence proceedings to have the lawfulness of their detention decided speedily. These principles are echoed in various other international instruments.[89]

75. The HR Committee, in *General Comment No. 32*, states in paragraph 31:

> The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges. Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant. The right to be informed of the charge "promptly" requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such… (citations omitted).[90]

76. In *Campbell v. Jamaica*, the HR Committee held that "one of the most important reasons for the requirement of 'prompt' information about a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a

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[87] *Ibid*, para. 162.

[88] ECtHR, *Case of Elci and others v. Turkey*, Applications nos. 23145/93 and 25091/94, 13 November 2003, para. 669.

[89] See, for example: *Body of Principles*, Principles 10 and 12; *Tokyo Rules*, Rule 7.1; *ECHR*, Article 5(2).

[90] HR Committee, *CCPR General Comment No. 32*: *Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 23 August 2007, CCPR/C/GC/32, para. 31, http://www2.ohchr.org/english/bodies/hrc/comments.htm.

competent judicial authority."[91] An arrest and detention for a "presumed connection with subversive activities" is not sufficient for the purposes of the ICCPR, including Article 9(2), without an explanation as to "the scope and meaning of 'subversive activities' that constitute a criminal offence under the relevant legislation", particularly where the right to freedom of expression is implicated.[92]

C. Right to Be Promptly Brought Before a Judge or Judicial Officer and to Trial Within a Reasonable Time

77. Individuals arrested in Turkey must be brought promptly before a judicial authority so that a competent Court may determine whether the initial detention was justified and if detention prior to trial is justified. An individual detained is entitled to be tried within a reasonable time. Prior to conviction the individual is entitled to be presumed innocent and to be released in the absence of the prosecution's establishing a risk of flight, interference with evidence or recurrence and that there are no means other than detention likely to prevent the established risk(s). The judicial authority reviewing the arrest and detention must be independent of the executive, must personally hear the person concerned, and must be empowered to direct pre-trial detention or release the person arrested. The Court must give reasons for decisions imposing pre-trial detention or refusing a request for release. Detainees should have the right to appeal a decision to detain or to revoke conditional release to a higher judicial or other competent authority.

78. ICCPR, Article 9(3) provides that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...."[93] The HR Committee has stated that the purpose of the first sentence of Article 9(3) is to bring the detention of a person charged with a criminal offence under judicial control. "A failure to do so at the beginning of someone's detention, would thus lead to a continuing violation of article 9(3), until cured."[94]

79. Under the ICCPR, the duty to bring a detainee promptly before a judicial authority applies regardless of whether a detainee requests it.[95]

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[91] HR Committee, Communication No. 248/1987, *Campbell v. Jamaica*, para. 6.3.

[92] HR Committee, Communication No. 33/1978, *Carballal v. Uruguay*, paras. 12-13.

[93] For similar provisions, see also: *Body of Principles,* Principles 11, 37, 38; *Tokyo Rules,* Rule 6.3; *The Beijing Rules*, Rule 7.1; *Havana Rules*, Rule 70; *ECHR,* Article 5(3); *Council of Europe, Recommendation (2006)13,* paras. 14-16 and 18.

[94] HR Committee, Communication No. 521/1992, *Vladimir Kulomin v. Hungary,* para. 11.3.

[95] HR Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.114, 1 November 1999, para. 13. Similarly, the European Court of Human Rights has ruled that the review must be automatic and cannot depend on the application of the detained person: ECtHR, Case of *McKay* v. *the United Kingdom* (App. No. 543/03), para. 34.

VII. The Right to Release Pending Trial[96]

80. Pre-trial detention is viewed in international law as an option to be used only when strictly necessary and as a last resort. A presumption in favour of pre-trial release is based on the presumption of innocence and the right to liberty and security of the person, and must be afforded to all persons equally. Pre-trial detention is permitted by international law only under certain limited circumstances.

81. The relevant international instruments applicable to arbitrary arrest and detention, as well as pre-trial release, in Turkey include: the UDHR, ICCPR, *Optional Protocol to the International Covenant on Civil and Political Rights*,[97] *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[98] *Convention on the Elimination of All Forms of Discrimination against Women* (CERD),[99] *Standard Minimum Rules for the Treatment of Prisoners* ("Standard Minimum Rules")[100], *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* ("Body of Principles"),[101] *United Nations Standard Minimum Rules for Non-custodial Measures* ("The Tokyo Rules"),[102] *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* ("The Bangkok Rules"),[103] and *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* ("Basic Principles and Guidelines on the Right to a Remedy and Reparation").[104]

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[96] This section is (with permission) based largely on, and contains excerpts from, the 14 August 2012 report "Arrest and Detention of Lawyers in Turkey: The Right to Pre-Trial Release at International Law" prepared by Lois Leslie, B.Soc. Sc. (Hons), LL.B, LL.M for LRWC. Useful sources consulted in the preparation of this section include: Office of the UN High Commissioner for Human Rights in association with the International Bar Association (2003), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN), particularly, Chapter 5, "Human Rights and Arrest, Pre-trial Detention and Administrative Detention"; UN Centre for Human Rights (1994) Professional Training Series No.3: *Human Rights and Pre-trial Detention – A Handbook of International Standards relating to Pre-trial Detention* (UN); and American Bar Association Rule of Law Initiative, *Handbook of International Standards on Pretrial Detention Procedure* (2010).

[97] *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 U.N.T.S. 171, entered into force 23 March 1976, http://www2.ohchr.org/english/law/ccpr-one.htm.

[98] *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted 21 December 1965, entered into force 4 January 1969, 660 U.N.T.S. 195, http://www2.ohchr.org/english/law/cerd.htm.

[99] *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, entered into force 3 September 1981, UN Doc. A/34/46, at 193 (1979), http://www2.ohchr.org/english/law/cedaw.htm.

[100] Standard Minimum Rules for the Treatment of Prisoners, United Nations Secretariat, Report of First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, Switzerland (Aug. 22-Sept. 3, 1955), annex I.A. Approved by Economic and Social Council, E.S.C. Res. 663C XXIV (July 31, 1957). Amended by the Economic and Social Council, E.S.C. Res. 2076 LXII (May 13, 1997), http://www2.ohchr.org/english/law/treatmentprisoners.htm.

[101] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), http://www2.ohchr.org/english/law/bodyprinciples.htm.

[102] *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990), http://www2.ohchr.org/english/law/tokyorules.htm.

[103] UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women *Offenders (the Bangkok Rules*), adopted by General Assembly Resolution 65/229 of 21 December 2010, http://daccess-ods.un.org/TMP/7960160.97068787.html.

[104] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of

82. Regional instruments include the ECHR, *Recommendation Rec(2006)2 of the Committee of* Ministers *to member states on the European Prison Rules* ("Council of Europe, Recommendation (2006)2"),[105] and *Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse* ("Council of Europe, Recommendation (2006)13").[106]

83. Article 9(3) ICCPR provides: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial…." International and regional standards provide that pre-trial detention can only be justified when used to prevent the accused from absconding, committing a serious offence, or interfering with the administration of justice. Whatever the justification, detention should be used only as a last resort, when, following a consideration of the widest possible range of alternatives, the Court determines that detention remains necessary to address the risk identified.

84. The HR Committee states in *General Comment No. 8* that "[p]re-trial detention should be an exception and as short as possible."[107] Similarly, the relevant international instruments emphasize noncustodial measures for the avoidance of the unnecessary use of imprisonment, and the use of pre-trial detention as a means of last resort.[108]

85. The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders expressed serious concern about delays in the criminal justice process and the high proportion of pre-trial detainees among the prison population and recommended that Member States use pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.[109] The Chairperson-Rapporteur of the Working Group on Arbitrary Detention has stated that a system of mandatory denial of pre-trial release for certain crimes may, by definition be arbitrary, "since it does not allow the decision maker to take the individual circumstances into account."[110]

International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, http://www2.ohchr.org/english/law/remedy.htm.

[105] *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules*, adopted by the Committee of Ministers on 11 January 2006, http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp.

[106] Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, adopted by the Committee of Ministers on 27 September 2006, http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Recommendations_en.asp.

[107] CCPR General Comment No. 8: Article 9 (Right to liberty and security of persons), 1982, para. 3.

[108] See: *Body of Principles*, Principle 39; *The Tokyo Rules*, Rules 2.3, 3.1, 3.4, 3.5, 5.1, 6; *The Beijing Rules*, Rule 13 and 19; *Havana Rules*, Rules 1 and 2; *The Bangkok Rules*, Rule 58; *ECHR*, Articles 5(1)(c) and 5(3); *Council of Europe, Recommendation (2006)13*, paras. 3-7.

[109] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September, 1990, A/Conf.144/28/Rev.1, p. 158.

[110] Laurel Townhead, "Pre-Trial Detention of Women and its Impact on their Children", February 2007, Quaker UN Office, Women in Prison and Children of Imprisoned Mothers Series, at p. 13, citing comments on mandatory sentencing made by Leila Zerougi, Chairperson-Rapporteur of the Working Group on Arbitrary Detention, during the second regular session of the Human Rights Council, 20 December 2006,

86. Under the ICCPR, detention before trial must be lawful, reasonable, and necessary in all the circumstances, "for example, to prevent flight, interference with evidence or the recurrence of crime."[111] In *Aleksander Smantser v. Belarus*, the HR Committee reaffirmed previous decisions that pre-trial detention should remain the exception and that bail should be granted:

> except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party."... The mere assumption by a State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant.[112]

87. The HR Committee has held that the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial."[113] In *Case of Case of Grishin v. Russia*, the ECtHR reiterated that, under the second limb of Article 5(3):

> a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify his continuing detention. The domestic courts must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty and must set them out in their decisions on the applications for release."[114]

88. The ECtHR has ruled that the burden is on the State to show why the defendant cannot be released.[115] The danger of an accused person's absconding "cannot be gauged solely on the basis of the severity of the sentence risked", but "must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial."[116] In *Case of Grishin v. Russia*, the ECtHR stated that the risk of flight "should be assessed with reference to various factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted."[117]

89. Turkey's domestic Courts must give reasons explaining the finding of a risk of flight. It is not adequate to simply to confirm the detention using "identical stereotyped terms, such as 'having regard to the nature of the offence, the state of the evidence and the content of the case file'."[118] The ECtHR held, in *Case of Cahit Demirel v. Turkey*, that the multiple, consecutive detention periods served by the applicant should be regarded as a whole when

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http://www.quno.org/humanrights/women-in-prison/womenPrisonLinks.htm.

[111] HR Committee in *Mukong v. Cameroon*, *supra* note 29, para. 9.8.

[112] HR Committee, Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, para. 10.3.

[113] HR Committee, Communication No. 526/1993, *Hill v. Spain*, para. 12.3.

[114] ECtHR, *Case of Grishin v. Russia* (App No. 14807/08), para. 139.

[115] ECtHR, *Case Of Ilijkov v. Bulgaria* (App No. 33977/96), para. 85.

[116] ECtHR, *Case of Tomasi v France* (App No 12850/87), para. 98.

[117] ECtHR in *Grishin v. Russia*, *supra* note 114, para. 143.

[118] ECtHR, *Case of Cahit Demirel v. Turkey* (App No. 18623/03), paras. 24-25.

assessing the reasonableness of the length of detention under Article 5(3) of the *ECHR*.[119] While the ECtHR acknowledged that the "state of the evidence" may be relevant to the "existence and persistence of serious indications of guilt" and that the severity of the sentence faced is a relevant element in the assessment of the risk of flight, "neither the state of evidence nor the gravity of the charges can by themselves serve to justify a length of preventive detention of over six years and four months."[120] The ECtHR further noted that:

> the Diyarbakır State Security Court failed to indicate to what extent the applicant's release would have posed a risk after the passage of time, in particular in the later stages of the proceedings. Furthermore, the first-instance court never gave consideration to the application of a preventive measure, such as a prohibition on leaving the country or release on bail, other than the continued detention of the applicant…[121]

90. The existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention.[122] When release pending trial is refused on the basis that the defendant may commit further offences prior to trial, the domestic court must be satisfied that the risk is substantiated and that detention is the only means likely to prevent the established risk. A reference to a person's antecedents cannot suffice to justify refusing release.[123]

91. With respect to the risk of interference with witnesses, the ECtHR states:

> for the domestic courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the applicant's detention, it did not suffice merely to refer to an abstract risk unsupported by any evidence. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the applicant's personality, his behaviour before and after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed at the falsification or destruction of evidence or manipulation of witnesses…[124]

92. In *Case of Öcalan v. Turkey*, the ECtHR affirmed its earlier rulings regarding detention of persons suspected of terrorist offences. It recognized that while

> the investigation of terrorist offences undoubtedly presents the authorities with special problems…[t]his does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved.[125]

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[119] *Ibid*, para. 23.

[120] *Ibid*.

[121] *Ibid*, para. 26.

[122] ECtHR, *Case of Van Der Tang v. Spain* (App No 19382/92), para. 63. See also ECtHR, *Case Of Ilijkov V. Bulgaria* (App No. 33977/96), para. 81.

[123] ECtHR, *Case of Muller v. France* (App No. 21802/93), para. 44.

[124] ECtHR in *Grishin v. Russia*, *supra* note 114, para. 148.

[125] ECtHR, *Case of Öcalan v. Turkey*, (App No 46221/99), para. 104.

93. When deciding whether a person should be released or detained, the authorities have an obligation under Article 5(3) of the *ECHR*, to consider alternative measures of ensuring his or her appearance at the trial.[126] Where the Court considers that the risk of absconding exists, the authorities are under a duty to consider alternatives to detention that will ensure the defendant appears at trial.[127]

94. When fixing a financial surety as a condition of release pending trial, the domestic authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention is indispensable.[128]

95. The right to pre-trial release is intimately connected to the right to be presumed innocent until proven guilty. Turkey is obligated to respect this right, as set out in Article 11(1) of the UDHR and Article 14(2) of the ICCPR, which provides that: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

96. The HR Committee, in *General Comment No. 32*, states at paragraph 30:

> According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle...[129]

IX. Conclusion

97. This *Amicus Curiae* brief set out international human rights law binding on Turkey, including the rights to freedoms of expression, association and assembly, especially of lawyers and human rights defenders when they lawfully represent their clients or participate in public affairs, as well as the right to liberty and security and rights of due process, such as the right to be presumed innocent and the right to pre-trial release.

98. It is respectfully requested that the Constitutional Court of Turkey ensure that the international human rights law and principles outlined in this brief, as interpreted by the General Comments and case-law of the HR Committee and the decisions of the ECtHR, are applied to the case in which this brief is filed. All laws in Turkey must be interpreted in strict conformity with international human rights obligations, including obligations imposed by the ICCPR, the ECHR and other international law and principles as summarized above. It is incumbent on the judiciary to ensure respect for these binding international law obligations.

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[126] ECtHR, *Case of Yevgeniy Kuzmin v. Russia* (App No. 6479/05), para. 34.

[127] ECtHR, *Case of Khodorkovskiy v. Russia* (App No. 5829/04), para. 186.

[128] ECtHR, *Case of Mangouras v. Spain* (App No. 12050/04), para. 37.

[129] HR Committee, *CCPR General Comment No. 32*: *Article 14 (Right to equality before courts and tribunals and to a fair trial)*, 23 August 2007, CCPR/C/GC/32, para. 30, http://www2.ohchr.org/english/bodies/hrc/comments.htm.

99. With regard to the restrictions of rights protected by the ECHR, Article 18 of the ECHR establishes that "[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". As set out in this Amicus brief, with reference to the case of *Rasul Jafarov v. Azerbaijan*, the ECtHR ruled that "the actual purpose of the impugned measures was to silence and punish the applicant for his activities in the area of human rights". Therefore, no restriction of the right to liberty and security of the person is permitted when such restriction is imposed for the purpose of hindering a person's work on matters related to human rights.

100. Furthermore, domestic laws that have the effect of restricting the freedom of expression of lawyers and human rights defenders exercising their duties must not be applied in contravention of the ICCPR, the ECHR and other international human rights law binding on Turkey.

101. Finally, it is respectfully submitted that application of international human rights law and domestic law to the case in which this brief is filed requires that the applicants in this case be immediately and unconditionally released. In the absence of such evidence, it is submitted that their detention is arbitrary and in violation of the non-derogable fair trial rights, especially the right to be presumed innocent.

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- Endorsement: this *Amicus Curiae* brief is endorsed by Lawyers for Lawyers, a non-profit organization established under the laws of The Netherlands.