

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Atilla Taş v. Turkey (no. 72/17)**  
**Ahmet Hüsrev Altan v. Turkey (no. 13252/17)**  
**Mehmet Hasan Altan v. Turkey (no. 13237/17)**  
**Ahmet Şık v. Turkey (no. 36493/17)**  
**Şahin Alpay v. Turkey (no. 16538/17)**  
**Mehmet Murat Sabuncu and others v. Turkey (no. 23199/17)**  
**Murat Aksoy v. Turkey (no. 80/17)**  
**Ayşe Nazlı Ilicak v. Turkey (no. 1210/17)**  
**Ali Bulaç v. Turkey (no. 25939/17)**  
**Ilker Deniz Yucel v. Turkey (no. 27684/17)**

**INTERVENTION OF UNITED NATIONS SPECIAL RAPPORTEUR  
ON THE PROMOTION AND PROTECTION OF THE RIGHT TO  
FREEDOM OF OPINION AND EXPRESSION**

Under Article 36 of the European Convention on Human Rights  
and  
Rule 44 of the Rules of the European Court of Human Rights

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## A. Introduction

1. Professor David Kaye, the United Nations (“UN”) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (the “**Special Rapporteur**”) respectfully submits this brief (and the attached Appendix A) pursuant to the leave granted by the President of the Section on 11 September 2017.
2. The cases at issue in this *amicus* filing concern 10 separate applications to the Court regarding the criminal prosecution, arrest, and/or detention of journalists under counter-terrorism legislation and state-of-emergency decrees in Turkey.<sup>1</sup> Of particular importance to the Special Rapporteur, many, if not all, of these cases involve Turkey’s targeting of journalists or writers because of the content of their professional work.
3. The Special Rapporteur is deeply concerned by Turkey’s crackdown on the press, which predates, but has significantly accelerated since, the attempted coup of 14 July 2016. Relying upon vaguely worded anti-terrorism legislation and state-of-emergency decrees, Turkey has arbitrarily arrested, detained, and/or prosecuted journalists and media professionals merely for exercising their rights to freedom of expression. Turkey’s suppression of dissent has generated international condemnation, and Turkey’s own judiciary has proven unable, or unwilling, to act as an adequate safeguard against Turkey’s continuing violations of its citizens’ rights to freedom of expression and opinion.
4. The ten applications now before this Court provide an opportunity for the Court to clarify its interpretation of the “prescribed by law” provision of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“**ECHR**”), especially in the context of counter-terrorism legislation and state-of-emergency decrees. The Court should opine on whether Turkey’s arrest, detention, and/or prosecution of the applicants at issue in these cases are “prescribed by law.”
5. This *amicus* filing will first describe the Special Rapporteur’s mandate and then summarize the Special Rapporteur’s and other international actors’ findings regarding Turkey’s repeated violations of the right to freedom of expression. The filing will go on to describe the legal contours of Article 10 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights (“**ICCPR**”), and will conclude by focusing on Article 10’s “prescribed by law” provision.

## B. Background

### *The Special Rapporteur and this intervention*

6. Special rapporteurs are independent experts appointed by the UN Human Rights Council, a subsidiary organ of the UN General Assembly. The Special Rapporteur’s mandate requires him to: (a) gather information relating to violations of the right to freedom of opinion and expression under international human rights law, including, as a matter of high priority, harassment, persecution, or intimidation directed against journalists; and (b) make recommendations to UN Member States and related organizations on ways to better promote and protect the right to freedom of opinion and expression.<sup>2</sup>

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<sup>1</sup> They are application numbers: 13237/17, 13252/17, 72/17, 36493/17, 16538/17, 23199/17, 80/17, 1210/17, 25939/17, and 27684/17.

<sup>2</sup> U.N. Doc. A/HRC/25/2 (17 July 2014).

7. In carrying out his mandate, the Special Rapporteur collects information and reports on the extent, nature, and severity of the violations of, *inter alia*, journalists' right to freedom of expression worldwide, as well as the means by which these violations are effected by state actors. The Special Rapporteur's mandate rests upon Article 19 of the ICCPR, which (similar to Article 10 of the ECHR) protects a person's right "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."<sup>3</sup> Turkey ratified the ICCPR in 2003.<sup>4</sup>
8. In November 2016, the Special Rapporteur conducted an official country visit to Turkey and met with a variety of state actors, members of civil society and opposition, academics, lawyers, artists, and journalists. During the visit, the Special Rapporteur also sought and was granted access to visit several writers and journalists in detention (although he was denied the opportunity to visit some of the individuals who are the subject of the cases herein). Following the Special Rapporteur's visit to Turkey, he reported on the measures taken during the state of emergency, the broader attack on media and journalists, the use of defamation and counter-terrorism legislation and state-of-emergency decrees, the mass firings of academics, the attack on civil society and opposition, restrictions on freedom of expression online, and Turkey's institutional framework.<sup>5</sup> The Special Rapporteur made a series of recommendations, and has been in communication with Turkish authorities with respect to individual cases. To date, the Special Rapporteur has sent several communications to Turkish authorities in 2017 concerning allegations of violations of freedom of expression in individual cases or in legislation and policy. For context, between January 2016 and July 2017, the Special Rapporteur sent over 350 formal allegations and appeals to dozens of countries.
9. Pursuant to the leave granted by the President of the Section, the Special Rapporteur intervenes to provide (a) relevant factual material relating to the situation of journalists in Turkey and (b) recommendations on the interpretation and application of Article 10 of the ECHR, with a special focus on cases involving the arrest, detention, and/or criminal prosecution of journalists and media personnel to interfere with the right to freedom of expression. This intervention's discussion of Article 10 will principally focus on its requirement that any restriction on the rights it protects be "prescribed by law."

### *Turkey's pattern of abuse*

10. Since at least 2015, the Special Rapporteur has continuously communicated its concerns to Turkey regarding the Turkish Government's (the "**Government**") arrest, prosecution, and detention of journalists; takeover of media companies; and mass firings and arrests of academics, government officials, and members of the judiciary.<sup>6</sup> For example, on 16 January 2015, the Special Rapporteur (in conjunction with other UN special rapporteurs whose mandates concern arbitrary detention, the independence of judges and lawyers, and the rights to freedom of peaceful assembly and association) raised allegations that 31 people, including journalists and media personnel, were arrested in December 2014 solely for exercising their right to freedom of

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<sup>3</sup> ICCPR, art. 19.

<sup>4</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en).

<sup>5</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on His Mission to Turkey, U.N. Doc. A/HRC/35/22/Add.3 (21 June 2017) ("Special Rapporteur's Turkey Report") (attached as Appendix A).

<sup>6</sup> Communications sent to governments by all Human Rights Council mandate-holders may be found at <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

expression.<sup>7</sup> One of the journalists arrested was Mr. Ekrem Dumanli, the editor-in-chief of the newspaper *Zaman*. Upon arrest, Mr. Dumanli was held in solitary confinement for 72 hours and his attorney was neither permitted to see his client nor informed of the charges brought against him.<sup>8</sup> Mr. Dumanli was eventually charged under the anti-terrorism laws with, *inter alia*, establishing and administering an armed organization, and slander.<sup>9</sup> The basis of the charges against him was two op-ed pieces he published in *Zaman* and an article he wrote concerning a speech made by Turkish cleric Fethulla Gülen (whom Turkey blames for the July 2016 attempted coup).<sup>10</sup>

11. Following his November 2016 visit, the Special Rapporteur submitted a report to the UN Human Rights Council describing his visit, evaluating the legal and policy framework in force in Turkey, and making recommendations to the Government regarding its compliance with its international obligations concerning freedom of expression. The Special Rapporteur's conclusion was unequivocal:

[A]cross society [Turkey's] laws and policies of censorship and criminalization are working to repress freedom of opinion and expression in all the places that are fundamental to democratic life: the media, educational institutions, the judiciary and the bar, government bureaucracy, political space and the vast online expanses of the digital age. They do so, despite limited evidence that the restrictions are necessary to protect legitimate interests, such as national security and public order or the rights and reputations of others. Legal and institutional pressures coupled with increasing executive control and dominance, punctuated by the constitutional amendments adopted in April 2017, erode the foundations necessary for the exercise of freedom of opinion and expression. In short, the mission illuminated a squeezing of civil society space that signals a radical backsliding from the democratic path and deserves the most urgent attention to reverse.<sup>11</sup>

12. Most relevant to these cases, the Special Rapporteur's report noted that on the basis of the post-coup emergency decrees and anti-terrorism legislation, the Government severely restricted the media and the Turkish public's access to information.<sup>12</sup> Specifically, during the first six weeks of the state of emergency, the Government closed over 100 media outlets.<sup>13</sup> Within the first year after the attempted coup, "at least 177 media outlets have been closed; 231 journalists have been arrested (over 150 journalists are in prison); nearly 10,000 journalists and media workers have been dismissed; and the press cards of at least 778 journalists have been cancelled."<sup>14</sup> Of the approximately 155 journalists and media workers who had been imprisoned as of July 2017, most of them were in custody based on vague charges with either very little or no evidence presented or publicly available.<sup>15</sup>

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<sup>7</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=21249>. The response of the Government may be found at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=59167>.

<sup>8</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=21249> at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* ¶ 7.

<sup>12</sup> *Id.* ¶¶ 31-45.

<sup>13</sup> *Id.* ¶ 31.

<sup>14</sup> *Id.*

<sup>15</sup> See communication from the Special Rapporteur and other special procedure mandate-holders of 28 July 2016, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=3292>.

13. Moreover, judicial review of the Government’s actions has been significantly curtailed. Although Article 19 of the ICCPR requires access to independent mechanisms that allow individuals to challenge restrictions on the freedom of expression, Turkey’s “judiciary appears to be increasingly unavailable to those charged under the antiterrorism and emergency laws.”<sup>16</sup> For example, Turkey’s Constitutional Court held on 12 October 2016 that constitutional challenges to emergency decrees are no longer subject to judicial review.<sup>17</sup> Additionally, the judiciary is under intense pressure from Turkey’s executive branch. In the first five months after the coup attempt, 3,626 judges and prosecutors were removed under emergency decree.<sup>18</sup>
14. The Special Rapporteur’s report closed with a series of recommendations to the Government including, *inter alia*, that the Government should “review urgently the antiterrorism law so as to ensure that counter-terrorism measures are compatible with article 19(3)” of the ICCPR.<sup>19</sup> Specifically, the Special Rapporteur recommended that such offenses as “encouragement of terrorism” and “extremist activity,” and offenses of “praising,” “glorifying,” or “justifying” terrorism “should be clearly defined to ensure that they do not continue to lead to unnecessary or disproportionate interference with freedom of expression.”<sup>20</sup>
15. The Special Rapporteur is not alone in raising concerns about Turkey’s treatment of journalists, writers, and media outlets. Indeed, even before the July 2016 attempted coup, Turkey’s restrictions on freedom of expression garnered international concern. For example, during the Universal Periodic Review of Turkey’s compliance with its human rights obligations by the UN, a number of stakeholders raised concerns about the broad reach of Turkey’s anti-terrorism laws and state-of-emergency decrees and Turkey’s continued arrest and prosecution of journalists, writers, and others for exercising their rights to freedom of expression.<sup>21</sup> Numerous states also expressed concern about Turkey’s restrictions on freedom of expression.<sup>22</sup>
16. Numerous other human rights watchdogs in the international community have raised grave concerns about Turkey’s crackdown on freedom of expression. For example:
- a. The Organization for Security and Cooperation in Europe Representative on Freedom of the Media has repeatedly condemned Turkey’s ongoing crackdown on journalists and the media, stating that it is “quite clear” that Turkey’s media restrictions—including the “flagrant” disregard of any assurance of due process—fail to meet “the basic international standards ... even in times of emergency.”<sup>23</sup>
  - b. The Commissioner for Human Rights of the Council of Europe published a critical 25-page memorandum on freedom of expression and media freedom in Turkey, concluding that the deterioration of freedom of expression in Turkey has reached “seriously alarming levels,” and the measures taken by the authorities after the attempted coup “confer an almost limitless discretionary power to the Turkish executive to apply seriously sweeping measures ... without any evidentiary requirements or judicial control.”<sup>24</sup> According to

<sup>16</sup> Special Rapporteur’s Turkey Report, *supra* note 5, at ¶ 66.

<sup>17</sup> *Id.* ¶ 29.

<sup>18</sup> *Id.* ¶ 70.

<sup>19</sup> *Id.* ¶ 84.

<sup>20</sup> *Id.*

<sup>21</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/191/56/PDF/G1419156.pdf?OpenElement>, ¶¶ 44-53.

<sup>22</sup> *See, e.g.*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/076/33/PDF/G1507633.pdf?OpenElement>, ¶¶ 12 (USA), 55 (Egypt), 61 (Germany), 66 (Iceland), and 69 (Ireland).

<sup>23</sup> <http://www.osce.org/fom/256836>.

<sup>24</sup> <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=>

the Commissioner, “[t]he rapid deterioration in freedom of expression and media freedom went hand-in-hand with the erosion of the independence of the Turkish judiciary.... In this environment of fear, the remaining judges and prosecutors have clearly reverted to their state-centric approach, thereby offsetting progress which was achieved painstakingly through the sustained efforts of the Turkish authorities themselves and the support of various bodies of the Council of Europe.”<sup>25</sup>

- c. In response to the deteriorating human rights situation in Turkey, the Parliamentary Assembly of the Council of Europe voted in April 2017 to reopen the monitoring procedure in respect to Turkey until “serious concerns” about respect for human rights, democracy, and the rule of law are addressed in a satisfactory manner.<sup>26</sup>
- d. On 26 July 2017, the UN Working Group on Arbitrary Detention published its findings concerning the Government’s arrest, detention, and prosecution of 10 individuals working with the newspaper *Cumhuriyet*.<sup>27</sup> The Working Group concluded that the 10 journalists were deprived of their liberty because they exercised their rights to freedom of expression and opinion under Article 19 of the ICCPR.<sup>28</sup> Most importantly, the Working Group found that because the anti-terrorism laws are vaguely and broadly worded, they have a chilling effect on the exercise of the right to freedom of expression and violate the principle of legality as codified in Article 11 of the Universal Declaration of Human Rights and Article 15 of the ICCPR.<sup>29</sup>

### C. Article 10 Protections

17. Rooted in Article 19 of the Universal Declaration of Human Rights, the right to freedom of opinion and expression has been adopted by international and regional treaties, and is widely understood to be a fundamental human right and a keystone of modern democratic society.<sup>30</sup> At the core of the right is the recognition that, as this Court has noted, “[t]he press plays an essential role in a democratic society.”<sup>31</sup> The press’s “vital role of ‘public watchdog’” is to impart, in a manner consistent with its obligations and responsibilities, “information and ideas on all matters of public interest.”<sup>32</sup>
18. Moreover, the press plays an especially important role in public discussions of political questions and other matters of public interest. A free press provides the public with “one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders” and provides politicians with an “opportunity to reflect and comment on the preoccupations of public opinion.”<sup>33</sup> Indeed, the UN Human Rights Committee has emphasized that the ICCPR places a

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2961658&SecMode=1&DocId=2397056&Usage=2, ¶ 20.

<sup>25</sup> *Id.* ¶ 128.

<sup>26</sup> <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6603&lang=2&cat=8>; *see also*

[<http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnNveG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzY2NSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJlZi1XRClBVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTlZnY1>.](http://semantic-</a></p></div><div data-bbox=)

<sup>27</sup> U.N. Doc. A/HRC/WGAD/2017/41 (26 July 2017).

<sup>28</sup> *Id.* ¶ 97.

<sup>29</sup> *Id.* ¶¶ 98-104.

<sup>30</sup> *Steel and Others v. United Kingdom*, 23 Sept. 1998, no. 24838/94, § 101.

<sup>31</sup> *Gaweda v. Poland*, 14 Mar. 2002, no. 26229/95, § 34.

<sup>32</sup> *Id.*

<sup>33</sup> *Castells v. Spain*, 23 Apr. 1992, no. 11798/85, § 43.

“particularly high” value on public debate, especially in the media, concerning figures in the political domain.<sup>34</sup>

19. The UN has made the protection of journalists and promotion of free and open news media a global priority. Its Human Rights Council, General Assembly, and Security Council have each stressed the importance of protecting a “free, uncensored and unhindered press or other media.”<sup>35</sup> The UN General Assembly and the UN Human Rights Council have gone even further, issuing resolutions condemning violence against journalists and calling upon states to promote a safe environment for journalists to do their work.<sup>36</sup>
20. Article 19 of the ICCPR requires that any restriction on the right to freedom of expression (i) is provided by law; (ii) serves a legitimate purpose; and (iii) is necessary and proportional to meet the ends it seeks to serve.<sup>37</sup> For a restriction to be “provided by law,” it must “not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.”<sup>38</sup> Article 10 of the ECHR contains an extremely similar provision that has the same objectives.<sup>39</sup> Under Article 10, restrictions must be “prescribed by law.”<sup>40</sup>
21. Legal restrictions on expression that are too broad or vague create a “chilling effect” that discourages individuals from exercising their rights to free expression for fear that government authorities may penalize a broad swath of speech-related activities. Such wide government discretion makes the consequences of engaging in free expression unforeseeable, and as such, individuals may be deterred from exercising such rights in the first place. The “prescribed by law” provision is meant to limit such wide government discretion.
22. The right to freedom of expression is not, however, without limits. While opinion may not be restricted by any measure, the ECHR (similar to the ICCPR) provides that the exercise of the freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as [(i)] are prescribed by law and [(ii)] 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

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<sup>34</sup> *Zeljko Bodrozik v. Serbia and Montenegro*, Communication No. 1180/2003, U.N. Doc. CCPR/C/85/D/1180/2003, § 7.2 (2006).

<sup>35</sup> See UN General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 7, U.N. Doc. A/70/361 (8 Sept. 2015).

<sup>36</sup> UN General Assembly, Resolution 68/163, Safety of Journalists and the Issue of Impunity, ¶¶ 2, 6, UN Doc. A/HRC/68/163 (21 Feb. 2014); UN Human Rights Council, Resolution 27/5, Safety of Journalists, ¶¶ 1-2, 5, U.N. Doc. A/HRC/RES/27/5 (2 Oct. 2014); UN Human Rights Council, Resolution 21/12, Safety of Journalists, ¶¶ 4, 8, UN Doc. A/HRC/RES/21/12 (9 Oct. 2012); UN Plan of Action on the Safety of Journalists and the Issue of Impunity, ¶ 1.5 (endorsed 12 Apr. 2012).

<sup>37</sup> U.N. Econ. and Soc. Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) (“Siracusa Principles”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 12 (Dec. 10, 1948) (“Universal Declaration”); ICCPR, art. 19(3).

<sup>38</sup> UN Human Rights Committee General Comment UN No. 34, ¶ 25, U.N. Doc. CCPR/C/GC/34 (29 July 2011) (“General Comment 34”).

<sup>39</sup> *Youth Initiative for Human Rights v. Serbia*, 25 June 2013, no. 48135/06, § 13 (“Article 19 of [the ICCPR] guarantees freedom of expression in similar terms to those used in Article 10 of the [ECHR]”).

<sup>40</sup> As reflected in this Court’s case-law, the phrase “as are prescribed by law” in Article 10 is interpreted consistently with the French phrase “prévues par la loi” (“in accordance with the law”) in Articles 8-11 of the ECHR. See, e.g., *Sunday Times v. United Kingdom (No. 1)*, 26 Apr. 1979, no. 6538/74, § 48.

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.”<sup>41</sup>

23. The “prescribed by law” provision of Article 10, much like Article 19 of the ICCPR, has two requirements, as elucidated by this Court. “Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – 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.”<sup>42</sup> This two-part test is similar to the test that the UN Human Rights Committee has adopted to determine whether a restriction on the freedom of expression protected by Article 19 of the ICCPR is “provided by law,” which requires that the restriction be (i) adequately accessible and (ii) formulated with sufficient precision to enable a citizen to regulate his or her conduct.<sup>43</sup>
24. Based on his visit to Turkey and study of the current situation for journalists in the country, the Special Rapporteur is gravely concerned that the Government’s restrictions fail to meet the standards of necessity and proportionality to achieve a legitimate objective. However, as noted *supra*, this intervention will focus on the “prescribed by law” requirement.

#### **D. Turkey’s Restrictions on Freedom of Expression Are Not “Prescribed by Law”**

25. It is settled case-law in this Court that the expression “‘prescribed by law’ ... requires first of all that the impugned measure should have some basis in domestic law; however, it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must be able to foresee the consequences of his or her actions, and that it should be sufficiently precise.”<sup>44</sup>

#### ***Restrictions must be based in domestic law and provide adequate safeguards against arbitrary application and abuse***

26. “Domestic law” is not strictly limited to published legislation or judicial opinions. “[T]he concept of ‘law’ ... includes everything that goes to make up the written law, including enactments of lower rank than statutes and the court decisions interpreting them.”<sup>45</sup> For a norm to be characterized as “law,” it “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.”<sup>46</sup> Restrictions may not be enshrined strictly through traditional, religious, or other customary law.<sup>47</sup>
27. “Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention.”<sup>48</sup> As this Court has held, the

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<sup>41</sup> ECHR, art. 10.

<sup>42</sup> *Sunday Times v. United Kingdom (No. 1)*, 26 Apr. 1979, no. 6538/74, § 49.

<sup>43</sup> See *Anthony Fernando v. Sri Lanka*, Communication No. 1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003, § 7 (2005) (citing *Sunday Times v. United Kingdom*, 26 Apr. 1979, no. 6538/74); see also Universal Declaration, *supra* note 37, art. 12 (protecting from arbitrary laws and punishment).

<sup>44</sup> *Pasko v. Russia*, 22 Oct. 2009, no. 69519/01, § 67.

<sup>45</sup> *Id.* § 73.

<sup>46</sup> General Comment 34, *supra* note 38, ¶ 25.

<sup>47</sup> *Id.* ¶ 24.

<sup>48</sup> *Glas Nadezhda Eood and Elenkov v. Bulgaria*, 11 Oct. 2007, no. 14134/02, § 46.

“legal discretion granted to the executive” must not be “expressed in terms of an unfettered power.”<sup>49</sup> Even if the wording and interpretation of a restriction are sufficiently accessible and precise, the restriction may still fail the “prescribed by law” requirement if a government applies the restriction in an arbitrary manner.<sup>50</sup>

28. Moreover, for a restriction to be “prescribed by law,” domestic law must also provide for “adequate and effective safeguards against abuse, which may in certain cases include procedures for effective scrutiny by the courts.”<sup>51</sup> For example, in *Ross v. Canada*, the UN Human Rights Committee concluded that a school board’s decision to discipline a teacher for his anti-Semitic views as an author (and the Supreme Court of Canada’s affirmation of that decision) was “provided by law” under Article 19 of the ICCPR because, *inter alia*, the school board’s decision was scrutinized by the Supreme Court in all respects, the author was heard in all proceedings, and the author had an opportunity to appeal the decisions against him.<sup>52</sup>
29. In contrast, the Government has shown a blatant disregard for judicial oversight and the rule of law in its suppression of journalists. For example, in the case of *Altan and Others*, which involves some of the applicants here, international monitors attended the trial hearings and concluded that the “prosecutions have the appearance and character of a ‘show trial’ intended to suppress freedom of expression in Turkey and to remove essential journalistic safeguards.”<sup>53</sup> The international monitors noted that, *inter alia*, the criminal charges in the indictments were incredibly vague and the evidence presented at the hearing in support of the criminal charges against the defendants was sparse.<sup>54</sup> Indeed, the Government’s case appeared largely to rest on general allegations concerning the attempted coup, with very little evidence linking the individual defendants to that event.<sup>55</sup> In another example, the Government suspended three judges of the Istanbul High Criminal Court and the prosecutor after the court ruled that the majority of the defendants in that case, who are mostly journalists, should be released from jail.<sup>56</sup> The replacement judges re-arrested the defendants before they were released.
30. The Special Rapporteur is very concerned about Turkey’s arbitrary employment of the anti-terrorism legislation and state-of-emergency decrees to silence critical voices and limit freedom of speech. Turkey’s anti-terrorism legislation and state-of-emergency decrees have granted broad discretion to the executive branch, which holds unbridled prosecutorial authority with little to no judicial oversight. The post-attempted coup environment in Turkey is especially concerning to the Special Rapporteur, as the Government appears to have used the attempted coup as an opportunity to purge Turkish society of all dissenting voices.

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<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g., id.* §§ 49-53; *see also* Siracusa Principles, *supra* note 37, ¶ 16 (“Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.”).

<sup>51</sup> *Glas Nadezhda Food*, *supra* note 49, § 46; *see also* Siracusa Principles, *supra* note 37, ¶ 18 (“Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.”).

<sup>52</sup> *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997, §§ 11.3, 11.4 (2000).

<sup>53</sup> <http://www.barhumanrights.org.uk/wp-content/uploads/2017/09/Turkey-Report-June-2017.pdf>, ¶ 94.

<sup>54</sup> *Id.* ¶¶ 68-78.

<sup>55</sup> *Id.*

<sup>56</sup> <https://expressioninterrupted.com/journalists-appear-before-court-for-second-hearing-in-terrorism-case/>.

***Restrictions must be precise and foreseeable***<sup>57</sup>

31. This Court has “consistently adhered” to the position that to constitute a “law” under Article 10(2) of the ECHR, a restriction must be “formulated with sufficient precision to enable the person concerned to regulate his or her conduct.”<sup>58</sup> The degree of precision required depends on “the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed.”<sup>59</sup> Some discretion is permitted, so long as “the scope of the discretion and manner of its exercise are indicated with sufficient clarity to give adequate protection against arbitrariness.”<sup>60</sup> For example, a broad restriction that confers a wide measure of discretion may nonetheless be sufficiently precise if the exercise of that restriction is subject to judicial review.<sup>61</sup>
32. However, judicial review resulting in an unforeseeable interpretation of a restriction does not, by itself, make a restriction sufficiently precise. Even if a restriction is grounded in law and provides “a clear indication of the circumstances when such restraints are permissible,” a court’s interpretation of that restriction may still violate Article 10 if the interpretation is not grounded in the text of the underlying law.<sup>62</sup> Restrictions that are interpreted by domestic adjudicatory entities in an inconsistent manner may also be unforeseeable and therefore in violation of Article 10.<sup>63</sup>
33. Lastly, if a court’s interpretation of a law is “too wide and vague,” and it “is clear from the number of investigations and prosecutions brought under” that law that a government is restricting “any opinion or idea that is regarded as offensive, shocking or disturbing,” then the law “constitutes a continuing threat to the exercise of the right to freedom of expression” and is not “prescribed by law” under Article 10.<sup>64</sup>
34. As described in Section B above, the Government has used the anti-terrorism legislation and state-of-emergency decrees to persecute perceived critics in the media, government, and academia. Because the laws are extremely vague and have been arbitrarily applied by the Government, they are effectively limitless and it is nearly impossible to foresee what exercises of the right to freedom of expression fall outside their bounds. In one of the most extreme examples, the Government charged *Cumhuriyet* journalist Kadri Gursel with aiding a terrorist organization because, *inter alia*, he contacted individuals who used the secure messaging mobile application “Bylock,” which the Government alleges was used by the attempted coup plotters.<sup>65</sup> Most notably, the Government *did not* allege that Mr. Gursel used the “Bylock” application himself; rather, it alleged only that he contacted other individuals who used the application.<sup>66</sup> Such attenuated charges are nearly impossible for an individual to predict.

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<sup>57</sup> Although restrictions also must be accessible, the Special Rapporteur will not address that element in this submission.

<sup>58</sup> *Perincek v. Switzerland*, 15 Oct. 2015, no. 27510/08, §§ 131-132.

<sup>59</sup> *Dzhavadov v. Russia*, 27 Sept. 2007, no. 30160/04, § 36.

<sup>60</sup> *Id.*

<sup>61</sup> *See, e.g., Olsson v. Sweden (No. 1)*, 24 Mar. 1988, no. 10465/83, §§ 60-62.

<sup>62</sup> *See, e.g., Gaweda v. Poland*, 14 Mar. 2002, no. 26229/95, §§ 40-45; *see also Karademirci and Others v. Turkey*, 25 Jan. 2005, nos. 37096/97 & 37101/97, § 40 (holding that domestic court’s extension of criminal statute by analogy failed to satisfy the foreseeability requirement and therefore violated Article 10).

<sup>63</sup> *See, e.g., Goussev and Marenk v. Finland*, 17 Jan. 2006, no. 35083/97, § 54.

<sup>64</sup> *Altug Taner Akçam v. Turkey*, 25 Oct. 2011, no. 27520/07, § 93.

<sup>65</sup> <https://rsf.org/sites/default/files/jointstatementcumhuriyet.pdf>.

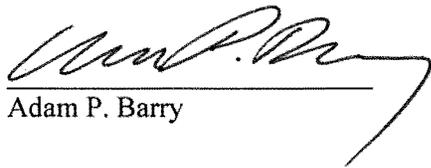
<sup>66</sup> *Id.*

35. Finally, the Special Rapporteur is also concerned that, while the underlying circumstances originally justifying the state of emergency may no longer apply, the Government's claim to derogation from the ICCPR and the ECHR may continue to undermine the enjoyment of the right to freedom of opinion and expression. In this context, the Special Rapporteur is of the view that the standards regarding restrictions in Article 19(3) of the ICCPR and Article 10(2) of the ECHR remain the applicable standards in the cases before this Court. The Special Rapporteur's enclosed report on his mission to Turkey describes his concerns regarding derogation in greater detail.<sup>67</sup>

**E. Conclusion**

36. The cumulative facts suggest that under the pretext of combating terrorism, the Government is widely and arbitrarily suppressing freedom of expression through arrests, prosecutions, and detention. The Court should assess whether Turkey's post-coup crackdown on the applicants at issue in these cases is "prescribed by law" under Article 10 of the ECHR.<sup>68</sup>

Filed for the Special Rapporteur by his representatives in this Intervention.



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<sup>67</sup> Special Rapporteur's Turkey Report, *supra* note 5, at ¶ 29.

<sup>68</sup> In participating in any legal proceedings the Special Rapporteur must note the following: in the performance of his mandate as UN Special Rapporteur, he is accorded certain privileges and immunities as an expert on mission pursuant to Article VI of the Convention on the Privileges and Immunities of the UN adopted by the UN General Assembly on 13 February 1946. This third-party intervention is made by the UN Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the UN.