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**THE 2022-2023 PRICE MEDIA LAW MOOT COURT COMPETITION**

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**Swarna Shikra and Kanthi Besra**

**(Applicants)**

**v.**

**The State of Kurulu**

**(Respondent)**

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**MEMORIAL FOR APPLICANT**

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## TABLE OF CONTENTS

<b>LIST OF ABBREVIATIONS .....</b>	<b>i</b>
<b>LIST OF AUTHORITIES .....</b>	<b>iv</b>
<b>STATEMENT OF RELEVANT FACTS .....</b>	<b>xxix</b>
<b>STATEMENT OF JURISDICTION.....</b>	<b>xxxii</b>
<b>QUESTIONS PRESENTED .....</b>	<b>xxxiii</b>
<b>SUMMARY OF ARGUMENTS .....</b>	<b>xxxiv</b>
<b>ARGUMENTS.....</b>	<b>1</b>
<b>I. KURULU’S FAILURE TO IMPOSE A STATUTORY DUTY ON SOCIAL MEDIA SERVICE PROVIDERS TO REMOVE HARMFUL CONTENT VIOLATED APPLICANTS’ RIGHTS RECOGNIZED BY ARTICLE 17 AND 19, READ WITH ARTICLE 2(3), OF THE ICCPR .....</b>	<b>1</b>
A. The users’ comments under Shikra’s post are clearly unlawful content that violated Applicants’ rights under Article 17 and 19 of the ICCPR.....	2
1. BarnOwl_NUKSU’s comment violated Applicants’ rights under Article 17 and 19 of the ICCPR.....	3
2. Drongo22’s comment violated Shikra’s right under Article 19 of the ICCPR.....	5
3. Heron100 and IUSU_RedKite’s comments violated Applicants’ rights under Article 17 of the ICCPR.....	6
B. Chirp as an active SMSP that moderates comments failed to remove the clearly unlawful content expeditiously .....	8

1. Chirp is an active SMSP moderating comments.....	10
2. Chirp failed to expeditiously remove the clearly unlawful content.	11
C. Kurulu violated Article 2(3) of the ICCPR by failing to impose a statutory duty on SMSPs.....	11
<b>II. KURULU’S ACTION AND INACTION WITH RESPECT TO INVESTIGATIONS INTO THE BREAK-IN AND VANDALIZATION OF APPLICANTS’ HOME VIOLATED THEIR RIGHTS RECOGNIZED BY ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR.....</b>	<b>14</b>
A. The perpetrators violated Applicants’ rights under Article 17 and 19 of the ICCPR.....	14
B. Kurulu violated Article 2(3) of the ICCPR by failing to conduct an effective investigation .....	15
1. The Magistrate’s denial of the warrant unjustifiably hampered the investigation.....	16
2. The CKP failed to conduct a thorough investigation.....	17
3. The Police failed to conduct an adequate investigation.....	18
<b>III. SECTION 24, PARAGRAPH 4 OF THE ACADEMIC CODE OF CONDUCT VIOLATED ARTICLE 19 OF THE ICCPR.....</b>	<b>19</b>
A. The sanctions of ACC S.24(4) are overbroad. ....	20
B. The text of ACC S.24(4) is overbroad. ....	22
C. Section 100 of the ACC lacks procedural safeguards. ....	23

<b>IV. SHIKRA’S SUSPENSION AND THE REMOVAL CONDITION VIOLATED HER RIGHTS RECOGNIZED BY ARTICLE 19 OF THE ICCPR.....</b>	<b>24</b>
A. The suspension and the removal condition are not prescribed by law ...	25
B. The suspension and the removal condition are not necessary .....	26
1. Shikra’s post does not disrupt public order.....	26
(1) Shikra’s post has no potential to incite violence .....	26
(2) Shikra’s post created no real risk of public disorder .....	30
2. Shikra’s post does not violate others’ rights.....	30
C. The suspension and the removal condition are not proportionate .....	31
1. The restrictions are not the least intrusive measures .....	31
2. The general and individual interests are not reasonably balanced...	32
<b>RELIEF SOUGHT.....</b>	<b>34</b>

## **LIST OF ABBREVIATIONS**

<b>AAUP</b>	American Association of University Professors
<b>ACC</b>	Academic Code of Conduct
<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ACmHPR</b>	African Commission on Human and Peoples' Rights
<b>AI</b>	Artificial intelligence
<b>CCPR</b>	Centre for Civil and Political Rights
<b>CCT</b>	Constitutional Court Trust
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CJEU</b>	Court of Justice of the European Union
<b>CKP</b>	Central Koha Police
<b>CLR</b>	Commonwealth Law Reports
<b>CPE</b>	Campaign for Private Education
<b>DRSIWA</b>	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries
<b>ECR</b>	European Court Reports
<b>ECtHR</b>	European Court of Human Rights
<b>EWHC</b>	England and Wales High Court
<b>HCA</b>	High Court of Australia
<b>HRC</b>	United Nations Human Rights Committee
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Convention on Civil and Political Rights

<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILC</b>	International Law Commission
<b>ISP</b>	Internet Service Provider
<b>IUSU</b>	Inter-University Students Union
<b>MCK</b>	Magistrate of Central Koha
<b>MLJ</b>	Malayan Law Journal
<b>NUK</b>	National University of Kurulu
<b>NUKSU</b>	National University of Kurulu Students Union
<b>OAS</b>	Representative on Freedom of the Media, the Organization of American States
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OIOS</b>	Office of Internal Oversight Services
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>RSIWA</b>	Responsibility of States for Internationally Wrongful Acts
<b>SCC</b>	Supreme Court of Canada
<b>SCtI</b>	Supreme Court of India
<b>SCR</b>	Supreme Court Reports
<b>SMSP</b>	Social Media Service Provider
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization

<b>UNGA</b>	United Nations General Assembly
<b>UNHRC</b>	United Nations Human Rights Council
<b>UNTS</b>	United Nations Treaty Series
<b>US</b>	United States
<b>USBL</b>	University Standards Board Law
<b>USCA</b>	United States Code Annotated
<b>ZLR</b>	Zimbabwe Law Report

## LIST OF AUTHORITIES

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<p>International Covenant on Civil and Political Rights                      (adopted 16 December 1966, entered into force 23                      March 1976) 999 UNTS 171</p>	<p>1, 2, 5, 7, 14, 19, 20,                      23, 24, 26, 33</p>
<p>International Covenant on Economic, Social and Cultural                      Rights (adopted 16 December 1966, entered into force                      3 January 1976) 993 UNTS 3</p>	<p>27, 30, 33</p>

<b>UN Documents</b>	<b>Page No.</b>
<p>American Association for the International Commission of                      Jurists ‘Siracusa Principles on the Limitation and                      Derogation Provisions in the International Covenant on                      Civil and Political Rights’ (1 July 1984) UN Doc                      E/CN.4/1984/4</p>	<p>26</p>
<p>CESCR, ‘General Comment No 3: The Nature of States                      parties’ Obligations’ (14 December 1990) UN Doc                      E/1991/23</p>	<p>12</p>
<p>CESCR, ‘General Comment No 13: The Right to Education                      (article 13 of the Covenant)’ (8 December 1999) UN                      Doc E/C.12/1999/10</p>	<p>27, 30, 33</p>



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17 USCA § 512	8

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<i>Jose Vicente and Amado Villafane Chaparro et al v Colombia</i> (Communication No 612/1995) UN Doc CCPR/C/56/D/612/1995	12
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<i>Majuwana Kankanamge v Sri Lanka</i> (Communication No 909/2000) UN Doc CCPR/C/81/D/909/2000	6
<i>Marques v Angola</i> (Communication No 1128/2002) UN Doc CCPR/C/83/D/1128/2002	31
<i>Nydia Erika Bautista v Colombia</i> (Communication No 563/1993) UN Doc CCPR/C/55/D/563/1993	12
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<i>Annen v Germany</i> App no 3690/10 (ECtHR, 26 November 2015)	27

<i>Animal Defenders International v the United Kingdom</i> App no 48876/08 (ECtHR, 22 April 2013)	6, 26, 31, 32
<i>Axel Springer AG v Germany</i> App no 39954/08 (ECtHR, 7 February 2012)	32
<i>Balsytė-Lideikienė v Lithuania</i> App no 72596/01 (ECtHR, 4 November 2008)	22, 31
<i>Beizaras and Levickas v Lithuania</i> App no 41288/15 (ECtHR, 14 January 2020)	3, 7
<i>Couderc and Hachette Filipacchi Associés v France</i> App no 40454/07 (ECtHR, 10 November 2015)	32
<i>Cumhuriyet Vakfı and ors v Turkey</i> App no 28255/07 (ECtHR, 8 October 2013)	23
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<i>Dmitriyevskiy v Russia</i> App no 42168/06 (ECtHR, 3 October 2017)	26, 28
<i>Domján v Hungary</i> App no 5433/17 (ECtHR, 14 November 2017)	13
<i>Ecodefence and ors v Russia</i> App no 9988/13 and 60 others (ECtHR, 14 June 2022)	22

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<i>Engels v Russia</i> App no 35550/18 (ECtHR, 16 January 2020)	25
<i>Frankowicz v Poland</i> App no 53025/99 (ECtHR, 16 December 2008)	24
<i>Gaši and ors v Serbia</i> App no 24738/19 (ECtHR, 6 September 2022)	5
<i>Gaweda v Poland</i> App no 26229/95 (ECtHR, 14 March 2012)	25
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<i>Guja v Moldova</i> App no 14277/04 (ECtHR, 12 February 2008)	6
<i>Gündüz v Turkey</i> App no 35071/97 (ECtHR, 4 December 2003)	23, 28, 29, 31
<i>Haldimann v Switzerland</i> App no 21830/09 (ECtHR, 24 May 2015)	23
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<i>Huseynova v Azerbaijan</i> App no 10653/10 (ECtHR, 13 April 2017)	3, 5, 6, 15
<i>Huvig v France</i> App no 11105/84 (ECtHR, 24 April 1990)	25
<i>Igor Kabanov v Russia</i> App no 8921/05 (ECtHR, 3 February 2011)	23
<i>Incal v Turkey</i> App no 22678/93 (ECtHR, 9 June 1998)	28
<i>Jersild v Denmark</i> App no 15890/89 (ECtHR, 23 September 1994)	29
<i>Kablis v Russia</i> App no 48310/16 and 59663/17 (ECtHR, 30 April 2019)	22, 23, 26, 27
<i>Kafkaris v Cyprus</i> App no 21906/04 (ECtHR, 12 February 2008)	25
<i>Karácsony and ors v Hungary</i> App nos 42461/13 and 44357/13 (ECtHR, 17 May 2016)	23, 31
<i>Kasymakhunov and Saybatalov v Russia</i> App no 26261/05 and 26377/06 (ECtHR, 14 March 2013)	28
<i>Khadija Ismayilova v Azerbaijan</i> App nos 65286/13 and 57270/14 (ECtHR, 10 January 2019)	6, 15, 17
<i>Klein v Slovakia</i> App no 72208/01 (ECtHR, 31 January 2007)	23
<i>Kokkinakis v Greece</i> App no 14307/88 (ECtHR, 25 May 1993)	25



<i>Krone Verlag v Austria</i> App no 27306/07 (ECtHR, 19 June 2012)	21
<i>Kruslin v France</i> App no 11801/85 (ECtHR, 24 April 1990)	25
<i>K.U. v Finland</i> App no 2872/02 (ECtHR, 2 December 2008)	17
<i>Kudeshkina v Russia</i> App no 29492/05 (ECtHR, 26 February 2009)	23
<i>Kudla v Poland</i> App no 30210/96 (ECtHR, 26 October 2000)	13
<i>Laptev v Russia</i> App no 36480/13 (ECtHR, 9 February 2021)	17
<i>Lashmankin v Russia</i> App no 57818/09 (ECtHR, 29 May 2017)	31
<i>Leyla Şahin v Turkey</i> App no 44774/98 (ECtHR 10 November 2005)	30
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<i>Liu v Russia</i> App no 42086/05 (ECtHR, 2 June 2008)	25
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<i>Mazepa and ors v Russia</i> App no 15086/07 (ECtHR, 17 July 2018)	15

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<i>Milanovic v Serbia</i> App no 44614/07 (ECtHR, 14 December 2010)	18
<i>Molla Sali v Greece</i> App no 20452/14 (ECtHR, 19 December 2018)	12
<i>Morice v France</i> App no 29369/10 (ECtHR, 23 April 2015)	23
<i>Mouvement raëlien suisse v Switzerland</i> App no 16354/06 (ECtHR, 13 July 2012)	5, 31
<i>MTE and Index.hu Zrt v Hungary</i> App no 22947/13 (ECtHR, 2 February 2016)	9, 10
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<i>Nuri Kurt v Turkey</i> App no 37038/97 (ECtHR, 29 November 2005)	14

<i>Ottan v France</i> App no 41841/12 (ECtHR, 19 April 2018)	24
<i>Otto-Preminger-Institut v Austria</i> App no 13470/87 (ECtHR, 20 September 1994)	23
<i>Özgür Gündem v Turkey</i> App no 23144/93 (ECtHR, 16 March 2000)	27, 28
<i>Öztürk v Turkey</i> App no 22479/93 (ECtHR, 28 September 1999)	8, 9
<i>Palomo Sanchez and ors v Spain</i> App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011)	5
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<i>Perinçek v Switzerland</i> App no 27510/08 (ECtHR, 17 December 2013)	5, 23, 26, 28, 31, 32
<i>Rotaru v Romania</i> App no 28341/95 (ECtHR, 4 May 2000)	25
<i>Savva Terentyev v Russia</i> App no 10692/09 (ECtHR, 28 August 2018)	23, 26, 27
<i>Sergey Bédat v Switzerland</i> App no 56925/08 (ECtHR, 29 March 2016)	23, 29
<i>Sorguç v Turkey</i> App no 17089/03 (ECtHR, 23 June 2009)	33
<i>Standard Verlagsgesellschaft mbH v Austria</i> App no 39378/15 (ECtHR, 7 December 2021)	17

<i>Steel and Morris v the United Kingdom</i> App no 68416/01 (ECtHR, 15 February 2005)	23
<i>Stoll v Switzerland</i> App no 69698/01 (ECtHR, 10 December 2007)	5
<i>Sürek v Turkey</i> App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999)	8, 9
<i>Sürek v Turkey (no. 1)</i> App no 26682/95 (ECtHR, 8 July 1999)	28, 29
<i>Sürmeli v Germany</i> App no 75529/01 (ECtHR, 8 June 2006)	13
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<i>The Sunday Times v United Kingdom</i> App no 6538/74 (ECtHR, 26 April 1979)	25
<i>Timciuc v Romania</i> App no 28999/03 (ECtHR, 12 October 2010)	32
<i>Tolstoy Miloslavsky v UK</i> App no 18139/91 (ECtHR, 13 July 1995)	20, 25
<i>Uj v Hungary</i> App no 23954/10 (ECtHR, 19 July 2011)	7
<i>Velichkin v Belarus</i> App no 1022/01 (ECtHR, 3 November 2005)	20, 22, 24
<i>Virabyan v Armenia</i> App no 40094/05 (ECtHR, 2 October 2012)	18

<i>Von Hannover v Germany (no. 2)</i> App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012)	31
<i>Vučković and ors v Serbia</i> App nos 17153/11, 17157/11 and 17160/11 (ECtHR, 28 August 2012)	13
<i>Wille v Liechtenstein</i> App no 28396/95 (ECtHR, 28 October 1999)	13
<i>Wingrove v The United Kingdom</i> App no 17419/90 (ECtHR, 25 November 1996)	25
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<i>Yasa v Turkey</i> App no 22495/93 (ECtHR, 2 September 1998)	15

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<i>Rodriguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia</i> , Series C No. 287 (IACtHR, 14 November 2014)	15

<b>Cases from ACmHPR</b>	<b>Page No.</b>
--------------------------	-----------------

<i>Amnesty International and ors v Sudan</i> Comm no 48/90, 50/91, 52/91, 89/93 (ACmHPR, 1999)	31
---	----

<b>Cases from National Courts</b>	<b>Page No.</b>
<i>Australian New Channel Pty Ltd v Voller</i> , 2021 HCA 27	9
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<i>Google Inc. v Equustek Solutions Inc.</i> , 2017 SCC 34	9
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<i>Norwood v DPP</i> (2003) EWHC 1564 (Admin)	29
<i>Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd &amp; Anor</i> [2021] 2 MLJ 652	9
<i>Qwelane v South African Human Rights Commission</i> (22 September 2020) CCT 13/20	3
<i>Re Munhumeso</i> [1994] (1) ZLR 49 (S)	26
<i>S Rangarajan v P Jagjivan Ram</i> (SCtI, 30 March 1989) (2) SCR 204	28
<i>Terry v Ohio</i> 392 US 1 (1968)	16

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ARTICLE 19, <i>Prohibiting incitement to discrimination, hostility or violence</i> , (ARTICLE 19, 2012)	28

MacKinnon and others, <i>Fostering Freedom Online: The Role of Internet Intermediaries</i> (UNESCO 2015)	8
Ministry of Justice, <i>The Human Rights Act 1998: the Definition of “Public Authority”: Government Response to the Joint Committee on Human Rights’ Ninth Report of Session 2006-07</i> (Cm 7726, 2009)	19
Sarah Joseph and Melissa Castan, <i>The International Covenant on Civil and Political Rights Cases, Materials, and Commentary</i> (3rd edn, OUP 2013)	1

<b>Journal Articles</b>	<b>Page No.</b>
AAUP, ‘Report of the Joint Subcommittee on Faculty Responsibility’ [1971] 57 AAUP Bulletin 524	21, 32
ARTICLE 19, ‘Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ [1998] 20 HRQ 1	25
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Paul R. David, Richard P. Adams and Edwin O. Stene,  ‘Academic Freedom and Tenure: College of the Ozarks’  [1963] 49 AAUP Bulletin 352	32

<b>Online Sources</b>	<b>Page No.</b>
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<p>Toby Mendel, ‘Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression’ (<i>Centre for Law and Democracy</i>, March 2010) &lt;<a href="http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf">www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf</a>&gt; accessed 21 November 2022</p>	<p>31, 32</p>
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<p>UNHRC, ‘UN Special Rapporteur on Minority Issues: Draft  “Effective Guidelines on Hate Speech, Social Media  and Minorities”  &lt;<a href="https://www.ohchr.org/sites/default/files/2022-06/Draft-Effective-Guidelines-Hate-Speech-SR-Minorities.pdf">https://www.ohchr.org/sites/default/files/2022-06/Draft-Effective-Guidelines-Hate-Speech-SR-Minorities.pdf</a>&gt; accessed 21 November 2022</p>	<p>3, 4</p>
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## STATEMENT OF RELEVANT FACTS

### **Socio-Political Background**

1. Kurulu is a country of approximately 50 million people. Article 14 of its Constitution recognizes every citizen's right to tertiary education. Section 4 of the University Standards Board Law of 1995 ("USBL") requires all universities be state-owned. Due to the scarcity of resources, less than 20% students completing secondary education are admitted to state universities.

### **Shikra, Besra and the CPE**

2. Professor Swarna Shikra is the head of the Campaign for Private Education ("CPE"), an organization comprising of approximately 30,000 civil society activists and academics advocating the establishment of private universities. She is also a reputed educationist and tenured professor at the National University of Kurulu ("NUK"). Shikra and the CPE argued that Kurulu's monopoly of universities denies young people the right to tertiary education.
3. Kanthi Besra, Shikra's partner, runs Besra Limited, which owns and operates twelve high schools in Kurulu. The fact that these twelve high schools have better performance than state-owned high schools suggests that private universities are likely to surpass state universities in the future.

### **Chirp**

4. Chirp is Kurulu's most popular social media platform where users express opinions by images and videos. Over 46% of the population use the Chirp. Most users post anonymously. Chirp has an interactive interface and generates revenue by

displaying advertisements. Chirp discretionarily determines what content it hosts and refuses to host according to its Community Guidelines that binds to all users.

5. To date, Chirp developed a two-tier moderation mechanism, specifically, Artificial Intelligence (AI) mechanism detecting all content on Chirp, as well as 500 human content moderators reviewing the comments when a complaint is made.

### **Shikra's post and aftermath**

6. At 9.00am on 9 July, Shikra posted on Chirp an image, calling all academics and students to help change the university education system by stopping to teach or attend classes and occupying all university premises.
7. Over a thousand users commented below Shikra's post, while a vast majority of them disagreed with her. After 5.00pm of 9 July 2022, hostile and antagonistic comments flooded toward Shikra.
8. Chirp's moderation system failed to remove four hostile comments against Applicants. Among these four comments, BarnOwl\_NUKSU's comment "*What a pair of birdbrains. Trash their nest!*" was liked by several hundred other users.
9. At 3am of 10 July, Applicants' home was broken into and vandalized with the words 'BIRDBRAINS!' left on the wall. At 4.00pm the same day, Besra filed complaints against both the perpetrators and Chirp at the Central Koha Police Station.

### **Investigation**

10. In the course of investigation, the Police summoned Chirp for assistance in identifying the perpetrators, requiring personal data stored by the platform. Chirp refused to provide the data unless a court warrant was obtained. This procedure was

terminated by the Magistrate of Central Koha's denial of warrant. The police thereafter adopted other investigative methods but made no progress.

### **Complaints and Inquiries**

11. On 17 July, the Vice Chancellor's Office ("VCO") of NUK appointed a panel of three senior academics to inquire about Shikra's post on 9 July. The VCO accepted the panel's determination concerning the nature of Shikra's post, therefore recommended that Shikra be suspended for a period of one week, and that the lifting of her suspension be conditional on a written undertaking that she refrains from issuing similar statements in the future.

### **The Constitutional Court decision**

12. Shikra and Besra jointly complained before the Constitutional Court of Kurulu, asserting that Kurulu violated their rights under Article 7, 9 and 20 of the Constitution by failing to provide effective remedy against the violation of their rights by private actors and by Chirp Enterprises. The Constitutional Court, however, found no violation of their rights.
13. Shikra filed complaints against NUK in a separate petition, asserting that NUK, as a state-owned entity, violated her rights under Articles 9 and 14(3) of the Constitution by suspending her and imposing conditions on the removal of her suspension. The Constitutional Court dismissed the petition.

## STATEMENT OF JURISDICTION

- A. Shikra, Besra, and the State of Kurulu, which is a party to the International Covenant on Civil and Political Rights (“ICCPR”), submitted this dispute to the Universal Court of Human Rights (“this Court”). The dispute relates to rights under Articles 2(3), Article 17 and Article 19 of the ICCPR. All domestic remedies have been exhausted.
- B. On the basis of the foregoing, this Court is requested to issue a judgment in accordance with the rules and principles of international law, including any applicable declarations and treaties.

## QUESTIONS PRESENTED

- A. Whether the State of Kurulu's failure to impose a statutory duty on social media service providers to remove content that is likely to cause imminent harm of a serious nature violated their rights recognized by Article 17 and Article 19, read with Article 2(3), of the ICCPR.
- B. Whether the State of Kurulu's action and inaction with respect to investigations into the break-in and vandalization of Shikra and Besra's home, violated their rights recognized by Article 17 and Article 19, read with Article 2(3), of the ICCPR.
- C. Whether Section 24, Paragraph 4 of the Academic Code of Conduct itself as a restriction violated Article 19 of the ICCPR.
- D. Whether the State of Kurulu's action with respect to the suspension of Shikra and the imposing of conditions on the removal of her suspension violated her rights recognized by Article 19 of the ICCPR.

## SUMMARY OF ARGUMENTS

**The State of Kurulu’s failure to impose a statutory duty on social media service providers to remove content that is likely to cause imminent harm of a serious nature violated Shikra and Besra’s rights recognized by Article 17 and Article 19, read with Article 2(3), of the ICCPR.**

- A. The right to effective remedy is a fundamental right and a guarantee for other rights of the ICCPR. Kurulu, in failing to make an effective remedy available to Applicants whose rights were infringed by Chirp, violated their rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR.
- B. Four users’ clearly unlawful comments hosted by Chirp violated Applicants’ rights under Article 17 and Article 19 of the ICCPR. Specifically, Drongo22’s provocative comment seeking Shikra’s dismissal in the offline world exerted stifling effects on Shikra’s rights to freedom of expression. Heron100’s and IUSU\_RedKite’s comments gravely impaired Applicants’ psychological integrity therefore violated their rights to reputation. BarnOwl\_NUKSU’s comment is of a serious nature that amounts to incitement to violence, violating Applicants’ rights both under Article 17 and 19 of the ICCPR.
- C. Chirp is an active social media service provider (“SMSP”) that assumes duties and responsibilities of an author under Article 19 of the ICCPR. First, Chirp exercises substantial control over all the posts and comments on the platform. Second, Chirp invites users to comment by providing them with personalized content. Third, Chirp generates its profits by displaying advertisements to users.

D. Kurulu violated its obligation under Article 2(3) of the ICCPR by failing to regulate SMSPs through legislation. The existing judicial remedies under Kurulu's Constitution and the precedent do not amount to effective remedies to Applicants.

**The State of Kurulu's action and inaction with respect to investigations into the break-in and vandalization of Shikra and Besra's home violated their rights recognized by Article 17 and Article 19, read with Article 2(3), of the ICCPR.**

E. Kurulu's failure to conduct an effective investigation into the crime amounted to the violations of Applicants' rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR.

F. Kurulu unjustifiably hampered the investigation. Sufficient evidence suggests BarnOwl\_NUKSU's information is a crucial lead to the case. Given that the protection of BarnOwl\_NUKSU's anonymity must yield to the need to trace the perpetrators, the Magistrate of Central Koha's denial of the warrant unjustifiably hampered the investigation.

G. Kurulu did not take adequate and thorough investigative steps. First, the Central Koha Police has neither complied with the general investigative procedures nor taken the techniques specific to the case. Second, while evidence seriously indicated that the crime may be motivated by political bias, the Central Koha Police did not take step that is capable of unmasking the potential motivation.

**Section 24, Paragraph 4 of the Academic Code of Conduct itself as a restriction violated Article 19 of the ICCPR**

- H. Article 19 of the ICCPR obliges Kurulu to respect and protect its citizens' right to freedom of opinion and expression. The National University of Kurulu ("NUK") is a state-owned university. The disciplinary actions on professors based on Section 24, Paragraph 4 of the ACC ("ACC S.24(4)") are attributable to the State. The Section can be a disproportionate restriction on an individual's freedom of expression.
- I. The sanctions of ACC S.24(4) are overbroad. ACC S.24(4) only indicates that violations would lead to disciplinary actions, but fails to give an exhaustive list of actions with specified time period. It would result in sanctions disproportionate to the legitimate objectives.
- J. The text of ACC S.24(4) is overbroad without clear definition for interpretation. The Section includes multiple conditions where an individual would be subjected to disciplinary actions. Several of them have no clear definition. Without clear text for guidance, even a trivial deviation may lead to harsh sanctions, which is disproportionate to the legitimate aims of protection.
- K. The procedural rule for disciplinary actions, Section 100 of the ACC, provides no safeguard against abuse of discretion. The rule gives the Vice Chancellor's Office too much discretion when selecting a "**suitable** panel of academic **peers**", possibly leading to disproportionate results.

**The State of Kurulu's action with respect to the suspension of Shikra and the imposing of conditions on the removal of her suspension violated her rights recognized by Article 19 of the ICCPR.**



- L. Shikra’s suspension and the imposing of conditions on the removal of her suspension are attributable to the state. The sanctions constitute significant restrictions on Shikra’s freedom of expression that cannot be justified under Article 19(3) of the ICCPR.
- M. The restrictions are not prescribed by law. ACC S.24(4) is not sufficiently precise because the prohibited “gross misconduct” and the permitted “disciplinary actions” are overbroad without any procedural safeguards.
- N. The restrictions are not necessary. Shikra’s post does not disrupt public order because it has no potential to incite violence and did not create any real risk of public disorder. Her post does not violate others’ rights because there is no possible harm on others’ right to life, right to health, or right to education.
- O. The restrictions are not proportionate. The suspension and the removal conditions are not the least intrusive measures for NUK to achieve its desired aim. The general and individual interests are not reasonably balanced in the case.

## ARGUMENTS

### I. KURULU'S FAILURE TO IMPOSE A STATUTORY DUTY ON SOCIAL MEDIA SERVICE PROVIDERS TO REMOVE HARMFUL CONTENT VIOLATED APPLICANTS' RIGHTS RECOGNIZED BY ARTICLE 17 AND 19, READ WITH ARTICLE 2(3), OF THE ICCPR

1. The right to effective remedy is a fundamental right and a supporting guarantee<sup>1</sup> for other rights of the ICCPR. Under Article 2(3) of the ICCPR, States have an obligation to provide effective remedy<sup>2</sup> to victims whose rights have been violated, even by private person or entities.<sup>3</sup> A failure to ensure Covenant rights as required by Article 2(3) would give rise to States' violations of those rights.<sup>4</sup>
2. In this digital era, Internet Service Providers ("ISPs"), especially social media service providers ("SMSPs"), enable global citizens to impart their opinions freely.<sup>5</sup> However, the instantaneous and anonymous features of SMSPs are often abused, thus intensifying human rights violations online.<sup>6</sup> Illegal content,

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<sup>1</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary* (3rd edn, OUP 2013) 867.

<sup>2</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR') Article 2(3).

<sup>3</sup> Human Right Committee ('HRC'), 'General Comment No 31 Art 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 ('General Comment 31') [8].

<sup>4</sup> *ibid.*

<sup>5</sup> United Nations Human Right Council ('UNHRC'), 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (16 May 2011) UN Doc A/HRC/17/27 [67]; ARTICLE 19, 'Internet Intermediaries: Dilemma of liability' <[https://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf)> accessed 21 November 2022 3.

<sup>6</sup> UNHRC, 'Report of the Special Rapporteur on minority issues, Fernand de Varennes' (3 March 2021) UN Doc A/HRC/46/57 [21]; UNHRC, 'Report: Online hate increasing against minorities, says expert' (*OHCHR*, 23 March 2021) <<https://www.ohchr.org/en/stories/2021/03/report-online-hate-increasing-against-minorities-says-expert>> accessed 21 November 2022; UNHRC, 'The impact of online violence

including but not limited to hate speech, incitement to violence, and defamation,<sup>7</sup> widely and instantaneously disseminates on these publicly accessible platforms.

3. The UN Human Rights Council has emphasized that same rights people have offline must also be protected online.<sup>8</sup> Among all the Covenant rights, the rights to privacy and freedom of expression, which are particularly susceptible in the virtual space created by SMSPs,<sup>9</sup> have raised serious global concerns. As a party to the ICCPR, Kurulu is obliged to provide its citizens whose Covenant rights have been violated online with effective remedy.<sup>10</sup>
4. Here, (A) the users' comments under Shikra's post are clearly unlawful content that violated Applicants' rights under Article 17 and 19 of the ICCPR; (B) Chirp as an active SMSP that moderates comments failed to remove the clearly unlawful content expeditiously; and (C) Kurulu violated Article 2(3) of the ICCPR by failing to impose a statutory duty on SMSPs.

**A. The users' comments under Shikra's post are clearly unlawful content that violated Applicants' rights under Article 17 and 19 of the ICCPR**

5. Here, four users' comments under Shikra's post violated Applicants' rights under

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on women human rights defenders and women's organisations' (*OHCHR*, 21 June 2018) <<https://www.ohchr.org/en/statements/2018/06/impact-online-violence-women-human-rights-defenders-and-womens-organisations>> accessed 21 November 2022.

<sup>7</sup> *ibid.*

<sup>8</sup> UNHRC, 'The promotion, protection and enjoyment of human rights on the internet Resolution' (27 June 2016) UN Doc A/HRC/32/L.20 3.

<sup>9</sup> UNHRC, 'Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci' (6 September 2017) UN Doc A/HRC/34/60 [22].

<sup>10</sup> ICCPR (n 2) Article 2(3).

Article 17 and 19 of the ICCPR. In particular, BarnOwl\_NUKSU's comment "*What a pair of birdbrains. Trash their nest!*"<sup>11</sup> constitutes an incitement to violence of a serious nature.

**1. BarnOwl\_NUKSU's comment violated Applicants' rights under Article 17 and 19 of the ICCPR**

6. A speech that incites violence violates both Article 17<sup>12</sup> and 19<sup>13</sup> of the ICCPR. The Rabat Plan,<sup>14</sup> widely adopted by courts and commentators,<sup>15</sup> provides a six-part test to assess whether a speech amounts to incitement.<sup>16</sup>
7. Not all six parts of the test need to be satisfied, especially the "speaker" test in the context of online speech.<sup>17</sup> Here, given its (a) content, (b) intent, (c) extent of the speech, and (d) context, BarnOwl\_NUKSU's comment incited violence of a serious nature.

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<sup>11</sup> Fact Pattern [45].

<sup>12</sup> *Beizaras and Levickas v Lithuania* App no 41288/15 (ECtHR, 14 January 2020) ('*Beizaras*') [111], [129].

<sup>13</sup> *Huseynova v Azerbaijan* App no 10653/10 (ECtHR, 13 April 2017) ('*Huseynova*') [115]; *Mariya Alekhina and ors v Russia* App no 38004/12 (ECtHR, 17 July 2018) ('*Mariya Alekhina and ors*') [188]; *Qwelane v South African Human Rights Commission* (22 September 2020) CCT 13/20 [112]; James Weinstein, 'Hate Speech Bans, Democracy, and Political Legitimacy' [2017] 32 Const. Comment. 527, 527.

<sup>14</sup> UNHRC, 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (5 October 2012) UN Doc A/HRC/22/17/Add.4 ('Rabat Plan').

<sup>15</sup> *Mariya Alekhina and ors* (n 13) [110]; UNHRC, 'UN Special Rapporteur on Minority Issues: Draft "Effective Guidelines on Hate Speech, Social Media and Minorities"' <<https://www.ohchr.org/sites/default/files/2022-06/Draft-Effective-Guidelines-Hate-Speech-SR-Minorities.pdf>> accessed 21 November 2022 ('Draft "Effective Guidelines on Hate Speech, Social Media and Minorities"').

<sup>16</sup> Rabat Plan (n 14) [11]-[29].

<sup>17</sup> Draft 'Effective Guidelines on Hate Speech, Social Media and Minorities' (n 15).

**a. Content**

8. Following the stigmatizing rhetorical device “*birdbrains*”,<sup>18</sup> the expression “*Trash their nests!*”<sup>19</sup> directly refers to an intended physical attack and destruction of Applicants’ home.

**b. Intent**

9. “Intent” is expounded as the “likelihood” with “some causality and risk.”<sup>20</sup> First, BarnOwl\_NUKSU’s comment entails high likelihood of violence. The comment was posted at the point when numerous hostile and antagonistic comments flooded towards Shikra,<sup>21</sup> which exacerbated the tension. Furthermore, soon after its posting, several hundreds of users liked BarnOwl\_NUKSU’s comment.<sup>22</sup>
10. Second, the provocative verb “*Trash*”<sup>23</sup> indicates BarnOwl\_NUKSU’s explicit intent of calling for violence. Posting at the peak of hostility against Shikra, BarnOwl\_NUKSU could reasonably foresee potential violence against Shikra.

**c. Extent of the speech**

11. BarnOwl\_NUKSU’s comment has reached maximum extent of audience on Chirp. BarnOwl\_NUKSU made the comments under Shikra’s post in “Public Mode”,<sup>24</sup>

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<sup>18</sup> Fact Pattern [45].

<sup>19</sup> *ibid.*

<sup>20</sup> Draft ‘Effective Guidelines on Hate Speech, Social Media and Minorities’ (n 15) [11].

<sup>21</sup> Fact Pattern [40].

<sup>22</sup> Fact Pattern [45].

<sup>23</sup> *ibid.*

<sup>24</sup> Fact Pattern [38].

which allows all users on Chirp to see both Shikra's post and any comments below.

#### **d. Context**

12. In Kurulu's social and political context, BarnOwl\_NUKSU's comment fueled existing hostility towards Shikra. The privatization of university is a controversial topic in Kurulu<sup>25</sup> and supported by minor section of the society.<sup>26</sup> Against such social background, BarnOwl\_NUKSU's comment further divides the public and intensifies the confrontation among different sections of the society.
13. Therefore, BarnOwl\_NUKSU's comment amounts to an incitement to violence of a serious nature, and violated Applicants' rights under Article 17 and 19 of the ICCPR.

#### **2. Drongo22's comment violated Shikra's right under Article 19 of the ICCPR**

14. Under Article 19 of the ICCPR, freedom of expression shall include imparting information and ideas of all kinds, without interference by public authority as well as private persons or entities.<sup>27</sup> Free expression of all kinds, particularly the commentary on public affairs,<sup>28</sup> forms the foundation of every free and democratic society.<sup>29</sup>

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<sup>25</sup> Fact Pattern [12].

<sup>26</sup> Fact Pattern [6].

<sup>27</sup> ICCPR (n 2) Article 19; HRC, 'General Comment No 34 Art 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 (General Comment 34) [7]; *Palomo Sanchez and ors v Spain* App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011) [60]; *Huseynova* (n 12) [105]; *Gaši and ors v Serbia* App no 24738/19 (ECtHR, 6 September 2022) [80].

<sup>28</sup> *Perinçek v Switzerland* App no 27510/08 (ECtHR, 17 December 2013) ('*Perinçek*') [48].

<sup>29</sup> *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) [101]; *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) ('*Mouvement raëlien suisse*') [47]; *Animal*

15. The freedom of expression could only be fully exercised without fear.<sup>30</sup> Fear of dismissal of position<sup>31</sup> and physical attack<sup>32</sup> severely stifles individuals' exercise of freedom of expression.
16. Drongo22's comment interferes with Shikra's enjoyment of her right to freedom of expression. First, Drongo22 expressed hostility against Shikra by calling for her dismissal from National University of Kurulu ("NUK").<sup>33</sup> The comment targets Shikra's profession for her political opinion, interfering with her freedom to express her advocacy for privatization of schools. Second, the radical expression "*Clip those wings*"<sup>34</sup> online aims to provoke Shikra's dismissal in the offline world. The fact that Shikra has never posted anything on Chirp to date further evidences her fear of the career being ruined and the stifling effects of Drongo22's speech.
17. Therefore, Drongo22's comment violated Shikra's rights under Article 19 of the ICCPR.

**3. Heron100 and IUSU\_RedKite's comments violated Applicants' rights under Article 17 of the ICCPR**

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*Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013) ('*Animal Defenders International*') [100].

<sup>30</sup> *Majuwana Kankanamge v Sri Lanka* (Communication No 909/2000) UN Doc CCPR/C/81/D/909/2000 [9.4]; *Khadija Ismayilova v Azerbaijan* App nos 65286/13 and 57270/14 (ECtHR, 10 January 2019) ('*Khadija*') [158].

<sup>31</sup> *Guja v Moldova* App no 14277/04 (ECtHR, 12 February 2008) [72].

<sup>32</sup> *Huseynova* (n 13) [115].

<sup>33</sup> Fact Pattern [41].

<sup>34</sup> *ibid.*

18. Article 17 of the ICCPR safeguards a person’s reputation.<sup>35</sup> Reputation encompasses the physical and psychological integrity of a person.<sup>36</sup> By damaging a person’s social status,<sup>37</sup> a speech infringing the person’s moral integrity<sup>38</sup> at a serious level<sup>39</sup> violates his or her rights to reputation under Article 17 of the ICCPR.
19. First, Heron100 infringes Shikra’s moral integrity at a serious level by posting derogatory comments. “Honesty, true fairness, and responsibility” are core values a university academic expected to possess.<sup>40</sup> Degrading the honesty of Shikra, a university professor,<sup>41</sup> is detrimental to her social status. By stigmatizing Shikra as “*a fraud*”<sup>42</sup> and using provocative exclamation point twice, Heron100 posted a comment constituting not merely a vulgar expression but a serious insult.
20. Second, IUSU\_RedKite’s comment degraded Besra’s personality with the stigmatizing expression “*evil neoliberal*.”<sup>43</sup> Since the term “*neoliberal*” has been widely recognized as a political swearword,<sup>44</sup> the comment “*evil neoliberal*”

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<sup>35</sup> ICCPR (no 2) Article 17.

<sup>36</sup> *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985) [22]; *Nicolae Virgiliu Tănase v Romania* App no 41720/13 (ECtHR, 25 June 2019) [126].

<sup>37</sup> *Uj v Hungary* App no 23954/10 (ECtHR, 19 July 2011) [22].

<sup>38</sup> *Beizaras* (n 11) [109].

<sup>39</sup> *Tamiz v United Kingdom* App no 3877/14 (ECtHR, 19 September 2017) (‘*Tamiz*’) [80]-[81].

<sup>40</sup> International Center for Academic Integrity, ‘The Fundamental Values of Academic Integrity’ (*academic integrity*) <[https://academicintegrity.org/images/pdfs/20019\\_ICAI-Fundamental-Values\\_R12.pdf](https://academicintegrity.org/images/pdfs/20019_ICAI-Fundamental-Values_R12.pdf)> accessed 21 November 2022 4.

<sup>41</sup> Fact Pattern [7].

<sup>42</sup> Fact Pattern [41].

<sup>43</sup> Fact Pattern [44].

<sup>44</sup> Jonathan Chait, ‘How “Neoliberalism” Became the Left’s Favorite Insult of Liberals’ (*Intelligencer*, 16 July 2017) <<https://nymag.com/intelligencer/2017/07/how-neoliberalism-became-the-lefts-favorite->



severely discriminated Besra’s political opinion and impaired their psychological integrity.

21. Therefore, Heron100 and IUSU\_RedKite’s comments violated Applicants’ right under Article 17 of the ICCPR.

**B. Chirp as an active SMSP that moderates comments failed to remove the clearly unlawful content expeditiously**

22. In principle, “no one should be held liable for the content that he is not the author.”<sup>45</sup> However, the exception occurs when “they have adopted that content as their own.”<sup>46</sup> In the era of printed media, publishers and editors, who participate fully in the authors’ freedom of expression, share the author’s “duty and responsibility” set out in Article 19(3) of the ICCPR.<sup>47</sup>

23. For SMSPs that merely “give access to, host, transmit and index content, products and services originated by third parties,”<sup>48</sup> limited liability should be imposed.<sup>49</sup>

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insult.html> accessed 21 November 2022; Ed Conway, ‘What is neoliberalism and why is it an insult?’ (*sky news*, 15 May 2018) <<https://news.sky.com/story/sky-views-what-is-neoliberalism-and-why-is-it-an-insult-11373031>> accessed 21 November 2022.

<sup>45</sup> The UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, ‘*Joint Declaration on International Mechanisms for Promoting Freedom of Expression*’ (21 December 2005) <<https://www.osce.org/files/f/documents/5/d/27455.pdf>> accessed 21 November 2022 [2].

<sup>46</sup> *ibid.*

<sup>47</sup> *Sürek v Turkey* App nos 23927/94 and 24277/94 (ECtHR, 8 July 1999) (‘*Sürek*’) [63]; *Öztürk v Turkey* App no 22479/93 (ECtHR, 28 September 1999) [49].

<sup>48</sup> UNHRC, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye’ (11 May 2016) UN Doc A/HRC/32/38 (‘May 2016 Report of UN Special Rapporteur David Kaye’) [36]; MacKinnon and others, *Fostering Freedom Online: The Role of Internet Intermediaries* (UNESCO 2015) 19.

<sup>49</sup> May 2016 Report of UN Special Rapporteur David Kaye (n 49) [43]-[44]; Council Directive 2000/31/Ec of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1; 17 USCA § 512; Council of Europe,

However, for SMSPs that not only host speech but actively participate in author's freedom of expression through controlling what content they host, refuse to host, and prioritize.<sup>50</sup> Accordingly, active SMSPs that enjoy editorial control<sup>51</sup> take on the role of traditional publishers and editors<sup>52</sup> and share the author's duty under Article 19(3) of the ICCPR.<sup>53</sup>

24. Therefore, active SMSPs should be liable for not expeditiously removing the clearly unlawful content even if no user complaint has been made.<sup>54</sup> Such liability upon SMSPs has been accepted in many jurisdictions, including the European Union,<sup>55</sup> Estonia,<sup>56</sup> Australia,<sup>57</sup> Canada,<sup>58</sup> and Malaysia.<sup>59</sup>

25. Here, Chirp should be held liable for users' clearly unlawful content even if no user

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'Recommendation CM/Rec(2011)7 of 21 September 2011 on a new notion of media' (2011) <[<sup>50</sup> Ashutosh Bhagwat, 'Do Platforms Have Editorial Rights?' \[2021\] 1 \*Journal of Free Speech Law\* 97, 97.](https://edoc.coe.int/en/media/8019-recommendation-cmrec20117-on-a-new-notion-of-media.html#:~:text=Recommendation%20CM%2FRec%20%282011%297%20recognises%20the%20important%20changes%20in,must%20take%20these%20and%20future%20developments%20into%20account.> accessed 21 November 2022 ('Recommendation on a new notion of media') Appendix 35; C-291/13 <i>Sotiris Pappasavvas v O Fileleftheros Dimosia Etairia LTD, Takis Kounnafi, Giorgos Sertis</i> [2014].</p></div><div data-bbox=)

<sup>51</sup> Recommendation on a new notion of media (n 49) Appendix 30.

<sup>52</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) ('*Delfi*') [128]; *MTE and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) ('*MTE*') [91].

<sup>53</sup> *ibid.*

<sup>54</sup> *Sürek* (n 47) [63]; *Öztürk* (n 47) [49]; *Delfi* (n 52) [153]; *MTE* (n 52) [91].

<sup>55</sup> *Delfi* (no 52) [153].

<sup>56</sup> *ibid.*

<sup>57</sup> *Australian New Channel Pty Ltd v Voller*, 2021 HCA 27 [183].

<sup>58</sup> *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [61]-[81].

<sup>59</sup> *Peguan Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2021] 2 MLJ 652.

complaint has been made, for it (1) is an active SMSP moderating comments, and (2) failed to take down the clearly unlawful content expeditiously.

### **1. Chirp is an active SMSP moderating comments**

26. A SMSP would be deemed as active if it (a) exercises substantial control over the comments, (b) invites users to comment by offering content, and (c) generates commercial interests.<sup>60</sup>

#### **a. Chirp exercises substantial control over the comments**

27. First, according to Clause 8 of Chirp’s Communities Guidelines that binds all users, Chirp maintains substantial control over content removal. Chirp gets the overwhelming power to decide how, when and which categories of content should be removed.

28. Second, Chirp adopts a two-tier mechanism to moderate all comments. Any comment would be first subjected to the AI moderation.<sup>61</sup> If a complaint is reported, it is second subjected to 500 human content moderators.<sup>62</sup>

29. Therefore, Chirp exerts substantial control over all posts and comments on the platform.

#### **b. Chirp invites users to comment by offering content**

30. Chirp does not simply provide a forum for users. Rather, Chirp offers users personalized content tailored to their preferences by introducing the “Home Feed”

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<sup>60</sup> *Delfi* (n 52) [142]; *MTE* (n 52) [69]; *Tamiz* (n 39) [85].

<sup>61</sup> Fact Pattern [23].

<sup>62</sup> Fact Pattern [26].

function.<sup>63</sup> Furthermore, Chirp implements an interactive user interface,<sup>64</sup> guiding the users to read and share their opinions about their interested topics.

### **c. Chirp generates commercial interests**

31. Multinational SMSPs generate substantial fortune from advertisements.<sup>65</sup> Here, as a multinational company with extensive readership,<sup>66</sup> Chirp profits from displaying advertisements.<sup>67</sup> Moreover, by attracting more users to view the advertisements, Chirp essentially makes revenue from users of the platform.

### **2. Chirp failed to expeditiously remove the clearly unlawful content**

32. An active SMSP is obliged to remove unlawful content that violates users' human rights under the ICCPR.

33. Here, as established in [6]-[21], the comments under Shikra's post violated Applicants' rights under Article 17 and 19 of the ICCPR, but to date Chirp has not removed them.

34. Therefore, Chirp is an active SMSP that failed its obligation to remove unlawful content.

### **C. Kurulu violated Article 2(3) of the ICCPR by failing to impose a statutory**

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<sup>63</sup> Fact Pattern [16].

<sup>64</sup> Fact Pattern [15].

<sup>65</sup> 'Meta Platforms Net Income 2010-2022' (*macrotrends*) <<https://www.macrotrends.net/stocks/charts/META/meta-platforms/net-income>> accessed 21 November 2022; S. Dixon, 'Twitter's net income from 1st quarter 2012 to 2nd quarter 2022' (*statista*, 3 August 2022) <<https://www.statista.com/statistics/299119/twitter-net-income-quarterly/>> accessed 21 November 2022.

<sup>66</sup> Fact Pattern [14].

<sup>67</sup> Clarifications [7]

## duty on SMSPs

35. Article 17 and 19 construed alongside Article 2(3) of the ICCPR impose upon Kurulu positive obligations to provide effective remedy to the citizens whose human rights have been violated.<sup>68</sup> The remedy should be essentially judicial.<sup>69</sup>
36. While States are afforded with discretion in choosing the method to provide remedy, legislation is recognized by the UN<sup>70</sup> and the HRC<sup>71</sup> as the most preferred measure in addressing the issues of harmful speech.
37. When business entities violate human rights, the ICESCR's *travaux préparatoires* recognize the duty to legislate falls upon States to provide victims with access to effective remedies to ensure non-repetition.<sup>72</sup> Furthermore, to justify its lack of legislation, States, rather than Applicants, bear the burden of proof in establishing the availability and effectiveness in existing remedies.<sup>73</sup>

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<sup>68</sup> General Comment 31 (n 3) [16].

<sup>69</sup> Committee on Economic, Social and Cultural Rights ('CESCR'), 'General Comment No 3: The Nature of States parties' Obligations' (14 December 1990) UN Doc E/1991/23 [5]; Committee on the Elimination of Discrimination against Women, 'General Comment No 19 regarding violence against women' (29 January 1992) UN Doc A/47/38 [24]; *F. Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba v Zaire* (Communication No 241/1987) UN Doc CCPR/C/37/D/241/1987 [14]; *Nydia Erika Bautista v Colombia* (Communication No 563/1993) UN Doc CCPR/C/55/D/563/1993 [8.2]; *Jose Vicente and Amado Villafane Chaparro et al v Colombia* (Communication No 612/1995) UN Doc CCPR/C/56/D/612/1995 [8.2].

<sup>70</sup> United Nations General Assembly ('UNGA'), 'Promotion and protection of the right to freedom of opinion and expression' (9 October 2019) UN Doc A/74/486 [57]; UNHRC, 'State Responsibilities to regulate and adjudicate corporate activities under the United Nations' core Human Rights Treaties' (June 2007) Report No. III [103].

<sup>71</sup> HRC, 'Concluding observations on the third periodic report of Bosnia and Herzegovina' (13 April 2017) UN Doc CCPR/C/BIH/CO/3 [21].

<sup>72</sup> CESCR, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24 [41].

<sup>73</sup> *Molla Sali v Greece* App no 20452/14 (ECtHR, 19 December 2018) [89]; *Dalia v France* App no 154/1996/773/974 (ECtHR, 19 February 1998) [38]; *McFarlane v Ireland* App no 31333/06 (ECtHR, 10 September 2010) [107]; *Vučković and ors v Serbia* App nos 17153/11, 17157/11 and 17160/11 (ECtHR,

38. Here, the absence of the statutory duty imposed upon SMSPs renders Applicants no avenue to obtain judicial remedy when their rights under Article 17 and 19 of the ICCPR were violated by Chirp's failure to remove.
39. Kurulu may argue that the judicial remedies provided under Kurulu's Constitution and the precedent (*Battichcha v The State of Kurulu*) are sufficiently effective. However, for a remedy to be effective, it must have both compensatory and preventive functions.<sup>74</sup>
40. First, a remedy is not compensatory if it is obviously futile.<sup>75</sup> Kurulu's Constitution is neither content-specific nor foreseeable to be the applicable law by which Chirp's and other users' rights to freedom of expression can be limited. Therefore, a proposed judicial remedy under Kurulu's Constitution is futile.
41. Second, a single judicial decision is not sufficient to satisfy that there is an effective remedy available in theory and in practice.<sup>76</sup> Here, only one precedent concerning SMSPs' liability exists in Kurulu.<sup>77</sup> Accordingly, a proposed judicial remedy under *Battichcha* is not preventive.
42. Therefore, Kurulu's failure to impose statutory duty upon SMSPs amounts to

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28 August 2012) [77].

<sup>74</sup> General Comment 31 (n 3) [16]-[17]; *Ananyev and Others v Russia* (Communication No 161/1983) UN Doc CCPR/C/31/D/161/1983 [118]; *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000) [159].

<sup>75</sup> *Domján v Hungary* App no 5433/17 (ECtHR, 14 November 2017) [33]; *Mendrei v Hungary* App no 54927/15 (ECtHR, 5 July 2018) [26].

<sup>76</sup> *Sürmeli v Germany* App no 75529/01 (ECtHR, 8 June 2006) [113]; *Wille v Liechtenstein* App no 28396/95 (ECtHR, 28 October 1999) [76]-[78].

<sup>77</sup> Fact Pattern [35].

violations of Article 17 and 19, read with Article 2(3), of the ICCPR.

**II. KURULU'S ACTION AND INACTION WITH RESPECT TO INVESTIGATIONS INTO THE BREAK-IN AND VANDALIZATION OF APPLICANTS' HOME VIOLATED THEIR RIGHTS RECOGNIZED BY ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR**

43. Article 2(3) of the ICCPR obliges States to conduct effective investigation into a crime.<sup>78</sup> Here, (A) the perpetrators violated Applicants' rights under Article 17 and 19 of the ICCPR. However, (B) Kurulu violated Article 2(3) of the ICCPR by failing to conduct an effective investigation.

**A. The perpetrators violated Applicants' rights under Article 17 and 19 of the ICCPR**

44. First, Article 17 of the ICCPR protects every citizen the right from arbitrary and unlawful interference with home.<sup>79</sup> The right to home keeps citizens from outside intrusion.<sup>80</sup>

45. The intrusion and vandalization happened at 3am 10 July<sup>81</sup> constitute an interference of Applicants' rights to home. Such interference has neither legal basis nor legitimate aims to protect.

46. Second, the fear deriving from physical attack gravely restricts the exercise of

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<sup>78</sup> General Comment 31 (n 3) [15]; *Nuri Kurt v Turkey* App no 37038/97 (ECtHR, 29 November 2005) ('Nuri') [118]-[122].

<sup>79</sup> ICCPR (n 2) Article 17(1).

<sup>80</sup> *Coeriel and Aurik v The Netherlands* (Communication No 453/1991) UN Doc CCPR/C/52/D/453/1991 [10.2].

<sup>81</sup> Fact Pattern [49].

freedom of expression under Article 19 of the ICCPR.<sup>82</sup> Here, the actual intrusion and destruction of their home happened within 1 day of Shikra's post.<sup>83</sup> The word "BIRDBRAIN!" left on the wall<sup>84</sup> evidences the crime targeting Shikra's post, intending to break Applicants' wills of expressing their opinions on public affairs. Fearing to be attacked again, Applicants have not posted anything on Chirp to date.

47. Therefore, the perpetrators violated Applicants' rights under Article 17 and 19 of the ICCPR.

**B. Kurulu violated Article 2(3) of the ICCPR by failing to conduct an effective investigation**

48. The obligation to investigate is not of the results, but of the means.<sup>85</sup> An effective investigation must be adequate<sup>86</sup> and thorough.<sup>87</sup> Moreover, the judicial branch's unjustifiable interference of the investigation, such as impeding the gathering of evidence with no reason,<sup>88</sup> amounts to States' violation of Article 2(3) of the ICCPR.<sup>89</sup>

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<sup>82</sup> *Huseynova* (n 13) [115].

<sup>83</sup> Fact Pattern [49].

<sup>84</sup> *ibid.*

<sup>85</sup> *Khadija* (n 30) [118]; *Rodriguez Vera et al. (The Disappeared from the Palace of Justice) v Colombia*, Series C No. 287 (IACtHR, 14 November 2014) [460].

<sup>86</sup> *Yasa v Turkey* App no 22495/93 (ECtHR, 2 September 1998) [107]; *Mazepa and ors v Russia* App no 15086/07 (ECtHR, 17 July 2018) [75].

<sup>87</sup> General Comment 31 (n 3) [15].

<sup>88</sup> *Ernesto Benitez Gamarra v Paraguay* (Communication No 1829/2008) UN Doc CCPR/C/104/D/1829/2008 [7].

<sup>89</sup> *ibid.*



49. Here, Kurulu violated Article 2(3) of the ICCPR by both (1) unjustifiably impeding the investigation and failing to conduct an (2) adequate and (3) thorough investigation.

**1. The Magistrate's denial of the warrant unjustifiably hampered the investigation**

50. By impeding the Central Koha Police ("CKP") to gather crucial evidence from Chirp, the Magistrate of Central Koha ("MCK") unjustifiably hampered the investigation.

51. First, BarnOwl\_NUKSU's information constitutes a lead highly relevant to the case that should be investigated. The words "BIRDBRAINS!" left on the wall<sup>90</sup> mirrored BarnOwl\_NUKSU's incitement. Additionally, BarnOwl\_NUKSU commented at 8.00 pm and the crime happened at 3am the next morning.<sup>91</sup> A passage of mere 7 hours indicates a strong causal link. Therefore, the evidence suggesting an obvious connection between the crime and BarnOwl\_NUKSU is sufficient to meet the reasonable suspicion standard<sup>92</sup> required by the Criminal Procedure Act of Kurulu for a warrant.<sup>93</sup>

52. Second, the MCK's denial could not be justified. While confidentiality is well-recognized as important to communications, the protection of anonymity must

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<sup>90</sup> Fact Pattern [49].

<sup>91</sup> Fact Pattern [45], [49].

<sup>92</sup> *Terry v Ohio* 392 US 1, 392 (1968) [19].

<sup>93</sup> Clarifications [38].

yield to other legitimate imperatives,<sup>94</sup> such as “to trace those responsible for criminal acts.”<sup>95</sup> Since gathering information of BarnOwl\_NUKSU pursues a legitimate imperative to trace the perpetrators of the break-in, the MCK’s decision could not be justified by BarnOwl\_NUKSU’s right to anonymity.

53. Therefore, the MCK’s denial of the warrant amounts to Kurulu’s violation of Article 2(3) of the ICCPR.

## **2. The CKP failed to conduct a thorough investigation**

54. Thoroughness requires States to take all reasonable steps to establish the facts.<sup>96</sup> A comprehensive investigation includes reasonable steps to interview the alleged victims, eyewitnesses<sup>97</sup> and experts<sup>98</sup> to gather testimonial evidence.<sup>99</sup>

55. Specifically in the investigation of the break-in and vandalization, the CKP should (a) secure the scene to maximize the forensic opportunities,<sup>100</sup> (b) note the point

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<sup>94</sup> *Standard Verlagsgesellschaft mbH v Austria* App no 39378/15 (ECtHR, 7 December 2021) [40]; *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) [49]; *Delfi* (n 52) [149].

<sup>95</sup> Council of Europe, ‘Declaration on freedom of communication on the Internet’ (2003) <<https://www.osce.org/files/f/documents/0/6/31507.pdf>> accessed 21 November 2022 Principle 7.

<sup>96</sup> *Adali v Turkey* App no 38187/97 (ECtHR, 31 March 2005) (‘*Adali*’) [221]-[222]; *Khadija* (n 30) [123]-[124]; *Laptev v Russia* App no 36480/13 (ECtHR, 9 February 2021) [38].

<sup>97</sup> *Khadija* (n 30) [124]; *Menteş and ors v Turkey* App no 23186/94 (ECtHR, 28 November 1997) (‘*Menteş*’) [67]; ‘Effective investigation. Stemming impunity’ (*Council of Europe*) <[https://www.coe.int/en/web/freedom-expression/effective-investigation-stemming-impunity#\\_ftn18](https://www.coe.int/en/web/freedom-expression/effective-investigation-stemming-impunity#_ftn18)> accessed 21 November 2022.

<sup>98</sup> Government of Canada, ‘A Handbook for Police and Crown Prosecutors on Criminal Harassment’ (*Government of Canada*, 8 December 2021) <<https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/har/part2.html>> accessed 21 November 2022 para 2.9.

<sup>99</sup> Office of Internal Oversight Services (‘OIOS’), ‘Investigations Manual’ (*OIOS*, 2015) <[https://oios.un.org/sites/oios.un.org/files/general/investigations\\_manual.pdf](https://oios.un.org/sites/oios.un.org/files/general/investigations_manual.pdf)> accessed 21 November 2022 5.1.1; *Menteş* (n 97) [67].

<sup>100</sup> Association of Chief Police Officers, ‘Investigating Burglary: A Guide to Investigative Options and Good Practice How to Investigate a Burglary’ (*NPCC*, 2011) <<https://www.npcc.police.uk/documents/crime/2011/201109CBAInvBurGP.pdf>> accessed 21 November 2022 (‘*Investigating Burglary*’) 22; Amaury Murgado, ‘How to Investigate a Burglary’ (*Police Mag*, 9

of entry, exit and flight,<sup>101</sup> (c) get a detailed list of destroyed property,<sup>102</sup> and (d) employ strategies to deter similar crimes from reoccurring.<sup>103</sup>

56. Here, no record shows that the CKP carried out any of these investigative steps.

### **3. The Police failed to conduct an adequate investigation**

57. An adequate investigation must be capable of leading to the identification of the perpetrators.<sup>104</sup> Where the crime may be motivated by bias concerning political opinions, States take additional duty to unmask any political motive<sup>105</sup> to combat discrimination.<sup>106</sup>

58. Here, the steps taken by the CKP are neither capable of identifying the perpetrators nor unmasking political motives. As established in [48]-[49], the crime targeted Applicants' political opinions. Although Bersa provided the username

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February 2017) <<https://www.policemag.com/342195/how-to-investigate-a-burglary>> accessed 21 November 2022.

<sup>101</sup> Moe Greenberg, 'Investigating property crime: A checklist for success' (*Police1*, 20 July 2010) <<https://www.police1.com/investigations/articles/investigating-property-crime-a-checklist-for-success-bYcTfB13kHwwFRjR/>> accessed 21 November 2022.

<sup>102</sup> *ibid.*

<sup>103</sup> *Investigating Burglary* (n 100) 22; 'Property Crime and Burglary Investigators at Work' (*DetectiveEDU*) <<https://www.detectiveedu.org/property-crimes-investigations/>> accessed 21 November 2022.

<sup>104</sup> General Comment 31 (n 3) [18]; The UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights ('ACHPR') Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on Crimes Against Freedom of Expression' (*OHCHR*, 25 June 2012) <<https://www.ohchr.org/en/statements/2012/07/joint-declaration-crimes-against-freedom-expression>> accessed 21 November 2022.

<sup>105</sup> *Adali* (n 96) [245]; *Milanovic v Serbia* App no 44614/07 (ECtHR, 14 December 2010) [96]; *Virabyan v Armenia* App no 40094/05 (ECtHR, 2 October 2012) [218].

<sup>106</sup> *ibid.*

“BarnOwl\_NUKSU” to the CKP,<sup>107</sup> the CKP never interviewed any suspicious members of the NUKSU to seriously examine the NUKSU’s possible involvement in the crime. To date, no further progress has been made by the CKP on the crime.<sup>108</sup>

59. Therefore, Kurulu’s action and inaction in the investigation violated Applicants’ rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR.

### **III. SECTION 24, PARAGRAPH 4 OF THE ACADEMIC CODE OF CONDUCT VIOLATED ARTICLE 19 OF THE ICCPR**

60. Under Article 19 of the ICCPR, the State of Kurulu has obligations to respect professors’ freedom of opinion and expression.<sup>109</sup> As a state-owned university,<sup>110</sup> NUK is a public authority performing the public function of education.<sup>111</sup> NUK’s conduct is directed by Kurulu<sup>112</sup> under both the Constitution and the University

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<sup>107</sup> Fact Pattern [52].

<sup>108</sup> Fact Pattern [68].

<sup>109</sup> ICCPR (n 2) Article 19; General Comment 34 (n 27) [7].

<sup>110</sup> Fact Pattern [3].

<sup>111</sup> *National Collegiate Athletic Ass'n v Tarkanian* 488 US 179 (‘*National Collegiate Athletic Ass'n*’), 192 (1988) ; Richard Bird, ‘Schools as “public authorities”’ (*Tes*, 25 April 2008) <<https://www.tes.com/magazine/archive/schools-public-authorities>> accessed 21 November 2022; Ministry of Justice, *The Human Rights Act 1998: the Definition of “Public Authority”: Government Response to the Joint Committee on Human Rights’ Ninth Report of Session 2006-07* (Cm 7726, 2009) para 11; ‘What is a public entity?’ (*Queensland Human Rights Commission*) <<https://www.qhrc.qld.gov.au/your-rights/human-rights-law/what-is-a-public-entity>> accessed 21 November 2022.

<sup>112</sup> UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 Annex: Responsibility of States for Internationally Wrongful Acts (‘RSIWA’) Article 8; ILC, ‘Report on the work of the fifty-third session’ (2 July-10 August 2001) UN Doc A/56/10 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (adopted 2001) (‘DRSIWA’) 40 [2], 48 [7].

Standards Board Law of 1995 (“USBL”).<sup>113</sup> Therefore, NUK’s disciplinary actions on professors based on Section 24, Paragraph 4 of the Academic Code of Conduct (“ACC S.24(4)”) are attributable to Kurulu.<sup>114</sup>

61. As the basis of Professor Shikra’s suspension and the imposing of conditions on the removal of her suspension (“the removal condition”), ACC S.24(4) itself is not a valid restriction under Article 19 of the ICCPR. Consequently, the disciplinary actions on Shikra cannot be justified.
62. ACC S.24(4) restricts an individual’s freedom of expression by targeting all kinds of “instances of gross misconduct”, including instances of speech acts.<sup>115</sup> Such restriction must strictly conform to the test of legality, necessity, and proportionality under Article 19 of the ICCPR to be justified as permissible.<sup>116</sup> Here, ACC S.24(4) is disproportionate to the legitimate aims because it is overbroad without procedural safeguards.

**A. The sanctions of ACC S.24(4) are overbroad.**

63. Without enumerated forms of sanctions, restrictions would be overbroad and riddled with abuse of discretion.<sup>117</sup> In practice, faculty disciplinary rules of

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<sup>113</sup> Fact Pattern [3].

<sup>114</sup> *National Collegiate Athletic Ass'n* (n 111) 194.

<sup>115</sup> Fact Pattern [42].

<sup>116</sup> ICCPR (n 2) Article 19 [3]; General Comment 34 (n 27) [22]; *Malcolm Ross v Canada* (Communication No 736/1997) UN Doc CCPR/C/70/D/736/1997 (‘*Malcolm Ross*’) [11.2]; *Velichkin v Belarus* App no 1022/01 (ECtHR, 3 November 2005) (‘*Velichkin*’) [7.3].

<sup>117</sup> *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995) (‘*Tolstoy Miloslavsky*’) [50]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) (‘*Editorial Board*’) [54]-[59].

University College London,<sup>118</sup> University of Chicago,<sup>119</sup> and University of Edinburgh<sup>120</sup> all contain an enumerated and exhaustive list of sanctions, including warnings, loss of university privileges, suspensions, and etc.

64. Here, the sanctions NUK could impose on professors are unenumerated. ACC S.24(4) only indicates that violations would lead to disciplinary actions without defining the specific categories of disciplinary actions.<sup>121</sup> NUK should have an exhaustive list of disciplinary actions such as reprimands, fine, reduction in salary, and suspension.<sup>122</sup> Otherwise, NUK would have the sole unfettered discretion in creating new categories of sanctions.

65. Additionally, the time period of possible sanctions should be clear for reference.<sup>123</sup> In practice, University College London<sup>124</sup> and University of Edinburgh<sup>125</sup> have limited possible sanctions to a stated period.

66. Here, ACC S.24(4) includes no guiding time period of possible sanctions. Under

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<sup>118</sup> ‘Disciplinary Procedure’ (*UCL*) <<https://www.ucl.ac.uk/human-resources/disciplinary-procedure-0#appendix-e>> accessed 21 November 2022 (‘UCL Disciplinary Procedure’).

<sup>119</sup> ‘Process for the Investigation of Complaints Made Against Faculty, Other Academic Appointees and Postdoctoral Researchers’ (*UChicago*, 1 October 2018) <<https://provost.uchicago.edu/sites/default/files/InvestigationofComplaints.pdf>> accessed 21 November 2022 6-7.

<sup>120</sup> ‘Disciplinary Policy’ (*ED*, May 2022) <[https://www.ed.ac.uk/sites/default/files/atoms/files/disciplinary\\_policy\\_-\\_golden\\_copy\\_-\\_may\\_2022.pdf](https://www.ed.ac.uk/sites/default/files/atoms/files/disciplinary_policy_-_golden_copy_-_may_2022.pdf)> accessed 21 November 2022 (‘ED Disciplinary Policy’) 9-10.

<sup>121</sup> Fact Pattern [42]; American Association of University Professors (‘AAUP’), ‘Report of the Joint Subcommittee on Faculty Responsibility’ [1971] 57 AAUP Bulletin 524, 525.

<sup>122</sup> AAUP, ‘Report of the Joint Subcommittee on Faculty Responsibility’ (n 121) 525.

<sup>123</sup> *Krone Verlag v Austria* App no 27306/07 (ECtHR, 19 June 2012) [61].

<sup>124</sup> UCL Disciplinary Procedure (n 118).

<sup>125</sup> ED Disciplinary Policy (n 120) 9-10.

ACC S.24(4), a tenured professor at NUK might face a suspension for 10 years, 20 years, or even longer time without being dismissed. Lack of explicit definition and sanction period renders the sanctions of ACC S.24(4) overbroad, possibly leading to disproportionate results.<sup>126</sup>

**B. The text of ACC S.24(4) is overbroad.**

67. Restrictions would be overbroad if the text of the rule provides no clear definition for interpretation.<sup>127</sup> The proportionality test under Article 19(3) of the ICCPR requires a fair balance to be struck between restrictions and legitimate aims.<sup>128</sup>
68. Here, ACC S.24(4) includes multiple conditions where an individual would be subjected to disciplinary actions.<sup>129</sup> NUK would punish speakers “**disrupting** the normal operations of the university ... by participating in an ... **activity**”.<sup>130</sup> However, NUK gives no hint of what kinds of “gross misconduct” would **disrupt** “the normal operations of the university.” Additionally, the word “activity” is too broad without explicit definition.
69. Similarly, the “gross misconduct” “**leading or inciting** others to cause **nuisance** or disrupt scheduled or normal activities within any university building or area” is

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<sup>126</sup> *Kablis v Russia* App no 48310/16 and 59663/17 (ECtHR, 30 April 2019) (*‘Kablis’*) [56].

<sup>127</sup> *Lings v Denmark* App no 15136/20 (ECtHR, 12 April 2022) [58]; *Ecodefence and ors v Russia* App no 9988/13 and 60 others (ECtHR, 14 June 2022) [112].

<sup>128</sup> General Comment 34 (n 27) [22]; *Velichkin* (n 116) [7.3]; *Balsytė-Lideikienė v Lithuania* App no 72596/01 (ECtHR, 4 November 2008) (*‘Balsytė-Lideikienė’*) [77]; *Delfi* (n 52) [136].

<sup>129</sup> Fact Pattern [42].

<sup>130</sup> *ibid.*

insufficiently defined.<sup>131</sup> NUK gives no hint of what kinds of speech would “leading or inciting.” Additionally, the word “nuisance” has no clear definition, which may cover some speech explicitly protected by the ICCPR such as expressions that offend, shock, or disturb people.<sup>132</sup>

70. The text of ACC S.24(4) is too inclusive without clear explanations. As established in [63]-[66], even if the alleged misconduct merely disrupts the normal teaching activities for a few hours, NUK could still impose harsh disciplinary actions, especially when ACC S.24(4) fails to provide the allowed categories and time period of sanctions.

71. Therefore, the restrictions sweep unnecessarily broadly and are disproportionate to the legitimate aims like protecting public order or the rights of others.<sup>133</sup>

### **C. Section 100 of the ACC lacks procedural safeguards.**

72. Restrictions would be disproportionate without procedural guarantees.<sup>134</sup> The procedure producing restrictions should be impartial without potential abuse of

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<sup>131</sup> *ibid.*

<sup>132</sup> General Comment 34 (n 27) [11]; *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [49]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) (‘*Gündüz*’) [37]; *Giniewski v France* App no 64016/00 (ECtHR, 31 January 2006) [43]; *Klein v Slovakia* App no 72208/01 (ECtHR, 31 January 2007) [47]; *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) [124]; *Haldimann v Switzerland* App no 21830/09 (ECtHR, 24 May 2015) [44]; *Perinçek* (n 28) [196]; *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015) [87]; *Sergey Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) (‘*Sergey Bédat*’) [48]; *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 28 August 2018) (‘*Savva Terentyev*’) [61].

<sup>133</sup> ICCPR (n 2) Article 19 [3]; General Comment 34 (n 27) [28], [29]; *Kablis* (n 126) [56].

<sup>134</sup> *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) [95]; *Kyprianou v Cyprus* App no 73797/01 (ECtHR, 15 December 2005) [171]; *Kudeshkina v Russia* App no 29492/05 (ECtHR, 26 February 2009) (‘*Kudeshkina*’) [83]; *Cumhuriyet Vakfi and ors v Turkey* App no 28255/07 (ECtHR, 8 October 2013) [59]; *Karácsony and ors v Hungary* App nos 42461/13 and 44357/13 (ECtHR, 17 May 2016) (‘*Karácsony and ors*’) [133].



discretion.<sup>135</sup>

73. Here, the procedural producing restrictions provides no safeguard against abuse of discretion. Section 100 of the ACC authorizes the Vice Chancellor's Office ("VCO") to appoint "a **suitable** panel of academic **peers**" to recommend disciplinary actions on tenured professors.<sup>136</sup> However, section S.100 fails to define the terms "suitable" and "peers". The interpretation of the terms solely vests in the VCO,<sup>137</sup> which is selected by NUK.<sup>138</sup> The VCO could be potentially biased when exercising its discretion in choosing the "suitable" "peers", yet professors have no recourse to secure their rights.

74. In conclusion, ACC S.24(4) is not a valid basis for NUK to grant restrictions on tenured professors.

#### **IV. SHIKRA'S SUSPENSION AND THE REMOVAL CONDITION VIOLATED HER RIGHTS RECOGNIZED BY ARTICLE 19 OF THE ICCPR**

75. Sanctions imposed on individuals based on their speech qualify as restrictions on freedom of expressions under Article 19 of the ICCPR.<sup>139</sup> Such restrictions must meet the test of legality, necessity, and proportionality to be permissible.<sup>140</sup>

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<sup>135</sup> *Igor Kabanov v Russia* App no 8921/05 (ECtHR, 3 February 2011) [40]-[44], [52]; *Kudeshkina* (n 134) [97].

<sup>136</sup> Fact Pattern [58].

<sup>137</sup> *ibid.*

<sup>138</sup> Clarifications [28].

<sup>139</sup> *Malcolm Ross* (n 116) [11.1]; *Frankowicz v Poland* App no 53025/99 (ECtHR, 16 December 2008) [44]; *Ottan v France* App no 41841/12 (ECtHR, 19 April 2018) [49]; *Comcare v Banerji* (2019) 267 CLR 373 [39].

<sup>140</sup> ICCPR (n 2) Article 19 [3]; General Comment 34 (n 27) [22]; *Malcolm Ross* (n 116) [11.2];

76. Here, after Professor Shikra's post on 9 July calling on actions against the state monopoly of universities,<sup>141</sup> the VCO initiated investigation on Shikra<sup>142</sup> which resulted in her sanctions.<sup>143</sup> The sanctions based on Professor Shikra's post are serious restrictions on Shikra's freedom of expressions. The restrictions are impermissible because they are (A) not prescribed by law, (B) unnecessary, and (C) disproportionate.

**A. The suspension and the removal condition are not prescribed by law**

77. Restrictions are prescribed by law only if the law is sufficiently precise to enable citizens to foresee the consequences of their conduct.<sup>144</sup> Both the conditions and the sanctions should be precise enough to fulfill the test.<sup>145</sup> Otherwise, the law would lead to arbitrary application.<sup>146</sup>

78. As established in [4]-[12], ACC S.24(4) is not sufficiently precise because the

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*Velichkin* (n 116) [7.3].

<sup>141</sup> Fact Pattern [37].

<sup>142</sup> Fact Pattern [51].

<sup>143</sup> Fact Pattern [61].

<sup>144</sup> General Comment 34 (n 27) [25]; UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (6 April 2018) UN Doc A/HRC/38/35 [46]; *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) [26]; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [27]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Wingrove v The United Kingdom* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) [56]; *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007) [41]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) ('*Kafkaris*') [140]; *Liu v Russia* App no 42086/05 (ECtHR, 2 June 2008) [56]; *Editorial Board* (n 117) [52]; *Gaweda v Poland* App no 26229/95 (ECtHR, 14 March 2012) [40]; *Engels v Russia* App no 35550/18 (ECtHR, 16 January 2020) [26]; ARTICLE 19, 'Johannesburg Principles on National Security, Freedom of Expression and Access to Information' [1998] 20 HRQ 1 [1.1].

<sup>145</sup> *Kafkaris* (n 144) [140]; *Editorial Board* (n 117) [52].

<sup>146</sup> *Tolstoy Miloslavsky* (n 117) [50].

prohibited “gross misconduct” and the permitted “disciplinary actions” are overbroad without any procedural safeguards. Therefore, the restrictions on Shikra are not prescribed by law.

## **B. The suspension and the removal condition are not necessary**

79. Under Article 19 of the ICCPR, restrictions on freedom of expression are permissible only if they are necessary for protecting others’ rights and reputations, national security, public order, public health or public morals.<sup>147</sup> To invoke such grounds, NUK must demonstrate a direct and immediate connection between the expression and the threat to legitimate aims.<sup>148</sup>

### **1. Shikra’s post does not disrupt public order**

80. Public order refers to the functioning of the society and the maintenance of public peace, safety, and tranquility.<sup>149</sup> If a speech (1) has no potential to incite violence and (2) did not create any real risk of public disorder, there is no pressing social need to impose restrictions.<sup>150</sup>

#### **(1) Shikra’s post has no potential to incite violence**

81. Here, while protecting public order is a legitimate ground to restrict speeches, Shikra’s post does not disrupt public order. Considering its context, intent, nature,

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<sup>147</sup> ICCPR (n 2) Article 19(3); General Comment 34 (n 27) [27]-[32].

<sup>148</sup> General Comment 34 (n 27) [35]; *Jong-Kyu Sohn v Republic of Korea* (Communication No 518/1992) UN Doc CCPR/C/54/D/518/1992 [10.4]; *Shin v Republic of Korea* (Communication No 926/2000) UN Doc CCPR/C/80/D/926/2000 [7.2].

<sup>149</sup> American Association for the International Commission of Jurists ‘*Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*’ (1 July 1984) UN Doc E/CN.4/1984/4 [22]; *Re Munhumeso* [1994] (1) ZLR 49 (S), 64.

<sup>150</sup> ICCPR (n 2) Articles 19(3), 20; *Kablis* (n 126) [104]-[105].

form and extent, Shikra's post would not incite violence.<sup>151</sup>

**a. Context**

82. Context refers to the legal, political, or social background of the speech.<sup>152</sup> In Kurulu, Section 4 of the USBL establishes a state monopoly over universities.<sup>153</sup> Consequently, more than 80% of high school students cannot enter universities in Kurulu.<sup>154</sup> While private schools have operated successfully in Kurulu for many years,<sup>155</sup> the state monopoly of tertiary education has not changed since 1995.<sup>156</sup> Such regulation constitutes violations of the right to tertiary education for students under Article 14 of Kurulu's Constitution.<sup>157</sup> It also violates the liberty of individuals to establish private universities and the liberty of parents to choose private domestic universities under Article 13(4) of the ICESCR.<sup>158</sup>
83. Here, Shikra and the Campaign for Private Education have been striving for private education for at least 3 years, yet the system remains unchanged.<sup>159</sup> Eager to push

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<sup>151</sup> Rabat Plan (n 14) [11]-[29]; *Animal Defenders International* (n 29) [100]; *Perinçek* (n 28) [206]-[208]; *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017) ('*Dmitriyevskiy*') [95]-[101].

<sup>152</sup> *Annen v Germany* App no 3690/10 (ECtHR, 26 November 2015) [63]; *Savva Terentyev* (n 132) [73].

<sup>153</sup> Fact Pattern [3].

<sup>154</sup> Fact Pattern [2].

<sup>155</sup> Fact Pattern [11].

<sup>156</sup> Fact Pattern [3].

<sup>157</sup> Fact Pattern [4].

<sup>158</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ('ICESCR') Article 13 [4]; CESCR, 'General Comment No 13: The Right to Education (article 13 of the Covenant)' (8 December 1999) UN Doc E/C.12/1999/10 ('CESCR General Comment No 13') [29], [30], [50], [59].

<sup>159</sup> Fact Pattern [12].

for legal reform, Shikra posted on Chirp to ignite public awareness and a movement for change instead of trying to incite violence on campus.<sup>160</sup>

### **b. Intent**

84. A speaker must have deliberate intent to incite violence to be sanctioned.<sup>161</sup> Such intent is established if the speech involves clear language leading to unlawful attack,<sup>162</sup> armed struggle,<sup>163</sup> or similar extreme conducts.<sup>164</sup>

85. Here, Shikra did not have deliberate intent to call for violence. She merely asked people to “take a stand” by “occupying all university premises”.<sup>165</sup> Without words such as “war”,<sup>166</sup> “attack”, or “burying someone in asphalt”,<sup>167</sup> the expression of “do not **tolerate** traitors” remains unclear without apparent call for violent acts.<sup>168</sup>

Therefore, no inference can be made that Shikra has intent to incite violence.

### **c. Nature**

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<sup>160</sup> See *Kablis* (n 126) [104]. cf *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) (*‘Özgür Gündem’*) [65].

<sup>161</sup> ARTICLE 19, *Prohibiting incitement to discrimination, hostility or violence*, (ARTICLE 19, 2012) 31.

<sup>162</sup> *S Rangarajan v P Jagjivan Ram* (SCtI, 30 March 1989) (2) SCR 204 (*‘S Rangarajan’*) [226].

<sup>163</sup> *Özgür Gündem* (n 160) [65]; *Kasymakhunov and Saybatalov v Russia* App nos 26261/05 and 26377/06 (ECtHR, 14 March 2013) (*‘Kasymakhunov and Saybatalov’*) [107].

<sup>164</sup> *Gündüz* (n 132) [48], [51]; *Balsytė-Lideikienė* (n 128) [69], [78]. cf *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) (*Incal*) [50]; *S Rangarajan* (n 162) [222G-H; 223A].

<sup>165</sup> Fact Pattern [37].

<sup>166</sup> *Sürek v Turkey (no. 1)* App no 26682/95 (ECtHR, 8 July 1999) (*‘Sürek v Turkey (no. 1)’*) [61].

<sup>167</sup> *Kasymakhunov and Saybatalov* (n 163) [35].

<sup>168</sup> See *Incal* (n 164) [50].

86. The nature of a speech relates to the style of the expression.<sup>169</sup> Political speech on certain governmental policies leads to a debate of public interest, commanding a higher standard of tolerance towards incitement.<sup>170</sup>

87. Here, Shikra’s post is a political speech that does not incite violence. Calling for a change of the national tertiary system, Shikra is striving to give more people access to tertiary education.<sup>171</sup> Her post inspires public debates, leading people to reflect on the status quo rather than directly resorting to violence.

#### **d. Form and extent**

88. The form and extent of a certain speech refer to the means of publication and the scope of dissemination.<sup>172</sup> The likelihood of violence is lesser when individuals are exposed to different points of view,<sup>173</sup> which is increasingly common on social media due to its nature.<sup>174</sup>

89. Here, Shikra’s post on Chirp aroused great public attention with over 15,000 “Likes”<sup>175</sup> and over 1,000 comments, while a vast majority of comments are disagreeing opinions.<sup>176</sup> Audience of the post are inevitably exposed to different

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<sup>169</sup> *Perinçek* (n 28) [206]-[207]; *Dmitriyevskiy* (n 151) [99]; *S Rangarajan* (n 162) [226].

<sup>170</sup> *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [33]; *Sürek v Turkey (no. 1)* (n 166) [61]; *Sergey Bédat* (n 132) [49].

<sup>171</sup> Fact Pattern [37].

<sup>172</sup> *Norwood v DPP* (2003) EWHC 1564 (Admin) [33].

<sup>173</sup> *Gündüz* (n 132) [51].

<sup>174</sup> General Comment 34 (n 27) [15].

<sup>175</sup> Fact Pattern [38].

<sup>176</sup> Fact Pattern [40].

opinions, which would significantly promote public debate and substantially lower the likelihood of violence.

90. Therefore, given its context, intent, nature, form and extent, Shikra's post did not amount to incitement to violence that would disrupt the public order.

## **(2) Shikra's post created no real risk of public disorder**

91. After her post, only the Student Association of the National University of Kurulu ("SANUK") members boycotted classes for merely one day.<sup>177</sup> Given the small size and non-violent result of the boycott, it is unnecessary to regulate Shikra's speech.

## **2. Shikra's post does not violate others' rights**

92. Under Article 19 of the ICCPR, the rights of others refer to human rights protected by international human rights laws.<sup>178</sup> Here Shikra's post would not violate others' rights.
93. Firstly, Shikra's post does not violate others' right to life or right to health. As established in [20]-[28], Shikra's post would not incite violence. Therefore, the right to life or health of others would not be violated.
94. Secondly, Shikra's post does not violate others' right to tertiary education. The right to education refers to the general accessibility of education rather than the specific accessibility of education on a daily basis.<sup>179</sup> Here, Shikra's post only resulted in

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<sup>177</sup> Clarifications [16].

<sup>178</sup> General Comment 34 (n 27) [28].

<sup>179</sup> ICESCR (n 117) Article 14; CESCR General Comment No 13 (n 117) [32]. See also *Leyla Şahin v Turkey* App no 44774/98 (ECtHR 10 November 2005) [24], [161].

boycott for one day rather than inaccessibility to the education in general.<sup>180</sup>

Therefore, Shikra's post does not violate others' rights.

95. In conclusion, NUK's restrictions are not necessary as Shikra's post does not violate the protection of public order or others' rights.

### **C. The suspension and the removal condition are not proportionate**

96. A state must justify its restrictions to be proportionate to achieve the purported aim.<sup>181</sup> Even if Shikra's post violated a legitimate ground under Article 19 of the ICCPR, the restrictions on Shikra are disproportionate because (1) the restrictions are not the least intrusive measures to achieve the desired aims,<sup>182</sup> (2) the general and individual interests at stake are not reasonably balanced.<sup>183</sup>

#### **1. The restrictions are not the least intrusive measures**

97. The suspension is not the least intrusive measure for NUK to achieve its desired aim.<sup>184</sup> American Association of University Professors ("AAUP") has regarded

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<sup>180</sup> Clarifications [16].

<sup>181</sup> General Comment 34 (n 27) [35]; *Gündüz* (n 132) [38]; *Balsytė-Lideikienė* (n 128) [77]; *Animal Defenders International* (n 29) [100]; *Mouvement raëlien suisse* (n 29) [48]; *Perinçek* (n 28) [196]; *Karácsony and ors* (n 134) [148]; *Lashmankin v Russia* App no 57818/09 (ECtHR, 29 May 2017) [317].

<sup>182</sup> General Comment 34 (n 27) [34]; UNGA, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye' (28 July 2020) UN Doc A/75/261 (July 2020 Report of UN Special Rapporteur David Kaye) [24]; *Malcolm Ross* (n 116) [11.6]; *Amnesty International and ors v Sudan* Comm no 48/90, 50/91, 52/91, 89/93 (ACmHPR, 1999) (*Amnesty International and ors*) [80]; *Marques v Angola* (Communication No 1128/2002) UN Doc CCPR/C/83/D/1128/2002 ('*Marques*') [3.9]; *Toregozhina v Kazakhstan* (Communication No 2137/2012) UN Doc CCPR/C/112/D/2137/2012 [7.4]; *Sviridov v Kazakhstan* (Communication No 2158/2012) UN Doc CCPR/C/12D/2158/2012 [10.3]; Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression' (*Centre for Law and Democracy*, March 2010) <[www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf](http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf)> accessed 21 November 2022 18 ('Restricting Freedom of Expression') 18.

<sup>183</sup> *Perinçek* (n 28) [228]; *Medžlis Islamske Zajednice Brčko v Bosnia and Herzegovina* App no 17224/11 (ECtHR 27 June 2017) [74].

<sup>184</sup> General Comment 34 (n 27) [34]; *Malcolm Ross* (n 116) [11.6]; *Marques* (n 182) [3.9]; *Amnesty*



suspension as the most severe sanction other than dismissal.<sup>185</sup> “Barring a teacher from his classroom inflicts ignominy upon the teacher and is destructive to the morale of the academic community.”<sup>186</sup> Only when a professor’s continuance of work presents “immediate harm to himself or others” can a suspension be justified.<sup>187</sup>

98. Here, concerning the nature and actual results of Shikra’s speech, a reprimand, a fine, or a reduction in salary for a stated period would be sufficient to let Shikra caution for her future speech. Therefore, the restrictions are not the least intrusive measures to achieve NUK’s desired aim.

## **2. The general and individual interests are not reasonably balanced**

99. NUK shows no reasonable balance between the general and individual interests at stake. Usually, depending on the specific circumstances of the case, two Conventional rights are entitled to equal respect.<sup>188</sup>

100. Here, the Constitutional Court of Kurulu justified the restrictions citing the rights to the tertiary education of NUK’s students and academic autonomy as the rights

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*International and ors* (n 182) [80]; *Restricting Freedom of Expression* (n 182) 18.

<sup>185</sup> AAUP, ‘Report of the Joint Subcommittee on Faculty Responsibility’ (n 121) 525.

<sup>186</sup> Paul R. David, Richard P. Adams and Edwin O. Stene, ‘Academic Freedom and Tenure: College of the Ozarks’ [1963] 49 AAUP Bulletin 352, 358; AAUP, ‘Report of the Joint Subcommittee on Faculty Responsibility’ (n 121) 525; ‘The Use and Abuse of Faculty Suspensions’ (AAUP, August 2008) <<https://www.aaup.org/AAUP/comm/rep/A/facsup.htm#B8>> accessed 21 November 2022.

<sup>187</sup> *ibid.*

<sup>188</sup> *Timciuc v Romania* App no 28999/03 (ECtHR, 12 October 2010) [144]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [87]; *Von Hannover v Germany (no. 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) [106]; *Perinçek* (n 28) [228]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [91].

impaired,<sup>189</sup> which are not entitled to equal respect with Shikra's freedom of expression.<sup>190</sup> The tertiary education rights of NUK's students under the ICESCR are only accessible based on capacity,<sup>191</sup> while freedom of expression is a basic Covenant right everyone enjoys under the ICCPR. As a reputed educationist, Shikra defended her post under the protection of academic freedom,<sup>192</sup> which is an exercise of her freedom of expression<sup>193</sup> in the school context. NUK's alleged academic autonomy is not commensurate to Shikra's freedom of expression as a core human right. Therefore, NUK did not strike a balance between the general and individual interests at stake.

101. In conclusion, the suspension and the removal condition on Shikra are not prescribed by law, necessary nor proportionate under Article 19 of the ICCPR.

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<sup>189</sup> Fact Pattern [71].

<sup>190</sup> ICCPR (n 2) Article 19; General Comment 34 (n 27) [2].

<sup>191</sup> ICESCR (n 117) Article 14; CESCR General Comment No 13 (n 117) [32]; Paul M Taylor, 'Thinking Allowed in the Academy International Human Rights Law and the Regulation of Free Speech and Academic Freedom Under the "Model Code"' [2020] 39(1) UQLawJl 117, 143.

<sup>192</sup> CESCR General Comment No 13 (n 117) [38]-[39]; July 2020 Report of UN Special Rapporteur David Kaye (n 85) [8], [20], [58]; *Sorguç v Turkey* App no 17089/03 (ECtHR, 23 June 2009) [35]; *Hassan Yazıcı v Turkey* App no 40877/07 (ECtHR, 15 April 2014) [55]; Taylor (n 191) 122.

<sup>193</sup> UNESCO, 'Recommendation Concerning the Status of Higher-Education Teaching Personnel' (11 November 1997), 29th sess [17], [22]; Association's Committee A on Academic Freedom and Tenure, 'Academic Freedom and Electronic Communications' (*AAUP*, November 2013) <<https://www.aaup.org/file/Academic%20Freedom%20%26%20Electronic%20Communications.pdf>> accessed 21 November 2022 42; Association of Governing Boards of Universities and Colleges, 'Why this is important' (*AGB*) <[33](https://agb.org/knowledge-center/trending-topics/academic-freedom-and-freedom-of-speech/#:~:text=Academic%20freedom%20and%20freedom%20of%20speech%20are%20core,their%20stakeholders%E2%80%99%20rights%20through%20commitments%20to%20academic%20freedom.></a> accessed 21 November 2022.</p></div><div data-bbox=)

## **RELIEF SOUGHT**

For the foregoing reasons, Applicants respectfully request this Honorable Court to adjudge and declare that:

- A. The State of Kurulu's failure to impose a statutory duty on SMSPs to remove content that is likely to cause imminent harm of a serious nature violated Applicants' rights recognized by Article 17 and Article 19, read with Article 2(3), of the ICCPR.
- B. The State of Kurulu's action and inaction with respect to investigations into the break-in and vandalization of Applicants' home violated their rights recognized by Article 17 and Article 19, read with Article 2(3), of the ICCPR.
- C. Section 24, Paragraph 4 of the Academic Code of Conduct violated Article 19 of the ICCPR.
- D. The State of Kurulu's action with respect to the suspension of Shikra and the imposing of conditions on the removal of her suspension violated her rights recognized by Article 19 of the ICCPR.

Respectfully submitted 21 November 2022

Agents for Applicants