

THE 2022-2023 PRICE MEDIA LAW
MOOT COURT COMPETITION

SWARNA SHIKRA and KANTHI BESRA
(APPLICANTS)

v

STATE OF KURULU
(RESPONDENT)

MEMORIAL FOR APPLICANT

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OHCHR	United Nations Office of the High Commissioner for Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council

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STATEMENT OF RELEVANT FACTS

Background of Kurulu

- A. The State of Kurulu (**'Kurulu'**) has a population of approximately 50 million people. Article 14(2) of Kurulu's Constitution states that every person has the right to tertiary education, which the State, through reasonable measures, shall make progressively accessible. In accordance with its Constitution, Kurulu provides free tertiary education.
- B. At the same time, the state maintains a monopoly over university education. Section 4 of the University Standards Board Law of 1995 provides that all universities in Kurulu shall be owned and operated by the state. Due to a scarcity of resources, less than 20% of those completing secondary education are admitted to state universities.

Campaign for Private Education

- C. The Campaign for Private Education (**'CPE'**) is an organisation of civil society activists and academics who advocate for the establishment of privately-owned universities. The head of the CPE is Professor Swarna Shikra (**'Shikra'**), a reputed educationist and tenured professor at the National University of Kurulu (**'NUK'**). Shikra and the CPE members argue that a large majority of young persons are deprived of a university education due to the lack of capacity within the state university system, and demand that Section 4 of the University Standards Board Law be amended to permit privately-owned universities.

Besra Limited

- D. One of CPE's largest benefactors is Kanthi Besra (**'Besra'**). Besra is a successful entrepreneur who has promised to found the first private university in Kurulu once the law permits. Besra is also Shikra's partner.

- E. Besra’s organisation, Besra Limited, owns and operates a dozen of private high schools in Kurulu, which charge school fees. These schools have performed at a slightly better level than state-owned high schools during the past five years. The CPE has relied on this statistic to argue that future private universities have the potential to meet and even exceed the standards of state universities.

The Inter-University Students Union

- F. The Inter-University Students Union (‘IUSU’) is a nation-wide organisation comprising student unions in 39 of the 40 state universities. The Student Association of the National University of Kurulu (‘SANUK’) used to be part of the IUSU, but was expelled in 2019 due to its overt support of Shikra and the CPE. A rival student union called the National Kurulu Student Union (‘NUKSU’) was formed in 2020. The NUKSU publicly opposes Shikra and the SANUK.
- G. The IUSU opposes the privatisation of universities. It has actively lobbied the Kurulu government to maintain its monopoly over university education. It argues that Kurulu has thus far managed to maintain standards in university education because of its policy, and that permitting ‘for profit’ universities would erode the people’s right to a free education.

Chirp

- H. Chirp is Kurulu’s most popular social media platform, with over 23 million users. Chirp’s interface allows users to post images and videos with a caption, ‘Follow’ users of their choice, and ‘Share’, ‘Like’ and post comments in response to another user’s posts.

Chirp's users have a 'Home Feed' which displays the content of those they follow as well as content that is 'Liked' by those they follow.

- I. Chirp has its own Community Guidelines ('**Community Guidelines**') which sets out Chirp's content removal policy. Content that violates the Community Guidelines will be removed. Clause 8(1) of the Community Guidelines provides that Chirp allows unrestricted conversation around public figures. Clause 8(2) of the Community Guidelines provides for the types of content that would result in removal by Chirp. This includes 'specific threats of physical harm as well as threats of theft, vandalism, and other financial harm'.
- J. Chirp has two mechanisms to deal with content that violates its Community Guidelines. First, Chirp employs the Artificial Intelligence ('**AI**') mechanism which scans and analyses all content on Chirp, and detects violations of the Community Guidelines. While an in-depth review conducted by the NUK's Information Technology Department found that the mechanism had succeeded detecting 86% of all violations within a year, it also found that the mechanism had wrongly flagged 10% of its content (relating to public figures) as violations. Following the review, Chirp announced in September 2021 that it had introduced certain 'tweaks' to its AI mechanism for 2022 to ensure 'more robust debates on public issues'.
- K. Second, Chirp employs human content reviewers who review content reported by other social media users for violating the Community Guidelines. Chirp recently announced that it would downsize its human content review team by more than half due to the efficacy of the AI mechanism.

Regulation of Social Media Platforms in Kurulu

- L. There is currently no legislation regulating social media platforms in Kurulu. However, in 2016, the Constitutional Court of Kurulu (**‘Constitutional Court’**) issued a historic judgment in the case of *Battichcha v The State of Kurulu* (**‘Battichcha’**), laying down a constitutional duty which required social media content providers to take reasonable action to ‘proactively detect and take down harmful content’.

The Events of 9 July 2022

- M. On 9 July 2022, Shikra made a post Chirp, advocating for the privatisation of tertiary education (**‘Post’**). In the Post, Shikra called for all academics and students to hold a peaceful vigil to achieve a change in the current system. The Post was accompanied with an image of a candle.
- N. Shikra’s Post was met with backlash. The vast majority of the responses to the Post disagreed with her. There were also comments that were hostile and antagonistic directed at Shikra and Besra (collectively, **‘Applicants’**). One Chirp user, ‘BarnOwl_NUKSU’, referred to the Applicants as ‘a pair of birdbrains’ and called for others to ‘trash their nest!’. This comment was liked by several hundred users and went unremoved by Chirp.
- O. At 3 am the next morning, the Applicants’ home was broken into and vandalised. CCTV footage depicted three suspects who broke into the premises, and spray painted the words ‘BIRDBRAINS!’ on the living room wall.

Investigations into the Break-In and Vandalism

- P. On 10 July, Besra filed a complaint with the Central Koha Police (**'Police'**) regarding the break-in and vandalism. Besra provided a screenshot of the comment by BarnOwl_NUKSU, and alleged that the exact words used by the user suggest that this user was involved in the break-in. Besra's complaint also alleged that Chirp failed to take reasonable action to prevent or mitigate the crime from taking place.
- Q. The Police launched an investigation, and applied for a warrant to obtain from Chirp Enterprises any information with regard to the user BarnOwl_NUKSU that may reveal their identity. The request was denied by the Magistrate of Central Koha (**'Magistrate'**) due to concerns over BarnOwl_NUKSU's rights to privacy and freedom of expression.
- R. While the police continued to investigate the incident via CCTV footage and forensic evidence, no progress has been made since.

NUK's Imposition of Sanctions on Shikra

- S. Section 24 of the NUK's Academic Code of Conduct (**'Code'**) states that instances of gross misconduct could result in disciplinary action. This includes calling for the disruption of normal operations of the university.
- T. On 17 July, the Vice Chancellor's Office held an inquiry into Shikra's post on 9 July. A panel of three senior academics was convened to conduct the inquiry (**'Panel'**). The Panel determined that Shikra's Post had violated Section 24 of the Code, and recommended that Shikra be suspended for a period of one week, with the lifting of her suspension conditional upon a written undertaking that she refrains from issuing similar statements in the future (**'sanctions'**).

U. Shikra is yet to return to her post at the NUK, as she has yet to tender the written undertaking.

Proceedings before the Constitutional Court

V. On 20 July, the Applicants filed a joint petition before the Constitutional Court, alleging that Kurulu had violated their constitutional rights under Articles 7, 9 and 20 of the Kurulu's Constitution, in failing to impose reasonable statutory duties on private actors to remove online content that is likely to result in imminent harm of a serious nature, failing to provide them an effective remedy against the violation of their rights by private actors, and failing to conduct a proper investigation into the crime. Shikra also filed a separate petition complaining that the NUK had violated her rights under Articles 9 and 14(3) of the Kurulu's Constitution.

W. The Constitutional Court dismissed both petitions. In relation to the joint petition, the Constitutional Court held that the state had launched an investigation and it was too early in the process to determine whether there was a denial of effective remedy. It also held that there was insufficient evidence to establish that a particular user on Chirp was responsible for or had caused the commission of the crime, and thus deferred to the order of the Magistrate, who had determined that there was no basis to violate the privacy of any user.

X. In relation to Shikra's individual petition, the Constitutional Court observed that the sanctions imposed appeared to be harsh but stated that 'it is not for this Court to interfere with the disciplinary action of a higher educational institution, which enjoys a degree of autonomy under Article 14(3) of the Constitution'.

STATEMENT OF JURISDICTION

Swarna Shikra, Kanthi Besra, and the State of Kurulu have submitted their differences to the Universal Court of Human Rights (**'this Court'**), and hereby submit to this Court their dispute concerning alleged violations of Article 17 and Article 19, read with Article 2(3), of the ICCPR.

On the basis of the foregoing, this Court is requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable declarations and treaties.

QUESTIONS PRESENTED

1. Whether Kurulu's (1) failure to impose a statutory duty on social media providers to remove content that is likely to cause imminent harm of a serious nature and (2) action and inaction with respect to investigations into the break-in and vandalism of Shikra and Besra's home violated their rights recognised by Article 17 and Article 19, read with Article 2(3), of the ICCPR.
2. Whether Kurulu's action with respect to the suspension of Shikra and the imposing of conditions on the removal of her suspension violated her rights recognised by Article 19 of the ICCPR.

SUMMARY OF ARGUMENTS

Kurulu's failure to impose a statutory duty on social media providers to remove content that is likely to cause imminent harm of a serious nature, and action and inaction with respect to investigations into the break-in and vandalism violated the Applicants rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR

- A. Kurulu's failure to impose a statutory duty on social media service providers to remove content likely to cause imminent harm of a serious nature violated the Applicants' rights because the unremoved comments interfered with the Applicants' rights; it is reasonable to impose a positive obligation on Kurulu to protect the Applicants from harmful online content; and Kurulu did not strike a fair balance between the Applicants' rights and other competing rights. Further, the Applicants were denied an effective remedy.
- B. There was an interference with the Applicants' rights when BarnOwl_NUKSU's unremoved comment called for an attack on the Applicants' home, as a result of their political stance.
- C. It is reasonable to impose a positive obligation on Kurulu to protect the Applicants from harmful online content, as Kurulu had the requisite knowledge of a real and immediate risk to the Applicants' right. A situation similar to the Applicants' had arisen in *Battichcha*. Further, the situation faced by the Applicants is not novel and has materialised around the world.
- D. Kurulu failed to strike a fair balance between the Applicants' rights and other competing rights. The duty laid down in *Battichcha* is insufficient in protecting the Applicants'

rights as it leaves too much discretion to social media service providers to define ‘harmful content’. Chirp’s Community Guidelines do not prohibit metaphorical threats of violence such as BarnOwl_NUKSU’s. Further, Chirp’s AI mechanism is inadequate due to its limitations.

- E. Kurulu denied the Applicants an effective remedy when the Constitutional Court failed to examine whether the Kurulu’s domestic legal framework was consistent with its obligations under international law.

- F. Kurulu’s action and inaction with respect to investigations into the break-in and vandalism of the Applicants’ home violated the Applicants’ rights because there was an interference with the Applicants’ rights by other private persons, and Kurulu violated its positive obligation to provide an effective investigation. Further, the Applicants were denied an effective remedy.

- G. The break-in and vandalism of the Applicants’ home by private persons interfered with their rights to privacy and freedom of expression as their home was targeted due to their political views.

- H. A rigorous standard of investigation was justified as the break-in and vandalism were carried out to intimidate the Applicants. Kurulu cannot justify the Magistrate’s refusal to issue a warrant. While the issuance of the warrant would interfere with BarnOwl_NUKSU’s rights, such interference is justified pursuant to a legitimate aim of

criminal investigation. There is reasonable suspicion that BarnOwl_NUKSU is related to the break-in and vandalism.

- I. Kurulu denied the Applicants an effective remedy. The Constitutional Court failed to determine whether a warrant could be issued pursuant to a legitimate aim. Instead, it simply deferred to the decision of the Magistrate.

Kurulu's suspension of Shikra and imposition of conditions on the removal of her suspension violated her freedom of expression

- J. Kurulu's imposition of sanctions on Shikra interfered with her freedom of expression as they were imposed as a result of her making the Post. The sanctions on Shikra were not justified because they were not prescribed by law, and were not necessary in a democratic society.
- K. The sanctions were not prescribed by law as the Code was not sufficiently precise and there were no adequate safeguards against arbitrariness. Section 24(4) of the Code does not particularise the range of punishment possible in an event of a violation. There were no adequate safeguards as the Constitutional Court failed to carry out a review of the proportionality of the sanctions and simply endorsed the decision of the NUK.
- L. There was no pressing social need to impose the sanctions. Shikra's Post did not pose a direct and immediate threat to the right to education as it did not undermine the availability and accessibility of education. Further, Shikra's Post did not pose a direct and immediate threat to public order as it did not prevent individuals from carrying out lawful

activities. Furthermore, there was no threat of incitement of violence. The Post was incapable of, and unlikely to, incite violence. Additionally, Shikra clearly did not intend to incite violence.

- M. The sanctions were disproportionate as they were not the least restrictive measures to prevent future violations of the Code. Threats of dismissal constitute a most serious form of compulsion. The sanctions imposed effectively amounted to an indefinite suspension. Further, the vague phrasing of the undertaking is open to potential future abuse by the NUK.

- N. Kurulu cannot rely on the margin of appreciation doctrine to justify the imposition of disproportionate measures. This doctrine has been rejected by the HRC for undermining the protection of human rights. Even if a margin was accorded, it must be narrow because Shikra's Post contributed to a debate on a matter of public interest.

ARGUMENTS

I. 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, AND ACTION AND INACTION WITH RESPECT TO THE INVESTIGATIONS INTO THE BREAK-IN AND VANDALISATION OF THE APPLICANTS’ HOME VIOLATED THEIR RIGHTS UNDER ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR

1. The rights to privacy, freedom of expression, and an effective remedy are enshrined in Article 17, Article 19, and Article 2(3) of the ICCPR respectively.¹ These rights are similarly provided for in the UDHR,² ECHR,³ ACHR.⁴
2. The Internet has provided individuals with a powerful tool to exercise their freedom of expression.⁵ However, such benefits are accompanied by the potential dangers of the amplification of unlawful content online. Coupled with the option of anonymity on the

¹ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 arts 2(3), 17, 19.

² UDHR (adopted 10 December 1948) UNGA Res 217A (III) arts 8, 12, 19.

³ ECHR (adopted 4 November 1950, entered into force 3 September 1953) (‘ECHR’) arts 8, 10, 13.

⁴ ACHR (adopted 22 November 1969, entered into force 18 July 1978) arts 11, 13, 25(2).

⁵ *Times Newspapers Ltd (Nos 1 and 2) v UK* App nos 3002/03, 23676/03 (ECtHR, 10 June 2009) (‘*Times Newspaper Ltd v UK*’) para 27; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) (‘*Ahmet Yildirim v Turkey*’) para 48; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) (‘*Delfi AS v Estonia*’) para 110; *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 4 February 2019) (‘*Savva Terentyev v Russia*’) para 79; *Savci Çengel v Turkey* App no 30697/19 (ECtHR, 18 May 2021) (‘*Savci Çengel v Turkey*’) para 35; *Sanchez v France* App no 45581/15 (ECtHR, 2 September 2021) (‘*Sanchez v France*’) para 86; *Çakmak v Turkey* App no 45016/18 (ECtHR, 7 September 2021) (‘*Çakmak v Turkey*’) para 47.

Internet,⁶ unlawful content such as defamatory speech or calls for violence can now be disseminated at an unprecedented rate.⁷ Such unlawful content may constitute interferences with other individuals' rights under Article 17 and Article 19 of the ICCPR. States are under a positive obligation under the ICCPR to protect these rights from interferences by other private persons.⁸

3. The Applicants are individuals seeking to increase the accessibility of tertiary education in Kurulu.⁹ Shikra took to Kurulu's most popular social media platform, Chirp,¹⁰ to advocate for this cause.¹¹ However, the Applicants were met with hostile and antagonistic comments,¹² one of which referred to them as 'a pair of birdbrains' and called for others to 'trash their nest'.¹³ This comment went unremoved by Chirp.¹⁴ The following morning, the Applicants' home was broken into,¹⁵ and vandalised with the words,

⁶ *K.U. v Finland* App no 2872/02 (ECtHR, 2 March 2009) ('*K.U. v Finland*') para 49; *Delfi AS v Estonia* (n 5) paras 147, 149; Molly Land, 'Toward an International Law of the Internet' (2013) 54(2) Harvard International Law Journal 393, 436.

⁷ *Delfi AS v Estonia* (n 5) para 110; *Savva Terentyev v Russia* (n 5) para 79; *Savci Çengel v Turkey* (n 5) para 35; *Sanchez v France* (n 5) para 86; *Çakmak v Turkey* (n 5) para 48.

⁸ HRC, 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 ('HRC General Comment No 31') para 8.

⁹ Paras 7, 8 of the Facts.

¹⁰ Para 14 of the Facts.

¹¹ Para 37 of the Facts.

¹² Para 40 of the Facts.

¹³ Para 45 of the Facts.

¹⁴ Para 47 of the Facts.

¹⁵ Para 49 of the Facts.

‘BIRDBRAINS!’.¹⁶ To this day, Kurulu has not been able to identify the suspects in question,¹⁷ due to its refusal to issue a warrant to identify BarnOwl_NUKSU.¹⁸

4. Kurulu has violated Article 17 and Article 19, read with Article 2(3), of the ICCPR because of its: **(A)** 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; and **(B)** action and inaction with respect to investigations into the break-in and vandalism of the Applicants’ home.

A. 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 THE APPLICANTS’ RIGHTS UNDER ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR

5. Article 17 and Article 19 of the ICCPR impose positive obligations on a state to implement measures to ensure the protection of individuals’ rights against interferences by other private persons.¹⁹ When an individual’s rights under the ICCPR have been

¹⁶ Para 49 of the Facts.

¹⁷ Para 68 of the Facts.

¹⁸ Paras 55, 66 of the Facts.

¹⁹ *Reyes et al. v Chile* UN Doc CCPR/C/121/D/2627/2015 (HRC, 7 November 2017) para 7.5; *Daniel Billy et al. v Australia* UN Doc CCPR/C/135/D/3624/2019 (HRC, 22 September 2022) para 8.10; *Evans v UK* App no 6339/05 (ECtHR, 10 April 2007) para 75; *Dink v Turkey* App nos 2668/07, 6102/08, 30079/08, 7072/03, 7124/09 (ECtHR, 14 December 2010) (‘*Dink v Turkey*’) para 137; *Rolf Anders Daniel PIHL v Sweden* App no 74742/14 (ECtHR, 7 February 2017) para 26; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) (‘*Bărbulescu v Romania*’) paras 108–110; *Khadija Ismayilova v Azerbaijan* App nos 65286/13, 57270/14 (ECtHR, 10 April 2019) (‘*Khadija Ismayilova v Azerbaijan*’) para 158; *Kapa v Poland* App no 75031/13 (ECtHR, 28 February 2022) (‘*Kapa v Poland*’) para 150; *Gaši and Others v Serbia* App no 24738/19 (ECtHR, 6 September 2022) (‘*Gaši and Others v Serbia*’) para 77; HRC General Comment No 31 (n 8) para 8; HRC, ‘General Comment No 34’ (12 September 2011) UN Doc CCPR/C/GC/34 (‘HRC General Comment No 34’) para 7.

violated, Article 2(3) of the ICCPR requires states to provide an effective remedy.²⁰ In assessing whether a state has violated its positive obligation to protect an individual's rights under the ICCPR, one must consider:²¹ whether there is an interference with a right;²² whether it is reasonable to impose a positive obligation;²³ and whether a fair balance has been struck by the state.²⁴ Kurulu has violated the Applicants' rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR because: (1) the unremoved comments interfered with the Applicants' rights; (2) it is reasonable to impose a positive obligation on Kurulu to protect the Applicants from harmful online content; (3) Kurulu failed to strike a fair balance; and (4) the Applicants were denied of an effective remedy.

²⁰ *Konstantin Zhukovsky v Belarus* UN Doc CCPR/C/127/D/2955/2017 (HRC, 10 December 2019) ('*Konstantin Zhukovsky v Belarus*') para 9; *Leonid Zdrestov v Belarus* UN Doc CCPR/C/128/D/2391/2014 (HRC, 9 June 2020) ('*Leonid Zdrestov v Belarus*') para 10; *Murat Telibekov v Kazakhstan* UN Doc CCPR/C/128/D/2687/2015 (HRC, 15 June 2020) ('*Murat Telibekov v Kazakhstan*') para 11; *Djegdjigua Cherguit v Algeria* UN Doc CCPR/C/128/D/2828/2016 (HRC, 4 November 2020) ('*Djegdjigua Cherguit v Algeria*') para 9; *Vladimir Malei v Belarus* UN Doc CCPR/C/129/D/2404/2014 (HRC, 4 March 2021) ('*Vladimir Malei v Belarus*') para 11.

²¹ *Fadeyeva v Russia* App no 55723/00 (ECtHR, 30 November 2005) paras 70, 89, 93; *Dubetska v Ukraine* App no 30499/03 (ECtHR, 10 May 2011) paras 105, 108, 124; Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights' (*Council of Europe*, January 2007) <<https://rm.coe.int/168007ff4d>> accessed 20 November 2022, 18–20; Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights Under the European Convention on Human Rights' (2018) 87 *Nordic Journal of International Law* 344, 369–373.

²² *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) ('*Hämäläinen v Finland*') paras 57–64; *Khadija Ismayilova v Azerbaijan* (n 19) para 39; *Budimir v Croatia* App no 44691/14 (ECtHR, 16 December 2021) ('*Budimir v Croatia*') para 40; *Pavlov and Others v Russia* App no 31612/09 (ECtHR, 11 October 2022) ('*Pavlov and Others v Russia*') para 61.

²³ *Van Colle v UK* App no 7678/09 (ECtHR, 13 November 2012) ('*Van Colle v UK*') para 88; *Demir v Turkey* App no 58402/09 (ECtHR, 10 January 2017) ('*Demir v Turkey*') para 29; *M.M. v Russia* App no 7653/06 (ECtHR, 12 December 2017) ('*M.M. v Russia*') para 63; *Budimir v Croatia* (n 22) para 58; *Pavlov and Others v Russia* (n 22) para 75.

²⁴ *Hájovský v Slovakia* App no 7796/16 (ECtHR, 1 October 2021) ('*Hájovský v Slovakia*') para 30; *Samoylova v Russia* App no 49108/11 (ECtHR, 14 March 2022) ('*Samoylova v Russia*') para 73; *I.V.Ț. v Romania* App no 35582/15 (ECtHR, 1 June 2022) ('*I.V.Ț. v Romania*') para 47.

1. *The unremoved comments interfered with the Applicants' rights under Article 17 and Article 19 of the ICCPR*

6. Under Article 17 of the ICCPR, an individual has the right to respect for one's home. This protects an individual from calls for attack that prevent the peaceful enjoyment of their home.²⁵ BarnOwl_NUKSU's comment employed the words 'birdbrains' and 'nest'.²⁶ These words must be seen in the context of the Applicants' having the same namesake as bird species.²⁷ Seen in this light, BarnOwl_NUKSU was calling for an attack on the Applicants' home.
7. Under Article 19 of the ICCPR, an individual has the right to hold opinions freely without being subject to harassment or intimidation.²⁸ Article 19 also encompasses an individual's right to express themselves freely without fear.²⁹ The Applicants faced reprisals for their political stance on education policies in Kurulu.³⁰ This is likely to cause fear and intimidation to the Applicants, thereby dissuading them from publicly expressing their political views.

²⁵ *Udovičić v Croatia* App no 27310/09 (ECtHR, 24 July 2014) ('*Udovičić v Croatia*') para 136; *Irina Smirnova v Ukraine* App no 1870/05 (ECtHR 13 October 2016) ('*Irina Smirnova v Ukraine*') para 93; *National Federation of Sportspersons' Associations and Unions v France* App nos 48151/11, 77769/13 (ECtHR, 18 April 2018) ('*National Federation of Sportspersons' Associations and Unions v France*') para 154; *Kapa v Poland* (n 19) para 148.

²⁶ Para 45 of the Facts.

²⁷ Ebird, 'Shikra' (*Ebird*, 18 November 2022) <<https://ebird.org/species/shikra1>> accessed 20 November 2022; Ebird, 'Besra' (*Ebird*, 17 November 2022) <<https://ebird.org/species/besra1>> accessed 20 November 2022.

²⁸ HRC General Comment No 34 (n 19) para 9.

²⁹ *Dink v Turkey* (n 19) para 137; *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 April 2015) ('*Uzeyir Jafarov v Azerbaijan*') para 68; *Gaši and Others v Serbia* (n 19) para 78; *Tagiyeva v Azerbaijan* App no 72611/1 (ECtHR, 7 October 2022) ('*Tagiyeva v Azerbaijan*') para 78.

³⁰ Para 45 of the Facts.

2. *It is reasonable to impose a positive obligation on Kurulu to protect the Applicants from harmful online content*

8. The scope of a state's positive obligation must be reasonable.³¹ In assessing reasonableness, one must consider whether the proposed scope of the positive obligation imposes an impossible or disproportionate burden on the state.³² The ECtHR has enquired whether a state knew or ought to have known, at the time of the alleged interference, of the existence of a real and immediate risk to that right.³³
9. With the Constitutional Court having adjudicated on a case involving a journalist who had experienced doxing and calls for reprisal against him online,³⁴ Kurulu ought to have known that threats of a similar nature could easily materialise in the future. Moreover, the situation faced by the Applicants is not novel. States like Australia,³⁵ Brazil,³⁶

³¹ *Van Colle v UK* (n 23) para 88; *Demir v Turkey* (n 23) para 29; *M.M. v Russia* (n 23) para 63; *Budimir v Croatia* (n 22) para 58; *Pavlov and Others v Russia* (n 22) para 75.

³² *Osman v UK* App no 23452/94 (ECtHR, 28 October 1998) ('*Osman v UK*') para 116; *Keenan v UK* App no 27229/95 (ECtHR, 3 April 2001) ('*Keenan v UK*') para 90; *Van Colle v UK* (n 23) para 88; *O'Keefe v Ireland* App no 35810/09 (ECtHR, 28 January 2014) ('*O'Keefe v Ireland*') para 144; *Oganezova v Armenia* App nos 71367/12, 72961/12 (ECtHR, 17 August 2022) ('*Oganezova v Armenia*') para 83; *P.H. v Slovakia* App no 37574/19 (ECtHR, 8 September 2022) ('*P.H. v Slovakia*') para 111; *Tagiyeva v Azerbaijan* (n 29) para 64.

³³ *Osman v UK* (n 32) para 116; *Keenan v UK* (n 32) para 90; *Van Colle v UK* (n 23) para 88; *O'Keefe v Ireland* (n 32) para 144; *Hiller v Austria* App no 1967/14 (ECtHR, 22 November 2016) para 49; *Oganezova v Armenia* (n 32) para 83; *J.I. v Croatia* App no 35898/16 (ECtHR, 8 September 2022) para 6; *P.H. v Slovakia* (n 32) para 111; *Pueblo Bello Massacre v Colombia* (IACtHR, 31 January 2006) paras 124–125.

³⁴ Paras 34–35 of the Facts.

³⁵ Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (No 38, 2019) (AUS).

³⁶ Freedom, Responsibility and Transparency on the Internet Bill No 2630/2020 (BRA).

Bangladesh,³⁷ France,³⁸ and Tanzania,³⁹ have come up with legislation to tackle online content regulation. It is not open for Kurulu to argue with the benefit of hindsight that the threat that materialised was novel.

3. *Kurulu did not strike a fair balance between the Applicants' rights under Article 17 and Article 19 of the ICCPR, and other competing rights*

10. A fair balance must be struck between the competing interests of the individual and of the community as a whole.⁴⁰ The measures imposed must adequately protect individuals' rights, without restricting the competing interests more than necessary.⁴¹ The balance to be struck in the present case is between the Applicants' rights under Article 17 and Article 19 of the ICCPR, and the rights of Chirp and other social media users.
11. The following factors are relevant in determining whether a fair balance has been struck in the context of social media content moderation:⁴² the content of the comments in

³⁷ Digital Security Act 2018 (BGD).

³⁸ Proposition de loi n° 1785 visant à lutter contre la haine sur internet (FRA).

³⁹ Electronic and Postal Communications (Online Content) Regulations, 2020 (Cap 306) (TZA).

⁴⁰ *Powell and Rayner v UK* App no 9310/81 (ECtHR, 21 February 1990) para 41; *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) para 247; *Hämäläinen v Finland* (n 22) para 65.

⁴¹ *Fáber v Hungary* App no 40721/08 (ECtHR, 24 October 2012) ('*Fáber v Hungary*') para 43.

⁴² *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) ('*Axel Springer AG v Germany*') paras 90–95; *Von Hannover v Germany (No 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) paras 109–113; *Delfi AS v Estonia* (n 5) paras 142–143; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 68; *Hájovský v Slovakia* (n 24) para 30; *Standard Verlagsgesellschaft mbH v Austria (No 3)* App no 39378/15 (ECtHR, 7 March 2022) ('*Standard Verlagsgesellschaft mbH v Austria (No 3)*') para 85; *Samoylova v Russia* (n 24) para 74; *I.V.Ț. v Romania* (n 24) para 47; *Mesić v Croatia* App no 19362/18 (ECtHR, 5 September 2022) ('*Mesić v Croatia*') para 85; *Drousiotis v Cyprus* App no 42315/15 (ECtHR, 5 October 2022) para 41; *Stancu and Others v Romania* App no 22953/16 (ECtHR, 18 October 2022) ('*Stancu and Others v Romania*') para 117.

question; whether the comments contribute to a debate of public interest; and the measures applied by the social media service provider to prevent or remove the comments.

12. Kurulu's current measures do not sufficiently protect the Applicants' rights. Although the Constitutional Court imposed a duty on social media service providers to take reasonable action to proactively detect and take down 'harmful content',⁴³ this duty left too much discretion to social media content providers. Specifically, social media content providers have the discretion to define what is 'harmful content'.⁴⁴
13. First, with respect to the content of the comment, clause 8(2) of Chirp's Community Guidelines only prohibits 'specific threats'.⁴⁵ Metaphorical threats such as BarnOwl_NUKSU's comment do not violate Chirp's Community Guidelines. This over-protects social media users' freedom of expression, to the extent of protecting calls for attacks veiled in metaphorical terms.
14. Secondly, while it is true that freedom of expression on matters of public interest ought to be accorded stronger protection,⁴⁶ this protection is not absolute. Comments that incite

⁴³ Para 35 of the Facts.

⁴⁴ 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 ('UNHRC 6 April 2018 Freedom of Opinion and Expression Report') paras 26–27.

⁴⁵ Para 21 of the Facts.

⁴⁶ *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) para 43; *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996) ('*Wingrove v UK*') para 58; *Lopes Gomes Da Silva v Portugal* App no 37698/97 (ECtHR, 28 December 2000) para 33; *Refah Partisi (the Welfare Party) v Turkey* App nos 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003) paras 88, 100; *Kudeshkina v Russia* App no 29492/05 (ECtHR, 14 September 2009) para 87; *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 3 July 2017) ('*Orlovskaya Iskra*

violence are not accorded protection.⁴⁷ BarnOwl_NUKSU's call for an attack against the Applicants' home is not protected by the right to freedom of expression under Article 19 of the ICCPR.

15. Thirdly, the measures applied by Chirp to prevent or remove comments were inadequate. The use of an AI mechanism has several limitations, which includes the challenge of assessing content and taking into account widespread variation of language cues, meaning, and linguistic and cultural particularities.⁴⁸ The fact that BarnOwl_NUKSU's comment went unremoved is indicative of the limitations of the AI mechanism.

16. A fair balance can be struck only if Kurulu imposes a statutory duty on social media service providers to remove content that is likely to cause imminent harm of a serious nature. Given the grave potential impacts of online content moderation on individuals' freedom of expression, a thorough and comprehensive review of the appropriate legislative or regulatory response is necessary.⁴⁹ Such a need for legislation to be created

v Russia) para 111; *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR, 20 January 2020) (*Magyar Kétfarkú Kutya Párt v Hungary*) para 100; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (13 April 2021) UN Doc A/HRC/47/25 ('UNHRC 13 April 2021 Freedom of Opinion and Expression Report') para 42.

⁴⁷ *Delfi AS v Estonia* (n 5) para 140.

⁴⁸ UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (29 August 2018) UN Doc A/73/348 para 15.

⁴⁹ OHCHR, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (4 April 2019) OL AUS 5/2019, 4.

through a process of public consultation has also been acknowledged by the Constitutional Court.⁵⁰

17. Kurulu should not enjoy a margin of appreciation in striking a fair balance. While the ECtHR has recognised the margin of appreciation,⁵¹ this doctrine has not been accepted by other human rights tribunals,⁵² such as the UNHRC,⁵³ and the ACHPR.⁵⁴ The HRC has rejected this doctrine for offending the universality of human rights.⁵⁵ Even if a margin of appreciation was to be accorded, this margin must be narrow in scope.⁵⁶ Permitting Kurulu to rely on a broad margin would confer upon the state excessive discretion to compromise on the protection of the Applicants' rights to privacy and

⁵⁰ Para 67 of the Facts.

⁵¹ ECHR (n 3) Protocol No 15, art 1; *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) paras 158–161; *Delfi AS v Estonia* (n 5) para 131.

⁵² Gary Born, Danielle Morris, Stephanie Forrest, “A Margin of Appreciation”: Appreciating Its Irrelevance in International Law’ (2020) 61(1) Harvard International Law Journal 65 (“*A Margin of Appreciation*”: *Appreciating Its Irrelevance in International Law*”), 78.

⁵³ UNGA, ‘Draft International Covenants on Human Rights: Report of the 3rd Committee’ (12 Dec 1963) UN Doc A/5655 para 49; HRC General Comment No 34 (n 19) para 36; “*A Margin of Appreciation*”: *Appreciating Its Irrelevance in International Law* (n 52), 78.

⁵⁴ *Garreth Anver Prince v South Africa* AHRLR 105 Comm no 255/2002 (ACommHPR, 2004) paras 51–53; “*A Margin of Appreciation*”: *Appreciating Its Irrelevance in International Law* (n 52), 78.

⁵⁵ *Ilmari Lämsman v Finland* UN Doc CCPR/C/52/D/511/1992 (HRC, 14 October 1993) (“*Ilmari Lämsman v Finland*”) para 9.4; Cora Feingold, ‘The Doctrine of Margin of Appreciation and the European Convention on Human Rights’ (1977) 53 Notre Dame Law Review 90 (“*The Doctrine of Margin of Appreciation and the European Convention on Human Rights*”), 95; Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 New York University Journal of International Law and Politics 843 (“*Margin of Appreciation, Consensus, and Universal Standards*”), 844; Trevor Allan, ‘Human Rights and Judicial Review: A Critique of “Due Defence”’ (2006) 65 Cambridge Law Journal 671 (“*Human Rights and Judicial Review: A Critique of “Due Defence”*”), 675; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) (“*The Margin of Appreciation in International Human Rights Law*”), 1.

⁵⁶ *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) (“*Handyside v UK*”) para 55; *ATV Zrt v Hungary* App no 61178/14 (ECtHR, 28 July 2020) para 43; Onder Bakircioglu, ‘The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases’ (1978) 8(7) German Law Journal 711, 712, 718; Ivana Radačić, ‘The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups’ (2010) 31(1) Collected Papers of the Faculty of Law University of Rijeka 599, 603.

freedom of expression, without setting out clear guidelines and following procedures for social media content regulation online. This is especially so in the context of political expression,⁵⁷ given that it concerns a matter of public interest.⁵⁸

4. *The Applicants were denied an effective remedy under Article 2(3) of the ICCPR*

18. Where an individual's rights under the ICCPR have been violated, the state is obligated to provide an effective remedy.⁵⁹ As argued above,⁶⁰ Kurulu's failure to impose a statutory duty on social media service providers to remove harmful content violated the Applicants' rights under Article 17 and Article 19 of the ICCPR. Even if a violation is not made out, a state is obligated to provide an effective remedy so long as there is an arguable claim of violation.⁶¹ An arguable claim can be established so long as the claim

⁵⁷ *TV Vest As & Rogaland Pensjonistparti v Norway* App no 21132/05 (ECtHR, 11 March 2009) ('*TV Vest As & Rogaland Pensjonistparti v Norway*') para 67; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 March 2009) ('*Khurshid Mustafa and Tarzibachi v Sweden*') para 44; *Ashby Donald v France* App no 36769/08 (ECtHR, 10 April 2013) ('*Ashby Donald v France*') para 39; *Cengiz v Turkey* App nos 48226/10, 14027/11 (ECtHR, 1 March 2016) ('*Cengiz v Turkey*') para 39; *Magyar Kétfarkú Kutya Párt v Hungary* (n 46) para 71.

⁵⁸ *Animal Defenders International v UK* App no 48876/08 (ECtHR, 22 April 2013) ('*Animal Defenders International v UK*') para 102; *Erdoğan Gökçe v Turkey* App no 31736/04 (ECtHR, 14 January 2015) ('*Erdoğan Gökçe v Turkey*') para 35; *Orlovskaya Iskra v Russia* (n 46) para 103; *Centre for Democracy and the Rule of Law v Ukraine* App no 10090/16 (ECtHR, 26 July 2020) ('*Centre for Democracy and the Rule of Law v Ukraine*') paras 16, 86; *OOO Informatsionnoye Agentstvo Tambov-Inform v Russia* App no 43351/12 (ECtHR, 18 August 2021) ('*OOO Informatsionnoye Agentstvo Tambov-Inform v Russia*') para 79.

⁵⁹ ICCPR (n 1) art 2(3); *Konstantin Zhukovsky v Belarus* (n 20) para 9; *Leonid Zdrestov v Belarus* (n 20) para 10; *Murat Telibekov v Kazakhstan* (n 20) para 11; *Djegdjigua Cherguit v Algeria* (n 20) para 9; *Vladimir Malei v Belarus* (n 20) para 11.

⁶⁰ Paras 5–17 of this Memorial.

⁶¹ *Gorlov and Others v Russia* App nos 27057/06, 56443/09, 25147/14 (ECtHR, 4 November 2019) ('*Gorlov and Others v Russia*') para 104; *Shirkhanyan v Armenia* App no 54547/16 (ECtHR, 22 February 2022) ('*Shirkhanyan v Armenia*') para 126; *Buttet v UK* App no 12917/19 (ECtHR, 15 March 2022) ('*Buttet v UK*') para 66; *Yufryakov v Russia* App no 48564/11 (ECtHR, 15 March 2022) ('*Yufryakov v Russia*') para 10; *Spiteri Maempel and Others v Malta* App no 26917/21 (ECtHR, 6 September 2022) ('*Spiteri Maempel and Others v Malta*') para 13; *Jansons v Latvia* App no 1434/14 (ECtHR, 8 September 2022) ('*Jansons v Latvia*') para 97.

is not manifestly ill-founded.⁶² It is not open for Kurulu to argue that the Applicants' petition was manifestly ill-founded. Even the Constitutional Court noted in response to the Applicants' petition that it was time for the government of Kurulu to consider introducing legislation to regulate the conduct of social media platforms.⁶³

19. An effective remedy requires recourse to a competent national authority,⁶⁴ such as a judicial body,⁶⁵ to examine the merits of a complaint.⁶⁶ Where the courts fail to examine the substance of the grievance brought before them, there is no effective remedy.⁶⁷ In its judgment issued on 1 August 2022, the Constitutional Court made findings as to whether Chirp had taken reasonable steps to detect and take down harmful content.⁶⁸ However, the Constitutional Court failed to consider whether Kurulu's failure to impose a statutory duty violated the Applicants' constitutional rights under Article 7 and Article 9, read with

⁶² *Kablis v Russia* App nos 48310/16, 59663/17 (ECtHR, 30 April 2019) ('*Kablis v Russia*') paras 64–72; *Klapoff and Others v Hungary* App nos 4431/21, 10676/21, 11522/21, 12020/21, 23611/21 (ECtHR, 2 December 2021) ('*Klapoff and Others v Hungary*') para 11; *Tsarev and Others v Russia* App nos 83036/17, 7398/18 (ECtHR, 28 July 2022) ('*Tsarev and Others v Russia*') para 10; *Vorobyeva and Others v Russia* App nos 7440/07, 75624/12, 16041/13, 28465/13, 27036/14 (ECtHR, 10 November 2022) ('*Vorobyeva and Others v Russia*') para 11; Françoise Hampson, 'The Concept of an "Arguable Claim" under Article 13 of the European Convention on Human Rights' (1990) 39 *The International and Comparative Law Quarterly* 891 ('*The Concept of an "Arguable Claim" under Article 13 of the European Convention on Human Rights*'), 893–898.

⁶³ Para 67 of the Facts.

⁶⁴ *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) ('*Klass and Others v Germany*') para 64; *Silver and Others v UK* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 24 October 1983) ('*Silver and Others v UK*') para 113; *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) ('*Leander v Sweden*') para 77.

⁶⁵ *Klass and Others v Germany* (n 64) para 66; HRC General Comment No 31 (n 8) para 15.

⁶⁶ *Swedish Engine Drivers' Union v Sweden* App no 5614/72 (ECtHR, 6 February 1976) para 50; *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000) para 157.

⁶⁷ *Bulgakov v Russia* App no 20159/15 (ECtHR, 16 November 2020) para 48; *Engels v Russia* App no 61919/16 (ECtHR, 16 November 2020) paras 42–44; *OOO Flavus v Russia* App nos 12468/15, 23489/15, 19074/16 (ECtHR, 16 November 2020) ('*OOO Flavus v Russia*') paras 53–55; *Vladimir Kharitonov v Russia* App no 10795/14 (ECtHR, 16 November 2020) paras 55–57.

⁶⁸ Para 67 of the Facts.

Article 20, of Kurulu’s Constitution.⁶⁹ In particular, the Constitutional Court ought to have examined whether the domestic legal framework relating to social media content moderation was consistent with Kurulu’s obligations under international law, in accordance with Article 21 of Kurulu’s Constitution.⁷⁰

B. KURULU’S ACTION AND INACTION WITH RESPECT TO THE INVESTIGATION OF THE BREAK-IN AND VANDALISATION OF THE APPLICANTS’ HOME VIOLATED THEIR RIGHTS UNDER ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR

20. Where an individual’s rights under Article 17 and Article 19 of the ICCPR have been interfered with by private parties, states are obligated to conduct an effective investigation.⁷¹ An effective investigation must be capable of identifying the perpetrators.⁷² Further, as stated above,⁷³ where an individual’s rights under the ICCPR have been violated, states are obligated to provide an effective remedy.⁷⁴ Kurulu’s refusal to issue a warrant to disclose BarnOwl_NUKSU’s identity information violated the Applicants’ rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR

⁶⁹ Para 4 of the Facts.

⁷⁰ Para 4 of the Facts.

⁷¹ *Ageyevy v Russia* App no 7075/10 (ECtHR, 18 April 2013) paras 195–196; *Khadija Ismayilova v Azerbaijan* (n 19) paras 115–116; *Volodina v Russia (No 2)* App no 40419/19 (ECtHR, 14 September 2021) para 49; *M.D. and Others v Spain* App no 36584/17 (ECtHR, 28 June 2022) (*‘M.D. and Others v Spain’*) para 59; *Y.G. v Russia* App no 8647/12 (ECtHR, 30 August 2022) para 43; *Malagić v Croatia* App no 29417/17 (ECtHR, 17 November 2022) para 57; HRC General Comment No 31 (n 8) para 8.

⁷² *Premiininy v Russia* App no 49973/04 (ECtHR, 10 February 2011) para 74; *Alković v Montenegro* App no 66895/10 (ECtHR, 5 December 2017) para 65; *Khadija Ismayilova v Azerbaijan* (n 19) para 118; *M.D. and Others v Spain* (n 71) para 59.

⁷³ Para 18 of this Memorial.

⁷⁴ *Konstantin Zhukovsky v Belarus* (n 20) para 9; *Leonid Zdrestov v Belarus* (n 20) para 10; *Murat Telibekov v Kazakhstan* (n 20) para 11; *Djegdjiqgua Cherguit v Algeria* (n 20) para 9; *Vladimir Malei v Belarus* (n 20) para 11.

because: (1) there was an interference with the Applicants' rights by other private persons; (2) Kurulu failed to conduct effective investigation into the break-in and vandalism of the Applicants' home; and (3) the Applicants were denied of an effective remedy.

1. There was an interference with the Applicants' rights under Article 17 and Article 19 of the ICCPR by other private persons

21. As stated above,⁷⁵ Article 17 and Article 19 of the ICCPR confer upon an individual the right against unauthorised entry into their home⁷⁶ and the right to express themselves freely without fear.⁷⁷ The Applicants' rights were interfered with when their home was broken into and vandalised,⁷⁸ due to their public stance on the issue concerning the privatisation of university education in Kurulu. This was likely to instill fear in them and dissuade them from continuing to express their views.

2. Kurulu has violated its positive obligation to provide an effective investigation into the break-in and vandalism of the Applicants' home

22. When determining the requisite rigour of an effective investigation, the standard of investigation must correspond to the severity of the allegation.⁷⁹ Unauthorised entry into

⁷⁵ Paras 6–7 of this Memorial.

⁷⁶ *Udovičić v Croatia* (n 25) para 136; *Irina Smirnova v Ukraine* (n 25) para 93; *National Federation of Sportspersons' Associations and Unions v France* (n 25) para 154; *Kapa v Poland* (n 19) para 148.

⁷⁷ *Dink v Turkey* (n 19) para 137; *Uzeyir Jafarov v Azerbaijan* (n 29) para 68; *Gaši and Others v Serbia* (n 19) para 78; *Tagiyeva v Azerbaijan* (n 29) para 78.

⁷⁸ Para 49 of the Facts.

⁷⁹ *Puertas v Spain* UN Doc CCPR/C/107/D/1945/2010 (HRC, 18 June 2013) para 8.6.

an individual's home constitutes a grave violation of privacy.⁸⁰ This is exacerbated where the violation is reasonably connected to the individual's expression of their opinions, and is intended to silence them.⁸¹ The present case requires a high degree of rigour as the break-in and vandalism were carried out with the specific aim of harassing the Applicants because of their political views. The break-in and vandalism occurred in the early morning after Shikra made the post.⁸² Instead of stealing valuables from the Applicants' home, the perpetrators spraypainted 'BIRDBRAINS' on the Applicants' wall.⁸³ This evinces that their sole goal of the break-in and vandalism was to intimidate the Applicants.

23. Despite the high degree of rigour of investigation required, Kurulu refused to issue a warrant to uncover BarnOwl_NUKSU's email address and IP address.⁸⁴ This was due to the Magistrate's concerns over the protection of BarnOwl_NUKSU's constitutional rights and the lack of evidence to establish that a particular user on Chirp was responsible for the break-in.⁸⁵
24. Kurulu cannot justify its refusal to issue a warrant. The Magistrate's concerns neglect the fact that an individual's rights to privacy and freedom of expression can be interfered

⁸⁰ *Söderman v Sweden* App no 5786/08 (ECtHR, 12 November 2013) para 86; *Khadija Ismayilova v Azerbaijan* (n 19) para 115.

⁸¹ *Khadija Ismayilova v Azerbaijan* (n 19) paras 116–117.

⁸² Para 49 of the Facts.

⁸³ Para 49 of the Facts.

⁸⁴ Paras 54, 55, 66 of the Facts.

⁸⁵ Paras 55, 66 of the Facts.

with pursuant to a legitimate aim of criminal investigation.⁸⁶ Although BarnOwl_NUKSU uses an anonymous name, there is no absolute right to anonymity.⁸⁷ In fact, this is reflected in Section 215 of the Criminal Procedure Act of Kurulu, which contemplates a justified interference with an individual's right to privacy by establishing a standard of 'reasonable suspicion' for the issuance of a warrant.⁸⁸

25. Further, the Magistrate failed to apply the standard of reasonable suspicion under Section 215 of the Criminal Procedural Act of Kurulu. Facts which raise a reasonable suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge.⁸⁹ In the present case, a reasonable suspicion is likely to be made out, given that the perpetrators spray painted a phrase which bore a high degree of similarity with BarnOwl_NUKSU's comment on the wall of the Applicants' living room.⁹⁰ BarnOwl_NUKSU is also affiliated with the NUKSU, a rival organisation which publicly opposes the movement led by the Applicants.⁹¹

26. As a result of Kurulu's refusal to issue a warrant, the Police is only able to continue the investigation via CCTV and forensic evidence.⁹² To this day, the Police's efforts have

⁸⁶ *Z v Finland* App no 22009/93 (ECtHR, 25 February 1997) para 97; *K.U. v Finland* (n 6) para 49; *Avilkina v Russia* App no 1585/09 (ECtHR 7 October 2013) para 45.

⁸⁷ *Standard Verlagsgesellschaft mbH v Austria (No 3)* (n 42) para 75.

⁸⁸ Para 38 of the Clarifications.

⁸⁹ *Dudchenko v Russia* App no 37717/05 (ECtHR, 7 November 2011) para 96, *Baş v Turkey* App no 66448/17 (ECtHR, 7 September 2020) para 171; *Borodokin v Russia* App no 63614/11 (ECtHR, 8 July 2021); *Petlin and Yakupov v Russia* App nos 14829/12, 20420/12 (ECtHR, 27 October 2022) para 7.

⁹⁰ Paras 45, 49 of the Facts.

⁹¹ Para 12 of the Facts.

⁹² Para 56 of the Facts.

proven unsuccessful in identifying the three suspects of the break-in and vandalism of the Applicants' home.⁹³

3. *The Applicants were denied an effective remedy under Article 2(3) of the ICCPR*

27. Where an individual's right under the ICCPR has been violated, the state is obligated to provide an effective remedy.⁹⁴ As argued above,⁹⁵ the refusal to issue a warrant violated the Applicants' rights under Article 17 and Article 19 of the ICCPR. Even when a violation is not made out, a state is obligated to provide an effective remedy as long as there is an arguable claim of violation.⁹⁶ This is established as long as the claim is not manifestly ill-founded.⁹⁷ In dismissing the Applicants' petition, the Constitutional Court considered the possibility that the Applicants had been denied an effective remedy.⁹⁸ This demonstrated that there was at least an arguable claim that of violation.

⁹³ Para 68 of the Facts.

⁹⁴ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 197; *Tagayeva and Others v Russia* App nos 6562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, 37096/11 (ECtHR, 13 April 2017) para 620; *Khudoroshko v Russia* App no 3959/14 (ECtHR, 18 January 2022) para 47; *A.B. and Others v Poland* App no 42907/17 (ECtHR, 30 June 2022) para 60; *A.I. and Others v Poland* App no 39028/17 (ECtHR, 30 June 2022) paras 63, 64.

⁹⁵ Paras 20–26 of this Memorial.

⁹⁶ *Gorlov and Others v Russia* (n 61) para 104; *Shirkhanyan v Armenia* (n 61) para 126; *Buttet v UK* (n 61) para 66; *Yufryakov v Russia* (n 61) para 10; *Spiteri Maempel and Others v Malta* (n 61) para 13; *Jansons v Latvia* (n 61) para 97.

⁹⁷ *Kablis v Russia* (n 62) paras 64–72; *Klapoff and Others v Hungary* (n 62) para 11; *Tsarev and Others v Russia* (n 62) para 10; *Vorobyeva and Others v Russia* (n 62) para 16; *The Concept of an "Arguable Claim" under Article 13 of the European Convention on Human Rights* (n 62), 893–898.

⁹⁸ Para 65 of the Facts.

28. There is no effective remedy when, in conducting judicial review, domestic courts fail to consider whether an interference is justifiable pursuant to a legitimate aim.⁹⁹ The Constitutional Court failed to consider whether the evidence supported a finding that BarnOwl_NUKSU was reasonably suspicious. This is evinced by the fact that the Constitutional Court required evidence that a particular user on Chirp was responsible for the break-in and vandalism of the Applicants' home.¹⁰⁰

II. KURULU VIOLATED SHIKRA'S RIGHT UNDER ARTICLE 19 OF THE ICCPR WITH THE SUSPENSION FROM HER EMPLOYMENT AND THE IMPOSITION OF CONDITIONS ON THE REMOVAL OF HER SUSPENSION

29. Academic freedom is a crucial part of the right to freedom of expression.¹⁰¹ An attack on academic freedom could result in the corrosion of the pillars of democratic life.¹⁰² The ability for academics to freely express their views and opinions on areas within their expertise is crucial to furthering the debate on matters of public interest.¹⁰³ The issue of privatisation of university education is a contentious topic in Kurulu. As the head of the

⁹⁹ *Smith and Grady v UK* App nos 339985/96, 33986/96 (ECtHR, 27 September 1999) para 138; *Hatton and Others v UK* App no 36022/97 (ECtHR, 8 July 2003) para 141; *Lashmankin and Others v Russia* App nos 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12, 37038/13 (ECtHR, 7 February 2017) (*Lashmankin and Others v Russia*) para 358.

¹⁰⁰ Para 66 of the Facts.

¹⁰¹ UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (28 July 2020) UN Doc A/75/261 ('UNHRC 28 July 2020 Freedom of Opinion and Expression Report') para 21.

¹⁰² UNHRC 28 July 2020 Freedom of Opinion and Expression Report (n 101) para 2.

¹⁰³ *Mustafa Erdoğan and Others v Turkey* App nos 346/04, 39779/04 (ECtHR, 27 May 2014) para 40; UNHRC 28 July 2020 Freedom of Opinion and Expression Report (n 101) para 21; CESCR, 'General Comment No 13: The Right to Education' (8 Dec 1999) UN Doc E/C.12/1999/10 ('CESCR General Comment No 13') para 39.

CPE and a reputed educationist,¹⁰⁴ Shikra exercised her academic freedom in critiquing Kurulu's policy on education.

30. Shikra made the Post calling for a vigil to compel Kurulu to further its people's right to tertiary education under Article 14(2) of the Kurulu's Constitution.¹⁰⁵ Consequently, Shikra was deemed to have violated Section 24 of the Code. She was suspended for one week, with the lifting of the suspension contingent on a written undertaking that she refrains from issuing similar statements in the future.¹⁰⁶

31. An interference with the right to freedom of expression is established when a detriment is imposed on an individual because of the expression of their views.¹⁰⁷ Having been imposed with the sanctions as a result of the expression of her views in the Post, Shikra's right to freedom of expression has been interfered with. Under the ICCPR, a state is responsible for the actions of state-owned entities that do not enjoy sufficient institutional and operational independence from the state.¹⁰⁸ Given that the NUK is a state-owned and state-operated entity,¹⁰⁹ Kurulu is responsible for the NUK's actions.

¹⁰⁴ Para 7 of the Facts.

¹⁰⁵ Paras 4, 37 of the Facts.

¹⁰⁶ Para 61 of the Facts.

¹⁰⁷ *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) ('*Malcolm Ross v Canada*') para 11.1.

¹⁰⁸ *Novoseletskiy v Ukraine* App No 47148/99 (ECtHR, 22 May 2005) paras 81–83; *Mykhaylenko and Others v Ukraine* App nos 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, 42814/02 (ECtHR, 6 June 2005) paras 43–45; *Kotov v Russia* App No 54522/00 (ECtHR, 3 April 2012) paras 92–95; *Slovenia v Croatia* App No 54155/16 (ECtHR, 18 November 2020) paras 61–68.

¹⁰⁹ Para 3 of the Facts.

32. While the right to freedom of expression under Article 19 of the ICCPR is not absolute, international tribunals including the UNHRC,¹¹⁰ ECtHR,¹¹¹ IACtHR,¹¹² and ACommHPR,¹¹³ have consistently held that state interferences with the right are justified only when they are prescribed by law, pursuant to a legitimate aim, and necessary in a democratic society. While Kurulu may have acted in pursuit of legitimate aims, it has nonetheless violated Shikra’s right under Article 19 of the ICCPR as the sanctions were: **(A)** not prescribed by law; and **(B)** not necessary in a democratic society.

¹¹⁰ *Malcolm Ross v Canada* (n 107) para 11.2; *Vladimir Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 23 November 2005) para 7.3; *Tatsiana Reviako v Belarus* UN Doc CCPR/C/129/D/2455/2014 (HRC, 4 March 2021) para 8.3; HRC General Comment No 34 (n 19) para 35; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (17 April 2013) UN Doc A/HRC/23/40 (‘UNHRC 17 April 2013 Freedom of Opinion and Expression Report’) para 29; UNHRC 28 July 2020 Freedom of Opinion and Expression Report (n 102) para 24; UNHRC 13 April 2021 Freedom of Opinion and Expression Report (n 46) para 39.

¹¹¹ *Handyside v UK* (n 56) para 49; *Bowman v UK* App no 24839/94 (ECtHR, 19 February 1998) para 34; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) (‘*Ceylan v Turkey*’) para 24; *Animal Defenders International v UK* (n 58) para 78; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) (‘*Perinçek v Switzerland*’) para 124; *Orlovskaya Iskra v Russia* (n 46) para 97; *Selahattin Demirtas v Turkey (No 2)* App no 14305/17 (ECtHR, 22 December 2020) para 248; *Kilin v Russia* App no 10271/12 (ECtHR, 11 August 2021) para 59; *OOO Informatsionnoye Agentstvo Tambov-Inform v Russia* (n 58) para 72; *Milosavljević v Serbia (No 2)* App no 47274/19 (ECtHR, 21 September 2021) para 50; *Bodalev v Russia* App no 67200/12 (ECtHR, 6 September 2022) para 65; *Stancu and Others v Romania* (n 42) para 103.

¹¹² *Francisco Martorell v Chile* (IACtHR, 3 May 1996) para 55; *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004) para 120; *Urrutia Laubreaux v Chile* (IACtHR, 27 August 2020) para 85; IACHR, ‘Report of the Special Rapporteur for Freedom of Expression’ (2009) OEA/SER L/V/II Doc 51 para 89; IACHR, ‘Freedom of Expression and the Internet’ (2013) OEA/SER L/II CIDH/RELE/IN F11/13 paras 55–64.

¹¹³ *Interights v Mauritania* AHRLR 87 Comm no 242/2001 (ACommHPR, 2004) paras 78–79; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80; *EIPR v Egypt* AHRLR 10 Comm no 323/06 (ACommHPR, 2013) para 245; *Agnes Uwimana-Nkusi & Amp and Saidati Mukakibibi v Rwanda* AHRLR 1 Comm no 426/12 (ACommHPR, 2019) para 49; ACommHPR, ‘Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa’ (2002) ACHPR/Res 62(XXXII)02 Principle II.

A. THE SANCTIONS IMPOSED ON SHIKRA WERE NOT PRESCRIBED BY LAW

33. An interference is prescribed by law if the relevant law is sufficiently precise, and there are adequate safeguards.¹¹⁴ For the purposes of this requirement, law includes regulatory measures imposed by professional regulatory bodies under independent rule-making powers delegated to them by Parliament.¹¹⁵ Section 29 of the University Standards Board Law authorises the Board to approve codes of conduct of state universities.¹¹⁶ The Code, which grants the Vice Chancellor's Office the authority to issue sanction, was approved by the Board in 1999.¹¹⁷ Therefore, the Code must meet the requirements of sufficient precision and adequate safeguards.
34. A law is sufficiently precise if it allows individuals to reasonably foresee the consequences of their conduct.¹¹⁸ Section 24(4) of the Code prescribes that instances of gross misconduct could result in 'disciplinary action'.¹¹⁹ There is no particularisation of what this entails nor the range of punishment possible.

¹¹⁴ *Silver and Others v UK* (n 64) paras 85–90; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) ('*Rotaru v Romania*') para 55; *Magyar Kétfarkú Kutya Párt v Hungary* (n 46) para 93; *Bagirov v Azerbaijan* App nos 81024/12, 28198/15 (ECtHR, 25 September 2020) para 54.

¹¹⁵ *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) para 88; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) para 83; *Ólafsson v Iceland* App no 58493/13 (ECtHR, 6 June 2017) para 35; *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR, 5 April 2022) para 157.

¹¹⁶ Para 58 of the Facts.

¹¹⁷ Para 58 of the Facts.

¹¹⁸ *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) ('*Malone v UK*') para 66; *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995) para 37; *Wingrove v UK* (n 46) para 40; *Editorial Board of Pravoye Delo and Shtetel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) para 52; *Şahin Alpay v Turkey* App no 16538/17 (ECtHR, 20 June 2018) para 173; HRC General Comment No 34 (n 19) para 25.

¹¹⁹ Para 42 of the Facts.

35. Further, adequate safeguards are necessary to fetter the discretion of parties in charge of executing the law.¹²⁰ For judicial review to be considered an adequate safeguard, domestic courts must conduct a review of whether the contested decision answered a pressing social need and was proportionate to any legitimate aims pursued.¹²¹ There is no adequate judicial review where courts are incapable of conducting the aforementioned review,¹²² and merely endorse the state's decisions.¹²³ In its judgment, the Constitutional Court demonstrated its inability to conduct a genuine review of the sanctions' proportionality. The Constitutional Court acknowledged that the sanctions imposed on Shikra appeared harsh, but did not intervene on the basis that it was 'not for this Court to interfere with the disciplinary action of a higher educational institution, which enjoys a degree of autonomy under Article 14(3) of the Constitution'.¹²⁴ Accordingly, the Constitutional Court's decision-making powers were fettered to the NUK, with no judicial scrutiny present.

¹²⁰ *Malone v UK* (n 118) paras 66–68; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) para 56; *Rotaru v Romania* (n 114) para 55; *S and Marper v UK* App nos 30562/04, 30566/04 (ECtHR, 4 December 2008) para 95; *Gorlov and Others v Russia* (n 61) para 85; *Karastelev v Russia* App no 16435/10 (ECtHR, 6 October 2020) ('*Karastelev v Russia*') para 79.

¹²¹ *Lashmakin and Others v Russia* (n 99) para 356; *Polyakova and Others v Russia* App no 35090/09 (ECtHR, 7 March 2017) ('*Polyakova and Others v Russia*') paras 111–115; *Karastelev v Russia* (n 120) para 95.

¹²² *Polyakova and Others v Russia* (n 121) para 111.

¹²³ *Polyakova and Others v Russia* (n 121) para 114; *Mirgadirov v Azerbaijan and Turkey* App no 62775/14 (ECtHR, 17 December 2020) para 99.

¹²⁴ Para 71 of the Facts.

B. THE SANCTIONS IMPOSED ON SHIKRA WERE NOT NECESSARY IN A DEMOCRATIC SOCIETY

36. For a restriction to be necessary in a democratic society, it must:¹²⁵ (1) correspond to a pressing social need; and (2) be proportionate to the legitimate aim pursued.

1. There was no pressing social need to impose the sanctions on Shikra

37. A pressing social need to curtail the freedom of expression arises only when the expression poses a direct and immediate threat:¹²⁶ (a) to the rights of others;¹²⁷ (b) to public order;¹²⁸ or (c) constitutes incitement to violence.¹²⁹

a. The Post did not pose a direct and immediate threat to the rights of others

38. Article 19(3)(a) of the ICCPR permits restrictions to freedom of expression ‘for respect of the rights or reputation of others’. The term ‘rights’ encompasses human rights

¹²⁵ *Praded v Belarus* UN Doc CCPR/C/112/D/2029/2011 (HRC, 29 November 2014) para 7.5; *Wegrzynowski and Smolczewski v Poland* App no 33846/07 (ECtHR, 16 July 2013) paras 53–54; *Couderc and Hachette Filipachi Associés v France* App no 40454/47 (ECtHR, 10 November 2015) para 92; *Chernega v Ukraine* App no 74768/10 (ECtHR, 18 June 2019) para 222; *Razvozhayev v Russia and Ukraine and Udaltsov v Russia* App nos 75734/12, 2695/15, 55325/15 (ECtHR, 19 November 2019) para 296; *Monica Macovei v Romania* App no 53028/14 (ECtHR, 28 July 2020) para 73; HRC General Comment No 34 (n 19) paras 22, 33–34; HRC, ‘General Comment No 37’ (27 July 2020) UN Doc CCPR/C/GC/37 para 40; UNHRC 17 April 2013 Freedom of Opinion and Expression Report (n 110) paras 28–29.

¹²⁶ HRC General Comment No 34 (n 19) para 35; UNHRC 28 July 2020 Freedom of Opinion and Expression Report (n 101) para 24.

¹²⁷ ICCPR (n 1) art 19(3)(a).

¹²⁸ ICCPR (n 1) art 19(3)(b).

¹²⁹ *Robert Faurisson v France* UN Doc CCPR/C/58/D/550/1993 (HRC, 8 November 1996) para 7.7; *Gündüz v Turkey* App no 35071/97 (ECtHR, 14 June 2004) (‘*Gündüz v Turkey*’) paras 24, 40; *Nur Radyo Ve Televizyon Yayıncılığı AŞ v Turkey* App no 6587/03 (ECtHR, 2 June 2008) para 28.

recognised in international human rights law,¹³⁰ and includes the right to education enshrined in Article 13 of the ICESCR.¹³¹

39. The right to education requires education to be available and accessible.¹³² Shikra's Post did not threaten the availability or accessibility of education in Kurulu. Availability entails functioning educational institutions and programs in sufficient quantity.¹³³ Although Shikra's Post called for academics and students to refuse to attend or teach classes, it does nothing to prevent individuals from carrying out such activities. Instead, it simply calls for supporters of her movement to willingly cease their own academic activities. In fact, a vast majority of comments below Shikra's Post disagreed with her,¹³⁴ making it unlikely for a substantial number of academics to heed Shikra's call.
40. Accessibility requires education to be within safe physical reach.¹³⁵ While Shikra's Post called for her followers to occupy university premises and to not tolerate traitors, this call must be interpreted in context of the peaceful vigil she was calling for.¹³⁶ Further, the SANUK's endorsement of the Post merely required its members to cease all academic activities.¹³⁷ This was unlikely to threaten the safety of educational institutions.

¹³⁰ HRC General Comment No 34 (n 19) para 28.

¹³¹ ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 13; Para 73 of the Facts.

¹³² CESCR General Comment No 13 (n 103) para 6.

¹³³ CESCR General Comment No 13 (n 103) para 6(a).

¹³⁴ Para 40 of the Facts.

¹³⁵ CESCR General Comment No 13 (n 103) para 6(b).

¹³⁶ Para 37 of the Facts.

¹³⁷ Para 39 of the Facts.

41. Furthermore, restrictions on free speech are harder to justify where the speech concerns matters of public interest.¹³⁸ This is especially so when the objective of the speech is to defend human rights.¹³⁹ The Post was made as part of an ongoing debate concerning Kurulu’s education policies.¹⁴⁰ It raised genuine concerns about the inaccessibility of university education to many young people in Kurulu.¹⁴¹ By calling for demonstrations in an effort to challenge Kurulu’s existing policy,¹⁴² Shikra was furthering the right to education.

b. The Post did not pose a direct and immediate threat to public order

42. The threat of demonstrations alone cannot constitute reason for interference.¹⁴³ In determining whether the expression posed a direct and immediate threat to public order,

¹³⁸ *Axel Springer AG v Germany* (n 42) para 90; *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) para 61; *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) para 125; *Sabuncu and Others v Turkey* App no 23199/17 (ECtHR, 19 April 2021) para 221; *Şık v Turkey (No 2)* App no 36493/17 (ECtHR, 19 April 2021) para 176; *Ahmet Hüsrev Altan v Turkey* App no 13252/17 (ECtHR, 13 July 2021) para 215; *Khural and Zeynalov v Azerbaijan* App no 55069/11 (ECtHR, 6 October 2022) para 44.

¹³⁹ *Perinçek v Switzerland* (n 111) para 66.

¹⁴⁰ Paras 2, 6, 13, 34, 37 of the Facts.

¹⁴¹ Para 37 of the Facts.

¹⁴² Para 37 of the Facts.

¹⁴³ *Disk and Kesk v Turkey* App no 38678/08 (ECtHR, 27 November 2012) para 29; *Kudrevičius v Lithuania* App no 37553/05 (ECtHR, 15 October 2015) (*‘Kudrevičius v Lithuania’*) para 155; *Lashmakin and Others v Russia* (n 99) para 423.

pertinent factors to consider include: the extent of potential disruption to ordinary life;¹⁴⁴ and the public interest of the potential demonstration.¹⁴⁵

43. An impermissible extent of the disruption to ordinary life is reached when other individuals are prevented from carrying out their lawful activities.¹⁴⁶ As stated above, the Post does nothing to prevent individuals from carrying out academic activities. In reality, SANUK members merely boycotted classes for one day.¹⁴⁷ This did not affect the ability of any student to learn, nor the ability of any academic to teach. Further, the mere risk of clashes between the demonstrators and their opponents is insufficient to justify the imposition of measures to prevent the demonstration from happening.¹⁴⁸ Instead, a real risk of clash is demonstrated where there is a history of violent clashes between opposing groups.¹⁴⁹ There was no real risk of clash here. The movement supporting the privatisation of universities has been historically peaceful. Disagreements were mostly seen in the form of heated exchanges online.¹⁵⁰ While there was an isolated incident of a

¹⁴⁴ *Primov v Russia* App no 17391/06 (ECtHR, 12 June 2014) (*'Primov v Russia'*) para 145; *Kudrevičius v Lithuania* (n 143) para 155; *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14 (ECtHR, 15 November 2018) (*'Navalnyy v Russia'*) para 128; *Bumbeș v Romania* App no 18079/15 (ECtHR, 3 May 2022) (*'Bumbeș v Romania'*) para 95.

¹⁴⁵ *Primov v Russia* (n 144) paras 119, 134; *Kudrevičius v Lithuania* (n 143) para 151; *Bumbeș v Romania* (n 144) para 92.

¹⁴⁶ *Steel and Others v UK* App no 24838/94 (ECtHR, 23 September 1998) para 92; *Drieman and Others v Norway* App no 33768/96 (ECtHR, 4 May 2000) 10; *Kudrevičius v Lithuania* (n 143) para 97.

¹⁴⁷ Para 16 of the Clarifications.

¹⁴⁸ *Lashmakina and Others v Russia* (n 99) para 425.

¹⁴⁹ *Fáber v Hungary* (n 41) para 44; *Primov v Russia* (n 144) para 151.

¹⁵⁰ Para 40 of the Facts.

demonstration resulting in damage to public property,¹⁵¹ this did not rise to a level of violence.

44. Although restrictions may be justifiably imposed in response to conduct which leads to disruption beyond what is inevitable in the circumstances, Kurulu cannot argue that Shikra's Post crossed this threshold. The Post merely called for a peaceful vigil to be held at university premises. Such demonstrations form an integral part of public discourse,¹⁵² and are a regular occurrence in the academic context.¹⁵³ In the present case, it is natural for such demonstrations to take place on university premises given the strong symbolic ties between state universities and the call for the privatisation of university education.

c. The Post did not incite violence

45. In determining whether an expression constitutes incitement to violence, regard must be had to the content and the context of the speech, the speaker's intention, and the

¹⁵¹ Para 34 of the Facts.

¹⁵² *Taranenko v Russia* App no 19554/05 (ECtHR, 12 May 2014) para 65; *Kudrevičius v Lithuania* (n 143) para 91; *Navalnyy v Russia* (n 144) para 98; *Bumbeş v Romania* (n 144) paras 63–64.

¹⁵³ Tom Westbrook, Alex Fraser, "'Worse than Voldemort': Global students' strike targets climate change" *Reuters* (15 March 2019) <<https://www.reuters.com/article/us-climate-change-youth-idUSKCN1QW01S>> accessed 20 November 2022; Benjamin Novak, 'Student Blockade Protests Viktor Orban's Reach at a Top Arts University' *The New York Times* (6 September 2020) <<https://www.nytimes.com/2020/09/06/world/europe/hungary-students-blockade-orban.html?searchResultPosition=1>> accessed 20 November 2022; Hannah Richardson, 'Further strikes threatened at universities this term' *British Broadcasting Corporation* (18 October 2021) <<https://www.bbc.com/news/education-58929348>> accessed 20 November 2022; Meimei Xu, 'Harvard's Grad Student Strike, Explained: How Did We Get Here, and What's Next?' *The Harvard Crimson* (27 October 2021) <<https://www.thecrimson.com/article/2021/10/27/hgsu-second-strike-explained/>> accessed 20 November 2022; University and College Union, 'Biggest ever university strikes set to hit UK campuses over pay, conditions & pensions' *University and College Union* (8 November 2022) <<https://www.ucu.org.uk/article/12609/Biggest-ever-university-strikes-set-to-hit-UK-campuses-over-pay-conditions--pensions>> accessed 20 November 2022.

likelihood of incitement.¹⁵⁴ This framework has been endorsed by the UNHRC,¹⁵⁵ and the ECtHR.¹⁵⁶

46. First, the Post did not contain content that advocated violence or hostility. Advocacy of violence or hostility is found in language that encourages recourse to violent actions or casts identified persons in a negative light.¹⁵⁷ This is found nowhere in Shikra's Post. Rather, the Post focused on the plight of many young, deserving people in Kurulu who cannot access university educations. By calling for a vigil,¹⁵⁸ the Post sought for change to the status quo through peaceful means.
47. Secondly, given the context, Shikra did not intend to advocate hatred or incite violence. Although the Post contains words such as 'DO NOT TOLERATE traitors to the cause',¹⁵⁹ aggressive language used in the context of political criticism is more likely to reflect a legitimate expression of dissatisfaction, as opposed to an appeal to violence.¹⁶⁰ In

¹⁵⁴ UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add.4 para 29; CERD, 'General Recommendation No 35: Combating racist hate speech' (26 September 2013) CERD/C/GC/35 para 15; UNHRC, 'Report of the Special Rapporteur on the Freedom of Religion or Belief' (26 December 2013) A/HRC/25/58 para 58.

¹⁵⁵ International Justice Resource Center, 'UN Launches the Rabat Plan of Action' (*International Justice Resource Center*, 25 February 2013) <www.ijrcenter.org/2013/02/25/un-launches-the-rabat-plan-of-action/> accessed 20 November 2022; UNHRC, 'Report of the Special Rapporteur in the Field of Cultural Rights' (14 March 2013) UN Doc A/HRC/23/34 para 28.

¹⁵⁶ *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) para 63; *Gözel and Özer v Turkey* App nos 43453/04, 31098/05 (ECtHR, 6 July 2010) para 52.

¹⁵⁷ *Perinçek v Switzerland* (n 111) para 206.

¹⁵⁸ Para 37 of the Facts.

¹⁵⁹ Para 37 of the Facts.

¹⁶⁰ *Arslan v Turkey* App no 23462/94 (ECtHR, 8 July 1999) para 51; *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) paras 48–52; *Christian Democratic People's Party v Moldova (No 2)* App no 25196/04 (ECtHR, 2 May 2010) ('*Christian Democratic People's Party v Moldova No 2*') paras 26–27.

Christian Democratic People's Party v Moldova (No 2), the slogans 'Down with Voronin's totalitarian regime' and 'Down with Putin's occupation regime' were accompanied by the burning of flags and pictures of Russian leaders.¹⁶¹ Yet, the ECtHR considered this to be a mere expression of opinion and was not convinced that this should be understood as a call to violence.¹⁶² In the present case, the Post does not go as far. When read in the context of the overall peaceful tenor of her Post, the aggressive nature of Shikra's words is better understood as a reflection of her discontentment towards the Kurulu's education policies.

48. Thirdly, the Post has a low likelihood of incitement. A key factor to consider is whether the speech was made in a climate of violence or hostility.¹⁶³ As stated above,¹⁶⁴ the movement supporting the privatisation of higher education has always been a peaceful one. The peaceful message of the movement is evident when its leader, Shikra, led her call to action by starting a vigil.¹⁶⁵

¹⁶¹ *Christian Democratic People's Party v Moldova No 2* (n 160) para 27.

¹⁶² *Christian Democratic People's Party v Moldova No 2* (n 160) para 27.

¹⁶³ *Christian Democratic People's Party v Moldova* App no 28793/02 (ECtHR, 14 February 2006) para 76; *Yalçiner v Turkey* App no 64116/00 (ECtHR, 21 February 2008) para 45.

¹⁶⁴ Para 43 of this Memorial.

¹⁶⁵ Para 37 of the Facts.

2. *The sanctions imposed on Shikra were disproportionate*

49. Whether an interference is necessary in a democratic society also depends on the proportionality of the interference.¹⁶⁶ In assessing proportionality, the nature and severity of the interference are relevant.¹⁶⁷
50. First, interferences amounting to a threat of dismissal involving a loss of livelihood constitute a most serious form of compulsion.¹⁶⁸ Greater protection of employees' freedom of expression is warranted because individuals are hesitant to speak out against their employers whom they are financially dependent on.¹⁶⁹ The sanctions imposed on Shikra amount to an indefinite suspension, which contains an implicit threat of dismissal. Given that the NUK is a state-owned university, the state has abused its position as an employer by imposing harsh sanctions against an academic who was merely expressing her opinion on state education policies.
51. Secondly, restrictions must be clearly defined to prevent potential abuses by the state.¹⁷⁰ The requirement for Shikra to provide an undertaking to 'refrain from issuing similar

¹⁶⁶ *Erdođdu v Turkey* App no 25723/94 (ECtHR, 18 July 1999) para 47; *Gündüz v Turkey* (n 129) para 40; *Delfi AS v Estonia* (n 5) para 131; *Savva Terentyev v Russia* (n 5) para 65; *Słomkav v Poland* App no 68924/12 (ECtHR, 6 March 2019) para 65; *Staniszewski v Poland* App no 20422/15 (ECtHR, 14 October 2021) para 45.

¹⁶⁷ *Ceylan v Turkey* (n 111) para 37; *Salov v Ukraine* App no 65518/01 (ECtHR, 6 December 2005) para 115; *Kwiecie Ń v Poland* App no 51744/99 (ECtHR, 9 April 2007) para 56.

¹⁶⁸ *Young, James and Webster v UK* App nos 7601/76, 7806/77 (ECtHR, 13 August 1981) para 55.

¹⁶⁹ *Palomo Sánchez and Others v Spain* App nos 28955/06, 28957/06, 28959/06 (ECtHR, 12 September 2011) Joint Dissenting Opinion of Judges Tulkens, Björgvinsson, Jočienė, Popović and Vučinić para 18.

¹⁷⁰ *Cumhuriyet Vakfı v Turkey* App no 28255/07 (ECtHR, 8 January 2014) para 62.

statements in the future’ is vague as to what constitutes ‘similar statements’.¹⁷¹ This could be interpreted in various ways. For instance, it could be interpreted to mean that Shikra is not allowed to advocate for the privatisation of universities on social media. It could also be interpreted to mean that Shikra is not allowed to call for vigils on campuses. The broad scope of construing the restriction is an avenue for abuse, effectively giving the NUK *carte blanche* to silence Shikra in the future where required. The vague undertaking would lead to severe repercussions for Shikra beyond her employment in the NUK, and was tantamount to silencing her voice on social media.¹⁷²

52. Third, proportionality requires that states adopt the least restrictive measure to achieve the legitimate aim.¹⁷³ The present sanctions by Kurulu are a perpetual restraint on Shikra’s freedom of expression, which goes beyond a minimum impairment of her rights. Less restrictive measures were available to the NUK. Such measures could include the imposition of a limited period of suspension, or the limited scope of undertaking.

¹⁷¹ Para 61 of the Facts.

¹⁷² UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (9 October 2019) UN Doc A/HRC/74/486 (‘UNHRC 9 October 2019 Freedom of Opinion and Expression Report’) para 41; Al Jazeera Staff, ‘Social Media Giants Accused of ‘Silencing’ Kashmir Voices’ *Aljazeera* (1 October 2021) <<https://www.aljazeera.com/news/2021/10/1/kashmir-report-accuses-us-social-media-giants-of-censorship>> accessed 20 November 2022; David Smith, ‘The Silence of Donald Trump: How Twitter’s Ban is Cramping His Style’ *The Guardian* (9 October 2021) <<https://www.theguardian.com/us-news/2021/oct/09/the-silence-of-donald-trump-how-twitters-ban-is-cramping-his-style>> accessed 20 November 2022.

¹⁷³ *Malcolm Ross v Canada* (n 107) para 11.6; *Saint-Paul Luxembourg SA v Luxembourg* App no 26419/10 (ECtHR, 18 July 2013) para 44; *Bărbulescu v Romania* (n 19) para 121; *Michael Schwarz v Stadt Bochum* Case C-291/12 (CJEU, 17 October 2013) para 46; HRC, ‘General Comment No 27’ (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 para 14; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (28 December 2009) UN Doc A/HRC/13/37 para 17; UNHRC 6 April 2018 Freedom of Opinion and Expression Report (n 44) para 7; UNHRC 9 October 2019 Freedom of Opinion and Expression Report (n 172) para 6; UNHRC 13 April 2021 Freedom of Opinion and Expression Report (n 46) para 41.

53. Furthermore, the imposition of harsh sanctions against academics must be avoided to protect academic freedom.¹⁷⁴ As argued above,¹⁷⁵ Shikra’s exercise of academic freedom in relation to an important issue of public debate was met with an indefinite suspension. This is likely to dissuade other academics, such as those in the CPE, from commenting on matters relating to this topic.
54. Kurulu cannot rely on the margin of appreciation to justify its imposition of sanctions on Shikra. As argued above,¹⁷⁶ this doctrine has been rejected for offending the universality of human rights.¹⁷⁷ Even if a margin of appreciation is to be applied, it should be narrow. This is due to the political nature of Shikra’s expression,¹⁷⁸ which surrounds a matter of public interest.¹⁷⁹

¹⁷⁴ UNHRC 6 April 2018 Freedom of Opinion and Expression Report (n 44) para 66; UNHRC 13 April 2021 Freedom of Opinion and Expression Report (n 46) para 54; UN Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, ‘2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression’ (20 October 2021) <<https://www.osce.org/files/f/documents/9/4/501697.pdf>> accessed 20 November 2022.

¹⁷⁵ Paras 29–30, 50 of this Memorial.

¹⁷⁶ Para 17 of this Memorial.

¹⁷⁷ *Ilmari Länsman v Finland* (n 55) para 9.4; HRC General Comment No 34 (n 19) para 36; *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, (n 55), 95; *Margin of Appreciation, Consensus, and Universal Standards* (n 55), 844; *Human Rights and Judicial Review: A Critique of “Due Defence”* (n 55), 675; *The Margin of Appreciation in International Human Rights Law* (n 55), 1.

¹⁷⁸ *TV Vest As & Rogaland Pensjonistparti v Norway* (n 57) para 67; *Khurshid Mustafa and Tarzibachi v Sweden* (n 57) para 44; *Ashby Donald v France* (n 57) para 39; *Cengiz v Turkey* (n 57) para 39; *Magyar Kétfarkú Kutya Párt v Hungary* (n 46) para 71.

¹⁷⁹ *Animal Defenders International v UK* (n 58) para 102; *Erdoğan Gökçe v Turkey* (n 58) para 241; *Orlovskaya Iskra v Russia* (n 46) para 103; *Centre for Democracy and the Rule of Law v Ukraine* (n 58) paras 16, 86; *OOO Flavus v Russia* (n 67) para 34; *OOO Informatsionnoye Agentstvo Tambov-Inform v Russia* (n 58) para 79.

RELIEF SOUGHT

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

1. Kurulu's (1) failure to impose a statutory duty on social media providers to remove content that is likely to cause imminent harm of a serious nature and (2) action and inaction with respect to investigations into the break-in and vandalism of Shikra and Besra's home violated their rights recognised by Article 17 and Article 19, read with Article 2(3), of the ICCPR.
2. Kurulu's action with respect to the suspension of Shikra and the imposing of conditions on the removal of her suspension violated Shikra's rights recognised by Article 19 of the ICCPR.

Respectfully submitted 21 November 2022,

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Agent for the Applicants