

THE 2022-2023 PRICE MEDIA LAW
MOOT COURT COMPETITION

SWARNA SHIKRA and KANTHI BESRA
(APPLICANTS)

v

STATE OF KURULU
(RESPONDENT)

MEMORIAL FOR RESPONDENT

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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
UNESCO	United Nations Educational, Scientific and Cultural Organisation
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. In accordance with Article 14 of its Constitution, which recognises the right to education, Kurulu provides free primary, secondary, and tertiary education.
- B. All universities are registered and regulated by the University Standards Board (**'Board'**). Section 4 of the University Standards Board Law of 1995 provides that all universities in Kurulu shall be owned and operated by the state, which shall make available adequate resources to ensure the progressive realisation of the right to tertiary education in compliance with the Constitution of Kurulu.

Campaign for Private Education

- C. The Campaign for Private Education (**'CPE'**) is an organisation of civil society activists and academics who advocate the establishment of privately-owned universities. The organisation has approximately 30,000 members, mostly comprising young persons aged eighteen to twenty-five years. It also has around a hundred academics within its membership.
- D. The head of 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

E. One of CPE's largest benefactors is Kanthi Besra ('**Besra**'). Besra is a successful entrepreneur, whose organisation, Besra Limited, owns and operates a dozen of private high schools in Kurulu, which charge school fees. Besra has promised to found the first private university in Kurulu once the law permits. Besra is also Shikra's partner.

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 in Kurulu. The only student union that is not part of the IUSU is the Student Association of the National University of Kurulu ('**SANUK**'). The IUSU expelled the SANUK from its membership due to a dispute in 2019, which concerned SANUK's overt support of Shikra and the CPE. A rival student union called the National University of Kurulu Students Union ('**NUKSU**') was formed in 2020 and has publicly opposed Shikra and the SANUK.

G. The IUSU has consistently opposed private universities in Kurulu and has actively lobbied the government to maintain a monopoly over university education. It argues that permitting 'for profit' universities would erode the people's right to free education, as private universities would charge fees, creating inequality in access to education.

Chirp

H. Chirp is Kurulu's most popular social media platform. with over 23 million users in 2022. Chirp has a simple user interface, where users can post images and videos on the platform along with a caption, and other users can 'Follow' them and post comments in response. A user can 'Like' another user's post or comment. They can also share a post with others by

sharing the unique internet hyperlink to a post. All 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 offers several ‘Modes’ to enable a user to customise their experience — ‘Private’, ‘Normal’, and ‘Public’. If a user chooses ‘Public Mode’, any user, regardless of whether they ‘Follow’ them or not can view their content and post comments. Additionally, Chirp offers additional functions which enable users to ‘Restrict Comments’ on a specific post, and ‘Block’ any other user.
- J. Chirp has Community Guidelines (**‘Community Guidelines’**) that apply to all posts and comments. Content that violates the Community Guidelines will be removed. Clause 8(1) of the Community Guidelines provides that Chirp will remove content that ‘contains credible threats, content that targets private individuals to degrade or shame them, and personal information meant to blackmail or harass someone’. Chirp will generally allow 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. The types of content include ‘specific threats of physical harm as well as threats of theft, vandalism, and other financial harm’.
- K. Chirp has two mechanisms in place to deal with content that violate 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. The AI mechanism usually takes down a violating comment within three to five seconds of it being posted. An in-depth review conducted by the NUK’s Information Technology

Department found that the mechanism had an 88% ‘accuracy rate’ in terms of correctly classifying content as either complying with or violating the Community Guidelines.

L. Second, Chirp employs a thousand human content reviewers who review content reported by other social media users for violating the Community Guidelines.

Regulation of Social Media Platforms in Kurulu

M. There is 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*’), declaring that private sector companies operating social media platforms have duties and responsibilities under the Constitution of Kurulu.

N. The case concerned comments which revealed the personal details of a journalist, who had published a video on Chirp depicting damage to public property following a student demonstration against the privatisation of university education. Several users commenting on the video had revealed the address of his residence and had called for reprisals against him. The Constitutional Court found that Chirp failed to take reasonable action to ‘proactively detect and take down harmful content’, i.e., user comments that revealed the petitioner’s personal address and called for reprisals against him. It found that Chirp had therefore violated the petitioner’s freedom from interference with his privacy and home, protected under Article 7 of Kurulu's Constitution.

O. Following the decision, Chirp began developing an AI mechanism to detect and take down violations of Community Guidelines.

The Events of 9 July 2022

- P. On 9 July, Shikra made a post on Chirp advocating for the privatisation of university education (**‘Post’**). In the Post, Shikra called for academics and students to *‘REFUSE to teach or attend classes’*, *‘OCCUPY all university premises’* and to *‘NOT TOLERATE traitors to the cause’*.
- Q. Shikra has over 200,000 followers on Chirp and maintains her account on ‘Public Mode’. The Post received over 15,000 ‘Likes’. Shikra’s Post was endorsed by the SANUK, which issued a statement on Chirp and its official website requiring all members of the SANUK to comply with the directive. The SANUK stated that ‘[s]trict action will be taken against non-compliance’.
- R. Shikra’s Post was met with disagreement by the vast majority of commenters. This included comments which were hostile and antagonistic towards Shikra and Besra (collectively, **‘Applicants’**). One comment by 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. Although the comment by BarnOwl_NUKSU was not removed, Chirp’s AI mechanism removed around 40 comments that were determined to be violations of Clause 8 of the Community Guidelines. The removed comments called for physical harm against the Applicants or their property.
- S. At 3 am the next morning, the Applicants’ home was broken into and vandalised. CCTV footage depicted three suspects breaking into the premises. One suspect spray painted the words ‘BIRDBRAINS!’ on the living room wall.

Investigations into the Break-In and Vandalism

T. 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.

U. On 12 July, the Police summoned a representative of Chirp Enterprises and recorded a statement on the company’s process relating to content moderation. The Chirp representative informed the officer that Chirp Enterprises would only have the email address and IP address of a user, and that no other personal data was stored by the platform. The representative also assured the officer that such data could be provided to the police if a court warrant was obtained. The Police applied for the warrant the next day. However, the Magistrate of Central Koha (**‘Magistrate’**) denied the warrant request, citing Articles 7 and 9 of Kurulu’s Constitution, which guarantee the right to privacy and the freedom of expression respectively. The Police continued to investigate through other means, including by analysing CCTV footage and forensic evidence.

NUK’s Imposition of Sanctions on Shikra

V. In accordance with Section 29 of the University Standards Board Law, the NUK’s Academic Code of Conduct (**‘Code’**) was approved by the Board in 1999. Section 24 of the Code states that instances of gross misconduct could result in disciplinary action. This includes calling for the disruption of normal operations of the university.

W. On 17 July, the Vice Chancellor's Office held an inquiry into Shikra's Post on 9 July. In accordance with Section 100 of the Code, a panel of three senior academics were appointed to conduct the inquiry and question Shikra ('**Panel**'). Shikra was given the opportunity to defend her Post and did so on the basis of academic freedom. The Panel determined that Shikra 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**'). The Vice Chancellor's Office accepted and acted upon the recommendations of the Panel.

Proceedings before the Constitutional Court

X. 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 with 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 Kurulu's Constitution.

Y. The Constitutional Court dismissed both petitions. In relation to the joint petition, it held that Kurulu had launched an investigation and it was too early in the process to determine whether there is a denial of effective remedy. The Constitutional Court 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 decision of the Magistrate. In relation to Shikra's individual petition, the Constitutional Court determined that the

NUK's actions were reasonable in terms of Article 19 of the Constitution. It held that Shikra's expressions potentially impeded students at the NUK from receiving their entitlements under Article 14 of the Constitution and could therefore be reasonably restricted through disciplinary action.

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 service providers and action and inaction with respect to investigations into the break-in and vandalism of the Applicants' home does not violate their rights

- 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 does not violate the Applicants' rights because the unremoved comments did not interfere with the Applicants' rights; it is unreasonable to impose a positive obligation on Kurulu to protect the Applicants from content of a similar nature to the unremoved comments; and Kurulu struck a fair balance between the Applicants' rights and other competing rights. Further, the Applicants were not denied an effective remedy.
- B. There was no interference with the Applicants' rights arising from the unremoved comments on Shikra's Post. Metaphorical comments such as BarnOwl_NUKSU's call to 'trash their nest' are insufficient to amount to an interference with the right to respect of the Applicants' home. The unremoved comments were innocuous and trivial, or vulgar, and thus unlikely to cause significant damage to the Applicants' reputation. Further, the scope of acceptable criticism against public figures such as the Applicants is wider.
- C. It is unreasonable to impose a positive obligation on Kurulu to protect the Applicants from contents of a similar nature to the unremoved comments. Kurulu had no knowledge of a real and immediate risk to the Applicants' rights.

- D. Kurulu struck a fair balance between the Applicants' rights and the rights of Chirp and other social media users. The duty laid down in *Battichcha* sufficiently protects the Applicants' rights. Chirp has Community Guidelines which accurately reflect the position in international law and has adopted two mechanisms which effectively enforce its Community Guidelines. This has resulted in the removal of comments that threaten the Applicants' rights. Further, a wide margin of appreciation should be accorded as there is no consensus among the states as to the best means to protect individuals' rights.
- E. The Applicants were not denied an effective remedy as they had recourse to a joint petition before the Constitutional Court, which heard and reviewed their case. The effectiveness of the remedy is unaffected by the eventual dismissal of the Applicants' complaint.
- F. Kurulu's action and inaction with respect to investigations into the break-in and vandalism of the Applicants' home did not violate the Applicants' rights because Kurulu fulfilled its positive obligation to provide an effective investigation. Further, the Applicants were not denied an effective remedy.
- G. Kurulu conducted an effective investigation into the break-in and vandalism of the Applicants' home because the Police carried out the investigation in a timely manner. The Magistrate's rejection of the warrant request was justified. It was made in accordance with domestic law and Kurulu's obligations under international law. The issuance of the warrant would have interfered with BarnOwl_NUKSU's rights. An interference with BarnOwl_NUKSU's rights was not justifiable as there is insufficient evidence to raise a reasonable suspicion.

H. The Applicants were not denied an effective remedy, as they had recourse to a joint petition before the Constitutional Court, which heard and reviewed their case.

Kurulu's suspension of Shikra and imposition of conditions on the removal of her suspension were justified

I. Kurulu's imposition of sanctions on Shikra was justified because the sanctions were prescribed by law, in pursuit of legitimate aims, and necessary in a democratic society.

J. The sanctions were prescribed by law because the Code is sufficiently precise, and there were adequate safeguards against arbitrariness. Section 24(4) of the Code clearly states that instances of gross misconduct could result in disciplinary action and includes examples of gross misconduct. The scope of the term 'disciplinary action' must be understood as action with respect to the status of an academic's employment at the NUK. There were adequate safeguards as the Vice Chancellor's decision to impose sanctions was made on the recommendations of the Panel, which consisted of three senior academics. Shikra was given an opportunity to present her case before the Panel. Further, Shikra had recourse to judicial review by the Constitutional Court, which made an independent determination of the reasonableness of the sanctions.

K. The sanctions pursued the legitimate aims of protecting the rights of education and public order. The sanctions were imposed to prevent further escalation of the threats to access to education and public order.

L. There was a pressing social need to impose the sanctions because Shikra's Post posed a direct and immediate threat to the right to education. Shikra's Post contained calls for

academics to refuse to teach classes and for her supporters to occupy university premises and not to tolerate traitors. This threatened the availability and accessibility of education in Kurulu. Given the extent of dissemination of the Post and Shikra's influence, there was a possibility that Shikra's call would be heeded by many. Without intervention from the IUSU and Vice Chancellor's Office, the actions of Shikra's followers might have escalated.

M. There was also a pressing social need to impose the sanctions because Shikra's Post posed a direct and immediate threat to public order. In light of the volatile context surrounding the issue of the privatisation of university education in Kurulu, there was a possibility that the Post would lead to the physical obstruction of classes, preventing academics and students from carrying out their lawful activities. Further, Shikra's calls for occupation and intolerance led to a threat of disruption beyond what was inevitable in the circumstances.

N. The sanctions were proportionate as they were the least restrictive measures capable of preventing similar violations of the Code in the future. The scope of the undertaking must be interpreted as merely prohibiting Shikra from making statements that would result in violations of the Code. The Post cannot be accorded a higher degree of protection on the basis of academic freedom, as Shikra's Post went beyond mere criticism of Kurulu's education policies. Further, stronger measures were justified given the reprehensible conduct of Shikra, and the high likelihood of recalcitrance. Finally, the sanctions imposed did not prohibit Shikra from advocating for her political views through other means.

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 INVESTIGATIONS INTO THE BREAK-IN AND VANDALISATION OF THE APPLICANTS’ HOME, DID NOT VIOLATE THEIR RIGHTS UNDER ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR

1. The rights to privacy and freedom of expression are enshrined in Article 17 and Article 19 of the ICCPR.¹ The right to an effective remedy for individuals whose rights under the ICCPR have been violated is provided for under Article 2(3) of the ICCPR. These rights are similarly provided for in the UDHR,² ECHR,³ ACHR.⁴
2. The advent of the Internet marks a major shift in the protection and exercise of individuals’ rights to privacy and freedom of expression.⁵ Recognising that the Internet provides

¹ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘ICCPR’).

² UDHR (adopted 10 November 1948) arts 8, 12, 19.

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

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

⁵ Tony Mendel, Andrew Puddephatt, Ben Wagner, Dixie Hawtin, Natalia Torres, *Global Survey on Internet Privacy and Freedom of Expression* (UNESCO Publishing, 2012) 97–98; Joseph Cannataci, Bo Zhao, Gemma Torres Vives, Shara Monteleone, Jeanne Mifsud Bonnici, Evgeni Moyakine, *Privacy, free expression and transparency* (UNESCO Publishing, 2016) 13–16, 19–22; Ruth Hickin, ‘How are today’s biggest tech trends affecting our human rights?’ *World Economic Forum* (11 December 2017) <<https://www.weforum.org/agenda/2017/12/how-are-today-s-biggest-tech-trends-affecting-human-rights/>> accessed 20 November 2022; Carly Nyst, ‘Two sides of the same coin – the right to privacy and freedom of

individuals with unprecedented access to platforms for the exercise of freedom of expression,⁶ states must be mindful that overregulation of social media content could potentially result in a chilling effect on Internet users.⁷ While it is true that content on the Internet could interfere with individuals' rights, states must strike the proper balance between the protection of these rights and the ability of Internet users to exercise their freedom of expression.⁸

3. In Kurulu, the Internet is a crucial medium for discussion on matters of public interest, such as the privatisation of universities.⁹ The Applicants are individuals advocating for the privatisation of tertiary education in Kurulu.¹⁰ Shikra made a post on Chirp,¹¹ which was faced with negative comments.¹² While 40 comments calling for physical harm against the Applicants and their property were removed by Chirp's AI mechanism,¹³

expression' *Privacy International* (2 February 2018) <<https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression>> accessed 20 November 2022.

⁶ *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) para 35; *Sanchez v France* App no 45581/15 (ECtHR, 2 September 2021) para 86; *Çakmak v Turkey* App no 45016/18 (ECtHR, 7 September 2021) ('*Çakmak v Turkey*') para 47.

⁷ Jonathon Penney, 'Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study' (2017) 6(2) *Internet Policy Review* 1, 1–2; UNESCO, United Nations Office on Genocide Prevention and the Responsibility to Protect, 'Addressing hate speech on social media: Contemporary challenges' (UNESCO, 26 October 2021) <<https://unesdoc.unesco.org/ark:/48223/pf0000379177>> accessed 20 November 2022, 5.

⁸ *Delfi AS v Estonia* (n 6) para 110; *Çakmak v Turkey* (n 6) para 47.

⁹ Paras 34, 37, 39–40, 42 of the Facts.

¹⁰ Paras 6–8 of the Facts.

¹¹ Para 37 of the Facts.

¹² Para 40 of the Facts.

¹³ Para 46 of the Facts.

some other comments were not removed.¹⁴ One such comment by Chirp user BarnOwl_NUKSU stated that the Applicants were ‘a pair of birdbrains’ and called for others to ‘trash their nest’.¹⁵ Subsequently, the Applicants’ home was broken into and vandalised with the words, ‘BIRDBRAINS!’.¹⁶ Besra filed a police report, alleging that the suspects were associated with the NUKSU.¹⁷ While a warrant request to uncover information relating to BarnOwl_NUKSU was rejected,¹⁸ the Police continued to investigate via CCTV footage and forensic evidence.¹⁹

4. Contrary to the Applicants’ allegations, (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; and (B) action and inaction with respect to the investigations into the break-in and vandalism of the Applicants’ home, did not violate their rights recognised 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 THAT IS LIKELY TO CAUSE IMMINENT HARM OF A SERIOUS NATURE DID NOT VIOLATE THE APPLICANTS’ RIGHTS UNDER ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR

¹⁴ Para 47 of the Facts.

¹⁵ Para 45 of the Facts.

¹⁶ Para 49 of the Facts.

¹⁷ Para 52 of the Facts.

¹⁸ Paras 55, 66 of the Facts.

¹⁹ Para 56 of the Facts.

5. Article 17 and Article 19 of the ICCPR impose positive obligations on a state to implement measures to ensure individuals' rights are respected by other private persons.²⁰ When an individual's rights under the ICCPR have been violated, Article 2(3) of the ICCPR requires states to provide an effective remedy.²¹ In assessing whether a positive obligation to protect has been violated, one must consider:²² whether there is an interference with a right;²³ whether it is reasonable to impose a positive obligation;²⁴ and whether a state has struck a fair balance.²⁵ Kurulu has not violated the Applicants' rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR because: (1) the

²⁰ *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) para 150; HRC, 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 ('HRC General Comment No 31') para 8; HRC, 'General Comment No 34' (12 September 2011) UN Doc CCPR/C/GC/34 ('HRC General Comment No 34') para 7.

²¹ *Konstantin Zhukovsky v Belarus* UN Doc CCPR/C/127/D/2955/2017 (HRC, 10 December 2019) 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.

²² *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.

²³ *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) ('*Hämäläinen v Finland*') paras 57–64; *Khadija Ismayilova v Azerbaijan* (n 20) 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 v Russia*') para 61.

²⁴ *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 23) para 58; *Pavlov v Russia* (n 23) para 75.

²⁵ *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.

unremoved comments did not interfere with the Applicants' rights; (2) it is unreasonable to impose a positive obligation on Kurulu to protect the Applicants from content of a similar nature to the unremoved comments; (3) Kurulu struck a fair balance with its current measures; and (4) the Applicants were not denied an effective remedy.

1. The unremoved comments did not interfere with the Applicants' rights under Article 17 and Article 19 of the ICCPR

6. Under Article 17 of the ICCPR, an individual has a right against unlawful interference with the peaceful enjoyment of their home.²⁶ However, where provocative metaphors are used in the context of political criticism, such expressions have been understood as the expression of legitimate dissent.²⁷ BarnOwl_NUKSU's comment cannot be interpreted as an actual call for attacks on the Applicants' home.
7. Article 17 of the ICCPR also protects an individual against attacks on their reputation.²⁸ However, an attack on an individual's reputation must attain a requisite threshold of seriousness, so as to prejudice their personal enjoyment of the right to respect for private

²⁶ ICCPR (n 1) art 17; *Malika Bendjael and Merouane Bendjael v Algeria* UN Doc CCPR/C/128/D/2893/2016 (HRC, 3 November 2020) para 3.11; *Djegdjigua Cherguit v Algeria* (n 21) para 3.10; HRC, 'General Comment No 16' (8 April 1988) HRI/GEN/1/Rev 9 (Vol I) ('HRC General Comment No 16') para 1.

²⁷ *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999) paras 49–52; *Savva Terentyev v Russia* (n 6) para 72.

²⁸ ICCPR (n 1) art 17; *Kouider Kerrouche v Algeria* UN Doc CCPR/C/118/D/2128/2012 (HRC, 29 December 2016) para 8.6; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004) para 70; *Pfeifer v Austria* App no 12556/03 (ECtHR, 15 February 2008) para 35; *Petrina v Romania* App no 78060/01 (ECtHR, 6 April 2009) para 28; *Polanco Torres and Movilla Polanco v Spain* App no 34147/06 (ECtHR, 21 February 2010) para 40; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) ('*Axel Springer AG v Germany*') para 83; *González et al. v Mexico* (IACtHR, 16 November 2009) para 444.

life.²⁹ Comments that are innocuous and trivial in character are unlikely to cause significant damage to one's reputation,³⁰ and expressions which have a lower level of style or contain vulgar insults may reduce the impact attributed to these expressions.³¹ The unremoved comments by 'Drongo22' and 'Heron100' merely pointed out the irony of Shikra, an academic, calling for classes to be boycotted as well as intolerance against those who disagree with her.³² The comments by BarnOwl_NUKSU and 'IUSU_RedKite',³³ would be taken less seriously, given that they were emotionally charged vulgar remarks against the Applicants.

8. Under Article 19 of the ICCPR, individuals have the right to express themselves freely without fear.³⁴ However, the limits of acceptable criticism are wider in respect of a public figure who inevitably and knowingly exposes himself to public scrutiny.³⁵ Shikra is the

²⁹ *A v Norway* App no 28070/06 (ECtHR, 9 July 2009) ('*A v Norway*') para 64; *Axel Springer AG v Germany* (n 28) para 83; *Haldimann v Switzerland* App no 21830/09 (ECtHR, 24 May 2015) para 49; *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) ('*Bédat v Switzerland*') para 72; *Međžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina* App no 17224/11 (ECtHR, 27 June 2017) para 76; *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 November 2017) para 33; *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 112; *Miljević v Croatia* App no 68317/13 (ECtHR, 25 September 2020) paras 61–62; *Balaskas v Greece* App no 73087/17 (ECtHR, 5 February 2021) para 40; *Çakmak v Turkey* (n 6) para 42; *M.L. v Slovakia* App no 34159/17 (ECtHR, 14 January 2022) para 24; *Drousiotis v Cyprus* App no 42315/15 (ECtHR, 5 October 2022) ('*Drousiotis v Cyprus*') para 40; HRC General Comment No 16 (n 26) para 1.

³⁰ *Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) ('*Tamiz v UK*') para 80; *Çakmak v Turkey* (n 6) para 50.

³¹ *Tamiz v UK* (n 30) para 81; *Çakmak v Turkey* (n 6) para 51.

³² Para 41 of the Facts.

³³ Paras 44–45 of the Facts.

³⁴ *Dink v Turkey* (n 20) para 137; *Uzeyir Jafarov v Azerbaijan* App no 54204/08 (ECtHR, 29 April 2015) para 68; *Gaši and Others v Serbia* App no 24738/19 (ECtHR, 6 September 2022) para 78; *Tagiyeva v Azerbaijan* App no 72611/14 (ECtHR, 7 October 2022) ('*Tagiyeva v Azerbaijan*') para 78.

³⁵ *Kuliś v Poland* App no 15601/02 (ECtHR, 18 June 2008) para 47; *Chalabi v France* App no 35916/04 (ECtHR, 18 September 2008) para 42; *Brunet-Lecomte and Lyon Mag' v France* App no 17265/05 (ECtHR, 6 May 2010)

head of the CPE,³⁶ and has chosen to express her views on ‘Public Mode’ on Chirp.³⁷ Besra, in their capacity as the founder of Besra Limited, has publicly promised to found the first private university in Kurulu.³⁸ The Applicants have knowingly adopted prominent positions within the movement for the privatisation of university education, vocally expressing their views on a highly contentious topic within Kurulu. Accordingly, the scope of acceptable criticism against them is wider. Further, as stated above,³⁹ the unremoved comments were of a less serious nature, and would fall within the acceptable scope of criticism against the Applicants.

2. It is unreasonable to impose a positive obligation on Kurulu to protect the Applicants from content of a similar nature to the unremoved comments

9. While states have positive obligations under the ICCPR,⁴⁰ the scope of a state’s positive obligation must be reasonable.⁴¹ This entails that the positive obligation must not impose

para 46; *Petrenco v Moldova* App no 20928/05 (ECtHR, 4 October 2010) (*‘Petrenco v Moldova’*) para 55; *GRA Stiftung gegen Rassismus und Antisemitismus v Switzerland* App no 18597/13 (ECtHR, 9 April 2018) (*‘GRA Stiftung gegen Rassismus und Antisemitismus v Switzerland’*) para 62; *Jishkariani v Georgia* App no 18925/09 (ECtHR, 20 December 2018) (*‘Jishkariani v Georgia’*) paras 46, 51; *Kaboğlu and Oran v Turkey* App nos 1759/08, 50766/10, 50782/10 (ECtHR, 18 March 2019) para 74.

³⁶ Para 7 of the Facts.

³⁷ Paras 17, 38 of the Facts.

³⁸ Para 8 of the Facts.

³⁹ Paras 6–7 of this Memorial.

⁴⁰ HRC General Comment No 31 (n 20) para 8.

⁴¹ *Van Colle v UK* (n 24) para 88; *Demir v Turkey* (n 24) para 29; *M.M. v Russia* (n 24) para 63; *Budimir v Croatia* (n 23) para 58; *Pavlov v Russia* (n 23) para 75.

an impossible or disproportionate burden on the state.⁴² In assessing reasonableness, 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.⁴³

10. The Applicants cannot argue that Kurulu had the requisite knowledge as a result of the Constitutional Court's decision in *Battichcha*.⁴⁴ There, a journalist had his address revealed online by other users and was subjected to calls for reprisal against him.⁴⁵ The present case is different, as none of the Applicants' personal information was posted online by other users.

3. Kurulu struck a fair balance between the Applicants' rights under Article 17 and Article 19 of the ICCPR, and other competing rights

11. A fair balance must be struck between the competing interests of the individual and of the community as a whole.⁴⁶ The measures imposed must not restrict the competing

⁴² *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 24) 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 34) para 64.

⁴³ *Osman v UK* (n 42) para 116; *Keenan v UK* (n 42) para 90; *Van Colle v UK* (n 24) para 88; *O'Keefe v Ireland* (n 42) para 144; *Hiller v Austria* App no 1967/14 (ECtHR, 22 November 2016) para 49; *Oganezova v Armenia* (n 42) para 83; *P.H. v Slovakia* (n 42) para 111; *J.I. v Croatia* App no 35898/16 (ECtHR, 8 September 2022) para 83.

⁴⁴ Para 34 of the Facts.

⁴⁵ Para 34 of the Facts.

⁴⁶ *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 23) para 65.

interests more than necessary to protect the Applicants' rights.⁴⁷ 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.

12. The following factors are relevant in determining whether a fair balance has been struck in the context of social media content moderation:⁴⁸ the measures applied by the social media service provider to prevent or remove the comments; the content, context, form, and consequences of the comments in question; whether the comments contribute to a debate of public interest; and the status of the person concerned. Where such a balancing exercise has been undertaken, strong reasons are required before supranational tribunals substitute their views for that of the domestic authorities.⁴⁹ Further, where there is no consensus among states as to the best measure to be adopted, a wide margin of appreciation will be accorded.⁵⁰

⁴⁷ *Fáber v Hungary* App no 40721/08 (ECtHR, 24 October 2012) ('*Fáber v Hungary*') para 43.

⁴⁸ *Axel Springer AG v Germany* (n 28) 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 6) paras 142–143; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) ('*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*') para 68; *Hájovský v Slovakia* (n 25) para 30; *Standard Verlagsgesellschaft mbH v Austria (No 3)* App no 39378/15 (ECtHR, 7 March 2022) para 85; *Samoylova v Russia* (n 25) para 74; *I.V.Ț. v Romania* (n 25) para 47; *Mesić v Croatia* App no 19362/18 (ECtHR, 5 September 2022) ('*Mesić v Croatia*') para 85; *Drousiotis v Cyprus* (n 29) para 41.

⁴⁹ *Delfi AS v Estonia* (n 6) para 139; *Mesić v Croatia* (n 48) para 87.

⁵⁰ *X, Y and Z v UK* App no 21830/93 (ECtHR, 22 April 1997) ('*X, Y and Z v UK*') para 44; *Fretté v France* App no 36515/97 (ECtHR, 26 May 2002) ('*Fretté v France*') para 41; *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002) ('*Christine Goodwin v UK*') para 85; *Abdyusheva and Others v Russia* App nos 58502/11, 62964/10, 55683/13 (ECtHR, 15 April 2020) ('*Abdyusheva and Others v Russia*') paras 111–112; *Lings v Denmark* App no 15136/20 (ECtHR, 12 July 2022) ('*Lings v Denmark*') para 60; *Lia v Malta* App no 8709/20 (ECtHR, 5 August 2022) ('*Lia v Malta*') para 59; *Thörn v Sweden* App no 24547/18 (ECtHR, 1 September 2022) ('*Thörn v Sweden*') para 46.

13. Kurulu’s current measures have struck a fair balance between protecting the Applicants’ rights and the competing interests. The Constitutional Court in *Battichcha* imposed a duty on social media service providers to take reasonable action to ‘proactively detect and take down harmful content’.⁵¹ This duty has led Chirp to adopt measures which sufficiently protect the Applicants’ rights, by removing comments which interfere with their rights.
14. Chirp adopted a set of Community Guidelines which guides its content removal policy.⁵² Clause 8(1) states that Chirp generally allows for ‘unrestricted conversation around people who are featured in the news or have a large public audience due to their profession or chosen activities.’⁵³ This accurately reflects the position in international human rights law, under which persons in the public eye enjoy a lesser degree of privacy and may be subject to others’ exercise of their freedom of expression, to a greater extent.⁵⁴ Clause 8(2) does not allow for speeches that call for physical harm.⁵⁵ Such a prohibition can be evinced by the fact that around 40 comments calling for physical harm against the Applicants and their property were removed.⁵⁶

⁵¹ Para 35 of the Facts.

⁵² Para 21 of the Facts.

⁵³ Para 21 of the Facts.

⁵⁴ *Petrenco v Moldova* (n 35) para 55; *GRA Stiftung gegen Rassismus und Antisemitismus v Switzerland* (n 35) para 62; *Jishkariani v Georgia* (n 35) paras 46, 51.

⁵⁵ Para 21 of the Facts.

⁵⁶ Para 46 of the Facts.

15. Chirp further adopted two mechanisms which effectively enforce its Community Guidelines.⁵⁷ In 2021, Chirp’s AI mechanism boasted an 88% accuracy rate in identifying violations of the Community Guidelines.⁵⁸ This was expected to increase to a 95% accuracy rate in 2022.⁵⁹ Furthermore, Chirp employs human content reviewers to manually review user reports of alleged violation of the Community Guidelines.⁶⁰ While Chirp has plans to downsize its human content review team,⁶¹ this must be seen in light of the high efficacy of the AI mechanism.
16. The Applicants cannot rely on the existence of the unremoved comments to argue that a fair balance has not been struck. As earlier argued,⁶² the unremoved comments do not interfere with the Applicants’ rights. Further, the exercise of one’s freedom of expression concerning matters of public interest is to be afforded great protection.⁶³ The comments by Drongo22, Heron100, IUSU_RedKite, and BarnOwl_NUKSU were part of the public debate surrounding the privatisation of university education in Kurulu. The removal of

⁵⁷ Para 22 of the Facts.

⁵⁸ Para 24 of the Facts.

⁵⁹ Para 25 of the Facts.

⁶⁰ Paras 26–27 of the Facts.

⁶¹ Para 28 of the Facts.

⁶² Paras 6–8 of this Memorial.

⁶³ *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 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.

such comments would amount to a censorship of public debate and constitutes an unnecessary restriction of other users' freedom of expression.

17. Lastly, Kurulu acted within its margin of appreciation in striking a fair balance between the Applicants' rights and the competing interests. States are accorded a wide margin of appreciation in weighing the competing rights to privacy and freedom of expression,⁶⁴ as national authorities are better placed to balance conflicting fundamental rights based on a state's unique social context.⁶⁵ Moreover, a wider margin of appreciation will be accorded to a state in discharging its obligations where there is no consensus among the states as to the best means to protect individuals' rights.⁶⁶ Globally, states have yet to reach a consensus on what is considered an adequate social media content moderation regime.⁶⁷ States that have introduced new and draft legislation have been faced with strong criticisms for threatening the right to freedom of expression. These include

⁶⁴ *Evans v UK* (n 20) para 77; *Dickson v UK* App no 44362/04 (ECtHR, 4 December 2007) para 78; *A v Norway* (n 29) para 66; *MGN Limited v UK* App no 39401/04 (ECtHR, 18 April 2011) para 142; *Ashby Donald v France* App no 36769/08 (ECtHR, 10 January 2013) para 40; *Delfi AS v Estonia* (n 6) para 139; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 48) para 59; *M.L. and W.W. v Germany* App nos 60798/10, 65599/10 (ECtHR, 28 June 2018) para 94.

⁶⁵ *Chassagnou v France* App nos 25088/94, 28331/95, 28443/95 (ECtHR, 29 April 1999) para 113; *Palomo Sánchez v Spain* App nos 28955/06, 28957/06, 28959/06, 28964/06 (ECtHR, 12 September 2011) para 54; *Bédat v Switzerland* (n 29) para 54.

⁶⁶ *X, Y and Z v UK* (n 50) para 44; *Fretté v France* (n 50) para 41; *Christine Goodwin v UK* (n 50) para 85; *Abdyusheva and Others v Russia* (n 50) paras 111–112; *Lings v Denmark* (n 50) para 60; *Lia v Malta* (n 50) para 59; *Thörn v Sweden* (n 50) para 46.

⁶⁷ Molly Land, 'Toward an International Law of the Internet' (2013) 54(2) *Harvard International Law Journal* 393, 394; Council of Europe, 'Guidance Note on Content Moderation' (2021) <<https://rm.coe.int/content-moderation-en/1680a2cc18>> accessed 20 November 2022, 16; OHCHR, 'Moderating online content: fighting harm or silencing dissent?' *OHCHR* (23 July 2021) <<https://www.ohchr.org/en/stories/2021/07/moderating-online-content-fighting-harm-or-silencing-dissent>> accessed 20 November 2022; Talita Dias, 'Tackling Online Hate Speech through Content Moderation: The Legal Framework under the International Covenant on Civil and Political Rights' (Oxford Institute for Ethics, Law and Armed Conflict, 5 July 2022), 17–18.

Australia,⁶⁸ Brazil,⁶⁹ Bangladesh,⁷⁰ France,⁷¹ and Tanzania.⁷² It is therefore within Kurulu's margin of appreciation to determine the appropriate domestic legal framework for the moderation of social media content.

4. *The Applicants were not 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.⁷³ An effective remedy requires recourse to a competent

⁶⁸ 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.

⁶⁹ OHCHR, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights' (3 July 2020) OL BRA 6/2020.

⁷⁰ 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 situation of human rights defenders' (14 May 2018) OL BGD 4/2018.

⁷¹ OHCHR, 'Mandat du Rapporteur spécial sur la promotion et la protection du droit à la liberté d'opinion et d'expression' (20 August 2019) OL FRA 6/2019.

⁷² OHCHR, 'Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (16 November 2020) OL TZA 4/2020.

⁷³ *Konstantin Zhukovsky v Belarus* (n 21) para 9; *Leonid Zdrestov v Belarus* (n 21) para 10; *Murat Telibekov v Kazakhstan* (n 21) para 11; *Djegdjigua Cherguit v Algeria* (n 21) para 9; *Vladimir Malei v Belarus* (n 21) para 11.

national authority,⁷⁴ such as a judicial body,⁷⁵ to examine the merits of the complaint.⁷⁶ The Applicants had recourse to an effective judicial remedy in the form of a joint petition before the Constitutional Court,⁷⁷ The effectiveness of the remedy afforded to the Applicants is maintained, despite the eventual dismissal of the complaint by the Constitutional Court.⁷⁸

B. KURULU’S ACTION AND INACTION WITH RESPECT TO INVESTIGATIONS INTO THE BREAK-IN AND VANDALISATION OF THE APPLICANTS’ HOME DID NOT VIOLATE THEIR RIGHTS RECOGNISED BY ARTICLE 17 AND ARTICLE 19, READ WITH ARTICLE 2(3), OF THE ICCPR

19. 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.⁷⁹ While an effective investigation must be capable of identifying the

⁷⁴ *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.

⁷⁵ *Klass and Others v Germany* (n 74) para 66; HRC General Comment No 31 (n 20) para 15.

⁷⁶ *Swedish Engine Drivers’ Union v Sweden* App no 5614/72 (ECtHR, 6 February 1976) (*‘Swedish Engine Drivers’ Union v Sweden’*) para 50; *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000) (*‘Kudla v Poland’*) para 157.

⁷⁷ Paras 63, 65 of the Facts.

⁷⁸ *Swedish Engine Drivers’ Union v Sweden* (n 76) para 50; *Boyle and Rice v UK* App no 9659/82 (ECtHR, 27 April 1988) para 67; *Vereinigung demokratischer Soldaten Österreichs and Gubi v Austria* App 15153/89 (ECtHR, 30 June 1993) para 55; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) para 89; *Kudla v Poland* (n 76) para 157.

⁷⁹ *Ageyevy v Russia* App no 7075/10 (ECtHR, 18 April 2013) paras 195–196; *Khadija Ismayilova v Azerbaijan* (n 20) 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 20) para 8.

perpetrators,⁸⁰ the obligation is of means, and not result.⁸¹ Further, as stated above,⁸² where an individual's rights under the ICCPR have been violated, states are obligated to provide an effective remedy.⁸³ Kurulu's action and inaction with respect to investigations into the break-in and vandalism of the Applicants' home did not violate the Applicants' rights under Article 17 and Article 19, read with Article 2(3), of the ICCPR because: (1) Kurulu fulfilled its positive obligation to conduct an effective investigation into the break-in and vandalism of the Applicants' home; and (2) the Applicants were not denied of an effective remedy.

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

20. In assessing whether an effective investigation has been conducted, the following factors are relevant: the opening of investigations;⁸⁴ delays in taking statements;⁸⁵ and the length of time taken for the initial investigation.⁸⁶ Two days after Besra had lodged the initial

⁸⁰ *Premininy v Russia* App no 49973/04 (ECtHR, 10 February 2011) para 74; *Khadija Ismayilova v Azerbaijan* (n 20) para 118; *Alković v Montenegro* App no 66895/10 (ECtHR, 5 December 2017) para 65; *M.D. and Others v Spain* (n 79) para 59.

⁸¹ *Khadija Ismayilova v Azerbaijan* (n 20) para 118; *X and Others v Bulgaria* App no 22457/16 (ECtHR, 2 February 2021) para 186.

⁸² Paras 5, 18 of this Memorial.

⁸³ *Konstantin Zhukovsky v Belarus* (n 21) para 9; *Leonid Zdrestov v Belarus* (n 21) para 10; *Murat Telibekov v Kazakhstan* (n 21) para 11; *Djegdjigua Cherguit v Algeria* (n 21) para 9; *Vladimir Malei v Belarus* (n 21) para 11.

⁸⁴ *Labita v Italy* App no 26772/95 (ECtHR, 6 April 2000) para 133.

⁸⁵ *Tekin v Turkey* App no 52/1997/836/1042 (ECtHR, 9 June 1998) para 67; *Timurtaş v Turkey* App no 23531/94 (ECtHR, 13 June 2000) para 89.

⁸⁶ *Indelicato v Italy* App no 31143/96 (ECtHR, 18 October 2001) para 37.

report, the Police launched an investigation,⁸⁷ and summoned a representative from Chirp for an interview.⁸⁸ When notified by Chirp's representative that a warrant was necessary to disclose BarnOwl_NUKSU's personal data,⁸⁹ the Police applied for a warrant the next day.⁹⁰ Despite the subsequent rejection of this request,⁹¹ the Police continued to investigate via CCTV footage and forensic evidence.⁹² The Applicants cannot rely on the fact that the investigation has yet to identify perpetrators, to argue that Kurulu has not provided an effective investigation. This is expected as it has only been a few months since the investigation has begun.⁹³

21. The Applicants cannot argue that the Magistrate's rejection of the warrant request resulted in the lack of an effective investigation. The obligation to investigate is not breached merely because the investigation does not produce a satisfactory result.⁹⁴ Rather, the Magistrate's decision was made in accordance with international law. The protection of personal data and the anonymity of Internet users are essential to one's rights to privacy and freedom of expression respectively.⁹⁵ BarnOwl_NUKSU was using

⁸⁷ Paras 52–53 of the Facts.

⁸⁸ Para 54 of the Facts.

⁸⁹ Para 54 of the Facts.

⁹⁰ Para 55 of the Facts.

⁹¹ Para 55 of the Facts.

⁹² Para 56 of the Facts.

⁹³ Para 65 of the Facts.

⁹⁴ *Velásquez Rodríguez v Honduras* (IACtHR, 29 July 1988) para 177.

⁹⁵ *Delfi AS v Estonia* (n 6) para 147; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) para 137.

an anonymous account online and was exercising their right to freedom of expression by participating in a public debate.⁹⁶ The issuance of the warrant would have directly interfered with their rights.

22. Although BarnOwl_NUKSU's rights could be interfered with in pursuance of the legitimate aim of criminal investigation,⁹⁷ a low level of suspicion of a suspect's involvement in a crime does not justify the interference with their right.⁹⁸ The standard required by Section 215 of the Criminal Procedure Act of Kurulu for a warrant to be issued is 'reasonable suspicion'.⁹⁹ A reasonable suspicion is present if an objective observer, having regard to the circumstances of case, would be satisfied that the person concerned committed the offence.¹⁰⁰ There is insufficient evidence to raise a reasonable suspicion that BarnOwl_NUKSU had carried out the break-in and vandalism of the Applicants' home. The only evidence tying BarnOwl_NUKSU to the suspects that had broken into and vandalised the Applicants' home is a single word, 'BIRDBRAINS!'.¹⁰¹ Further, BarnOwl_NUKSU's comment was posted on Kurulu's most popular social media platform, Chirp,¹⁰² and liked by several hundred other users.¹⁰³

⁹⁶ Paras 40, 45 of the Facts.

⁹⁷ *Z v Finland* App no 22009/93 (ECtHR, 25 February 1997) para 97; *K.U. v Finland* App no 2872/02 (ECtHR, 2 March 2009) para 49; *Avilkina v Russia* App no 1585/09 (ECtHR 7 October 2013) para 45.

⁹⁸ *Sommer v Germany* App no 73607/13 (ECtHR, 27 April 2017) para 58.

⁹⁹ Para 38 of the Clarifications.

¹⁰⁰ *Imakayeva v Russia* App no 7615/02 (ECtHR, 9 February 2007) para 173; *Baş v Turkey* App no 66448/17 (ECtHR, 7 September 2020) para 171.

¹⁰¹ Paras 45, 49 of the Facts.

¹⁰² Para 14 of the Facts.

¹⁰³ Para 45 of the Facts.

2. *The Applicants received an effective remedy*

23. As stated above,¹⁰⁴ the right to an effective remedy requires individuals to have recourse to a judicial remedy to assess the purported violation of their rights and provide redress.¹⁰⁵ The effectiveness of a remedy is not dependent on the certainty of a favourable outcome for the applicant, but refers to an accessible remedy before an authority competent to examine the merits of a complaint.¹⁰⁶ The Applicants had recourse to an effective judicial remedy in the form of a joint petition before the Constitutional Court, which heard and reviewed their case.¹⁰⁷ The Constitutional Court determined that there was insufficient evidence to establish that the break-in was committed by a user on Chirp, and there was no basis to issue a warrant which would violate the privacy of BarnOwl_NUKSU.¹⁰⁸

II. KURULU'S ACTIONS WITH RESPECT TO THE SUSPENSION AND IMPOSITION OF CONDITIONS ON SHIKRA DID NOT VIOLATE SHIKRA'S RIGHTS UNDER ARTICLE 19 OF THE ICCPR

¹⁰⁴ Para 18 of this Memorial.

¹⁰⁵ *Klass and Others v Germany* (n 74) para 64; *Silver and Others v UK* (n 74) para 113; *Leander v Sweden* (n 74) para 77.

¹⁰⁶ *Swedish Engine Drivers' Union v Sweden* (n 76) para 50; *Kudla v Poland* (n 76) para 157.

¹⁰⁷ Paras 63, 65 of the Facts.

¹⁰⁸ Para 66 of the Facts.

24. The right to freedom of expression under Article 19 of the ICCPR is not absolute,¹⁰⁹ and may yield to a state's duty to protect the rights of others and public order.¹¹⁰ An interference with the right to freedom of expression is made out when a detriment is imposed on an individual because of the expression of their views.¹¹¹
25. The privatisation of university education is a highly contentious and volatile topic in Kurulu. While the CPE demands the privatisation of university education,¹¹² their movement has been met with strong opposition by those who believe that the privatisation of universities would create inequality in access to education.¹¹³ As the head of CPE, Shikra created a Post calling for a strike in support of the privatisation of university education.¹¹⁴ An inquiry was conducted, and the Panel found that Shikra had violated Section 24 of the Code.¹¹⁵ Shikra was suspended for one week, with the lifting of her suspension conditional upon a written undertaking that she refrains from issuing similar statements in the future.¹¹⁶ It is accepted that the imposition of sanctions on Shikra constitutes an interference with her right to freedom of expression. However,

¹⁰⁹ ICCPR (n 1) arts 19(3), 21; HRC General Comment No 34 (n 20) paras 21, 28–32; HRC, 'General Comment No 37' (27 July 2020) UN Doc CCPR/C/GC/37 ('HRC General Comment No 37') paras 42–47; IACHR, 'Report of the Rapporteurship for Freedom of Expression' (2002) OEA/Ser. L/V/II. 117 para 31; IACHR, 'Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2005' (2006) OEA/Ser.L/V/II.124 121.

¹¹⁰ ICCPR (n 1) art 19(3).

¹¹¹ *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) ('*Malcolm Ross v Canada*') para 11.1.

¹¹² Para 6 of the Facts.

¹¹³ Para 13 of the Facts.

¹¹⁴ Para 37 of the Facts.

¹¹⁵ Para 60 of the Facts.

¹¹⁶ Para 61 of the Facts.

Kurulu was justified in doing so because the sanctions were: (A) prescribed by law; (B) in pursuit of legitimate aims; and (C) necessary in a democratic society. These requirements have been endorsed by tribunals including the ECtHR,¹¹⁷ UNHRC,¹¹⁸ IACtHR,¹¹⁹ and ACommHPR.¹²⁰

A. THE SANCTIONS IMPOSED ON SHIKRA WERE PRESCRIBED BY LAW

¹¹⁷ *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) para 49; *Bowman v UK* App no 141/1996/760/961 (ECtHR, 19 February 1998) para 34; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) para 24; *Animal Defenders International v UK* App no 48876/08 (ECtHR, 22 April 2013) 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 63) 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* App no 43351/12 (ECtHR, 18 August 2021) para 72; *Milosavljević v Serbia (No 2)* App no 47274/19 (ECtHR, 21 December 2021) para 50; *Bodalev v Russia* App no 67200/12 (ECtHR, 6 September 2022) para 65; *Stancu and Others v Romania* App no 22953/16 (ECtHR, 18 October 2022) para 103.

¹¹⁸ *Malcolm Ross v Canada* (n 111) para 11.2; *Vladimir Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 23 November 2005) para 7.3; *Leonid Zdrestov v Belarus* (n 21) para 8.3; *Murat Telibekov v Kazakhstan* (n 21) para 9.3; *Tatsiana Reviako v Belarus* UN Doc CCPR/C/129/D/2455/2014 (HRC, 4 March 2021) para 8.3; *Vladimir Malei v Belarus* (n 21) para 9.3; HRC General Comment No 34 (n 20) 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 para 29; 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 24; UNHRC 13 April 2021 Freedom of Opinion and Expression Report (n 63) para 39.

¹¹⁹ *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.

¹²⁰ *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.

26. An interference is prescribed by law if the relevant law (1) is sufficiently precise; and (2) there are adequate safeguards.¹²¹ Under this requirement, ‘law’ includes regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament.¹²² Section 29 of the University Standards Board Law authorises the Board approve all codes of conduct of state universities in Kurulu.¹²³ The Code was promulgated in 1999, following the Board’s approval.¹²⁴ Accordingly, the Code can be regarded as law.

1. Section 24(4) of the Code was sufficiently precise

27. A law is sufficiently precise if it enables individuals concerned to regulate their conduct.¹²⁵ Individuals must be able to reasonably foresee the consequences a given action could entail.¹²⁶ Section 24(4) of the Code clearly states that instances of gross misconduct could result in disciplinary action,¹²⁷ and includes examples of gross

¹²¹ *Silver and Others v UK* (n 74) paras 85–90; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) para 55; *Magyar Kétfarkú Kutya Párt v Hungary* (n 63) para 93; *Bagirov v Azerbaijan* App nos 81024/12, 28198/15 (ECtHR, 25 September 2020) para 54.

¹²² *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005) (‘*Leyla Şahin v Turkey*’) para 88; *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) (‘*Sanoma Uitgevers B.V. v the Netherlands*’) 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) (‘*NIT S.R.L. v the Republic of Moldova*’) para 157.

¹²³ Para 58 of the Facts.

¹²⁴ Para 58 of the Facts.

¹²⁵ *Wingrove v UK* (n 63) para 40; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) (‘*Editorial Board of Pravoye Delo and Shtekel v Ukraine*’) paras 51–52; *Perinçek v Switzerland* (n 117) para 131; *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 29 January 2018) (‘*Dmitriyevskiy v Russia*’) para 78; HRC General Comment No 34 (n 20) para 25.

¹²⁶ *Wingrove v UK* (n 63) para 40; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (n 125) paras 51–52; *Perinçek v Switzerland* (n 117) para 131; *Dmitriyevskiy v Russia* (n 125) para 78; HRC General Comment No 34 (n 20) para 25.

¹²⁷ Para 42 of the Facts.

misconduct such as ‘leading or inciting others to cause nuisance or disrupt scheduled or normal activities within any university building or area’.¹²⁸ In the Post, Shikra called for both academics and students to refuse to teach or attend classes, and to occupy university premises.¹²⁹ It was reasonably foreseeable that Shikra’s actions would result in disciplinary action under Section 24(4) of the Code.

28. Consequences need not be foreseeable with absolute certainty.¹³⁰ Instead, the scope of foreseeability depends on the content of the law, the field it is designed to cover, and the number and status of those to whom it is addressed.¹³¹ Having regard to the purpose of the Code, which is to regulate the conduct of academics in the NUK, the scope of the term ‘disciplinary action’ must necessarily be understood as action with respect to the status of an academic’s employment. In fact, it is common practice for academic codes of conduct to impose suspensions as a form of ‘disciplinary action’.¹³² Further, it is reasonably foreseeable for the Panel to require Shikra to make an undertaking that she would refrain from similar violations of the Code in the future. Thus, the imposition of

¹²⁸ Para 42 of the Facts.

¹²⁹ Para 37 of the Facts.

¹³⁰ *Perinçek v Switzerland* (n 117) para 131.

¹³¹ *Leyla Şahin v Turkey* (n 122) para 91.

¹³² Harvard Information for Employees, ‘Employee Conduct’ (*Harvard Human Resources*, 21 May 2008) <<https://hr.harvard.edu/staff-personnel-manual/employee-conduct/introduction>> accessed 20 November 2022; London School of Economics and Political Science, ‘The “Academic Annex”’ (*London School of Economics and Political Science*, 13 October 2021) <<https://info.lse.ac.uk/staff/services/Policies-and-procedures/Assets/Documents/acaAnn.pdf>> accessed 20 November 2022; University of Cambridge Human Resources, ‘Disciplinary procedures’ (*University of Cambridge*, 15 November 2022) <<https://www.hr.admin.cam.ac.uk/hr-staff/information-staff/assistant-staff-handbook/disciplinary-procedures>> accessed 20 November 2022.

sanctions was a reasonably foreseeable consequence of violating Section 24(4) of the Code.

2. *There were adequate safeguards*

29. Adequate safeguards are present when a body charged with the execution of the relevant law does not possess unfettered discretion.¹³³ There were multiple procedures which prevented the arbitrary imposition of sanctions by the Vice Chancellor. Pursuant to Section 100 of the Code, a Panel of three senior academics was appointed to conduct an inquiry into Shikra's actions.¹³⁴ Shikra appeared on the day of her hearing and was given an opportunity to present her case before the Panel.¹³⁵ The Panel duly deliberated before finding that Shikra had violated Section 24(4) of the Code, and recommending the imposition of the sanctions.¹³⁶ The Vice Chancellor's Office must accept the Panel's recommendations before the sanctions could be imposed.¹³⁷

¹³³ *Silver and Others v UK* (n 74) para 90; *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) para 68; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) para 34; *Liu v Russia (No 2)* App no 29157/09 (ECtHR, 8 March 2012) para 87; *Karácsony v Hungary* App nos 42461/13, 44357/13 (ECtHR, 17 May 2016) paras 151, 156; *Magyar Kétfarkú Kutya Párt v Hungary* (n 63) para 93; HRC, 'General Comment No 27' (2 November 1999) CCPR/C/21/Rev.1/Add.9 para 13; HRC General Comment No 34 (n 20) para 25; HRC General Comment No 37 (n 109) para 39.

¹³⁴ Paras 57–58 of the Facts.

¹³⁵ Para 59 of the Facts.

¹³⁶ Para 60 of the Facts.

¹³⁷ Para 61 of the Facts.

30. Further, the ability to bring an application for judicial review is an adequate safeguard, as it ensures state accountability and transparency.¹³⁸ Shikra was able to challenge the Panel’s decision in the Constitutional Court.¹³⁹ The Constitutional Court made an independent determination of the reasonableness of the sanctions in accordance with Article 19 of Kurulu’s Constitution, which reproduces the requirements in Article 19(3) of the ICCPR.¹⁴⁰

B. THE SANCTIONS PURSUED THE LEGITIMATE AIMS OF PROTECTING THE RIGHTS OF OTHERS AND PUBLIC ORDER

31. The protection of the rights of others and public order are legitimate aims for restricting freedom of expression.¹⁴¹ The term ‘rights of others’ encompasses human rights generally recognised in international human rights law,¹⁴² which includes the right to education under Article 13 of the ICESCR.¹⁴³ Shikra’s Post, which called for her followers to ‘REFUSE to teach classes’, ‘OCCUPY all university premises’ and ‘NOT

¹³⁸ *Malcolm Ross v Canada* (n 111) paras 11.4, 11.5; *Andrés Felipe Arias Leiva v Columbia* UN Doc CCPR/C/123/D/2537/2015 (HRC, 18 December 2018) para 11.3; *Klass and Others v Germany* (n 74) para 56; *Sanoma Uitgevers B.V. v the Netherlands* (n 122) para 90; *Uzun v Germany* App no 35623/05 (ECtHR, 2 December 2010) para 72; *Gürtekin v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014) para 28; Consultative Council of European Judges, ‘Opinion No 18’ (Council of Europe, 16 October 2015) <<https://rm.coe.int/16807481a1>> accessed 20 November 2022, para 23; International Commission of Jurists, ‘Judicial Accountability – A Practitioner’s Guide’ (*International Commission of Jurists*, June 2016) <www.icj.org/wp-content/uploads/2016/06/Universal-PG-13-Judicial-Accountability-Publications-Reports-Practitioners-Guide-2016-ENG.pdf> accessed 20 November 2022, 34.

¹³⁹ Para 69 of the Facts.

¹⁴⁰ Paras 4, 70 of the Facts.

¹⁴¹ ICCPR (n 1) art 19(3); *Vladimir Malei v Belarus* (n 21) para 9.3; HRC General Comment No 34 (n 20) para 28.

¹⁴² HRC General Comment No 34 (n 20) para 28.

¹⁴³ ICESCR (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; HRC General Comment No 34 (n 20) para 28.

TOLERATE traitors to the cause’, threatened the availability and accessibility of education, and led to a heightened risk of public disorder on university campuses. The sanctions were imposed to prevent further escalation of the aforementioned threats.

C. THE SANCTIONS IMPOSED ON SHIKRA WERE NECESSARY IN A DEMOCRATIC SOCIETY

32. For a restriction to be necessary in a democratic society, it must:¹⁴⁴ (1) correspond to a pressing social need; and (2) be proportionate to the legitimate aim pursued.

1. The sanctions corresponded to a pressing social need

33. A pressing social need to curtail the freedom of expression arises only when the expression poses a direct and immediate threat:¹⁴⁵ (a) to the rights of others;¹⁴⁶ or (b) to public order.¹⁴⁷

a. The Post posed a direct and immediate threat to the rights of others

¹⁴⁴ *Praded v Belarus* UN Doc CCPR/C/112/D/2029/2011 (HRC, 25 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 20) paras 22, 33–34; HRC General Comment No 37 (n 109) para 40; UNHRC 13 April 2021 Freedom of Opinion and Expression Report (n 63) paras 28–29.

¹⁴⁵ HRC General Comment No 34 (n 20) para 35; UNHRC 28 July 2020 Freedom of Opinion and Expression Report (n 118) para 24.

¹⁴⁶ ICCPR (n 1) art 19(3)(a).

¹⁴⁷ ICCPR (n 1) art 19(3)(b).

34. As stated above,¹⁴⁸ the rights of others include the right to education. This entails that education must be available and accessible.¹⁴⁹ Availability entails functioning educational institutions and programs in sufficient quantity,¹⁵⁰ and accessibility requires education to be within safe physical reach.¹⁵¹ The Post contained calls for all academics to refuse to teach classes,¹⁵² therefore depriving existing university students of teaching academics. Further, Shikra's call for academics and students to occupy all university premises and to not tolerate detractors can be interpreted as a call for the physical obstruction of classes and intolerance towards people who chose to attend classes. In fact, this was the very interpretation arrived at by Chirp users Drongo22 and Heron100, who understood her Post as calling for 'intolerance against her opponents' and others to 'attack traitors'.¹⁵³ By calling for the aforementioned actions to continue 'until change comes', Shikra effectively threatened to hold hostage the availability of and safe access to education in Kurulu until the state acceded to the CPE's demands.
35. Given the extent of dissemination of the Post and Shikra's significant influence, there was a real possibility that Shikra's call would be heeded by many. Shikra made the Post on Chirp, Kurulu's most popular social media platform,¹⁵⁴ where she had over 200,000

¹⁴⁸ Para 31 of this Memorial.

¹⁴⁹ 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 6.

¹⁵⁰ CESCR General Comment No 13 (n 149) para 6(a).

¹⁵¹ CESCR General Comment No 13 (n 149) para 6(b).

¹⁵² Para 37 of the Facts.

¹⁵³ Para 41 of the Facts.

¹⁵⁴ Para 14 of the Facts.

followers.¹⁵⁵ The Post also received over 15,000 ‘Likes’ and had been shared several thousand times.¹⁵⁶ Shikra also wielded significant influence as the head of the CPE and a reputed educationist.¹⁵⁷ She had the support of the SANUK, which publicly endorsed the Post shortly after it was made. In fact, the SANUK required its members to ‘comply with [Shikra’s] directive until further notice and threatened strict action against non-compliance.’¹⁵⁸ This led the SANUK members to boycott classes on the following day.¹⁵⁹ Without intervention from the IUSU and Vice Chancellor’s Office,¹⁶⁰ the actions of Shikra’s followers might have escalated.

b. The Post posed a direct and immediate threat to public order

36. Although states must exercise tolerance with respect to calls for public demonstrations, restrictions may be justifiably imposed when there is a direct and immediate threat to public order.¹⁶¹ In determining whether there is a threat to public order, it is pertinent to consider the extent of potential disruption to ordinary life.¹⁶² There is an impermissible

¹⁵⁵ Para 38 of the Facts.

¹⁵⁶ Para 38 of the Facts.

¹⁵⁷ Para 7 of the Facts.

¹⁵⁸ Para 39 of the Facts.

¹⁵⁹ Para 16 of the Clarifications.

¹⁶⁰ Paras 42–43, 50 of the Facts.

¹⁶¹ ICCPR (n 1) art 19(3)(b).

¹⁶² *Primov v Russia* App no 17391/06 (ECtHR, 12 June 2014) para 145; *Kudrevicius v Lithuania* App no 37553/03 (ECtHR, 15 October 2015) (‘*Kudrevicius v Lithuania*’) para 155; *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14 (ECtHR, 15 November 2018) para 128; *Bumbeş v Romania* App no 18079/15 (ECtHR, 3 May 2022) (‘*Bumbeş v Romania*’) para 95.

extent of disruption to ordinary life when individuals are prevented from carrying out their lawful activities.¹⁶³ As stated above,¹⁶⁴ there was a real possibility that the Post would lead to the physical obstruction of classes, preventing academics and students from carrying out academic activities.

37. Further, when assessing the potential disruption, one must take into consideration past violence at similar events, and the impact of a counter demonstration.¹⁶⁵ The context surrounding the call for privatisation of university education in Kurulu is a volatile one. In 2016, a student demonstration against the privatisation of university education resulted in damage to public property.¹⁶⁶ A journalist who reported on the incident was subject to doxing and calls for reprisals against him.¹⁶⁷ Public sentiments remain tense, as evinced by the backlash faced by Shikra following her Post.¹⁶⁸ Against this context, and having regard to Shikra's position as the leader of the CPE,¹⁶⁹ action taken both in support of and in direct opposition to Shikra's calls can lead to serious disruption. This strengthens the need to impose sanctions, in order to prevent further aggravation of tensions within Kurulu.

¹⁶³ *Drieman and Others v Norway* App no 33679/96 (ECtHR, 4 May 2000) 10; *Lucas v UK* App no 39013/02 (ECtHR, 18 March 2003) 7; *Barraco v France* App no 31684/05 (ECtHR, 5 March 2009) ('*Barraco v France*') para 39; *Kudrevicius v Lithuania* (n 162) para 169.

¹⁶⁴ Para 34 of this Memorial.

¹⁶⁵ *Fáber v Hungary* (n 47) para 44.

¹⁶⁶ Para 34 of the Facts.

¹⁶⁷ Para 34 of the Facts.

¹⁶⁸ Para 40 of the Facts.

¹⁶⁹ Para 7 of the Facts.

38. Secondly, restrictions may be justifiably imposed in response to conduct which leads to potential disruption beyond what is inevitable in the circumstances.¹⁷⁰ Heated debates surrounding the topic of privatisation of university education are to be expected. This was why Kurulu did not restrict the freedom of its people to advocate for their respective causes, whether physically or virtually, prior to Shikra's Post. Shikra's message could have been effectively conveyed without threatening the ability of existing students to attend university physically. However, she crossed the line when she called for academics and students to carry out disruptive acts, such as refusing to teach or attend classes, and occupying all university premises.
39. Thirdly, the imposition of restrictions may be justified where a direct and immediate threat to the order within a specific social group may lead to repercussions on order in society as a whole.¹⁷¹ Shikra's Post threatened to sow discord between academics and students who held differing views, placing an immense strain on an already resource-scarce education system in Kurulu.

2. *The sanctions imposed on Shikra were proportionate*

40. Whether an interference is necessary in a democratic society also depends on the proportionality of the interference.¹⁷² Proportionality requires that states adopt the least

¹⁷⁰ *Kudrevicius v Lithuania* (n 162) para 156.

¹⁷¹ *Engel and Others v the Netherlands* App nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) para 98; *Arrowsmith v UK* App no 7050/75 (ECtHR, 16 May 1977) para 6; *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* App no 15153/89 (ECtHR, 30 June 1993) para 69.

¹⁷² *Erdoğan v Turkey* App no 25723/94 (ECtHR, 18 July 1999) para 47; *Gündüz v Turkey* App no 35071/97 (ECtHR, 14 June 2004) para 40; *Delfi AS v Estonia* (n 6) para 131; *Savva Terentyev v Russia* (n 6) para 65;

restrictive measure to achieve the legitimate aim.¹⁷³ Notwithstanding calls for Shikra to be dismissed from her position as a tenured professor at the NUK,¹⁷⁴ Shikra was merely suspended for a week and asked to provide a written undertaking.¹⁷⁵ The sanctions were the least restrictive measure capable of preventing similar violations of the Code in the future.

41. The Applicants cannot argue that the scope of the undertaking, which required Shikra to refrain from issuing ‘similar statements’,¹⁷⁶ was overly broad. Shikra was sanctioned for violating Section 24(4) of the Code, which makes explicit reference to the act of ‘leading or inciting others to cause nuisance or disrupt scheduled or normal activities within any university building or area’.¹⁷⁷ The Panel made its recommendations after determining that Shikra’s actions ‘would have caused serious disruption to the university’.¹⁷⁸ Accordingly, the requirement of the undertaking must be interpreted as merely prohibiting Shikra from making statements that would result in violations of the Code.

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.

¹⁷³ *Malcolm Ross v Canada* (n 111) para 11.6; *Vladimir Malei v Belarus* (n 21) para 9.3; *Saint-Paul Luxembourg SA v Luxembourg* App no 26419/10 (ECtHR, 18 July 2013) para 44; *Bărbulescu v Romania* (n 20) para 121; *Michael Schwarz v Stadt Bochum* Case C-291/12 (CJEU, 17 October 2013) para 46; 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, ‘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 para 7; 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 para 6; UNHRC 13 April 2021 Freedom of Opinion and Expression Report (n 63) para 41.

¹⁷⁴ Para 41 of the Facts.

¹⁷⁵ Para 61 of the Facts.

¹⁷⁶ Para 61 of the Facts.

¹⁷⁷ Para 42 of the Facts.

¹⁷⁸ Para 60 of the Facts.

42. The Applicants cannot argue that Shikra’s Post was to be accorded a higher degree of protection on the basis of academic freedom. While it is true that academic freedom plays a crucial role in furthering debates on matters of public interest,¹⁷⁹ this protection should not extend to statements that go beyond mere criticism.¹⁸⁰ Shikra’s Post went beyond mere criticism of Kurulu’s education policies, in calling for the physical obstruction of classes and intolerance towards people who chose to attend classes.¹⁸¹
43. In any event, reprehensible conduct warrants stronger restrictions,¹⁸² especially where one demonstrates a blatant disregard for the rights of others.¹⁸³ An individual’s conduct is found to be reprehensible when they intentionally cause serious disruption to the activities carried out lawfully by others to an extent beyond what is necessary.¹⁸⁴ As argued above,¹⁸⁵ Shikra intended for the disruption of education to pressure Kurulu into accepting CPE’s demands. Stronger measures, such as the sanctions in the present case,

¹⁷⁹ *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 118) para 21; CESCR General Comment No 13 (n 149) para 39.

¹⁸⁰ *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) para 171.

¹⁸¹ Para 34 of this Memorial.

¹⁸² *Skalka v Poland* App no 43425/98 (ECtHR 27 May 2003) para 41; *Bukta v Hungary* App no 25691/04 (ECtHR, 17 July 2007) paras 35–36; *Barraco v France* (n 163) para 48; *Berladir v Russia* App no 34202/06 (ECtHR, 10 July 2012) paras 56–57; *Kudrevicius v Lithuania* (n 162) para 172; *Frumkin v Russia* App no 74568/12 (ECtHR, 5 January 2016) para 141.

¹⁸³ *Kudrevicius v Lithuania* (n 162) paras 172–174.

¹⁸⁴ *Kudrevicius v Lithuania* (n 162) paras 172–174.

¹⁸⁵ Para 34 of this Memorial.

were necessary to send a strong message against her willingness to jeopardise the ability of existing students to seek university education.

44. Further, where there is a high likelihood of recalcitrance, stronger deterrent measures are also necessary.¹⁸⁶ Shikra has refused to comply with the NUK's condition of a written undertaking.¹⁸⁷ It was legitimate for Kurulu to interpret this refusal as a statement that Shikra considered her behaviour justified, and that she intended to continue with it in the future. Given the dangers inherent in her chosen form of protest and the pressing social need to deter such conduct, it was proportionate to suspend Shikra indefinitely until she complies with the NUK's conditions.
45. Lastly, an assessment of proportionality also depends on whether a restriction prevents an individual from using other means to express their views.¹⁸⁸ The sanctions imposed do not prohibit Shikra from advocating for her political views through other means. Shikra retains her ability to serve as the head of the CPE, and advocate for the privatisation of university education in Kurulu.

¹⁸⁶ *Steel and Others v UK* App no 24838/94 (ECtHR, 23 September 1998) para 107.

¹⁸⁷ Para 72 of the Facts.

¹⁸⁸ *NIT S.R.L. v the Republic of Moldova* (n 122) para 223.

RELIEF SOUGHT

For the foregoing reasons, the Respondent respectfully requests 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 did not violate 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 did not violate Shikra's rights recognised by Article 19 of the ICCPR.

Respectfully submitted 21 November 2022,

702R

Agent for the Respondent