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# COMMENTS ON THE COMMUNICATED CASE “TUTENK” OF THE ECTHR

**Application No. 6550/25 — Tütenk v. Türkiye**

**Submitted pursuant to Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court**

**On behalf of ASSEDEL (L'Association européenne pour la défense des droits et des libertés). Prepared in cooperation with the University of Urbino and University of Bologna Law Faculties.**

## I. PURPOSE OF COMMUNICATION

ASSEDEL (L'Association européenne pour la défense des droits et des libertés) is a Strasbourg-based non-governmental organisation dedicated to the protection of fundamental rights, civil liberties and democratic freedoms under the European Convention on Human Rights ("the Convention"). ASSEDEL has a particular interest in cases concerning the right to freedom of peaceful assembly, and specifically the protection of student protest as an expression of political and civic participation in a democratic society.

ASSEDEL submits these written comments in order to assist the Court by providing analysis of the general principles applicable to:

- the concept of "peaceful assembly" in the context of protests that are disruptive or obstructive in character;
- the conditions under which criminal sanctions imposed on participants in such assemblies may constitute a disproportionate interference with Article 11 of the Convention;
- the obligations of domestic courts to conduct an adequate balancing of competing interests before imposing criminal penalties for conduct arising from a protest.

These observations do not address the specific facts of the case before the Court, nor do they express any view on the individual circumstances of the applicant. They are limited to identifying general principles emerging from the Court's case-law and from relevant international and comparative standards. This intervention does not contain an individual assessment of the Case.

## II. APPLICABLE LEGAL FRAMEWORK

### A. Article 11 of the Convention

Article 11 § 1 of the Convention guarantees to everyone the right to freedom of peaceful assembly. Article 11 § 2 permits restrictions on this right only where they are prescribed by law and necessary in a democratic society in the interests of, inter alia, public safety, the prevention of disorder or crime, and the protection of the rights and freedoms of others.

The Court has consistently held that the right to freedom of assembly is "a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society" and that "it should not be interpreted restrictively" (*Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 91, ECHR 2015; *Kemal Çetin v. Turkey*, no. 3704/13, § 37, 26 May 2020).

**B. International Standards**

The OSCE/ODIHR *Guidelines on Freedom of Peaceful Assembly* (3rd edition, CDL-AD(2019)017rev, 15 July 2020) and the UN Human Rights Committee *General Comment No. 37 on Article 21 of the ICCPR* (CCPR/C/GC/37, 2020) constitute significant sources of interpretive guidance recognised by the Court in its case-law (see *Laurijsen and Others v. the Netherlands*, nos. 56896/17 and 4 others, §§ 32–33, 21 November 2023). These instruments are referenced throughout these submissions where relevant.

## III. ON QUESTION 1: THE CONCEPT OF "PEACEFUL ASSEMBLY" IN THE CONTEXT OF OBSTRUCTIVE PROTESTS

### A. The Presumption of Peacefulness and the Threshold of "Violent Intentions"

The protection of Article 11 is confined to "peaceful" assemblies. The Court has consistently held that this notion "does not cover a demonstration where the organisers and participants have violent intentions which result in public disorder" (*Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 77, ECHR 2001-IX, cited in *Kemal Çetin*, § 38).

However, the threshold for removing an assembly from the scope of Article 11 protection has been consistently proven to be a high one. The OSCE/ODIHR Guidelines establish a clear presumption: "All assemblies shall be presumed to be peaceful in the absence of convincing evidence that the organisers and/or a significant number of participants intend to use, advocate or incite imminent violence" (§ 86 of the Guidelines, cited in *Laurijsen and Others*, § 32). This presumption reflects the fundamental importance of protecting civic participation and ensures that the burden of proving violent intent rests on the State.

The Court has established a three-part test to determine whether a particular individual may claim the protection of Article 11: (i) whether the assembly was intended to be peaceful or whether the organisers had violent intentions; (ii) whether the individual demonstrated violent intentions when joining the assembly; and (iii) whether the individual inflicted bodily harm on anyone (*Laurijsen and Others*, § 49). The Court also notes that if both participants to the demonstrations and the police engage in violent acts, it can resort to examination of who started the violence (*Primov and Others v. Russia*, no. 17391/06 § 157, 12 June 2014). Each element must be assessed individually, and it is only when all three criteria are satisfied against a particular person that the protection of Article 11 is definitively excluded.

### B. Obstructive Conduct and the Scope of Protection of Article 11

A central question arising in this case concerns whether a gathering that is physically obstructive or disruptive — blocking access to a building or facility — may still qualify as a "peaceful assembly" within the meaning of Article 11.

The Court's case-law clearly and unambiguously answers this question in the affirmative.

In *Kudrevičius and Others v. Lithuania* [GC] (§ 97), the Grand Chamber expressly acknowledged that "physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by Article 11 of the Convention." However — and this is of fundamental importance — the Grand Chamber immediately qualified this observation, holding that "such obstructive or disruptive conduct might still be protected by that provision." The Grand

Chamber confirmed this position at § 98, finding that the applicants' conduct was not "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of the right to freedom of peaceful assembly under Article 11 of the Convention."

The Court affirmed this approach in *Laurijsen and Others* (§§ 52–55), a case involving protesters who deliberately sought to obstruct the eviction of a building. The Court held that, even where participants intended to prevent a lawful act carried out by public authorities, "such obstructive or disruptive conduct might still be protected by [Article 11]." The Court further stated that even if the purpose of the gathering went beyond the expression of opinion and extended to physical prevention of a lawful activity — "potentially amounting to a form of coercion" — "this did not, of itself, remove the applicants' participation in it from the scope of protection of the right to freedom of peaceful assembly under Article 11 of the Convention" (*Laurijsen and Others*, § 55).

It follows from these authorities that obstructive conduct is not, *per se*, incompatible with the notion of "peaceful assembly." The decisive criterion is not whether the assembly causes disruption to the activities of others, but whether the organisers and participants harbored violent intentions. Where violence is absent, even significant obstruction of ordinary life and the activities of others does not remove the assembly from the scope of Article 11 protection.

ASSEDEL respectfully submits that this general principle is of particular importance in the context of student protests. Universities have historically served as the primary fora for the formation of civic and political opinion by younger generations. Protests arising from student communities, including sit-ins, occupations, and blockades of university facilities, constitute a well-established and socially recognised form of political expression. Their disruptive character — affecting access to university buildings and educational activities — is a foreseeable and inherent feature of this form of protest, not evidence of violent intent.

> **[INTEGRATE]:** *We invite contributing law faculties to add a brief comparative analysis of how student occupations and sit-ins are treated under domestic law in their respective jurisdictions (e.g., whether such conduct is characterised as a criminal offence, an administrative infringement, or a disciplinary matter), with a view to establishing whether a criminal conviction for participation in a university blockade is consistent with the practice of Council of Europe member States.*

## C. Individual, Not Collective, Responsibility for Violence

A corollary of the principle described above is that an individual participant does not lose the protection of Article 11 merely because other participants in the same assembly commit acts of violence.

The Court stated this principle in unambiguous terms in *Kudrevičius and Others* (§ 94): "an individual does not cease to enjoy the right to freedom of peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour." The Court reiterated the same principle in *Laurijsen and Others* (§ 50): "individuals are not to be held responsible for the acts of violence by other participants."

This approach is equally reflected in the OSCE/ODIHR Guidelines (§ 87): "Law enforcement officials must differentiate between peaceful and non-peaceful participants since only those who themselves take part in violence forfeit the legal guarantee of their right to assemble. State intervention should target individual wrongdoers, rather than all participants more generally, unless that is impossible due to the massive nature of the violence committed."

The consequence of this principle is that criminal proceedings against participants in an assembly must be assessed individually. A conviction cannot be based solely on an individual's participation in an assembly during which other persons committed acts of violence, without establishing that the convicted person personally shared the violent intentions of those others or personally committed violent acts.

The Court applied this approach in *Kemal Çetin v. Turkey* (§ 47), finding that "the criminal liability of demonstration organisers cannot be established if they do not directly participate in the acts in question, do not encourage them, or do not show leniency toward illegal conduct." The Court further noted that "organizers cannot be held responsible for the actions of others if they did not take part in them either explicitly, through active and direct participation, or implicitly" (*ibidem*). As the Court recognised at § 48, citing the OSCE/ODIHR Guidelines, "organizers of assemblies should not be held liable for the criminal acts of individual participants" where "they have deployed reasonable efforts" to prevent such acts, and "the individual liability of any person who has personally committed an offence or failed to comply with the orders of law enforcement officials should be established" on an individual basis.

The converse of this rule is equally significant: when isolated violent acts are committed within a broader assembly, the proper response of the State must be to identify and prosecute the specific individuals responsible for those acts. It is not to impose criminal liability on the assembly as a whole, or on individuals whose conduct has been consistently peaceful throughout.

### D. Clothing, Slogans and Proof of Violent Intent

The use of particular clothing (e.g., face coverings or protective equipment) or the chanting of provocative slogans does not, *per se*, constitute evidence of violent intent sufficient to remove an individual from the protection of Article 11.

The UN Human Rights Committee's *General Comment No. 37* expressly provides that "the use of disguises should not in itself be deemed to signify violent intent" (cited in *Laurijsen and Others*, § 33). The Court has not departed from this principle. Indeed, in *Laurijsen and Others* (§ 56), the Court found that the presence in a gathering of persons wearing balaclavas and carrying protective equipment was not, without more, sufficient to characterise the assembly as non-peaceful.

Equally, the use of slogans that authorities regard as illegal or as promoting a politically sensitive cause does not, without more, strip an assembly of its peaceful character. In *Kemal Çetin v. Turkey* (§ 39), the Court held that "the fact that some demonstrators used slogans and signs considered illegal on that occasion cannot, in and of itself, justify the deprivation of the applicant's right to demonstrate." The Court reached this conclusion even in circumstances where the slogans in question were alleged by the Government to glorify a terrorist organisation.

ASSEDEL respectfully submits that these principles have a particular importance in the context of politically sensitive student protests, where authorities may be tempted to characterise the content of political speech, or the dress of protesters, as evidence of unlawful intent. The Court's case-law establishes that such considerations are insufficient, in isolation, to justify the suppression of an assembly or the criminal prosecution of its participants.

## IV. ON QUESTION 2: NECESSITY, PROPORTIONALITY AND THE FAIR BALANCE TEST

### A. The Three-Stage Necessity Test

Any restriction on the right to freedom of peaceful assembly must satisfy three conditions under Article 11 § 2: it must be (i) prescribed by law; (ii) directed at a legitimate aim; and (iii) necessary in a democratic society. The focus of the Court's analysis in the present type of case typically falls on the third criterion — necessity.

"Necessary" implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate aim pursued (*Kudrevičius and Others*, § 144; *Kemal Çetin*, § 41, citing *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, § 128, 15 November 2018). The Court requires that domestic authorities adduce "relevant and sufficient reasons" to justify any interference (*Kudrevičius and Others*, § 143).

### B. The Obligation to Conduct an Adequate Fair Balance

The most important obligation imposed on domestic courts by Article 11 § 2 — and the most frequently violated — is the obligation to strike a genuine and explicit *fair balance* between the exercise of the right to freedom of assembly and the competing interests invoked to justify the restriction.

The Court has been clear that this balancing exercise must be conducted visibly and substantively by the domestic courts, not merely assumed or implied. In *Kemal Çetin v. Turkey* (§ 52), the Court found a violation of Article 11 precisely because "the national authorities failed to balance the applicant's right to freedom of peaceful assembly against the legitimate aims pursued in a manner that was adequate and consistent with the criteria established by [the Court's] case-law." The Court confirmed that neither the arguments of the Government nor the reasoning of the domestic courts established that the criminal conviction "could reasonably be regarded as having served a pressing social need" (§ 53).

Similarly, in *Laurijsen and Others* (§§ 65–66), the Court found a violation on the ground that the domestic courts — specifically the Supreme Court — had failed to examine whether the applicants' role in the gathering had been "peaceful" within its autonomous Convention meaning, and had therefore failed to "convincingly establish the necessity for the restrictions."

ASSEDEL respectfully submits that the following specific criteria are required by the Court's case-law to form part of any adequate balancing exercise in cases involving the restriction of the right to peaceful assembly:

1. **The nature and extent of the disruption caused by the assembly** — whether the disruption to the activities of others was severe and disproportionate, or whether it was within the range of inconvenience that is inherent in public protest (*Kudrevičius and Others*, §§ 162–163).
2. **Whether less restrictive alternatives were available** — in particular, whether the State could have used administrative or civil law measures, rather than criminal prosecution, to address the

disruption caused (*Kudrevičius and Others*, § 146: "Where the sanctions imposed on the demonstrators are criminal in nature, they require particular justification"; *Kemal Çetin*, § 54).

3. **The individual conduct of the person charged** — whether that specific person personally committed reprehensible acts, or whether the charge is based on generalised group liability (*Kemal Çetin*, §§ 45–47; *Laurijsen and Others*, § 50).

4. **The nature and gravity of the penalty imposed** — heavy criminal sanctions, including custodial sentences of significant duration, require heightened justification because of their "chilling effect" on the future exercise of Convention rights (*Kemal Çetin*, § 54; *Kudrevičius and Others*, § 100).

### C. The "Disruption" Threshold: When Does Obstruction Justify Criminal Sanction?

In *Kudrevičius and Others* [GC] (§§ 169–173), the Grand Chamber set important limits on the circumstances in which States may impose criminal sanctions for disruptive assemblies. The Grand Chamber acknowledged that the applicants' conduct — the near-total obstruction of three major motorways — was "might be considered a reprehensible act" and could justify the imposition of penalties, "even of a criminal nature." However, it did so on the basis of a highly specific set of aggravating factors: the deliberate choice to block critical national infrastructure, the total disregard for police orders, the severe impact on road users and commercial transport, and the clear, preannounced, availability of legal alternatives for the applicants to advance their grievances.

The Grand Chamber simultaneously reaffirmed, at § 138, that "any demonstration in a public place may cause a certain level of disruption to ordinary life", including disruption of traffic. This fact in itself does not justify an interference with the right to freedom of assembly. And it emphasized, at § 150, the obligation of public authorities to "show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance."

Crucially, in *Kudrevičius and Others*, the Court found that even given the severity of the disruption, the domestic authorities had struck a fair balance because: (a) they had prepared alternative road itineraries in advance; (b) they had allowed vehicles carrying dangerous goods to pass; (c) the criminal penalties ultimately applied were lenient (suspended custodial sentences of sixty days); and (d) the disruption at issue had no connection to the object of the applicants' protest (ibid., §§ 171–175).

These factors underscore the centrality of proportionality and the nature of the sanction in cases of this kind. ASSEDEL submits that the following general principles emerge from this case-law:

- The severity of the disruption caused by an assembly is a relevant — but not determinative — factor in assessing the proportionality of any restriction.
- A criminal sanction of significant duration is not automatically proportionate to any level of disruption. The sanction must be calibrated to the gravity of the individual's conduct, taking into account the overall context of the assembly.
- The availability of non-criminal alternatives — such as administrative sanctions, university disciplinary proceedings, or civil law remedies — is highly relevant to the assessment of whether criminal prosecution satisfied a "pressing social need."

**[INTEGRATE]:** *We invite contributing law faculties to provide comparative data on the range of legal responses used in their jurisdictions when university buildings are occupied by students during protests (e.g., but not limited to, internal disciplinary measures, administrative fines, criminal offences), and whether custodial sentences of several years have ever been imposed (and upheld) or would be considered proportionate for conduct of this nature.*

### D. Criminal Sanctions, the Chilling Effect, and the Pressing Social Need Requirement

The Court has repeatedly emphasised that the nature and severity of criminal penalties imposed in connection with the exercise of Convention rights must be specially justified, because of the particular "chilling effect" such penalties produce on the future exercise of those rights.

In *Kemal Çetin v. Turkey* (§ 54), the Court stated "the nature and severity of the penalties imposed are also factors to be taken into account" and "criminal sanctions require specific justification.". The Court found that even a suspended prison sentence of one year and three months was sufficient to produce a "deterrent effect on the exercise by the applicant of his right to demonstrate" – that is, a chilling effect on the applicant's future exercise of his Article 11 rights – in the absence of adequate justification.

The principle that criminal sanctions have a chilling effect on political speech and civic participation is well-established across both the Court's case-law on Article 10 and its jurisprudence on Article 11. This chilling effect is particularly acute when the sanction is imposed on student protesters, given: (i) the formative and irreversible impact of criminal convictions on the professional and civic futures of young persons; (ii) the broader deterrent on student communities as a whole, potentially suppressing legitimate political engagement, and (iii) the particular vulnerability of students, who often lack the financial, legal and psychological resources to fully defend themselves in protracted criminal proceedings.

ASSEDEL respectfully submits that a criminal sentence of several years' imprisonment, imposed on a student in connection with participation in a university protest, can only be consistent with Article 11 of the Convention if domestic courts have explicitly addressed all of the following:

- the specific individual conduct of the convicted person within the protest, including whether she personally committed violent acts as distinct from other participants;
- the proportionality of the chosen sanction compared to the actual level of disruption caused to the rights of others;
- whether less coercive means — including non-criminal responses — were available and adequate to achieve the legitimate aim pursued;
- and the chilling effect of the sentence on the future exercise of the right to freedom of assembly by the convicted person and by the broader community.

The absence of any such analysis in a domestic judgment constitutes a failure to conduct the fair balance required by Article 11 § 2, as identified by the Court in *Kemal Çetin* (§ 52) and *Laurijsen and Others* (§§ 65–66).

## V. CONCLUSIONS and RECOMMENDATIONS

In summary, ASSEDEL respectfully invites the Court to affirm or develop the following general principles, which emerge from well-established case-law and from relevant international standards:

1. **Obstructive assemblies remain protected.** A gathering that intentionally obstructs access to a building or facility, or that disrupts the ordinary activities of others, does not thereby lose the protection of Article 11 of the Convention, provided that the organisers and participants do not harbour violent intentions
2. **Disruption is not equivalent to violence**. The disruptive character of an assembly – including a university blockade – is a relevant factor in proportionality assessment but does not, of itself, bring the assembly outside of the scope of Article 11 § 1 or justify any and all measures of restriction
3. **Responsibility is individual, not collective.** Individuals participating in an assembly are not to be held responsible for the violent acts of others. Criminal liability requires individual attribution of specific violent or reprehensible conduct.
4. **Clothing and slogans do not establish violent intent**. The use of protective clothing, face coverings or politically controversial slogans by participants in a gathering does not constitute evidence of violent intent sufficient to remove the gathering outside the perimeter of protection of Article 11.
5. **Domestic courts must conduct a visible and substantive fair balance**. Any criminal convictions for participation in a protest that restricts the rights of others (such as the right to education) must be supported by a specific and explicit balancing exercise, demonstrating that the interference corresponded to a pressing social need and was proportionate to the legitimate aim pursued.
6. **Severe criminal sanctions require heightened justification.** A custodial sentence of several years imposed on a student for participation in a protest generates a significant chilling effect on the exercise of the right to freedom of assembly and requires a specific, rigorous and evidence-based justification that goes beyond the formal satisfaction of the constituent elements of a criminal offence.

The principles set out above represent the core of a consistent line of authority in the Court’s case-law. ASSEDEL respectfully submits that their application in the present case, and their further elaboration in the Court's judgment, will make an important contribution to the protection of the right to freedom of peaceful assembly, and in particular the protection of student protests and demonstrations as a democratic value.