Third Party Intervention

In the Case of Özgür Avşar v. Turkey (no. 42080/19)

by

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Introduction

1. İFÖD will address in its intervention in the case of Özgür Avşar v. Turkey (**no. 42080/19**) the issue of freedom of expression on the social media platforms and incitement to hatred and hostility. In this case, the applicant was detained for approximately two months as part of a criminal investigation involving the crime of inciting public to hatred and hostility (subject to article 216/1 of the Turkish Criminal Code[1]) with regards to a publication on his Facebook account. The publication in question showed a photo of three people, believed to be members of an illegal organization killed by law enforcement and was accompanied by a comment which read as follows: "*In this country justice, law, human rights do not exist. The barbarity inflicted on Kurdish civilians in Muğla-Seydikemer-Kaş. Afterwards, they[would] have been killed under the guise of [armed] conflict*." (*Bu ülkede adalet hukuk, insan hakları yok, Muğla Seydikemer-Kaş ta, sokak ortasında Kürt sivillere yapılan barbarlık sonra da çatışma süsü verilerek öldürüldüler*). The applicant complained of infringement of his freedom of expression for his detention invoking Article 9 of the Convention.

2. It is understood from the case file that the applicant **did not produce the content but shared the content generated** by another Facebook user. So far as the content of the shared Facebook post by the applicant is concerned, it is related to criticism of abuse of power by law enforcement officers and extrajudicial killing of alleged members of illegal organisation.

3. The European Court of Human Rights ("the Court") asked to the parties whether the applicant has been deprived of his liberty in violation of Article 5 §§ 1 and 3 of the Convention and whether his freedom of expression had been interfered, within the meaning of Article 10(1) of the Convention. In particular, the Court asked, having regard to the content of the speeches and other activities alleged against the applicant, the context in which these facts took place, their potential to harm and the circumstances of the case, had the national courts carried out in their decisions sufficient consideration and proper balancing of the interests at stake with regard to the criteria set out and implemented by it in cases relating to freedom of expression?[2]

4. The İFÖD submission will address the issues of limitation of freedom of expression to prevent incitement to hatred and hostility. The international and European standards on the relationship between freedom of expression and incitement to hatred and hostility will be provided. The submission will also discuss the compliance of domestic law and practice with these standards. Subsequently, an overview of legal issues surrounding social media postings and an assessment of the impact of such publications will be provided. İFÖD will therefore assess the important issue of whether the majority of comments published on social media platforms are likely to be too trivial in character, and/or the reach of their publication is likely to be too limited in semi closed social media platforms such as Facebook. İFÖD will argue that **content published to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website or news portal**. Finally, İFÖD will provide a procedural review model discussing the 'general principles' to be

[1] Article 216/1 of the TCC reads as follows: "A person who publicly provokes hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates an explicit and imminent danger to public security shall be sentenced to a penalty of imprisonment for a term of one to three years."

[2] *Gözel and Özer v. Turkey*, nos. 43453/04 and 31098/05, § 64, 06.07.2010 and *Mart and Others v. Turkey*, no 57031/10, § 32, 19.03.2019.

taken into account in the decision-making process of the European Court with regards to allegations of violation of freedom of expression protected by Article 10 of the Convention in criminal cases.

International Human Rights Standards on the Relationship between Freedom of Expression and Incitement to Hostility and Hatred

5. The right to freedom of expression is a fundamental right and protected by international human rights law such as Article 19 of the Universal Declaration of Human Rights ("UDHR"), Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 10 of the European Convention on Human Rights ("ECHR"). The right to freedom of expression is not an absolute right and it can be limited by the states, under Article 19(3) of the ICCPR and Article 10/2 of the ECHR, provided that the limitation is provided for by law, in pursuit of a legitimate aim, (listed exhaustively as: respect of the rights or reputations of others or the protection of national security or of public order, or of public health or morals) and necessary in a democratic society.

6. Article 20(2) of ICCPR also provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. The UN Human Rights Committee ("HRC") stated that Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in Article 20 are all subject to restriction pursuant to Article 19, paragraph 3. As such, a limitation that is justified on the basis of Article 20 must also comply with Article 19, paragraph 3. Although there may be certain restrictions based on conditions provided in article 19(3) of the ICCPR or Article 10(2) of the ECHR, freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb.[3]

7. According to the Council of Europe Committee of Experts for the Development of Human Rights ("DH-DEV") ,"at the core of the examination of any interference in the exercise of freedom of opinion is therefore a balancing of interests, in which the Court takes account of the significance of freedom of opinion for democracy".[4]

Restrictions based on "Hate Speech"

8. There is no agreed definition of "hate speech". Generally, speech that incites or promotes hatred towards individuals, on the basis of their race, colour, ethnicity, gender, nationality, religion, sexual preference, disability, and other forms of individual discrimination can constitute "hate speech". In 1997, a Council of Europe ("CoE") Recommendation on Hate Speech stated that the term "hate speech" should be understood as covering "*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and*

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[3] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, p. 23, § 49; *Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, § 41; and *Jersild v. Denmark*, 23 September1994, Series A no. 298, p. 26, § 37.

[4] Council of Europe Steering Committee For Human Rights (CDDH), Committee of Experts for the Development of Human Rights (DH-DEV), Working Group A, Report on "Hate Speech", document GT-DH-DEV A(2006)008, Strasbourg, 09.02.2007, at www.coe.int/t/e/human_rights/cddh/3._committees/04.%20development%20of%20human%20rights%20(dh-dev)/04.%20meeting%20reports/36thareport.asp#P479_54485, para. 22. Note further the case of Handyside judgment of 7 December 1976, Series A No. 24, §49.

people of immigrant origin".[5] The Court refers to "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)"[6] as "hate speech" but "only statements which promote a certain level of violence qualify as hate speech".[7] Hate speech is also understood, by the European Commission against Racism and Intolerance ("ECRI") as "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status".[8] This may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes".

9. On the other hand, Article 20(2) of the International Covenant on Civil and Political Rights narrowly defines speech that requires prohibition as "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The UN HRC has held that any prohibition of propaganda of such a "hate speech" must be subject to all restrictions pursuant to Article 19.3 ICCPR[9] and they must conform to the strict tests of necessity and proportionality.

10. Partly as a result of such ambiguity it is also emphasised in the UN **Rabat Plan of Action** that perpetrators of incidents, which indeed reach the threshold of Article 20 of the International Covenant on Civil and Political Rights, are not prosecuted and punished. At the same time, members of minorities are de facto persecuted, with a chilling effect on others, through the abuse of vague domestic legislation, jurisprudence and policies. This dichotomy of (1) non-prosecution of "real" incitement cases and (2) persecution of minorities under the guise of domestic incitement laws seems to be pervasive. Anti- incitement laws in countries worldwide can be qualified as heterogeneous, at times excessively narrow or vague. Similarly, the Committee on the Elimination of Racial Discrimination ("CERD") observed with concern that "broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention on the Elimination of All Forms of Racial Discrimination".[10] Similarly, UN Rabat Plan of Action also acknowledged that jurisprudence on incitement to hatred has been scarce and ad hoc, and while several States have adopted related policies, most of them are too general, not systematically followed up, lacking focus and deprived of proper impact assessments.[11]

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5 Council of Europe, Committee of Ministers, Recommendation R (97) 20 (1997).

6 Gündüz v. Turkey, Application No. 35071/97 judgment of 4 December 2003, § 40. See further European Commission for democracy through law (Venice Commission), Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008), CDL-AD(2008)026, at www.venice.coe.int/docs/2008/CDL-AD(2008)026-e.pdf.

7 *Ibid.*

8 European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 15 on Combating Hate Speech adopted by the ECRI on 8 December 2015, at https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01

9 CCPR, General Comment no. 34 UN Doc. CCPR/C/GC/34, 12.09.2011, para. 50.

10 Committee on the Elimination of Racial Discrimination, General Recommendation No. 35, Combating Racist Hate Speech, of 12.09.2011, para 20.

11. Therefore, in order to clarify the distinction between prohibited hate speech and lawful expressions that are, for example, offensive, shocking or disturbing a "**six-part test**" has been developed by the UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[12] This is also referred to as the "**Rabat Threshold Test**" which will be considered as part of this submission. Based on the Rabat criteria and test, criminal sanctions should only be applied to offences that concern advocacy of hatred which constitute incitement to violence, hostility or discrimination on the grounds of nationality, race, religion, ethnicity, gender or sexual orientation. The European Court of Human Rights noted and referred to the Rabat Plan of Action in its *Mariya Alekhina and Others v. Russia* decision.[13]

12. The Rabat Plan of Action defines "hatred" and "hostility" as referring to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.[14]

Legitimate Limitations

13. The UN Strategy and Plan of Action on Hate Speech[15] adopted a comprehensive approach to respond to hate speech and defined three levels of unlawful and lawful expression. At the top level, only unlawful hate speech prohibited under international law which meets the "**Rabat Threshold Test**" requires criminal sanctions. At the intermediate level certain forms of hate speech may be prohibited, but only if restrictions are provided by law, pursue a legitimate aim and are necessary and proportionate. This less severe forms of hate speech should attract civil or administrative law-based restrictions, or public policy responses. At the bottom level, legal restrictions should not be imposed on the dissemination of lawful expressions that are offensive, shocking or disturbing.[16]

14. Within the Council of Europe region, any restriction regarding Internet speech and other types of speech must meet the strict criteria under Article 10 of the European Convention on Human Rights. According to the Court's jurisprudence, a strict three-part test is required for any content-based restriction. Similar to the requirements by Article 19 paragraph 3 of the International Covenant on Civil and Political Rights the restriction or interference must be "provided by law", these must be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 of Article 19 of ICCPR or Article 10(2) of the European Convention and they must conform to the strict tests of necessity in a democratic society and proportionality.[17] Therefore, any limitation based on "hate speech" must always respect the

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[11] Rabat Plan of Action is the result of a discussion by a high-level group of human rights experts, convened under the auspices of the United Nations High Commissioner for Human Rights in 2013. https://www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx A/HRC/22/17/Add.4 appendix para. 11.

[12] *Ibid*.

[13] *Mariya Alekhina and Others v. Russia*, no. 38004/12, 17.07.2018.

[14] A/HRC/22/17/Add.4, appendix, footnote 5

[15] United Nations Strategy and Plan of Action on Hate Speech, Detailed Guidance on Implementation for UN Field Presencers, September 2020, p. 10 available at https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20PoA%20on%20Hate%20Speech_Guidance%20on%20Addressing%20in%20field.pdf

[16] *Ibid*, p. 6.

[17] See communication no. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20.10.2005.

three-part test for a legitimate restriction of the right to freedom of expression under international law. Indeed, although in some cases critique against the government might exceed the permissible limits and turn to incitement to violence, international law and jurisprudence suggest that this will only meet the requirements of necessity and proportionality only under very exceptional conditions.[18]

15. As mentioned above, considering the international human rights standards and jurisprudence, the Rabat Plan of Action has set a criteria to assess the severity of the "hatred" involved and whether the threshold of prohibition under Article 20.2 ICCPR is reached:

    a. **Context of the statement**: Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;
    b. **Speaker's position or status**: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;
    c. **Intent to incite audience against target group**: Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under Article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.
    d. **Content and form of the statement**: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;
    e. **Extent of its dissemination**: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;
    f. **Likelihood of harm, including imminence**: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct."[19]

16. The Rabat Test is also in line with ECRI General Policy Recommendation No. 15 on Combating Hate Speech which stated that, "when determining whether an expression constituted incitement to hatred, the following elements are essential for assessment of whether or not there is a risk of acts of violence, intimidation, hostility or discrimination: (i) the context in which the hate speech concerned is being used; (ii) the capacity of the person

[18] See for instance, *Sürek v. Turkey* (no. 1), no. 26682/95, 08.07.1999; *Medya FM Reha Radyo ve İletişim A.Ş v. Turkey* (dec.), no. 32842/02, 14.11.2006.

[19] UN Rabat Plan of Action, para. 29, endorsed by UN Special Rapporteur on freedom of expression. https://undocs.org/A/HRC/22/17/Add.4.

using the hate speech to exercise influence over others; (iii) the nature and strength of the language used; (iv) the context of the specific remarks; (v) the medium used; and (vi) the nature of the audience.[20]

17. The Court also **applies a similar test** and requires domestic judicial authorities to take into account the text or content of the speech alongside the broader context in which it is made.[21] The **context of the speech** includes **an assessment of multiple factors**, including the identity and status of the speaker, surrounding conditions including whether the statements were made against a tense political or social background,[22] medium of expression,[23] target audience,[24] and impact of the speech.[25] Having said that, the Court's approach is **highly context-specific**[26] and **the interplay between the various factors involved** rather than any one of them taken in isolation determines the outcome of any case in the Court's approach.

18. It should also be noted that the Court **applies two different doctrines** in dealing with hate speech, depending on the nature of the speech. If the Court finds that impugned speech negates the fundamental values of the Convention, then it excludes relevant speech from the protection of the Convention under Article 17[27] considering it as hate speech and as abuse of the Convention rights. However, if the Court finds the impugned speech not clearly apt to

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20 ECRI General Policy Recommendation No. 15 on Combating Hate Speech, 08.12.2015.

21 See generally *Mariya Alekhina and Others v. Russia*, no. 38004/12, 17.07.2018, paras 217-221.

22 Examples include the **tense climate surrounding the armed clashes between the PKK** (the Workers' Party of Kurdistan, an illegal armed organisation) and the Turkish security forces in south-east Turkey in the 1980s and 1990s (see *Zana v. Turkey*, 25.11.1997, §§ 57-60, *Reports* 1997-VII; *Sürek (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV, §§ 52 and 62; and *Sürek v. Turkey (no. 3)* [GC], no. 24735/94, § 40, 8.07.1999); the atmosphere engendered by deadly prison riots in Turkey in December 2000 (see *Falakaoğlu and Saygılı v. Turkey*, nos. 22147/02 and 24972/03, § 33, 23.01.2007, and *Saygılı and Falakaoğlu v. Turkey (no. 2)*, no. 38991/02, § 28, 17.02.2009).

23 The Court has also paid attention to the manner in which **statements were made, and their capacity – direct or indirect – to lead t**o harmful consequences. Examples include Karataş v. Turkey ([GC], no. 23168/94, §§ 51-52, ECHR 1999 IV), where the fact that the statements in question had been made **through poetry** rather than in the media led to the conclusion that the interference could not be justified by the special security context otherwise existing in the case.

24 The Court has been particularly **sensitive towards sweeping statements attacking entire ethnic, religious or other groups** or casting them in a negative light, examples of which include statements portraying non-European immigrant communities in Belgium as criminally minded (Féret v. Belgium, no. 15615/07, 16.07.2009) and which concerned direct calls for violence against Jews, the State of Israel, and the West in general (*Hizb ut-Tahrir and Others*, (dec.), no. 31098/08, § 73, 12.06.2012, § 73, and *Kasymakhunov and Saybatalov*, nos. 26261/05 26377/06, 14.03.2013, § 107

25 The Court also pays particular attention to whether the statements, fairly construed and seen in their immediate or wider context, **could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance** (see, among others, *Incal v. Turkey*, 9.06.1998, § 50, Reports 1998-IV; *Özgür Gündem v. Turkey*, no. 23144/93, § 64, ECHR 2000-III; *Gündüz v. Turkey*, no. 35071/97, §§ 48 and 51, ECHR 2003-XI; *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, § 73, 12.06.2012; *Fáber v. Hungary*, no. 40721/08, §§ 52 and 56-58, 24.07.2012; and *Vona v. Hungary*, no. 35943/10, §§ 64-67, ECHR 2013).

26 *Perinçek v. Switzerland* [GC], no. 27510/08, § 208, ECHR 2015 (extracts).

27 This Category includes such expressions as incitement to violence and support for terrorist activity (see for example, *Roj TV A/S v. Denmark*, No. 24683/14, 17/04/2018) statements denying the Holocaust, or justifying a pro-Nazi policy (see for example, *Lehideux and Isorni v. France*, 23.09.1998, Reports of Judgments and Decisions 1998-VII, para. 50; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Williamson v. Germany*, no. 64496/17, 08.01.2019) or ethnic (see for example, *Glimmerveen and Haqenbeek v. the Netherlands*, no. 8348/78, 11.10.1979), religious (see for example, *Norwood v. United Kingdom*, no. 23131/03, 16.11.2004; *Belkacem v. Belgium*, no. 34367/14, 27.06.2017) and racial hate (*Pavel Ivanov v. Russia*, no. 35222/04, 20.2.2007).

destroy fundamental rights, then it applies the tests of proportionality and necessity under Article 10 of the Convention by taking into account the above mentioned factors.

19. In this second category cases, the Court's approach also depends on the nature of impugned speech; if the speech includes a clear expression of hostility and hatred against a certain target group, then the Court either finds the application inadmissible[28] or finds no violation[29] of freedom of expression.[30]

20. However, when the **target group** and **hatred issue is not clear**, the Court requires national authorities to carry out a comprehensive assessment of the impugned remarks, putting forward relevant and sufficient reasons for justifying the interference and carefully balancing the applicants' right to freedom of expression with the protection of the rights of other people not to be insulted on the grounds of their beliefs, ethnic identity or other protected grounds. According to the Court, the national judicial authorities should also examine the statements under the general context and content of the remarks, assess the author's intention, the public interest of the matter discussed and other relevant elements.[31] Domestic courts in such proceedings are required to also consider whether the context of the case, the public interest and the intention of the author of the impugned remarks justified the possible use of a degree of provocation or exaggeration.

21. In *Tagiyev and Huseynov v. Azerbaijan*,[32] the Court held that the respondent State had violated Article 10 of the Convention due to the failure of domestic authorities to make these assessments. Similarly, in *Savva Terentyev v. Russia*, the Court held that the applicant's comment[33] was used as a provocative metaphor, which frantically affirmed the applicant's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops") and this was his emotional appeal to take measures with a view to improving the situation.[34]

22. İFÖD is of the opinion that **Rabat Plan of Action threshold test on hate speech is compatible with the caselaw of the European Court of Human Rights** on restricting freedom of expression on the grounds of inciting to hatred and hostility. As mentioned above, the Court takes into account the social and political context of the statement, position and status of the speaker, content and form of the speech, extent of its dissemination, intent to incite the audience against a target group and likelihood of harm including imminence. Within this context, **İFÖD would like to bring to the attention of the Court that** social media postings should be assessed in terms of status of its publisher, nature of the social media platform it is published on, the extent of dissemination and impact of the posting as well as its

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28 *Le Pen v. France* (dec.), no. 18788/09, 20.4.2010.

29 *Soulas and Others v. France*, no. 15948/03, 10.7.2008, para. 43; *Féret v. Belgium*, no. 15615/07, 16.07.2009, para. 71; *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 04.11.2008, para. 79.

30 See further ICJ, Expert Opinion submitted to the Ankara Appeal Court, 19th Criminal Chamber, Case No. 2019/1191. p.12, available at https://www.icj.org/wp-content/uploads/2020/02/Turkey-AssDoctors-ExpertOpinion-2020-ENG.pdf.

31 See generally *Mariya Alekhina and Others v. Russia*, no. 38004/12, 17.07.2018, paras 217-221.

32 *Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, 05.12.2019, para. 46 and 48.

33 The applicant was prosecuted and given a suspended prison sentence for statements which, as the domestic courts found, incited hatred and enmity against police officers as a "social group" and called for their "physical extermination". The applicant commented that "it would be great if in the centre of every Russian city, on the main square ... there was an oven, like at Auschwitz, in which ceremonially every day, and better yet, twice a day (say, at noon and midnight) infidel cops would be burnt".

34 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, para. 72. See for similar authority, *Perinçek v. Switzerland*, 27510/08 [GC], 15.10. 2015, para. 107; *Dink v. Turkey*, no. 2668/07, 14.9.2010.

content and context. The criteria provided below by İFÖD is both in line with the **Court's jurisprudence** as well as with the **Rabat Threshold Test** mentioned above.

23. **Firstly**, there needs to be a distinction between various types of social media users. Although the title and position of the person making the speech is important within the Court's jurisprudence, there may be other types of users of social media platforms previously not considered by this Court. Therefore, there needs to be a distinction between the **Speaker** (the person who **creates**, **produces** and **owns** the original content); the **Direct Distributor** (the person who **shares** the original content) and the **Indirect Distributor** (the person who **likes** the original content). Even when liability may arise for the **speaker category** within the context of social media postings and content, that may not necessarily extend to the **distributor category** as **the potential impact of such distribution** needs to be evaluated further by reference to the Court's jurisprudence.

24. **Secondly**, the Court should also take into consideration whether the applicant was a public, well-known or influential figure at the time **he shared a posting** created by another user on the Facebook platform or when he was prosecuted[35] or whether he was a **well-known blogger** or **YouTuber**[36] or a **popular user of social media**,[37] **let alone a public or influential figure**,[38] which could have attracted public attention to his **shared post created by another user** and thus have **enhanced the potential impact** of the impugned statements.[39]

25. **Thirdly**, the Court established that the **potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference**.[40] According to the Court's jurisprudence, "*it is clear that the reach and thus potential impact of a statement released online with a small readership is certainly not the same as that of a statement published on mainstream or highly visited web pages*".[41] Within this context, İFÖD points out that there are substantial differences between the social media platforms and how the users choose to use such platforms. While, for example, Twitter is regarded as largely an open microblogging platform, **Facebook** is often regarded as a semi closed platform. Therefore, the Court should be mindful that **the applicant shared one posting of a political nature on a semi closed social media platform, namely Facebook**. The users of the Facebook platform themselves decide whether to have their accounts and profiles are publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, the Facebook activities of the applicant did not take place on a completely publicly accessible Internet platform, website or blog.[42] In the admissibility decision of *Tamiz v. The United Kingdom*,[43] the Court established that "millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, **the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage**" (§80-81) to another person's reputation or to state

35 *Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131.
36 *Rebechenko v. Russia*, no. 10257/17, 16.04.2019, § 25.
37 *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, ECHR 2016.
38 Contrast, *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, 11.10.2001; *Féret v. Belgium*, no. 15615/07, §§ 75 and 76.
39 *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 81.
40 *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).
41 *Savva Terentyev*, § 79.
42 *Savva Terentyev*, § 79.
43 *Tamiz v. The United Kingdom*, no. 3877/14, 19.09.2017.

institutions to require criminal prosecutions or sanctions such as dismissal.[44] It is therefore essential to assess the potential influence of an online publication to determine the scope of its reach to the public.

26. **Fourthly**, the Court should take into the account the content and form of the posting and as suggested by the Rabat Threshold Test, content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed. Therefore, the Court should assess whether the content shared by the applicant had a clear target group and whether the content clearly included hatred, or whether the shared content included political criticism of security operations and whether such content can be considered as a contribution to a public debate about abuse of power by law enforcement agencies. The Court should also consider whether the applicant targeted a certain section of the society on the ground of their race, religion or other protected grounds, whether his shared content included a call for violence, hatred or discrimination against a specific target group and finally whether the applicant intended to incite his limited audience on the Facebook platform against a specific target group.

27. **Fifthly,** the Court also should assess the **context of the content** shared by the applicant. As the Rabat Threshold Test suggests context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group. The applicant seems to draw attention of his fellow friends and followers on the Facebook platform to his disapproval of the security operations in Turkey by sharing content produced by another user. Therefore, the social and political context prevalent at the time the speech was made and disseminated should be part of the Court's assessment.

28. **Finally**, the Court should also consider whether the applicant had intention to incite people to hatred, violence or discrimination against a targeted group and whether there was a reasonable probability that the speech would succeed in inciting actual action against the target group. Likelihood of harm, including imminence is an important threshold to be considered as part of the Rabat Threshold Test.

Procedural Obligations of Article 10

29. The Court established that Article 10 imposes procedural obligations to the Contracting parties and the Court's task is to assess the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts. The Court emphasized that **the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account** when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10.[45]

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[44] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, in his Report submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 07.09.2012 also stated that "**a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website** " (§ 46).

[45] *Baka v. Hungary* [GC], no. 20261/12, § 161, 23.06.2016; *Kula v. Turkey*, no. 20233/06, §§ 45 and 46, 19.06.2018.

30. Within this context, the Court established that the **obligation to provide reasons for a decision is an essential procedural safeguard under Article 6 § 1 of the Convention,** as it demonstrates to the parties that their arguments have been heard, affords them the possibility of objecting to or appealing against the decision, and also serves to justify the reasons for a judicial decision to the public. This general rule, moreover, **translates into specific obligations under Articles 10 and 11** of the Convention, by **requiring domestic courts to provide "relevant" and "sufficient" reasons for an interference**. This obligation enables individuals, amongst other things, to learn about and contest the reasons behind a court decision that limits their freedom of expression or freedom of assembly, and thus offers an important procedural safeguard against arbitrary interference with the rights protected under Articles 10 and 11 of the Convention.[46]

31. İFÖD is of the opinion that failure of domestic courts **including that of the Constitutional Court** to evaluate an impugned social media post in the light of principles developed by the European Court and failure in providing relevant and sufficient reasons constitutes in itself violation of procedural obligation of the State under Article 10. Therefore, the Court should evaluate whether domestic courts provided relevant and sufficient explanation why the applicant's Facebook posting constituted incitement to hatred according to above mentioned six-part threshold test.

Conclusion

32. İFÖD would like to emphasize that Rabat threshold test is compatible with the case-law of the Court and the Court should evaluate whether the applicant's posting reached the threshold to constitute incitement to hatred and whether domestic courts provided relevant and sufficient reasons when deciding to detain the applicant.

29.10.2020

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.

[46] *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; *Obukhova v. Russia*, no. 34736/03, § 25, 08.01.2009; *Sapan v. Turkey*, no. 44102/04, §§ 40-42, 08.06.2010; *Cumhuriyet Vakfı and Others v. Turkey*, no. 28255/07, §§ 67-68, 08.10.2013; *Gülcü v. Turkey*, no.17526/10, § 114, 19.01.2016.