Third Party Intervention

In the Case of Resul Üçdağ v. Turkey (23314/19)

by

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and

ARTICLE 19

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I. Introduction

1. In this intervention, **İFÖD** and **ARTICLE 19** (the Interveners hereinafter) will address the issue of freedom of expression on social media platforms in the case of Resul Üçdağ v. Turkey (**No. 23314/19**). In this case, the applicant, who was an imam in a local mosque at the time of the alleged events, was charged with the crime of terror propaganda on account of his activities on the Facebook social media platform. It is understood from the case file that the applicant has been found guilty by the Diyarbakır Criminal Assize Court of committing the crime of terrorist propaganda due to two posts shared via his Facebook account.

2. The first publication concerned a photo of two persons in front of destroyed buildings who appeared to be members of YPG, an organization based in northern Syria and which the Turkish authorities considered to be illegal; and the second publication contained a photo of a crowd of demonstrators in front of a fire in the middle of a street, accompanied by the following sentence: "If our brothers in Sur are not comfortable, we cannot rest no more." The local court considered these two publications to be of a nature to call for violence and that the applicant's act thus constituted an apology, a legitimation and an incitement to use the methods of a terrorist organization consisting in coercion, violence and threat.

3. The applicant was found guilty and he was sentenced to a term of imprisonment of one year and six months and twenty-two days and the pronouncement of the verdict was postponed. Later on, the applicant was dismissed from public duty by a decree law during the state of emergency period because of his alleged connection with FETÖ (Fetullahist Terrorist Organisation). He was also dismissed from his public position by the Disciplinary Board of the Directorate of Religious Affairs on the grounds of his alleged connection with PKK (Kurdistan Workers Party).

4. The applicant complained of violation of his right of access to court relying on Article 6 § 1 of the Convention and violation of his freedom of expression relying on Article 10.

5. It is **understood** from the case file that **none of the above mentioned content was produced by the applicant**, but the applicant **shared the content generated by other Facebook users**. So far as the content of the shared Facebook posts by the applicant are concerned, both seem to be related to criticism of military operations by Turkish Army in the south-eastern Turkey and in northern Syria.

6. The European Court asked to the parties whether the applicant has been deprived of his right to access to the Constitutional Court in violation of Article 6 of the Convention and whether his freedom of expression had been interfered, within the meaning of Article 10(1) of the Convention. The Court also asked whether this interference was foreseen by law and necessary, within the meaning of Article 10(2).[1] In particular, having regard to the content of the applicant's publications on Facebook, the Court asked to comment, on the context in which these publications took place and their capacity to cause harm and

[1] *Faruk Temel v. Turkey*, no. 16853/05, §§ 53-57, 01.02.2011 and *Belge v. Turkey*, no. 50171/09, §§ 31, 34 and 35, 06.12.2016.

whether the national courts carried out in their decisions sufficient examination and balancing between the interests at stake in the light of the criteria set out and implemented by it in cases relating to freedom of expression.[2]

7. The **Interveners' submission will only address issues related to Article 10**.

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9. The intervention will first provide the relevant European standards concerning the limitation of freedom of expression and incitement to violence. Then the submission will discuss the legal issues surrounding social media posts and an assessment of the impact of such publications will be provided. The Interveners 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. The Interveners will argue that **content produced by third parties but shared or liked by others to a small and restricted group of Facebook users should not carry the same weight as a statement published on a mainstream website. Distinctions should be also made between minor distributors and authors of the impugned statements**. In conclusion, the Interveners will provide **a procedural review model** discussing the 'general principles' that should be taken into account with regards to allegations of violation of freedom of expression protected by article 10 of the Convention in criminal cases.

The International Legal Framework Used to Limit Speech Associated with Terrorism

10. The Interveners are of the opinion that one of the most fundamental questions in international human rights case-law regarding freedom of expression is how to assess the link between freedom of expression and the possibility of certain expression leading to violence. The categorisation of statements associated with terrorism as an offence is often based on the argument that **it is not the statement itself but the effect that it causes which must be prohibited**. Since the restriction of speech must meet the requirements of international human rights instruments, **there is a necessity to determine the conditions under which a statement associated with terrorism can be restricted**. As noted by the former Commissioner for Human Rights of the Council of Europe it is crucial to bear in mind that **violence or the threat of violence is an essential component of an act of terrorism**, and that restrictions of human rights in the fight against terrorism 'must be defined as precisely as possible and be necessary and proportionate to the aim pursued'.[3]

11. **Two fundamental problems arise in the case of terrorism-related offences**. The first is general statements which are not associated with a concrete criminal act; the second is statements that indirectly incite terrorism. In both cases, in order for criminal sanctions imposed on such statements not to violate freedom of expression, a link must be established with the violent act. Since terrorist propaganda and incitement to terrorism are regarded as criminal endangerment crimes, they need not give rise to damage for there to

[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.

[3] Report of 10 January 2012 (CommDH(2012)2), para. 69.

be a link with violence; it would suffice for such acts to be of a nature that could incite or encourage any likely violent conduct in the future. This would mean that **a test to be conducted in terms of freedom of expression would be one to determine the proximity between the statement and the act**. States do not have unlimited discretion in regulating and setting forth this matter within the scope of criminal law.

12. Article 12 of the Convention on the Prevention of Terrorism requires that the provisions of the Convention to be interpreted in accordance with human rights law. So, the crime of terrorist propaganda should be regulated and implemented in compliance with the ECHR and other international human rights standards. Thus, even if proscription of propaganda activities can be viewed as legitimate for purposes of combating terrorism, it is clear that arbitrary, discriminatory, racist and disproportionate restrictions are a violation of international law.

The ECtHR's Multi-Pronged Incitement Test

13. The European Court of Human Rights (the Court) has developed **a complex balancing test in order to evaluate whether criminalization of an expression is legitimate**. The test takes into account the varying needs of different legal systems and grants a margin of appreciation to both the Court and the State Parties. Although there are arguments that this approach leads to uncertainty, it would be safe to say that in most cases, the Court's balancing test yields similar results to that of the "clear and present danger test". The Court's 1999 judgments in cases against Turkey and its subsequent case-law where a balancing test is applied to determine the connection between speech and violence, take into consideration the person making the speech and the medium used. This balancing approach requires **a three-pronged cumulative test based on the formula "cannot be said to incite violence or construed as inciting violence":**

    - Does the assessment take into consideration who the expression is uttered by, on what subject and through which means?
    - Is there incitement to violence?
    - Is it likely that the speech will cause violence?

14. In other words, in order for speech to be lawfully restricted under the Convention, it must constitute incitement to violence and there must be a likelihood of violence occurring as a result of such incitement. The Court examines a set of factors to determine whether these two conditions are met, known as the **Multi-Pronged Incitement Test. The Interveners submit that this test should be considered together with the potential impact of the medium of expression concerned**[4] as an important factor in determining whether social media content such as those shared on Facebook can result in incitement to violence or be regarded as terror propaganda.

[4] *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).

The Speaker/Producer vs. the Distributor of Content

15. There is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest. **The limits of permissible criticism are wider with regard to the government than** in relation to a private citizen or even a politician. Moreover, the dominant position which the government **occupies makes it necessary for it to display restraint** in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.[5]

16. Within this context, 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 following type of users while determining criminal responsibility if any:

a. **The Speaker** is the person who **creates**, **produces** and **owns** the original content

b. **The Direct Distributor** is the person who **shares** the original content

c. **The Indirect Distributor** is the person who **likes** the original content

17. 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, as will be explained further below.

Potential Impact of the Distribution of Content on Facebook

18. There are substantial differences between the various social media platforms and how the users choose to use these platforms. While, for example, Twitter is regarded as largely an open microblogging platform, Facebook is often regarded as a semi closed platform given that users largely post on their Facebook "wall" that is visible to their "friends" (unless they make the content accessible to anyone). The users of Facebook themselves decide whether to have their accounts and profiles publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, the Interveners believe it is important to consider **the nature of the platform on which the impugned posts were made**; that is whether they were made on a completely publicly accessible Internet platform, website or blog or on semi-private platform.[6]

19. 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**.[7] According to the Court's jurisprudence, "**it is clear that the reach and thus potential**

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5 *Erdoğdu and İnce v. Turkey*, no. 25067/94, § 50, 8.7.1999; *Başkaya and Okçuoğlu v. Turkey*, no. 23536/94, § 62, 08.7.1999; *Sürek v. Turkey* (no. 4), no. 24762/94, § 57, 08.7.1999; *Sürek v. Turkey* (no.2), no. 24122/94, § 34, 8.7.1999; *Yalçın Küçük v. Turkey*, no. 28493/95, § 38, 5.12.2002; *Erdoğdu v. Turkey*, no. 25723/94, §§ 61-62, 15.6.2000.

6 Compare *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 79.

7 *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).

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".[8] It is therefore essential for the assessment of a potential influence of an online publication to determine the scope of its reach to the public. Similarly, in the admissibility decision of *Tamiz v. The United Kingdom*,[9] 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 institutions to require criminal prosecutions or sanctions such as dismissal.

20. 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).

21. Therefore, the Interveners suggest that distinctions should be made between whether the posts were made by a public, **well-known or influential figure**,[10] or **a well-known blogger or YouTuber**[11] **or a popular user of social media**,[12] **which could have attracted public attention to his comment and thus have enhanced the potential impact of the impugned statements**[13] at the time he shared two separate postings on Facebook or when he was prosecuted.[14] Moreover, the Court should also take into account the content of shared postings whether they had a political nature and whether they were **part of a political debate on a matter of general and public concern.** Thirdly, the Court should be mindful of the fact that the applicant did not produce the content of postings, but he shared contents generated by other Facebook users and already available on the platform. Fourthly, the Court should also consider whether the **statements shared by the applicant attracted any public attention**. Fifthly, the Court should assess whether the original speaker of the content was identified, and if this is the case whether a criminal investigation has been conducted against that person. Finally, the Court should examine whether domestic judicial authorities evaluated the potential impact of the applicant's postings on Facebook and **his trivial role in distribution of the original content.**

22. The Interveners are of the opinion that **these are important factors that needs to be taken into account** and that the Court should assess in the present case.

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8 *Savva Terentyev*, § 79.
9 *Tamiz v. The United Kingdom*, no. 3877/14, 19.09.2017.
10 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.
11 *Rebechenko v. Russia*, no. 10257/17, 16.04.2019, § 25.
12 *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, ECHR 2016.
13 *Savva Terentyev*, § 81.
14 *Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131.

Context of the Statements and the Requirement for Incitement to Violence

23. Although cases brought against Turkey at the Court concerning the violation of Article 10 are based on different criminal provisions, they are similar in that they all involve statements that disturb the State and the society at large. They mostly involve criticism of the government's anti-terrorism practices and its policies on the Kurdish issue, sometimes praising and legitimising an organisation, its activities or its leader.

24. In such cases, the Court finds that it is not acceptable to impose criminal sanctions based solely on the statement itself. Since 2005, the Court has made numerous judgments on cases where national courts had issued decisions of imprisonment in the absence of any examination solely because the statements in question were unfavourable and amounted to propaganda and incitement to hostility and hatred.[15] In such cases, the Court has repeatedly found violations and made reference to its earlier judgments without the need for any additional in depth examination.

25. In a number of recent cases involving the alleged dissemination of propaganda in favour of a terrorist organisation, the Court found a violation of freedom of expression since the domestic courts had **failed to demonstrate that impugned acts could, having regard to the context in which they were registered and their capacity to cause violence** have been regarded as containing an incitement to the use of violence, to armed resistance or to uprising, or as constituting hate speech.[16]

26. The Court requires that national authorities or domestic courts **should provide a sufficient explanation justifying why the impugned content, read in the context, should be interpreted as legitimating and encouraging the methods of violence used by the terrorist organisation.** Furthermore, the domestic courts should justify why the relevant content could not be considered as participation in a public debate on questions of general interest relating to the conflict between the PKK and the security forces.[17]

27. Therefore, **in order to punish a statement, it should include a call or incitement to violence**. The Court held that in the absence of a call or incitement to violence the conviction of a person for an act or statement which may be deemed to coincide with the aims or instructions of an illegal organisation was of concern.[18] The mere fact that an expression is harsh and critical of the government and even one-sided does not necessarily mean that it amounts to incitement. In this regard, the Court has found various statements to fall within the acceptable limits of freedom of expression including those such as, "*Kurdistan having been annexed as a colony by the Turkish State*"; the portrayal of the Turkish State as an oppressor of "Kurdistan" in "political, military, cultural [and] ideological" terms; the "racist policy of denial" vis-à-vis the Kurds being instrumental in the development of the "fascist movement";[19] the romanticizing of the aims of the Kurdish

[15] *Gözel and Özer v. Turkey* (nos. 43453/04 and 31098/05); *İncal v. Turkey* (no. 22678/93).

[16] *Mart and others v. Turkey*, no 57031/10, 19.03.2019, § 32; *Necdet Atalay v. Turkey*, no. 76224/12, 19.11.2019, § 20, *Mehdi Tanrıkulu v. Turkey*, no. 9735/12, 05.05.2020, § 33.

[17] *Mehdi Tanrıkulu v. Turkey*, no. 9735/12, 05.05.2020, § 32.

[18] *Gülcü v. Turkey*, no.17526/10, 19.1.2016, § 112.

[19] *Başkaya and Okçuoğlu v. Turkey*, nos. 23536/94 and 24408/94, § 64.

movement by saying that "it is time to settle accounts"; referring to the Republic of Turkey as a "terrorist state";[20] the condemning of the "military action" of the State which includes the State's "dirty war against the guerrilla" and the "open war against the Kurdish people";[21] saying that "Kürdistan is burning" and "describing events as genocide";[22] claiming that the State is engaging in "massacre" or defining the conflict as "a war".[23]

28. According to the Court, although criticism directed at both sides would indicate that the statements do not amount to incitement, **the one-sided nature of the expression is not sufficient reason to justify its incrimination**.[24] On the contrary, national authorities have an obligation to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.[25] The fact that a statement is biased or that it resorts to hyperbole and distorts the truth, that fact that it is provocative and voiced as an insult against the State are not sufficient grounds on their own to criminalise speech.[26]

29. A reading of the Convention as a whole would naturally result in the granting of a higher degree of tolerance to harsh statements that have the ability to protect fundamental principles such as the right to life and the prohibition of torture. Uncovering the acts of state agents violating these rights is of special importance when one considers how difficult it is to unearth the truth in repressive environments. Imposing criminal penalties on people who uncover such violations and publicise them will be against the spirit of the Convention since such measures will eliminate the opportunity to conduct an effective investigation.[27]

30. The Court does not make a clear distinction between direct and indirect incitement.[28] However, it is extremely difficult to fulfil the conditions of the test applied by the Court in cases where the statement does not openly provoke violence. Especially in cases where the accused is alleged to have intentions different from those they publicly display, the authorities have an obligation to present concrete evidence that this is the case.[29] Merely arguing that the terrorist organisation also voices similar views does not count as concrete evidence.[30]

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20 *Sürek v. Turkey* (no. 4), no. 24762/94, § 56.
21 *Erdoğdu v. Turkey*, no. 25723/94, § 62.
22 *Şene v. Turkey r*, no. 26680/95, § 44.
23 *Karkın v. Turkey*, no. 43928/98, 23.9.2003.
24 *Sürek and Özdemir v. Turkey*, nos. 23927/94 and 24277/94, § 61.
25 *Şener v. Turkey*, no. 26680/95, § 45.
26 *Özgür Gündem v. Turkey*, no. 23144/93, 16.3.2000, § 60.
27 *Yavuz and Yaylalı v. Turkey*, no. 12606/11, § 54, 17.12.2013.
28 Howard Davis, "Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech" [2005] E.H.R.L.R. 75.
29 *Yağmurdereli v. Turkey*, no. 29590/96, § 53.
30 Zübeyde Füsun Üstel (Academics for Peace decision), Constitutional Court decision no. 2018/17635, 26.07.2019.

31. In its semi-pilot judgment in the case of *Gözel and Özer v. Turkey*,[31] the Court summarises a basic formula which clearly shows that the probability of the statement to cause violence must be considered when determining incitement: "*A statement cannot be proscribed only because it is a statement made by or about a terrorist organisation if it does not incite to violence, justify terrorist acts to facilitate the aims of its supporters and cannot be construed to encourage violence based on a deep and unreasonable hatred towards certain people*." In the case of *Gül and Others v. Turkey*, "the Court observes that, taken literally, some of the slogans shouted (such as "*Political power grows out of the barrel of the gun", "It is the barrel of the gun that will call into account*") had a violent tone. Nevertheless, having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations – which limited their potential impact on "national security" and "public order" – they cannot be interpreted as a call for violence or an uprising.".[32] In the case of *Yağmurdereli*, the fact that the harsh statements made by the applicant were uttered in Istanbul, hundreds of kilometres away from the conflict region, played an important role in the Court's finding that there had been a violation.[33]

32. The Court, therefore, should take into consideration the context of the statements and assess further whether the shared content amounts to incitement to violence or whether such content remains within the limits of acceptable political criticism.

Content of the Facebook Publications: Political Speech Enjoys Wider Protection

33. The Court's well-established case law holds that political speech enjoys high protection and there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest. The margin of appreciation of States is thus reduced where a debate on a matter of public interest is concerned.[34] Therefore, the local courts should consider whether the nature of the online content at issue in a given case constitutes political speech or relates to matters of public interest. They should analysed statements **"in the context of the relevant discussion and to find out which idea they sought to impart**".[35] The Court rightly stated in *Terentyev v. Russia* that the local courts "made no attempt to assess the potential of the statements **at hand to provoke any harmful consequences**, with due regard to the political and social background, against which they were made, and to the scope of their reach".[36]

34. Furthermore, the local courts should assess whether the impugned statements, are fairly construed and seen in their immediate or wider context, can be seen **as a direct or indirect call for violence or as a justification of violence, hatred or intolerance**.[37]

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31 *Gözel and Özer v. Turkey*, no. 43453/04 and 31098/05, 06.07.2010.

32 *Gül and Others v. Turkey*, no. 4870/02, § 41.

33 *Yağmurdereli* v. Turkey, no. 29590/96, § 54.

34 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, [GC], no. 931/13, § 167, 27.06.2017.

35 *Savva Terentyev*, § 82.

36 *Savva Terentyev*, § 82.

37 See, among other authorities, *Incal v. Turkey*, no. 22678/93, 09.06.1998, § 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.*

35. The Court stated that offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration; **but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes**. For the Court, style constitutes part of the communication as the form of expression and is as such protected together with the substance of the ideas and information expressed.[38] The Court stresses that not every remark which may be perceived as offensive or insulting by particular individuals or their groups justifies a sanction. It is only by a careful examination of the context in which the offending, insulting or aggressive words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 of the Convention and that which forfeits its right to tolerance in a democratic society.[39] Within this context, though it did not approve of the language used by the applicant or the tone of his text, the Court considered even very harsh statements like "*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. The people would be burning them. This would be the first step to cleansing society of this cop-hoodlum filth.*" to be a provocative metaphor, which frantically affirmed the applicant's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops") and which was the applicant's emotional appeal to take measures with a view to improving the situation.[40] This assessment of the Court should also be taken into consideration when deciding whether specific types of content result in direct or indirect call for violence or as a justification of violence, hatred or intolerance.

36. The Interveners, therefore, believe that in addition to context analysis, content analysis is an important necessary element for assessing this and similar applications in the future with regards to social media content.

Procedural Obligations of Article 10

37. The Court has established that Article 10 imposes procedural obligations on the Contracting parties and the Court's task is to look at 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

Hungary, no. 40721/08, §§ 52 and 56-58, 24.07.2012 and *Vona v. Hungary*, no. 35943/10, §§ 64-67, ECHR 2013.

38 *Gül and Others v. Turkey*, no. 4870/02, § 41, 08.06.2010; *Grebneva and Alisimchi v. Russia*, no. 8918/05, § 52, 22.11.2016; *Savva Terentyev v. Russia*, no. 10692/09, § 68, 28.08.2018.

39 *Vajnai v. Hungary*, no. 33629/06, §§ 53 and 57, ECHR 2008.

40 *Terentyev*, § 72.

assessing the proportionality of an interference with freedom of expression guaranteed by Article 10.[41]

38. Within this context, the Court has 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.[42]

39. The Interveners are of the opinion that the Court first and foremost should examine whether domestic courts evaluated impugned social media post under the light of principles developed by the Court in the form of the multi-pronged incitement test. It should also examine whether domestic courts applied **procedural standards in conformity with the principles embodied in Article 10**".[43] The Court should take into consideration whether the domestic courts provided a reasoned decision considering all the relevant factors explained above.

Conclusion

40. Considering all the above factors, the Interveners would like to emphasize that the applicant's case should be considered in the context of a general deterioration in the state of freedom of expression in Turkey and a crackdown on critical voices. In particular, the Interveners are concerned that any critical attitude from any person, including trivial Facebook shared posts with very limited impact, can be punished harshly by the public authorities.

41. The Court found in a number of cases that convictions pursuant to Article 7/2 of Anti-Terrorism Act in Turkey constituted a violation of Article 10 of the Convention and the implementation of those judgments, (known as the *Öner and Türk* group of cases) is being supervised by the Committee of Ministers under enhanced procedure.[44] Although several amendments have been made in the relevant provision to bring it in line with the Convention standards, the situation in practice has nevertheless not improved, and in fact

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

42 *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.

43 See *Terentyev v. Russia*, no. 25147/09, § 24, 26.01.2017; *Kommersant and Others v. Russia*, nos. 37482/10 and 37486/10, § 23, 23.06.2020.

44 See İFÖD's Rule 9.2 Submission at https://rm.coe.int/native/09000016809a463a.

has worsened. The total number of prosecutions and convictions has considerably increased in recent years. While only 669 persons were convicted under Article 7/2 of Anti-Terror Law in 2014, 6162 persons were convicted in 2017. Since 2017, detailed statistics involving the Anti-Terror Law have not been published and specifically more recent statistics are not available. However, it should be noted that for 2019, the official statistics reveal that 15786 crimes were committed subject to Anti-Terror Law No. 3713, 4.813 convictions were secured and 1851 persons were imprisoned and 7362 persons were found not guilty. The pronouncement of the verdict was postponed in 5450 cases. It is however unknown how many of these involve Article 7/2 of the Anti-Terror Law.

42. Furthermore, in 2018, the Ministry of Interior started investigations into several social media accounts in relation to the crimes of making propaganda for a terrorist organization, praising those organizations, publicly declaring affiliation with terrorist organizations, inciting people to enmity and hatred, insulting state officials, acting against the indivisible integrity of the state and threatening the safety of the nation and hate speech. As a result, 42.406 social media accounts were investigated, and legal actions were taken against 18.376 accounts. Similarly, according to the information provided by the Ministry of Interior, 53.814 social media accounts were investigated in relation to the crimes of "making propaganda for a terrorist organization, praising those organizations, publicly declaring affiliation with terrorist organizations, inciting people to enmity and hatred, insulting state officials, acting against the indivisible integrity of the state and threatening the safety of the nation, and hate speech" during 2019. As a result of these investigations, legal action was taken against 24.224 people. Such investigations and related prosecutions continue persistently until the present time.

43. Overall, this submission shows that the Court's **Multi-Pronged Incitement Test** which takes into account the distinction between different kind of social media users **(**the Speaker/Producer vs. the Distributor of Content) together with the potential impact of the distribution of content on the Facebook platform or any other social media platforms is necessary to address claims under Article 10 of the Convention.

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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.