



Expert Opinion Submission
Oversight Board Case No. 2021-006-IG-UA
by
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An independent non-governmental organization specialized in defending and promoting freedom of expression

Introduction

1. On 21.04.2021 Oversight Board announced case no. 2021-006-IG-UA related to an Instagram picture and called for public comments. This submission includes the comments by İfade Özgürlüğü Derneği (“İFÖD – the Freedom of Expression Association”), which has been set up formally in 2017 to protect and foster the right to freedom of opinion and expression in Turkey.¹

I. Facts of the Case No. 2021-006-IG-UA

2. The facts of the case as reported by the Oversight Board is as follows:

In January 2021, an Instagram user in the United States posted a picture of Abdullah Öcalan, one of the founding members of the Kurdistan Workers’ Party (PKK). The picture included the words “y’all ready for this conversation.” Underneath the picture the user wrote that it was time to talk about ending Öcalan’s isolation in prison on Imrali Island. They encouraged readers to engage in conversation about his imprisonment and the inhumane nature of solitary confinement.

Facebook removed the content for violating Instagram’s Community Guidelines after the post was automatically flagged for review (at this stage, the Board does not know if the content was removed by an automated system or through human review). The user states in their appeal that Öcalan has been a political prisoner for decades and that banning any reference to him prevents discussions that could advance the position of the Kurdish people. They argue that Öcalan’s philosophy is peaceful and that his writings are widely available in bookshops and online. The user compares Öcalan’s imprisonment to that of former South African President Nelson Mandela, noting that discussion of Öcalan’s imprisonment should be allowed and encouraged.

II. Facebook’s Community Guidelines and the Policy on Dangerous Persons

3. According to the Facebook’s **Community Guidelines**,² “Instagram is not a place to support or praise terrorism, organized crime, or hate groups.” The Guidelines also link to Facebook’s **Community Standard on Dangerous Individuals and Organizations**.³ According to these rules Facebook also prohibits **any support or praise** for groups, **leaders**, or individuals involved in terrorist activity or other serious crimes committed by these groups.
4. Facebook also does not allow people (living or deceased) or groups to maintain a presence (for example, have an account, Page or group) on Facebook if they are terrorist organisations and terrorists, which include any non-state actor that engages in, advocates or lends substantial support to purposive and planned acts of violence; which causes or attempts to cause death, injury or serious harm to civilians, or any other person not taking direct part in the hostilities in a situation of armed conflict, and/or significant damage to property linked to death, serious injury or serious harm to civilians; with the intent to coerce, intimidate and/or influence a civilian population, government or international organisation in order to achieve a political, religious or ideological aim.
5. Within this context, Abdullah Öcalan is the leader of PKK which has been designated as a terrorist organization by multiple countries, including Turkey, the United States, and the EU.

¹ See <https://ifade.org.tr>

² See <https://www.facebook.com/help/instagram/477434105621119/>

³ See https://www.facebook.com/communitystandards/dangerous_individuals_organizations

6. Finally, the Oversight Board, has already overturned Facebook’s decision to remove a post which the company claims violated its **Community Standard on dangerous individuals and organisations** as these rules **were not made sufficiently clear to users**.⁴

III. Turkey, Facebook and Lack of Transparency

7. Turkey has extensive blocking and content removal measures subject to its Law No. 5651 and it has been the long practice of Facebook to comply with majority of the blocking and removal decisions the platform receives. The transparency reports published by Facebook for the period of 2003-2020 (first half) show that Facebook removed 24.958 specific content in relation to requests coming from Turkey.⁵ According to İFÖD’s EngelliWeb research, over 8.000 Facebook content and over 7.000 Instagram content are blocked from Turkey. Moreover, in January 2021, Facebook announced that the company will appoint a legal entity to represent the company as its local representatives subject to Law No. 5651 requirements. Recent ProPublica coverage⁶ revealed lack of transparency especially in terms of geo-blocking measure deployed in relation to Facebook content accessible from Turkey. İFÖD’s submission should be considered with this background in mind.

IV. The International Legal Framework Used to Limit Speech Associated with Terrorism

8. İFÖD is 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 categorization 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’.⁷
9. **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

⁴ Oversight Board Case Decision no. 2020-005-FB-UA.

⁵ İFÖD, **EngelliWeb 2018**: An Assessment Report on Blocked Websites, News Articles and Social Media Content from Turkey, July 2019, at https://ifade.org.tr/reports/EngelliWeb_2018_Eng.pdf; **EngelliWeb 2019**: An Iceberg of Unseen Internet Censorship in Turkey, August 2020, at https://ifade.org.tr/reports/EngelliWeb_2019_Eng.pdf.

⁵ Third party intervention by the Council of Europe Commissioner for Human Rights, Application no. 25479/19

⁶ ProPublica, “Sheryl Sandberg and Top Facebook Execs Silenced an Enemy of Turkey to Prevent a Hit to the Company’s Business,” 24.02.2021, at <https://www.propublica.org/article/sheryl-sandberg-and-top-facebook-execs-silenced-an-enemy-of-turkey-to-prevent-a-hit-to-their-business> and “Senator Says Censorship in Turkey Raises “Serious Questions” About Facebook’s Commitment to Free Expression,” 18.03.2021, at <https://www.propublica.org/article/senator-says-censorship-in-turkey-raises-serious-questions-about-facebooks-commitment-to-free-expression>

⁷ Report of 10 January 2012 (CommDH(2012)2), para. 69.

criminal endangerment crimes, they need not give rise to damage for there to 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.

10. 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 European Convention 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.

i. **Rabat Threshold Test**

11. Article 20(2) of International Covenant on Civil and Political Rights (“ICCPR”) provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law. The Human Rights Committee 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.

12. Article 20 of the ICCPR requires a high threshold because **limitation** of freedom of expression **must remain an exception.** Rabat Plan of Action was adopted as a 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 2013.⁸ The Rabat Plan of Action (A/HRC/22/17/Add.4, appendix), based on international human rights standards and jurisprudence, sets a **six part threshold test** to assess the severity of the “**hatred**” such to reach the threshold of prohibition under Article 20.2 ICCPR:

“(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 ICCPR 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.

⁸ <https://www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx>

(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.”⁹

13. Although this test is developed for hate speech, it can easily be adopted to “**incitement to violence**” cases as well. IFÖD submits that **Oversight Board** should take into the **consideration the Rabat Threshold Test** when evaluating this and similar applications.

ii. **The ECtHR’s Multi-Pronged Incitement Test**

14. Moreover, the European Court of Human Rights (“the Court”) has also 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?

15. 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 European Court examines a set of factors to determine whether these two conditions are met, known as the **Multi-Pronged Incitement Test**. IFÖD submits

⁹ UN Rabat Plan of Action, para. 29, endorsed by the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression. <https://undocs.org/A/HRC/22/17/Add.4>.

that **this test is compatible with the Rabat Threshold Test** and should be **considered** by the **Oversight Board together with the potential impact of the medium of expression concerned**¹⁰ as an important factor in determining whether social media content such as those shared on Facebook and/or Instagram can result in incitement to violence or be regarded as terror propaganda.

iii. Potential Impact of Facebook and Instagram Content

16. 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 and/or Instagram is often regarded as a semi closed platform given that users largely post on their pages that is visible to their “friends” (unless they make the content accessible to anyone). The users of Facebook and/or Instagram themselves decide whether to have their accounts and profiles publicly open to anyone or whether their accounts are restricted to family and friends. Therefore, ÍFÖD believes 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 a semi-private platform.¹¹
17. The European 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**.¹² 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”.¹³ 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**. It is **certainly not clear** from the facts provided by the Oversight Board whether the case no. 2021-006-IG-UA related to an Instagram picture **had any meaningful or wide distribution and/or visibility** before it was taken down.
18. 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).
19. Therefore, ÍFÖD suggests that distinctions should be made by the Oversight Board between whether the posts were made by a public, **well-known or influential figure**,¹⁴ or a **popular user of social media**,¹⁵ which could have attracted public attention to his/her post and thus have **enhanced the potential impact of the impugned statements or post**¹⁶ at the time they were published.¹⁷

¹⁰ *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).

¹¹ *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, § 79.

¹² *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).

¹³ *Savva Terentyev v. Russia*, § 79, no. 10692/09, 28.08.2018.

¹⁴ *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.

¹⁵ *Rebechenko v. Russia*, no. 10257/17, 16.04.2019, § 25; *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, ECHR 2016.

¹⁶ *Savva Terentyev v. Russia*, § 81, no. 10692/09, 28.08.2018.

¹⁷ *Stomakhin v. Russia*, no. 52273/07, 09.05.2018, §131.

20. Moreover, İFÖD believes that the Oversight Board should also take into account the content of shared postings and 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 Oversight Board should also consider whether the alleged **publications** of the applicant **attracted any public attention**. İFÖD is of the opinion that **these are important factors that needs to be taken into account** and that the Oversight Board should assess in the present case.
21. The Oversight Board, should also 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. İFÖD is in the opinion that the Instagram user **intended to initiate a debate** on the imprisonment of Abdullah Öcalan rather than trying to incite hatred or violence towards others.¹⁸ In its semi-pilot judgment in the case of *Gözel and Özer v. Turkey*, 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.*”¹⁹

Conclusion

22. İFÖD, believes that political speech should enjoy wider protection. İFÖD submits that the above mentioned UN **Rabat Threshold Test** as well as the European Court’s **Multi-Pronged Incitement Test** should be considered by the **Oversight Board** together with the **potential impact of the medium of expression concerned**²⁰ as an important factor in determining whether social media content such as those shared on Facebook and/or Instagram can result in incitement to violence or be regarded as terror propaganda. The assessment of the **context** and the **content** of the disputed content is an important necessary element for assessing this and similar applications in the future with regards to Facebook and/or Instagram. İFÖD also believes that such an assessment should include an assessment of the intent of the speaker, the nature and style of the expression, the potential reach of the expression and establish whether the disputed content involves **a direct or indirect call for violence or a justification of violence, hatred or intolerance**.²¹

¹⁸ The European Court of Human Rights dealt with a significant number of cases involving Turkey which mostly involved 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**. In such cases, the Court finds that it is not acceptable to impose criminal sanctions based solely on the statement itself. See e.g. *Gözel and Özer v. Turkey* (nos. 43453/04 and 31098/05); *Incal v. Turkey* (no. 22678/93). The Court specifically examined sentencing of a journalist for publication of an article **discussing the prison conditions of Öcalan** in the case of *Yıldız and Taş v. Turkey (I)* (no. 77641/01, 19.12.2006) and found violation of right to freedom of expression of the applicant. See further *Belek and Velioğlu v. Turkey*, no. 44227/04, 06.10.2015. In these cases the European Court noted that the texts, taken as a whole, had not contained any call for violence, armed resistance or insurrection and did not amount to hate speech, which was the main factor to be taken into consideration.

¹⁹ *Gözel and Özer v. Turkey*, no. 43453/04 and 31098/05, 06.07.2010.

²⁰ *Murphy v. Ireland*, no. 44179/98, § 69, ECHR 2003 IX (extracts).

²¹ 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. Hungary*, no. 40721/08, §§ 52 and 56-58, 24.07.2012 and *Vona v. Hungary*, no. 35943/10, §§ 64-67, ECHR 2013.

23. İFÖD also believes that Facebook’s Community Guidelines and the Policy on Dangerous Persons are rather vague and unhelpful to resolve disputes and applications of this kind. Vagueness of these policies result with almost automated removal of politically motivated speech and content and such an automated process is inconsistent with Facebook’s stated values and human rights commitments, including freedom of expression.
24. Finally, İFÖD believes that the Oversight Board should provide more details about the disputed content in its call for submissions and established civil society associations should be in a position to see the content of the disputed text and/or photos to be able to provide an informed submission and for this process to be meaningful.

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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.