

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 41482/19**

**Between: -**

**Özdemir**

**Applicant**

**- v -**

**Turkey**

**Respondent Government**

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**Third-party Intervention by ARTICLE 19**

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**Introduction**

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. We welcome the opportunity to intervene as a third party in this case, by the leave of the President of Section II of the Court, which was granted on 5 June 2020 pursuant to Rule 44 (3) of the Rules of Court.
2. This case concerns the compatibility of the applicant's pre-trial detention and conviction for terrorist propaganda on the basis of his activity on Facebook, including, among others:
  - (i) sharing a video showing the team members of an illegal organization; and
  - (ii) 'liking' a photo and a comment posted by another Facebook user that referred to the destruction of Efrin by Turkish forces and warned President Erdogan that he would be held accountable by God.
3. This case raises an important issue, involving the proper approach to "terrorist propaganda" cases on social media. In particular, it is an opportunity for the Court to clarify the circumstances, if any, in which a criminal conviction for apology of terrorism may be justified under Article 10 of the Convention on the basis of merely sharing or simply 'liking' a post on social media. Such a decision would also provide guidance for similar cases at domestic level. As such, it represents a test case for the protection of freedom of expression and opinion online in the context of terrorism in Turkey and throughout the Council of Europe.
4. In these submissions, ARTICLE 19 addresses (i) the nature of online communications and expression on social media; (ii) international standards on incitement to terrorism; and (iii) the proper approach to cases involving incitement to terrorism online and the importance of protecting opinion falling short of incitement to commit acts of terrorism, including on social media. It is submitted that this would assist the Court in examining the compatibility of the Turkish authorities' decision to convict the applicant of terrorist propaganda with Article 10 ECHR.

**I. The nature of online communications**

5. Social media platforms have profoundly changed the way in which people communicate over the past decade. Anyone with a computer or smartphone can now publicly communicate their opinions and ideas to the entire world at the click of a mouse or a tap of their finger. Accordingly, the key characteristics of online communications include (i) their immediacy; (ii) the ability to reach potentially millions of other users; and (iii) the ability for ordinary users to share information or ideas themselves, unmediated by newspapers or other traditional media with teams of lawyers giving pre-publication advice.

### **Facebook as a semi-open digital space**

6. With over 2.6 billion users, Facebook is the largest social media platform on the planet.<sup>1</sup> As a social media platform, it enables its users to post information, ideas and opinions about themselves or the world around them. Facebook users can also simply share information published by others with or without comments. In practice, the kind of information that can be shared can be in text format but also includes images, photos, videos and Graphics Interchange Formats (GIFs), among others. Facebook also includes features so that users can ‘like’ posts shared by others or choose a different reaction through the use of ‘emoticons’ that are meant to express love, astonishment or admiration, sadness, anger or that something is funny.<sup>2</sup>
7. Importantly, users can in principle control who gets to see information they share. In particular, Facebook allows users to select whether a post should be (a) public, i.e. visible to anyone on or off Facebook; (b) visible only to friends on Facebook; (c) a custom list involving specific friends or categories of friend (e.g. close friends, relatives, etc). This selection has an impact on how a post appears in News Feed, on the users’ profile and in search results. In practice, however, Facebook algorithms remain opaque so that it remains unclear how a post or ‘like’ might appear in someone else’s news feed or search, or whether it will appear at all.
8. Research suggests that many users are not aware of the full range of options when they post content.<sup>3</sup> Equally, they are not always prompted to select a particular option before posting. This is important because default settings and ‘nudging’ have a demonstrated impact on the protection of individuals’ privacy online or the extent to which they might think twice before posting.<sup>4</sup> Indeed, it is increasingly well established that the architecture and design choices made by Facebook seek to increase user ‘engagement’ in the form of ‘likes’, ‘shares’, ‘comments’ or other reactions as they generate data and therefore serve the business model of the company.<sup>5</sup> This explains to

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<sup>1</sup> See Statista, *Number of monthly active Facebook users worldwide as of first quarter 2020*: <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>

<sup>2</sup> Facebook explains the range of reactions available on its platform here: <https://en.facebookbrand.com/facebookapp/assets/reactions/>

<sup>3</sup> See, e.g., C. Fiesler, M. Dye, J. L. Feuston, C. Hiruncharoenvate, C.J. Hutto, S. Morrison, P. Khanipour Roshan, U. Pavalanathan, A. S. Bruckman, M. De Choudhury, E. Gilbert, *What (or Who) is Public? Privacy Settings and Social Media Content Sharing*, CSCW 2017, February 25–March 1, 2017.

<sup>4</sup> See for instance, A. Acquisti, I. Adjerid, R. Balebako, L. Brandimarte, L.F. Cranor, S. Komanduri, P. G. Leon, N. Sadeh, F. Schaub, M. Sleeper, Y. Wang, S. Wilson, *Nudges for Privacy and Security: Understanding and Assisting Users’ Choices Online*, ACM Computing Surveys, Vol. 50, No. 3, Article 44, August 2017.

<sup>5</sup> See e.g., Z. Tufekci, *Yes, Big Platforms Could Change Their Business Model*, 17 December 2018.

some extent the phenomenon of online communications being marked by strong emotions and therefore liable to become easily polarised.<sup>6</sup>

### ***What's in a 'Like'?***

9. Over the past decade, online communications have come to rely increasingly on emoticons or 'likes'. It is however extremely difficult to assign their use a precise meaning. As one reporter, Jason Abbruzzese, pointed out, the answer to the question "What are you saying when you "Like" a story about the Syrian Civil War in your Facebook News feed?" is far from straightforward.<sup>7</sup> Abbruzzese lists at least four possible meanings, ranging from (a) enjoying reading the story, (b) approving the fact that the story was covered in the first place, (c) liking that the person sharing the story is raising awareness about a particular issue, or (d) indicating that the person approves of the war in Syria.<sup>8</sup> Even to indicate 'approval' for the war in Syria is ambiguous: does it mean that the person supports the Assad regime, the Free Syrian Army, Kurdish-backed forces, or ISIS?
10. In short, it is plainly simplistic to equate 'liking' a post with endorsing its contents. At best, a 'like' might be said to express a sentiment of enjoyment or interest but it says nothing specific about supporting or endorsing any part of a given statement. Its use might even be ironic. It is also worth noting that, for a long time, a 'like' on Facebook was the only emoticon available to users. As Abbruzzese concludes:

Parsing intent from someone hitting a button on the Internet is, at best, a faulty calculus of context. Trying to figure out what a Like means is a question that requires knowing everything about the time, place, content, and people involved in said Like. In a world where Facebook networks often include friends, family, colleagues, frenemies, old friends, and whoever else is around, that's an incredibly messy proposition.

### ***Sharing content on Facebook***

11. Similarly, online communications on Facebook often involve the mere sharing of information without comment. More often than not, the person sharing it has not read the content at issue.<sup>9</sup> They may have looked briefly at the title, thought it interesting and decided to share it on social media. This usually happens within a matter of seconds. Sharing someone else's post could generally be considered the next level of interaction on social media after 'liking' a post since the reader assigns sufficient value to the content to share it (rather than merely 'liking' it) but it still says little about the extent to which the person sharing the content approves it or endorses it in the absence of any further comment. For this reason, it is not uncommon for users on social media platforms such as Twitter to put a disclaimer in the description of their account to the effect that retweets (RTs) are not endorsement. This practice is not universal. It is also less prevalent on Facebook than on Twitter, for instance.

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<sup>6</sup> See e.g. [Echo Chambers: Emotional Contagion and Group Polarization on Facebook](#), Nature, 01 December 2016. Please note, however, that the phenomenon of 'echo' chambers remains contested: see Dr R. Fletcher, [The Truth behind filter bubbles: Bursting some myths](#), Reuters Institute, University of Oxford.

<sup>7</sup> See Jason Abbruzzese, [In search of meaning for the Facebook Like](#), 06 June 2017.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Caitlin Dewey, [6 out of 10 of you will share this link without reading it, a new, depressing study says](#), Washington Post, 16 June 2016.

12. In any event, as ARTICLE 19 highlighted in our submissions in the *Tamiz v United Kingdom* case before this Court, it is well understood by readers of online publications that individuals posting comments online are often saying the first thing that comes into their heads and reacting in the heat of the moment.<sup>10</sup> In the area of defamation, several courts have noted the brief and transitory nature of comments on social media and therefore their more limited capacity for harm.<sup>11</sup>

## **II. Applicable international and European standards on freedom of opinion and expression and terrorism offences**

### ***International standards on freedom of opinion***

13. Paragraph 1 of Article 19 ICCPR protects the right to hold opinions without interference. In its General Comment no. 34, the UN Human Rights Committee stressed that this is a right that permits no restriction or exception.<sup>12</sup> The Human Rights Committee went on to note that “No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, *perceived* or *supposed* opinions” (our emphasis).<sup>13</sup> The Committee also made clear that criminalising the holding of an opinion was incompatible with Article 19 (1) ICCPR.<sup>14</sup>

### ***International standards on freedom of expression and national security***

14. Under Article 19 (3) ICCPR and Article 10 (2) ECHR, the right to freedom of expression may legitimately be restricted for the purposes of national security, provided that the restriction at issue complies with the requirements of legality, necessity and proportionality.
15. Under international law, States are also required to prohibit incitement to terrorism.<sup>15</sup> The UN Special Rapporteur on counter-terrorism has elaborated upon the threshold that laws relating to incitement to terrorism must meet in order to comply with international human rights law.<sup>16</sup> In particular, he has highlighted that for the offence of incitement to terrorism to comply with international human rights law, it (a) must be limited to the incitement to conduct that is truly terrorist in nature; (b) must restrict freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals; (c) must be prescribed by law in precise language and avoid vague terms such as “glorifying” or “promoting” terrorism; (d) must include an actual (objective) risk that the act incited will be committed; (e) should expressly refer to intent to communicate a message and intent that this

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<sup>10</sup> See ARTICLE 19’s [submissions](#) in *Tamiz v United Kingdom*, no. 3877/14, 19 September 2017.

<sup>11</sup> *Ibid.*

<sup>12</sup> See HRC, [General Comment 34](#), CCPR/C/GC/34, para. 9.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> UN Security Council Resolution 1624 (2005); available at <http://bit.ly/1SMOH9r>.

<sup>16</sup> A model offence of incitement to terrorism was also provided in A/HRC/16/51, paras 29-32. See also Article 5 of the Council of Europe’s Convention on the Prevention of Terrorism on the “public provocation to commit acts of terrorism;” and OSCE, Preventing Terrorism and Countering Violent Extremism and Radicalization that lead to terrorism, p. 42; see also HRC, General Comment 34, *op.cit.*, para 46.

message incite the commission of a terrorist act; and (f) should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.<sup>17</sup>

16. In addition, *the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,<sup>18</sup> which authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression, provide that an act of expression should be criminalised on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the speech and the likelihood or occurrence of such violence (Principle 6). The UN Secretary-General has supported this interpretation, stating that “laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that *directly* encourages the commission of a crime, is *intended* to result in criminal action and is *likely* to result in criminal action.”<sup>19</sup> In practice, however, restrictions imposed on freedom of expression to give effect to these provisions are often abused.
17. By contrast, expression that only transmits information from or about an organization that a government has declared threatens national security must not be restricted.<sup>20</sup>

#### ***ECHR case-law on national security and freedom of expression***

18. The European Court of Human Rights (the Court) has considered several cases in which the Turkish authorities have prosecuted and convicted individuals, journalists, protesters, members of the opposition or human rights defenders under the Turkish Criminal Code and the Law on Counterterrorism in its various iterations.<sup>21</sup>
19. In particular, the Court has consistently found violations of the right to freedom of expression in cases where newspapers and journalists were prosecuted for having published statements by proscribed organisations that did not otherwise incite the commission of terrorist offences.<sup>22</sup> The Court has found that such a practice could have the effect of partly censoring the work of media professionals and reducing their ability to put forward views which have their place in a public debate.<sup>23</sup> Similarly, the fact that statements or interviews contain views strongly disparaging of government policy cannot in itself justify an interference with a newspaper's freedom of expression.<sup>24</sup> More recently, the Court held that “*criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or*

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<sup>17</sup> See UN Special Rapporteur on Counter-Terrorism, Ben Emmerson, A/HRC/31/65, para. 24.

<sup>18</sup> *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* London, ARTICLE 19, 1996; available at <http://bit.ly/2h8NStO>.

<sup>19</sup> A/63/337, para 62.

<sup>20</sup> Johannesburg Principles, *op.cit.*, Principle 8.

<sup>21</sup> See e.g. *Özer v. Turkey (no.3)*, no 69270/12, 11 February 2020; *Hatice Coban v. Turkey*, no. 36226/11, 20 October 2019; *Ali Gürbüz v. Turkey*, nos 52497/08 and 6 others, 12 March 2019.

<sup>22</sup> See, e.g., *Gözel et Özer v. Turkey*, App. No. 43453/04 and 31098/05, 6 July 2010 and more recently *Ali Gürbüz*, *op. cit.*

<sup>23</sup> *Ibid.* See also *Nedim Şener v. Turkey*, no. 38270/11, para. 115, 8 July 2014.

<sup>24</sup> See *Gözel et Özer v. Turkey*, App. No. 43453/04 et 31098/05, 6 July 2010.

*assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda.”<sup>25</sup>*

20. This reflects the important principle that one of the key characteristics of a democracy is “*the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome.*”<sup>26</sup> In this regard, the Court has long stressed that Article 10 ECHR “*is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.*”<sup>27</sup>
21. This does not relieve the press, terrorist organisations or anyone of the Court’s scrutiny. In cases involving the publication of statements by proscribed organisation, the European Court examines whether the statements at issue can be said to amount to ‘incitement to violence’ or ‘hate speech’ within the meaning of the Convention. In doing so, the Court focuses its analysis of the words being used, the intent of the speaker and the context in which they were published with a view to determining whether the texts taken as a whole could be considered as inciting to violence.<sup>28</sup> More recently, in *Mart and others v Turkey*, the Court considered whether the slogans, declarations and other writings at issue could - given their content, the context and their “*capacity to harm*” (our emphasis) – be considered to incite to violence, to armed resistance or uprising, or whether they could be said to amount to ‘hate speech’.<sup>29</sup>
22. More generally, the Court also takes into account the “position of strength occupied by a government”, which “commands it to show restraint in the use of criminal proceedings”.<sup>30</sup> Whilst this jurisprudence has been developed in the context of governments’ response to criticisms of the opposition or the media, in principle, it is broadly applicable to ordinary individuals expressing themselves on social media. At the same time, the nature of online communications calls for some special considerations as we set out further below.

### **III. The proper approach to terrorist propaganda cases involving social media**

#### ***Article 7 (2) of the Anti-Terrorism Law is not ‘in accordance with law’***

23. At the outset, ARTICLE 19 urges the Court to consider the foundational principles of the protection of freedom of expression when examining cases involving the ‘glorification

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<sup>25</sup> [Mehmet Hasan Altan v Turkey](#), no. 13237/17, para. 211, 20 March 2018.

<sup>26</sup> See, *inter alia*, European Court, *United Communist Party of Turkey and others v Turkey*, no. 19392/92, 30 January 1998, para. 57; *DTP and others v Turkey*, no. 3840/10 and 6 others, 12 January 2016, para. 74.

<sup>27</sup> *Handyside v the United Kingdom*, (7 December 1976, Series A no. 24), para. 49.

<sup>28</sup> See, for example, *Sürek and Özdemir v. Turkey* [GC], nos. [23927/94](#) and [24277/94](#), para. 61, 8 July 1999, unreported. See also, *mutatis mutandis*, [Perincek v Switzerland](#) [GC], no. 27510/08, 15 October 2015.

<sup>29</sup> See [Mart and others v Turkey](#), no 57031/10, § 32, 19 March 2019.

<sup>30</sup> See *Nedim Şener v. Turkey*, *op.cit.*, para. 122.

of terrorism'. As Hoffman LJ stated in *In R v Central Independent Television plc* [1994] Fam 192, 202-203:

[A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute." (our emphasis)

24. ARTICLE 19 accepts that this important principle is subject to exceptions, including for reasons of national security. However, we stress that even 'borderline' content or opinions ought to be protected, so long as they fall below the threshold of incitement to violence set out above (paragraphs 15-21). In this respect, we reiterate that the UN Special Rapporteur on counter-terrorism has consistently found the terms 'glorification', 'promotion' or 'support' of terrorism to be overly broad for the purposes of the prohibition of incitement to commit acts of terrorism under international law. This is in no small part because it risks criminalising the holding of opinions considered unpalatable by the government but that are not truly terrorist in nature, i.e. they do not purport to incite the commission of violent acts for ideological ends.
25. The Venice Commission has expressed a similar view:<sup>31</sup>

33. Another category of offences that raises significant human rights concerns are "new" crimes for speech that is seen to encourage, directly or indirectly, terrorism. Restrictions have expanded from existing prohibitions on incitement to much broader and less defined areas such as "apology", "praising"; "glorification or indirect encouragement" or "public justification" of terrorism. These "new" offences often criminalise the dissemination, publication and possession of material which are considered to fall foul of the incitement provisions. These provisions generally tend towards a weakening of the causal link that is normally required in law between the original speech (or other form of expression) and the danger that criminal acts may be committed. Such offences are particularly worrisome when applied to the media. The ECHR provides for strong protection of freedom of expression (Article 10) while allowing States to protect national security. According to the Strasbourg case-law, under article 10 ECHR incitement can only be prohibited in limited circumstances, which are highly context based. As recommended in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, "Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined".

26. Secondly, we draw the Court's attention to the criticism that the Turkish provisions on terrorism propaganda have consistently attracted, in particular from the Council of Europe Commissioner for Human Rights. In her 2020 report on Turkey, she observed that the Turkish Criminal Code, Code of Criminal Procedure and Anti-Terrorism Law required complete overhaul.<sup>32</sup> Whilst noting an amendment to Article 7 of the Anti-Terrorism Law that would exclude expressions that do not exceed the limits of reporting or criticism from its scope, the Commission considered that "*this amendment*

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<sup>31</sup> See Venice Commission, Report on Counter-Terrorism and Human Rights, Study no. 500/2008, CDL-AD(2010)022, 05 July 2010.

<sup>32</sup> Commission for Human Rights of the Council of Europe, *Report following her visit to Turkey from 1 to 5 July 2019*, CommDH(2020)1, 19 February 2019, para. 110.

*is unlikely to have a significant impact on the excessive use of this provision by the Turkish judiciary”.*<sup>33</sup>

27. This is consistent with ARTICLE 19’s own submissions to the Committee of Ministers on the implementation of the *Öner and Türk v Turkey*<sup>34</sup> judgment under Rule 9.2 of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements. In particular, ARTICLE 19 highlighted a large number of high profile cases in which Article 7 (2) of the Law had been used to prosecute academics, journalists, members of opposition parties, documentary makers or book publishers.<sup>35</sup> As of 2018, 17,077 people had been prosecuted under Articles 6 and 7 (2) of the Anti-Terrorism Law.<sup>36</sup> Similarly, Amnesty noted that as of 24 April 2019, 691 academics had been charged with “making propaganda for a terrorist organisation”.<sup>37</sup>
28. In light of the above, ARTICLE 19 submits that in examining the compatibility of a conviction on the basis of Article 7 (2) of the Anti-Terrorism Law, the Court ought to examine closely the extent to which that provision complies with the legality requirement under Article 10 (2) ECHR. Alternatively, the Court ought to exercise the most anxious scrutiny of the way in which Article 7 (2) of the Anti-Terrorism law has been applied by the Turkish courts in the instant case.

#### ***Considerations specific to social media cases***

29. Notwithstanding the above, ARTICLE 19 submits that in applying its case-law on incitement to violence, the Court should have regard to the following elements that are specific to the online environment:
- (i) In engaging in commentary on social media, ordinary users often react in the heat of the moment and are generally unlikely to be aware of the legal implications of the information that they like or share online. As noted above, they also often do not read the materials they like or share in their entirety. Accordingly, it is unfair to attach liability to users in circumstances where they are unlikely to be aware of its unlawful nature.
  - (ii) In the vast majority of cases, merely ‘liking’ a statement posted by another should be insufficient on its own to lead to a conviction for a serious offence such as ‘disseminating terrorist propaganda’ since ‘likes’ are an inherently crude way of expressing a sentiment or opinion. For this reason, ‘emojicons’ are frequently excluded as evidence in criminal cases on the basis that they are insufficiently relevant to demonstrate intent.<sup>38</sup> In other words, with the possible exception of ‘liking’ manifestly unlawful content such as child sex abuse material, individuals should generally be free to like content on Facebook or other platforms without

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<sup>33</sup> *Ibid.* para. 111.

<sup>34</sup> See [Öner and Türk v Turkey](#), no. 51962/12, 31 March 2015.

<sup>35</sup> ARTICLE 19 and Turkey Human Rights Litigation Support Project, [Rule 9.2 submission in Öner and Türk v Turkey group of cases](#), January 2020.

<sup>36</sup> *Ibid.*

<sup>37</sup> See Amnesty International, [Turkey: First academic to go to prison for signing peace petition in a flagrant breach of freedom of expression](#), 30 April 2019.

<sup>38</sup> See for instance Stephen Harrison, [How Emojis Have Invaded the Courtroom](#), Slate, 26 November 2019.



fear that they might be prosecuted for expressing interest in a piece of content or the ‘wrong’ kind of opinion in a very crude way;<sup>39</sup>

- (iii) Similarly, in the vast majority of cases, simply sharing or repeating a post should not – without more – be considered indicative of sufficient intent to incite to the commission of terrorist acts. This is because, more often than not, sharing content merely indicates that some value is attributed to a post without necessarily signalling endorsement, let alone incitement to take a particular course of action;
  - (iv) In examining the extent and magnitude of an online communication, the semi-open nature of Facebook should be taken into account. In particular, the visibility of a post is likely to be limited by Facebook’s publication settings;
  - (v) In any event, the transitory nature of information liked or shared on social media is such that it is less likely to have a significant impact in circumstances where (a) an algorithm may well not make it visible to a large audience, even amongst Facebook friends; (b) the visibility of that information may well be reduced by new, more ‘relevant’, content being added to users’ newsfeeds;<sup>40</sup>
  - (vi) The likelihood of a terrorist act occurring as a result of merely ‘liking’ someone’s post is likely to be nil or minimal, even if the original post is subsequently found to be unlawful. When reposting material that could be said to amount to incitement to commit acts of terrorism, the likelihood of harm occurring should be assessed by reference to the position of the speaker, his or her capacity to influence his or her audience and whether the audience has the means to resort to acts of terrorism. In our view, the likelihood of harm is likely to be especially low in cases involving ordinary Facebook users.
30. Furthermore, ARTICLE 19 submits that in examining cases involving civil or criminal liability for what they say online, the Court should bear in mind that ordinary Internet users do not have the same resources for checking information or seeking pre-publication legal advice as journalists. As such, they should not be held to the same standards when sharing or publishing information online. Equally, we urge the Court to exercise caution against requiring that users should expressly distance themselves from the content they want to share if they want to avoid a conviction for a serious offence such as incitement to terrorism or ‘hate speech’.<sup>41</sup> In our view, this would be deeply inimical to the way in which individuals ‘engage’ or express themselves online.
31. More generally, in cases involving alleged ‘terrorist’ content, ARTICLE 19 submits that measures aimed at seeking the removal of the material at issue are likely to be more proportionate than seeking a criminal conviction. In other words, particularly in cases involving less serious conduct, it may well be more proportionate for content to be taken down on the basis that it is unlawful or in breach of community standards rather than pursuing it before the courts.

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<sup>39</sup> See contra, Guardian, [Man fined by Swiss court for ‘liking’ defamatory comments on Facebook](#), 30 May 2017.

<sup>40</sup> See e.g. *Rana v Google Australia Pty Ltd* [2013] FCA 60, para 78, citing *Prefumo v Bradley* [2011] WASC 251.

<sup>41</sup> Cf *Jersild v Denmark*, no. no. [15890/89](#), [GC], 23 September 1994, para. 34.

## **Conclusion**

32. Freedom of expression is a foundational principle of democracy. In the context of national security, this means that the expression of opinions that fall short of incitement to violence must be allowed, however unpalatable they might be to the government. In criminal cases involving the mere 'liking' of someone else's content on social media, ARTICLE 19 urges the Court to consider that as a matter of principle, 'likes' should not be given any, or any significant weight in carrying out its assessment of the intent of the speaker. Similarly, merely sharing someone else's content should not generally be considered indicative of intent to commit a terrorist offence in the absence of other evidence or elements of context. To hold otherwise would significantly undermine the protection of freedom of expression.

29 June 2020

Gabrielle Guillemin

Senior Legal Officer

**ARTICLE 19: Global Campaign for Freedom of Expression**