



PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
www.ohchr.org • TEL: +41 22 917 9000 • FAX: +41 22 917 9008 • E-MAIL: registry@ohchr.org

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

**IN THE EUROPEAN COURT OF HUMAN RIGHTS
Second Section**

**Application no. 25479/19
Case of Wikimedia Foundation, Inc. v. Turkey
Communicated on 2 July 2019**

INTERVENTION

Pursuant to Article 36(2) of the European Convention on Human Rights and Rule 44(3) of the Rules of Court

**by the UN Special Rapporteur on the Promotion and Protection of the
Right to Freedom of Opinion and Expression**

Professor David Kaye

A. INTRODUCTION

1. This is the intervention of the United Nations (“UN”) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (“**the Special Rapporteur**”) in connection with application no. 25479/19 made by Wikimedia Foundation, Inc. against Turkey (**the “Government”**). The intervention is submitted in accordance with Article 36 of the European Convention on Human Rights (“ECHR”) and Rule 44 of the Rules of Court. Leave to intervene was granted on 7 November 2019.
2. Relying on reports, investigations, and prior consultations with civil society, this intervention offers the following:
 - a. Observations on the interpretation and application of Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”), as it relates to issues and concerns common to Article 10 of the ECHR, particularly with respect to the requirements of legality, legitimacy, and necessity and proportionality in the context of website blocking;
 - b. Relevant factual findings relating to freedom of expression in Turkey, as well as documented impacts of such government action on the exercise of freedom of expression;

- c. Analysis of the requirement that domestic remedies be made available to redress violations of the obligation to protect and promote the right to freedom of opinion and expression.
3. This intervention is submitted to the European Court of Human Rights (“EctHR”) on a voluntary basis without prejudice to and should not be considered as a waiver, express or implied of, the privileges and immunities of the United Nations, its officials, and experts on missions, including the individuals listed above, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by me as Special Rapporteur, in full accordance with my independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

B. BACKGROUND

The Mandate of Special Rapporteur

4. The Special Rapporteur in the UN human rights system serves as an independent expert appointed by the UN Human Rights Council. Human Rights Council resolution 7/36 mandates the Special Rapporteur to, *inter alia*, gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, as a matter of high priority, against journalists or other professionals in the field of information.
5. The mandate draws upon, though it is not limited by, Article 19 of the ICCPR, which, similar to Article 10 of the ECHR, protects a person’s right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹ In discharging this mandate as Special Rapporteur, I have collected and continue to collect evidence, and report to the Human Rights Council, on the extent, nature and severity of restrictions and violations of freedom of expression in different countries, as well as the remedies available to address such violations by State and non-State actors.

The restriction of online expression in Turkey

6. As Special Rapporteur, I have repeatedly expressed concern about the deterioration of freedom of expression in Turkey prior to, but especially since, the attempted coup in July 2016. In November 2016, I conducted an official mission to assess the situation for freedom of expression in Turkey. My report to the Human Rights Council concerning the mission concluded, “across society [Turkey’s] laws and policies of

¹ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) (“ICCPR”).

ensorship and criminalization are working to repress freedom of opinion and expression in all the places that are fundamental to democratic life: the media, educational institutions, the judiciary and the bar, government bureaucracy, political space and the vast online expanses of the digital age.”² The report noted the broad scope and far-reaching implications of Law no. 5651 (“**the Internet Law**”), which provides broad authority to the Government to monitor the Internet and restrict access to content or websites on vaguely defined grounds.³ The report found that as of March 2017, over 110,000 websites had reportedly been blocked in Turkey.⁴ Despite Turkey’s ratification of the ICCPR in 2003, the report noted evidence of Government restrictions of freedom of expression, both online and offline, going well beyond the permissible limitations available under human rights law. In particular, news and citizen journalism websites are frequently subject to censorship, and there has been a corresponding surge in arrests of journalists and others and a rise in self-censorship.⁵ The overall assault on freedom of expression has been inconsistent, I have suggested⁶, even with Turkey’s public declaration of a derogation from Article 19.

C. ASSESSMENT OF WEBSITE BLOCKING UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS

7. Website blocking has emerged as a common means of information control in recent years as States increasingly rely on the digital access industry to control, restrict or monitor expression online. While States sometimes order total network outages, they also block, throttle or render “effectively unusable” access to mobile communications, websites or social media and messaging applications, as in the current case. In a 2016 report to the Human Rights Council, I noted that “[s]ervice shutdowns and associated restrictions are a particularly pernicious means of enforcing content regulations” and expressed concern about their growing use across the world.⁷ In a 2017 report, I observed that shutdowns are often ordered in violation of human rights standards, pursuant to vaguely formulated domestic laws or without an obvious legal basis. The

² Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye on his mission to Turkey (June 21, 2017), U.N. Doc. A/HRC/35/22/Add.3, ¶ 7 [hereinafter 2017 Report on Turkey], available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22/Add.3.

³ Id. ¶ 20.

⁴ Id. ¶ 21.

⁵ See Intervention, Atilla Taş v. Turkey (no. 72/17) (Oct. 20, 2017), available at <http://freedex.org/wp-content/blogs.dir/2015/files/2017/10/Amicus-Filing-ECHR-Turkey-UNSR.pdf>.

⁶ Office of the High Commissioner for Human Rights, *Ahead of referendum, UN experts warn Turkey about impact of purge on economic, social and cultural rights* (13 April 2017),

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21497&LangID=E>;

2017 Report on Turkey, *supra* note 2, ¶¶ 75-85. The Parliamentary Assembly of the Council of Europe, the Council of Europe Commissioner for Human Rights and the OSCE Representative on Freedom of Media have expressed similar concerns and urged Turkey to take immediate steps to meet its obligations under human rights law.

Recommendation 2097 (2017) by the Parliamentary Assembly of the Council of Europe, available at

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23403&lang=en>; Nils Muiznieks,

Memorandum on Freedom of Expression and Media Freedom in Turkey (Feb 15, 2017), available at

<https://rm.coe.int/memorandum-on-freedom-of-expression-and-media-freedom-in-turkey/16806f1ae2>. Statements by the OSCE Representative on freedom of the media (Oct. 31, 2016), available at <http://www.osce.org/fom/302351> and <http://www.osce.org/fom/278326>.

⁷ Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, (May 11, 2016), U.N. Doc. A/HRC/32/28, ¶ 48, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/095/12/PDF/G1609512.pdf?OpenElement>.

2017 report also found that shutting down of the entire network or particular websites is often ordered during instances of extraordinary public interest including demonstrations and elections, disproportionately affecting areas beyond those of specific legitimate concern.⁸

8. Attacks on access to online information reinforces a basic global reality: Online space has become a primary medium to seek, receive and impart information and ideas, particularly for individuals living in the areas where traditional public means of expression have become exceedingly difficult or dangerous. As a result, restrictions on access to certain websites interferes with a person's "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers [...] or through any [...] media of his choice," which is enshrined in Article 19(2) of the ICCPR and parallels both global and regional human rights instruments. I emphasized in the 2017 report to the Human Rights Council the State's positive duty to promote freedom of expression and the widest possible non-discriminatory access to information.⁹ In the digital age, the freedom to choose among information sources is meaningful only when Internet content and applications of all kinds are transmitted without undue discrimination or interference. The practice of website blocking, which allows States to filter out from public view information they deem subject to restriction, directly contradicts this principle and thus requires the closest scrutiny.
9. Others share this view. Echoing the previous Special Rapporteur's concern for "the emerging trend of timed (or 'just- in-time') blocking to prevent users from accessing or disseminating information at key political moments,"¹⁰ the Council of Europe Commissioner for Human Rights has recognized Internet blocking is a "widespread phenomenon" that jeopardizes media freedom.¹¹ The Human Rights Council, in its resolution 32/13, "condemned unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law, and called upon all States to refrain from and cease such measures."¹² The mere threat of website blocking may have a significant and disproportionate chilling effect. For instance, rather than risking the shutdown of their

⁸ Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, (May 11, 2016), U.N. Doc. A/HRC/35/22, ¶¶ 9-11 [hereinafter 2017 Report on the Role of Digital Access Providers], available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/095/12/PDF/G1609512.pdf?OpenElement>. See also UNGA, 'Report Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye' (Sept. 6, 2016) UN doc. A/71/373 [hereinafter 2016 Report on Contemporary Challenges to Freedom of Expression], available at https://www.un.org/ga/search/view_doc.asp?symbol=A/71/373. For example, both Turkey and Uganda allegedly restricted access online in advance of elections, and Malaysia invoked its Sedition Act to justify blocking news sites. Nauru cited crime prevention as one of the reasons for blocking social media sites and my mission to Tajikistan revealed that Government has repeatedly blocked access to messaging services and social media websites operated from outside the country.

⁹ Id. ¶ 23.

¹⁰ Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 30, U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter La Rue, Report on Key Challenges on the Internet], available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

¹¹ Nils Muižnieks, Arbitrary Internet Blocking Jeopardises Freedom of Expression, Council of Europe (Sept. 26, 2017), <https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises-freedom-of-expression>

¹² Human Rights Council Res. 32/13, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/156/90/PDF/G1615690.pdf?OpenElement>.

website, an operator may choose to err on the side of caution and take down material that may be perfectly legitimate or lawful. The threat of blocking may also incentivize owners and operators to monitor their websites in such a way that increases the risk of prior censorship.¹³

10. In light of these realities, any tools used to restrict the ability of individuals to access and of operators to maintain websites (whether full blocking or more limited throttling of speeds, filtering keywords, and so forth) must comply with the requirements of Article 19 (3) of the ICCPR. While limitations of the right to freedom of expression are permissible, Article 19(3) requires that any restriction on the right to freedom of expression (i) is provided by law; (ii) serves a legitimate purpose; and (iii) is necessary and proportionate to meet the ends it seeks to serve. The UN General Assembly and the Human Rights Council have recognised that the “same rights that individuals exercise offline must also be protected online.” Thus, “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].”¹⁴

Provided by law

11. The Human Rights Committee, in its interpretation of Article 19, found that for any restriction to satisfy the legality requirement, “the law must be made accessible to the public” and “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”¹⁵ Furthermore, “a law may not confer unfettered discretion of the restriction of freedom of expression on those charged with its execution” and must provide “sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.”¹⁶ As I described in my 2017 report to the Human Rights Council, Internet shutdowns and website blockings are often conducted “covertly or without an obvious legal basis” or “pursuant to vaguely formulated laws and regulations” that fail to define exact bounds of restricted expression and confers unfettered discretion to authorities.¹⁷ The previous Special Rapporteur shared the same concern that “States’ use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression [...]. Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner.”¹⁸

¹³ 2017 Report on the Role of Digital Access Providers, *supra note 8*, ¶¶ 46-47. See also Daphne Keller, *Empirical Evidence on “Over-Removal” By Internet Companies Under Intermediary Liability Laws*, Ctr. Internet & Society (Oct. 12, 2015), <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

¹⁴ General Comment No. 34, ¶ 43, available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹⁵ *Id.* ¶ 25.

¹⁶ *Id.*

¹⁷ 2017 Report on the Role of Digital Access Providers, *supra note 8*, ¶¶ 9-10.

¹⁸ La Rue, Report on Key Challenges on the Internet, *supra note 11*, ¶ 31.

12. In our 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda, independent monitors of freedom of expression and the media in the UN, the Americas, Europe and Africa, including my mandate as Special Rapporteur, stated that content blocking measures must provide “minimum due process guarantees.”¹⁹ In my 2018 report to the Human Rights Council, I also reiterated that the restrictions on online content should only be imposed “pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy.”²⁰ As such, any law permitting website blocking must include due process guarantees including “details regarding the necessity and justification for blocking a particular website,” and seek content restriction pursuant to an order of “a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences to ensure that blocking is not used as a means of censorship.”²¹
13. For purposes of this litigation, it is important to note that any restrictions on the right to freedom of expression must be exceptional, and States bear the burden of demonstrating the consistency of such restrictions with international law. Hence, the practice of website blocking must be subject to the strict and narrow conditions established under Article 19(3) of the ICCPR. Similarly, the Human Rights Committee has concluded that “permissible restrictions generally should be content-specific” and that “generic bans on the operation of certain sites and systems are not compatible with paragraph 3.”²² It follows that it is “inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.”²³ Given the significant implications of such restrictions on online expression, an independent and impartial court working under appropriate procedural legal safeguards should be the only authority authorizing website blocking.²⁴
14. In *Ahmet Yıldırım v. Turkey*, this Court’s conclusion was in keeping with the analysis under Article 19 of the ICCPR. In finding that the government of Turkey violated Article 10 of the ECHR, the Court observed that blocking access to all Google sites rather than access to one particular offending site produced arbitrary and disproportionate effect. The Court found that the judicial review procedures concerning the blocking of Internet sites in Turkey were insufficient to meet the criteria for avoiding abuse, as the Internet Law “does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of

¹⁹ See Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda, available at https://www.law-democracy.org/live/wp-content/uploads/2017/03/mandates.decl_2017.fake-news.pdf.

²⁰ David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, ¶ 17, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018), available at <http://undocs.org/A/HRC/38/35>.

²¹ Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Rep. of the Special Rapporteur on the freedom of opinion and expression, ¶ 82, U.N. Doc. A/66/290 (Aug. 11, 2011), <https://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>.

²² General Comment No. 34, ¶ 43.

²³ *Id.*

²⁴ See Article 19, Freedom of Expression Unfiltered: How Blocking and Filtering Affect Free Speech (Dec. 2016), https://www.article19.org/data/files/medialibrary/38586/Blocking_and_filtering_final.pdf.

blocking access in general.”²⁵ As such, the Government was required to amend the Internet Law as applied to blocking of Internet publications to comply with the standards of the ECHR.²⁶

Legitimate purpose

15. Any content or website restriction must be for a legitimate objective. Article 19(3) enumerates as legitimate the State’s responsibility to protect the rights and reputations of others, national security or public order (*ordre public*), or public health or morals. In the context of website blocking, while it is common for States to seek to justify restrictions on the bases of ‘national security’, this rationale should generally be limited in application to “situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime or power group.”²⁷ Likewise, ‘public order’ justifications must be limited to specific situations in which a limitation “would be demonstrably warranted.”²⁸ Furthermore, the State must provide an “articulable and evidence-based justification for the interference.”²⁹ When the blocking list and the criteria for restriction remain inaccessible to the public, as is often the case, it also becomes difficult to assess “whether access to content is being restricted for a legitimate purpose”³⁰ and such administrative decisions can easily evade legal scrutiny and public accountability.

Necessity and proportionality

16. The requirement of necessity entails that restrictions “must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”³¹ Article 19(3)’s requirement of necessity also implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”³² The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion. Finally, the restrictions must be “the least intrusive instrument among those which might achieve the desired result.”³³

²⁵ *Ahmet Yıldırım v. Turkey*, Application no. 3111/10, Eur.Ct. H.R. (2012), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-115705%22%5D%7D>.

²⁶ *Id.*

²⁷ Alexandre Charles Kiss, “Permissible limitations on rights”, in *The International Bill of Rights: The Covenant on Civil and Political Rights*, Louis Henkin, ed. (New York, Columbia University Press, 1981). See also Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (London, 1996).

²⁸ 2016 Report on Contemporary Challenges to Freedom of Expression, *supra* note 8, ¶ 18.

²⁹ UNGA, ‘Report of the Special Rapporteur on the Promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson’ (Sept. 24, 2014) UN doc. A/69/397, ¶ 11, available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/69/397&Lang=E>.

³⁰ La Rue, Report on Key Challenges on the Internet, *supra* note 11, ¶ 31.

³¹ General comment No. 34, ¶ 22.

³² Human Rights Council, ‘Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye’, (May 22, 2015) UN Doc. A/HRC/29/32, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/32.

³³ General comment No. 27, ¶ 14.

17. The UN, Inter-American Commission, and African Commission Special Rapporteurs for Freedom of Expression, and the Organization for Security and Co-operation in Europe Representative on Freedom of the Media have specified the limited circumstances under which website blocking may establish a permissible restriction on freedom of expression. In their 2011 Joint Declaration on freedom of expression on the internet, they explained that:

“Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure - analogous to banning a newspaper or broadcaster - which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.”³⁴

18. In the context of countering online extremism, the UN High Commissioner for Human Rights has reiterated these criteria. States resorting to website blocking are required to:

“[p]rovide evidence-based justification of the necessity and proportionality of such interference with freedom of expression. They must demonstrate how the perceived benefits of these measures outweigh the importance of the Internet as a tool to maximize the number and diversity of voices in the discussion of numerous issues. Any lack of transparency with regard to blocking or content removal measures renders it difficult to assess whether such restrictions were really necessary for the purported aim. Consequently, there is a need for much greater transparency by States to clarify what content they are filtering, blocking or removing and on what basis.”³⁵

19. Even when States provide a justification for the blocking of a website and such restriction is in accordance with the legality requirement, it remains common that “blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal.”³⁶ Indeed, website blocking is an extreme measure that not only restricts allegedly infringing activity, but also cuts off access to all legitimate content on that website or uses of that application. The duration of such blocking is often disproportionate and in fact, governments often fail to show that blocking access to certain websites or information is necessary to achieve the stated object. In response to the rise in administrative website blocking measures in Europe for counterterrorism and other purposes, the Council of Europe Commissioner for Human Rights expressed a similar concern that such measures are “inherently likely to produce (unintentional) false positives (blocking sites with no prohibited material) and false negatives (when sites with

³⁴ International Mechanisms for Promoting Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, ~ 3(a) (June 1, 2011), available at <http://www.osce.org/fom/78309?download=true>.

³⁵ Human Rights Council, Report of the High Commissioner for Human Rights, U.N. Doc. NHRC/33/29, ~ ~ 53 – 54 (Jul 21, 2016), available at <https://documents-ddsny.un.org/doc/UNDOC/GEN/G16/162/55/PDF/G1616255.pdf?OpenElement> (“H.C. CVE Report”)

³⁶ La Rue, Report on Key Challenges on the Internet, *supra* note 11, ¶ 31.

prohibited material slip through a filter),” and governed by “opaque” and secretive criteria and appeals processes that are “onerous, little known or non-existent.”³⁷

F. ACCESS TO EFFECTIVE REMEDIES IS ESSENTIAL TO PROTECTING ONLINE FREEDOM OF EXPRESSION

20. The Human Rights Committee has concluded that States should give effect to the right to freedom of expression in a manner consistent with their obligation to provide effective remedies for rights violations.³⁸ Article 2(3) of the ICCPR requires that claims of such violations must be determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. The Human Rights Committee has stressed that “[a]dministrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”³⁹
21. In the context of the right to freedom of expression online, I have concluded that States “bear the primary duty to remediate business-related human rights abuses, particularly those they instigate, such as overbroad content restriction, unlawful user data requests and disproportionate surveillance.”⁴⁰ The previous mandate holder also emphasized the need for legislation restricting freedom of expression online to include “adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.”⁴¹ He also stated that any “legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.”⁴²
22. The importance of effective remedies in respect of restrictions on freedom of expression is underlined in the Court's case law. The Court has made clear that an applicant must have the ability to challenge the infringement of his rights in a manner that is effective in practice as well as in law, and which provides for proper redress in the light of the particular context and importance of the right to freedom of expression.⁴³
23. To be effective, a remedy must be sufficient to enforce the substance of his right to freedom of expression. There is no effective remedy if the national authority simply relies on the discretion of the decision-maker as to any restrictions imposed (for

³⁷ Nils Muižnieks, *Arbitrary Internet Blocking Jeopardises Freedom of Expression*, Council of Europe (Sept. 26, 2017), <https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises-freedom-of-expression>.

³⁸ General Comment No. 34, ¶ 8

³⁹ General Comment No. 31, ¶15.

⁴⁰ 2017 Report on the Role of Digital Access Providers, *supra* note 8, ¶ 73.

⁴¹ La Rue, Report on Key Challenges on the Internet, *supra* note 11, ¶ 24.

⁴² *Id.* ¶ 69.

⁴³ For example, see *Mackay & BBC Scotland v. United Kingdom*, Judgment of 7 December 2010, application no 10734/05; see also, *Sze/ v. Hungary*, Judgment of 16 September 2014, application no 44357/13, §93.

example, a decision not to grant a broadcasting license); a review of the substance of the decision is required.⁴⁴

G. CONCLUSIONS

The following conclusions may be drawn based on the above legal analysis:

- a. Online censorship through website blocking involves significant threats to freedom of expression and must be subjected to rigorous scrutiny under Article 19(3) requirements. The examples of internet censorship identified in the course of my mandate are of a nature that would entail a violation of ICCPR.
- b. The current case presents the Court with a valuable opportunity to further address the ways in which online censorship interferes with the right to freedom of expression. In so doing, I urge the Court to
 - i. take into account the detrimental effects of internet censorship on the effective exercise of rights under Article 19 of the ICCPR and Article 10 of the ECHR. This letter has addressed examples in which my own mandate and other international mechanisms have examined instances of internet censorship and their consequences for the freedom of expression.
 - ii. take into account developments in the law under the ICCPR as presented in this letter, in accordance with the general principles of interpretation under the 1969 Vienna Convention on the Law of Treaties Article 31(3)(c).
- c. This letter has shown why internet censorship is a serious interference with the rights under Article 19 (2) and consequently how this leads to the application of a strict standard of review in the assessment of the legitimate aim, legality, and necessity and proportionality of the restriction, as well as in assessing the adequacy of available of safeguards and effective remedies against abuse.

Yours faithfully,



David Kaye
Special Rapporteur on the promotion and protection of the right to
freedom of opinion and expression

⁴⁴ Glas Nadezhda Eood and Elenkov v. Bulgaria, Judgment of 11 October 2007, application no 141134/02, §65-70.