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

**Application for leave to intervene under Rule 44(3) of the Rules of Court
Wikimedia Foundation, Inc. v. Turkey, Application no. 25479/19**

Dear President,

This is a request for leave to intervene as *amicus curiae*, in my capacity as UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. I respectfully seek permission to intervene in the case of *Wikimedia Foundation, Inc. v. Turkey*, Application no. 25479/19, pursuant to Article 36(2) of the European Convention on Human Rights (“the ECHR”), read together with Rule 44(3) of the Rules of Court.

The mandate and work of the proposed *amicus curiae* intervener

In my capacity as Special Rapporteur, I am mandated by Human Rights Council resolution 7/36 to, *inter alia*:¹

- (a) 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;
- (b) seek, receive and respond to credible and reliable information from governments, non-governmental organizations and any other parties who have knowledge of these cases; and
- (c) make recommendations and provide suggestions on ways and means to better promote and protect the right to freedom of opinion and expression in all its manifestations.

¹ http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf.

The Human Rights Council has also specifically requested my mandate to focus on freedom of expression issues and challenges online. In particular, Resolution 7/36 states that my mandate should “provide views, when appropriate, on the advantages and challenges of new information and communication technologies, including the Internet and mobile technologies, for the exercise of the right to freedom of opinion and expression, including the right to seek, receive and impart information and the relevance of a wide diversity of sources, as well as access to the information society for all.”²

In discharging my mandate, I have collected and continue to collect evidence, and to report, on the extent, nature and severity of violation of freedom of expression relating to government surveillance and control of information such as internet shutdowns. My mandate rests in part upon Article 19 of the International Covenant on Civil and Political Rights (“the ICCPR”), which, similar to Article 10 of the ECHR, protects, *inter alia*, the 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.”

For example:

- (a) I prepare and publish thematic reports. My reports to the Human Rights Council and the General Assembly have examined the duty of States to refrain from excessive censorship and surveillance, and to protect and promote a free, open, and safe Internet. One such report published in 2016 considered the legality of national legislation that broadly define key terms such as terrorism and national security and fail to limit discretion of executive authorities as required by Article 19 the ICCPR. The report also highlighted the importance of judicial or other independent third-party review with the authority necessary to evaluate claims of violations. In particular, the report expressed concern for state-ordered disruptions of Internet and telecommunications services in the name of broad justifications such as national security and public order in many countries including Turkey.³ In another report on the subject in 2017, I documented the increasing use of vaguely formulated laws and regulations as a basis to restrict access to certain websites and platforms or entire networks.⁴ In addition, the report concluded that States “bear the primary duty to remediate business-related human rights abuses, particularly those they instigate, such as overbroad content restriction, unlawful

² *Id.*

³ <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/FOE-worldwide-report.pdf&hl=en>, at 9.

⁴ <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/AHRC3522.pdf&hl=en>, at 5.

user data requests and disproportionate surveillance.”⁵ I continue to collect evidence on and to document the use of ambiguous national laws to allow disproportionate measures like website blocking, and the lack of effective remedies that result in continuous violations of freedom of expression.

- (b) I also address communications and urgent appeals to Member States regarding particular cases of restrictions on freedom of expression. Between 1 August 2014 and 15 October 2019, I have issued 1,273 communications and urgent appeals to Member States of the United Nations. In particular, I have communicated my concerns to States about the legality of overbroad or ambiguous laws that confer unfettered discretion to agencies, as well as the human rights implications of extreme measures such as blocking access without providing appropriate safeguards of judicial review or appeal. Such concern was addressed in communications to States including Egypt,⁶ Lebanon,⁷ Cameroon,⁸ and Malaysia.⁹ The growing body of evidence suggests the potential abuse of vaguely formulated laws, similar to those complained in this case, to restrict freedom of online expression without due process safeguards and democratic legitimacy of the judicial process.
- (c) I submit amicus interventions and expert testimony in key cases that raise issues of freedom of expression. In *Flavus v. Russia*, I submitted an amicus filing before the European Court of Human Rights examining similar issues of the legality of Russia’s ‘Yarovaya law,’¹⁰ proportionality of extreme form of restrictions such as website blocking,¹¹ and the importance of effective legal remedies that allow enforcement of the substance of one’s right to freedom of expression.¹²
- (d) I conduct fact-finding country visits to member States to survey the state of freedom of expression in those states. My reporting on Turkey,¹³ which resulted from a visit in November 2016, has found that the State’s Internet Law significantly expanded the power of the government to regulate website blocking on “vaguely defined grounds and without prior court approval.”¹⁴ While the criteria for filtering were not publicly available, the government proactively used

⁵ <https://docs.google.com/viewerng/viewer?url=http://freedex.org/wp-content/blogs.dir/2015/files/2017/05/AHRC3522.pdf&hl=en>, at 20.

⁶ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24560>

⁷ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24560>

⁸ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20955>

⁹ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24680>

¹⁰ <https://freedex.org/wp-content/blogs.dir/2015/files/2018/05/Flavus-OOO-SR-intervention.pdf>, at 5.

¹¹ *Id.* at 6.

¹² *Id.* at 8-9.

¹³ A/HRC/35/22/Add.3, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22/Add.3.

¹⁴ <https://freedex.org/country-visit-turkey/>, at 5.

the legislation to order blocking of websites on the grounds of “national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedom.”¹⁵ The report concluded that even though blanket Internet blockings, such as the one in present case, have been ruled unconstitutional by the Turkish Constitutional Court for lacking legal basis and for giving rise to a serious violation of freedom of expression,¹⁶ the government continued to pursue the policy.¹⁷ In addition to censorship of online expression, I raised concern that the laws and policies of censorship and criminalization were working to repress opinion and expression in all of the places in Turkey including “media, educational institutions, the judiciary and the bar, government bureaucracy, and political space.”¹⁸

Significance of the issues raised by the case and the scope of the proposed intervention

In reaching its judgment on the case of *Wikimedia Foundation, Inc. v. Turkey*, the Court may be called upon to consider and determine, amongst other issues, critical issues of significant relevance to the work of my mandate (as summarised above). The Court’s judgment on these issues is likely to be relevant and influential to the interpretation and application of international human rights standards on the freedom of expression under the ECHR and beyond, including Article 19 of the ICCPR.

In the light of the above, I am seeking leave to intervene in order to assist the Court by providing it with:

- (a) observations on the interpretation and application of Article 10 of the ECHR in light of Art. 19 of the ICCPR, particularly the requirements of a legitimate aim, of legality, and of necessity and proportionality, to the question of website blocking;
- (b) relevant factual material relating to the situation of website blocking in Turkey and other countries, as well as documented impacts of such government action on the exercise of freedom of expression; and
- (c) analysis of the domestic remedies available to appeal and repair violations of ECHR Art 10 and ICCPR Art. 19 (see Art. 2(3) ICCPR) in Turkey.

¹⁵ Id. at 7.

¹⁶ Constitutional Court, Application No. 2014/3986, 2 April 2014.

¹⁷ <https://freedex.org/country-visit-turkey/>, at 13

¹⁸ <https://freedex.org/country-visit-turkey/>, at 3.

It is respectfully suggested that an intervention would be of benefit to the Court in discharging its function in accordance with "*the interests of the proper administration of justice*" (Rule 44(3)(a)). It is further respectfully suggested that the reasons specified above constitute "*exceptional reasons*", and I therefore respectfully request the President of the Court to grant leave in accordance with its competence in Rule 44(3)(b) of the Rules of Court.

If the President decides to grant my application to intervene, I shall of course abide by any terms attached to that decision and by the Rules of Court. If my request to intervene is accepted, please indicate the timetable within which my submissions should be filed with the Court.

The proposed intervention submitted to the European Court of Human Rights would be drafted on a voluntary basis 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, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views to be expressed, 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.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D. Kaye', written in a cursive style.

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