

Input of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to the Facebook Oversight Board Concerning its “Community Guidelines” and “Community Standard on Dangerous Individuals and Organizations”

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1. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established pursuant to Human Rights Council resolution 40/16 is pleased to submit views to the Facebook Oversight Board on its “Community Guidelines” and “Community Standard on Dangerous Individuals and Organizations.”

2. The submission of these views is provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission enjoyed, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.

3. The Special Rapporteur reports regularly to the UN Human Rights Council and General Assembly on the promotion and protection of human rights and fundamental freedoms while countering terrorism, countering violent extremism and extremism including broadly related security regulation by States. As a result, the Special Rapporteur is in a position to assess the broad human rights implications of the regulatory actions by both State and private entities in the area of terrorism, violent extremism and extremism.

4. The Special Rapporteur will share its broad assessments of the guidelines and standard used by Facebook but will not make judgement on the specifics of the case, given the potential for conflict of interest should this case be submitted or reviewed by her mandate.

5. The Special Rapporteur has been engaged in a long-term and constructive conversation with Facebook concerning its previous definition of terrorist entities as well as its Community Guidelines on Dangerous Individuals and Organizations.¹ I have welcomed Facebook’s effort to update its definition of terrorist entities with the aim of bringing it in line with international law standards and note some improvements brought by the amendments.

¹ [*UN human rights expert says Facebook’s ‘terrorism’ definition is too broad*](#), 3 September 2018.

Nonetheless, the Special Rapporteur remains very concerned that the Guidelines and Standard are insufficiently consistent with international law and may function in practice to undermine certain fundamental rights, including but not limited to freedom of expression, association, participation in public affairs and non-discrimination.

6. The Special Rapporteur has advised Facebook to develop a definition of terrorism as opposed to relying primarily on a definition of terrorist entities or dangerous organizations. The language of dangerous organizations raises complex issues about assessing and establishing membership in and/or affiliation with such groups. The Special Rapporteur notes in this respect that Facebook does not seem to have publicly available criteria on how such assessments are to be conducted.

7. The Special Rapporteur is particularly concerned about the use of the opaque term ‘dangerous’ to define the regulation of organizations and individuals on the internet. There is no agreed international law or even domestic law meaning of this term. The term creates undisputable legal uncertainty and is vague and imprecise. It is regrettable that the regulatory basis for removal is premised on a standard that suffers from these defects making the concerns about improper, discriminatory or repressive speech restrictions more acute.

8. While acknowledging the importance of regulating advocacy to violence, Facebook must make clear that the company maintains a robust protection of freedom of expression, including speech that may be offensive, distasteful or unacceptable to some. The mandate therefore reiterates its earlier recommendations² that Facebook consider adopting the model definition of incitement to terrorism advanced by the mandate of the Special Rapporteur² and be guided by Articles 19(3) and 20 of the International Covenant on Civil and Political Rights and the standards spelled out in the Rabat Plan of Action³ when addressing advocacy of national, racial or religious hatred that may constitute incitement to discrimination, hostility or violence.

9. I further wish to express my concern at the overly broad definition of terrorism / dangerous organizations used by Facebook combined with the seeming lack of a human rights approach to content moderation policies. The combination provides what might be described as a sub-optimal protection of human rights on the platform, which may be enormously consequential in terms of the global protection of certain rights, the narrowing of civic space, and the negative consolidation of trends on governance, accountability and rule of law in many national settings. Moreover, the Special Rapporteur warns against the use of overly broad and imprecise definitions as the basis for regulating access to and the use of Facebook’s platform as such approaches may lead to indiscriminate implementation, over-censoring and arbitrary denial of access to and use of Facebook’s services.

10. The Special Rapporteur underscores the role and influence of the private sector and, in particular, of companies such as Facebook, which own and operate major social media platforms and enable and facilitate communication between a wide variety of stakeholders. As a consequence, such companies, including Facebook, control significantly impact the public’s access to seek, receive and impart information. Companies like Facebook exert considerable influence over individuals’ access to information, freedom of opinion, expression, and association, and over interlinked political and public interest processes.

² A/HRC/16/51, Practice 8.

³ A/HRC/22/17/Add.4, in particular its para. 29.

11. The growing role of corporate actors and their increased impact on the enjoyment of human rights is addressed by the UN Guiding Principles on Business and Human Rights (UNGPs), providing an authoritative global standard for preventing and addressing adverse human rights impacts linked to business activity.⁴ While the UNGPs have been endorsed by the Human Rights Council in Resolution 17/4 of 16 June 2011,⁵ they are not formally legally binding. They represent, however, an important step towards matching the impact of businesses on human rights with corresponding levels of corporate responsibility. Moreover, they represent the direction of legal obligations, as soft law norms that may crystalize to hard law obligation over time and use. Under the UNGPs the responsibility to respect internationally recognized human rights⁶ implies that businesses must '[a]void causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur' and '[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships', even if they have not contributed to those impacts.⁷ Corporate responsibility under the UNGPs is independent of State obligations and as such 'exists over and above compliance with national laws' and irrespective of States' abilities and/or willingness to fulfil their own duties under human rights law.⁸ The Special Rapporteur would affirm the obligations of Facebook in this regard, underscore the need to move beyond a stated commitment to human rights as a value of the organization, and rather implement these values in practice, including in what may be perceived as 'difficult' cases.

12. The Special Rapporteur would be concerned regarding the removal of posts appearing to highlight issues of specific human rights violations alleged to have been experienced by any individual. The legal basis for which a person has been imprisoned is not a bar to raise legitimate and often needed concerns about the treatment of an individual in custody. More specifically, as the Special Rapporteur can attest, there are proven and demonstrated concerns about the human rights adherence in the treatment and detention regimes experienced by persons who have been convicted of acts of terrorism. It is particularly important therefore that concerns about detention regimes, or experiences of those convicted of especially serious crimes can be raised in public fora, including internet and social media platforms.

Recommendations

The Special Rapporteur urges the Oversight Board to incorporate a human rights approach into guidelines, standards, considerations, and practices through the following:

1. Utilize the model definitions of terrorism and incitement to terrorism advanced by the mandate of the Special Rapporteur as relevant to the regulation involved here;

⁴ Parallel but complementary to the UNGPs, different interest groups have also developed guidance for the ICT sector, largely aligned with the Guiding Principles in their overall approach and expectations of companies. For example, the multi-stakeholder Global Network Initiative, an initiative that counts Facebook as a member, has adopted Principles on Freedom of Expression and Privacy, addressing some of the most salient human rights risks posed by the activities of ICT companies. See Global Network Initiative, 'Principles on Freedom of Expression and Privacy', available at: <http://globalnetworkinitiative.org/principles/index.php>.

⁵ A/HRC/17/4.

⁶ These are understood to include, at a minimum, the rights expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. See UNGPs, Principle 12.

⁷ UNGPs, Principle 13.

⁸ See Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights. An Interpretative Guide* (2012), at 13.

2. When handling content potentially amounting to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Facebook should be guided by Articles 20 and 19(3) of the International Covenant of Civil and Political Rights and the standards spelled out in the Rabat Plan of Action, in particular the six-part threshold test proposed therein;⁹
3. Establish clear, detailed, foreseeable and publicly accessible rules and procedures governing access to and use of the platform;
4. The Oversight Board should be guided by the recommendations issued in this respect by the Office of the High Commissioner for Human Rights, the Working Group on the issue of human rights and transnational corporations and other business enterprises as well as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.¹⁰

⁹ A/HRC/22/17/Add.4, para. 29.

¹⁰ See, in particular, A/HRC/38/35, A/HRC/35/22 and A/HRC/32/38.