ARTICLE 19

Contribution to the Consultations on the European Union's justice policy (fundamental rights and criminal law)

December 2013

Submission

Introduction

ARTICLE 19 welcomes the opportunity to provide comments to the consultations organized by the Assises de la Justice on shaping the European Union's justice policy over the coming years.[i] The aim of this submission is to outline how the EU policies on combating certain forms and expressions of racism and xenophobia by means of criminal law comply with international standards on the right to freedom of expression and information and the right to equality.[ii]

This submission hence relates to the discussion paper on the use of criminal law[iii] and the discussion paper on fundamental rights.[iv]

ARTICLE 19 strongly believes that the right to freedom of expression and the right to equality are complementary and mutually reinforcing human rights. This has informed our on-going advocacy for greater consensus on State obligations for prohibiting the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence; including extensive contributions to the expert workshops organised by the UN Office of the High Commissioner for Human Rights (OHCHR) culminating in the Rabat Plan of Action.[v]

Our comments are informed by our policy briefs in this area, including the "Camden Principles on Equality and Freedom of Expression"[vi] (the Camden Principles), "Prohibiting incitement to discrimination, hostility or violence",[vii] and "Responding to hate speech against lesbian, gay, bisexual, transgender and intersex (LGBTI) people."[viii]

ARTICLE 19 is concerned that the current EU policies in this area - stemming from the Framework Decision the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, 2008/913/JHA (the Framework Decision) - fail to comply with international standards on the right to freedom of expression and the right to equality. In particular, we are concerned that the Framework Decision fails to recognise the full extent of States' obligations to combat intolerance and discrimination on all grounds recognised under international human rights law, including on the grounds of sex, sexual orientation, gender identity, and disability. Moreover, the Framework Decision does not fully elaborate on the need for States to take comprehensive measures to promote both the right to freedom of expression and the right to equality, including positive policy measures.

ARTICLE 19 finds that the focus of on criminal sanctions for combating "hate speech" is seriously problematic for the right to freedom of expression and the right to equality. The criminal offences themselves are drawn far too broadly and are inconsistent with the obligations placed on States by international human rights law. The Framework Decision also provides insufficient guidance to States to identify severe forms of incitement that warrant prohibition. At the same time, excessive faith is placed in the criminal law as a tool for promoting the right to equality; alternative mechanisms for redress in the civil and administrative law are overlooked, even those that would be more beneficial to victims and less intrusive on the right to freedom of expression. Lastly, the requirement that condoning, denying or grossly trivialising historical crimes be punished through the criminal law is wholly unnecessary, and contradicts international standards on freedom of expression.

For these reasons, ARTICLE 19 recommends that the Framework Decision be substantially revised to ensure that both the right to freedom of expression and the right to equality can be fully realised. Further, the EU justice policy should be comprehensive and should require a variety of legal means should be used to prohibit incitement, primarily through the civil and administrative law; criminal sanctions should only be used exceptionally and as a last resort.

ARTICLE 19's concerns and proposals

ARTICLE 19 recommends that the EU justice policy should address the following concerns:

Recommendation 1: The Framework Decision should require member states to tackle other forms of intolerance and discrimination in addition to racism and xenophobia

The Framework Decision only requires States to criminalise certain forms of racism and xenophobia, with characteristics that are protected limited to an exhaustive list of race, colour, religion, descent, or national or ethnic group (Article 1(1)(a)). The Framework Decision permits States to extend prohibitions to intolerance on other grounds, such as on the basis of "social status" or "political conviction", but creates no obligation.[ix]

ARTICLE 19 is concerned that the Framework Decision is not inclusive of all discriminatory grounds recognised by international and European human rights law. This has the potential to allow States to justify gaps in domestic legislation for the protection of certain groups, and may create the impression that there is a hierarchy in protections for different minorities and vulnerable groups in EU law. We therefore strongly support extending the protected grounds of the Framework Decision to cover all forms of discrimination and intolerance, including the grounds of sex, age, political or other opinion, sexual orientation, gender identity or disability.

EU treaty law supports the extension of the protective scope of the Framework Decision to include other grounds of non-discrimination. The Charter of Fundamental Rights of the European Union (the Charter of Fundamental Rights) protects against "discrimination based on any ground", specifically listing sex, disability, age and sexual orientation (Article 21).[x] Article 19 of the Treaty on the Functioning of the European Union (TFEU) gives the Council competence to legislate to combat discrimination on these grounds. In addition, the European Parliament has made numerous political pronouncements against "hate speech" on grounds not recognised in the framework decision, notably in relation to homophobia and transphobia.[xi]

Although there is no express obligation to prohibit the advocacy of hatred constituting incitement under the European Convention on Human Rights, the European Court of Human Rights has developed extensive jurisprudence of the necessity, under certain circumstances, of restricting "hate speech" to uphold the objectives of the Convention as a whole.[xii] In 2012, the ECtHR extended this jurisprudence to "hate speech" targeting people on account of their sexual orientation, noting that "discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour."[xiii] This reflects the inclusive approach taken in the Council of Europe Committee of Ministers in Recommendation No. R (97) 20 on "hate speech", which has been elaborated upon in relation to combating discrimination on grounds of sexual orientation and gender identity.[xiv]

At the international level, Article 20(2) of the ICCPR only requires States to prohibit "the advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence." However, a broad reading of these protected characteristics would be consistent with the overall purposes of the ICCPR and the expansive interpretation given to guarantees against discrimination in Article 2(1) and Article 26 of the ICCPR, which have been interpreted to include the grounds of sexual orientation and disability.[xv] Tackling intolerant and discriminatory expression on grounds other than nationality, race or religion has also been recommended in several concluding observations by the Human Rights Committee (HR Committee),[xvi] and finds support in

the 2012 report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression.[xvii]

Recommendation 2: The EU justice policy should adopt a comprehensive approach to addressing prejudice and intolerance

At present, the Framework Decision only requires that States address racism and xenophobia through the criminal law, but acknowledges that combating racism and intolerance requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters.[xviii]

ARTICLE 19 firmly believes that the EU justice policy should go further to emphasise the positive obligation on States to promote both the right to freedom of expression and the right to equality, including through positive policy measures. Without this emphasis, the EU may encourage the development of predominantly punitive approaches that are not necessarily appropriate or effective.

Recent developments in international human rights law have emphasised the importance of positive policy measures to challenge the forms of prejudice and intolerance that "hate speech" is symptomatic of, focusing on furthering dialogue and engagement over suppressing contentious viewpoints. This includes pronouncements by the UN Human Rights Council,[xix] The Committee on the Elimination of Racial Discrimination,[xx] the Rabat Plan of Action (incorporating the Camden Principles),[xxi] the Joint Declarations of the international mandates on freedom of expression,[xxii] as well as recommendations by the Committee of Ministers for the Council of Europe.[xxiii]

In brief, the positive policy measures outside of the imposition of punitive sanctions recommended by the above authorities include:

- **Building institutional knowledge** though independent equality institutions with proper financial support to develop data collection mechanisms and other research to inform policy decision-making;
- **Public education and information campaigns** to combat negative stereotypes of, and discrimination against, vulnerable groups;
- **Equality training** for public officials and other public figures on the right to equality, particularly where discrimination is institutionalised and has a history of going unchallenged;
- **Mobilisation of influential actors, in particular politicians, and institutional alliances**, to collaborate on publicly challenging and disavowing manifestations of intolerance and prejudice in society;
- **The role of an independent, pluralistic and self-regulated media** in promoting equality and non-discrimination in accordance with the Camden Principles on freedom of expression and equality;
- **The development of strong anti-discrimination legislation**, including the development of alternative non-punitive models of mediation and dispute resolution through equality institutions.

Recommendation 3: Advocacy of hatred constituting incitement should be prohibited

Currently, Article 1(1)(a) of the Framework Decision requires the criminal prohibition of "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin." Article 1(1) limits the offence to intentional conduct, Article 1(1)(b) clarifies that the offence can be committed through the dissemination of any material, and Article 1(2) allows States to opt to punish "only conduct which is either carried out in a manner likely to disturb public order or

which is threatening, abusive or insulting." Article 3 prescribes "effective, proportionate and dissuasive criminal penalties", with mandatory custodial sentences of between 1 and 3 years.

ARTICLE 19 is concerned that the offences in Article 1(1)(a) and (b) of the Framework Decision do not comply with international standards on the right to freedom of expression and information, including the obligation on States under Article 20(2) of the ICCPR to prohibit the "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence."

- "Incitement to hatred" is too broad: The offence of "incitement to hatred" in Article (1)(a) is formulated in terms that are too broad. It does not accurately transpose the obligation of States under Article 20(2) of the ICCPR or meet the three-part test for legitimate restrictions on the right to freedom of expression under Article 19(3) of the ICCPR.

  Article 20(2) of the ICCPR only requires States to prohibit "incitement to discrimination, hostility or violence." The "advocacy of hatred" is the vehicle for incitement, but "hatred" is not in itself a proscribed outcome. "Incitement to hatred" makes the proscribed outcome an emotional state or opinion, rather than the imminent and likely risk of a manifested action (discrimination, hostility, or violence). It should be noted that the right to freedom of opinion is an absolute right that cannot be qualified under any circumstances.

  Thus, "incitement to hatred" does not meet the pressing social need that the obligation for restricting expression in Article 20(2) of the ICCPR addresses.[xxiv] The subjective nature of "hatred" as a proscribed outcome also raises questions of legal certainty, and may open the door to arbitrary application. The circular definition given to the term "hatred" in the preamble to the Framework Decision is particularly concerning in this regard.[xxv] Thus, the formulation of the offence under Article 1(1)(a) of the Framework Decision would probably not withstand scrutiny under the three-part test of Article 19(3) of the ICCPR.

- Incitement is an offence that requires specific intent: ARTICLE 19 considers that a crucial and distinguishing element of incitement as prohibited by Article 20(2) of the ICCPR and Article 4(a) of the ICERD is the intent of the speaker to incite others to discrimination, hostility or violence.

  Article 1(1)(a) falls short of this standard as it fails to provide for specific intent in relation to each element of the offence. The use of the term "advocacy" in Article 20(2) of the ICCPR implies that negligence or reckless are not sufficient for imposing sanctions.[xxvi] "Advocacy" also implies something more than intentional distribution or circulation, which is all that is seemingly required by Article 1(1)(b).[xxvii]

  ARTICLE 19 recommends that the Framework Decision require three constitutive elements for intent:[xxviii]
  - Purposively striving to engage in advocacy to hatred;
  - Purposively striving to target a protected group on the basis of prohibitive grounds;
  - Having knowledge that discrimination, hostility or violence will be a consequence of his/her action and knowing that those consequences will occur or might occur in the ordinary course of events.

- Expression should meet a high severity threshold to be considered incitement, and be strictly assessed under a six-part test: The Framework Decision provides in its preamble that it is limited to combating "particularly serious" forms of racism and xenophobia.[xxix] However, it provides little guidance to States on what is considered "particularly serious", and how to reconcile these limitations with the right to freedom of expression (set out in Article 7).

ARTICLE 19 is concerned that the Framework Decision encourages States to prohibit expression that does not meet the threshold of "incitement" under international standards, and does not comply with the three-part test for restrictions on freedom of expression.[xxx]

Article 1(2) of the Framework Decision allows States to choose to limit the scope of the obligation to prohibit incitement to circumstances where a public order disturbance is likely, or where the language at issue is threatening, abusive or insulting. This reveals how broad the obligation is under Article 1(1)(a) of the Framework Decision for States that do not exercise this option. It allows States to restrict expression without regard to the likelihood of harm, the content of the expression or its impact on the audience. In the absence of robust consideration of these factors, it is unlikely that any restriction on expression will comply with the requirement of necessity under the three-part test.

ARTICLE 19 recommends that Article 1(2) of the Framework Decision be replaced with clearer guidance to assist States in determining the "threshold" for when the obligation to prohibit incitement, as defined under Article 20(2) of the ICCPR, is engaged.[xxxi] ARTICLE 19 has developed a six-part test in this regard, which requires a review of all the following elements:

- **Context.** 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, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework and the media landscape;
- **The identity of the speaker**. The position or status of the speaker in society should be considered, specifically the individual or organisation's standing in the context of the audience to whom the speech is made and disseminated;
- **The intent of the speaker.** It should be considered whether the speaker specifically intended to engage in the advocacy of hatred, to target a protected group, and for the proscribed outcome of discrimination, hostility or violence to actually occur;
- **The content of the expression.** The words that were said and how they were said is critical, in particular with regard to what the audience understood by the content of the expression, and the form of the expression;[xxxii]
- **The extent or magnitude of the expression.** This includes elements such as the reach of the speech, its public nature, magnitude and the size of the audience;
- **The likelihood and imminence** of discrimination, hostility or violence actually occurring. As an inchoate offence (where criminalised), there must be a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.

The six-part test has been incorporated to the Rabat Plan of Action,[xxxiii] and referenced positively by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.[xxxiv] The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the ICERD on this test.[xxxv]

In addition to the six-part test, it is important to recall that any prohibition of incitement must also conform to the three-part test set out in Article 19(3) of the ICCPR.[xxxvi]

ARTICLE 19 believes that revising the Framework Decision in line with the Rabat Plan of Action would greatly aid States ensuring consistency in their interpretation of their

obligations to prohibit incitement, and enhance international coherence in respect of obligations in this area.

- A variety of legal means should be used to prohibit incitement, primarily through the civil and administrative law; criminal sanctions should only be used exceptionally and as a last resort: Article 3 of the Framework Decision requires Member States to take necessary measures to ensure that offences concerning racism and xenophobia are punishable by "effective, proportionate and dissuasive" criminal penalties, prescribing a maximum of at least between 1 and 3 years of imprisonment. While Article 3 does not *require* mandatory custodial sentences, it does not recommend or suggest alternative or less severe sanctions.

  ARTICLE 19 is concerned that the Framework Decision mandates the criminal prohibition of incitement, and seemingly prefers custodial penalties as sanctions. This potentially violates the principle of proportionality, as severe penalties are prescribed without requiring consideration of lesser sanctions in the criminal law or alternative modes of redress through civil or administrative law that would be less intrusive on the right to freedom of expression.[xxxvii] In comparison, under international law

  - ***Criminalisation as an exceptional and last resort measure:*** Article 20(2) of the ICCPR requires that States *prohibit by law* the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence, it does not *require* criminalisation or that imprisonment be available as a sanction.

    International standards indicate that criminal sanctions should be used to punish "only serious and extreme instances of incitement to hatred."[xxxviii] The Venice Commission has affirmed that the use of criminal sanctions should be seen as "last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest,"[xxxix] a principle also supported by the Rabat Plan of Action.[xl] The Committee of Ministers for the Council of Europe emphasise that where criminal sanctions are imposed, there must be strict respect for the principle of proportionality, given that criminal sanctions generally constitute a serious inference with the right to freedom of expression.[xli]

    In relation to Article 4(a) of the ICERD, which does *require* criminalisation of certain forms of racist expression, the CERD Committee has recently clarified that sanctions under this provision "should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law."[xlii]

    The Commission should also consider that criminal sanctions for "hate speech" may be counter-productive to the goal of effectively combating discrimination, particularly where that expression falls beneath the high threshold prescribed by Article 20(2) of the ICCPR.

    The CERD Committee has noted "with concern" that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention, and stressed that measures to combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition.[xliii] This has been reiterated by the international mandates on freedom of expression in their 2006 Joint Declaration,[xliv] as well as by the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression.[xlv]

The European Commission should also be cautious of the counter-productive impact "hate speech" prosecutions might have a on the promotion of tolerance and respect for the rights of others. As the Council of Europe Committee of Ministers has warned, proponents of "hate speech" may exploit attempted criminal prosecutions to present themselves as "martyrs" or "victims", or frame unsuccessful prosecutions as a vindication of their prejudicial views.[xlvi] In both cases the prosecution serves as a platform to elevate the hate speaker's views to a broader audience. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has echoed these concerns.[xlvii]

- ***Incitement should be prohibited primarily through the civil and administrative law:*** International standards foresee that, where effective, incitement should be sanctioned through a range of measures outside of the criminal law, principally through the civil and administrative law. We recall that the requirement of necessity means the least intrusive effective remedy should be employed when restricting speech to protect an overriding public or private interest.

  Civil sanctions for incitement should include pecuniary and non-pecuniary damages, along with the right of correction and the right of reply.[xlviii] The effectiveness of these sanctions is enhanced where civil society organisations are given standing to bring claims.[xlix] Some countries only prohibit incitement through the civil law,[l] and where both criminal and civil sanctions are available, civil sanctions have been reported to be more effective.[li] Administrative sanctions and remedies should also be considered, including those identified and put in force by various professional and regulatory bodies.[lii]

- Tackling the advocacy of hatred constituting incitement online: The Framework Decision makes no provision on interpreting and implementing the obligations it contains in the context of online communications, giving no guidance to States on how to ensure fundamental rights including the right to freedom of expression should be protected in this context.

  The UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression has expressed concern that many attempts by States to tackle "hate speech" online have been misguided.[liii] These measures include requests for online intermediaries to screen or remove content, registration requirements to identify users' real names, and the arbitrary blocking of websites.[liv] The Rapporteur also points to the volume of content posted online everyday, and the cross-border nature of communications, as complicating implementation of any law on hate speech.[lv]

  ARTICLE 19 believes that there should be specific guidance for safeguarding fundamental rights in the implementation of the Framework Decision in the online context. It is well established that the right to freedom of expression applies online.[lvi] Although there is no pressing social need for specific restrictions on content disseminated over the Internet,[lvii] enforcement mechanisms for existing restrictions must take into account the special characteristics of the Internet.[lviii]

  A series of principles should be emphasised to protect fundamental rights in relation to the enforcement of the Framework Decision in the online context:
  - Self-regulation should be promoted as an effective tool for redressing harmful speech;[lix]

- 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;[lx]
- States should request the removal of content only through a court order and intermediaries should never be held liable for content of which they are not the authors;[lxi]
- Decisions to block or compel the removal of content should be undertaken by 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;[lxii]
- The right of individuals to express themselves anonymously online must be fully guaranteed.[lxiii]

ARTICLE 19 has developed a number of policy documents that set out these principles in greater detail. These include "The Right to Blog" (2013),[lxiv] and "Internet Intermediaries: Dilemma of Liability" (2013).[lxv]

Recommendation 4: There should be no specific prohibition on condoning, denying or grossly trivialising crimes

Article 1 (c) and (d) of the Framework Decision require States to criminalise "publicly condoning, denying or grossly trivialising" specific international crimes recognised under international humanitarian law "in a manner likely to incite to violence or hatred against" a protected group.

ARTICLE 19 advances two reasons why the Framework Decision should dispense with the requirement for Member States to prohibit expression that condones, denies or grossly trivialises historical crimes.

- First, specific offences prohibiting expression in respect of historical events do not meet a pressing social need, and are therefore not "necessary" restrictions on the right to freedom of expression. Any instance of incitement committed by way of condoning, denying or trivialising a crime committed against a protected group of people may, where necessary, be prosecuted through standalone provisions on incitement, or alternative provisions within the civil or administrative law. This should be done by reference to both Article 19(3) and Article 20(2) of the ICCPR, using the six-part test set out above.

- Secondly, it is undesirable for States to interfere with the right to know and the search for historical truth by tasking itself with promoting or defending an established set of "historical facts". It should be the role of free and open debate to establish historical truths, and not the role of States. Defending the right to freedom of expression is based on the importance of open discussion and the discovery of the truth, including the truth about historical personalities and events; prohibiting false arguments inevitably affects historical debate as well as the ability of historians to establish the truth. The existence of these laws in developed democracies can also embolden other countries to adopt analogous prohibitions that are abused to silence legitimate expression.[lxvi] Holding an individual criminally liable for denials of historical events amounts to an unacceptable restriction on the right to freedom of expression.

Removing Articles 1(1)(c) and (d) from the Framework Decision would find support in international human rights law and domestic jurisprudence.

In General Comment No. 34, the HR Committee states "laws that penalise the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression."[lxvii] This has been reiterated by the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression,[lxviii] who also calls on all States to repeal laws that prohibit discussion of historic events.[lxix]

At the same time, the CERD Committee stress that public denials or attempts to justify crimes of genocide and crimes against humanity should only be prohibited by criminal law "provided that they clearly constitute incitement to racial violence or hatred." They also endorse and reference the view of the HR Committee that "expression of opinions about historical facts should not be prohibited or punished."[lxx]

The ECtHR has held that "it is an integral part of freedom of expression to seek historical truth."[lxxi] In *Lehideux and Isorni v. France* the ECtHR noted that the "demands of pluralism, tolerance and broadmindedness" in a democratic society were such that a debate on matters of history must be permitted, despite the memories it might bring back of past sufferings and the controversial role of the Vichy regime in the Nazi Holocaust.[lxxii] However, the jurisprudence of the ECtHR is not consistent in this regard.[lxxiii]

The French Constitutional Court also found unconstitutional a law prohibiting the denial of the 1915 Armenian Genocide. The Court found that "by punishing anyone contesting the existence of ... crimes that legislators themselves recognised or qualified as such, legislators committed an unconstitutional attack on freedom of expression."[lxxiv] The decision of the ECtHR in *Garaudy v. France*, should be read in light of this development.

Conclusions

ARTICLE 19 calls on the Assises de la Justice to highlight the concerns outlined in the above comments in the future EU justice policy. In particular, we call on the EU to:

- Protect against intolerance and discrimination on all grounds recognised under international human rights law, including but not limited to: age, sex, political or other opinion, sexual orientation, gender identity, and disability, in addition to the grounds already covered;

- Provide specific guidance to member states on their positive obligation to promote both the right to freedom of expression and the right to equality through non-punitive policy measures;

- Ensure that any prohibition on "incitement" reflects both the requirements of Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), and complies with the three-part test for restrictions on expression under Article 19(3) of the ICCPR;

- Ensure that States are given sufficient guidance to consistently interpret their obligations under international human rights law in prohibiting the advocacy of hatred constituting incitement by adopting the 6-part test set out in the Rabat Plan of Action;

- Require that States provide a variety of legal means for prohibiting incitement, primarily through the civil and administrative law. Only in the most serious cases of incitement should the use of criminal sanctions be considered, and imprisonment should only be available as a sanction in exceptional circumstances;

- Ensure that States are given adequate guidance in respecting fundamental rights and freedoms online when interpreting or enforcing the Framework Decision;

- Not require that States prohibit the condoning, denying or grossly trivialising of historical events.

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[i] For the call for contributions, see http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm.

[ii] Our comments are limited to those provisions of the Framework Decision that may impact on the right to freedom of expression. These are the offences listed under Articles 1 and the qualified forms set out in Article 2, the penalties set out in Article 3, and their compatibility with the constitutional rules and fundamental principles set out in Article 7. We do not address provisions that relate to bias motivation in the commission of criminal offences generally (Article 4), as these do not necessarily implicate the right to freedom of expression.

[iii] The discussion paper on the use of criminal law; available at http://ec.europa.eu/justice/events/assises-justice-2013/files/criminal_law_en.pdf.

[iv] The discussion paper on fundamental rights; available at http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental_rights_en.pdf.

[v] The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012 (The Rabat Plan of Action), A/HRC/22/17/Add.4, 11 January 2013.

[vi] The Camden Principles on Freedom of Expression and Equality, ARTICLE 19, February 2009.

[vii] Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, December 2012.

[viii] Responding to hate speech against lesbian, gay, bisexual, transgender and intersex (LGBTI) people, ARTICLE 19, October 2013.

[ix] The Framework Decision, preamble para. 10.
[x] "Sex" has been interpreted to include gender identity. See, for example: CJEU, Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143
[xi] European Parliament resolution on homophobia in Europe, 18 January 2006, P6_TA(2006)0018 calls upon Member States "to ensure that LGBT people are protected from homophobic hate speech and violence". See also: European Parliament resolution on homophobia in Europe, 26 April 2007, P6_TA(2007)0167.
[xii] In *Erbakan v. Turkey*, Application No. 59405/00, 6 July 2006, the ECtHR stated: "As a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued", Application No. 59405/00 (2006), at para. 56. See also: ECtHR, *Gündüz v. Turkey*, Application No. 35071/97, 4 December 2003, at para. 22.
[xiii] *Vejdeland and Others v. Sweden*, Application No. 1813/07 (2012). ARTICLE 19 has analysed the implications of this case for the ECtHR jurisprudence on hate speech, see: "Responding to hate speech against lesbian, gay, bisexual, transgender and intersex people", at page 17. This also builds on the jurisprudence of the ECtHR recognising sexual orientation and gender identity as protected characteristics, see: ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96 (1999); ECtHR, *Dudgeon v. United Kingdom,* Application No. 7525/76 (1981); or ECtHR, *Smith and Grady v. the United Kingdom*, Application Nos. 33985/96 and 33986/96 (1996). The ECtHR has also interpreted "other status" under Article 14 to be inclusive of disability, see: ECtHR, *Glor v. Switzerland*, Application No. 13444/04, 30 April 2009, at para. 80.
[xiii] ECtHR, *P.V. v. Spain,* Application No. 35159/09, 30 November 2010, para. 30; ECtHR, *Goodwin v. United Kingdom*, Application No. 28957/95 (2002).
[xiv] See: Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States "on Hate Speech," 30 October 1997; Recommendation CM/Rec (2010) 5 of the Council of Europe Committee of Ministers to Member States "on measures to combat discrimination on the grounds of sexual orientation or gender identity".
[xv] On sexual orientation, see: HR Committee, *Toonen v. Australia*, Communication No. 488/199, CCPR/C/50/D/488/1992; HR Committee, *Young v. Australia*, communication No. 941/2000; HR Committee, *X v. Columbia*, communication No. 1361/2005; on disability, see: HR Committee, General Comment No. 25 of 1996 on the right to take part in the conduct of public affairs, the right to vote and to be elected, and the right to equal access to public service (article 25), at para. 10; and Concluding Observations on Ireland, 24 July 2000, A/55/40,paras.422-451, at para. 29(e).
[xvi] For example, in its concluding observations on Poland, the HR recommended the criminalisation of "hate speech" targeting individuals on account of their sexual orientation, and called for awareness raising activities aimed at the police force and wider public to be intensified; see HR Committee, concluding observations on Poland, CCPR/C/POL/CO/6, 17 July 2009, para. 8. Also, in its concluding observations on Russia, the Committee recommended "effective protection against violence and discrimination" on the basis of sexual orientation including through "the prohibition of discrimination on grounds of sexual orientation" but stopped short of calling for criminalisation; Concluding observations on Russia, CCPR/C/RUS/CO/6, 24 November 2009, para. 27. Both recommendations were premised on Article 2(1) and Article 26 of the ICCPR respectively.
[xvii] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 44;
[xviii] The Framework Decision, preamble paragraph 6.
[xix] UN Human Rights Council Resolution 16/18 on combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against, persons based on religion or belief, at para.5(h) recognises "the open, constructive and respectful debate of ideas, as well as interfaith and intercultural dialogue at the local, national and international levels, can play a positive role in combating religious hatred, incitement and violence"; see also A/HRC/Res/22/31, 15 April 2013.
[xx] Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No.35, "combatting racist hate speech", CERD/C/GC/35, "States parties should adopt policies empowering all groups within the purview of the Convention to exercise their right to freedom of expression", at para. 29. See also: paras. 30 – 44.
[xxi] The Rabat Plan of Action, *op. cit.*; see also: the Camden Principles on Freedom of Expression and Equality, ARTICLE 19, February 2009.
[xxii] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, stresses the importance of a "broad-based societal programmes to combat inequality and structural discrimination, in addition to creative policies and measures to promote a culture of peace and tolerance at all levels", at para. 56-57, 2012; International Mechanisms for Freedom of Expression, Joint Declaration of 20 December 2006; see also: Interim report of the UN Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, A/66/156, 18 July 2011, at para. 38.

[xxiii] Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on "Hate Speech," 30 October 1997; Recommendation CM/Rec (2010) 5 of the Council of Europe Committee of Ministers to Member States "on measures to combat discrimination on the grounds of sexual orientation or gender identity";
[xxiv] It should be noted that "incitement to hatred" is often used as shorthand for the obligation under Article 20(2) of the ICCPR. See, for example, the Rabat Plan of Action, *op. cit.*, at footnote 1.
[xxv] The Framework Decision, preamble, at paragraph 9, defines "hatred" as "referring to hatred based on race, colour, religion, descent or national or ethnic origin". For recommended definitions of key terms in Article 20(2) of the ICCPR, see: the Camden Principles (at Principle 12) and the Rabat Plan of Action, *op. cit.*, at para. 21. It should also be noted that "hatred" for the purposes of Article 20(2) of the ICCPR has a different meaning than "hatred" in the context of "hate crimes", where the term is used to denote a bias motivation.
[xxvi] Rabat Plan of Action, *op. cit.*, at para. 29(c).
[xxvii] Rabat Plan of Action, *op. cit.*, at para. 21.
[xxviii] Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, 2012, at recommendation no. 3
[xxix] Framework Decision, preamble, at para. 6.
[xxx] HR Committee, General Comment No. 34, *op. cit.*, at paras 50 – 52; CERD Committee, General Recommendation No. 35, *op. cit.*, at para. 12.
[xxxi] Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, 2012, at recommendation no. 8 and at pages 29 – 40.
[xxxii] *Ibid.*, at pages 35 – 36.
[xxxiii] Rabat Plan of Action, *op. cit.*, at para. 29.
[xxxiv] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 45. The report cites an earlier draft of ARTICLE 19's policy brief on incitement, prepared ahead of one of the regional expert meetings organised by OHCHR. Following these workshops the test was streamlined to six parts, which is also reflected in the Rabat Plan of Action.
[xxxv] General Recommendation No. 35, *op. cit.*, at paras. 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.
[xxxvi] HR Committee, General Comment No. 34, *op. cit.*, at paras 50 – 52; CERD Committee, General Recommendation No. 35, *op. cit.*, at para. 12; the Rabat Plan of Action, *op. cit.*, at para. 22; See also: Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, 2012, at recommendation no. 7.
[xxxvii] The HR Committee have stated that restrictions on the right to freedom of expression "must be the least intrusive instrument amongst those which might achieve their protective function", General Comment No. 34, *op. cit.*, at para 34.
[xxxviii] UN Special Rapporteur on the promotion and protection of the right of freedom of expression and information, A/67/357, para. 47, 2012. See also: The Supreme Court of Canada, *R v. Keegstra*, [1990] 3 S.C.R. 697, 13 December 1990, at 697 (Can.), para. 1.
[xxxix] Venice Commission, Report on the Relationship Between Freedom of Expression and Freedom of Religion, 17 – 18 October 2008.
[xl] The Rabat Plan of Action, *op. cit.*, at para. 34, specifies that "[c]riminal sanctions related to unlawful forms of expression should be seen as last resort measures to be only applied in strictly justifiable situations."
[xli] Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on "Hate Speech," 30 October 1997, at Principle 5.
[xlii] CERD Committee, General Recommendation No. 35, *op. cit.*, at para. 12; see also: HR Committee, General Comment No. 34, at paras. 22- 25; 33-35.
[xliii] *Ibid.*, at para. 20.
[xliv] See: International Mechanisms for Freedom of Expression, Joint Declaration of 20 December 2006. The Special Mechanisms warned that "hate speech" legislation is often "abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues" and that the "resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance."
[xlv] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 51.
[xlvi] Council of Europe Committee of Ministers, Explanatory Memorandum to Recommendation No. R 97) (20), at Para. 16;

[xlvii] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 32.
[xlviii] See: Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on "Hate Speech," 30 October 1997, at Principle 2; Rabat Plan of Action, *op. cit.*, at para. 34; and Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, 2012, at page 41 - 42.
[xlix] *Ibid.*
[l] Rabat Plan of Action, *op. cit.*, at para. 16.
[li] For example, in Brazil it has been document that sanctions have been levied more effectively through civil proceedings. See, Tanya Hernandez, "Hate Speech and the Language of Racism in Latin America", 32 U. Pa. J. Int'l L. 805 2010 – 2011.
[lii] See: Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on "Hate Speech," 30 October 1997, at Principle 2; Rabat Plan of Action, *op. cit.*, at para. 34; and Prohibiting incitement to discrimination, hostility or violence, ARTICLE 19, 2012, at page 43.
[liii] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 32.
[liv] *Ibid.*
[lv] *Ibid.*
[lvi] HR Committee, General Comment No. 34, *op. cit.*, at para. 11; UN Human Rights Council, Resolution 20 on "the promotion, protection and enjoyment of human rights on the Internet", A/HRC/20/L.13, 29 June 2013.
[lvii] Joint Declaration on Freedom of Expression and the Internet 2011, at para. 1(d), available at: http://www.osce.org/fom/78309
[lviii] *Ibid.* See also HR Committee, General Comment No. 34, *op. cit.*, at paras 15 and 43.
[lix] Joint Declaration on Freedom of Expression and the Internet 2011, at para. 1(e).
[lx] *Ibid.* See also: Human Rights Committee, General Comment No. 34, *op. cit.*, para. 43.
[lxi] Joint Declaration on Freedom of Expression and the Internet 2011, at para. 2(a); Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 87.
[lxii] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, at para. 38.
[lxiii] Joint Declaration on Freedom of Expression and the Internet 2011, at para. 6(d); Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 87.
[lxiv] "The Right to Blog", ARTICLE 19, 2013, available at: http://www.article19.org/data/files/medialibrary/3733/Right-to-Blog-EN-WEB.pdf
[lxv] "Internet Intermediaries: Dilemma of Liability", ARTICLE 19, 2013, available at: http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf
[lxvi] See: "Cambodia: Law Against Non-Recognition of the Crimes Committed During Democratic Kampuchea", ARTICLE 19, 27 June 2013, available at: http://www.article19.org/resources.php/resource/37127/en/cambodia:-law-against-non-recognition-of-the-crimes-committed-during-democratic-kampuchea; "Rwanda: President should Pardon Agnès Uwimana Nkusi and Saïdati Mukabibi", ARTICLE 19, 11 April 2012, available at: http://www.article19.org/resources.php/resource/3037/en/rwanda:-president-should-pardon-agnes-uwimana-nkusi-and-sa%C3%AFdati-mukabibi.
[lxvii] HR Committee, General Comment No. 34, *op. cit.*, at para. 49
[lxviii] Report of the UN Special Rapporteur on the promotion and protection of the right of freedom of opinion and expression, Frank La Rue, A/67/357, 7 September 2012, at para. 55: "By demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are enabled to subjugate freedom of expression to official versions of events."
[lxix] *Ibid.*, at para. 78.
[lxx] CERD Committee, General Recommendation No. 35, *op. cit.*, at para. 14
[lxxi] ECtHR, *Chauvy and Others v. France*, Application No. 64915/01, 29 September 2004.
[lxxii] ECtHR, *Lehideux and Isorni v. France*, Case No. 55/1997/839/1045, 23 September 1998, at para. 55
[lxxiii] See, for example: ECtHR, *Garaudy v. France*, Application No. 65831/01, 24 June 2003.
[lxxiv] French Constitutional Court, Decision no. 2012-647 DC of 28 February 2012