

ARTICLE 19

Spain: Report of the "Expert Dialogue on Freedom of Expression and 'Hate Speech'"

December 2020

Report

Executive Summary

In October 2020, ARTICLE 19 held an "Expert Dialogue on Freedom of Expression and 'hate speech' in Spain", where members and experts of the judiciary, prosecutors, lawyers, academics, as well as judges of the European Court of Human Rights and civil society, discussed their concerns, experiences and opportunities for advancing the protection of the right to freedom of expression in the Spanish jurisprudence. The aim was to examine the implementation and interpretation of international and regional standards on 'hate speech' at a national level and identify areas that would enable an adequate protection of freedom of expression in Spain while fighting against inequality and discrimination.

Prior to the Expert Dialogue, ARTICLE 19 analysed various [speech related offences of the Penal Code](#) and [relevant Spanish jurisprudence](#) for their compliance with international freedom of expression standards. Both analyses identify normative and jurisprudential issues concerning the protection of freedom of expression that fail to conform to Spain's human rights obligations under international human rights law. The Expert Dialogue addressed those concerns and provided a more detailed analysis of the root causes, trends and needed amendments and approaches. This report collects the main points of discussion resulting from the participants' analysis, experience and reflections. It covers the following issues:

- Legal and conceptual approaches to 'hate speech' under international and Spanish law;
- Tiered response for different types of 'hate speech' and the implementation of the severity test of the Rabat Action Plan;
- Severity thresholds in Spanish jurisprudence and judicial practice: risk factor or likelihood to cause harm, and intent;
- Protected groups or individuals: protection of historically discriminated groups;
- Investigation stage of the criminal process and its chilling effect on freedom of expression.

Finally, ARTICLE 19 selected and developed a series of recommendations to the Executive, Judicial and Legislative branches based on the experts' inputs and the aforementioned analyses in order to contribute to the development of responses to 'hate speech' compatible with freedom of expression and the protection of equality and non-discrimination.

Summary of recommendations:

- Apply a tiered response of permissible restrictions for the exercise of freedom of expression based on the severity and likelihood to cause harm, according to regional and international human rights standards.
- Incorporate the United Nations Rabat Plan of Action as applicable guidance and standards when designing and adopting measures in response to 'hate speech' and incitement to violence, hostility and discrimination in Spain.
- Limit the use of criminal sanctions for only the most serious forms of 'hate speech' and what constitutes incitement to violence and discrimination according to international human rights law.
- Encourage changes in the judiciary practice related to the investigation phase of the criminal process concerning 'hate speech' offences in order to analyse

the criminal elements during the admissibility and dismissal stage of the process.

- Resort to public policy responses when fighting against intolerant, insulting or offensive forms of speech that raise concerns in terms of discrimination, intolerance, and inequality.
- Promote training of members of the judiciary and legal professionals on human rights protection and guaranteed standards, particularly regarding freedom of expression and non-discrimination.
- Ensure that the expressions that are criminalised under Article 510 of the Penal Code and its interpretation are not used against groups and individuals that the Code aims to protect as a result of including groups that do not face historical discrimination and exclusion.



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Introduction

On 27 and 28 October of 2020, ARTICLE 19 held an "Expert Dialogue on freedom of expression and 'hate speech' in Spain" to discuss the implementation and interpretation of international and regional standards on 'hate speech' at a national level and identify areas that would enable an adequate protection of freedom of expression while fighting against inequality and discrimination.

National, regional, and international experts discussed the international and regional framework on freedom of expression and 'hate speech', examined in detail the types of protected and unprotected speech, as well as the relevance and implementation of standards within the judicial practice in Spain. Both panels featured experts from international organisations, judges of the European Court of Human Rights, national judges, members of academia, lawyers and practitioners in Spain. This report is the result of the exhaustive debate, presentations and recommendations provided during the event.

The Expert Dialogue was part of a series of initiatives carried out by ARTICLE 19 in Spain during 2020 on existing national regulatory responses to 'hate speech' and their compliance with international and regional human rights standards. They include the [legal analysis of speech related offences of the Penal Code](#) in which ARTICLE 19 analysed Article 510 and raised concerns regarding the scope and criminal elements of the offense which go beyond the permissible limitations to the right to freedom of opinion and expression under articles 19 and 20(2) of the International Covenant on Civil and Political Rights (ICCPR).

Similarly, in preparation for the Expert Dialogue, ARTICLE 19 analysed a series of decisions of Spanish courts in order to identify the implementation and interpretation of Article 510 of the Penal Code and their compliance with international and regional standards on freedom of expression. The [technical document](#) identified that, from a jurisprudential perspective, courts and prosecutors apply Article 510 and other 'hate speech' related offences inconsistently. They fail to provide clarity on the assessment of the criminal elements, such as seriousness, intent and the likelihood to cause harm (or danger category). Moreover, there is also a broad and ambiguous interpretation, which is contrary to international human rights law, of the factor of "ideology" stemming from the protected categories under Article 510.

Based on the foregoing, ARTICLE 19 organised the Expert Dialogue and called on national and international experts to discuss in detail the existing criteria on the above-mentioned issues. This report provides the contributions and conclusions during the Expert Dialogue. It also sets out a series of recommendations based on the discussion held on how to fight 'hate speech' in Spain and adequately respect the right to freedom of expression. Specifically, the report lays out the tiered response to different types of 'hate speech' that should be applied in the domestic legal systems; the usefulness, relevance and implementation of the Rabat Plan of Action and its *six-part threshold test to determine the severity of 'hate speech'*; the role of the right to non-discrimination and of the *groups in situation of vulnerability and targeted discrimination*, as well as an analysis of the efficacy of criminal measures and the reparation of rights of the protected groups.

1. Legal approaches to 'hate speech' in international law and in Spain

As a starting point, the conversation raised the need and opportunity to adopt a tiered response to different types of 'hate speech' based on international freedom of expression standards. Participants examined the international framework on the scope and concept of 'hate speech', the tiered response based on the severity of the expression and its application in Spanish jurisprudence.

Legal concept of 'hate speech' and regulatory responses to its different types

Tiered response to different types of 'hate speech' in international law (Articles 19 and 20 of the ICCPR)

The ICCPR establishes the obligations of States to protect, guarantee and respect the right to freedom of expression and non-discrimination. Articles 19(3) and 20(2) set out the permissible limitations to freedom of expression and incitement to violence and discrimination. The obligation of States to prohibit acts of incitement of violence and discrimination was interpreted by the United Nations in the [Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This was the result of a collaboration of experts, including organisations such as ARTICLE 19.

The Rabat Plan provides clear guidance on the circumstances under which certain expressions may be prohibited. It includes answers that, pursuant to international human rights law, freedom of expression and the rights to equality and non-discrimination are adequately protected. Also, it includes what can be called the "*tiered response to several forms of hate speech*". This tiered approach has become a solid international reference to address 'hate speech' issues through legal measures and other positive and non-punishable measures:

- **'Hate speech' that must be prohibited:** Art. 20(2) of the ICCPR¹ requires States to prohibit the most serious forms of 'hate speech', which are exclusively those that constitute incitement to violence, hostility and discrimination. Although this prohibition is mandatory, the ICCPR does not require to pursue criminal action under Article 20(2). States should, therefore, consider civil and administrative measures when complying with this provision as an alternative. Any measure aimed at prohibiting these serious forms of 'hate speech', pursuant Article 20(2), must be exceptional and comply with the requirements under Article 19(3) of the ICCPR²: legality, necessity and proportionality. They should also be accompanied by other comprehensive measures, such as public

¹ Art. 20.2: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

² Art. 19.3: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) For respect of the rights or reputations of others; b) For the protection of national security, or of public order (ordre public), or of public order or public health or morals."

programs, intercultural dialogue, and positive measures of integration of groups, among others.

- **'Hate speech' not prohibited pursuant Art. 20(2) of the ICCPR that may be restricted under Art. 19(3):** These types of restrictions fall out of the scope of mandatory prohibitions, but may be relied upon to limit the right to freedom of expression. These restrictions must strictly comply with the three-part test of Article 19(3), meaning they must be prescribed by law, pursue a legitimate aim and be necessary and proportionate in a democratic society. The [European Convention on Human Rights](#)³ establishes this same test in Art. 10(2). It lists exhaustively the respect for the rights of third parties or the protection of reputation, national security, public order, public health or morals as the only legitimate aims to pursue restrictions. The principle of criminal law as *ultima ratio* to criminalise expression remains applicable to legal responses against this category of 'hate speech'.

An important warning was raised regarding the effectiveness and necessity of 'hate speech' related restrictions: it is critical to assess restrictive measures from the perspective of the groups and individuals affected. Under the approach of effective protection and reparation, the protection of rights and freedoms of the affected groups or individuals should be taken into consideration. If censorship is rendered ineffective to tackle inequality under this perspective, and other less restrictive measures are available, it is not a suitable measure and therefore is a disproportionate restriction to the right to freedom of expression. The obligations of States must be assessed along with the results of restrictive measures and prevent that, paradoxically and contradictorily, regulations stifle freedom of expression not only of those that utter 'hate speech', but also of members of groups protected from severe forms of 'hate speech'.

- **'Hate speech' that must be protected:** This third category of 'hate speech' may include expressions that raise concerns in terms of intolerance and discrimination but do not meet the severity thresholds under Articles 20(2) and 19(3) of the ICCPR. Therefore, States should restraint from responding with restrictive or punishable measures and recognise these forms of expression as protected speech. Concerns involving this category should be addressed through comprehensive positive measures and public policy. These expressions can be considered annoying or hurtful, but nonetheless fall under the scope of Art. 19 of the ICCPR and Art. 10 of the European Convention on Human Rights (ECHR). Their protection is not contingent that they contribute or are useful for public debate. This category includes those insulting or even deeply offensive speeches that should not be restricted. Non-restriction does not mean for States to unattended or ignore the issues. These speeches make visible a situation of underlying discrimination in society that must be addressed. As international organisations have warned, criminal censorship of these expressions fails to contribute to the protection of discriminated groups and is detrimental to them and to the protection of human rights. Therefore, contrary to criminally sanctioning these offenses, the Rabat Plan of Action recommends States to undertake positive measures and orientate public policies against discrimination: creation of equality mechanisms with powers to leading social dialogues

³ Art. 10.2: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

and receiving complaints from groups and individuals targeted by incitement to violence and discrimination. These mechanisms should be subjected to permanent evaluation of their performance and effectiveness.

Many countries apply this tiered response inconsistently, an issue that can engage States' international human rights responsibility. Experts have identified problems in laws that criminalise 'hate speech' which. They fail to comply with international and regional requirements for the protection of freedom of expression and their permissible limitations. In many cases the prohibition of 'hate speech' related expression seems to be politically motivated; in other cases, its implementations are abusive, broad and used to silence critical or dissenting voices while leaving specific serious forms of incitement and discrimination unpunished.

The tiered approach, based on the severity of the expression along with international and regional human rights standards, seems to have not received a uniform nor adequate implementation in Spanish jurisprudence. As underlined in the next sections, the dominant interpretation, set forth by the Spanish Constitutional Court, divides 'hate speech' into two groups: those that promote intolerance and as such must be punishable, and those forms deemed as annoying and hurtful but constitute a legitimate exercise of the right to freedom of expression. This interpretation leaves a narrow margin for other approaches and responses other than criminal law, contrary to international and regional instruments and standards on the protection of freedom of expression.

Trends in Spanish constitutional jurisprudence: from incitement to discriminatory hate to promotion of intolerance

National experts recognised that the jurisprudence of the Spanish Constitutional Court has played an outstanding role consolidating a culture of fundamental rights and freedoms over forty years. Particularly on freedom of expression, the Constitutional Court has played a leading role highlighting the purpose of this freedom as a pillar of a pluralistic society and open public opinion. However, a worrying trend is identified in relation to the definition and scope of the concept of 'hate speech'. The Spanish jurisprudence has moved from initially criminally punishing 'hate speech' as a form of incitement to discriminatory hatred towards a broader position of 'hate speech' as a form of promotion of intolerance.

In order to identify the origins and trends of 'hate speech' related jurisprudence, a study of the Constitutional Court's case law was provided during the Expert Dialogue:

- The starting point in the constitutional jurisprudence on 'hate speech' can be found in judgement [STC 235/2007 of November 7](#). The Court accepts an interpretation known as the "Brandenburg Test"⁴ and defines punishable 'hate speech' as expressive acts going beyond communication which become incitement or provocation, at least indirectly, to violence. This statement finds precedent in judgement [STC 136/1999 of June 20](#), in relation to the national roundtable of Herri Batasuna⁵. Since the STC

⁴ In the famous case *Brandenburg v. Ohio*, 395 US 444 (1969), the Supreme Court of the United States found that speech directed to incite or imminently produce forbidden actions or likely to produce them could be forbidden.

⁵ In the STC 136/1999, among other issues discussed, the intimidating or threatening content of specific advertisements projected on an electoral campaign by Herri Batasuna, reflecting ETA publications. The legal basis 16 stated that "this is an issue that must be outlined case by case, considering different circumstances -such as the credibility and seriousness of the threats- firstly admitting the difficulty of measuring the real capacity of influence

235/2007 judgement, the Constitutional Court has extended the scope of the crime of hate speech with interpretations that significantly and worryingly broaden the criminalisation of freedom of expression. A milestone in this change of interpretive course was judgement [STC 177/2015](#), where the concept of 'hate speech' became more flexible to the point of identifying it as a mere promotion of intolerance, concluding that the protection of tolerance is the final purpose of criminal law and that its promotion may justify restrictions on freedom of expression. The judgment states that types of expression triggering "an emotional representation of hostility, inciting and promoting hatred and intolerance incompatible with the value system of democracy" could be punished. Judgement [STC 112/2016](#) confirms the interpretation of STC 177/2015 on the advocacy of terrorism acts by stating that 'hate speech' is equivalent to promoting intolerance. [Memo 7/2019 dated May 14 of the Office of the State Attorney General on guidelines for interpreting hate crimes classified in article 510 of the Penal Code](#) also brings this definition of 'hate speech' as intolerance and accepts the aforementioned constitutional jurisprudence stating that 'hate speech' punishes types of "exclusive intolerance" - or "intolerance that causes exclusion"-. It is worth noting that in judgement STC 112/2016, the Court offers an interpretative criterion that would allow connecting 'hate speech' related to acts of terrorism with the element of incitement when it warns that 'hate speech' may be legitimately punished without interfering with freedom of expression if they promote or encourage "even indirectly, a situation of risk for people or rights of third parties or for the system of freedoms itself".⁶ This approach may be useful to apply a more restrictive concept of 'hate speech' in the Spanish legal system. Types of expression inciting or provoking forbidden results is more aligned with the recommendations by international and regional standards for protection of freedom of expression and the prevailing international view on criminalisation of 'hate speech'. Recently, in judgement [STC 35/2020](#), the interpreter of the fundamental standard once again differentiates between the communication of facts or acts expressing a legitimate option that can transform the political system and others that incite hatred and intolerance, considered therefore incompatible with the democratic values. The problem is that unclear and imprecise criteria is developed between existing definitions and approaches to determine the scope of 'hate speech' offences. This raises concerns from the perspective of legal certainty and the principle of specificity or legality in criminal law. Both requirements to legitimately limit the fundamental right to freedom of expression.

of a message on the will of the recipients and the consequent difficulty of drawing the necessarily weak dividing line between threatening messages and those that are not. This first observation must lead to extreme precautions to avoid that under this circumstance public authorities try to limit the messages that can be presented to citizens, especially during electoral processes, since they have the legal power to decide what are the messages they want to receive and the value they want to give them, without protections of any kind. Strictly speaking, in the field of electoral processes, only in very extreme cases will it be possible to admit the possibility that a message has sufficient capacity to force or divert the will of the voters, given the intimate nature of the voting decision and the legal channels existing to guarantee freedom of suffrage".

⁶ The STC 112/2016 is about a supposed act of glorification of terrorism. The assessment made by the interpreter of the Constitution including extreme speech in the field of terrorism within the concept of hate speech is questionable, in view of international texts as hate speeches are directed at individuals or groups belonging to characteristics protected by international human rights law. Victims of terrorism and the general population that is affected by terrorist acts must have their own protections against dangerous behaviour, but it does not fit into the conceptualisation of hate speech. It is worth taking from this judgement that, in its opinion, by subjecting all types of hate speech to the requirement of "promoting or encouraging, even indirectly, a risk situation ...", it debates a criterion of interpretation that is also useful for the speeches of hatred of Art. 510 Penal Code, not applied until now.

Despite this negative aspect related to the definition of 'hate speech' as indirect promoter or inciter of intolerance, it was recognised as a positive aspect that the Court thought to examine 'hate speech' in view of international standards set forth in the Rabat Plan, although it does not directly quote the text of the United Nations neither applies its six-part test.⁷ The fifth legal basis of STC 35/2020 states that “an assessment of the intentional, circumstantial and contextual and even pragmatic-linguistic elements must be made, which govern the emission of the messages subject of the accusation”.

However, the Court does not invoke nor apply these thresholds of seriousness to determine whether that speech may satisfy the criteria to be criminalised, but rather uses them to determine whether freedom of expression has been duly weighed in a specific case. In other words, the constitutional assessment on the restriction of the specific speech is not based on the scope of protection of freedom of expression as a fundamental right and whether such speech goes beyond the constitutionally guaranteed scope. On the contrary, freedom of expression is a parameter of reasonability of the judicial decision, leaving it in a secondary position⁸. Even though this notion comes close to weighing and balancing fundamental rights, which is considered as the adequate treatment for protecting and respecting both interests, the concern about this position of the Constitutional Court is that, in legal practice, freedom of expression is linked to an effective judicial protection as if it were an annex to Art. 24 of the Constitution and did not have its own content as conferred by Art. 20 of the ICCPR. Freedom of expression is demoted from the category of fundamental right to the criterion of interpretation of reasonableness of a judgement. This generates potential and undesirable consequences from a legal practice and protection of the right standpoint.

According to the case law criteria presented during the Expert Dialogue, it was possible to conclude that the Constitutional Court has adopted excessively restrictive approaches for freedom of expression when defining 'hate speech', assuming broad concepts:

- The Constitutional Court qualifies 'hate speech' as "any intolerant speech pursuant the criminal offense of 'hate speech'", which makes it directly punishable. Consequently, any expression of intolerance is subject to criminal punishment;
- The existence of a broad range of expression that can be socially or politically reprehensible, but not necessarily punishable by criminal law, is omitted;
- The previous interpretations differ from the tiered response to 'hate speech' raised by international and regional standards. Therefore, it was considered necessary that the legislator and interpreter of the norm depart from intending to punish any type of intolerant speech. There are types of speech outside the constitutional scope of freedom of expression that do not have to be penalised criminally or, even less, administratively⁹.

⁷ In the technical document created to have an analysis and reference framework during the Expert Dialogue on freedom of expression and hate speech in Spain, ARTICLE 19 identified decisions of the Provincial Courts that do make a specific mention to the Rabat Action Plan; [see page 8](#).

⁸ The decision states that “the judgement of conviction has not complied with the sufficiency of the requirement for prior assessment of whether the conduct prosecuted was a manifestation of exercise of the fundamental right to freedom of expression, by denying the need to assess, among other aspects, the communication intention of the appellant in relation to the authorship, context and circumstances of the messages issued. This omission, by itself, has a determining factor to consider that the violation of the right to freedom of expression of the applicant for an *amparo* writ is covered”.

⁹ In relation to this issue, the presentations warn the unrestricted extension of the Administration's sanctioning power to that of expression, leaving out that this sanctioning power is not a tool by itself, but an instrument that goes with other organisational powers (intervention on the economy, urban planning ...) and which lacks the

Accordingly, the presentations highlighted that in order to guarantee the validity of freedom of expression in line with international and regional standards, the existing guidance must be reversed. The current position of 'hate speech' as intolerant speech must be abandoned, and recover the initial position (STC 235/2007 and, partly, STC 112/2016¹⁰) that weighed between a more restricted concept of 'hate speech', such as that which represents incitement of prohibited results.

Conceptual and legal indistinction: 'hate speech', hate crimes, incitement to violence and discrimination, incitement related to terrorism

In addition to the indistinct use of 'hate speech' and 'speech promoting intolerance' as punishable behaviours derived from the Spanish constitutional jurisprudence, the presentations made it clear that another problem has settled in the international community and in Spain. 'Hate speech' and the speeches of glorification and incitement to terrorist acts are being placed on the same level. Specifically, the following legal, conceptual, and historical considerations were raised:

- It is important to clarify that these are different concepts, geared towards the protection of different interests, even when it is possible that the criminal characteristic of each crime related to incitement acts may be similar, and that both modalities may imply restrictions on the broad exercise of freedom of expression;
- The standards for combating terrorism are designed to protect the constitutional order, public safety, and citizen security, while Spanish laws on 'hate speech' are intended to protect groups in particular situations of vulnerability, historically excluded and marginalised, whom hatred is directed, against discrimination;
- In Spain, this proximity and confusion has a historical explanation based on the ETA terrorism that the country suffered for decades and that drove the punishment of the glorification of terrorism (Art. 578 Penal Code) to protect the "dignity of the victims". Based on the protection of dignity, connections were drawn between speeches glorifying terrorism and 'hate speech', despite being oriented to different legal rights.;
- The difference between 'hate speech' crimes is not the hateful attitude of the person making the speech (attitude of mind of the authors), but rather their conception as crimes aimed at protecting socially discriminated groups against acts constituting an actual risk of violence and discrimination.

The confusion is worrisome because it allows the criminalisation of any message motivated by hatred, using "hate speech crime" as a wild card, even when the message is directed against institutions (the Crown), religious beliefs or professional bodies of the State (Police), or groups other than those for whom this protection procedure was intended.

Incitement to terrorism crimes

In order to elaborate on the importance of clearly differentiating incitement to terrorist acts and 'hate speech', as well as the concerning implications of their indiscriminate use,

reinforced guarantees of other law courts.

¹⁰ See footnote 6.

experts in the field of human rights and the fight against terrorism shared the origins and problems associated with these concepts for human rights.

As a response to terrorism acts occurred during the first decade of the twenty first century, the international community and the European region expressed the need to criminalise the initial acts of terrorism through different initiatives¹¹, including the criminalisation of speeches of incitement of terrorism acts. It was raised during the Expert Dialogue that all these initiatives have inaccurate and vague definitions of the terrorism phenomenon that are problematic from a human rights perspective, specifically for freedom of expression and other human rights. In European Union law, international conventions on terrorism are included in the [Directive \(EU\) 2017/541 of the European Parliament and the Council dated March 15, 2017 on combating terrorism](#). Article 5 requires States to classify the incitement to terrorist acts according to elements of intentionality and the creation of actual risk. Several experts argued that both the transposition of this Directive, on the one hand, and the definition of the crimes establishing the obligation to criminalise indirect conduct, on the other hand, have resulted in restrictions on freedom of expression contrary to international and regional human rights standards¹².

International bodies and organisations, including the United Nations Special Rapporteurs on freedom of expression and on human rights while countering terrorism, the International Commission of Jurists and ARTICLE 19, have questioned these incriminating approaches since their appearance. Based on evidence, they have demonstrated the harmful and disproportionate effects on the exercise of freedom of expression. The three aspects of concern related to the criminalisation of incitement to terrorist acts are the following:

- Failure to comply with the jurisprudence firmly set out by the European Court of Human Rights according to which (i) freedom of expression protects the dissemination of ideas that annoy, hurt, and disturb, and (ii) criminal restrictions of freedom of expression must be the last option, as well as exceptional, necessary, proportionate and oriented to legitimate purposes;
- The criminalisation of indirect incitement, under the name of "justification", "promotion" and "glorification" of terrorism, is vague and therefore open to a broad margin of interpretation. Additionally, these behaviours do not have a clear causal link between the expression and the harm, even if they were future or highly probable, so that their anticipated restriction becomes disproportionate;
- The seriousness and severity test applicable to cases of incitement to acts of violence remains absent.

The experts emphasised that these concerns are similar to the regulatory and interpretative issues of other forms such as incitement to violence and discrimination that, although materially different, are confused with punishable 'hate speech', unnecessarily and

¹¹ Important decisions on this matter are: [Resolution 1624 \(2005\)](#) of the United Nations Security Council, that urges States to prohibit by law the incitement to commit an act or acts of terrorism; [Resolution 2178 \(2014\)](#) of the United Nations Security Council, that proposed to criminalise conducts related to trips, recruitment and financing terrorism.

¹² Article 5. Public provocation to commit a terrorist offence. "Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally".

disproportionately restricting freedom of expression. In order to move towards an application of the crimes of inciting terrorist acts that respects and protects freedom of expression, the presentations underlined the need to establish, as a requirement, the evaluation of the strict causal connection between the expression and the concrete danger of the harm occurring - or potential harm - as well as the intention of the subject and the context.

2. Criteria to limit freedom of expression under justifications of 'hate speech' prohibition

The gradual response to different types of 'hate speech' needs to be completed with criteria that assess the seriousness of the speech. Therefore, only those that reach a specific level or severity could be legitimately restricted according to the obligations of States related to freedom of expression. This section includes discussions raised within the Expert Dialogue on the Rabat Plan as an international tool defining these criteria or thresholds of severity according to Arts. 20 (2) and 19 (3) of the ICCPR, as well as its acceptance in the Spanish jurisprudence, mainly the *danger* or likelihood factors, and *intent*.

The Rabat Plan of Action

The Rabat Plan of Action develops the so-called test of *the six elements or criteria for verifying the seriousness of the speech*, specifically applicable to 'hate speech' that must be prohibited pursuant to Art. 20 (2), following the standard set forth in Art. 19 (3). The speech must have a causal and finalistic connection with the incitement of violent acts. The Rabat Plan of Action calls on States to consider six elements which a detailed, restrictive, and coherent application corresponds to guarantee and monitor the judiciary:

- a) *context* of the speech: it is directly linked to the likelihood that the speech causes harm to the population;
- b) *speaker identity*, position, or authority: the speaker's position and standing in the context;
- c) *intention of the speaker*: who must (i) have the specific intention to participate in advocacy to discriminate and hatred; (ii) intend to achieve discrimination, hostility, or violence or, at least, be aware of the likelihood that their public will be incited to those acts¹³;
- d) *content of the expression*: considering the form and style (where insulting and hurtful styles must be admitted as protected), and what the audience understands;
- e) *nature and means of expression*: intensity, or magnitude in terms of frequency;
- f) *likelihood of harm resulting* from the expression.

¹³ With more detail on this matter, see section: *The intention: the mens rea of the crime*.

From a comparative and international viewpoint, some successful experiences were shown when receiving the criteria of the Rabat Plan, in particular, the use of the severity threshold test of 'hate speech' inciting violence in countries such as Tunisia, Ivory Coast and Morocco. Also, references to the six criteria have been made in the jurisprudence of the European Court of Human Rights, the Plan against 'hate speech' of the Secretary General of the United Nations, the United Nations Special Rapporteur on Minority Issues and in resolutions of the United Nations Human Rights Council on freedom of religion or belief.

The national perspective raised that the test of the six criteria of the Rabat Plan is known and has publicity in the Spanish jurisprudence, although not as much in terms of recognition and application in cases of punishable hate speech. In other words, the actual adoption, not only declarative or rhetorical, of the criteria of this test is variable: from the generic but not specific reference of the [STC 35/2020](#)¹⁴, through the explicit mention of the test of the Rabat Plan in the [Judgement of the Provincial Court of Barcelona 702/2018](#) and in the [Order of the Provincial Court of Barcelona 787/2018](#), to the worrisome omission in [STS 72/2018, dated February 9](#).

Finally, the experts emphasised the need for Spanish justice operators to know the international standards for protecting freedom of expression, that influenced and are established in the Rabat Plan, for them to be applied systematically and rigorously in detail. In addition, experts highlighted the importance of applying the likelihood element and mandatorily interpret it in the Spanish jurisprudential context under the criteria of *suitability* of the speech to move others to violent acts, as the standards of abstract/concrete danger¹⁵, and not as a reduced or even disconnected or absent likelihood, comparable to the abstract danger. The parameter in the Rabat Plan is contrary to the standards or thresholds of danger that are upheld by the Spanish criminal jurisprudence and [Circular 7/2019](#) of the State Attorney General's Office when using the interpretation of the Supreme Court in judgement 72/2018 and states that "hate-crimes are construed as crimes of abstract danger"¹⁶.

The abstract-concrete danger: the likelihood of harm

The *likelihood* factor to determine that the prohibited result may be fulfilled, included in the six criteria test of the Rabat Plan, is comparable to the standard of *danger* in criminal matters in the Spanish judicial system. On this basis, the compatibility of the abstract danger applicable to the crimes of Art. 510 of the Penal Code with the applicable international and regional standards was analysed during the Expert Dialogue.

Incitement prohibited in Article 20 of the ICCPR and other instruments setting prohibitions on incitement must promote or persuade others, provoke them, and call them to act, to the point of "generating an imminent risk of discrimination, hostility or violence for people who belong to the group". The Rabat Plan, the jurisprudence of the European Court and the [Camden Principles on freedom of expression and equality](#) establish that in order to determine the seriousness of the speech, it is necessary to verify the likelihood in each case that the

¹⁴ Its fifth legal basis addresses the need for an "assessment of the intentional, circumstantial and contextual and even pragmatic-linguistic elements presiding over the emission of the messages subject of the accusation". Consider the warning abovementioned, in practice, since it supposes the demotion of freedom of expression when using it as an argument for the reasonableness of the decision and not for the balance of rights. See page 9.

¹⁵ In crimes of abstract-concrete danger, potential danger or hypothetical danger, a concrete result of danger is not properly classified (the danger is not an element of the criminal type), but an ideal behaviour to produce danger to the protected legal asset, that is, the suitability of the behaviour actually carried out to produce said danger.

¹⁶ With more detail on this, see next section: *The abstract-concrete danger: the likelihood of harm*.

prohibited result occurs (hostility, violence, discrimination). That is, that the speech turns into a tangible and material damaging or harmful effect.

The international interpretive guidance regarding *likelihood* has not yet been recognised in the Spanish jurisprudence. Instead, the STS 72/2018 states in the Legal Basis that Art. 510 of the Penal Code is fulfilled with:

“the creation of danger that is specified in the message with its own content of “hate speech”, which implies the danger referred to in International Conventions from which the legal description arises, [...] without the need for a requirement that goes further [...] Offences included in hate speech [...] already imply a conduct that directly or indirectly provokes feelings of hatred, violence, or discrimination”.

This jurisprudence attributes the nature of the crime of abstract danger to the 'hate speech' crime of Art. 510 Penal Code¹⁷, and removes the burden to prove the suitability of the conduct to produce prohibited results. The influence of the Supreme Court is found in several cases: [Order of the Supreme Court of Justice of Catalonia, 72/2018](#); [Judgement of the Provincial Court of Barcelona 607/2018](#); [Judgement of the National Court 6/2018](#); [Judgement of the Provincial Court of Madrid, 132/2020](#).

Regarding this interpretation, a point was made on the need to require a connection between the expression act and the prohibited results it calls for, including the likelihood of its occurrence as part of the assessment of the criminal-type elements. It is advisable to change the conception of the crimes of Art. 510 as crimes of mere abstract danger. The wording of the offence could accommodate a less broad interpretation, in line with international interpretive standards and the jurisprudence of the European Court of Human Rights. A danger of an abstract/concrete, hypothetical or ability (of the conduct to harm the legal right) could be a step in the right direction, such as the one that is already repeatedly required by the jurisprudence of the Supreme Court in crimes of glorification and incitement to terrorism¹⁸.

The intention: mens rea of the crime

As well as the likelihood of harm, the standard of intentionality, as applied in the Spanish jurisprudence, seems to be far from the standard of the Rabat Plan and the regional standards regarding incitement and expression considered as 'hate speech'.

During the Expert Dialogue, a point was made on the intention factor of the person making the speech as one of the decisive criteria to determine the seriousness of the 'hate speech', pursuing the purposes of international and regional instruments, and their application in the Spanish jurisprudential context:

¹⁷ Except for the category of subsection 2.a) of collective libel construed as a crime of harm to the dignity of vulnerable groups.

¹⁸ See, therefore, [STS 354/2017](#), dated May 17: “risk (which we must understand as not concrete but hypothetical) of committing terrorist acts”; [STS 52/2018](#), dated January 31: “risk that must be understood as not concrete, but hypothetical, of committing of terrorist acts”; [STS 646/2018](#) dated December 14: “The hate crime is defined in Article 510 Penal Code, which does not require, in its classification, the creation of a concrete situation of danger, but a hypothetical generation of a situation of danger, which is considered serious, for the dignity of the people it is referring to”.

- The intention is to assess whether the speech in question deserves to be included among those that must be prohibited under Art. 20 (2) of the ICCPR or those that can be forbidden according to the limitations of Art. 19 (3) of the ICCPR (and 10 (2) ECHR). It was suggested, from an international standpoint, that behaviours inciting violence and discrimination subject to penalties must be those carried out with a specific or reinforced intent of the perpetrator, a category available in the Spanish criminal system;
- The intentionality factor, and its scope in accordance with international and regional standards, does not seem to find its way either in the jurisprudence of the Supreme Court on 'hate speech' crimes. The [STS 72/2018, dated February 9](#), explicitly rules out a specific intent in the crimes of glorification and incitement to hatred, stating that it is enough with a basic intent emerging from the content of the expressions itself and that it requires only a voluntary and controllable act¹⁹;
- The [Instruction of the Office of the State Attorney General 7/2019](#) states this flexible interpretative criterion and points out that the subjective offence, the intention of the individual in the crime of 'hate speech' is filled with the generic intent: "Hate crimes are considered malicious criminal offences. A specific spirit is not required. It is enough with the generic intent consisting of knowing the elements of the criminal offense and acting in accordance with that understanding".

Based on the above, national and international experts urge to promote and adopt a more restricted interpretation of the crimes of hate speech of the Penal Code, where the intention of the individual appears in a reinforced and undoubted way, as a determined will of the individual to incite, provoke, encourage and call others to perform acts of prohibited results (specific intent), as already required in the field of extreme terrorist speech by the Supreme Court²⁰.

3. Groups in situation of discrimination and inequality: the person committing the crime of 'hate speech'

International and national experts pointed out that one of the current challenges derives from who can be the target of 'hate speech', that is, who is the recipient of these messages.

¹⁹ "Regarding the subjective classification, both the crime of glorification and the incitement to hatred do not require a specific intent, the concurrence of a basic intent is enough, which must be verified from the content of the expressions made. The intent of these crimes is completed with the verification of the voluntariness of the act and the verification that it is not an uncontrolled situation or a momentary reaction, even emotional, to a circumstance that the individual has not been able to control".

²⁰ See thus, [STS 378/2017](#): "the subjective component constitutionally enforceable, represented by the «trend», in the author's will to actually and effectively incite the commission of terrorist crimes"; [STS 560/2017](#): "trend in the author's will, to actually and truly incite the commission of crimes of terrorism"; [STS 600/2017](#): "it is worth mentioning the definition of a «trend element», even though it is not expressed in the literature of the criminal principle"; and identically [STS 52/2018](#). ARTICLE 19 reaffirms that the crimes of incitement to terrorism are not hate speech according to international law. The interpretive criteria identified in these cases are a guide for restrictive interpretation recommendations and to appropriately protect the right to freedom of expression, according to international and regional standards.

From a historical point of view, the presentations showed that international experience has seen the need to generate criminal responses to face traditional discrimination that has deprived specific groups from recognition, exercise, and enjoyment of their rights under real conditions of equality. To that effect, the Expert Dialogue began with the following considerations:

- The criminal offenses on 'hate speech' in international law, as well as in European and Spanish law, are conceived as a second opportunity for society to correct the injustices tolerated for decades and to commit to the groups whose freedoms and rights were denied;
- The subject of protection and object of rights allows for the interaction and potential conflict between freedom of expression and the protection of historically discriminated groups;
- Under the democratic principle of having complex, plural, open and tolerant societies, 'hate speech' is construed within the scope of protection against discrimination for groups in conditions of inequality and in situations of discrimination. In this context, the protection of freedom of expression may find limitations while specific expressions are a conduit to endanger specific people.

Bearing in mind the experience and reality of the past, as well as the present and future political-criminal guidance, it can be stated, as the speakers pointed out, that the rationale behind the limitations to freedom of expression based on 'hate speech' stems from the protection of individuals and groups that have suffered extensive and systematic violations throughout history and that have lacked the opportunities for political participation and enjoyment of fundamental rights. The limitation of specific speeches has become a political tool in the course of history to eradicate discrimination. Recognising this past of discrimination and violence is a decisive step to understand the different manifestations of 'hate speech', to correctly guide its interpretation and application and to adopt legal and non-legal measures within the framework of an anti-discrimination policy.

Therefore, it was raised that the devaluation or accusation of this type of behaviour lies in the fact that the speech is directed not against any group, but against groups that have experienced discrimination and subordination through social notions, prejudices, and stereotypes. It was then emphasised that the fight against discrimination is a special mandate for States under the European Convention on Human Rights (Art. 14 ECHR: prohibition of discrimination²¹), the jurisprudence of its Court and the Council of Europe:

- The judgment of the European Court (ECHR) [B. S. v. Spain](#), dated July 24, 2012 (and in a similar way, [Abdu v. Bulgaria, dated March 11, 2014](#)) recalls that when analysing allegations of acts of torture "the State authorities have the obligation to adopt all reasonable measures to discover if there is any racist motivation, and to establish whether feelings of hatred or prejudice based on ethnic origin play a role in the events", in accordance with both of Art. 3 and Art. 14 of the Convention.
- In [Savva Terentyev v. Russia, dated February 4, 2019](#), the European Court states that only "an unprotected minority or group that has a history of

²¹ Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without any discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

oppression or inequality, or that faces deep-rooted prejudices, hostility and discrimination, or that is vulnerable for some other reason" could "need a heightened protection from attacks committed by insult, holding up to ridicule or slander". In this case, the Court reiterated that the police, as part of the State security forces, could hardly be an unprotected group according to these features²².

The above considerations were contrasted with Spanish case law criteria regarding individuals and groups subject to protection against specific types of 'hate speech':

- Judgment [STC 177/2015, dated July 22](#) of the Constitutional Court is a fundamental milestone since it ratified the conviction of two people who burned photographs of the Kings of Spain at the end of an anti-monarchical demonstration held in Girona in the course of the visit of the Monarchs. The majority of the Constitutional Court understood that this act was an expression of 'hate speech' (although, subsumed in the criminal offense of libel against the Crown). On the other hand, the individual votes underlined that 'hate speech' could not be referred to against the Kings: although hatred against people or groups can exclude them from public life and create violence against them, not all incitement to violence through expression acts represent 'hate speech'. This figure must be restricted, circumscribed and put in relation to victimised and discriminated groups. After the judgment was appealed in [Stern Taulats and Roura Capallera v. Spain](#), the European Court declared the violation of freedom of expression of the persons sentenced, ruled out the existence of 'hate speech' and placed the act prosecuted in the context of the political protest directed against institutions or public figures such as the King (in accordance with what has already been stated in the ECHR [Otegi Mondragón v. Spain](#));
- The case above is particularly important since the Circular 7/2019 of the State Attorney General's Office takes up STC 177/2015, which was appealed and resolved in favour of freedom of expression by the ECtHR, to justify and establish that the crimes of Article 510 of the Penal Code prohibit all types of "intolerance that cause exclusion". As such, must be criminally prosecuted. The Circular also includes a broad definition of the defendant in the case as a discriminated group, which reaches any vulnerable group in the social environment, regardless of their history and current situation of discrimination, in such a way that "an attack on a person of Nazi ideology, or incitement to hatred towards such group, can be included in this type of crime". This concept is worrying since it goes in the opposite direction of the anti-discrimination foundation of 'hate speech';
- The broad interpretation of the defendant in the case²³ has given rise to decisions contrary to international and European standards that link these criminal elements (hate speech and the aggravating circumstance of action motivated by ideological hatred) to historically discriminated groups. Against the historical and political-criminal foundation of these types of criminal offenses, experts from the world of law

²² The same guidelines were followed in Spanish jurisprudence, with success and rightfully from the perspective of the European jurisprudence, in a controversial case of assaults on police officers in a bar in the Navarra town of Alsasua, in October 2016. After a long court due process where the aggravation of hateful motivation was highlighted for acting due to reasons of ideology when attacking police officers, [STS 458/2019, dated October 9](#), ruled out that the police could be victims of discrimination for ideological reasons. Hatred for ideological reasons must protect "traditionally vulnerable groups that the legal system wants to protect with a certain intensity to ensure the performance of an institute of social control, such as the criminal law", while the victims belong to the Civil Guard this does not "suppose the assumption of an ideology in need of special protection" (Fifth Legal Basis).

²³ As in the case in footnote 22, where judicial instances - prior to the Supreme Court - considered that the police could be a group deserving protection against discriminatory hatred on grounds of ideology.

and the defence of groups in situations of discrimination and inequality warned that there are cases of accusation of hate speech precisely against members of these groups.

The previous considerations (STC 117/2015 and the Circular of the State Attorney General's Office) are worryingly opposite to international standards. The experts highlighted that crimes of 'hate speech' are emptied and denatured when applied without knowing their history or their discriminatory operating social reality. Freedom of expression is undermined when the definition of a group in a situation of vulnerability includes people and groups that do not deserve such status under international and regional law, while the unique nature of the restrictions on this fundamental freedom is justified only if it protects discriminated groups and their members. Thus, the formalistic application of these crimes ends up being ineffective and damaging for freedom of expression.

4. Dismissal of criminal proceeding: balancing since the investigation phase

From the contextual and national perspective, experts pointed out that the dismissal stage of criminal proceedings was an alternative to applying a restricted interpretation of 'hate speech' and protect the right to freedom of expression. This approach focuses on the investigation phase in the criminal proceeding before admitting the criminal complaint or prosecuting. The focus is commonly made on the interpretation of the elements of the criminal offence (objective and subjective) in order to reduce the application scope of Art. 510 Penal Code in the actual prosecution phase. But prior to this, there is space for a broad interpretation of freedom of expression in the investigative phase.

The proposals were based on the following considerations on the Spanish jurisdictional situation:

- Jurisdictional bodies admit to process and initiate the investigation phase of the criminal proceeding in cases where the speech is simply uttered or only annoying for religious feelings or the dignity of a group. It is observed that through the use and interpretation of the concept "intolerance that causes exclusion", offenses and insults are pursued without demanding an extended specific harm. This is contrary to what is recommended by international standards that protect irreverent and critical speech, which must not be prohibited;
- The purpose of the opening of the investigation phase is focused on obtaining evidence, essentially the intention of the individual: did they want to hurt religious feelings or harm the dignity of the groups?
- Once the investigative phase has been opened, any solution is unsatisfactory as the defendant is likely to allege that they had no intention of committing the crime when asked about it (something, otherwise, unthinkable in the investigative phase of any other crime);
- If the judge archives the case and issues an order to dismiss for not proving the subjective element of intention, especially in cases where the defendant directly refuses to testify, freedom of expression will already have been impacted by just starting the investigation process. This decision will be proven unnecessary in view

- of the dismissal of a criminal charge (and burdensome, due to the environment of restriction of the freedoms it projects);
- In cases where the judge decides to continue and present an accusation, the impact on freedom of expression is then unquestionable. From the moment the criminal investigation is opened, the harm to freedom of expression is caused by the threat produced by the criminal consequences and the dissuasive effect on the uninhibited exercise of freedom of expression.

As the presentations warned, this practice is driven, among other factors, by one reason: the investigating judge performs the first procedural filter on the seriousness of the conduct. The judge is exposed to the community when deciding whether to archive the case or continue with the investigation. In this position, given the social repercussions of their decision, the judge can choose the caution of admitting the complaint and open the investigation, as not to rule out anything beforehand. However, this conduct is contrary to procedural legislation: Art. 269 and 313 of the [Code of Criminal Procedure](#)²⁴ impose on judges the task of carrying out a prior analysis of classification. It consists of a duty to refrain from initiating proceedings if the facts were false or - this is the key - *not criminal*. The law already requires a first analysis of classification in the phase of admission for processing, but, on the contrary, the jurisdictional practice usually delays the investigative phase, considering the harming effects on freedom of expression.

The other obstacle for protecting the right to freedom of expression at this stage of the criminal proceeding involves the starting of criminal proceedings for annoying or uncomfortable expressions that, *prima facie*, do not have seriousness or intentionality factors. Nevertheless, they activate the criminal process. They also stressed that the 'Gordian knot' in crimes that restrict freedom of expression is not about the number of convictions (low, in view of jurisprudence), but rather the high number of criminal proceedings started during an extensive period of time (between the investigative, the intermediate phase and public hearing). Although the defendant is finally acquitted, the criminal proceeding displays a chilling or discouraging effect on the exercise of this right, which is corrosive to a democratic and open society.

Recommendations

To the Legislative and Executive Branch:

- Thoroughly and comprehensively review national laws restricting the right to freedom of expression, in particular those that criminalise expression, so that: i) they include concise, precise, and clear concepts under which the restriction is based; ii) they pursue a legitimate aim in accordance with international and regional human rights law; and iii) they are necessary and proportionate, guided by the principle of criminal law as the *ultima ratio*.

²⁴ Article 269: "Once the complaint is formalised, the Judge or official, who received the verification of the alleged act, will proceed or will order to proceed immediately, unless it does not constitute a crime, or if the complaint is manifestly false. In either case, the Court or official shall refrain from any proceeding, without limiting the responsibility incurred if they unduly dismissed it." Article 313: "It will limit the complaint lodged by a third person in the same way when the facts on which it is based on do not represent a crime or when it is not considered competent to instruct the initiation of a case. An appeal shall proceed against the order referred to in this article, which shall be admissible in both effects."

- Repeal the laws and criminal offenses that criminalise expression about religious criticism (blasphemy and defamation of religion), as well as libel and slander against the institutions and symbols of the State.
- Recognise and translate into legislative practice that intolerant, hurtful, provocative or, offensive speech finds protection in the right to freedom of expression.
- Move towards a tiered response to permissible restrictions on the exercise of the right to freedom of expression based on the severity and the actual harm of the expressions that would need to be subject to limitation, in accordance with regional and international standards on human rights.
- Abandon the criminal response as the exclusive legal measure to combat expression based on prejudice, discrimination, and inequality. In practice, observe that, according to the Constitution, there are types of speech that do not find justification in criminal or, even less, administrative punishments.
- Review crimes related to terrorism and reform them to establish that their application and interpretation require a strict causal connection between the expression and the specific danger of the harm to occur - or likelihood of harm - as well as the intention of the individual, the speaker capacity of inciting such acts and the context.

To the Judiciary:

- Guarantee the protection of the right to freedom of expression in accordance with international and regional obligations of the Spanish State regarding freedom of expression:
 - Resume the guidance originally adopted in the constitutional jurisprudence regarding the concept of 'hate speech' punishable as provoking or inciting acts of violence, and move away from the most recent guidelines that identify 'hate speech' just with promotion of intolerance or exclusionary intolerance;
 - Restrict the criminal boundaries of 'hate speech' to those that consist of incitement to discrimination, hostility, and violence applying the six part-test of the Rabat Plan of Action.
- Modify the indistinct use of legal classifications related to 'hate speech', hate crimes or incitement to terrorism as 'hate speech', to provide conceptual clarity and material distinction on the scope of application, interpretation, and protection of each of offense.
- Clearly determine that crimes related to terrorism are not 'hate speech' in accordance with the standards for the protection of freedom of expression and the rights to non-discrimination and equality.
- Implement the criteria for the protection of the right to freedom of expression established by the European Court of Human Rights and international law, especially the application of a weighing and balanced examination between freedom of expression and the rights to non-discrimination and equality steered by guidelines which include:

- Adopting a model based on a case-by-case basis which comprehensively analyses the context, the content of the expression, its impact and potential result, the likelihood that the harm will occur, the speaker's ability to generate an actual risk to individuals and groups, as well as the intention to incite others;
 - Moving towards strict criteria contrary to the abstract danger, such as the danger of an abstract/concrete, or hypothetical type in such a way that it complies with the likelihood seriousness threshold -in terminology of the Rabat Plan- understood as a standard of danger in the Spanish jurisprudence;
 - Applying a strict and restricted criterion on the intention of the speaker, the intention - or intent (*dolo*) in the Spanish criminal law - of the individual appears in a reinforced and undoubted way, as a determined will of the individual to incite, encourage and call others to perform acts of prohibited results (specific intent);
 - Integrating the likelihood requirement as mandatory in the Spanish jurisprudential context, including the criterion of *suitability* of the speech to move others to violent acts, and not as an abstract and indirect likelihood.
 - Strictly limiting the scope of protection of individuals and groups to those historically discriminated against, oppressed and in conditions of inequality. Especially, develop reiterated jurisprudence establishing that State institutions, national symbols, or police forces, as well as other groups that do not comply with the historical, political, cultural, and social characteristics, are not subject to protection against 'hate speech'.
- Apply the three-part test on restrictions on freedom of expression and higher severity tests on incitement when analysing incitement or glorification of terrorism cases. It is necessary to establish and determine the direct and causal connection between the expression and the concrete danger of the harm to occur - or the likelihood of the harm - as a systematic and rigorous requirement, as well as the intention of the individual, and the speaker's ability to influence others and a specific context.
 - Design and implement training and educational programs for legal operators and interpreters of the norm on international and regional standards for the protection of freedom of expression:
 - Ensure their implementation in a rigorous and detailed manner;
 - Establish permanent awareness and training schemes that are carried out in the academic programs of legal professionals and training courses offered by the Spanish Judicial Branch. These schemes should aim to modify a model focused on the formalism of the law and move towards the content and guarantee of fundamental rights established by international and regional human rights law.
 - Undertake actions aimed at harmonising and consolidating the understanding of 'hate speech' from the application and interpretation of international standards.
 - Promote changes on the jurisdictional practice related to the review of the criminal requirements since the dismissal stage of 'hate speech' crimes. This involves revising the current analysis of the reported offence which is usually done once the complaint is admitted for processing in the investigative phase. The following considerations should be applied:
 - The admission of the complaint must determine whether the speech in question is an exercise of freedom of expression, either in the form of satire, opinion, political

- or artistic speech, and therefore part of the essential scope of protection of freedom of expression;
 - Prosecutors and judges should incorporate in the admissibility stage the fundamental nature and role of the right to freedom of expression and the consolidated jurisprudence in the matter, including the standards underlining that the accusation for expression-based crimes should be centered on clear and objective tests and not on subjective interpretations;
 - Prior evaluation under an objective test requires that judges and prosecutors should decisively and indicatively dismiss the criminal complaint if the speech is not directed at a socially and historically discriminated group.
- Ensure that the expressions that are criminalised under Article 510 of the Penal Code and its interpretation are not used against groups and individuals that the Code aims to protect as a result of including groups that do not face historical discrimination and exclusion.

To public institutions:

- Monitor the application and interpretation of crimes restricting the exercise of freedom of expression under 'hate speech' crimes and inform legislative and public policy changes under effectiveness and evidence-based approaches, as well as the protection of groups intended to be protected, with special emphasis on harm and adequate and effective reparation.
- Explore alternative responses to 'hate speech' that moves away from the criminal measures as the only and effective measure by evaluating the impact of existing measures based on the positive results to reduce and combat discrimination and inequality of the protected groups.
- Develop programs and public policies that place the right to freedom of expression at the core and as a necessary measure to combat discrimination, especially the exercise of this right by groups and individuals in situations of discrimination, inequality, and vulnerability.
- Evaluate existing public policies to determine the efficiency and effectiveness of the equality and non-discrimination bodies. These bodies should develop initiatives based on social dialogue, establish procedures for receiving complaints from victims of incitement to violence and discrimination, create public programs for intercultural dialogue and contribute to the design and implementation of positive measures for the integration of groups.
- Issue recommendations based on permanent evaluations of programs and public policies on non-discrimination and inequality that put targeted groups and individuals in the centre, recognising the importance of individuals and groups belonging to protected characteristics under the regional and international human rights law.

About ARTICLE 19

ARTICLE 19: Global Campaign for Freedom of Expression (ARTICLE 19) is an international human rights organisation that works around the world to protect and promote freedom of expression and information. It is named after the title and mandate of Article 19 of the Universal Declaration of Human Rights that guarantees freedom of expression.

ARTICLE 19 has created different documents setting standards and reports on international and public policies based on international law and comparative law, as well as best practices in terms of freedom of expression. ARTICLE 19 also increasingly examines the role of national and international regulatory bodies on legal, technical and governance aspects of the Internet that affect the protection and promotion of freedom of expression.

If you are interested in discussing in detail this document or have any comments you wish to bring to the attention of ARTICLE 19, please contact us via email eca@article19.org.

Annex 1

Expert Dialogue on Freedom of Expression and “Hate speech” in Spain

October 27-28, 2020, 5:00-7:30 p.m. CET

Day 1 – International standards on freedom of expression and hate speech and their application in Spain

Tuesday October 27, 2020, 5:00-7:30 p.m. CET

5:00 – 5:10 pm	<p>Welcome David Diaz-Jogeix, Senior Director of Programs, ARTICLE 19</p> <p>Introduction Joan Barata, Intermediary Liability Fellow, Stanford Cyber Policy Centre</p>
5:10 – 5:15 pm	<p>Hate speech trends in the Spanish jurisprudence Alejandro L. De Pablo Serrano, Assistant Professor Juris Doctor of Criminal Law (Hired Accredited Doctor), Valladolid University. ARTICLE 19 consultant.</p>
5:15 – 6:15 pm	<p>Presentations</p> <p><u>International Perspectives:</u></p> <ul style="list-style-type: none"> • Róisín Pillay, Director of the Europe and Central Asia Program, International Commission of Jurists. • Patricia Meléndez, Head of Civic Space, ARTICLE 19. <p><u>National Perspectives:</u></p> <ul style="list-style-type: none"> • Luis Pomed Sánchez, Legal Counsel of the Constitutional Doctrine Service of the Constitutional Court of Spain. Tenure Professor of Administrative Law, Zaragoza University. • Jacobo Dopico Gómez-Aller, Tenure Professor of Criminal Law, Carlos III University of Madrid (Accredited Professor).
6:15 – 7:15 pm	<p>Interventions and debate with participants Moderated by Joan Barata</p>
7:15 – 7:30 pm	<p>Conclusion</p>

**Day 2 – Speeches protected and not protected by international human rights law.
Review of the matter in the Spanish legal system**

Wednesday October 28, 2020, 5:00 -7:30 p.m. CET

5:00 – 5:10 pm	<p>Welcome David Diaz-Jogeix, Senior Director of Programs, ARTICLE 19.</p> <p>Introduction to day 2 Joan Barata, Intermediary Liability Fellow, Stanford Cyber Policy Centre.</p>
5:10 – 5:25 pm	<p>Opening Speech Zdravka Kalaydjieva, Former Judge of the European Court of Human rights.</p>
5:25 – 6:25 pm	<p>Presentations</p> <p><u>Perspectives of the judicial practice in Spain</u></p> <ul style="list-style-type: none"> • Adela Asúa Batarrita, Former Vice President of the Constitutional Court of Spain. Professor of Criminal Law, Basque Country University. • José Antonio Martín Pallín, Former Magistrate of the Supreme Court of Spain. • Laia Serra Perelló, Legal Advisor of the Observatory Against Homophobia. • Paulina Gutiérrez, Legal Officer, ARTICLE 19.
6:25 – 7:20 pm	<p>Interventions and debate with participants Moderated by Joan Barata</p>
7:20 – 7:30 pm	<p>Summary of day 2 Joan Barata, Intermediary Liability Fellow, Stanford Cyber Policy Centre</p> <p>Conference Closure David Diaz-Jogeix, Senior Director of Programs, ARTICLE 19</p>

Annex 2

List of participants of the Expert Dialogue

Organisation/Entity/Institution	Name	Position
Progressive Union of Prosecutors	Carlos García del Berro	Prosecutor
Málaga University	Patricia Laurenzo Copello	Professor
Málaga University	Fátima Cisneros Ávila	Assistant Professor Juris Doctor
Valladolid University	Patricia Tapia Ballesteros	Tenure Professor
Supreme Court	Marta Timón	Legal Counsel Lawyer of the Technical Office of the Third Chamber of the Supreme Court
Amnesty International	Ignacio Jovtis	Manager Campaigns, Research and Policy
Open Society Foundations	Cristina Goñi	Regional Manager for Advocacy and Security
King Juan Carlos University	Rafale Alcácer Guirao	Tenure Professor
Pablo de Olavide University (Sevilla)	Víctor M. Macías Caro	Assistant Professor Juris Doctor
Murcia University	Germán M. Teruel Lozano	Hired Professor Juris Doctor
Pablo de Olavide University (Sevilla)	Pastora García Álvarez	Tenure Professor
Pablo de Olavide University (Sevilla)	Marta Rodríguez Ramos	Researcher
Salamanca University	Laura Zúñiga Rodríguez	Professor
Valladolid University	Mercedes Alonso Álamo	Professor
Observatory Against Homophobia	Laia Serra Perelló	Legal Adviser
OSEPI	Guillermo Beltrá	EU Digital Policy Lead
ARTICLE 19	Roberta Taveri	Program Officer Europe and Central Asia
ARTICLE 19	Kathleen Boyle	Law and Policy Programme Assistant
ARTICLE 19	Sarah Clarke	Head of Europe and Central Asia
ARTICLE 19	Barbora Bukovska	Senior Director for Law and Policy Programme
ARTICLE 19	Sonia Ouertani	Digital Communication Officer