

LEGAL STANDARDS ON GLORIFICATION

Case law analysis of the offence of glorification of
terrorism in Spain



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The report was written by Lydia Vicente Márquez, Executive Director of Rights International Spain. The section on “International human rights standards on the glorification of terrorism” was written by Amrit Singh, Director of the Accountability, Liberty and Transparency Division at the Open Society Justice Initiative. María Ángeles Sebastián researched Spanish case law on the glorification of terrorism and wrote the case studies included in this report. Pilar Eirene de Prada and Miguel Zamora provided research assistance. Neil McMahon and Sonsoles Plaza translated the report.

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About Rights International Spain

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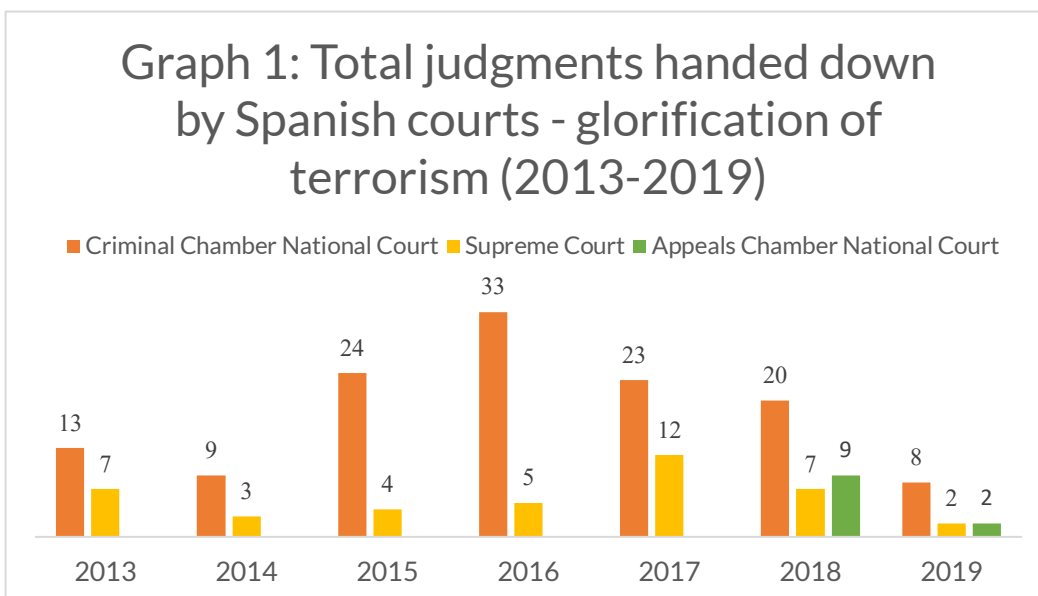
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1. Methodology

This report provides a human rights assessment of Spain's jurisprudence relating to the crime of glorification of terrorism as codified in Article 578 of the Spanish Criminal Code by virtue of the last reform to the Criminal Code chapter on terrorism offences with Organic Law 2/2015, of 30 March. It analyses from a human rights perspective all Spanish court decisions -including decisions of the *Audiencia Nacional* (Criminal Chamber, Juvenile Court and Appeals Chamber) and the Supreme Court - since the entry into force of Organic Law 2/2015, amending the Criminal Code chapter on terrorism offences¹ to March 2019, inclusive.

According to data from the Judicial Documentation Centre (CENDOJ)², Spanish courts handed down 20 judgments on the offence of glorification of terrorism in 2013, 12 in 2014, 28 in 2015, 38 in 2016, 35 in 2017, 36 in 2018 and 12 in 2019. Many were convictions, but there are also acquittals, including some convictions quashed in appeal (*casación*) (see graph 1).



We chose to analyse court decisions from the entry into force of the 2015 amendment onwards because, on the one hand, prosecutions of the crime of

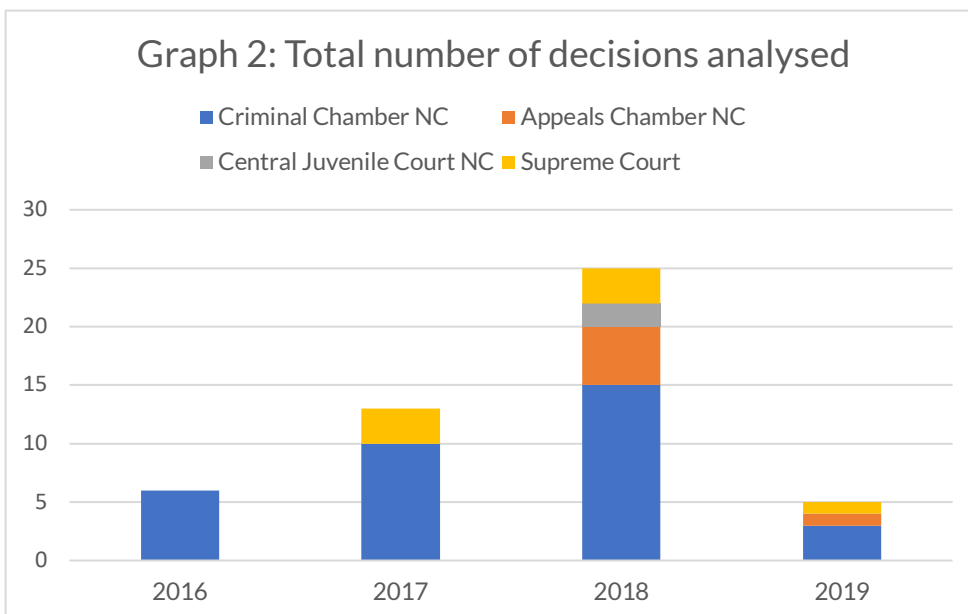
¹ See Organic Law 2/2015, of 30 March, which amends Organic Law 10/1995, of 23 November, on the Criminal Code, in relation to terrorist offences: <https://www.boe.es/boe/dias/2015/03/31/pdfs/BOE-A-2015-3440.pdf>

The reform was fast-tracked through Congress, under an urgent parliamentary procedure, and thus hindering any significant participation by civil society in the debate and preventing the mandatory reports being gathered, or the impact of the reform on human rights being assessed.

² Consulted on the CENDOJ website (Judiciary case law search engine) on 24 June 2019: <http://www.poderjudicial.es/search/indexAN.jsp>

glorification of terrorism sharply increased and, on the other hand, the 2015 amendments broadening the reach of Article 578 took effect in Spain.

We have analysed all decisions issued by Spanish courts since the entry into force of Law 2/2015 (that is, those decisions related to facts occurred as of 1 July 2015, when the Law came into force) up to March 2019, inclusive.³ In total, 49 judgments of the National Court (*Audiencia Nacional*) and the Supreme Court were examined, corresponding to 32 cases: 34 decisions from the Criminal Chamber of the National Court, 6 from the Appeals Chamber of the National Court, 2 from the Central Juvenile Court of the National Court and 7 from the Supreme Court (see Graph 2). For the time being, the Constitutional Court has not yet taken any decision on the offence of glorification as amended by virtue of Organic Law 2/2015.



It has been five years since the amendments took effect on 1 July 2015, making an assessment of their impact timely. In addition, it has been more than three years since the issuance of EU Directive 2017/541 on combatting terrorism⁴, which contains a provision on glorification of terrorism and requires the European Commission to issue an assessment of the Directive in 2021. This study will also be relevant for the European Commission's assessment report.

³ For example, of the total of 33 judgments on the enhancement of terrorism that were issued in 2016 by the Criminal Chamber of the National Court, only 6 referred to events that took place after the entry into force of Law 2/2015. Therefore, only these 6 have been analyzed in this study.

⁴ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

2. Introduction

Spain's recent history has been marked by a series of devastating terrorist attacks. *Euskadi Ta Askatasuna* (ETA), formed in 1959 under the Franco regime, did not announce the cessation of violence until 2010 and its complete dissolution did not occur until 2018. The first time Spain faced a new form of terrorism, to which authorities refer to as "jihadist"⁵, was on March 11, 2001. The last terrorist attack took place on August 17, 2017 in the tourist promenade of Las Ramblas in Barcelona. According to the Spanish government, the threat of further terrorist attacks remains real.⁶

Since 2015, Spain has seen a sharp rise in the number of prosecutions for the crime of "glorification or justification" of terrorism under Article 578 of the Spanish Criminal Code.⁷ A large number of twitter and Facebook users, rappers, poets, journalists and lawyers have been targeted under this provision, which was expanded in 2015 to encompass online "glorification or justification" of terrorism: "the dissemination of publicly available services or content via the communications media, internet or via electronic communications services or the use of information technology". This report assesses this trend, and the associated jurisprudence of Spanish courts, from a human rights perspective. It finds that an important number of Spanish court decisions are inconsistent with international human rights law governing the right to free expression. However, a few Spanish court decisions that do conform to human rights standards suggest avenues for reform.

International law recognises that there may be circumstances in which the right to freedom of expression may legitimately be restricted in order to protect national security. It permits an interference with the right to free expression if the

⁵ "Jihad" is an Arabic term that encompasses the general concept under Islam of an individual's internal and external struggles. It is sometimes misused to refer to unlawful acts of violence or terrorism. In referring to the authorities' use of "jihadi-type terrorism", Rights International Spain does not endorse this usage.

⁶ As of the date of publication of this report, the terrorist alert level of the Ministry of the Interior was 4 (high) on a scale of 5. See <http://www.interior.gob.es/prensa/nivel-alerta-antiterrorista>

⁷ The rise in popularity of social networks in the last decade has led to social media monitoring and surveillance by the State security forces, which monitor the daily activities of citizens in search of new forms of crimes. In 2013, the Technological Research Unit became an Independent Central Unit, consisting of two Central Brigades: the Computer Security and Technological Research brigades. In April 2014, the first "Spider" ("*Araña*") operation of the Civil Guard started -followed by three subsequent operations in November 2014, May 2015 and April 2015. With this operation, the Civil Guard sought to put an end to glorification of terrorism in social networks (especially, Facebook and Twitter) through the interception of messages published on these networks. See: http://www.interior.gob.es/prensa/noticias/-/asset_publisher/GHU8Ap6ztgsg/content/id/5847566 Another alarming aspect of police action in the internet is the introduction of the figure of the Undercover Computer Agent in the latest reform of the Criminal Procedure Law (*Ley de Enjuiciamiento Criminal*, Organic Law 13/2015, of October 5). This figure allows State security forces to create covert profiles in social networks to interact with individuals with certain characteristics, which may lead to situations of criminal provocation.

interference is (i) prescribed by law; (ii) meets a legitimate aim; and (iii) proportionate to the legitimate aim pursued, taking into account, inter alia, the content and context of the expression, the author's intention, the public interest of the matter discussed, and the nature and severity of the penalty imposed. Thus, international law recognises that governments may lawfully restrict incitement to violence. However, for a person's expression to amount to incitement to violence, there must be (i) **subjective intent** on the part of that person **to incite violence** through that expression; and (ii) an **objective danger** that the person's expression will cause violence—recent European Court of Human Rights jurisprudence requires this to be a “**clear and imminent danger**”.

The plain language of Article 578 of the Spanish Criminal Code, which was amended in 2015, does not conform these legal standards. This provision states, in relevant part, that “[t]he public glorification or justification of . . . [terrorist] offenses . . . or of those who have participated in the execution of the same, or committing acts that involve discredit, disregard or humiliation of the victims of terrorist offences or their relatives, will be punished with a prison sentence of one to three years and a fine of between twelve and twenty-four months”. It makes no mention of intent or causation of any danger of violence.

The decisions analysed in this report vary widely in the interpretation of the elements of the offence of glorification. This is not surprising given the overly broad and vague language and nature of Article 578. However, there are some decisions that hew closer to international legal standards (intent, clear and imminent danger) than others.⁸ We urge courts to conform to these standards.

⁸ For example, judgments n° 6/2018 of the Appeal Chamber of the National Court and 11/2018 of the Criminal Chamber include the concepts of intention and clear and imminent danger, in clear contrast to Supreme Court judgments 224/2010 and 523 / 2011, all of which are examined below.

3. Legal Framework

3.1 The Spanish Constitution

Freedom of expression includes the right (i) “to freedom of ideology, religion and worship of individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law” (article 16.1 of the Constitution) as well as the right (ii) “to freely express and disseminate thoughts, ideas and opinions in oral or written form or via any other means of reproduction; to literary, artistic, scientific and technical production and creation; to academic freedom [and] the freedom to freely communicate or receive truthful information via any means of dissemination” (article 20.1)⁹.

The Constitutional Court has recognized that “the unique institutional dimension of freedom of expression’ as a safeguard for the ‘creation and existence of a free and public opinion’”¹⁰, makes it a fundamental right in our democratic system and “one of the pillars of a free and democratic society”.¹¹ It is for this reason that this right has a “pre-eminent nature” because it is necessary “for the exercise of other rights inherent to the functioning of a democratic system”.¹²

According to the Constitutional Court, freedom of expression includes the right of criticism “even when this is in bad taste and can bother, disturb or upset those at whom it is directed, because this is a requirement for pluralism, tolerance and the spirit of openness, without which a democratic society cannot exist”; and that freedom of expression applies not just to the dissemination of ideas or opinions “that are received favourably or considered inoffensive or indifferent, but also those that oppose, clash with or disturb the State or any part of the population” (...) The value of pluralism and the need for the free exchange of ideas as part of the foundations of a representative democratic system rule out any activity by the public powers aimed at severely controlling, selecting or determining the mere public circulation of ideas or doctrines”.¹³

Finally, Article 10.2 of the Constitution establishes that “the rules on fundamental rights and freedoms recognised in the Constitution will be interpreted in accordance with the Universal Declaration of Human Rights and the international

⁹ Article 55 of the Constitution states “the rights recognised in articles ...20, sections 1, a) and d), and 5 [freedom of expression and information], ... may be suspended when a state of exception or siege is declared in the terms envisaged in the Constitution”.

¹⁰ Constitutional Court Judgment (CCJ) 35/2020, of 20 February (Point of Law 4, A), referring to CCJ’s 112/2016, Point of Law 2, I, CCJ 177/2015, of 22 July, Point of Law 2, CCJ 6/1981, of 16 March and 12/1982, of 31 March.

¹¹ Constitutional Court Judgments (CCJ) 6/1981, of 16 March, and 12/1982, of 31 March, Point of Law 3.

¹² CCJ 112/16, of 20 June Point of Law 2.

¹³ CCJ 112/16, of 20 June, Point of Law 2(i), referring CCJ 177/2015, of 22 July, Point of Law 2b).

treaties and agreements on the same issues ratified by Spain”. Moreover, Article 96.1 stipulates that: “validly concluded international treaties, once published officially in Spain, will form part of the internal legal system. Their provisions will only be derogated, amended or suspended in the manner envisaged in the treaties themselves or in accordance with general rules of international law”. Accordingly, international human rights treaties ratified by the Spanish state are part of domestic law in Spain.

3.2 The Criminal Code

3.2.1 Terrorism offences

The Spanish Criminal Code (CC) devotes section 2, in Chapter VII (Terrorist organisations and groups and terrorist offences) of Title XXII (public order offences) to regulating “terrorist offences”. In 2015, a definition of the offence of terrorism was introduced for the first time, inspired by Framework Decision 2002/475/JHA of the Council of the European Union, dated 13 June 2002, on combating terrorism, amended by Framework Decision 2008/919/JHA, of 28 November 2008.

The offence of terrorism is considered to comprise (article 573 of the Criminal Code) “the commission of any serious offence against the life or physical wellbeing, freedom, moral integrity, sexual freedom and indemnity, property, natural resources or the environment, public health, entailing a catastrophic risk, fire, forgery, against the Crown, involving an armed attack or the possession, trafficking and storage of weapons, ammunition or explosives, envisaged in this Code, and the hijacking of aircraft, ships or other means of collective or goods transport, when carried out for any of the following purposes: 1. Overthrow of the constitutional order, or preventing or seriously destabilising the functioning of political institutions or economic or social structures of the State, or obliging the public powers to act or refrain from doing so. 2. Seriously disturb public peace. 3. Seriously destabilise the functioning of an international organisation. 4. Provoke a state of terror in the population or any part of it.”¹⁴

Certain computer-related offences¹⁵ will be considered terrorist offences (section 2, article 573 CC) when the acts are committed with any of the purposes indicated, as well as (section 3), the rest of the offences described in articles 574 to 579 CC. Article 574 CC punishes the storage of weapons or ammunition, the

¹⁴ Organic Law 2/2015, of 30 March. Likewise, the first paragraph of section 1 was amended by article one.20 of the Criminal Code Act (*Ley Orgánica 1/2019, de 20 de febrero del Código Penal*), in order to transpose European Union Directives in the fields of finance and terrorism and in order to address issues of an international nature.

¹⁵ Those categorised in articles 197 bis and 197 ter and 264 to 264 quater.

holding or storage of explosive, inflammable, incendiary or toxic substances or devices, or their components, as well as the manufacture, trafficking, transport or supply of the same and the mere placement or use of such substances. Article 575 punishes military or combat indoctrination or training, or techniques for the development of chemical or biological weapons, the production or preparation of explosive, inflammable, incendiary or toxic substances or devices, or any specifically designed to facilitate the commission of an act of terrorism.¹⁶ Article 576 CC punishes anyone who gathers, acquires, possesses, uses, converts, transmits or performs any other activity with goods or securities of any kind with a view to them being used, or which could be used, in full or in part, to commit any of the terrorist offences. Article 577 CC punishes any act of collaboration with the activities or objectives of a terrorist organisation, group or element, or in order to commit terrorist offences.¹⁷ Articles 578 and 579 CC will be analysed in more detail in subsection 3.2.3, below.

3.2.2 Conspiracy, solicitation and provocation

The Criminal Code, in its general part, punishes conspiracy, solicitation and provocation to commit an offence, although **only in the cases specifically foreseen by the law**.¹⁸ Article 579 of the Criminal Code punishes conspiracy, solicitation and provocation of terrorist offences.¹⁹ Article 17 CC states that “conspiracy exists when two or more persons act in concert to execute an offence and decide to execute it” (section 1) and “solicitation exists when the person who has decided to commit an offence invites another person or persons to participate in it” (section 2).²⁰

According to article 18.1 CC, “**provocation** exists when **there is direct incitement** by means of printed material, radio broadcasts or any other similar effective

¹⁶ Article 575.2: A person will be considered to have committed this offence when, for that purpose, the person accesses one or more publicly-available online communication services or services with content accessible via the internet or an electronic communications service whose content is designed or is suitable for inciting people to join a terrorist organisation or group, or to collaborate with any of them or in their aims. Moreover, a person will be understood to have committed this offence when, for the same purpose, the person acquires or possesses documents that are designed or, due to their content, are suitable for inciting someone to join a terrorist organisation or group or to collaborate with any of them or with their aims.

¹⁷ Acts of collaboration include informing or surveillance of persons, assets or facilities, the construction, conditioning, assignment or use of stores or deposits, the concealment, harbouring or transfer of persons, the organisation of or attendance at training activities, providing technological services and any other equivalent form of cooperation or aid.

¹⁸ Articles 17.3 and 18.2 CC.

¹⁹ Article 579.3: “Any other acts of provocation, conspiracy and solicitation to commit the offences envisaged in this Chapter will also be punished with a sentence that is one or two degrees, respectively, less severe than that which corresponds to the acts envisaged in this Chapter”, following the reform implemented by Organic Law 2/2015, of 30 March, which amends LO 10/1995, of 23 November, on the Criminal Code, on terrorist offences.

²⁰ This last section was amended by virtue of Organic Law 2/2015, of 30 March, which amends LO 10/1995, of 23 November, on the Criminal Code, on terrorist offences. Prior to the reform, the solicitation required that the invitation be to execute the offence.

measure which facilitates publicity, or at a gathering of people, for the **perpetration of an offence**". Therefore, there must be (i) an incitement to commit an offence, (ii) the incitement must be direct, and it must be (iii) via means that facilitate publicity or at a gathering of people.

This provision also establishes that, for the purposes of the Criminal Code, **apology** is "the exhibition, at a gathering of people or via any other means of dissemination, **of ideas or doctrines that praise the crime or glorify the perpetrator**" and concludes that "apology **will only be an offence as a form of provocation** if, due to its nature and the circumstances, it constitutes a **direct incitement to commit an offence.**" As such, the characteristics of apology are (i) the exhibition of ideas or doctrines that praise an offence or glorify its perpetrator, (ii) made at a gathering of persons or by any other means of dissemination and (iii) constitute a direct incitement to commit an offence.

3.2.3. Articles 578 and 579 of the Criminal Code

A 2000 reform of the Criminal Code specifically introduced "the glorification or justification by any means of public expression or dissemination of the offences included in articles 571 to 577 of this Code or of those who participated in the execution of the same, or the performance of acts that involve discrediting, disregarding or humiliating the victims of the terrorist offences or their relatives."²¹

The legislator justified the introduction of this new type of offence on the grounds of the evolution of terrorism, which was seeking new ways to terrorise society. The introduction to the Law stated that "it is clearly not a question of prohibiting the praise or defence of ideas or doctrines, however discordant or questioning they are of the constitutional framework, far less of prohibiting the expression of subjective opinions on historical or current events. It is rather as simple as prosecuting the praise of terrorist methods, radically unlawful from any constitutional perspective, or the perpetrators of these offences, as well as the particularly perverse conduct

²¹ Organic Law 7/2000, of 22 December, which amends Organic Law 10/1995, of 23 November, CC, and Organic Law 5/2000, of 12 January, which regulates the Criminal Liability of Minors, in relation to terrorist offences. According to the Supreme Court, "two clearly different criminal offences exist in the same article: a) the glorification or justification of terrorism or its perpetrators and b) acts of disregard, discredit or humiliation of the victims of terrorist offences. Perhaps, in view of the different criminal actions and elements comprising them, it would have been advisable to separate them into different articles" (Supreme Court Judgment (SCJ) 224/2010, of 3 March, Third Point of Law). As for the concept of disregard for or humiliation of the victims "it has its own profiles, defined and distinct" from glorification, specifically, the following is punishable: "acts that involve «discredit» (that is, reduction or diminution of the reputation of persons or of the value and regard for things), «disregard» (equivalent to scant regard, little esteem, despise or disdain) or «humiliation» (injury to the self-regard or dignity of someone, undergo a situation in which the dignity of the person is undermined) of the victims of terrorist offences or their families, formulas designed to prosecute particularly perverse conduct by those who slander or humiliate the victims, while at the same time increasing the horror of their relatives" SCJ 656/2007, of 17 July, Point of Law 2, SCJ 623/2016, of 13 July, Point of Law 4).

of those who slander or humiliate the victims while at the same time increasing the horror of their relatives.”²²

In its report to the Anti-terrorism Committee in 2007, the Government explained that, “with the aim of penalising conduct constituting apology of terrorism **independently and with a broader scope than apology** regulated in article 18 CC, Organic Law 7/2000 of 22 December reformed article 578 CC introducing a new type of offence (praising terrorism) which regulates **conduct which is separate from the terrorist phenomenon that cause a major public rebuke**. (...) The conduct regulated in article 578 (glorification of terrorism) **is not a terrorist offence**. Glorification, when prosecuted criminally, is an offence (of opinion) that has to do with another different offence, or offence of reference: the terrorist offences (regulated in articles 571-577), with which it cannot be confused. When the conduct of article 578 CC is liable to fall under article 579 as a form of provocation, this rule will be applied by preference by virtue of the principle of speciality.”²³

Even at that stage, for legal scholars, the creation of a specific offence of apology, which did not expressly require a direct incitement to offend, represented a step backward.²⁴ Meanwhile, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms on the fight against terrorism, after visiting Spain on an official mission in 2008 declared that “the vague term of “glorification” must not be used to restrict expression”²⁵ and recommended that “[t]he current crime of glorification in article 578 be amended to be applied exclusively to acts intended to incite the commission of a terrorist crime and carrying the risk that such acts are subsequently committed. In this regard, the Special Rapporteur takes the view that other statements falling under the broader notion of “apology” should not be fought with the tool of criminal law.”²⁶

The elements that define the offence of glorification of terrorism, according to Supreme Court case law, are:

“1. The existence of actions or words that glorify or justify. Glorifying is equivalent to extolling or praising, lauding the qualities or merits of someone or something. Justifying, in this context, means making something that is nothing more than criminal conduct appear as lawful and legitimate

²² The purpose of the existence of the offence of glorification according to the Supreme Court is to “combat actions aimed at the public promotion of those who cause a major violation of the system of freedoms and peace in the community with their criminal acts, ruling out any kind of justification and support for what is nothing more than actual attacks against to the very heart of the democratic system itself” (SCJ 523/2011, 30 May, Point of Law 3).

²³ See Report S/2007/164.

²⁴ Carmen Lamarca Pérez, *Apología: Un residuo de incriminación de la disidencia*, La Ley Penal: revista de derecho penal, procesal y penitenciario, no. 28, 2006, pages 41-51.

²⁵ Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin : addendum : mission to Spain, A/HRC/10/3/Add.2 16 December 2008, paragraph 11.

²⁶ Paragraph 53.

actions. 2. The object of this extolling or justification can be either of the following two: a) any of the types of conduct defined as terrorist offences in articles 571 to 577; or b) any of the persons who have participated in the execution of such behaviour. It is worth noting here that it is not necessary to identify one or more of such persons. It is also possible extoll the virtues of a collective of perpetrators or joint participants in this kind of criminal acts. 3. This addition of glorifying or justifying must be in the form of any medium of public expression or dissemination, such as a newspaper or a well-attended public act. The characteristics of the offence are constituting active behaviour (...) being an offence of activity alone and not having a material outcome, and of essentially comprising wilful misconduct or intent and that constitutes an autonomous form of apology characterised by its generic nature and without involving direct or indirect provocation for the commission of an offence".²⁷

2010 saw the reform, among others, of article 579 CC in order to comply with the legislative obligations derived from Framework Decision 2008/919/JHA on combatting terrorism. The Preamble stated "the first section of article 579 [contains] the conducts of public distribution or dissemination, by any medium, of messages or slogans that, without necessarily constituting manifest criminal decisions (that is, provocation, conspiracy or solicitation in relation to the execution of a specific criminal action), have been shown to be measures that are undoubtedly liable to generate the breeding ground in which, at a particular point in time, the executive decision to offend comes to fruition, although, as required by the Framework Decision and the Council of Europe Convention on terrorism, this conduct must **generate or increase a certain danger of the commission of a terrorist offence.**"²⁸

In 2015 the chapter of the Criminal Code on terrorism was amended again, including articles 578 and 579. The reform deepened the vagueness and inaccuracy of these provisions, disproportionately and unjustifiably increasing the punishments.²⁹ The legislator's justification for this modification was the new "jihadi-type" international terrorism, which included new methods of "recruitment, training or indoctrination in hatred"³⁰ to use them against those who do not think like them or share their ideas (the enemy). According to the Preamble, "articles 578 and 579 punish the public glorification or justification of terrorism, acts of discredit, disregard or humiliation of the victims, as well as the dissemination of messages or slogans designed **to incite others to commit terrorist offences.** The categorisation of this conduct places particular emphasis on

²⁷ SCJs nos. 149/2007, of 26 February, 585/2007, of 26 June, 539/2008, of 23 September, 224/2010, of 3 March, Point of Law 3, 523/2011, of 30 May, 481/2014, of 3 June, 481//2014, of 3 June, 843/2014, of 4 December.

²⁸ Organic Law 5/2010, of 22 June, which amends Organic Law 10/1995, of 23 November, on the Criminal Code.

²⁹ Rights International Spain, Specific observations for the Senate on the reform of the Criminal Code in relation to terrorism, February 2015

<http://www.rightsinternationalspain.org/uploads/publicacion/4958abf734404761f1ca43aca613334f1001ee5e.pdf>

³⁰ Organic Law 2/2015, of 30 March, which amends Organic Law 10/1995, of 23 November, CC, on terrorist offences, Preamble.

scenarios in which acts are committed **by means of services or content accessible to the public via the communications media, internet, or electronic communications services or the use of information technologies**". This latter legislative amendment was immediately criticised by legal scholars as violating the fundamental right to freedom of ideology and expression.³¹

Finally, it is worth highlighting that although Organic Law 2/2015 referred expressly to Resolution 2178 (2014) of the Security Council to justify the changes, it omitted an important part of the same Resolution, which was not included in the text of the reform:

"Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and that together with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort".³² This clause has not been included in the Criminal Code.

³¹ Directors Alberto Alonso Rimo, Antonio Fernández Hernández, María Luisa Cuerda Arnau, *"Terrorismo, sistema penal y derechos fundamentales"*, Editorial Tirant Lo Blanch, 2018. This group of legal scholars considers that the Spanish legislator has gone further than what was required by Resolution 2178/2014 of 24 September and EU Directive 2017/541 of the European Parliament and of the Council of 15 March 2017. In February 2015, several Special Rapporteurs from the United Nations tackled the Spanish state, expressing their rejection of the reform with regard to the restrictions on the freedoms of expression and assembly. They stated that the provisions on the criminalisation of the acts of "incitement or glorification" or "justification of terrorism" are excessively broad and ambiguous" and "could result in disproportionate restrictions on the exercise of freedom of expression". See <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597&LangID=S>

³² Resolution 2178 (2014), Adopted by the Security Council at its 7272nd meeting, on 24 September 2014 S/RES/2178 (2014).

4. The EU Directive on combatting terrorism and its transposition into the Spanish domestic legal system

On 17 March 2017, Directive 2017/541 on combatting terrorism was approved. The period of drafting and adoption of the Directive was very fast, as a result of the terrorist attacks in France in 2015. According to the Whereas of the Directive, “Taking account of the evolution of terrorist threats to and legal obligations on the Union and Member States” a number of Framework Decisions needed to be amended and replaced so that “the definition of terrorist offences, of offences related to a terrorist group and of offences related to terrorist activities should be further approximated in all Member States, so that it covers conduct related to, in particular, foreign terrorist fighters and terrorist financing more comprehensively. These forms of conduct should also be punishable if committed through the internet, including social media”.³³

The Directive requires Members States to “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**”.³⁴

Therefore, in accordance with the Directive, there are two requirements for the conduct to be punishable: (i) the **intention to incite, directly or indirectly, the commission of** a terrorist offence and (ii) the **danger that such offence may be committed**. Whereas 10 clarifies that “Such conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed. The significance and the credible nature of the danger should be also considered when applying the provision on public provocation (...)”.

The term for transposition of the Directive into the legal systems of the Member States expired on 18 September 2018. In Spain, Organic Law 1/2019, of 20 February, amending Organic Law 10/1985, of 23 November, on the Criminal Code,

³³ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

³⁴ Article 5, Public provocation to commit a terrorist offence.

was approved, to transpose European Union Directives on financial and terrorist matters and address issues of an international nature. The Preamble recognises that, although Organic Law 2/2015 amending the Criminal Code “stole quite a march on the content of the directive”, there were however some diverging points that required “minor adjustments”.³⁵ These did not include either article 578 or article 579 CC which were not affected by this most recent reform.

At this point, it is interesting to cite Supreme Court Judgment (SCJ) 52/2018, of 31 January 2018, Point of Law 1 of which refers to the appeal from the Public Prosecutor's Office that disputed the fact that the acquittal was based “on the new anti-terrorism Directive, the final wording of which is pending publication in the Official Journal of the European Union, the judgment indicating that such legislation represents a legislative amendment that renders the content of the criminal offence of article 578 CC ineffective. In defence of its position, [the Public Prosecutor's office] (...) argued that article 5 of the Directive of the European Parliament and of the Council on combatting terrorism shortly to be published in the Official Journal of the European Union, refers to article 579 and not 578”. The Supreme Court, however, did not accept this argument, dismissing the appeal based on the following reasons: pursuant to CCJ 112/2016 two additional elements are required for interfering with freedom of expression, punishing an offence of glorification, to be constitutionally acceptable; on the one hand, the intention to incite the commission of an offence of terrorism and, on the other, the existence of a risk, that is, the danger of the the commission of terrorist offences is objectively and effectively increased.³⁶

³⁵ These diverging points refer to article 15.3 of the Directive (article 572 CC), article 12 section c) of the Directive (article 573 CC) and minor changes to articles 575, section 3, 576, section 5 and new article 580 bis.

³⁶ “In the case at hand, given the specific means of expression, context of the author, date of issue, references to events generally prior to the introduction of democracy and the system of freedoms, that aptitude for risk of the conduct in question is not contained in the narration of the facts as found; neither is there any sign of incitement of violence (...). The best demonstration of the absence of any risk is that the tweets were only detected when the police investigators searched social media (...). Therefore, they would not have had any impact on public opinion” Point of Law 5.

5. The limits to the freedom of expression according to constitutional case law

The right to freedom of expression is not an absolute right, but the limits to the same must be interpreted restrictively. According to constitutional case law, “the limits to which the right to freedom of expression is subject must always be **weighed-up with exquisite thoroughness**, in view of the **preferential position** held by freedom of expression, when this freedom enters into **conflict with other fundamental rights** or interests of major social and political importance”.³⁷ That is, there must be **proportionality** in any restriction of freedom of expression. Otherwise, a deterrent effect may be generated that would undermine and pervert the right itself. Therefore, the judge, when applying the criminal rule, cannot “react disproportionately to the act of expression, even in the event that it does not constitute a legitimate expression of the fundamental right in question and even when it is lawfully envisaged as an offence in the criminal precept”.³⁸

The **constitutional control** that must be applied in relation to **proportionality** implies, firstly, that the criminal court judge must **first assess “the different circumstances of the case”** and, secondly, the **absence** of this primary assessment **constitutes a violation of fundamental rights in itself** (and the same applies when the assessment is manifestly ill-founded).³⁹

Article 20.4 of the Constitution establishes the limits of freedom of expression “at respect for the rights recognised in this Title, the precepts of the laws that implement it and, in particular, at the right to honour, privacy, one's own image and the protection of youth and infancy”.⁴⁰ Therefore, first and foremost, abusive, slanderous or insulting expressions are not protected.⁴¹

Nor does freedom of expression protect racist statements and those that **encourage violence, hatred or intolerance**. The constitutional task to be carried out is that of “ascertaining whether the events that occurred are the expression of a legitimate political opinion, that could stimulate debate designed to transform the political system or whether, on the other hand, their aim is to trigger an emotional reflex of hostility, inciting or promoting hatred and intolerance, in a manner that is

³⁷ CCJ 112/16, of 20 June, Point of Law 2(iii), referring to CCJ 177/2015, of 22 July, Point of Law 2d), *Capellera and Stern Taulets*.

³⁸ CCJ 112/16, of 20 June, Point of Law 2(iii), referring to CCJ 110/2000, of 5 May, Point of Law 5).

³⁹ CCJ 35/2020, of 20 February (Point of Law 4) and CCJ 112/16, of 20 June, Point of Law 2, referring to CCJ 177/2015, of 22 July, Point of Law 2d.

⁴⁰ Moreover, article 16.1 includes the limit of “the maintenance of the public order protected by law”.

⁴¹ CCJ 235/2007, of 7 November, Point of Law 5: “the dissemination of abusive or offensive phrases or expressions, unrelated to the ideas or opinions the person is seeking to set out and, therefore, unnecessary for this purpose, fall outside the scope of protection of said right”.

incompatible with the system of democratic values.”⁴² To that end, it is important to consider “not just the literal nature of the words expressed, but the meaning or intention with which they were used”,⁴³ as well as the occasion, scenario and context in which they were pronounced “and, ultimately, all the existing circumstances” in which it takes place.⁴⁴

The Constitutional Court affirms that “all forms of expression that propagate, incite, promote or justify **hatred based on intolerance**” do not qualify as the lawful exercise of freedom of expression⁴⁵, and neither do “messages that include **threats or intimidation** of citizens or voters, which, as is evident, do not respect the freedom of others or contribute to the formation of public opinion that can be described as free”⁴⁶, nor statements that “seek to **promote rejection and exclusion** from political life, and even the **physical elimination, of those who do not share the ideas** of the intolerant elements”⁴⁷. In this regard, “the use of symbols, messages or elements that represent or are identified with political, social or cultural exclusion, cease to be a simple ideological manifestation and become an act that cooperates with exclusive intolerance”.⁴⁸

As it was not until 2016 that the Constitutional Court issued a decision on the offence of glorification of terrorism and its effect on freedom of expression,⁴⁹ the court itself refers to its own doctrine on the criminal offences of denial and dissemination of ideas that justify genocide (article 607.2 CC). Thus, it reminds us that in judgment 235/2007 it asserted that “the particular danger with such hateful crimes that put the very essence of our society at risk, such as genocide, allows the criminal legislator to punish the public justification of such offences, on an exceptional basis, without violating the Constitution, **provided that such justification acts as a direct incitement to the commission of the same; that is, criminalising** (and this is what article 607.2 CC must be understood as doing) **conduct that even if only indirectly, represents a provocation of genocide**”.⁵⁰ The

⁴² CCJ 112/16, of 20 June, Point of Law 2(ii), referring to CCJ 177/2015, of 22 July, Point of Law 2c.

⁴³ SCJ 31/2011, of 2 February, Point of Law 1.3, also SCJ 812/2011, of 21 July.

⁴⁴ SCJ 224/2010, of 3 march, Sole Point of Law, SCJ 843/2014, of 25 November and SCJ 585/2007 of 20 June.

⁴⁵ CCJ 112/16, of 20 June, Point of Law 2(ii), referring to CCJ 177/2015, of 22 July, Point of Law 4.

⁴⁶ CCJ 112/16, of 20 June, Point of Law 2(ii), referring to CCJ 136/1999, of 22 July, Point of Law 15).

⁴⁷ CCJ 35/2020, of 20 February (Point of Law 4) and CCJ 112/16, of 20 June, Point of Law 2(ii), referring to CCJ 136/1999, of 20 July, Point of Law 4.

⁴⁸ *Idem*.

⁴⁹ CCJ 112/16, of 20 June. Proven facts: the accused person acted as main speaker at an act commemorating and praising an ETA leader, murdered 30 years before. The act was publicised by means of posters put up in the streets. The act was held in a marquee with a stage featuring a large photograph of the ETA member and there was a screen projecting photographs of ETA members. The accused person was convicted as the perpetrator of the offence of glorification of terrorism in articles 578 and 579.2 CP. The Constitutional Court dismissed his appeal.

⁵⁰ CCJ 112/16, of 20 June, Point of Law 3, referring to CCJ 235/2007, of 7 November, Point of Law 9. In view of the absence of the element of incitement in the description of the offence, a requirement of interpretation is introduced meaning that this element of incitement must exist in the offence. Also CCJ 35/2020, of 20 February, Strawberry case, Point of Law 4.

Constitutional Court finally concluded that the criminal punishment for the conduct of glorification of terrorism set out in article 578 CC “represents a legitimate interference in the freedom of expression of the perpetrators as it can be understood as a manifestation of hate speech in that it **encourages or fosters, even if only indirectly, a situation of risk for persons or third-party rights or for the system of freedoms itself**”.⁵¹

Summing up, as the Constitutional Court sees it, it is not sufficient for the action of glorification or justification to have been carried out. Two additional elements are required in order for such conduct to be punishable: (i) **the intention to incite**, even if only indirectly, the commission of a terrorist offence, and (ii) the existence of a **situation of risk** for persons or third-party rights or for the system of freedoms itself.

⁵¹ CCJ 35/2020, of 20 February, Point of Law 4 and CCJ 112/16, of 20 June, Point of Law 4.

6. International human rights standards on the glorification of terrorism

Article 10 of the European Convention on Human Rights, to which Spain is party, guarantees the right to freedom of expression.⁵² Article 19 of the International Convention on Civil and Political Rights (ICCPR), signed and ratified by Spain, similarly protects the right to free expression.⁵³

The European Court of Human Rights has repeatedly held that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.”⁵⁴ Indeed, the Court has found that Article 10 applies “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁵⁵

The Human Rights Committee, an expert body that monitors states parties’ implementation of the ICCPR, has similarly observed that freedom of expression and opinion “constitute the foundation stone for every free and democratic society” and that article 19 of the ICCPR “embraces even expression that may be regarded as deeply offensive”.⁵⁶

The ICCPR and the European Convention both recognise that freedom of expression is not an absolute right and that **restrictions to this right can be justified** under certain exceptions.⁵⁷ Thus, Article 19(3) of the ICCPR provides that the right to freedom of expression “may 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 health or morals”.⁵⁸ The Human Rights Committee

⁵² Article 10 provides that “[e]veryone has the right to freedom of expression,” which may be subject to restrictions that “are prescribed by law and 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.”

⁵³ Art. 19 of the ICCPR provides that “[e]veryone shall have the right to freedom of expression” which may be subject to 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 health or morals.”

⁵⁴ *Lingens v. Austria*, ECtHR, 8 July 1986, para. 41.

⁵⁵ *Perinçek v. Switzerland*, ECtHR (GC), 15 October 2015, para. 196; *Handyside v. The United Kingdom*, ECtHR, 7 December 1976, para. 49.

⁵⁶ Human Rights Committee, General Comment No. 34, 12 September 2011, UN Doc. CCPR/C/GC/34, paras. 2, 11, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁵⁷ European Convention on Human Rights, art. 10 (2); ICCPR, art. 19 (3).

⁵⁸ Article 20(2) of the ICCPR also provides that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. The Human Rights Committee has held that “Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a

has emphasised that “when a State party imposes restrictions on the exercise of freedom of expression, these **may not put in jeopardy the right itself**”.⁵⁹ The Committee has further observed that “the restrictions must be ‘provided by law’; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must **conform to the strict tests of necessity and proportionality**”.⁶⁰

The European Court has similarly emphasised that Article 10’s exceptions must be “construed strictly, and the need for any restrictions must be established convincingly.”⁶¹ Thus, Article 10 permits an interference with the right to free expression if the interference (i) is prescribed by law, i.e., the interference has a legal basis in a domestic law that is **sufficiently precise** to enable individuals subject to the law to **regulate their conduct and to foresee the consequences** of their actions⁶²; (ii) meets a **legitimate aim** identified in the provision⁶³; *and* (iii) is **necessary** in a democratic society, *i.e.*, the restriction must meet a “pressing social need”, “it must be **proportionate** to the legitimate aim pursued” and “the reasons adduced by the national authorities to justify it must be “relevant and sufficient”.⁶⁴

In order to determine whether the restriction is proportionate, the European Court “look[s] at the interference **in light of the case as a whole**, including the **content** of the impugned **statements** and the **context** in which they were made.”⁶⁵ National courts are required to assess the impugned remarks within their context, “the author’s **intention**” and the “**public interest** of the matter discussed and other elements”.⁶⁶ In addition, the Court has consistently held that the “**nature and severity of the penalty** imposed are also factors to be taken into account when assessing the **proportionality** of the interference”.⁶⁷ The Court has noted that “a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal”.⁶⁸ It has found the “**chilling effect**” of “the very

limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.” Human Rights Committee, General Comment No. 34, 12 September 2011, UN Doc. CCPR/C/GC/34, para. 50 (citing HRC Communication No. 736/1997, *Ross v. Canada*, Views adopted on 18 October 2000).

⁵⁹ Human Rights Committee, General Comment No. 34, 12 September 2011, UN Doc. CCPR/C/GC/34, para. 21.

⁶⁰ Human Rights Committee, General Comment No. 34, 12 September 2011, UN Doc. CCPR/C/GC/34, para. 22.

⁶¹ *Perinçek v. Switzerland*, ECtHR (GC), 15 October 2015, para. 196.

⁶² *The Sunday Times v. the United Kingdom*, ECtHR, 26 April 1979, para. 49; *Rotaru v. Romania*, ECtHR, 4 May 2000, para. 55; *Petra v. Romania*, ECtHR, 23 September 1998, paras. 37-38.

⁶³ These aims include national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. European Convention on Human Rights, art. 10 (2).

⁶⁴ *Perinçek v. Switzerland*, ECtHR (GC), 15 October 2015, para. 196; *Handyside v. The United Kingdom*, ECtHR, 7 December 1976, paras. 48-49.

⁶⁵ *Sürek and Özdemir v. Turkey*, (Applications nos. 23927/94 and 24277/94), ECtHR, 8 July 1999, para. 57.

⁶⁶ *Tagiyev and Huseynov v. Azerbaijan*, ECtHR, 5 December 2019, para. 48.

⁶⁷ *Ceylan v. Turkey*, ECtHR, 8 July 1999, para. 37.

⁶⁸ *Tagiyev and Huseynov v. Azerbaijan*, ECtHR, 5 December 2019, para. 49.

fact” of a criminal conviction to be **relevant for assessing the proportionality** of that conviction.⁶⁹

It is well-established that “there is little scope under Article 10 § 2 of the Convention for restrictions on political expression or on debate on questions of public interest.”⁷⁰ Indeed, “[i]t is the Court’s consistent approach to **require very strong reasons for justifying restrictions** on such debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for freedom of expression in general in the State concerned.”⁷¹ The Court has also held that the government⁷² and civil servants acting in an official capacity⁷³ are subject to wider limits of acceptable criticism than ordinary citizens. It has found that “[s]ecurity forces of the State . . . should display a particularly high degree of tolerance to offensive speech unless such inflammatory speech is likely to **provoke imminent unlawful actions** in respect of their personnel and to **expose them to a real risk of physical violence**”.⁷⁴

The Council of Europe’s Human Rights Commissioner has observed that “the European Court of Human Rights has clearly stressed in its case-law, that views expressed which cannot be read as an incitement to violence or be construed as liable to incite to violence should be covered by freedom of expression”.⁷⁵ Thus, in *Terentyev v. Russia*, a unanimous Court held that a suspended sentence of one year’s imprisonment on a blogger--for referring to the police in “vulgar, derogatory and vituperative terms,” and expressing a wish to see them burn by fire in ovens “like [those] at Auschwitz”—constituted a violation of article 10 because **these expressions did not pose a “clear and imminent danger”** for the police.⁷⁶ The Court noted that the domestic courts had provided no reason for concluding that the applicant’s offence was particularly “blatant and dangerous for national security.”

⁶⁹ *Dmitriyevskiy v. Russia*, ECtHR, 3 October 2017, para. 117.

⁷⁰ *Perinçek v. Switzerland*, ECtHR (GC), 15 October 2015, para. 197.

⁷¹ *Terentyev v. Russia*, ECtHR, 28 August 2018, paras. 62, 70.

⁷² *Stomakhin v Russia*, ECtHR, 9 May 2018, para. 89. The Court found that some articles had gone beyond the bounds of acceptable criticism and had amounted to calls for violence and the justification of terrorism. However, others had been within acceptable limits of criticism. The Court concluded that, overall, there had not been a pressing social need to interfere with freedom of expression and that by penalizing the applicant for some of the statements and the harshness of the penalty his rights had been violated.

⁷³ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 75, 77.

⁷⁴ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 75, 77.

⁷⁵ Dunja Mijatović, Misuse of anti-terror legislation threatens freedom of expression, Human Rights Comment, 12 April 2018, <http://go.coe.int/ryaf3> (citing *Association Ekin v. France*, ECtHR, 17 July 2001, and *Belek and Velioglu v. Turkey*, ECtHR, 6 October 2015). **The Court’s jurisprudence requiring a clear and imminent danger” showing arguably supersedes that of *Leroy v. France***, ECtHR, 2 October 2008, in which the Court held that France did not violate the article 10 rights by convicting a Basque cartoonist and a newspaper for publishing on 13 September 2001 a cartoon of the World Trade Center attack with a caption which parodied the advertising slogan of a famous brand: “We have all dreamt of it... Hamas did it”. The Court’s reasoning relied, *inter alia*, on the **proximity of the publication date** to the date of World Trade Center **attack**, the **likely impact** of the cartoon in the politically sensitive Basque region, and the **modest nature** of the fine (€1500) imposed on the cartoonist.

⁷⁶ *Terentyev v. Russia*, ECtHR, 28 August 2018, paras. 67, 84 (emphasis added).

⁷⁷ It found that the domestic courts “had limited their findings to the form and tenor of the speech” and “**made no attempt to assess the potential of the statements at hand to provoke** any harmful consequences.”⁷⁸ Finding that the domestic courts had “failed to take account of all facts and relevant factors” the Court held that the reasons could not “be regarded as ‘relevant and sufficient’ to justify the interference with the applicant’s freedom of expression.”⁷⁹ It concluded that the applicant’s criminal conviction was “not necessary in a democratic society” because it did not meet a “pressing social need” and was “disproportionate to the legitimate aim invoked.”⁸⁰ The Court observed that “it is **vitaly important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope** of relevant offences, and that those provisions be **strictly construed** in order to avoid a situation where the State’s discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement”.⁸¹

Similarly, in *Gul and Others v. Turkey*, the Court found that Turkey’s conviction of applicants for shouting slogans during lawful demonstrations in commemoration of the Sivas massacre was “not necessary in a democratic society” and therefore violated article 10 of the Convention. The Court reasoned that the applicants “did not advocate violence, injury or harm to any person” and there was no indication in the domestic court decision or the Turkish government’s observations that “there was *a clear and imminent danger* which required an interference such as the lengthy criminal prosecution faced by the applicants”.⁸² The Court also found that the applicants’ lengthy criminal proceedings and initial sentences of three years and nine months were disproportionate.⁸³ In *Kılıç and Eren v. Turkey*, the Court similarly found that Turkey had violated article 10 in criminally convicting the applicants for shouting slogans praising an imprisoned PKK leader because the slogans, which occurred during “a lawful and peaceful gathering”, “did not advocate violence, injury or harm to any person” and there was no indication of a “clear and imminent danger which required the interference faced by the applicants”.⁸⁴

⁷⁷ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 82.

⁷⁸ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 82.

⁷⁹ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 82.

⁸⁰ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 86.

⁸¹ *Terentyev v. Russia*, ECtHR, 28 August 2018, para. 85. Likewise, in *Özer v. Turkey* (ECtHR, 11 February 2020), the Court found that the Turkish authorities had **failed to conduct an appropriate analysis having regard to all the criteria set out** by the Court in freedom of expression cases. In particular, the Court noted that the **domestic courts had not taken account of all the principles established in its case-law, given that their assessment of the facts** had not answered how -having regard to the content, context and capacity to lead to harmful consequences - the articles **could be considered as comprising incitement to the use of violence**.

⁸² *Gul and Others v. Turkey*, ECtHR, 8 June 2010, para. 42.

⁸³ *Gul and Others v. Turkey*, ECtHR, 8 June 2010, para. 43.

⁸⁴ *Kılıç and Eren v. Turkey*, ECtHR, 29 November 2011, paras. 28- 29. The Court found an article 10 violation even though the Turkish government argued that the interference had been proportionate to its aims, as the applicants had received minor fines and the second applicant’s sentence had subsequently been suspended for five years. *Ibid.* at para. 20.

The Human Rights Committee has similarly observed that “offences as ‘encouragement of terrorism’ and ‘extremist activity’ as well as offences of ‘praising’, ‘glorifying’, or ‘justifying’ terrorism, should be **clearly defined** to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression”.⁸⁵ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has added:

“In its resolution 7/36, the Human Rights Council stressed the need to ensure that **invocation of national security**, including counter-terrorism, is **not used unjustifiably or arbitrarily** to restrict the right to freedom of opinion and expression. The potential for adverse impact of such measures is exacerbated when applied to online-based forms of expression.

While incitement to terrorism is prohibited under international law,⁸⁶ many laws criminalize, often with a lack of precision, acts that do not amount to incitement **because they lack the element of intent and/or of danger that the act will lead to the actual commission of violence**. These include the glorification, justification, advocacy, praising or encouragement of terrorism, and acts relating to “propaganda” for terrorism. The element common to these offences is that liability is based on the content of the speech, rather than the speaker’s intention or the actual impact of the speech [T]he threshold for these inchoate crimes requires the reasonable probability that the expression in question would succeed in inciting a terrorist act, thus establishing a degree of causal link or actual risk of the proscribed result occurring.”⁸⁷

Other Council of Europe legal provisions similarly confirm that incitement to violence justifies a restriction on free expression, provided that **intent and causation can be established**.⁸⁸ Thus, Article 5 of the Council of Europe Convention on the Prevention of Terrorism prohibits the crime of “public provocation of terrorism”, which “means the distribution, or otherwise making available, of a message to the public, with the *intent* to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, *causes* a danger that one or more such offences may be committed.”⁸⁹ (Emphasis added).

⁸⁵ *Ibid.*, para. 46.

⁸⁶ Security Council resolution 1624 (2005).

⁸⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, 1 March 2019, A/HRC/40/52. (Emphasis added).

⁸⁸ *Sürek v. Turkey* (No. 3), (Application no. 24735/94), ECtHR (GC), 8 July 1999, para. 40.

⁸⁹ CETS no. 196, adopted on 16 May 2005, entered into force 1 June 2007, art. 5, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016808c3f55>.

The former U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has observed that the three elements of the offence under Article 5 are properly confined to (i) an act of communication; (ii) a subjective intention on the part of the person to incite terrorism; and (iii) an additional objective danger that the person's conduct will incite terrorism.⁹⁰ The former UN Special Rapporteur added that the "latter objective requirement separates the incitement to terrorism from more vague notions such as 'glorification' of terrorism."⁹¹

UN special rapporteurs have defined "terrorism" as an action or attempted action where: (1) The action: (a) Constituted the intentional taking of hostages; or (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and (2) The action is done or attempted with the intention of: (a) Provoking a state of terror in the general public or a segment of it; or (b) Compelling a Government or international organization to do or abstain from doing something; and (3) The action corresponds to: (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) All elements of a serious crime defined by national law".⁹² U.N. Security Council resolution 1566 (2004) has endorsed a similar definition of terrorism⁹³ as has the UN Special Tribunal for Lebanon in finding that "a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged".⁹⁴

⁹⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, U.N. Doc. No A/HRC/4/26/Add.3, p. 11 (14 December 2006), <https://www.ohchr.org/EN/HRBodies/SP/Pages/AnnualreportsHRC4th.aspx>.

⁹¹ *Ibid.*

⁹² Report of UN Special Rapporteur Martin Scheinin to the UN Human Rights Council, 22 Dec. 2010, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement>; UN Special Rapporteur Ben Emmerson, International Seminar on Terrorism and human rights standards, 15 Nov. 2011, <http://acnudh.org/wp-content/uploads/2011/11/Final-statement-Chile-seminar-15-November-Ben-Emmerson.pdf>.

⁹³ Security Council resolution 1566 (2004) on Threats to international peace and security caused by terrorist acts, para 3. <https://www.un.org/ruleoflaw/files/n0454282.pdf> (equating "terrorism" with criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act).

⁹⁴ The Appeals Chamber, focused on international terrorism, declared that this customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element. Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I, 16 Feb. 2011, paras 85, 90, <https://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/534-f0936>. Scholars have, however, criticized the Tribunal's reasoning. See Guenael Mettraux, *The United Nations Special Tribunal for Lebanon*, in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2014).

The Joint Declaration on Freedom of Expression and Responses to Conflict Situations similarly urges States to “refrain from applying restrictions relating to ‘terrorism’ in an unduly broad manner”; to limit “[c]riminal responsibility for expression relating to terrorism . . . to those who incite others to terrorism” and not use “vague concepts such as ‘glorifying’, ‘justifying’ or ‘encouraging’ terrorism”.⁹⁵ A 2016 Communique from the OSCE Representative on Freedom of the Media urges OSCE States to “[o]nly restrict content that is considered a threat to national security if it can be demonstrated that it is intended to incite imminent violence, likely to **incite such violence and there is a direct and immediate connection between the expression and the likelihood of occurrence of such violence**”.⁹⁶ (emphasis added)

The Council of Europe’s Human Rights Commissioner has observed that Article 578 of the Spanish Criminal Code is an example of problematic counterterrorism legislation that uses terms that are “vague or unduly broad and fail to clearly define notions such as glorification or propaganda”.⁹⁷ The Commissioner has noted that when this provision was broadened in 2015, with a view to increasing sanctions for online conduct, five UN experts had raised concerns that these amendments to the criminal code “could criminalise behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression, amongst other limitations”, noting that the definition of terrorist offenses were too broad and vague.⁹⁸

In conclusion, international law recognises that there may be circumstances in which the right to freedom of expression may legitimately be restricted in order to protect national security. It permits an interference with the right to free expression if the interference is (i) prescribed by law; (ii) meets a legitimate aim; and (iii) is proportionate to the legitimate aim pursued, taking into account, inter alia, the content and context of the expression, the author’s intention, the public interest of the matter discussed, and the nature and severity of the penalty imposed. Thus, international law recognises that governments may lawfully restrict incitement to violence. However, for a **person’s expression to amount to**

⁹⁵ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and Responses to Conflict Situations, 4 May 2015, <https://www.osce.org/fom/154846?download=true>.

⁹⁶ Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism, Communiqué No. 6/2016, 1 September 2016, <https://www.osce.org/fom/261951?download=true>.

⁹⁷ Dunja Mijatović, Misuse of anti-terror legislation threatens freedom of expression, 4 December 2018, https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPF0xOkq/content/misuse-of-anti-terror-legislation-threatens-freedom-of-expression.

⁹⁸ *Ibid.* See also “Two legal reform projects undermine the rights of assembly and expression in Spain” - UN experts, 23 February 2015, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597>.

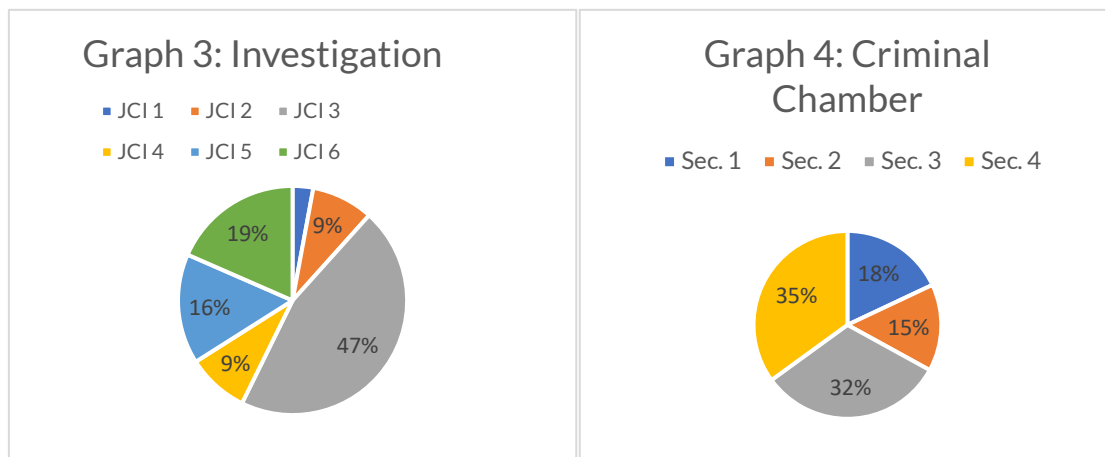
incitement to violence, there must be (i) **subjective intent** on the part of that person to **incite violence** through that expression; and (ii) an **objective danger** that the person's expression will **cause violence**—the European Court's recent jurisprudence requires this danger to be “clear and imminent”.

7. Domestic case law (National Court and Supreme Court) on the application of LO 2/2015 in relation to the offence of glorification of terrorism

7.1 General information on the decisions analysed

We have analysed a total of 49 judgments of the National Court and the Supreme Court, handed down since the entry into force and application of LO 2/2015 and up to 31 March 2019, corresponding to 32 cases: 34 decisions of the Criminal Chamber of the National Court⁹⁹, 6 of the Appeal Chamber of the National Court,¹⁰⁰ 2 from the Central Juvenile Court (CJC) of the National Court and 7 from the Supreme Court.

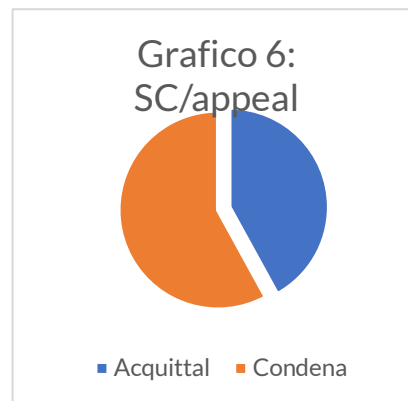
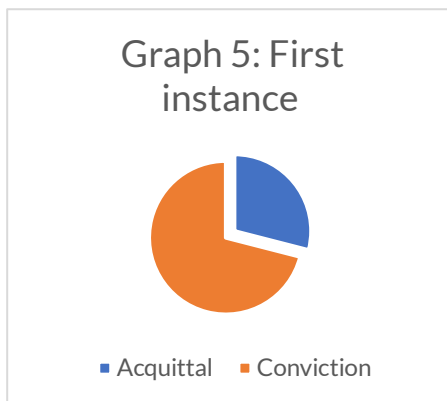
It is worth highlighting that while 47% of the cases examined were investigated by Central Investigating Court no. 3, only one case was dealt with by Central 1 (see Graph 3, below). As for the sections of the Criminal Chamber of the National Court, it is notable that 35% of the decisions examined were adopted by Section 4 and 32% by Section 3 (see Graph 4).



⁹⁹ Two of which were resolving pleas for nullity and appeals against decisions of the Central Juvenile Court of the National Court.

¹⁰⁰ The Appeals Chamber was created in 2015 by virtue of an amendment to the Civil Procedure Act designed to expedite criminal justice and enhance procedural guarantees (*Ley 41/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para la agilización de la justicia penal y el fortalecimiento de las garantías procesales*). The Chamber has jurisdiction to hear appeals filed against the decisions of the Criminal Chamber of the National Court (article 64 bis of the Judiciary Act). The first judgment handed down by the Chamber was in late 2017.

Of the first instance judgments examined, 29% of the cases ended in acquittals¹⁰¹ and 71% in convictions¹⁰² (of an offence of glorification of terrorism and/or humiliation of the victims of terrorism). 29% of these convictions followed agreements between the Prosecutor's Office and the parties (plea bargain)¹⁰³. 100% of the decisions from the Appeals Chamber of the National Court confirmed the convictions. 42% of Supreme Court judgments were acquittals (overturning or quashing the convictions).¹⁰⁴



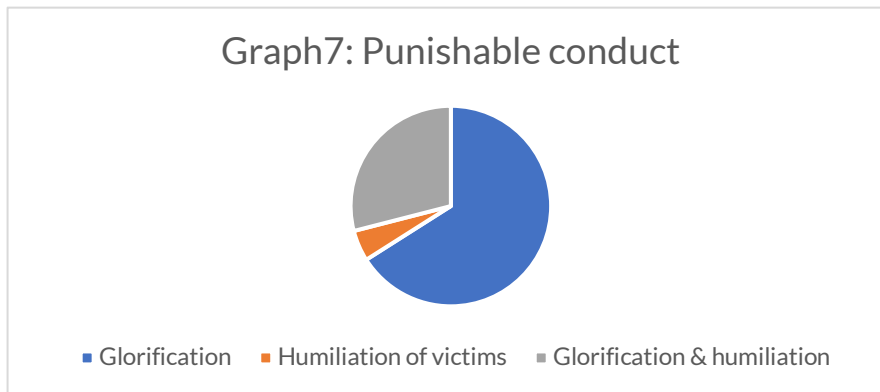
Of the convictions, 67% of them were for the offence of glorification, 5% (only one case) for the section relating to humiliation and disregard for the victims of terrorism and 29% for both components of article 578 of the Criminal Code (glorification of terrorism and humiliation of the victims) (see Graph 7). Only in 3 cases did a victim and/or association of victims of terrorism participate as a private prosecution or citizen's action (*acción popular*) -that means, that in more than 90% of the cases, the prosecution was led by the Public Prosecutor's Office.

¹⁰¹ In two cases, the accused were acquitted of glorification; however, in one case, the accused person was convicted of collaboration and, in the other, the accused person was convicted for indoctrination. One acquittal was subsequently quashed and another was overturned by the Appeals Chamber of the National Court just recently confirmed by the Supreme Court. The overturned decision is not counted for the purposes of this study as the Chamber found that the majority of the facts took place prior to the entry into force of new Organic Law 2/2015, which is stricter, and therefore the previous law had to be applied to the case.

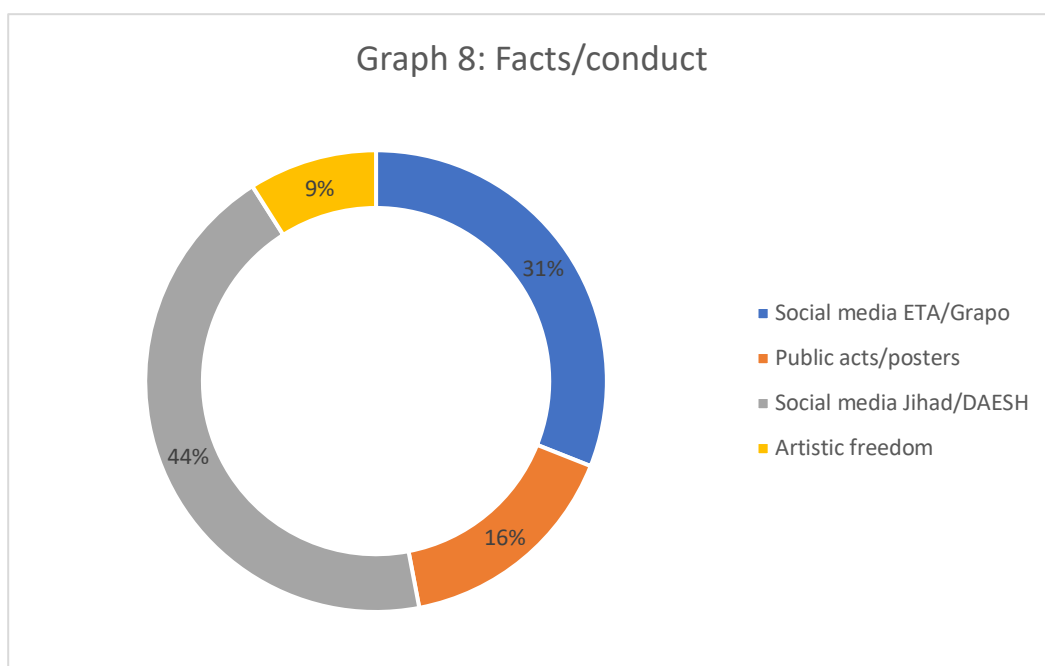
¹⁰² In two cases, the court changed the legal qualification of the offence and convicted the accused person for self-indoctrination (art. 575 CC), given it was the most serious offence and in another case, convicted for indoctrination.

¹⁰³ In some cases, agreements are reached due to the high sentences requested by the Public Prosecutor's Office in its initial accusations, requesting sentences in excess of two years in prison which imply serving actual prison time. The accused persons who do not have prior criminal convictions, facing the risk of a sentence of more than two years' imprisonment, which cannot be suspended, prefer to reach an agreement for requests of sentences of less than two years with the possibility of conditional suspension, even though it involves long sentences of disqualification, often restricting their possibility to obtain public employment.

¹⁰⁴ The Supreme Court dismissed the appeal, confirming the conviction, in 3 of the cases examined; 1 decision overturned and quashed the conviction for an offence under article 575 CC (self-indoctrination) and convicted of an offence of glorification; and on 3 occasions it quashed the conviction, acquitting of an offence under article 578 (in 1 case, it maintained the conviction for incitement to hatred under article 510 of the Criminal Code.)



The facts, in 44% of cases, referred to messages, videos and comments published on social media praising jihad and/or the Islamic State; 31% for posting messages and comments praising ETA and/or GRAPO or denigrating victims; 16% did not involve social media but rather public acts at local festivals, tributes, participation in demonstrations with posters/banners and only 9 % (3 cases) involved artistic freedom (giving rise to 8 first instance, appeal and cassation decisions – cases involving poet-rapper *Pablo Hasel*, *Resistencia Films* and hip hop band *La Insurgencia*) (See Graph 8). All (100%) decisions on “Islamic” terrorism led to convictions at first instance. The Supreme Court overturned one conviction, acquitting the accused person.



7.2 The judgments of the National Court¹⁰⁵ (2016-2019)

2016

The decisions examined handed down by the Criminal Chamber of the National Court in 2016, in general, follow the case law of the Supreme Court which affirms that glorification is apology that is committed by the simple action of praising or justifying, without the need for an outcome or that such action leads others to commit terrorist actions. That is, there is no requirement of direct or indirect incitement.¹⁰⁶ According to this Supreme Court doctrine, glorification requires “active behaviour, that excludes commission by omission (...), being an offence of simple activity without a material outcome, of an essentially malicious or intentional nature” and “constitutes an autonomous form of apology characterised by its generic nature and without comprising a direct or indirect provocation for the commission of an offence. The protective barrier is brought forward, requiring only generic praise/justification, either of the terrorist acts or of those who perpetrated them”.¹⁰⁷

Therefore, in its initial year, the National Court relied on the case law that affirmed that generic praise or justification is sufficient to convict someone of glorification.

2017

In 2017, the first relevant decision in the context of the study is judgment NCJ 2/2017, of 26 January of the Criminal Chamber of the National Court. The accused person, a young man with two Twitter accounts and around 2,000 followers, published negative comments about women and others in relation to Bin Laden and the Jihad, and was convicted of the offence of the glorification of terrorism and the offence of incitement of hatred (article 510 CC). Section 4 of the Criminal Chamber of the National Court concluded that freedom of expression did not cover “the prohibited praising of terrorist activities, regardless of effectiveness or actual occurrence”.¹⁰⁸ The only case law reference cited is Supreme Court Judgment SCJ 846/2015, of 30 December, which stated that “the objectively humiliating and insulting nature of the expressions considered in isolation and in context, assuming it and disseminating it as one's own, is sufficient”.¹⁰⁹

In March 2017, the Criminal Chamber of the National Court handed down judgment SAN 9/2017 (known as the *Cassandra* case)¹¹⁰. The accused person had used her Twitter account to publish comments, videos and jokes about Carrero

¹⁰⁵ From the Criminal Chamber, as well as the Central Youth Court of the National Court.

¹⁰⁶ In this vein, see National Court Judgments 25/2016, of 3 June (facts: local festivals and homage to a member of ETA; agreement), 24/2016, of 19 July (facts: messages published on Twitter by a user, justifying the actions of ETA, as well as insulting comments on the victims; conviction), 28/2016, of 21 September (facts: Facebook user publishing and sharing videos and comments on ISIS; agreement) and 36/2016, of 16 November (facts: banner and commemorative plaque in a square praising a member of ETA; acquittal).

¹⁰⁷ Supreme Court Judgments 224/2010, of 3 March, Point of Law 3 and 523/2011, of 30 May, Point of Law 3.

¹⁰⁸ National Court Judgment (NCJ) 2/2017, of 26 January, Second Point of Law.

¹⁰⁹ SCJ 846/2015, of 30 December, Fourth Point of Law.

¹¹⁰ Judgment 9/2017 of Section 4 of the Criminal Chamber of the National Court, of 29 March.

Blanco. Section 4 sentenced Cassandra to one year's imprisonment for the offence of disregard and humiliation of the victims of terrorism.¹¹¹ What is important is that, in terms of intent, it uses the arguments provided by the Supreme Court in judgment STS 4/2017, of 18 January, in the *Strawberry* case which concluded that the will or intention of the author of the messages is not relevant, not attributing any value to it, and the context in which the facts took place is likewise irrelevant.¹¹²

The Supreme Court stated

“article 578 CC only requires wilful misconduct, that is, knowledge of the elements that define the offence. In this case, being fully aware that a message is being sent and doing so knowingly (...). This is how the subjective requirements of the offence are met (...) The affirmation that the [sentenced person] was not looking to defend the tenets of a terrorist organisation and that such person was not seeking to scorn victims, is absolutely irrelevant for the purposes of the requirements of the offence. The typical structure of the offence envisaged in article 578 CC does not require demonstration of the end to which the acts of glorification or humiliation were carried out. It is sufficient for someone to assume the justification of a violent form of resolving political differences as their own (...); it is sufficient for there to be conscious reiteration of these message via a Twitter account, to rule out any doubt regarding whether the perpetrator wilfully met the requirements of the offence”¹¹³ (emphasis added).

That judgment contains a dissenting vote which rejects the literal and de-contextualised interpretation of the majority, requiring “a capability for stimulating the practice of [terrorist] actions” and that the expressions “have some kind of contextual and effective functional relationship” with the terrorist offences.¹¹⁴

These decisions, therefore, maintain that the simple knowledge of the insulting nature of the messages and the mere dissemination of comments of praise, is sufficient, and there is no need for there to be an intention to commit the offence of glorification.

¹¹¹ Cites SCJ 623/2016, of 13 July, which in turn cites SCJ 846/2015, of 30 December, which indicates that freedom of expression does not protect expressions that “contain an unjustifiable disregard for the victims of terrorism, which entails humiliating them” (Point of Law 3) and that “It is not a question of punishing a joke in bad taste, but that one of the facets of humiliation consists of mockery, which is not recreated in our case with macabre jokes about an unspecified subject, but with a specific reference to persons who are identified with their full name”.

¹¹² As for the context, the Supreme Court cited SCJ 820/2016, of 2 November, Point of Law 4 (“explanations after the fact cannot undo them. They are not present in the message that is received by its numerous recipients without these additional modulations or excuses (...) In offences of expression in which the message, objectively punishable, has been fixed, once the fact that the person is the perpetrator is accepted, the chances of eluding the conviction are clearly reduced”).

¹¹³ Point of Law 3.

¹¹⁴ The vote concludes, therefore, that in the specific case “due to its own morphology and in view of the context and the purpose, there is scarcely a possibility of a practical connection with any kind of actors and actions liable in technical-legal terms to be considered of a terrorist nature. In any event, but more at the time in our country in which they were written and disseminated”.

Judgment NCJ 22/2017, of Section 4 of the Criminal Chamber of the National Court, also invokes Supreme Court Judgment STS 4/2017 in relation to wilful misconduct: article 578 only requires “being fully aware that a message is being sent and doing so knowingly, when it contains a nostalgic evocation of violent actions of a terrorist group referred to using its initials”.¹¹⁵

Meanwhile, one decision that does contextualise the messages and acquit the accused person, is judgment NCJ 15/2017, of 29 March:

“in the case at hand, referring to the literal nature of the four tweets (...) neither the objective or subjective elements inherent in glorification, and which go beyond the legitimate exercise of freedom of expression, are met (...) the accused person is expressing more his exclusively political facet, with regard to the class struggle, rather than praising or justifying violence as a means to achieve ideological aims. The fact that he refers to one of them as a working-class hero, and to another as a communist, and not a terrorist, without referring to GRAPO, cannot lead to the conclusion that he was praising the activities of said terrorist organisation. With regard to the last two tweets, referring essentially to the ideology of the class struggle, which entails confronting those who he considers represent power, as well as referring to rights being conquered in the street, not in Parliament, they can in no way be considered to overstep the bounds of criticism, because even though one does not share the sentiment, and even if they use formally “aggressive” language, they help to construct public opinion.”¹¹⁶

The last judgment of the National Court in 2017 to be highlighted in this study was the conviction of the rappers belonging to the musical collective “*La Insurgencia*” (Judgment no. 34/2017, of Section 4 of the Criminal Chamber of the National Court dated 4 December 2017). According to the Criminal Chamber, in addition to the conduct matching the description of the offence, there must be “some other element that makes the sanction constitutionally tolerable”.¹¹⁷ In this regard, it refers to Constitutional Court Judgment (CCJ) 112/2016 which, in addition to the requirement of intent on the part of the subject, contemplates the need to objectively confirm the existence of a situation of risk for persons or third-party rights or for the system of freedoms itself. This risk must be understood “in abstract terms as a capability that is inherent in the action of which the person is accused, but not referring to a specific offence of terrorism, delimited in time, space, by reference to the persons affected”¹¹⁸ (emphasis added). All of this leads the

¹¹⁵ NCJ 22/2017, of 25 July, Second Point of Law. Judgment 3/2018, of section 4 of the Criminal Chamber of the National Court, dated 15 January, also cites SCJ 4/2017 in the sense that wilful misconduct only “requires being fully aware that a message is being sent and doing so knowingly, with content that attacks the reputation, esteem and dignity of the victims” (Point of Law 1 e).

¹¹⁶ NCJ 15/2017 from Section 1 of the Criminal Chamber of the National Court of 29 March, Point of Law 2.2.

¹¹⁷ NCJ 34/2017, Point of Law 4 citing Supreme Court Judgment 600/17, of 25 July.

¹¹⁸ NCJ 34/2017, Point of Law 5, citing Supreme Court Judgment 378/2017, of 25 May, Point of Law 2 and SCJ 600/17, of 25 July, Point of Law 3. SCJ 378/2017 is considered a pioneering judgment establishing guarantees in this field. Put simply, the Supreme Court argued that mere objective “adequacy in terms of the conduct attributed and the description that the criminal categories represent” was not sufficient, other elements were necessary: (i) the intention to effectively and actually incite the commission of an offence of terrorism (“it is one thing to proclaim, even rant, what the subject ‘feels’, that is, his/her desires or emotions, expressing them ‘with free rein’ but another for such expression to be made, not as an expression of emotion, but, beyond that, for the rational purpose of having the message, even if only indirectly, move others to commit terrorist

Chamber to conclude that the musical production of the accused persons represents justification of terrorism as it portrays terrorists as freedom fighters for the working class and praises their criminal activities, calling from them to be emulated. The Chamber found that the content of the songs was neither metaphorical nor lyrical, but instead showed “an absolute and calculated orientation towards incitement to violence”.¹¹⁹ The judgment contains a dissenting vote which argued that the accused persons did not intend to glorify or justify terrorist actions; they were rather looking for rhymes at any cost, and seeking notoriety and to draw attention to themselves.

This decision, following the criteria set by the Constitutional Court Judgment CCJ 112/2016, introduces two additional elements necessary to determine the conviction, namely, the need to objectively evaluate the existence of a situation of risk and the intention of the perpetrator to incite violence.

2018

In 2018, Judgment NCJ 6/2018, of 1 March, acquitted a person accused of publishing tweets via Twitter. According to the decision, in line with CCJ 112/2016 and Supreme Court case law, the courts have to assess whether the conduct of the accused person incites violence and creates a situation of risk (complementary elements). It is a constitutional requirement to demonstrate “with what purpose or motivation the acts of glorification or humiliation were carried out. And the assessment of the risk created with the act of which the person is accused”¹²⁰ (emphasis added). In the specific case, what was proven did not lead to the conclusion that the tweets “generated or were potentially liable to increase the danger of the commission of terrorist offences even minimally (...) in the context in which they were sent, always coinciding with some event or anniversary, exhibiting mordant wit or a critical intent, never an incitement to violence”¹²¹ (emphasis added). Thus, citing Supreme Court Judgement SCJ 52/2018 it concludes that “they are expressions of opinions or desires, acts of communication not followed by incitement to take action, because they do not contain a call to terrorist violence and have not generated a risk for persons, or for the third-party rights or for the legal system”.¹²²

Judgment NCJ 3/2018, of 15 January, of Section 1 of the Criminal Chamber, in the case of the rapper-poet *Pablo Hasel*, however, convicted the accused person of the offence of glorification of terrorism (as well as of insults and slander of the Crown and the Institutions of the State). This decision also refers to the theory of “abstract

offences”) and (ii) objectively verify that a situation of risk has been created (“in such a way that the likelihood of the perpetration of terrorist offences is augmented”) Point of Law 2 (2 and 4).

¹¹⁹ NCJ 34/2017, Point of Law 4.

¹²⁰ NCJ 6/2018, of Section 2 of the Criminal Chamber of the National Court, of 1 March, Point of Law 1, citing SCJ 378/2017, of 25 May, Point of Law 2.3 and 560/2017, of 13 July, Point of Law 3 (which reproduces SCJ 378/2017).

¹²¹ NCJ 6/2018, of 1 March, Point of Law 1, referring to SCJ 52/2018, of 31 January, Point of Law 5.

¹²² NCJ 6/2018, Point of Law 1, citing SCJ 53/2018, of 31 January, Point of Law 5.

risk”¹²³ developed by the Supreme Court and contained in Supreme Court Judgments 378/2017, 560/2017, 600/17 and 52/2018:

“this requirement, referring to the intention of the subject, combines with another requirement that, although it should be covered by the wilful misconduct of the originator, it must be corroborated objectively: a situation of risk for persons or third-party rights or for the system of freedoms itself (...) Regardless of the fact that the risk must be understood on an abstract basis as a «capability» inherent in the acts of which the person is accused, but not referring to a specific offence of terrorism, delimited in time, space, by reference to the persons affected” ¹²⁴ (emphasis added).

For the Court, the element of risk is present as it is not occasional conduct, but something that forms part of an ongoing trajectory of the accused person as he had been convicted of the same offence in the past. Moreover, the fact that the Prosecutor’s Office acted after a complaint was lodged by a citizen shows, in the Court’s opinion, that the messages are offensive and dangerous, generating risk, if the fact that the accused person had a wide audience is taken into account. Finally, the Court finds that the call by the accused person to go “further” converts the protest into a violent one, inciting others to act.

However, this judgment contains a dissenting vote. According to this vote, Supreme Court judgments, following CCJ 112/2016, require some kind of incitement to the commission of terrorist actions, even if only indirect. Although the majority understand that the tweets contain an exaltation of violence because, in this case, the investigation was initiated following a complaint from a citizen, this senior judge disagrees. This senior judge believes that the risk “must be justified by the court following a process of assessment which involves examining, together with the expressions used, the specific circumstances of the case, the originator, the addressee of the message, the context, even historical, all of which will enable the court to establish the importance and credibility of the risk.”¹²⁵ And she concludes that none of the 62 tweets analysed can be said to contain a call to violence and likewise cannot be considered liable to generate a situation of risk.

In these decisions we see how the Court is already restrictively qualifying the complementary elements (the two requirements set by the Directive): thus, we have incitement, even if only “indirect” and the mere “suitability” for creating a situation of risk.

In Judgment 11/2018, of 15 March, of Section 2 of the Criminal Chamber, which acquitted the accused person, the Court reiterated the case law of the Supreme

¹²³ Judgment no. 15, of Section 1 of the Criminal Chamber of the National Court, of 11 May, also refers to this theory of “abstract risk”.

¹²⁴ NCJ 3/2018 from Section 1 of the Criminal Chamber of the National Court of 2 March, Point of Law 3. SCJ 378/2017, of 25 May, Point of Law 2.3 is reproduced literally in SCJ 560/2017, of 13 July, Point of Law 3, 600/2017, of 25 July, Point of Law 3 and 52/2018, of 31 January, Point of Law 4.

¹²⁵ Dissenting vote by Senior Judge Ms Manuela Fernández Prado.

Court, based on CCJ 112/2016,¹²⁶ which requires, in order for the offence of glorification to be punished, that it be a manifestation of hate speech, creating a situation of risk for persons or third-party rights or for the system of freedoms itself. Moreover, it insists “on the need for the existence of complementary elements in the message that go beyond the mere utilisation of a certain language or expressions and that refer to some form of indirect incitement for the commission of offences, by means of the production of a discourse that is effective to a certain degree in implying a risk, as an element that justifies or legitimates the restriction of or interference with freedom of expression”¹²⁷ (emphasis added). Therefore, in the specific case, the Court finds that they are “generic comments”¹²⁸ that do not form part of a consistent discourse aimed at a particular end, together with the objective lack of actual following of the messages published. There can be no question of them preaching violence or promoting hatred or terrorism.

However, the decision includes a dissenting vote arguing that the accused person should have been convicted for the offence of glorification of terrorism due to the seriousness of the expressions¹²⁹. Thus “the plurality of the messages, the lengthy period over which they were sent, the patent manifestation of ideology-based hatred of certain collectives, the police and bankers in particular (...) entails a justification of violent methods, and an invitation to use terrorist methods, presenting terrorism as praiseworthy, and the murder of the police and bankers as something necessary.” The dissenting senior judge stated that “if the collectives at which expressions of violence were directed had been women, homosexuals or immigrants, no one would have disputed that they were a manifestation of hate speech and as such merited criminal rebuke. The difference in the case in question is that the accused person has a radical, anti-system ideology, which the judgment terms ‘anti-authority political radicalism’, an ideological orientation that acts as a negative element of offence or cause of justification that the law does not contemplate”.¹³⁰

In June 2018 judgment no. 3/2018 was handed down by the Central Juvenile Court of the National Court, acquitting a minor who had formed part of the “*La Insurgencia*” collective. The Judge reached a different decision to that of Judgment no. 34/2017, from Section 4, of 4 December, in the case of the adults belonging to “*La Insurgencia*”. The Judge found that case law requires that each case must be analysed taking into account the specific circumstances, with great effort being

¹²⁶ Among them, SCJ 354/2017, of 17 May, 378/2017, of 25 May, 560/2017, of 13 July, 600/2017, of 25 July and 52/2018, of 31 January.

¹²⁷ NCJ 11/2018, of 15 March, Point of Law 2.

¹²⁸ Referring to SCJ 72/2018, of 9 February, Sole Point of Law.

¹²⁹ This dissenting vote is cited by the Appeals Chamber in its judgment 4/2018, of 10 July which revoked the acquittal and convicted the accused person of the offence of glorification. SCJ no. 185/2019, of 2 April also relies on that dissenting vote to dismiss the appeal in cassation and confirm the conviction. Neither decisions form part of this study as the Appeals Chamber decided that the law in force prior to the 2015 reform should apply.

¹³⁰ The acquittal was quashed and the accused person was convicted of the offence of glorification in Judgment no. 4/2018 of the Appeals Chamber of the National Court dated 10 July 2018. The Chamber's opinion was based precisely on the dissenting vote. This judgment does not fall within the scope of this study as the Chamber considered that the law prior to the 2015 reform should apply. The Supreme Court handed down judgment 185/2019, of 2 April, dismissing the appeal in cassation and confirming the conviction based on the arguments of the Appeals Chamber and the interpretation of the Dissenting Vote.

made to avoid citizens ceasing to exercise their freedom of expression for fear of a criminal accusation. After analysing the lyrics of the songs, the Judge concluded that they were born of the writer's personal thoughts and experiences, that the verses had rhythm, metre and a limit that looked for simple rhymes, that the majority of the facts contained in the lyrics occurred before the minor was born, meaning that his knowledge of them is limited, and some references are of a historical nature. Thus, even though the expressions are unfortunate, they must be understood in the context in which they are made as “the creativity of a free verse song and not for the purpose of making apology for terrorism or those who committed it”.¹³¹ Therefore, they neither incite violence nor generate a risk of the commission of terrorist acts.

The Prosecutor's Office presented a nullity appeal against said decision, arguing that the first instance Judge failed to interpret the elements of the offence correctly. Citing SCJ 90/2016, of 3 November, it maintained that the subjective element (wilful misconduct) should not be confused with the purpose of the perpetrator or the motive for the offence and that the description of the offence only required the former, “regardless of the internal motivation that led the appellant to act in the way that he did”.¹³²

The Court found in favour of the Prosecutor's Office and considered that the appealed judgment contained contradictory reasoning in relation to the intent of the minor. Citing SCJ 820/2016, it argued that “objectively, the phrases contain that offensive weight for some victims and can undoubtedly be said to praise and stimulate terrorism. Explanations given after the fact cannot undo them. They are not present in the message that is received by the numerous recipients without these additional modulations or excuses”¹³³ (emphasis added). In assessing it mistakenly, the appealed judgment failed to evaluate the risk of terrorist acts being reactivated. Therefore, it annulled the judgment and ordered a retrial.¹³⁴

Judgment 4/2018, of 7 November, was handed down by a new Central Juvenile Court following the restrictive line of National Court Judgment (NCJ) 26/2018 in the nullity appeal. The Judge found:

“the sanctioned person expressed what he said not what at the trial he said he wanted to say. Once again, he is liable for what he said and the terms used (...) if he himself accepts that in order to express an idea (violent) or justify acts (also violent) he had the option or dilemma of doing so differently when choosing the terms used, and voluntarily and premeditatedly chose to use the formulas actually used and

¹³¹ Judgment 3/2018, from the Central Juvenile Court of the National Court, of 6 June, Point of Law 2.

¹³² SCJ 90/2016, of 17 February, Point of Law 1.

¹³³ SCJ 820/2016, of 2 November, Point of Law 4. This judgment concludes that, as far as the subjective part is concerned, SCJ 846/201, of 30 December, explained that a singularised disposition is not required “in addition to generic wilful misconduct: it is sufficient to confirm the objectively humiliating and insulting nature of the expressions considered in isolation and in context, and assume and disseminate them, assuming them as one's own” (Point of Law 4).

¹³⁴ Judgment 26/2018 of Section 3 of the Criminal Chamber of the National Court of 24 July.

that naturally required no reinterpretation on the part of the target audience at which his compositions were directed”¹³⁵ (emphasis added).

Therefore, the Judge concludes that, as the minor was fully aware of what he was saying, it constitutes “the risk envisaged by the description of the offence; that is, violent means being held up as an example of how to achieve political ends”¹³⁶, and the risk of reactivation of terrorist acts is enhanced.

Finally, the last judgment from the Criminal Chamber in 2018, relevant for this study, is NCJ 28/2018, of 21 November, against the filmmaker and producer of “*Resistencia Films*” for the publication of videos in defence of GRAPO prisoners on social media. After analysing the publications, the Court found that it could absolutely not be inferred that the accused intended to justify the commission of terrorist acts or praise those who carried out those acts. For the Court, what the publications actually showed was a clear desire on the part of the accused to disseminate a distorted social reality. It concluded that “it is obvious that these publications neither praise nor justify and far less propitiate terrorist actions; quite the opposite, they omit any reference to such actions, as if to conceal them, presenting the ‘alleged perpetrators’ or ‘perpetrators’ as people who were unjustly treated by the accusation and conviction for terrorist offence that they never committed”.¹³⁷

Essentially, in this period, part of the case law includes two additional elements (the need to assess the credible risk and the intent of the perpetrator to incite violence, with the message being a manifestation of hate speech) and highlights the need to avoid the criminal sanction restricting freedom of expression. At the same time, interpretations are being introduced that restrict these same concepts. Thus, on the one hand, it is interpreted that risk must be understood to mean “abstract risk”, defined as “capability” or “suitability”. Meanwhile, with regard to the perpetrator's intent, the focus is on the content of the message itself, meaning that if the message is clear (the motivation and any subsequent explanations are irrelevant), there is intent. In order to support these interpretations, recourse is taken to case law predating CCJ 112/2016, to the SCJ in the *Strawberry* case (January 2017), as well as to earlier Supreme Court judgments (2015-2016). These restrictive interpretations do not reach the threshold established by the Directive in terms of the requirements of incitement and risk.

¹³⁵ Judgment 4/2018 of the Central Juvenile Court of the National Court of 7 November 2018, Sole Point of Law.

¹³⁶ *Ibidem*.

¹³⁷ Judgment no. 28/2018 of Section 4 of the Criminal Chamber of the National Court of 21 November, Point of Law 1.

2019

We will highlight Judgment no. 3/2019, which resolved the appeal against the judgment handed down by the Central Youth Court in the “*La Insurgencia*” case. The decision reiterates that, following the case law of the Constitutional Court and the Supreme Court (it cites judgments from 2017 and 2018)¹³⁸, additional, decisive elements must also exist in order for the conduct to be sanctioned: intent, the existence of some kind of incitement, even if indirect, and a situation of risk for persons, third-party rights or the system of freedoms. Therefore, the sanction will only be legitimate insofar as the expressions are considered a manifestation of hate speech because they propitiate or encourage a situation of risk, even if only indirectly.¹³⁹

Despite the case law it cites and the elements to be considered, the Court agreed with the original judge that the lyrics were sufficiently serious to qualify as the offence of glorification. It also concurs with the original judgment that the element of intent is present and that the expressions constitute hate speech, as they represent a justification of terrorism, terrorist organisations or their members and incite violence.¹⁴⁰ Finally, it also accepted that the accused person's messages enhanced the risk of promoting the activation of terrorist acts given the widespread distribution of the same (as the internet channel on which the songs were disseminated had a high number of subscribers and views).¹⁴¹

7.3 Appeals Chamber (2018)¹⁴²

The first relevant decision for the purposes of this study is Judgment 1/2018 by the Appeals Chamber against NCJ 10/2018, of 9 March, convicting two persons accused of the offence of glorification and humiliation of the victims of terrorism. In it, the Chamber affirms that “according to the interpretative doctrine of the Constitutional Court and the Supreme Court, the protected legal asset is jeopardised if the messages objectively glorify terrorism and constitute full-on “hate speech” and for this reason **it is not necessary to accredit whether, subsequent to the same, social disturbances, public disorder, recognition on social**

¹³⁸ For example, Supreme Court Judgments 378/2017, of 25 May; 560/2017, of 13 July; 79/2018, of 15 February; 52/2018, of 31 January and Constitutional Court Judgment 112/2016.

¹³⁹ Judgment no. 3/2019 of Section 3 of the Criminal Chamber of the National Court of 23 January, Point of Law 2, citing SCJ 79/2018 of 15 February, 378/2017 of 25 May, 560/2017, of 13 July, 600/2017, of 25 July and SCJ 52/2018 of 31 January, as well as CCJ 112/2016.

¹⁴⁰ NCJ 3/2019, Point of Law 3.

¹⁴¹ NCJ 3/2019, Point of Law 4.

¹⁴² As indicated earlier, this Chamber was created following the 2015 reform and handed down its first judgment in 2017. It should be indicated that in March 2019 the Contentious-Administrative Chamber of the Supreme Court cancelled the appointments of senior judges Enrique López and Eloy Velasco as members of the Appeals Chamber of the National Court, announced in May 2017 by the General Council of the Judiciary. Senior Judge Enrique López was the judge rapporteur in [3] of the decisions analysed in the context of this study of the Chamber.

media, impact on public opinion or other kinds of reactions took place”¹⁴³ (emphasis added).

The judgments cite the Supreme Court -in the first case against the rapper-poet *Pablo Hasel* (SCJ 106/2015, of 19 February) and the *Strawberry* case (SCJ 4/2017, of 18 January), in cases in which it was concluded that the messages published on social media contained “hate speech” and, therefore, fell outside the remit of freedom of expression. As for the subjective element, it cites, among others, SCJ 948/2016, which concluded that, a **mere reading of the phrases and images** published, showed that they were “**sufficiently expressive of a concrete wish to praise and justify the actions of terrorist organisations**”¹⁴⁴ (emphasis added) and SCJ 72/2018, which reminded that the offence of glorification “does not require specific wilful misconduct, as it is sufficient that there be **basic wilful misconduct that must be corroborated from the content of the expressions uttered**. The wilful misconduct of these offences is completed with the corroboration of the **intentionality of the act and the corroboration of the fact that it is not an uncontrolled situation or momentary, or even emotional, reaction, to a circumstance that the subject has been unable to control**”¹⁴⁵ (emphasis added).

Accordingly, the Chamber concluded that the publications sought to provoke hostility: “they are not neutral, but constitute **incitement (with actual capability) in abstract terms** to adhere to a strategy based on violence and the use of terror, with patterns that are repeated and directed against the same sectors of the population (...) **suitable for inciting abstract third parties to join the chain of indiscriminate terror** by managing to impose beliefs that are not shared by the vast majority” (emphasis added) and thus placing our system of freedoms at risk.¹⁴⁶ Therefore, this first decision already contains the doctrine to be followed by the Chamber: the literal wording of the expressions or comments published is the basis for establishing the existence of the offence of glorification as well as the abstract (capable) risk, it not being necessary that there be a subsequent impact.

The next examined decision issued by the Appeals Chamber is the appeal from the rapper-poet *Pablo Hasel* (Judgment 5/2018 of the Appeals Chamber of the Criminal Chamber of the National Court, of 14 September 2018). One of the arguments of the defence referred to the non-existence of the offence of glorification pursuant to Directive 2017/541. The Chamber found that, contrary to what the defence contended, the Directive envisaged the punishment of glorification in articles 5 and 6, as well as in whereas 10. The judgment also affirmed

¹⁴³ Judgment 1/2018 of the Appeals Chamber of the National Court of 21 May 2018, Point of Law 1.

¹⁴⁴ Judgment 1/2018, of the Appeals Chamber, of 21 May, Point of Law 2, citing SCJ 948/2016, of 15 December 2016.

¹⁴⁵ Judgment 1/2018, of the Appeals Chamber, of 21 May, Point of Law 2, citing SCJ 72/2018, of 9 February.

¹⁴⁶ Judgment 1/2018, of the Appeals Chamber, of 21 May, Point of Law 2.

that the Directive sets out the bare minimum and that States have a degree of discretion when it comes to defining the offences.

The Chamber then went on to provide a detailed description of the case law in relation to the elements of the offence of glorification. With regard to the subjective element, it insisted that “the offence is committed **regardless of the internal motives** that a person may have to act in the way that they did” (emphasis added), so that “the **offence is committed if the expressions have the objective elements** referred to” (citing SCJ 90/2016, of 17 February).¹⁴⁷ Likewise, it interprets **wilful misconduct** as “the intention and knowledge that one is committing a criminal act, which is **corroborated by means of the objective examination of the messages published, without it being possible for subsequent explanations to be included in the same**” (emphasis added), as affirmed by SCJ 820/2016, of 2 November and SCJ 4/2017, of 18 January (*Strawberry* case).¹⁴⁸

And as for the **abstract, rather than concrete, risk**, so that “the description of the offence is not rendered devoid of content”, the Chamber cites SCJ 52/2018 and 79/2018 (*Valtonyc* case)¹⁴⁹. The Chamber confirms that **risk is a genuine element of the description of the offence, “without it being necessary that it produce a result other than the conduct itself”** that is, it does not require “a specific ex post endangerment” (emphasis added), meaning that “the risk invoked must be inherent in the manifestations”.¹⁵⁰ The Chamber goes on to define what capability is (“the ability or position that a person or thing possesses to perform a certain activity”) and how the degree of probability should be interpreted (“real possibility of a future attack and injury to the legal asset”) not being necessary to demonstrate that the legal asset was actually in danger.

The Chamber concludes that there is an abstract risk which objectively exists due to the wording of the statements made, the number of messages repeated over time (“not the result of the heat of the moment”), by the figure of the person issuing them (already convicted of the same offence in the past) and due to the significant number of followers targeted (over 54,000 followers). It was found that, in his discourse (a manifestation of hate speech), the **perpetrator sought to trigger emotions of hostility, promoting hatred and intolerance**, inciting the use of violence against the Crown and the Security Forces. This can cause (“capability”) an indirect incentive for some of the people he sought to whip up positively considering the

¹⁴⁷ Judgment 5/2018 of the Appeals Chamber of the Criminal Chamber of the National Court, of 14 September 2018, Point of Law 4.

¹⁴⁸ *Ibidem*.

¹⁴⁹ In SCJ 79/2018, of 15 February, the Supreme Court concluded that the lyrics of the songs constitute a manifestation of hate speech without contextualizing the intention of the author, the desire to incite the commission of terrorist offences or how a situation of the risk of terrorist acts being committed is created.

¹⁵⁰ Judgment 5/2018 of the Appeals Chamber of the Criminal Chamber of the National Court, of 14 September 2018, Point of Law 4.

possibility of committing a violent act due to the “inflammatory nature” and “intrinsic danger” of some tweets.¹⁵¹

A few days after the appeal judgment in the *Pablo Hasel* case, the Appeals Chamber handed down a judgment in the case of the “*La Insurgencia*” rap group (Judgment no. 6/2018 of the Appeals Chamber of the Criminal Chamber of the National Court of 18 September). The Appeals Chamber began by offering an extensive exposition of the doctrine regarding article 578, the limits to the freedom of expression followed, like in the *Pablo Hasel* case, with a detailed analysis of all the elements of the offence. It cites SCJ 90/2016, 820/2016 and SCJ 4/2017 (*Strawberry* case) to insist that the **motives that lead a person to act, like any subsequent explanations, are irrelevant** where the **expressions used are unequivocally offensive or praise** terrorists acts or the members of a terrorist organisation in the knowledge that they will reach the public.¹⁵²

The Chamber then goes on to make 87 references to risk, repeatedly reproducing the case law of the Criminal Chamber of the National Court and of the Supreme Court, as well as its own judgment in the *Pablo Hasel* case. The Chamber highlights SCJ 4/2017 (*Strawberry*), SCJ 95/2018 (*Cassandra*) which also relies on the *Strawberry* judgment, SCJ 79/2018 (case of the rapper *Valtonyc*), as well as 52/2018. The Chamber insists that “the knowledge of the objective elements of the description of the offence, **the suitability and capability for objectively converting the expressions into manifestations that praise or justify terrorism, together with the knowledge of their seriousness, determines the provision [of] assumption of this abstract risk by the perpetrator**”¹⁵³ (emphasis added). And in order to assess the suitability, account will be taken of the person of the originator, the target audience and the circumstances in which it occurs. The Chamber affirms that this doctrine was already defined by the European Court of Human Rights in the *Leroy v. France* judgment, which makes it possible to deduce that “for the ECHR, an indirect incentive for the potential reader to positively consider the commission of a criminal act can already be considered an element determining an abstract risk”. Essentially, the Chamber reiterates that the abstract risk arises from the wording of the expressions or messages, the person of the originator, the target audience, the specific circumstances and when it constitutes a manifestation of hate speech that incites the use of violence.

¹⁵¹ *Ibidem*.

¹⁵² Judgment no. 6/2018 of the Appeals Chamber of the Criminal Chamber of the National Court of 18 September, Point of Law 4 (“We find that this reduplication of wilful misconduct is not necessary (...) as it is sufficient in this regard that the expressions use words and phrases that praise and laud terrorism to such a degree that they do not require elaborate, complex arguments to determine what motive led the person to act”).

¹⁵³ Judgment no. 6/2018 of the Appeals Chamber of 18 September, Point of Law 4, citing SCJ 52/2018 and SCJ 79/2018.

Applied to this particular case, the Chamber states that what is important is not the rhythm, the musical construction or the rhymes of the songs, but the text of the same, and that the content of the messages serve, in itself, to accredit a justification and praise of violent methods and of the members of the terrorist group mentioned. According to the Chamber **“the wording is decisive** in considering that the requirements are met in terms of both the objective and subjective elements of the description of this offence”.¹⁵⁴ The Chamber found that the lyrics of the songs were an invitation to use terrorist actions by presenting violence as a way of defending political rights and combatting an unfair political model, that is, they are looking to arouse emotional hostility that incites and promotes hatred and intolerance. Therefore, the **element of indirect risk of incitement** to commit violent acts of a terrorist nature is present due to the number of songs published, their reiteration over time, the high number of users of the channel, essentially: “due to the lyrics of the songs (...) a **context that was liable to increase, even if only minimally, which is sufficient, the danger of the commission of terrorist offences is generated**”¹⁵⁵ (emphasis added).

The Appeals Chamber of the National Court is the body that has most categorically performed a restrictive interpretation of both the case law of the Constitutional Court and of the Supreme Court in relation to the new concepts or elements to be assessed concerning the offence of glorification: (1) intentionality is replaced by the analysis of the literal content of the messages and the interpretation is once more that praising and justifying is sufficient to ascertain the intention of the author (intent, motivations or explanations being irrelevant); (2) we have moved from the need to objectively corroborate the importance and credibility of the risk created by the messages for persons or rights to a “capability” or “suitability” which does not require a concrete subsequent endangerment. Such a limited interpretation of this requirement does not seem to be in line with the provisions of the Directive; (3) the broad interpretation of hate speech and (4) the ease with which freedom of expression is restricted in order to protect assets considered superior to this freedom (“collective safety”).

¹⁵⁴ Judgment no. 6/2018 of the Appeals Chamber of 18 September, Point of Law 4.

¹⁵⁵ *Ibidem*. The Chamber uses the same arguments set out in this section in Judgment no. 8/2018 of the Appeals Chamber, of 21 September 2018 (appeal against NCJ 12/2918, of 25 May). Judgment 3/2019 of the Appeals Chamber of the National Court, of 16 March (appeal against NCJ 40/2018, of 22 November) does not offer additional arguments to those set out in this section.

7.4 The judgments of the Supreme Court (2017-2019)

The first two 2017 Supreme Court judgments examined¹⁵⁶ for this study cite CCJ 112/2016 to argue that freedom of expression can be legitimately limited in the case of manifestations of hate speech which propitiate or foster a situation of risk. Likewise, with regard to incitement, one of the decisions relies on the *Strawberry* doctrine (SCJ 4/2017, of 29 March), that is, it is sufficient to be fully aware and desirous of disseminating a message that contains violent actions of a terrorist group for a person to be punished of the offence of glorification.¹⁵⁷

In SCJ 354/2017, of 17 May, the Supreme Court addressed an appeal in cassation against a first instance judgment (NCJ 39/2016) which had convicted the accused person of the offence of self-indoctrination (article 575) and acquitted him of the offence of glorification (article 578). The defence of the appellant alleged that the facts, ultimately and on a subsidiary basis, could constitute a count of provocation of terrorism under article 579 of the Criminal Code. After examining the material (videos, photographs and documents) of a jihadi nature published on the accused person's Facebook wall, the Supreme Court concluded that it incited hatred by justifying and clearly glorifying the war being waged by the Islamic State against non-Muslims.¹⁵⁸

The Supreme Court affirmed that “for the purposes of establishing liability for an offence of this kind”¹⁵⁹ (glorification of terrorism) there must be a particularly thorough analysis of the wording of the expressions, the way in which they were made, the context, the specific circumstances of the case, occasion and scenario in order to clearly determine the meaning used and be able to carry out a balanced weighing-up. Moreover, CCJ 112/2016 addresses the issue of what exclusive expressions cease to be a legitimate exercise of the freedoms of expression and information and become hate speech. The Supreme Court cites article 17 of the European Convention on Human Rights which prohibits abuse of law and how it has been applied by the European Court of Human Rights (specifically, the *Norwood v. United Kingdom* case, it explains, 2004 decision on inadmissibility). Finally, it refers to the *Leroy v. France* case (2008) in which the ECHR did not require “the presence of an certain risk or of a credible danger that new terrorist attacks may be committed derived from the expression in view of the

¹⁵⁶ Supreme Court Judgment 206/2017, of 28 March (appeal against NCJ 24/2016, of 19 July) and Judgment no. 221/2017, of 29 March (appeal against NCJ 28/2016, of 21 September). SCJ 206/2017 follows the case law of the Supreme Court in SCJ 846/2015, of 30 December citing SCJ 224/2010, of 3 March, regarding the humiliating and insulting act.

¹⁵⁷ Supreme Court Judgment 221/2017, of 29 March.

¹⁵⁸ SCJ 354/2017, of 17 May, Point of Law 4 (5 and 6).

¹⁵⁹ SCJ 354/2017, of 17 May, Point of Law 5 (2) citing SCJ 812/2011, of 21 July, SCJ 32/2011 of 2 February, STS 2016/0217, of 28 March and SCJ 224/2010, of 3 March.

circumstances of the case”,¹⁶⁰ as it is derived from the very nature and methods of international jihadi-type terrorism. The Court concluded that “the **potentiality for the incitement of commission thereof via purely generic messages** has been proven. **This gives us the credible danger**”¹⁶¹ (emphasis added). That is, international jihadi terrorism uses its own marketing techniques to persuade society which in themselves are evidence of “**indirect incitement and risk or danger of capability** (abstract-specific) of the commission of terrorist offences”¹⁶² (emphasis added).

The next judgment analysed is 72/2018, of 9 February, which resolved an appeal in cassation against the conviction for the publication of "jihadi" and chauvinistic tweets on Twitter as the perpetrator of the offences of glorification and incitement of hatred (article 510 CC). The Court affirmed that article 578 CC does not require a specific incitement, “but the generic conduct of glorification or justification” of a terrorist act.¹⁶³ Nevertheless, in order for the conduct to be punished, there must be “a **certain specification** regarding what is glorified or justified so that **it is not just a generic comment, but a justification of the terrorist act or group**”¹⁶⁴ (emphasis added). As for the subjective element, it is fulfilled “with the verification of the intentionality of the act and that it is not a uncontrolled situation or a momentary reaction, even an emotional one, in relation to a circumstance that the subject was unable to control”.¹⁶⁵

The Supreme Court considers that hate speech is clear. But it considers that there is not the same intensity as in relation to the offence of glorification as the expressions are too generic, lacking terrorist content. However, the judgment reaches a surprising conclusion: the expressions regarding terrorism are included within the more generic offence under article 510, “in order to provide unified, common treatment”.¹⁶⁶

The next case resolved by the Supreme Court was the appeal by *Cassandra Vera* (SCJ 95/2018, of 26 February) against the 1 year prison sentence for humiliating the victims of terrorism. First of all, the Supreme Court highlighted that, despite the fact that the National Court referred to several Supreme Court judgments, it did not explain how they were applicable to that particular case. It went on to say that not every message considered unacceptable or that provokes rejection by society should be considered an offence, as the criminal action should be reserved

¹⁶⁰ STS 354/2017, Point of Law 5 (6).

¹⁶¹ *Ibidem*. On this point, the judgment cites the Preamble to OL 2/2015.

¹⁶² SCJ 354/2017, Points of Law 5 (7).

¹⁶³ SCJ 72/2018, of 9 February, Sole Point of Law.

¹⁶⁴ *Ibidem*.

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem*.

for the most serious actions. Carrying out a **detailed labour of contextualisation**, the Supreme Court declared that this case fell outside the remit of article 578 CC, for the following reasons: the accused person focussed on repeating jokes that were already known on social media on how the attack took place; the attack took place 44 years ago, making it a historic fact, “humorous comments on a historical event cannot have the same transcendence as with a recent occurrence”;¹⁶⁷ the age of the accused person when the messages were published (18 years of age), and the fact that they do not contain injurious or abusive expressions regarding the victim's person, only mocking the way the attack took place. For this reason the criminal reply was not proportionate. The Supreme Court found that the elements of seriousness of hate speech did not exist.

It concluded that “none of the circumstances referred to in the criteria indicated in the case law of the Constitutional Court exist [it cites CCJ 112/2016], given that the accused person **neither provided an example with her conduct that she was attempting to incite violence** by means of an unlawful exercise of freedom of expression, **nor provoked hatred of certain groups, and was not mocking** the attack on a former prime minister that occurred over forty years ago **with the intention of justifying it or inciting further attacks**”¹⁶⁸ (emphasis added).

We subsequently analysed SCJ 334/2018, of 4 July, the *Miguel Ángel Blanco* case: the accused person was convicted of the offence of glorification of terrorism and humiliation of the victims of terrorism for publishing videos and comments on Facebook and YouTube attacking said victim on the occasion of the naming of a street in Madrid in his honour. The starting point for the Supreme Court was “we would be looking at, if applicable, the [aspect] of ‘humiliation of the victims of terrorism’, as **there is no risk or potentiality with regard to glorification of terrorism in this case**”¹⁶⁹ (emphasis added). The Supreme Court reminds is that it is necessary to evaluate the specific circumstances in which the humiliating act took place, the phrases of which it consisted, the occasion and scenario, also taking into account not just the literal wording of the expressions but also the **meaning and intention** with which they were used and the context.¹⁷⁰

The Court found that, in this case, the situation was on the border between the criminal and civil spheres. The message published by the accused person was contradictory and ambiguous, on the one hand, the accused person complains because a street is being named after the politician who was assassinated, but, on

¹⁶⁷ SCJ 95/2018, of 26 February, Point of Law Two, 4.

¹⁶⁸ *Ibidem*.

¹⁶⁹ SCJ 334/2018, of 4 July, Point of law 3 (1 and 2). It cites SCJ 95/2018, of 26 February, SCJ 846/2015, of 30 December and SCJ 656/2007, of 17 July.

¹⁷⁰ Citing SCJ 224/2010, of 3 March and SCJ 31/2011, of 2 February.

the other, he expresses rejection of the actions carried out by ETA. Finally, it concluded that the accused person should be acquitted. It did however warn of

“the need to adopt organisational measures at the service providers in order to cut the immediate dissemination of expressions such as those contemplated herein that go beyond the objective of these communications network and that, obviously, can offend persons affected by these expressions, but in the field of criminal law it is necessary to focus on the specific case in these cases, as explained.”¹⁷¹

The last decision examined as part of this study is SCJ 47/2019, of 4 February. The Court starts by affirming that the right to freedom of expression does not cover those facts that represent any injury or creation of risk or danger that may be abstract, yet real, for peaceful coexistence of all citizens. The glorification of terrorism and disregard for victims are offences of hatred that require a specific potentiality of risk:

“When the variety of hate speech is specified as terrorism, in addition to that subjective, aggressive animus we have the terrorist purpose, requiring the generation of **danger that will be specific (article 579 CC) or the capability of risk and danger (article 578 CC) (...)**. In our criminal justice system, the concepts envisaged in articles 510, 578 and 579 CC, correspond to offences of hatred, the first generic, while the other two are specific. It is precisely because **terrorism is involved that the description of the offence requires a specific potentiality of risk** in the terms indicated above”¹⁷² (emphasis added).

The Supreme Court then went on to review the changing case law of the Constitutional Court requiring, on the one hand, “the creation of a danger, that, while abstract, must be real for the integrity of the legal assets” (CCJs 285/2007 and 235/2007) and as “together with this Judgment, others hold a less strict position concerning hate speech and do not require, in the terms set out, that creation of risk” (for example, CCJ 177/2015).¹⁷³ It also referred to the difference between the two sections of article 578 and how endangerment is not necessary when we are dealing with the disregard for victims side (provided the action taken against the victims of their families increases the suffering and reopens the wound, for example, SCJ 826/2015, of 30 December, and SCJ 72/2918, of 25 January).

The decision also takes time to cite what is considered one of the Supreme Court's most pioneering judgments in terms of establishing guarantees, SCJ 378/2017, of

¹⁷¹ SCJ 334/2018, of 4 July, Point of Law 3 (3).

¹⁷² SCJ 47/2019, of 4 February, Point of Law 2.

¹⁷³ SCJ 47/2019, of 4 February, Point of Law 2.

17 May, which examined the original judgment and acquitted the sentenced period:

“as such we can require what is termed the **‘tendential element’**, even if this is not stated literally in the criminal rules. In addition to this requirement, referring to the **intention of the perpetrator [to incite, even indirectly, the commission of terrorist offences]**, there is another which, although it should be approached from the perspective of the wilful misconduct of the perpetrator, must be corroborated objectively: a **situation of risk** for persons or third-party rights or for the system of freedoms itself. And it warns [CCJ 112/2016] of the significance of this requirement as a decisive element delimiting the constitutionality of the description of the offence (...) Hence the relevance of the effects of categorisation, as a matter of everyday legality, but under constitutional requirements, of **accrediting for what purpose or motivation the acts of glorification or humiliation were carried out. And the valuation of the risk created with the act** with which the person is charged. Despite the fact that this risk must be understood in abstract terms as a ‘capability inherent in the acts of which the person is accused, but not referring to a specific offence of terrorism, limited in time, space, by reference to the persons affected’.¹⁷⁴ (emphasis added)

The Supreme Court concludes that, in the case analysed, the messages disseminated on social media praising the Islamic State contain the potential to cause an actual risk.

Essentially, the first judgments analysed from early 2017 are closer to more restrictive approaches, following the doctrine of SCJ 4/2017 and citing CCJ 112/2016, strictly to justify the restriction of freedom of expression when there is hate speech. Moreover, we have seen that generic messages in the context of jihadi terrorism are in themselves sufficient to accredit the element of risk while, in other cases, certain specification is required. In mid-2017 there was a change that represented progress with SCJ 378/2017. The judgment in the *Cassandra* case follows this case-law current. However, it is worth noting that SCJ 79/2018 (the *Valtonyc* case, not covered by this study) represents a step backwards, having also been cited by the Appeals Chamber in several of its most restrictive decisions in terms of freedom of expression.

¹⁷⁴ SCJ 47/2019, of 4 February, Point of Law 3.

8. Conclusions

Following the completion of the study, the first finding is that the terrorist offences are so open and ambiguous that the same facts can be considered to constitute membership and/or collaborating with a terrorist organisation, recruitment, indoctrination, self-indoctrination or glorification or justification of terrorism. For example, in 5 cases (16% of the total analysed) the accusation was for an offence under article 578 CC and an offence of indoctrination or self-indoctrination (article 575). In one of the cases (NCJ 15/2018, of 11 May), the Court reached the **conclusion that it was an offence of indoctrination, which contained self-indoctrination and glorification**, although the conviction sentence was for the most serious conduct in order to avoid falling foul of the *non bis in idem* prohibition. In another case (NCJ 10/2018, of 9 March), a person was accused of having joined a terrorist organisation, alternatively and subsidiarily to the offences of active and passive indoctrination or self-indoctrination for the purpose of joining and/or collaborating with a terrorist organisation and the offence of glorification of terrorism and humiliation of victims; finally, it is also worth highlighting NCJ 12/2018, of 26 April, in which the Prosecutor presented a charge of the offence of joining a terrorist organisation (articles 571 and 572 CC), the offence of collaboration with a criminal organisation (article 577 CC), one count of indoctrination (article 575 CC) and another of glorification (article 578 CC). These multiple legal qualifications and accusations occur in the **context of cases of jihadi/DAESH terrorism** (in 71% of these types of cases). Therefore, the fact that the same facts can be the subject of multiple accusations **jeopardises the principle of criminal legality and the right to a fair trial**.

As for the evolution of case law, in 2016 and in the first few months of 2017, the National Court relied on Supreme Court case law that affirmed that generic praise or justification is sufficient to convict someone of the offence of glorification of terrorism. This is at odds with international legal standards outlined in section 5 of this report.

Examples of such poor practice are found in National Court judgments, such as the *Cassandra Vera case* (NCJ 8/2017, of 29 March, which relied on SCJ 4/2017, of 18 January, *Strawberry case*, which contained a literal, de-contextualised interpretation of the conduct of the accused person, stating that the will or intention of the perpetrator is irrelevant, it is not necessary for there to be one) and the “*Insurgencia*” rap group case (NCJ 34/2017, of 4 December).

It is towards mid-2017 that we find decisions that, following the criteria set by CCJ 112/2016, introduce the two elements necessary to establish whether the

offence of glorification can be applied, namely: the need to objectively evaluate the existence of a situation of risk and the intention of the perpetrator to incite violence. SCJ 378/2017 represents a change - and one for the better (although it does not form part of this study, not having been included in the methodological framework, it has been referenced by various judgments from both the National Court and the Supreme Court). The Supreme Court Judgment which quashes the National Court judgment in the *Cassandra Vera* case (SCJ 95/2018, of 26 February) followed this case law trend.

In 2018 we saw that part of the more guarantee-focussed case law relies on SCJ 112/2016 to require the will to incite the commission of a terrorist offence and a situation of risk (which are the two requirements demanded by the Directive 2017/541). However, how these concepts should be interpreted is being qualified in a restrictive manner. For example, from a scenario where the existence of the corroboration of an objective situation of risk is required, one that increases the likelihood of terrorist acts being carried out, we have moved to the mere, "suitability" for creating a situation of risk. This interpretation of risk falls far short of the standard required by the Directive. One example of good practice from this period is Judgment 3/2018 from the Central Juvenile Court of the National Court, in the case of the minor belonging to the "*la Insurgencia*" rap group, which assesses the circumstances and context of the case to conclude that there is no incitement, no danger or risk of the commission of terrorist acts. However, this decision was subsequently quashed by the Criminal Chamber of the National Court (NCJ 26/2018, of 24 July). Another part of the case law, in what represents a clear backward step, insists that the intentionality of the perpetrator is set in the content of the message itself, meaning that, if the message is clear, intention exists, rendering motivation and any kind of subsequent explanation irrelevant. In order to support these interpretations, recourse is taken to the Supreme Court Judgments from 2015-2016 and SCJ 4/2017, the *Strawberry* case).

We have observed that the Constitutional Court case law (CCJ 35/2020, of 20 February, 112/16, of 16 March and 177/2015, of 22 July) that appealed to the obligation of the judge to consider the seriousness of the facts in order to prevent criminal law being used as a tool from restricting the exercise of fundamental rights has not been taken into account by the courts. Proportionality in the application of criminal punishment, another of the key aspects highlighted by part of the more guarantee-focussed case law, has also been ignored by the National Court.

Another finding is that the Appeals Chamber of the National Court is the court that carries out the broadest interpretation of the elements of the offence of

glorification and most restrictive and less protective of the rights of freedom of expression and opinion in all the decisions examined for this study. In doing so, the Chamber relies on outdated case-law criteria in relation particularly to the elements of incitement and risk. For the Appeals Chamber, intentionality is replaced by the analysis of the literal content of the messages, with the wording of the expressions constituting the basis for establishing incitement and risk. Specifically, the abstract risk required by the description of the offence is interpreted so broadly that it would appear to accommodate any possible situation, without the need for there to be a subsequent impact. Moreover, its decisions are an accumulation of extracts from Supreme Court and Constitutional Court judgments that are repeated in various parts of the decisions, often without a clear explanation of their relevance for the case in question. What is more, the Chamber interprets hate speech in broad terms which it bases on case law from the ECHR, although the case law cited is repetitive and refers to a limited number of judgments that are not very recent. The Appeals Chamber also takes recourse to Directive 2017/541 to justify its interpretations, although the stance maintained by the Appeals Chamber bears little relation to, indeed it falls far short of the text of the Directive and the threshold established in it in relation to the requirements of incitement and risk.

Therefore, we can conclude that case law is so **erratic, with such contradictory and unpredictable case law**, that it **generates great legal uncertainty in violation of the principle of legality**. Spanish courts, unlike the ECHR, which follows the line of real, concrete and imminent danger, opt for the application of an “abstract” risk concept that disturbingly advances the barrier criminal protection. This could seriously affect -as we have seen throughout the case law analysis- the right to freedom of expression.

The vague and extensive interpretation carried out in some cases by the Spanish courts extends the intimidatory effectiveness derived from the preventive function of the criminal law to conducts that border the legitimate exercise of freedom of expression, punishing these disproportionately. It should be noted that this aspect has also been raised by the European Court of Human Rights, which considers both the severity of the sentence imposed, and the paralyzing or dissuasive effect (chilling effect) generated by the norm, which are relevant factors when assessing proportionality.

9. Recommendations

For the legislator:

- Derogate article 578 CC and reform article 579 in light of the requirements established by article 5 of Directive 2017/541 on the fight against terrorism and the case-law of the European Court of Human Rights analysed in this report.
- Alternatively, amend the wording of article 578 CC as follows:

Public glorification or justification of the offences contained in articles 572 to 577 or of those who participated in the perpetration of the same, will be punished [...], provided this conduct is committed with the subjective intention of inciting the commission of one of the offences of this chapter, thus generating a real, clear and imminent danger that one or more of such offences may be committed as a consequence.

For the Judiciary:

- That the courts interpret article 578 CC in line with international legal standards and the requirements established by Directive 2017/541 on combatting terrorism:
 - Following the more protective and guarantee -focused line of case law analysed in this report and, in particular, having regard to all the criteria and principles set out in the case law of the European Court of Human Rights;
 - Strictly interpreting the restrictions of freedom of expression; and
 - Carrying out an acceptable assessment of the facts, providing relevant and sufficient reasons.
- In the next case involving a prosecution for an offence under article 578 CC, that a preliminary question be referred to the Court of Justice of the European Union so that it can clarify the interpretation of article 5 of Directive 2017/541, as it has not issued a decision on this matter to date, and in order to determine the compatibility of the domestic regulations (article 578 CC) with the law of the European Union.
- In view of the lack of uniformity in the case law in this area, that the Criminal Chamber of the Supreme Court call a non-jurisdictional plenary session to unify

the interpretation of articles 578 and 579 of the Criminal Code and conform to all the criteria and principles set out in the case-law of the European Court of Human Rights.

For the Attorney General's Office:

- To issue a circular establishing lines of interpretation for the offence of glorification of terrorism defined in article 578 CC, complementing Circular 7/2019 on hate crimes defined in article 510 CC, taking into account international legal standards and, in particular:
 - The precedence of the fundamental right to freedom of expression and ideology.
 - The proportionality in the application of the criminal sanction.
 - The application of the requirements set forth in EU Directive 2017/541 and case law of the European Court of Human Rights on subjective intent to incite violence, taking account of the specific circumstances of the case, context, content of the expression, general interest and the objective need that a real, clear and imminent danger exists for third parties or for society in general as a consequences of the expressions.

ANNEXES

ANNEX I

Comparative table of articles 578 and 579 of the Criminal Code before and after the 2015 reform.

	Criminal Code (LO 7/2000* and 5/2010**)	LO 2/2015, Criminal Code
Article 578	<p>*The glorification or justification, by any means of public expression or dissemination, of the offences comprised in articles 571 to 577 of this Code or of those who participated in the execution of the same, or committing acts that involve discredit, disregard or humiliation of the victims of terrorist offences or their relatives, will be punished with a prison sentence of one to two years. In the judgment, the Judge may also apply any of the prohibitions envisaged in article 57 of this Code for the period of time he/she stipulates.</p>	<p>1. The public glorification or justification of the offences comprised in articles 572 to 577 or of those who participated in the execution of the same, or committing acts that involve discredit, disregard or humiliation of the victims of terrorist offences or their relatives, will be punished with a prison sentence of one to three years and a fine of between twelve and twenty-four months. In the judgment, the Judge may also apply any of the prohibitions envisaged in article 57 of this Code for the period of time he/she stipulates.</p> <p>2. The punishment envisaged in the foregoing section will be imposed in the upper half of the scale when the facts were carried out by means of the dissemination of publicly available services or content via the communications media, internet or via electronic communications services or the use of information technology.</p> <p>3. When the facts, in view of the circumstances, are liable to seriously alter social peace or create a serious feeling of insecurity or fear in society or part of it, the punishment will be imposed in the upper half of the scale, and punishments in the next highest range may be imposed.</p> <p>4. The judge or court will order the destruction, deletion or disablement of any books, files, documents, articles or other medium used to commit the offence. When the offence is committed using information and communications technology, the removal of the content will be ordered.</p> <p>If the facts were committed via services or content accessible via the internet or electronic communications services, the judge or court may order the removal of the unlawful content or services. Subsidiarily, the judge or court may order the hosting services to remove the unlawful content, or order the search engines to delete the links leading to them and order the electronic communications service providers to prevent access to the unlawful content or services, provided that one of the following scenarios exists:</p> <p>a) when the measure is proportionate in view of the seriousness of the acts and the relevance of the information and necessary to prevent dissemination thereof.</p> <p>b) When only or predominantly the content referred to in the foregoing sections is disseminated.</p> <p>5. The measures envisaged in the foregoing section may also be ordered by the investigating judge on an interim basis during the investigation of the case.</p>

<p>Article 579</p>	<p>**1. Provocation, conspiracy and solicitation to commit the offences envisaged in articles 571 to 578 will be punished with a sentence one or two degrees, respectively, below that which corresponds to the acts envisaged in the foregoing articles.</p> <p>When the public distribution or dissemination of messages or slogans, via any means, is designed to provoke, encourage or favour the perpetration of any of the offences envisaged in this chapter, generating or increasing the risk of the offence actually being committed, and which is not covered by the foregoing paragraph or another part of this Code establishing higher sentences, it will be punished with a term of six months' imprisonment.</p> <p>2. Those responsible for the offences envisaged in this Chapter, notwithstanding the punishments applicable under the foregoing articles, will also be subject to the punishment of complete disqualification for a period of between six and twenty months longer than the duration of any term of deprivation of liberty imposed in the judgment, in proportion to the seriousness of the offence, the number of counts committed and the circumstances of the perpetrator.</p> <p>3. Those sentenced to a serious term of deprivation of liberty for one or more offences under this Chapter will also be subject to probation for a term of five to ten years, and for one to five years if the term of deprivation of liberty is less serious. The above notwithstanding, in the case of a single offence that is not serious, committed by a first-time offender, the Court may decide whether or not to impose probation in view of the lesser degree of danger represented by the perpetrator.</p> <p>4. In the offences envisaged in this section, judges and courts may, providing a reasoned judgment, opt to impose a sentence that is one or two degrees less severe than that established by law for the offence in question, when the person has voluntarily abandoned the criminal activity and appears before the authorities to confess the acts in which he/she has participated and also collaborates actively with the same to prevent the production of the offence or provides effective assistance in obtaining evidence that is decisive for the identification or capture of other responsible parties or for preventing the actions or development of terrorist organisations or groups to which he/she has belonged or with which he/she has collaborated.</p>	<p>1. The punishment imposed may be one or two degrees less severe than that envisaged for the offence in question when it involves the public dissemination of messages or slogans, via any means, that are designed to or, due to their content, are liable to, incite others to commit any of the offences of this Chapter.</p> <p>2. The same punishment will be imposed on anyone who, publicly or at a gathering of people, incites others to commit any of the offences of this Chapter, as well as for anyone who asks another person to commit them.</p> <p>3. Any other acts of provocation, conspiracy and solicitation to commit the offences envisaged in this Chapter will also be punished with a sentence that one or two degrees, respectively, less severe than that which corresponds to the acts envisaged in this Chapter.</p> <p>4. In the cases envisaged in this precept, the judges or courts may adopt the measures envisaged in sections 4 and 5 of the foregoing article.</p>
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ANNEX II

List of Examined Decisions

Criminal Chamber of the National Court (NCJ)

2016:

1. NCJ 25/2016, of 3 June, Section 4
2. NCJ 24/2016, of 19 July, Section 3
3. NCJ 28/2016, of 21 September, Section 3
4. NCJ 30/2016, of 22 September, Section 3
5. NCJ 36/2016, of 16 September, Section 3
6. NCJ 39/2016, of 30 November, Section 3

2017:

7. NCJ 2/2017, of 26 January, Section 4
8. NCJ 4/2017, of 28 February, Section 1
9. NCJ 9/2017, of 29 March, Section 4 (*Cassandra Vera*)
10. NCJ 15/2017, of 29 March, Section 1
11. NCJ 11/2017, of 21 April, Section 4
12. NCJ 13/2017, of 9 May, Section 4
13. NCJ 14/2017, of 14 June, Section 3
14. NCJ 22/2017, of 25 July, Section 4
15. NCJ 34/2017, of 4 December, Section 4 (*La Insurgencia*)
16. NCJ 39/2017, of 15 December, Section 4

2018:

17. SAN 3/2018, of 15 January, Section 4
18. SAN 6/2018, of 1 March, Section 2
19. SAN 3/2018, of 2 March, Section 1 (*Pablo Hase*)
20. SAN 10/2018, of 9 March, Section 2
21. SAN 11/2018, of 15 March, Section 2
22. SAN 10/2018, of 6 April, Section 4
23. SAN 12/2018, of 26 April, Section 4
24. SAN 15/2018, of 11 May, Section 1
25. SAN 12/2018, of 25 May, Section 3
26. SAN 30/2018, of 28 June, Section 2
27. SAN 21/2018, of 29 June, Section 3
28. SAN 23/2018, of 9 July, Section 3
29. NCJ 26/2018, of 24 July, Section 3 (nullity challenge against decision of the Central Juvenile Court 3/2018, of 6 June, *La Insurgencia*)
30. SAN 28/2018, of 21 November, Section 4 (*Resistencia Films*)

31. SAN 40/2018, of 22 November, Section 2

2019:

32. NCJ 2/2019, of 23 January

33. NCJ 3/2019, of 23 January

34. NCJ 6/2019, of 19 February

Juvenile Central Court of the National Court (CJC)

35. CJC 3/2018, of 6 June (*La Insurgencia*)

36. CJC 4/2018, of 7 November (*La Insurgencia*)

Appeals Chamber of the National Court

37. 1/2018, of 21 May (against NCJ 10/2018, of 9 March)

38. 4/2018, of 10 July (against NCJ 11/2018, of 15 March)

39. 5/2018, of 14 September (against NCJ 3/2018 of 2 March – *Pablo Hasele*)

40. 6/2018, of 18 September (against NCJ 34/2017, of 4 December – *La Insurgencia*)

41. 8/2018, of 21 September (against NCJ 12/2018, of 25 May)

42. 3/2019, of 19 March (against NCJ 40/2018, of 22 November)

Supreme Court (SCJ)

43. SCJ 206/2017, of 28 March (against NCJ 24/2016, of 19 July)

44. SCJ 221/2017, of 29 de March (against NCJ 28/2016, of 21 September)

45. SCJ 354/2017, of 17 May (against NCJ 39/2016, of 30 November)

46. SCJ 72/2018, of 9 February (against NCJ 2/2017, of 26 January)

47. SCJ 95/2018, of 26 February (against NCJ 9/2017, of 29 March – *Cassandra Vera*)

48. SCJ 334/2018, of 4 July (against NCJ 22/2017, of 25 July)

49. SCJ 47/2019, of 4 February (against NCJ 10/2018, of 9 March)

