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Report on disinformation: Submission to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

This contribution is submitted by [Asociación por los Derechos Civiles \(ADC\)](#) a civil society organization based in Buenos Aires, Argentina. ADC's mission is to defend and promote people's fundamental rights in order to strengthen democracy and inclusiveness in Argentina and Latin America. ADC wishes to provide the following comments and information on desinformation.

1. Introduction

Disinformation is complex because it involves various problems (legal, political, social, psychological, etc.), approaches (law, sociology, psychology, political science, etc.) and key players (states, social networks, journalists, academia, political parties, etc.). The level of Internet access, the digital literacy of the inhabitants, the political power of each nation or the degree of social polarization may determine the most appropriate type of measure to combat disinformation. In this context, providing a general answer to all the problems posed by disinformation is beyond the scope of this concise contribution. However, we hope that our comments can join others in order to provide useful insights for the next report.

2. Key challenges to disinformation

The main challenges to be overcome in order to effectively combat disinformation include the following:

-Dispute on the effects of online disinformation: Faced with the expansion of online disinformation operations, certain actors see the Internet as a place filled with manipulation and defamation. However, it is necessary to carefully review the true

effects of these campaigns before making a decision on the matter. After all, the need for evidence-based regulation is a basic requirement of good practice. In this regard, it should be made clear that so far the evidence on the effects of disinformation campaigns is inconclusive. As stated in the Guide to Protect Freedom of Expression in the Face of Deliberate Disinformation in Electoral Contexts of the Office of the Special Rapporteur for Freedom of Expression (RELE) of the Inter-American Commission on Human Rights (IACHR), “*while some studies suggest that some people are more likely than others to believe false information, others believe that a significant percentage of the public maintains the ability to autonomously distinguish true information from false information*”¹. Also, “*at the electoral level, existing research shows contradictory evidence and while some point out that there are no significant effects, others have found that disinformation has an effect on the determination of the information agenda, that the existence of disinformation is amplified in the media and may even be connected to the erosion of confidence in democratic institutions*”².

Therefore, scientific studies that provide empirical evidence about the impact of these phenomena are indispensable for making justified and reasonable public policy decisions. Thus, it is necessary for academia and civil society to continue producing research that is useful for increasing our understanding of the phenomenon. In this sense, it is essential that states support research projects through grants or increased budgets for the scientific community.

-The role of internet intermediaries: Disinformation online occurs through platforms in the hands of private companies. Most of these companies are based outside our country and even the region. The responsibility of intermediaries is being strongly questioned. The actions taken by Facebook and Twitter against former US President Donald Trump, during the seizure of the Capitol (2020) by extremists has sparked discussion around the world. These internet companies have design and business logics that provide certain conditions for disinformation strategies to be successful and profitable. For many analysts, it is the design logic of the platforms - promoted

¹ *Guide to Protect Freedom of Expression in the Face of Deliberate Disinformation in Electoral Contexts*. Office of the Special Rapporteur for Freedom of Expression (RELE) of the Inter-American Commission on Human Rights (IACHR), October 2019, pag. 15

https://www.oas.org/es/cidh/expresion/publicaciones/Guia_Desinformacion_VF.pdf (in Spanish)

² Ibid.

to make their business models efficient - that hold the key to the problem of disinformation. In fact, the Oxford Internet Institute's Technological Propaganda Research Project has concluded that "the lies, garbage and disinformation" of traditional propaganda are widespread online and "supported by Facebook or Twitter algorithms." The actions of moderation and removal of false, misleading content, which incite hatred, discrimination and violence; it is only a fraction of the debate around the responsibility of internet intermediaries. This means having to overcome the challenge of legal or political approaches that address disinformation online as an isolated phenomenon.

-Focus on plurality of visions and information sources: Although initiatives to combat misinformation are promising and establish limits to their proliferation, it is much more relevant to establish initiatives that promote the production of quality content. In recent years, initiatives to combat misinformation have taken up a great deal of energy and resources. However these proposals have not focused on fostering initiatives that promote the production of quality content both at a journalistic level and by encouraging certain aspects of academic and other scientific content to be disseminated. This implies to finance and support different initiatives of funding of media outlets that produce quality content, from scratch, specially if they are local news. We have evidence that as the media gets concentrated and in the hands of technological conglomerates, local news tends to disappear. It's important for a good environment of information that we keep these fields of news alive. Also, it is very important that through educational initiatives, we strengthen the critical skills of the students to receive the information, process it and discuss it. This has been a fundamental role of elementary school and we need to preserve it and deepen it, as information is in every device 24/7. The focus must not only be in the information itself but in the audiences that receive the news and every piece of it. For example, a common exercise at school, that has been done historically, is to look up for the same news in different sources, compare it, discuss it and differentiate it.

-Understand reactions to the different contexts in which disinformation operates: At first, the analysis of disinformation operations was carried out based on the impact they could have in elections. The outbreak of the Covid-19 pandemic has added a new layer of complexity to the discussion since in this case it is a matter of analyzing the link between disinformation and public health. Although in principle both

phenomena can be considered separately, the experiences of countries around the world teach us that they end up intermingling. On the one hand, public officials and candidates disseminate information about means of preventing the disease or measures to confront the pandemic, the veracity of which has been questioned. On the other hand, elections are influenced by the dissemination of news about the effects that a potential concentration of people on election day could or could not produce in the spread of the disease. However, there is no reason to treat disinformation on health issues in a very different way. It is true that in this case disinformation can have an effect on a person's health and life. It is also true that in certain situations scientific consensus allows us to detect with greater certainty the falsity of the effectiveness of a treatment to cure a disease. However, the current pandemic serves as an example that the solutions for dealing with Covid-19 are not univocal. For instance, we can mention the debates on the convenience of strict quarantines versus other alternatives such as relaxed quarantines; the extent of the use of masks and social distancing as prevention tools; or the controversy over whether or not physical activity outdoors spreads the virus. Thus, even in public health matters, the veracity or falsity of a statement is a complex issue. This is not something that should surprise us, since science itself works on the basis of the collection of evidence that may eventually disprove a hypothesis that up to that moment was considered valid.

3. Use of criminal law to counter disinformation in Argentina

-Criminalizing online speech: Disinformation on public health issues in Argentina -and other Latin American countries- has led to judicial authorities to start criminal proceedings against individuals for comments made on social networks about the Covid-19 pandemic. These people were accused of committing the crime of "public intimidation" by posting allegedly false information with the aim of creating public fear or provoking incidents³. The situation led the Inter-American Commission on Human Rights (IACHR) and the Office of the Special Rapporteur for Freedom of Expression (RELE) to express their concern. Both organizations stated that *"the introduction of criminal offenses could take the region back to a logic of*

³ *Covid-19 and freedom of expression in the Americas*. Catharine Christie, Edison Lanza and Michael Camilleri, August 2020 pag. 8 and 15
<https://www.thedialogue.org/wp-content/uploads/2020/08/Covid-19-and-Freedom-of-Expression-in-the-Americas-FN-Final.pdf>

*criminalizing expressions about public officials or matters of public interest and establish a tool with a strong inhibiting effect on the dissemination of ideas, criticism and information"*⁴. Indeed, the use of figures such as "*public intimidation*", "*public fear*" or similar have always generated suspicion due to their vagueness. Resorting to criminal law to combat disinformation seriously affects freedom of expression, since subjecting a person to criminal prosecution for something he or she said, commented or posted is typical of an authoritarian government that does not support political discussion. For this reason, it has been stated on several occasions that "*penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct*"⁵.

-Monitoring on social media by law enforcement authorities (cyber patrolling): In order to detect online disinformation on Covid-19 pandemic, Argentina's law enforcement authorities has been using social media intelligence (SOCMINT). SOCMINT can be defined as the monitoring and gathering of information on social media platforms and were used by the Police to detect the above-mentioned cases⁶. This activity is very risky as it can severely restrict online civic space. The danger of SOCMINT techniques for the sustaining of a free Internet environment is evident for several reasons. The main one is that it legitimizes police prevention of expressions. SOCMINT has been colloquially referred to as "cyber patrolling" since it is intended to be assimilated to the prevention tasks that the Police perform in public spaces (streets, squares, parks, etc). However, this identification omits a substantial difference. The main purpose of police prevention is the deterrence and avoidance of unlawful conduct that may have a direct and immediate consequence on the life, physical integrity or property of a person. In contrast, cyber-policing focuses on discourse, i.e. comments, messages, posts and other forms of communication on the Internet. In other words, the object of surveillance are expressions that, in general, do not immediately put a person at risk. Of course, this does not mean that the Internet cannot be used to send messages or exchange information to carry out illicit

⁴ IACHR and its SR FOE express concern about restrictions on freedom of expression and access to information in States' response to the COVID-19 pandemic, April 2020 <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1173&IID=1>

⁵ Inter-american Human Rights Court. Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, para. 104; https://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf

⁶ A brief explanation on what is social media intelligence can be found in *How your social media activity is monitored by the police*. Privacy International. March 2019 <https://privacyinternational.org/long-read/2722/how-your-social-media-activity-monitored-police>

conduct, whether online or in real life. But the sensitivity of the use of SOCMINT leads to it eventually being used for social control or to restrict legitimate speech. In this regard, we should remember that in April 2020 the Minister of National Security of Argentina stated that they were doing cyber patrolling to detect social mood⁷.

Therefore, states should be prohibited from engaging in sweeping monitoring of social media or general cyber-patrolling. Law enforcement authorities should be allowed to gather information on platforms only under a specific crime investigation and the collection of personal data must be necessary in a democratic society and proportionate to a legitimate aim.

4. Disinformation, private platforms and decision-making process on content moderation.

Both civil society and academia have been insisting on the need to adopt international human rights standards as a framework for content moderation decisions. While it is obvious that no solution will magically solve all the problems of online discourse governance, the human rights approach has many advantages. In terms of legitimacy, it provides us with a universal language on which we can rely to initiate an egalitarian discussion. Disputes over post removals, account suspensions and other disinformation issues should be resolved on the basis of standards that the international community as such can recognize as its own. Also, it serves as a basis for the design of public regulation to prevent governments from falling into authoritarian tendencies. However, this is an indispensable but insufficient first step.

Any implementation of a regulatory framework -including that of human rights- will be frustrated if there is no deconcentration of the power that companies hold with respect to decision-making about content moderation. A change in the rules without profoundly altering the status quo in relation to the actors and the way in which these rules will be applied will result in the following drawbacks. Firstly, it will increase the power of platforms. Human rights standards need to be interpreted

⁷ *Polémica revelación: la ministra de Seguridad admitió que las fuerzas a su cargo realizan ciberpatrullaje en redes sociales para “detectar el humor social”* [Controversial revelation: Ministry of Security admitted law enforcement authorities at her command cyber patrolled social media to detect social mood] Infobae, April 2020
<https://www.infobae.com/politica/2020/04/09/polemica-revelacion-la-ministra-de-seguridad-admitio-que-las-fuerzas-a-su-cargo-realizan-ciberpatrullaje-en-redes-sociales-para-detectar-el-humor-social/> (in Spanish)

before they can give us an answer. It is therefore crucially important to know who is going to be in charge of applying the standard. If platforms continue to decide unilaterally and exclusively, replacing private guidelines with the International Covenant on Civil and Political Rights will not have a very significant effect. Discretionality would continue but this time in the name of human rights.

Thus, the power of companies would increase as they would now have a greater layer of legitimacy. Secondly, it will increase the likelihood that private criteria will influence the decisions of public authorities. Companies are daily dealing with thousands of cases happening on their platforms. This intensive work has allowed them to develop expedited criteria for resolving content disputes. In contrast, political and judicial authorities -especially those in our country or region- do not have equivalent experience. If the platforms begin to do their work under the human rights discourse, public bodies will probably be attracted by these interpretations once it is their turn to intervene. Consequently, the criteria used by the authorities would reflect the prior judgment of the platforms.

Finally, It will prevent users from having a central role in decisions. Platforms have stated that they are aware of the problems of decisions on online speech governance being exclusively in their hands. That is why several of them have started to design mechanisms to allow external actors to influence those resolutions in a binding way. The most relevant example so far is Facebook. The company has instituted an Oversight Board that will have the final word in certain controversial cases regarding content removals. The innovation is good news as Facebook recognizes the problem of the lack of legitimacy to make such sensitive decisions. Board members have sufficient background and expertise to deal with these issues. At the same time, there is no evidence so far that their independence is impaired. But this solution is unsatisfactory too because the final decision still remains in the hands of a small number of people.

Therefore, responses to such controversial and global issues should aim to incorporate civil society, academia, human rights experts and users in a meaningful way in the content moderation decision-making process. By meaningful we mean not only participating as advisors or consultants but having real power and influence in the most controversial decisions on disinformation. Democratizing the models of

governance of online speech requires the design of new institutions by which -such as in the case of deliberative mini publics- citizens can have a more decisive role in the judgement on how best to counter disinformation in social media.

For more information, contact Eduardo Ferreyra, Ssr. Project Officer
eferreyra@adc.org.ar