

## COUNTERING HATE SPEECH AGAINST REFUGEES AND MIGRANTS<sup>1</sup>: AN EVALUATION OF INTERNATIONAL HUMAN RIGHTS TREATIES AND SOFT LAW INSTRUMENTS

### CONTRARRESTANDO DISCURSOS DE ODIOS CONTRA MIGRANTES Y REFUGIADOS: UNA EVALUACIÓN DE TRATADOS INTERNACIONALES DE DERECHOS HUMANOS E INSTRUMENTOS DE DERECHO BLANDO

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#### ABSTRACT

Since the refugee crisis that struck Europe in 2015, hate speech against refugees and migrants has increased significantly, becoming a cause of concern for the United Nations. Although there is no definition of hate speech or xenophobia in international law, dispositions in human rights treaties and soft law provide a mandate for States to protect migrants from hateful speech. By reviewing human rights treaties, documents from treaty bodies and other soft law instruments, this article aims to show that hateful speech targeting migrants should be sanctioned by law, as it falls outside the scope of freedom of expression.

**Keywords:** Human rights; freedom of expression; hate speech; migrants; refugees; United Nations.

#### RESUMEN

Desde la crisis de refugiados que afectó a Europa en el 2015, los discursos de odio contra refugiados y migrantes han aumentado significativamente, generando preocupación en las Naciones Unidas. A pesar de que no existe una definición en el derecho internacional para los conceptos de discurso de odio o xenofobia, disposiciones en tratados de derechos humanos y en derecho blando indican un deber de los Estados de proteger a migrantes frente a discursos de odio. Haciendo una revisión de tratados de derechos humanos, documentos de organismos emanados de dichos tratados y otros instrumentos de derecho blando, este artículo busca demostrar que el discurso de odio contra migrantes debería ser sancionado por ley, ya que no entra dentro del espectro del derecho a la libertad de expresión.

**Palabras clave:** Derechos humanos; libertad de expresión; discursos de odio; migrantes; refugiados; Naciones Unidas.

- 1 For the purpose of this paper, both terms are used interchangeably, even though refugees have a different legal standing than migrants. This use of terminology is based on the fact that many asylum-seekers and illegal immigrants that are likely to qualify for refugee status are rejected under ill-founded suspicions or due to their illegal entry to the host country. A similar approach was adopted by UN bodies such as the International Organization of Migration (IOM), the International Labour Organization (ILO), and the United Nations High Commissioner for Human Rights (OHCHR) at the World Conference Against Racism. See, for example: IOM-ILO-OHCHR Joint Publication (2001).
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## Introduction

Between April 29 and May 1, 2019, the United Nations (UN) held the *Second Global Summit on Religion, Peace and Security*, aiming to develop a Plan of Action to enhance the protection of religious minorities and migrants by countering hate speech (United Nations, 2019). The UN Special Advisor for the Prevention of Genocide, Adama Dieng, said during the summit that political opportunism was bolstering the rise of hate speech, and drew comparisons between 1930s Europe and the current political climate on that continent. “Big massacres start always with small actions and language” he warned (Dieng, 2019).

Dieng’s concerns are motivated by the political strategies adopted by far-right parties in Europe in the wake of the 2015 refugee crisis. Often at the fringe of the political spectrum, these parties seized the opportunity to criticize Europe’s migratory policy and set the stage for a wider debate on migration. By appealing to xenophobia, islamophobia, and other popular fears, they have successfully introduced themselves into the political mainstream. Their use of speech and rhetoric charged against immigrants has blended with the spread of misinformation, creating a hostile environment against migrants that has helped their electoral success (Williams, 2010; Melzer and Serafin, 2013; and Mudde and Rovira-Kaltwasser, 2017). As the European body for monitoring racism noted in its 2016 annual report, “racist insults have become increasingly common and xenophobic hate speech has reached unprecedented levels” (ECRI, 2017).

The same strategies are now being implemented beyond Europe. In Brazil, President Jair Bolsonaro campaigned promising to revoke the migration law and claiming “Brazil is not a country of open borders”. In Chile, president Sebastian Piñera campaigned on limiting Chilean nationality for migrants’ children and migrants’ access to public healthcare. United States president Donald Trump has gone as far as calling immigrants animals. “You’re witnessing, every day, migrants and refugees being humiliated, being dehumanised. You’re hearing political leaders [...] who are simply using that category of population as a scapegoat,” added Dieng (2019) during his intervention at the summit.

Hate speech is not a new concern for the UN; however, the specific scope of hate speech against migrants and refugees is becoming increasingly important. As conflicts in Libya, Iraq, Afghanistan, and Syria continue to displace thousands of families, Europe alone has seen an unprecedented arrival of more than one million asylum seekers, mostly coming from these countries (European Union, 2015). Other regions in the world have also faced increased numbers of incoming refugees which has been accompanied by a dramatic hike in attacks

and hate speech targeting refugees and immigrant population (see examples in Amnesty International, 2017; Tendayi Achiume, 2014).

Faced with this emerging challenge, the UN aimed to address concerns over migration and the rights of migrants through a concerted effort that concluded in the presentation, in July 2018, of the *Global Compact for Migration*, a non-binding document containing a renewed commitment from member states to respect human rights and basic international law standards. It further reinforced the UN's compromise to tackle xenophobia, amongst other forms of discrimination. Although most countries endorsed the document (152 countries to be exact), the compact was widely rejected by far-right leaders and parties, showing the level of central anti-migrant sentiment in their agenda.

While no international treaty or convention has defined the concept of hate speech, it can be situated within a wider framework of limits to freedom of expression, contained in human rights treaties and soft law. Even though hate speech laws are defined domestically, international law provides a clear outline to identify the concept of illegal hate speech, allowing to substantiate the claim that domestic laws should extend protection from hate speech to refugees, if construed in accordance with international law. To back this assertion, this paper will show that hate speech laws are consistent with international standards on limits to freedom of expression and, at the same time, that complementary international law instruments provide enough grounds for these laws to protect migrants and refugees.

## 1. Hate speech against migrants in treaty law

Freedom of speech continues to be a contingent issue in academic literature and political debate. However, in many countries, hate speech is sanctioned somehow. Hate speech laws are based on substantive equality,<sup>3</sup> especially due to the consequences that hate speech and hate crimes have had historically on individuals and communities. Hate speech became a concern in the field of international law after the Second World War, when Nazi plans of extermination of Jewish population were accompanied by public hatred campaigns (Nowak, 2005; Van Blarcum, 2005). More recently, hate speech has fuelled ethnic conflict in places such as former Yugoslavia or Rwanda (Legesse Mengistu, 2012)

3 Legesse Mengistu (n 29) 356 to 360; Mona Elbahtimy, 'CGHR Working Paper 7: The Right to be Free from the Harm of Hate Speech in International Human Rights Law' (University of Cambridge Center of Governance and Human Rights, January 2014) 8; Eva Brems, 'State regulation of xenophobia versus individual freedoms: the European view' 1 *Journal of Human Rights* 481, 482, 483.

and has preceded violence in the aftermath of the 2008 and 2013 presidential elections in Kenya (Maynar and Benesech, 2016) as well as the persecution of the Rohingya in Myanmar (Southwick, 2015).

Arguments against regulation fail to take into account that a common consequence of hate speech is diminishing the victim group's social standing.<sup>4</sup> Furthermore, they do not seem to grasp the immediate harm caused, and instead follow the premise that victims will be unaffected in their possibility to respond to the harm inflicted, presupposing that vulnerable groups share an equal social standing as any other group, ignoring historic and contextual disparities and unequal power structures (Waldron, 2006; Benesch, 2014).

Beyond the debate and as shown later, international human rights treaties – legally binding to signatory States – provide norms limiting freedom of expression and consider hate speech to be outside the scope of protected free speech. Furthermore, the grounds on which hateful speech can be sanctioned extend beyond a fixed set of categories, which would allow the inclusion of protection for migrants.

## 1.1 *International human rights treaties*

The Universal Declaration of Human Rights (UDHR) provides the basic definition for the right to freedom of expression in its article 19, defining it as the freedom to hold and share opinions and ideas without interference. This broad definition does not limit free speech; however, article 7 of the declaration provides for equal protection from discrimination and against the incitement of discrimination. A more concise definition is found in the International Covenant on Civil and Political Rights (ICCPR), which constitutes the main and most widely recognized human rights instrument. The ICCPR recognizes freedom of speech as a non-absolute right, providing duties and responsibilities and allowing for restrictions to respect the rights and reputations of others, or when it is necessary to protect the public (ICCPR, 1966: art. 19.3). Furthermore, article 20(2) requires States to prohibit, by law, any national, racial and religious hatred that constitutes “incitement to discrimination, hostility or violence” (ICCPR, 1966: art. 20.2).

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4 In fact, many hate speech and racist incidents tend to go unreported. Paul Gordon, ‘Racist Violence: The Expression of Hate in Europe’ in Coliver et.al (n 34); Fiss (n 19) 11, 12; Stefan Sottiaux, ‘Bad Tendencies’ in the ECtHR’s ‘Hate Speech’ Jurisprudence’ (2011) 7 EuConst 40, 47.

Together with art 19, art 20(2) creates an obligation for States to adopt laws that sanction speech when it advocates hatred or incites violent and discriminatory behaviour (positive obligation) and, at the same time, provides enough guarantees to avoid interference with free speech (negative obligation). As professor Nazila Ghanea (2013: 936) observes, “we may rhetorically situate racist hate speech within ‘Article 19 ½’ of the ICCPR.”

Sanctions on hateful and racist speech in general would range from ‘duties and responsibilities’ expressed in article 19(3) up to prohibited expressions set out in article 20(2). Additionally, they are in line with article 5(1), which recognizes a horizontal level of protection from abuse of rights provided by the covenant, be it by States, groups or individuals. Following Nowak (2005: 459), “article 19(3) merely represents a special manifestation of this general principle,” and article 5(1) states that unprotected speech falls in line with abuse of rights. The margin left by the ICCPR can be exercised by States through administrative, civil or criminal sanctions, implying that some hateful expressions may be punished through civil law falling under art 19(3), but more severe expressions inciting violence could be criminally prosecuted as falling within the scope of art 20(2). Article 19(3) may also require States to take additional measures, providing space in society for plural discussion, interpreting ‘duties and responsibilities’ not only in restrictive terms (O’Flaherty, 2015).

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obliges States to create restrictions on free speech. Article 4 of the convention makes “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination” against “any race group or group of persons of another colour or ethnic origin”, as well as organizations promoting these ideas (ICERD, art 4(b)) illegal. It further directs States to prohibit public authorities from inciting racial discrimination (Idem: art. 4(c)). ICERD undoubtedly extends beyond the provisions in ICCPR. However, art. 4 of ICERD explicitly clarifies that any regulation must be subjected to “due regard to the principles embodied in the UDHR and the rights expressly set forth in article 5 of this Convention,” which includes freedom of expression as outlined in the ICCPR, rendering void any issues of compatibility between both instruments.

The Convention on the Prevention and Punishment of the Crime of Genocide also restricts freedom of expression, establishing the obligation for States to punish “direct and public incitement to commit genocide” (CPPCG, 1948: art. 3(c)). Although this may be considered a more overt and extreme expression possibly rare in a modern democracy, this provision reinforces the notion that an expression inciting or promoting extreme violence is not protected.

## 1.2 *Regional human rights treaties*

Regional treaties also provide limitations to freedom of speech. The American Convention of Human Rights (ACHR) recognizes the imposition of liability on expression to ensure respect for the rights of others and protection in favour of public safety, health, order, or morals (ACHR, 1969: art. 13.2). It further acknowledges the potential abuse of restrictions from government or private actors (ACHR, 1969: art. 13.3) and considers punishable offenses any propaganda for war and advocacy of national, racial, or religious hatred that constitutes incitement to violence or unlawful action against “any person or group of persons on *any* grounds” (ACHR, 1969: art. 13.5, emphasis added). The scope of article 13(5) is much narrower than article 19 of ICCPR, restricting punished expression exclusively to incitement to violence, echoing the position of the United States Supreme Court and in large part a reflection of the influence of the U.S. delegation in the final draft of the convention (Bertoni and Rivera, 2012).

The ACHR also imposes a limit on all rights, based on the rights of others and the security and wellbeing of society, in article 32(2). This article, together with article 13, provides a legal foundation for restricting hateful speech by law. Article 14 of the Convention further outlines the right to reply to anyone who has been injured by offensive statements or ideas, an implicit recognition of the harm that may be caused by certain expressions.

The European Convention on Human Rights (ECHR, 1950) recognizes freedom of expression as an exercise which carries duties and responsibilities and thus can be restricted by law when it is ‘necessary in a democratic society’ on various grounds, most notably seeking to protect the “reputation or rights of others” and maintaining public order (ECHR, 1950: art. 10.2). Furthermore, article 17 of the ECHR prohibits the abuse of rights by States, individuals or groups seeking the destruction or limitation of rights and freedoms of others.

Although not widely ratified,<sup>5</sup> the Council of Europe’s (CoE) Additional Protocol to the Convention on Cybercrime provides a clear basis for banning hateful speech, as it requires States to criminalize the dissemination of xenophobic, racist, and hateful content through computer systems (Council of Europe, 2003: art. 3 and 4). The protocol presents its own definition of racist and xenophobic material as:

Any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or vio-

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5 Only 27 of the 45 members of the Council of Europe have ratified the protocol.

lence, against any individual or group of individuals, based on race, colour, descent or *national* or ethnic origin, as well as religion if used as a pretext for any of these factors (Idem: art. 2.1, emphasis added).

By expanding hate speech to include xenophobia, the protocol suggests that *national or ethnic origin* qualify as grounds that would include hatred against migrants and refugees.

This approach is also present in the European Council's Framework Decision on Combating Certain Forms of Racism and Xenophobia (European Council, 2008), which is meant to provide a common minimum understanding amongst member States on offenses that constitute criminal hate speech (European Council, 2008: para. 13). This binding framework<sup>6</sup> considers racism and xenophobia as threats which require a criminal response (European Council, 2008: art 3). Interestingly, the decision – which comes five years after the optional protocol – addresses the contextual and evolving nature of hate speech by providing a broad definition of the categories of targeted groups protected, defining the grounds on which hate speech takes place as “against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin” (European Council, 2008: art. 1.1.a).

The Council seems to be conscious that grounds for hatred need to cover a broad spectrum, letting States know that this definition of categories does not impede them from punishing “crimes directed against a group of persons defined by other criteria than race, colour, religion, descent or national or ethnic origin, such as social status or political convictions” (European Council, 2008: para. 10). This addition would allow countries to address concerns in regards to hatred based on gender (Muižnieks, 2014), or against migrants and refugees.

It is worth noting that the recognition of freedom of expression as a qualified right is present in all human rights treaties. Freedom of opinion or thought is separated from expression and categorized as an absolute right; both the ICCPR (1966: art. 19.1) and the ECHR (1950: art. 9.1) do not allow any derogation.<sup>7</sup>

It is clear that hate speech requires an intent (advocacy) in both ICCPR and the ACHR. ICERD does not require intent but its *due regard* clause (article

6 Council decisions are binding on EU States in accordance with Article 288 of the Treaty on the Functioning of the European Union, which follows a process of transposition into domestic legislation allowing States to determine the terms in which it will fulfil the content of the decision. See the Consolidated Version of the Treaty on the Functioning of the European Union [2012] O.J. C 326/49, art 291(1).

7 ICCPR, art. 4(2) and consequently covered by ECHR, art. 15(1).

5) would follow UDHR provisions on freedom of expression. The grounds for restrictions are narrower in ACHR and broader in ICERD, with ACHR limiting the scope of regulation only to instances of violence or unlawful action while ICERD art 4(a) extends to the dissemination of *any* racist idea. In *prima facie* grounds for hatred, the ACHR is the broadest, including racial, religious and national origin, but also ‘action against any person or groups, on any grounds’ (ACHR, 1969: art. 13.5), which would include political groups and, arguably, migrants. The EU Council Framework Decision (European Council, 2008) also includes political groups and addresses xenophobic hate speech, although it does not provide a definition for xenophobia. The interpretational gaps and the contour lines for narrowing the scope of what constitutes hate speech have been further developed in soft law instruments issued by treaty bodies, which provide authoritative guidance to clarify the concept.

## 2. Hate speech against migrants in international soft law

Despite their non-binding nature, soft-law instruments provide a useful tool to develop international treaty law by clarifying provisions in treaties and providing States with policy guidance, as well as monitoring the implementation of treaties themselves. Some of these instruments may eventually become part of custom or hard law, and are regarded as authoritative (Chinkin, 2014).

By soft-law instruments, we refer to documents signed by States or issued by international independent expert bodies institutionalized by treaties with the competence to review and issue reports, gather information, and engage in dialogue to advance in the effective implementation of the rights and aims contained in the treaty (Shelton, 2012).

### 2.1 *United Nations treaty bodies*

General comments or recommendations of U.N. human rights treaty agencies potentially decrease manoeuvring from domestic courts and governments, which could disregard or misinterpret key provisions of treaties (Alston, 2001). The UN Human Rights Committee (HRC) is the expert body appointed to interpret the ICCPR and has referred to freedom of expression and its limitations in several general comments.

In General Comment 11, the committee expressly referred to art. 20 of the covenant prohibiting war propaganda and advocacy for hatred, holding the view



that it required “a law making it clear that propaganda and advocacy [...] are contrary to public policy and providing for an appropriate sanction in case of violation” (HRCComm, 1983). This suggests that expressions which fall within the categories outlined in art. 20 cannot be viewed as part of the public debate or ‘marketplace of ideas’ as some authors would contend, and thus require a *lex specialis* to prevent them from circulating.

In General Comment 34, the committee again reiterated this view. Furthermore, it addressed the content of articles 19 and 20 and underscored their compatible and complementary relation (HRCComm, 2011: para. 50, 51). In this sense, the limitations provided by art. 19(3) are open to discretion of States, while the limitations in art. 20 are mandatory. The Committee narrowed the scope of restrictions, stating that, for them to be legitimate States “must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken [...] establishing a direct and immediate connection between the expression and the threat” (HRCComm, 2011: para. 35).

Likewise, the committee suggests that restrictions in place should protect against attacks that could hinder the freedom of expression of others (HRCComm, 2011: para. 23), meaning that the nature of these regulative measures would fall in line with article 5 of the covenant and in the spirit of the necessary measures to safeguard equality. Such restrictions should be prescribed by law and must strictly conform with the principle of proportionality, including consideration for the means and form of the expression (HRCComm, 2011: paras. 25, 34).

Narrowing further the unprotected forms of speech, the committee clarifies that a “deeply offensive” expression may be protected by art 19(2) but may be conditioned to restrictions in arts 19.3 and 20 (HRCComm, 2011: para. 11), recognizing that a ‘deeply offensive expression’ does not constitute hate speech, confirming the requirement of an aggravating element beyond mere offense.

As it is clear from General Comments 11 and 34, the laws prohibiting certain type of speech under art 20 of the covenant are treated separately from the regulations that can fall within article 19(3). It is also important to note that the committee reaffirms the absolute protection for freedom of opinion (HRCComm, 2011: paras. 5, 9, 10). This is particularly relevant since, based on this protection, the committee rejects laws which “penalize the expression of opinions about historical facts” and considers these contrary to the covenant (HRCComm, 2011: para. 49), which contrasts with Holocaust denial laws implemented in Europe.

It is worth noting that the committee interprets the “rights of others” under article 17 as “other persons individually or as *members of a community*” (HRCComm, 2011: para. 28, emphasis added) which would suggest that groups identified by their shared characteristics – ethnic, religious<sup>8</sup> or other – would be protected, which could include the notion of a refugee or migrant community.

The Committee on the Elimination of Racial Discrimination (CERD) has issued General Recommendations providing further guidance for States in implementing ICERD. In particular, number 15, 30 and 35 have addressed the issue of hateful speech. In General Recommendation 15, CERD outlined the type of unlawful acts which article 4 would prohibit, namely “(i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts” (CERD, 1993: para 3). The committee further noted that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression” (HRCComm, 2011: para 4) through articles 5 (due regard clause) and 4 in relation with article 19 of the UDHR and article 20 of the ICCPR, by reference to the ‘special responsibilities and duties’ related to freedom of expression.

In General Recommendation 30, the committee focused on discrimination of non-citizens, a category which includes both refugees and asylum seekers (OHCHR, 2006). The committee recognized – referencing the Durban Declaration and Plan of Action (DDPA, 2001) – that xenophobic hatred constituted *a source of contemporary racism*. It addressed the issue of non-citizens as victims of hate speech, recognizing that they face “multiple discrimination” (CERD, 2002: para 8) and urged States to adopt policies to address “xenophobic attitudes and behaviours towards non-citizens” with special attention to stigmatizing or stereotyping non-citizens, especially by politicians, the media, and other social actors (CERD, 2002: paras 11, 12).

In General Recommendation 35, the committee made reference again to intersectionality (CERD, 2013: para 6). As a general guideline for States to sanction hate speech, the committee underlined that criminal charges should be exceptional while penalties should follow the principles of legality, proportionality and necessity (CERD, 2013: para 12). Most notably, the committee recognized that “racist hate speech can take many forms and is not confined to explicitly racial remarks [...and] may employ indirect language in order to disguise its tar-

8 The committee has been clear in discouraging criminal defamation laws, which should not be confused with hate speech against a religious group, falling within ICCPR art 20(2). See: Idem, para 47.

gets and objectives,” (CERD, 2013: para 7) a significant admission that would reaffirm the notion of xenophobia as a contemporary source of racism.

The committee provides guidance towards determining what constitutes racist hate speech, suggesting contextual elements should be analysed to conclude if a particular expression constitutes an offense punishable by law.<sup>9</sup> It also provides a definition of the concept of incitement as a speech that “seeks to influence others to engage in certain forms of conduct, including the commission of crime, [...] express or implied” and that must be judged on the likelihood of accomplishing its goal rather than its immediate effects (CERD, 2013: para 16).

In subsequent observations on country reports, the CERD has called upon States to expand protection for migrants, asylum-seekers and refugees,<sup>10</sup> in accordance with General Recommendation 30. However, it must be pointed out that CERD has construed ‘groups’ to engulf exclusively those that fit in article 1 of ICERD, while at the same time using the term ‘racist hate speech’ understood as defined in General Recommendation 35 on the grounds of ethnicity and race (Ghanea, 2013). This narrow approach somewhat restricts the idea of ‘all forms of discrimination’ contained in the convention but must be viewed in the context of reservations on article 4 introduced by several countries (See also Goldmann, Matthias and Sonnen, 2016).

Although both the general comments and recommendations leave some ground for interpretation, the approach adopted by CERD in particular outlines narrow boundaries for racist hate speech and provides a series of indicators to determine the presence of hateful racist speech through context. The CERD clarifies the concept of incitement, which is central to art 20(2) of the ICCPR and to distinguish between different forms of unprotected speech.

## 2.2 *Inter-American system*

The Organization of American States (OAS) has drafted two conventions to tackle issues of racism and discrimination: The Inter-American Convention

9 The committee points at form, economic, political and social context, the status of the speaker within society, and the reach and objective of the speech (CERD, 2013: para 15).

10 See for example: CERD, ‘Consideration of reports submitted by States parties under article 9 of the Convention – Spain’ (8 April 2011) UN Doc CERD/C/ESP/CO/18-20, para 14; CERD, ‘Concluding observations on the combined sixth and seventh periodic reports of Kazakhstan’ (14 March 2014) UN Doc CERD/C/KAZ/CO/6-7, para 11; CERD, ‘Concluding observations on the combined seventeenth to twenty-second periodic reports of Egypt’ (6 January 2016) UN Doc CERD/C/EGY/CO/17-22, paras 26(e), 33 and 34; CERD, ‘Concluding observations on the combined sixth to eighth periodic reports of Lithuania’ (6 January 2016) UN Doc CERD/C/LTU/CO/6-8, paras 11 and 13.

## Against All Forms of Discrimination and Intolerance and the Convention Against Racism, Racial Discrimination and Related Forms of Intolerance.

The Convention Against Discrimination defines discrimination on different grounds, including “migratory condition, refugee status, repatriation, statelessness or being internally displaced” amongst others (Convention Against Discrimination, 2013: art. 1.1). It further recognizes intersectionality – following CERD’s reasoning – and defines “intolerance” as both actions and expressions, providing substance towards defining the legal contours of hateful speech (Convention Against Discrimination: arts 1.3, 1.4). Both conventions address hate speech and genocide denial in art. 4 (ii), calling on States to sanction it. They both also recognize intersectional discrimination and mandate States to consider this form of multiple discrimination as an aggravating factor (both in article 11).

Despite their broad and thorough approach, these conventions have not been well received in the region: only Uruguay and Costa Rica<sup>11</sup> have ratified these conventions, which makes their normative value very limited.

Apart from these instruments, hate speech is addressed in the 2004 annual report by the Special Rapporteur for Freedom of Expression (OAS, 2004). After reviewing different international treaties and cases, the document concludes that under the ACHR “hate speech should be regulated like the other areas of expression provided for in paragraph 2” (OAS, 2004: Ch. 7, para 38) as speech subject to liability, while art. 13(5) of ACHR would only regulate speech advocating for unlawful violence. This conclusion suggests that hate speech in itself would not elicit an aggravating or differed legal figure. However, this contrasts with the dispositions found in both conventions mentioned above, which came 9 years after the report. This could be interpreted as further evidence of the emerging interest taken by the international community.

### 2.3 *European regional system*

The main European regional systems – the European Union (EU) and the Council of Europe (CoE) – have embarked in significant efforts to counter hateful speech and racism. While the CoE may issue recommendations – through the Committee of Ministers – or negotiate treaties and protocols, the Council of the EU has the legal capacity of negotiating and adopting EU laws together with the

<sup>11</sup> See: OAS, ‘Signatories and Ratifications’. Retrieved from [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-68\\_racism\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism_signatories.asp).

European Parliament. CoE and other bodies' recommendations lack the supranational power of the Council of the EU; however, they are regarded as policy guidelines or interpretation of the existing regional conventions and contribute towards the standardization of regional and international law.

One of the earliest of such instruments was CoE's Committee of Ministers Recommendation on hate speech in 1997. The committee provided a definition for hate speech as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance," including intolerance and hostility towards minorities, migrants, and people of immigrant origin (CoE, 1997: Scope).

The document called upon member States to establish a legal framework consisting of civil, administrative and criminal law provisions on hate speech to ensure "respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others" (CoE, 1997: Principle 2).

It further reiterates States that the standards applied when determining a restriction with freedom of expression should take into account the provisions in the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) on the matter (CoE, 1997: Principle 7). It draws attention towards media outlets, differentiating between media professionals and hateful speech as subject of exposure and analysis based on public interest (CoE, 1997: Principle 6).

The European Commission against Racism and Intolerance (ECRI) in its General Policy Recommendation No. 7 advised member states to adopt a set of legal definitions for racism and direct and indirect racial discrimination (ECRI, 2002: paras 1(a) to (c)). The document strongly recommends States to penalise expressions constituting intentional incitement to hatred, violence, or discrimination in different formats and manifestations, on the grounds of race, colour, language, religion, national or ethnic origin (ECRI, 2002: paras 18(a)-(h)). The extensive list of offenses and the categories used by ECRI were intentionally selected to ensure that the evolving nature of racism would be covered.

CoE's Parliamentary Assembly has also issued recommendations regarding hate speech. The first one (CoE, 2006) dealt with freedom of expression and religious belief, and largely reflected a growing concern elicited by the Danish cartoons case, warning States to avoid seeking further restrictions on freedom of expression as a response to religious sensitivities, bearing in mind that hate speech against religious groups is not protected by article 10 (CoE, 2006: paras 7, 12).

A second parliamentary recommendation (CoE, 2007) dealing with blasphemy and religious hatred considered that “national law should penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion” (CoE, 2007: para 12). This recommendation clarifies that blasphemy should not be subject to criminal liability (CoE, 2007: paras 4 and 7.2.4).

ECRI further developed the concept of hate speech in 2015 through a new recommendation specifically on the issue. The document addresses integral measures of promotion of tolerance in society by both the State and non-State actors and recommends the sanction and criminalisation of hate speech (ECRI, 2015: paras 6-10). The recommendation predominantly focuses on tackling more contemporary issues, concerning the spread of hate speech online and the role assigned to companies and individuals (ECRI, 2015: paras 8(a)-(c)). Interestingly, the commission also linked the publication of falsehoods to hate speech (ECRI, 2015: para 4), reflecting the increasing phenomenon of so-called ‘fake news’.

The concern with online hate speech resulted in the European Commission’s code of conduct (European Commission, 2016), which agreed with four major social media platforms (Facebook, Twitter, YouTube and Microsoft). The code uses the definition of illegal hate speech contained in Framework Decision 2008/913/JHA and requires companies to review complaints of hateful content based on their own guidelines together with the decision and any laws designed for such purpose.

## 2.4 *Other sources of soft law*

In 2001, the UN organized the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, comprised of delegates from States, national human rights institutions and non-governmental organizations, which concluded with the Durban Declaration and Plan of Action (DDPA) later adopted by the UN General Assembly.<sup>12</sup> The conference document addressed racism and discrimination through a set of policy recommendations, indicating that States “should expressly and specifically prohibit racial discrimination and provide effective judicial and other remedies” (DPPA, 2001: para 163). It also recommended that States take legal measures to fight incitement and hateful speech in general, with a particular emphasis on online sources (DPPA, 2001: Sec. 2 paras 147(b) and (e)). The DDPA notes a growing concern with hostility towards refugees categorizing it as a ‘source of contemporary racism’ (2001:

12 UNGA Resolution 56/266 (15 May 2002) UN Doc A/RES/56/266.

paras 16, 52, 53). The conference further recommended a series of measures directed at the media to avoid stereotyping migrants and refugees, amongst other vulnerable groups in society (DPPA, 2001: para 89, Sec. 2 paras 144(e) and 146).

In 2012, the UN organized a series of expert workshops, which concluded with the Rabat Plan of Action (2013), a document outlining concerns and recommendations in regards to incitement of hatred and other forms of intolerance. The plan divides expressions in the following three types (para 20): 1. expression that may raise concern due to its intolerant nature but would not give rise to criminal, civil, or administrative sanction; 2. expression that is not criminally punishable but may lead to administrative or civil sanction; and 3. expression that is criminally punishable.

This approach outlines the incremental nature of the penalties that would be proportionately assigned to each type of expression. It reaffirms the general approach established in international jurisprudence, implemented by the UN HRCComm and the European Court of Human Rights (ECtHR), in which any interference with free speech should meet a three-part test based on the legality, proportionality, and necessity of the restriction in question (Rabat Plan of Action, 2013: para 22).

Additionally, the plan of action sets out a six-point threshold to determine the criminality of the expression being restricted. The test is composed by an assessment of (a) the context in which the expression took place, (b) the speaker's social standing, (c) the intent, (d) the content and form in which it is delivered, (e) the reach or audience, and (f) the likelihood of the expression leading to violent or illegal action (Rabat Plan of Action, 2013: para 29).

The document elaborates further from previous UN efforts and includes guidelines to promote multiculturalism, diversity, pluralism in the media and other measures to tackle intolerance in society. The Rabat Plan of Action provides a thorough test for judges and perhaps the clearest delimitation of parameters to determine if an act of expression falls within article 20 of the ICCPR.

The action plan warns that broadening categories too much may lead to abuse or misinterpretation of art. 20 of the ICCPR (Rabat Plan of Action, 2013: para 15). Nevertheless, the document expresses concern about the sometimes "excessively narrow or vague" laws and scarce jurisprudence, further hampering the definition of key concepts and terminology towards consolidating a coherent regulatory approach (Rabat Plan of Action, 2013: para 11). These two key issues indicate that there are significant challenges towards reaching con-

solidated minimum standards of protection against hate speech, but also point towards a basic comprehension of hate speech and its regulation.

## A need to define xenophobic hate speech

The treaties and instruments discussed above provide a consistent mandate for States to punish, through law, certain types of expression, delimiting the boundaries of protected and unprotected free speech. Some commentators have gone as far as to suggest these restrictions amount to customary international law, providing a basis to penalise hate speech (See: Mendel, 2012; Herz, Michael and Molnar, 2006; Heinze, 2006, and Cohen, 2014)<sup>13</sup> The argument is grounded in the basic obligation for States to restrict incitement to discrimination, hatred, and violence.

We can identify the legal foundations that include refugees amongst those categories protected from hateful speech by the repeated reference to xenophobia found in some of the soft law instruments reviewed above, the most elaborate of these references being CoE Ministers Recommendation R(97)20 and ECRI's General Policy Recommendation No. 7, both extending protection to individuals or groups of immigrant origin.

When we turn to soft law issued by treaty bodies, we can find references to xenophobia, but not a definition of the term as such, nor the nuances between xenophobic hate speech and, for example, racism (with the notable exception of CERD's General Recommendation 30).

Even though there is a general consistency in the main international treaties regarding hateful speech (ICCPR, CERD), there is no definitive indication of the categories or groups protected from hateful speech. In soft law we can find diverse delimitations, some clearer than others. This patchwork approach is possibly due to the nature of hate speech itself, since limitations on freedom of expression (art 4 ICERD and art 20 ICCPR) are not self-executing rights and have to be considered in relation to other rights such as article 6 in ICERD or article 26 in ICCPR.

<sup>13</sup> On this matter, there is an ongoing debate between courts, judges and academics. See: Mendel, Toby (2012). Does international law provide for consistent rules on hate speech? In Herz, Michael and Molnar, Peter (eds), *The content and context of hate speech: rethinking regulation and responses*. Cambridge, United Kingdom: Cambridge University Press; Heinze, Eric (2006). Viewpoint Absolutism and Hate Speech. *Modern Law Review* (69) pp. 543-582; Cohen, Roni (2014). Regulating Hate Speech, Nothing Customary about It. *Chicago Journal of International Law* (15) pp. 229-255.



Would the ‘national origin’ ground found in both ICERD and ICCPR and the reference to ‘xenophobia’ and ‘groups’ in soft-law include protection for non-citizens? It should. The Vienna Convention on the Law of Treaties (1969) states that the wording of treaties should be interpreted *inter alia* in light of its object, purposes and context.<sup>14</sup> If courts or committees follow a narrow approach, they risk pigeonholing protection of groups to grounds too narrow to grasp the evolving nature of social phenomena, which does not seem to be the intention reflected in the *travaux préparatoires* of the ICCPR and ICERD (Bossuyt, 1987; Nowak, 2005; Lerner, 2015).

International jurisprudence, so far, shows that both UN bodies and the European Court of Human Rights (ECtHR) have failed to develop a consistent reasoning regarding migrant victims of hate speech. In this regard, CERD has displayed a contradictory and restrictive approach,<sup>15</sup> while the HRCComm has missed the opportunity to clarify its stance.<sup>16</sup> The ECtHR has been clear in condemning anti-migrant rhetoric as racist<sup>17</sup> and has advanced – throughout its rulings – an emerging definition of “vulnerable groups” as a self-contained category,<sup>18</sup> although it is yet to be applied to immigrant victims of hate speech.

An analogous situation can be found in the Convention on Genocide, which limits protection to national, ethnical, racial, or religious groups. This narrowly defined concept of groups became problematic during proceedings at the International Criminal Tribunal for Rwanda. The tribunal redefined the idea of these definitive categories stating that group membership, as perceived by the perpetrator, should be accepted as a defining ground (Gaeta, 2011; Mannecke, 2012). Of course, the crime of genocide is by no means equitable to hateful speech. Nevertheless, it shows just how important it is for terms in treaties to adjust to context.

14 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331: art 31(1) and (2).

15 See for example the differences in reasoning between *Quereshi v Denmark* (11 December 2003) Communication No. 33/2003 UN Doc CERD/C/66/D/33/2003, *Jewish Community v Norway* (22 August 2005) Communication No. 30/2003 UN Doc CERD/C/67/D/30/2003, *Dawas and Shava v Denmark* (6 March 2012) Communication No. 46/2009 UN Doc CERD/C/80/D/46/2009 and *PSN v Denmark* (8 August 2007) Communication No. 36/2006 UN Doc CERD/C/71/D/36/2006.

16 See *Rabbae and others v Netherlands* (18 November 2016) UN Doc CCPR/C/117/D/2124/2011.

17 See *Soulas and others v France* (10 July 2008) App No. 15948/03.

18 See *Féret v Belgium* (16 July 2009) App No. 15615/07 and *Vejdeland and Others v. Sweden* (9 February 2012) App no 1813/07.

## Conclusions

A contemporary approach to hate speech should protect refugees and migrants, as it would require the consideration that immigrants are now at the centre of hateful attacks in many countries around the world, partly due to an unprecedented increase in displaced people worldwide, a trend that is likely to increase. Conjunction of grounds in anti-refugee hate speech (e.g. its overlap with Islamophobia) requires an understanding of the thin limits between xenophobia, racism, and legitimate concerns with immigration. The UN has repeatedly expressed concern on these issues<sup>19</sup> and appointed a Special Rapporteur for the area.<sup>20</sup>

Much of contemporary xenophobia is closely linked to ideas of racial superiority and colonialism. The perception of non-western foreigners as ‘uncivilized’ is accompanied by the notion of allegedly incompatible cultures, which justifies their exclusion (Wiemer, 1997; Betz and Johnson, 2004; Wieviorka, 2010). Faced with a lack of consistency in treaties, soft law, and emerging international jurisprudence, the need to define the concept of xenophobia has been discussed at the UN Ad-Hoc Committee on the Elaboration of Complementary Standards on numerous occasions. Most recently the Chair-Rapporteur has suggested considering an international legal framework for addressing xenophobia.<sup>21</sup> At the UN Human Rights Council, countries such as the US and members of the EU argue that xenophobia should fall within the scope of ICERD with no additional definition needed.<sup>22</sup>

The lack of a legally binding definition of xenophobia is as concerning as the scarce academic literature discussing xenophobia in international law. Likewise, the very limited studies on immigration and hate speech – and even less focusing specifically on refugees – suggest that further research is needed. This becomes more troubling if we consider the lack of a legal approach to tackle the growing complexity of contemporary forms of racism. Case law in domestic courts dealing with refugees and hate speech is beginning to emerge, providing a new insight into sensitive areas such as the press and political debate.<sup>23</sup>

19 See: UNGA, Res 64/150 (18 December 2013) UN Doc A/RES/68/150; UNGA, Res 68/151 (18 December 2013) UN Doc A/RES/68/151; UN Human Rights Council, Res 24/26 (11 October 2013) UN Doc A/HRC/RES/24/26.

20 UN Commission on Human Rights, Res 1993/20 (2 March 1993) UN Doc E/CN.4/RES/1993/20.

21 See: Human Rights Council, Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its fifth session (14 March 2014) UN Doc A/HRC/25/69.

22 Human Rights Council, Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its seventh session (26 February 2016) UN Doc A/HRC/31/74.

23 FRA (n 4) 8, 9; Marcello Maneri (ed), ‘#SilenceHate: Study on hate Speech Online in Belgium, Czech Republic, Germany and Italy’ (Bricks Against Hate Speech Project-Fundamental Rights and Citizenship Program of the EU, 2016) 10, 11, 12.

A suggested approach is the incorporation of groups identified in discrimination case law to expand protection from hate speech beyond racial or ethnic grounds (Article 19, 2015; Clooney and Webb, 2017). This could further be strengthened by the concept of vulnerable groups, emerging in ECtHR jurisprudence. Regardless of the definition of groups, a clear concern with immigrant population can be seen throughout soft law instruments.

While we are not suggesting the incorporation of the category of refugees as specific grounds for protection, our argument is based on developing the concept of xenophobia, as well as the existing ‘national origin’ ground and the reference to ‘groups,’ all in conjunction, since all of these concepts are already present in treaties and soft law. International courts and bodies would do well by prioritizing cases involving anti-refugee or anti-immigrant hate speech, since they are likely to increase in the years to come.

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