

# **The Legal Regulation of Hate Speech: The United Nations Framework as the Common Denominator for Europe and Asia**

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## **Introduction**

Hate speech is a threat to the proper functioning of a democratic society and a damning force to central values such as respect and solidarity. It harms us on an interpersonal, community and societal levels and is “deeply rooted in the ideologies of racism, sexism, religious intolerance, xenophobia, and homophobia.”<sup>1</sup> In a world of rising populism and far-right extremism, hate speech, as a by-product of these phenomena, needs seriously to be addressed. There is a plethora of academic writing comparing the legal regulation of hate speech between Europe and the USA, but little to none comparing Europe and Asia. This paper will prompt such scholarship by setting out a supranational framework tying the two together. In this light, it will begin with an analysis of the United Nations (UN) legal framework for regulating hate speech. This focus on the UN at a first stage is necessary since this framework constitutes the only common denominator between the two continents and provides a foundation for a comparative discussion of European and Asian states’ legal responses to hate speech. More particularly, it is the only relevant institution with countries of both continents as members that have signed, acceded to, or ratified documents seeking to, *inter alia*, tackle hate speech.

After elaborating on the definitional and contextual arena of hate speech, which will include an overview of the UN’s conceptualisation of the free speech/hate speech tension, the paper will focus on an analysis of Article 4 of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) which prohibits, amongst other, the dissemination of ideas of racial superiority. It will then assess Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) on the prohibition of

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<sup>1</sup> Uladzislau Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*, London: Routledge, 2013, p. 41.

any advocacy for religious national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As well as the substance of the aforementioned articles and related jurisprudence of the Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee (HRC) that implement the Convention, the paper will also consider other documents such as General Recommendations and Concluding Observations. Where relevant, declarations and reservations imposed by countries of the two continents on Articles 4 and 20(1) will be assessed to further understand national stances *vis-à-vis* hate speech in the realm of their international obligations. One of the key premises on which the analysis of the above will be effectuated is that the UN framework is, in itself, flawed due to inherent limitations in the practical application of the relevant articles. Importantly, it is also due to what I refer to as the ‘hierarchy of hate’ that results from the prohibition of certain types of hate speech – for example racist speech but not homophobic speech.

### **Hate Speech: Definitional and Conceptual Framework**

There is no universally accepted definition of hate speech, and the phenomenon is seldom defined in legal documents by either states or international institutions. The closest we usually get is finding a definition in a non-binding policy document of a specialised committee or body. As well as not having a universally accepted definition, states and institutions around the globe adopt differing conceptualisations of (i) hate speech and (ii) free speech and their limitations.<sup>2</sup> The end product is that, even within a supranational organisation such as the European Union, states adopt their own understandings of hate speech and approaches for tackling it.<sup>3</sup>

At the European level, the Council of Europe’s Committee of Ministers has developed one of the only documents, albeit non-binding, which seeks to shed light on the meaning of hate speech, namely the

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<sup>2</sup> See Tarlach McGonagle, “The Council of Europe against Online Hate Speech: Conundrums and Challenges”, Expert Paper, Institute for Information Law, Faculty of Law, p. 3, at <https://rm.coe.int/16800c170f>, accessed 24 November 2020.

<sup>3</sup> European Parliament, “Motion for a European Parliament resolution on establishing a common legal definition of hate speech in the EU”, 2017, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2017-172+0+DOC+XML+V0//EN>, accessed 22 December 2017.

Recommendation of the Council of Europe Committee of Ministers on Hate Speech.<sup>4</sup> It holds that hate speech:

*...is to be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.*

This definition is both interesting and problematic. Firstly, by including the justification of hatred in the sphere of prohibited speech, the Recommendation is broad in its conceptualisation of hate speech, encapsulating a low threshold. Secondly, the Recommendation blatantly disregards hate speech which is not expressly linked to racial or religious groups. As such, homophobic and transphobic speech is left outside the spectrum.

On a judicial level, the European Court of Human Rights (ECtHR) has not provided a definition of hate speech, *per se*. Instead, it has correlated hate speech with ‘all forms of expression which spread, incite, promote or justify hatred based on intolerance including religious intolerance, for example’<sup>5</sup> Interestingly, in the case of *Vejdland v Sweden*, it mobilised around the opportunity to rectify loopholes left by institutions such as the Council of Ministers referred to above in relation to homophobic speech and argued that homophobic speech should be prohibited in the same manner as racist speech, stressing that “discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour.”<sup>6</sup> In the same case, the Court offered an important insight into threshold issues. More particularly, it held that it is not necessary for the speech “to directly recommend individuals to commit hateful acts”<sup>7</sup> given that harm may arise from “insulting, holding up to ridicule or slandering specific groups of the population.”<sup>8</sup> This is undoubtedly a broad conceptualisation on what is to be considered prohibited speech as the

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<sup>4</sup> Council of Europe’s Committee of Ministers Recommendation 97 (20) on Hate Speech.

<sup>5</sup> *Gündüz v Turkey*, App. no 35071/97 (ECHR, 4 December 2003), para. 40, *Erbakan v Turkey*, App. no 59405/00, (6 July 2006), para. 56.

<sup>6</sup> *Vejdland and Others v Sweden*, App. no 1813/07 (ECHR 09 February 2012), para. 55.

<sup>7</sup> *Ibid.*, para. 54.

<sup>8</sup> *Ibid.*, para. 54.

requirement for incitement to hatred and conducting hateful acts does not need to arise from the speech. Instead, the insult, ridicule or slander found in speech is, in itself, harmful. Notwithstanding the delineations and elucidations made by the ECtHR, the fact that it has not, yet, offered a hate speech definition has been characterised as “unsatisfactory from the point of judicial interpretation, doctrinal development, and general predictability and foreseeability.”<sup>9</sup> Unfortunately, because the ECtHR represents a working consensus of only European norms, no comparison can be made with the position of a respective Asian Court since such a body does not yet exist.

The central tenet behind the difficulty of defining and ensuring a collective approach to hate speech on an international level is the *perceived* fine line between free speech and hate speech. In fact, several of the reservations made to provisions of international documents such as Article 4 of the ICERD which prohibits, amongst others, racist speech is the free speech justification. For example, Japan adheres to the article with a reservation, namely that:

*Japan fulfils the obligations under those provisions to the extent that fulfillment is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan.*

In the 2001 Concluding Observations to Japan, CERD held that:

*Such an interpretation is in conflict with the State party's obligations under Article 4 of the Convention. The State party's attention is drawn to General Recommendations VII and XV, according to which Article 4 is of a mandatory nature, given the non-self-executing character of all its provisions, and the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the rights to freedom of opinion and expression.<sup>10</sup>*

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<sup>9</sup> McGonagle, above fn. 2, p. 10.

<sup>10</sup> Concluding Observations: Japan, CERD, A/56/18 (2001) 34, paras. 168, 169 and 171.

In the latest Concluding Observations to Japan (2014), CERD noted that “it regrets the decision of the State party to maintain its reservations.”<sup>11</sup>

France also incorporated a reservation to Article 4, holding that:

*With regard to Article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in Article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.*

CERD has repeatedly underlined the significance of prohibiting hate speech, noting that practicing free speech “carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas.”<sup>12</sup> Moreover, in its General Recommendation 15 on Measures to Eradicate Incitement to or Acts of Discrimination, CERD highlighted 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.”<sup>13</sup> However, this position is of no substantial assistance as it is not accompanied by any conceptual, contextual or theoretical analysis of either free speech or hate speech. At its best it can offer solely hollow rhetoric to the deep-rooted issues related to hate speech regulation. The readiness of CERD to restrict free speech in the name of protecting the rights and freedoms of others, in the sphere of regulating hatred was also reflected in *Jewish Community of Oslo et al. v Norway*, a case involving a march commemorating Rudolf Hess that considered what is meant by the “due regard clause” of Article 4. More particularly, the prohibition of racist speech and activity as incorporated in Article 4 should have “due regard of the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention” including freedom of expression. In this case, CERD held that:

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<sup>11</sup> Concluding Observations: Japan, CERD, CERD/C/JPN/CO/7-9 (2014), para.10.

<sup>12</sup> CERD Concluding Observations: United States of America (2001) CERD/C/59/Misc.17/Rev.3, para.12.

<sup>13</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para. 4.

*...to give the right to freedom of speech a more limited role in the context of Article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.<sup>14</sup>*

In fact, the Committee held that, the “freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies.”<sup>15</sup> This is in line with its position that the due regard clause cannot be exploited for “cancelling or justifying a departure from the mandatory obligations set forth in Articles 4(a) and 4(b).”<sup>16</sup>

The conflict between free speech and hate speech has also been generalized within the sphere of Article 19 of the ICCPR, which provides for the freedom of expression. Whilst the right to hold opinions is absolute, the freedom of expression “carries with it special duties and responsibilities” and can be restricted if this is provided for by law and is necessary for respect of the rights or reputations of others or for the protection of national security, public order or of public health or morals.<sup>17</sup> In this realm, the HRC has been faced with cases involving hate speech. For example, in the case of *Faurisson v France*, a revisionist historian made claims such as the following:<sup>18</sup>

*I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication ('est une gredinerie'), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government, with the approval of the court historians.<sup>19</sup>*

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<sup>14</sup> *The Jewish community of Oslo et al. v. Norway* (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003), para.10.3.

<sup>15</sup> *Ibid.*, para. 10.5.

<sup>16</sup> Committee on the Elimination of Racial Discrimination, 18<sup>th</sup> Sess. (339 mtg.) at 152, CERD/C/SR.399 (1978), para. 2.

<sup>17</sup> Article 19 ICCPR

<sup>18</sup> *Faurisson v France*, Communication no. 550/1993 (8 November 1996), CCPR/C/58/D/550/1993, Para. 9.6

<sup>19</sup> *Ibid.*, Para. 2.6

The historian who was prosecuted under an anti-revisionist law (the Gaysot Act) brought his case to the Committee, claiming that his freedom of expression had been violated. The Committee found that anti-Semitic speech could be restricted in order to protect the rights and freedoms of others, namely Jews, from religious hatred. More particularly, it held that:

*The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-Semitism; protecting that value could not have been achieved in the circumstances by less drastic means.*

The above overview demonstrates several significant issues. Firstly, it appears that at the heart of the problem in defining hate speech lies in the perceived tension between free speech and hate speech. Apart from one faulty example set by the Council of Europe's Committee of Ministers, no other body or committee of an institution whose outputs are binding or semi-binding or, at least, of some force at all, has formulated a definition of hate speech. For example, General Recommendation 15 of CERD on Article 4 of the Convention that deals with racist speech offers no definition of what this speech is. General Recommendation 35 of the same committee on Combatting Racist Hate Speech looks at several related issues such as what factors are considered for criminalisation and, whilst incitement is defined, racist hate speech is not. In fact, this recommendation recognises that the lack of a definition of hate speech in the Convention has "not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention."<sup>20</sup> The closest the Recommendation gets to extrapolation is its remark that:

*Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect*

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<sup>20</sup> CERD General Recommendation 35: Combatting Racist Hate Speech (2013) CERD/C/GC/35, para. 5.

*language in order to disguise its targets and objectives.*<sup>21</sup>

Although not a definition, this remark is reflective of the low threshold and broad spectrum of speech granted by the Committee. Unlike the European Union, which conceptualises prohibited speech as speech that publicly calls for violence or hatred,<sup>22</sup> the UN considers that even speech which, in a disguise, seeks to perpetuate hatred is to be prohibited.

Neither the ICERD, nor its monitoring committee CERD, offer a definition of racist speech which would constitute a useful definitional framework for the work of the Committee and States Parties. Either way, even if a definition was provided for by this committee it would be limited to racist speech. Furthermore, the ECtHR, which is directly relevant to the current discussion, has dealt with several hate speech cases, but has tiptoed around the definitional framework of the phenomenon. In essence, the result is that “hate speech seems to be whatever people choose it to mean.”<sup>23</sup> And although States receive guidelines from institutions such as CERD to prohibit the dissemination of racist ideas and racist expression, there is no technical analysis of themes such as thresholds and delineations between potentially conflict freedoms such as expression and non-discrimination.

#### **Article 4 ICERD: Prohibiting the Manifestation of Racism**

This section shall critically assess Article 4 of the ICERD as the key provision of the Convention to tackle racist expression. Article 4 of the ICERD encapsulates the prohibition of racist ideas, propaganda and expression as well as racist acts of violence and incitement to such acts. It seeks to tackle racial hatred as manifested by speech and acts as uttered or carried out by organised groups as well as racist speech uttered by public officials. In its General Recommendation 35, CERD

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<sup>21</sup> Ibid., para. 7.

<sup>22</sup> Article 1 (a) framework decision on racism xenophobia: (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin

<sup>23</sup> Roger Kiska, “Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence”, in *Regent University Law Review*, Vol. 25, No. 1, 2012, pp. 107-151, at p. 110.

noted that speech and acts prohibited under this article are those which are:

*directed against groups recognized in Article 1 of the Convention – which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin – such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups ... The Committee’s attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups ...*<sup>24</sup>

The historical context of the ICERD is significant in contextualizing and comprehending the formulation of Article 4. As noted by CERD when ICERD was finalized in 1969, the need to militantly restrict expression and association of racists was considered paramount because “there was a widespread fear of the revival of authoritarian ideologies”; hence the existence of Article 4.<sup>25</sup> In General Recommendation 15, CERD highlighted that this article is of a mandatory character<sup>26</sup> and has been described by Mahalic and Mahalic as “the most important article in the Convention.”<sup>27</sup> It is particularly relevant to the current discussion since, as noted by CERD, it has “functioned as the principal vehicle for combatting hate speech.”<sup>28</sup> In the current global context of rising far-right ideologies, this article is not one to be forgotten, either by states themselves, or by institutions.

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<sup>24</sup> CERD, above fn. 20, para 6.

<sup>25</sup> CERD, above fn. 13, para 1.

<sup>26</sup> CERD General Recommendation 15: “Measures to Eradicate Incitement to or Acts of Discrimination” (1985) A/40/18, at 120. This principle was reiterated in a number of documents including CERD General Recommendation 35: Combatting Racist Hate Speech (2003) CERD/C/GC/35, para. 10.

<sup>27</sup> Drew Mahalic, and Joan Gambia Mahalic, “The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination”, in *Human Rights Quarterly* Vol. 9, No. 1, 1987, pp. 74-101, at p. 89.

<sup>28</sup> CERD, above fn. 20, para. 8.

The text of Article 4 reads as follows:

*States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:*

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.*

This is a broad provision, banning an array of racist expression and activities, imposing the obligation on States to punish racist speech (without actually defining it).

The UN General Assembly has reiterated the importance of States Parties taking the necessary measures to tackle the different forms and manifestations of racism as extrapolated in this Article<sup>29</sup> whilst the UN Human Rights Council has highlighted that States Parties must criminalise the incitement to imminent violence

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<sup>29</sup> General Assembly Resolution 66/143: Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance: (29 March 2012).

based on religion or belief.<sup>30</sup> From the very beginning of its activities, CERD has underlined that the incorporation of Article 4 into national legislation is “obligatory under the Convention for all States Parties”<sup>31</sup> and denounces countries which do not comply with this strict requirement. For example, in its latest “Concluding Observations” to Japan, CERD expressed its concern in relation to national legislation, arguing that although there are provisions for defamation and other crimes that can be used in relation to racist ideas, “the legislation of the State party does not fully comply with all provisions of Article 4.”<sup>32</sup> As such, the committee recommended that “the State party take appropriate steps to revise its legislation, in particular its Penal Code, in order to give effect to the provisions of article 4.”<sup>33</sup> Although the development of relevant legis-lation is an obligation to acceding States Parties, CERD has highlighted that enacting legislation is not sufficient for purposes of Article 4 compliance and that the proper implementation of such legislation is a necessary pre-requisite.<sup>34</sup> For example, in its jurisprudence it has highlighted that:

*It does not suffice, for the purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in Article 4 of the Convention.*<sup>35</sup>

Article 4 provides that states must take immediate and positive measures in order to meet the requirements of this article. For elucidation purposes, such measures have been defined by the

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<sup>30</sup> Human Rights Council Resolution 16/18: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief (12 April 2011); Human Rights Council Resolution 19/25: Combating intolerance, negative stereotyping and stigmatization of, and discrimination and incitement to violence and violence against persons based on religion or belief, (10 April 2012).

<sup>31</sup> CERD General Recommendation 1: States Parties’ Obligations (1972) A/8718 at 37.

<sup>32</sup> Concluding Observations: Japan, above fn. 11, para. 10.

<sup>33</sup> Ibid.

<sup>34</sup> CERD, above fn. 13, para. 2.

<sup>35</sup> *Gelle v Denmark*, Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.3. This was reiterated in *Jama v Denmark*, *Adan v Denmark* and *TBB-Turkish Union v Germany*.

Committee as comparison of “legislative, executive, administrative, budgetary and regulatory instruments ... as well as plans, policies, programmes and ... regimes.”<sup>36</sup>

Furthermore, in the framework of speech potentially leading to violence and, more particularly, threats of racial violence, the Committee highlighted the strict duty on authorities to investigate such threats swiftly and effectively. More particularly, in *L.K. v the Netherlands* CERD noted that, “when threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition.” This is reflective of the positive duty imposed on countries to examine manifestations of racism, even when they do not arise from the public sphere.

In relation to the actual handling of prohibited speech and acts under Article 4, CERD has not been clear. For example, in its General Recommendation 31, the Committee held that “States parties should fully comply with the requirements of Article 4 of the Convention and criminalize all acts of racism.”<sup>37</sup> However, in the case of *Yilmaz-Dogan v The Netherland*, which involved racist statements made by an employer, CERD recognised the importance of the expediency principle – “the freedom to prosecute or not prosecute, is governed by considerations of public policy”<sup>38</sup> – and held that the Convention “cannot be interpreted as challenging the *raison d’être* of that principle.”<sup>39</sup> However, it underlined that the Convention is to be considered in all cases involving racial discrimination.<sup>40</sup> In *Zentralrat Deutscher Sinti und Roma et al. v Germany*, the Committee found that the disciplinary procedures taken against the author of a racist letter were sufficient to meet the requirements of Article 4.<sup>41</sup> So, on the one hand, the actual provision of Article 4 holds that States Parties “shall declare an offence punishable by law” the dissemination of racist ideas and racist expression and General Recommendation 31 stipulates the requirement for criminal penalties. On the other hand, the Committee’s

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<sup>36</sup> In general recommendation No. 32 (2009) on the meaning and scope of special measures in the Convention.

<sup>37</sup> CERD General Recommendation 31: The Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005) A/60/18 (2005) 98, para. 4.

<sup>38</sup> *Yilmaz-Dogan v The Netherlands*, Communication no. 1/1984 (10 August 1988) CERD/C/36/D/1/1984, para. 9.4.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Zentralrat Deutscher Sinti und Roma et al. v Germany*, CERD/C/72/D/38/2006 (3 March 2008), CERD/C/72/D/38/2006, para. 7.7.

jurisprudence has been sufficiently flexible to allow less grave approaches to prohibited expression and conduct. Although less harsh ‘penalties’ for racist speech could facilitate the use of Article 4 by States Parties, a clear line should be established and endorsed by CERD.

In light of the above, Article 4 ICERD is undoubtedly significant for tackling racist speech (but not hate speech in general). However, the issue that arises is whether its significance goes beyond the conceptual. More particularly, nowhere in the article or in the Convention itself, or in any explanatory documents such as General Recommendations, is there an analysis of what racist speech – a major element of this article – actually is, in both theoretical and practical terms. Further, fleeting references to the prohibition of “all dissemination of ideas based on racial superiority or hatred” are made in the article with no supporting extrapolation on semantics and notions. This is contrary to incitement, which has been explained in a General Recommendation. More particularly, the Committee has held that:

*Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words.*<sup>42</sup>

This extrapolation is a positive step to supporting countries in formulating and implementing necessary measures to tackle incitement as there is a conceptual explanation as well as practical examples on what kind of activities (for example, the display of racist symbols) can constitute this prohibited conduct. Such explanation is particularly important for the prohibition of expression which often is contextualised by States Parties within a free speech prism as can, anyhow be discerned in the reservations imposed to this article on free speech grounds.<sup>43</sup> Moreover, it is clearly evident that this article is not working as desired. Had it been sincerely accepted by States Parties, violent neo-Nazi groups such as Golden Dawn of Greece and Jobbik

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<sup>42</sup> CERD General Recommendation 35 Combatting Racist Hate Speech (2013) CERD/C/GC/35.

<sup>43</sup> Such a reservation has been incorporated by, inter alia, France and Japan. For a full list of reservations see [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en), accessed 20 December 2017.

of Hungary would not be prowling the streets and entering parliaments, and far-right populists around the globe would not be allowed to systematically utter racist rhetoric. Moreover, considering free speech considerations which have time and again been communicated by States Parties, the tilting of CERD towards the actual criminalization of racist speech may constitute an obstacle in achieving the aims and objectives of the Convention, namely the elimination of all forms of racial discrimination. Besides taking that consideration into account, the other step that could be taken by the UN in facilitating the correct implementation of this article would be the elucidation of prohibited conduct and the provision of a definitional framework in respect to racist speech.

### **Article 20(2) of the ICCPR: Prohibiting Advocacy of Hatred**

This section shall critically assess the UN's 'hate speech' clause as embodied in Article 20(2) of the ICCPR. Article 20(2) of the ICCPR is different from the majority of rights found in this Covenant and other conventions. Rather than providing a particular human right as with most convention articles, this one directly prohibits certain forms of expression. This is like Article 4 of the ICERD which, rather than setting out particular human rights, limits rights and freedoms for purposes of restricting the manifestation of racism.

Article 20(2) stipulates that:

*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Issues of free speech may arise, just as in the case of Article 4 ICERD since advocacy occurs through the vehicle of expression. Several countries have incorporated reservations to Article 20(2) on free speech grounds. An indicative example being the reservation of Luxembourg which held:

*The Government of Luxembourg declares that it does not consider itself obligated to adopt legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole will be implemented taking into account the rights to freedom of thought, religion,*

*opinion, assembly and association laid down in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in articles 18, 19, 21 and 22 of the Covenant.*

To this end, the HRC has been very clear in its approach, just as it was in its Article 19 jurisprudence on hate speech, following the same line and path as CERD. More particularly, in its General Comment 34 the Committee 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.<sup>44</sup>*

A 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression defined advocacy as the “explicit, intentional, public and active support and promotion of hatred towards the target group.”<sup>45</sup> This report also provides a brief description of what is meant by ‘hatred’, ‘incitement’, ‘discrimination’, ‘hostility’ and ‘violence’. Although it is beyond the scope of this paper to assess each term, the existence of such a report and this definitional framework is significant. More particularly, having such terms and extrapolations potentially facilitates the understanding of the words by States Parties and, therefore, the article and could promote the correct use of Article 20(2) where relevant. However as with the issue of advocacy referred to above, the definitions are but a brief overview of central elements rather than an exhaustive definition. As a result of, and as can be determined by, how ‘advocacy’ is defined, problems still remain regarding the precise meaning and measures of threshold. For example, what is meant by active support? What threshold needs to be surpassed for such support to exist?

Beyond the threshold issue for the words of the article, the threshold of Article 20(2) more generally has been set out by the aforementioned Special Rapporteur and by the Rabat Plan of Action. The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression held that “the threshold of the

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<sup>44</sup> Human Rights Committee General Comment 34: Article 19 – Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 50.

<sup>45</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 44(b).

types of expression that would fall under the provisions of Article 20 (2) should be high and solid.”<sup>46</sup> Furthermore, the Special Rapporteur noted that in determining the threshold, States Parties should adopt the test set out by the NGO Article 19. This test holds that States Parties must consider the “severity, intent, content, extent, likelihood or probability of harm occurring as well as the imminence and context of the speech in question.”<sup>47</sup> The Rabat Plan of action states that it is a necessary pre-requisite that a high threshold is associated with the implementation of Article 20.<sup>48</sup> In determining whether particular speech reaches the necessary threshold, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression followed the seven-part test proposed by the NGO Article 19, underlining that General Comment 11 of the HRC on the Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred holds that in order to meet the obligations of this article, States Parties must implement relevant legislation which directly prohibit the advocacy set out in Article 20(2).<sup>49</sup> However, as determined by the NGO Article 19, Article 20 is rarely enshrined in national legislation<sup>50</sup> The case of *Mohamed Rabbae, A.B.S and N.A v The Netherlands* was brought against the Netherlands for the acquittal of Geert Wilders, leader of the Dutch Party for Freedom (*Partij voor de Vrijheid*) following his prosecution for racist statements. This is the only case law of the HRC where here is a relatively in-depth extrapolation of the State obligations that amount from Article 20(2).<sup>51</sup> The Committee held that Article 20(2):

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<sup>46</sup> Ibid., para. 45.

<sup>47</sup> Ibid., para. 79.

<sup>48</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002), para. 22.

<sup>49</sup> General Comment 11: Article 20 – Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (1994), HRI/GEN/1/Rev.1 at 12, Para. 1.

<sup>50</sup> ARTICLE 19, “Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred Work in Progress: A study Prepared for the Regional Expert Meeting on Article 20, Organised by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010,” p. 3, at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>, accessed 8 December 2017.

<sup>51</sup> *Vassilari, Maria et al. v Greece* (19 March 2009) Communication no.570/2007; *J.R.T and the W.G. Party v Canada* (6 April 1983) Communication no. 104/1981.

*does not merely impose a formal obligation on States parties to adopt legislation prohibiting such conduct. Such a law would be ineffective without procedures for complaints and appropriate sanctions.*

This is the same position as that adopted by CERD in relation to state obligations in the realm of Article 4 ICERD. Although Article 4 ICERD renders racist expression an “offence punishable by law” whereas Article 20(2) requires solely the prohibition by law of such advocacy. To this end, the Committee noted in the case against Wilders that:

Article 20(2) does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be ‘prohibited by law.’ Such prohibitions may include civil and administrative as well as criminal penalties.<sup>52</sup>

In this case, the fact that the State Party had an established legislative framework that covered the obligations arising from Article 20(2) and given that the State Party pursued the prosecution of this case meant that the Netherlands had not violated its obligations under Article 20(2).<sup>53</sup> Importantly, the Committee set out that the obligation under this article:

*does not extend to an obligation for the State party to ensure that a person who is charged with inciting to discrimination, hostility or violence will invariably be convicted by an independent and impartial court of law.*

In brief, insofar as a functional legislative framework exists that is relied upon where relevant, the State Party is in conformity with its obligations. The issue of sanctioning bad speech is of direct relevance to the discussion on Article 20(2) but also of Article 4. It is clear, that there is a general confusion within the UN as to what sanctions need to be imposed on such speech. This is reflected in the discrepancy arising from the wording of the two articles under consideration, with Article 4 ICERD referring to the prohibited conduct being “punishable by law” and Article 20(2) ICCPR referring to the advocacy being

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<sup>52</sup> *Mohamed Rabbae, A.B.S and N.A v The Netherlands* (14 July 2016) Communication no. 2124/2011, para. 10.4.

<sup>53</sup> *Ibid.*, para. 10.7.

“prohibited by law” rather than punished. What is paradoxical is that while Article 4 prohibits the dissemination of racist ideas, Article 20(2) prohibits the advocacy for phenomena such as hatred and violence. Despite that, it is the former which is criminally punishable based on the reading of the article rather than the latter, notwithstanding the lower threshold of harm associated with article 4.

Moreover, the terms “punishable” and “prohibited”, although indicative of the criminal or non-criminal nature of a penalty, do not go far in designating what kind of repercussion haters should have in law. To complicate things further, in assessing Article 20(2), the Special Rapporteur on the Freedom of Opinion and Expression noted that “there is no requirement to criminalize such expression”<sup>54</sup> while the Rabat Plan of Action noted that “criminal sanctions related to unlawful forms of expression should be seen as last resort measures.”<sup>55</sup> Ensuring a commonly adhered to approach amongst UN bodies would be the first step to directing States Parties correctly as to how speech that falls within the realm of the above articles are dealt with.

Therefore, although conceptually significant as a tool to tackle hate speech, Article 20(2) is seldom found in national legislation. Further, the lack of clarity of the practical meaning of terms particularly in terms of thresholds, regardless of the effort made by the Special Rapporteur to elucidate the notions, in addition to the limited amount of HRC jurisprudence tackling this article means that there continue to be obstacles in its actual use.

### **The UN Framework and the Hierarchy of Hate: A Major Thorn in its Side**

Therefore, the two mechanisms that exist on a UN level to tackle hate speech are Article 4 ICERD and Article 20(2) ICCPR. These articles cover hatred that attack ethnic, racial and religious characteristics. There are no equivalent conventions or articles which seek to protect victims are targeted due to other characteristics such as sexual orientation and gender identity. This is a major downfall of the UN framework and sets a distressing precedent for States Parties, essentially indicating that steps do not have to be taken to punish or

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<sup>54</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 47.

<sup>55</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 22.

prohibit homophobic or transphobic speech. Regarding this, the NGO Article 19 has argued that Article 20(2) of the ICCPR must be read in light of the characteristics set out in Article 2 of the ICCPR which include sex and “other status”.<sup>56</sup> Although no reference is made in Article 2 of sexual orientation and “gender identity”, they could be incorporated in “other status” and as held by the HRC in *Toonen v Australia*, “sex” must include sexual orientation.<sup>57</sup> However, a recommendation of an NGO in how the Covenant should be interpreted is by far sufficient to provide protection against homophobic speech, whilst no respective recommendation has been made in relation to transphobic speech. Essentially, the UN framework has completely disregarded characteristics that are vulnerable to haters beyond the ones described above, establishing, therefore, a hierarchy of importance when it comes to what ought to be protected and what not.

### Conclusion

In conclusion, the UN framework does seek to tackle certain types of hate speech and could be considered as an important contributor to the fight against hate speech. However, the question arises as to whether its role goes beyond mere symbolism and, more importantly, whether this framework is actually effective both conceptually and practically. From the above analysis, it can be discerned that the framework is flawed insofar as there are limitations in relation to meanings and thresholds for both Article 4 ICERD and of Article 20(2) ICCPR. Further, the UN framework focuses solely on speech attacking racial, ethnic and religious characteristics, with no documents or provisions protecting attacks on sexual orientation and gender identity, resulting in an arbitrary and unjustified hierarchy of hate that is deemed worthy of legal address on an international scale. Moreover, the persistence of countries across the globe – in Europe, Asia, and beyond – to attach “sacred cow” status to free speech when confronted with hate speech regulation is reflected in reservations made to the articles under consideration. This is a profound structural problem for the effective implementation of the two articles. In this light, the UN framework is undoubtedly significant for any Europe-Asian comparison. It is also

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<sup>56</sup> ARTICLE 19, “Policy Brief – Responding to Hate Speech against LGBTI People”, 2013, p. 12.

<sup>57</sup> *Toonen v Australia Communication* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) para 8.7.

the realm in which concerted and collaborative efforts can be made to strengthen the two continents' fight against hate speech. However, regardless of the common denominator status of the UN, any such actions should take into account the limitations of the framework and work towards addressing them.