

The Concept of Racist Hate Speech and its Evolution over time

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Racism has long-plagued human society and, left unheeded, it risks growing as a cancerous tumour through our societies blighting the lives of individuals and communities. The purpose of this short paper is to give attention to the concept of racist hate speech and particularly to the fact of its complexity and inseparability from a wider spectrum of hatred. Using the methodology of intersectionality, this paper encourages the CERD Committee's continued but cautious engagement in this field.

Section I: The backdrop of Freedom of Expression and Incitement

Freedom of expression and incitement in human rights instruments

Before turning our attention to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and racist hate speech, it is worthwhile to situate hate speech more generally within other international instruments. We may rhetorically situate racist hate speech within 'Article 19 ½' of the ICCPR, between freedom of opinion and expression and incitement. We will give attention to this framework of freedom of expression and the prohibition of incitement within the ICCPR, before turning to the question of hate speech itself.

The texts of Articles 19¹ and 20² of the ICCPR bear testament to the fact that although freedom of expression is "one of the most widely accepted rights",³ it is not an absolute right and there are prohibitions and limitations attached to it. The right to hold opinions without interference is an absolute right and "permits no exception or restriction".⁴ It is only in their expression that "special duties and responsibilities", and hence possible restrictions, may apply. One of the legitimate grounds for

¹ Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

² Article 20 states:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

³ Dominic McGoldrick and Thérèse O'Donnell, 'Hate-speech laws: consistency with national and international human rights law' 18 *Legal Studies*, 1998, p. 454.

⁴ UN Doc. CCPR/C/GC/34, Human Rights Committee, General Comment 34 on Article 19 of the ICCPR, Freedoms of opinion and expression, adopted at the 102nd session, 12/9/11, para. 9.

restriction listed in article 19(3) of the ICCPR is that of respect for the rights or reputations of others. As the Human Rights Committee has rightly observed, “[t]he term ‘others’ relates to other persons individually or as members of a community. Thus it may, for instance, refer to individual members of a community defined by its religious faith or ethnicity.”⁵ The note of caution is that in its application of these restrictions the State Party “may not put in jeopardy the right itself”.⁶ As outlined in Article 19(3)(b) any restrictions must be:

Provided for by law; and

They must be imposed for one of the following purposes:

respect of the rights or reputations of others [Article 19(3)(a)]; OR the protection of:

national security,
public order (ordre public),
public health or
morals,

and be justified by the State party concerned as being necessary to achieve one of those purposes in a proportional manner.⁷

Article 20 of the ICCPR has been described as being “among the strongest condemnations of hate speech”,⁸ though strictly speaking the Article does not concern itself with ‘hate speech’ in general but only with ‘incitement’. Reference in Article 20 to both ‘propaganda for war’ as well as ‘advocacy of national, racial or religious hatred’ is indicative of the gravity of hatred that it is concerned with. It also qualifies its concern with hatred which is conditioned by that which ‘constitutes incitement to discrimination, hostility or violence’. Nowak has noted the lack of uniformity, the extraordinary vagueness – and hence risk of abuse – of the term ‘advocacy’.⁹ However, advocacy of hatred constituting incitement ‘to discrimination, hostility or violence’ is a lot more specific than discriminatory expressions in general.¹⁰ Reading these three limbs together is significant for upholding the high threshold it requires, particularly the shadow of 20(1)’s ‘propaganda for war’. The juxtaposition of these three terms is not accidental, neither is its positioning after Article 20(1).

The question of priority and relationship between Articles 19 and 20 can be discussed in the light of historical trends, the *travaux préparatoires* and their objectives. Reasons offered by scholars to date include “the response mandated by the horrors of National Socialism”,¹¹ the pre-war period, the Holocaust and “the Cold War dance and the need by the Soviet Union] to take an opposite position to the United States”.¹²

⁵ UN Doc. CCPR/C/GC/34, para. 28.

⁶ UN Doc. CCPR/C/GC/34, para. 21.

⁷ For a discussion of these provisions see: UN Doc. CCPR/C/GC/34, paras. 21-36.

⁸ Eric Heinze, *Viewpoint Absolutism and Hate Speech*, 69.4 *The Modern Law Review*, 2006, p. 544.

⁹ Manfred Nowak *U.N. Covenant on Civil and Political Rights*, CCPR Commentary, Kehl, NP Engel Publisher, 2005, 2nd rev. ed, p. 472.

¹⁰ Nowak has observed that “It is most difficult to conceive of an advocacy of national, racial or religious hatred that does not simultaneously incite discrimination. Manfred Nowak, p. 475.

¹¹ Manfred Nowak, p. 468.

¹² Kevin Boyle, *Hate Speech, The United States versus the rest of the World?*, 53.2 *Maine Law Review*, 2001, p. 489.

Article 20(2) “does not require States parties to prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination”.¹³ It does, however, require them to prohibit – though not necessarily to criminalise¹⁴ – other incitement.¹⁵ Article 20 places an obligation on States Parties “to adopt the necessary legislative measures prohibiting the actions referred to therein”,¹⁶ by showing that they have been “prohibited in law” or show that “appropriate efforts intended or made to prohibit them”¹⁷ have been made, for example as violations of tort law. According to the Human Rights Committee, full and effective compliance with this obligation requires “a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.¹⁸ This should apply to both private and public actors as States Parties “should themselves refrain from any such propaganda or advocacy”.¹⁹ The threshold set for this *requirement* on the state for action, this positive obligation – rather than permission – on the state to take action must necessarily be high. Post states in relation to Article 20(2) that “states must show that the harm of discrimination cannot be ameliorated by means other than the suppression of protected speech”,²⁰ say the utilisation of educational initiatives. Therefore, whilst prohibited by law, a well calibrated process of responding to hate speech that incites discrimination needs to be carefully ascertained in order for the sanctions adopted at each stage to indeed be “appropriate”.²¹

Section II: Freedom of Expression and ICERD

Freedom of expression and racist superiority in the ICERD Convention

The position of the ICCPR can be contrasted with Article 4 of ICERD.²² The CERD Committee has commented regarding Article 4 that “it is incumbent upon the State to investigate with due diligence and expedition” every threat of racial violence

¹³ Manfred Nowak, p. 475.

¹⁴ See: Article 19 Briefing note on International and Comparative Defamation Standards (London, February 2004) available at <http://www.article19.org/pdfs/analysis/defamation-standards.pdf> (last accessed July 2012).

¹⁵ ‘Incitement’ is used as a shorthand for Article 20(2)’s “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. This is a far more specific articulation than the general reference to ‘hate speech’, defined by one author as “speech designed to promote hatred on the basis of race, religion, ethnicity or national origin”. Michael Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis, 24 Cordozo Law Review, 2003, p. 1523.

¹⁶ UN Doc. CCPR/C/GC/11, Human Rights Committee, General Comment 11 on Article 20 of the ICCPR, Prohibition of propaganda for war and inciting national, racial or religious hatred, adopted at the nineteenth session on 29/7/83, para. 1.

¹⁷ UN Doc. CCPR/C/GC/11, para. 1.

¹⁸ UN Doc. CCPR/C/GC/11, para. 2.

¹⁹ UN Doc. CCPR/C/GC/11, para. 2.

²⁰ Robert Post, Religion and Freedom of Speech: Portraits of Muhammad, 14.1 Constellations, 2007, p. 83.

²¹ UN Doc. CCPR/C/GC/11, para. 2. See also UN Doc. CCPR/C/GC/34, para. 50: “Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.”

²² This article has been critiqued by a number of authors including Partsch. See: K. J. Partsch, Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination in Sandra Coliver (ed.) Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination, London: Article 19 and University of Essex: Human Rights Centre, 1992, pp. 27-28.

“especially when they are made in public and by a group”.²³ Article 4 imposes a positive and immediate duty on States Parties to condemn both propaganda and organisations “based on ideas or theories”²⁴ of racial superiority, hatred and discrimination by making it punishable by law, by prohibiting such organisations - whether public or private.

Hate speech

As discussed, the language of the ICCPR was that of ‘incitement’ rather than ‘hate speech’. There is a lot of confusion in the literature about the distinction between incitement and hate speech. Some turn to analysing the speech itself, others to the assumed impact on the victim(s) or on human dignity in itself, and others on the impact on others. Benesch simply distinguishes between the terms of ‘incitement’ and ‘hate speech’ in terms not of the gravity of the speech but its effects. She states:

Incitement in all of its forms is often confused with other types of inflammatory, hateful, or offensive speech. Incitement can be distinguished from these broader categories of speech, however, with reference to the intended or actual *effects* of speech. ... When inflammatory speech inspires one audience to harm another person or group, that is ... successful incitement. ... [M]any acts of hate speech that are aimed directly at the victim group do not have ... [such] effects and therefore do not constitute incitement.²⁵

Taking this as our point of departure, therefore, our concern is with speech that is aimed at the victim(s) and which has *not* had the effect of inspiring its audience to harm the victim(s) concerned.

An example of the CERD Committee’s use of the term ‘hate speech’ is in relation to descent-based communities. In its General Recommendation,²⁶ CERD insists on “measures” being taken “against any dissemination of ideas of caste superiority and inferiority or which attempt to justify violence, hatred or discrimination against descent-based communities”,²⁷ and “to raise awareness among media professionals of the nature and incidence of descent-based discrimination”.²⁸ The General Recommendation also insists on “strict measures” being taken “against any incitement

²³ See: Yilmaz-Dogan v. The Netherlands, CERD Report, 1988, GAOR A/43/18, Annex IV, para. 6.6. See also: Patrick Thornberry ‘Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)’, Conference room paper 11, Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, (2-3 October 2008, Geneva), available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/2008Seminar/Pages/ExpertPapers.aspx> (last accessed August 2012).

²⁴ UN Doc. A/RES/20/2106, ICERD, Article 4.

²⁵ Susan Benesch, Consultant to UN Special Advisor on the Prevention of Genocide, ‘Contribution to OHCHR Initiative on Incitement to National, Racial, or Religious Hatred’, paper made available at the UN OHCHR 2011 Expert workshop on the prohibition of incitement to national, racial or religious hatred, Vienna, February 2011, available at <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Others2011/SBenesch.doc> (last accessed August 2012).

²⁶ UN CERD/C/GC/29, CERD, General Recommendation 29, Article 1, paragraph 1 of the Convention (Descent), Sixty-first session, 1/11/02.

²⁷ UN CERD/C/GC/29, para. 18.

²⁸ UN CERD/C/GC/29, para. 20.

to discrimination or violence against the communities, including through the Internet”.²⁹ In the specific context of hate speech, therefore, CERD has recommended ‘measures’ or ‘strict measures’ to be taken against the justification of ‘violence, hatred or discrimination’ against specific communities, and put emphasis on ‘awareness raising among media professionals’.

In today’s discussion we are *not* discussing incitement. We are also *not* addressing the ‘lower grade’ discriminatory speech or the ‘higher grade’ incitement to terrorism or incitement to genocide. Discriminatory speech has been distinguished from hate speech by Brink:

There is much speech that is discriminatory but does not count as hate speech. It reflects and encourages bias and harmful stereotyping, but it does not employ epithets in order to stigmatize and insult ... vilify and wound. ... [H]ate speech is worse than discriminatory speech ... hate speech’s use of traditional epithets or symbols of derision to vilify on the basis of group membership expresses contempt for its targets and seems more likely to cause emotional distress and to provoke visceral, rather than articulate, response.³⁰

We may depict these five kinds of speech in this way:

Discriminatory speech	Hate speech	Incitement to hatred	Incitement to terrorism	Incitement to genocide
	(e.g. see CERD General Recommendation 29)	(e.g. see Article 20, ICCPR)	(e.g. see “incitement to commit a terrorist act or acts” in Article 1(1) of Security Council Resolution 1624 (2005))	(e.g. see “direct and public incitement to commit genocide” in Article 3(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide)

====> *increased gravity*

The UN and Racism

The UN’s efforts in relation to racism were largely triggered by the concerns of the General Assembly over the ‘Swastika epidemic’ in Europe of the late 1950s.³¹ This, in turn, led to the adoption of the ICERD Convention in 1965,³² which entered into force in 1969. This historical trigger is illustrative of the fact that at the outset the hate with which the international community was concerned addressed race-based as well as other hatreds – that is racist as well as ethnic and religious hatred. Although the hatreds that triggered the emergence of CERD were broad and inclusive, the text of the ICERD has narrowed it, particularly through Article 1(1) of the ICERD

²⁹ UN CERD/C/GC/29, para. 19.

³⁰ David O. Brink, Millian Principles, Freedom of Expression, and Hate Speech, 7 Legal Theory, 2001, pp. 138-139.

³¹ As Keane explains, “The movement toward international legislation against racial and religious discrimination began as a response to a growing number of anti-Semitic incidents that took place in the winter of 1959 and 1960, known as the ‘swastika epidemic’. Developing countries supported the creation of international legislation against racial and religious discrimination.” David Keane, Addressing the Aggravated Meeting Points of Race and Religion, 6 Maryland Law Journal of Race, Religion, Gender & Class, 2006, p. 371.

³² UN Doc. A/RES/20/2106, ICERD.

Convention: “race, colour, descent, or national or ethnic origin”.³³ This list does not, however, exhaust the hatreds with which racism has come to be amalgamated over time, so can the CERD Committee legitimately deal with the ‘evolution of racism’?

The evolution of Racism

‘Evolution’ is a somewhat odd word to use to describe the negative phenomenon of racist hate speech, as ‘evolution’ tends to be used to describe progress. Nevertheless, it also describes increased complexity. The phenomenon of racism has certainly become more complex over time. Much of this increased complexity concerns the very tendency towards amalgamation, pulling towards its vortex additional targets of prejudice. The targets of racism and racist hate speech are singled out by racists for their race, migrant status, ethnicity, religion or belief, colour and other characteristics - sometimes described under the umbrella term ‘otherness’. As Oleksy has argued, the ‘lived experience’ of discrimination is often multidimensional:

The thought underlying intersectionality has been a process and lived experience. ... [I]ts real success will be measured in how it will benefit the underprivileged. Will legislators listen to researchers and look into how different axes interlock in a single individual experience?³⁴

Section III: Intersectionality

Intersectionality

In recent years, the term ‘intersectionality’ has come into more general UN usage³⁵ to describe “multiple ... discrimination[,] ... compound discrimination, interlinking forms of discrimination, multiple burdens, or double or triple discrimination”.³⁶ Crenshaw introduced the term ‘intersectionality’ and defined it as “the need to account for multiple grounds of identity when considering how the social world is constructed”.³⁷ She also went on to distinguish structural intersectionality (the actual experience of discrimination) from political intersectionality (the manner in which politics marginalises such experience).³⁸ Both have a bearing on our discussion of hate speech, firstly in how intersectional hate speech is suffered and secondly in how it is responded to. A road intersection is used to depict intersectionality:

³³ UN Doc. A/RES/20/2106, ICERD, Article 1(1) recognises that “term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

³⁴ Elzbieta H. Oleksy, Intersectionality at the cross-roads, 34 Women's Studies International Forum (2011), p. 269.

³⁵ See, for example, para. 32 of the Beijing Declaration and Programme of Action, 2001, which determines to: “Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people”. See also Division for the Advancement of Women, Gender and racial discrimination, Report of the Expert Group Meeting, 21-24 November 2000, Zagreb, Croatia, UNDAW 2000, Section C. available at <http://www.un.org/womenwatch/daw/csw/genrac/report.htm> (last accessed August 2012).

³⁶ Division for the Advancement of Women, Gender and racial discrimination, Report of the Expert Group Meeting, Section C.

³⁷ Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color, 43 Stanford Law Review, 1991, p. 1245.

³⁸ Kimberle Crenshaw, p. 1245.

The idea of ‘intersectionality’ seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment.

Intersectional subordination may be described by the metaphor of a traffic intersection. In this metaphor, race, gender, class and other forms of discrimination or subordination are the roads that structure the social, economic or political terrain. It is through these thoroughfares that dynamics of disempowerment travel. These thoroughfares are sometimes framed as distinctive and mutually exclusive avenues of power. For example, racism is frequently perceived as distinct from patriarchy, while patriarchy is, in turn, viewed as distinct from class oppression. In fact, the systems of discrimination or subordination often overlap and cross each other, creating complex intersections at which two, three or four of these avenues meet. ... [It] can be dangerous when the traffic flows simultaneously from many directions. Injuries are sometimes created when the impact from one direction throws victims into the path of oncoming traffic, while on other occasions, injuries occur from simultaneous collisions. These are the contexts in which intersectional injuries occur - when multiple disadvantages or conditions interact to create a distinct and compound dimension of disempowerment. Intersectional discrimination which results in subordination creates consequences for those affected in ways which are different from consequences suffered by those who are subject to one form of discrimination only, be it based on race, gender or some other form of discrimination, such as sexual orientation, age and class.³⁹

Since a discriminatory attitude serves as the basis of hatred and the intent of discrimination as the purpose of hate speech, intersectionality can also be considered to be highly relevant to racist hate speech. Theories of ‘multidimensionality’ in fact build on intersectionality but shift the focus on the more relevant question of “the interaction of systems of oppression rather than on intersecting identity categories”.⁴⁰ However, since these theories have not yet been fully taken up by UN fora, they will not be discussed further here.

Section IV: CERD and Intersectionality

In order to respond adequately, to ensure that the gravity of multiple discriminations are addressed, and that no targets of discrimination remain vulnerable, CERD has gradually developed a widening ambit of discriminations within its activities through intersectionality, examples being evident in its General Recommendations on gender, descent and Roma.

³⁹ Division for the Advancement of Women, Gender and racial discrimination, Report of the Expert Group Meeting, Section C.

⁴⁰ Keri A. Froc, Multidimensionality and the Matrix, Identifying Charter Violations in Cases of Complex Subordination, 25.1 Canadian Journal of Law and Society, 2010, p. 23. Also see Froc for further discussion of these theories.

Already with the Gender General Recommendation, the CERD Committee recognised how discrimination can affect victims “in a different way, or to a different degree”, in both “public and private life”⁴¹ when they are victims of intersectional discrimination. The CERD Committee also recognised how “[c]ertain forms of racial discrimination may be directed towards women [*i.e. intersectional victims*] specifically because of their gender [*i.e. intersectionality*]”;⁴² and it committed itself to “integrate gender perspectives” [*i.e. intersectional perspectives*].⁴³

Taking forward this insight that “some forms of racial discrimination have a unique and specific impact on women [*i.e. intersectional victims*]”,⁴⁴ we find the same observations extended by CERD in its General Recommendations on Roma and Descent. The General Recommendation on Roma was adopted at the session subsequent to that which adopted the General Recommendation on Gender. Its genius is the holistic manner in which it recognises measures for: protection against racial violence, in the field of education, to improve living conditions, in the field of the media, and concerning participation in public life. It specifically recognises intersectionality in terms of insisting on: “all necessary measures in order to avoid any form of discrimination against immigrants or asylum-seekers of Roma origin” (para. 5), its recognition of “the situation of Roma women, who are often victims of double discrimination” (para. 6), in giving specific attention to the disadvantaged position of Roma women and girls (para. 22 and particularly the education of Roma girls (para. 17)), and in recognising the intersectionality of Roma and minority status (para.41).⁴⁵

The General Recommendation on Descent⁴⁶ dedicates a specific section to intersectionality in relation to women.⁴⁷ It also deals holistically with a range of issues plaguing the indignities stemming from descent-based discrimination, such as: segregation, the dissemination of hate speech including through the mass media and the Internet, the administration of justice, civil and political rights, economic and social rights and the right to education. It also takes an inclusive approach in outlining the relevance of the General Recommendation to those who “suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality”.⁴⁸ It is evident that

⁴¹ UN CERD/C/GC/25, CERD, General Recommendation 25, Gender related dimensions of racial discrimination, Fifty-sixth session, 20/3/00, Article 1.

⁴² UN CERD/C/GC/25, Article 2.

⁴³ UN CERD/C/GC/25, Article 2.

⁴⁴ UN CERD/C/GC/25, Article 4.

⁴⁵ UN Doc CERD/C/GC/27, General Recommendation 27, Discrimination against Roma, Fifty-seventh session, 16/8/00.

⁴⁶ UN CERD/C/GC/29.

⁴⁷ UN Doc CERD/C/GC/29, paras. 11, 12 and 13.

⁴⁸ UN Doc CERD/C/GC/29, para. 1.

“analogous systems” and the recognition of “relevant factors” seek to include parallel discriminations where appropriate.

The methodology of intersectionality, therefore, is a long-standing one in CERD Committee practice.

Section V: CERD, Intersectionality and the challenge of hate speech

Yuval-Davis has perceptively observed that concrete experiences of oppression, being oppressed, for example, as ‘a Black person’ is always constructed and intermeshed in other social divisions (for example, gender, social class, disability status, sexuality, age, nationality, immigration status, geography, etc.). Any attempt to essentialize ‘Blackness’ or ‘womanhood’ or ‘working classness’ as specific forms of concrete oppression in additive ways inevitably conflates narratives of identity politics with descriptions of positionality as well as constructing identities within the terms of specific political projects. Such narratives often reflect hegemonic discourses of identity politics that render invisible experiences of the more marginal members of that specific social category and construct an homogenized ‘right way’ to be its member.⁴⁹

Taking the path that CERD has already pursued with its holistic and intersectional approach in relation to discrimination, encourages it to continue to do so in relation to racist hate speech too. This would allow CERD to respond to the evolution of racist hate speech in terms of its increased complexity. In the emphasis on discrimination on the basis of “caste and analogous systems of inherited status”,⁵⁰ it can be seen that CERD puts forward an inclusive outlining of factors that can be beneficial in relation to hate speech as well. This continuity of CERD’s intersectional approach into the area of hate speech is further encouraged by the impulse of not essentialising some singular forms of ‘racist hate speech’ beyond others and rendering the Committee blind and neglectful of the complex kinds of hate speech that are evolving in the cynical effort to avoid censor. This approach enables the CERD Committee to respond to complex kinds of hate speech without needing to undertake the exercise of deciphering only ‘pure’ forms of racist speech - an exercise that runs the risk of fragmenting and caricaturing the actual experiences of potential claimants.⁵¹

After all, the challenge posed by racist hate speech mongers today is that they are in receipt of good legal advice as to how to navigate the law and persist with their hate mongering. Too narrow a fixation on ‘pure’ “race, colour, descent, or national or ethnic origin”⁵² hate speech, would render much hate speech beyond the reach of the CERD Committee, including what we may call ‘camouflaged’ racist hate speech.

Intersectionality and why CERD?

Within the UN Human Rights system as it stands, the question has to arise as to how far the CERD Committee is authorised to deal with hate speech in general, how this

⁴⁹ Nira Yuval-Davis, *Intersectionality and Feminist Politics*, 13.3 *European Journal of Women’s Studies*, p. 195.

⁵⁰ UN Doc CERD/C/GC/29, para. 1.

⁵¹ Keri A. Froc, see pp. 24-25.

⁵² UN Doc. A/RES/20/2106, ICERD, Article 1.

can remain within the intent of the ICERD Convention, and whether the Human Rights Committee is not, in fact, better placed to deal with this matter?

It is at this juncture that some ‘red lines’ need to be drawn. As already established in CERD practice, these ‘red lines’ call on the CERD Committee to deal with all aspects of intersectional discrimination, but when and only when discrimination on the basis of “race, colour, descent, or national or ethnic origin”⁵³ *also* exists. So, for example, “ICERD does not extend to religious groups per se.”⁵⁴

The CERD Committee observes in its General Recommendation on Special Measures that

The principle of enjoyment of human rights on an equal footing is integral to the Convention’s prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The “grounds” of discrimination are extended in practice by the notion of ‘intersectionality’ whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable ‘distinction, exclusion or restriction’ but also by an unjustifiable ‘preference’ ...⁵⁵

It is submitted that discrimination existing ‘in combination with’ the grounds listed in Article 1 of the Convention in fact allows for a greater flexibility than has been exercised to date by the CERD Committee. In line with existing CERD practice, this would have to primarily be informed by the “self identification”⁵⁶ of the claimant, whether of their ethnicity, religion or belief, race or other grounds. The insights of intersectionality would then encourage attention to be drawn to the experience of each of the various grounds as well as the unique aspects of the overall experience. It

⁵³ UN Doc. A/RES/20/2106, ICERD, Article 1(1) recognises that “term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

⁵⁴ Stephanie E. Berry, *Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination: Square Peg in a Round Hole?*, 11.3 *Human Rights Law Review*, 2011, p. 427. This author would also concur with Berry’s comment that in the light of Article 31(1) of the Vienna Convention on the Law of Treaties (1969, 1155 UNTS 331) that establishes that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’, then “‘Racial Discrimination’, even though interpreted widely in Article 1(1) of the Convention, cannot be considered to include ‘religious discrimination’ within its ‘ordinary meaning’. An examination of the purpose of ICERD corroborates the view that religious groups are not included per se. As ‘religion’ is only mentioned once in the text of ICERD, in Article 5(d)(vii), which prohibits racial discrimination and ensures equality before the law in respect of the right to freedom of thought, conscience and religion, this would lead to the conclusion that the prevention of religious intolerance does not fall within the ‘object and purpose’ of the Convention.” pp. 427-428.

⁵⁵ UN Doc CERD/C/GC/32, General Recommendation 32, The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination, Seventy-fifth session, 24/9/09, para. 7.

⁵⁶ For example, see: UN Doc CERD/C/GC/34, para. 1 and UN Doc CERD/C/GC/27, para. 3.

would also allow for a wider range of claims to be entertained through the individual complaints procedure by the Committee than has been declared admissible to date.⁵⁷

Intersectionality within a human rights framework

There is a warning that needs to be taken on board with regards to intersectionality and hate speech, whether by the CERD Committee, Human Rights Committee or other body. That is, that the response to hate speech needs to be informed by the rights-content of the issue at hand. The existing CERD approach to hate speech is not a ‘cookie cutter’ that can be applied to all intersectional hatreds in an identical fashion. Hatreds cannot be responded to interchangeably as they may be of a different nature. They are not all simply reducible to the parameters of racism that CERD has engaged with thus far. As Yuval-Davis has noted

The point of intersectional analysis is ... to analyse the differential ways in which different social divisions are concretely enmeshed and constructed by each other and how they relate to political and subjective constructions of identities.⁵⁸

The intersectional analysis in itself by no means implies that the same response should be utilised in response to all forms of discrimination. In fact the very strength of the intersectional approach is its ability to be context specific. This context-specificity means that, for example,

- (i) the precise gravity
- (ii) the historical background and institutional nature and
- (iii) all the human rights of the alleged perpetrator(s) and victim(s)

can all be taken on board. The questions of gravity and historical background have already been touched upon in commending the CERD approach in its General Recommendations on gender, descent and Roma. Attention will therefore now be focused on consideration of (iii) all the relevant rights pertaining to alleged perpetrator(s) and victim(s).

The response to hatred – in fact any action within the field of human rights – cannot be negligent of the nature of the rights at hand. The Human Rights Committee recognises this in its General Comment on Article 19. In one part it hints at the differential role of freedom of opinion and expression in relation to a whole set of other rights. “The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights.”⁵⁹ In another, it specifically spells this out in relation to some issues arising in the context of freedom of religion or belief.

“Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible

⁵⁷ See, for example, Berry’s claim that CERD has, thus far, insisted on the noting the targeting of ‘an identifiable ethnic group’ in its intersectional assessment of claims. Stephanie E. Berry, p. 450.

⁵⁸ Nira Yuval-Davis, p. 205

⁵⁹ For a discussion of these provisions see: UN Doc. CCPR/C/GC/34, para. 4.

for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”⁶⁰

The language of rights is precisely, and often laboriously, formulated in relation to the subject at hand. A ‘pick and mix’ approach to removing such texts beyond their intended context can lead to perverse outcomes and this is particularly so in relation to hate speech. One example of this may suffice. Simply taking Article 4 of CERD and substituting religion for race would provide us with the following text:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one *religion* or group of persons of one colour or ethnic origin, or which attempt to justify or promote *religious* 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 *religious* superiority or hatred, incitement to *religious* discrimination, as well as all acts of violence or incitement to such acts against any *religion* or group of persons of another colour or ethnic origin, and also the provision of any assistance to *religious discrimination* activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite *religious* 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 *religious* discrimination.

It is clear that within the field of freedom of religion or belief we *cannot* condemn a position on ‘religious superiority’ *per se* or declare ‘ideas based on religious superiority’ as punishable by law. This is a point that has also already been emphasised by three Special Rapporteurs in a seminar on a related matter:

Whereas some have argued that “defamation of religions” could be equated to racism, we would like to caution against confusion between a racist statement and an act of “defamation of religion”. We fully concur with the affirmation in the preamble of the International Convention on the Elimination of All Forms of Racial Discrimination that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous”. However, invoking a direct analogy between concepts of race or ethnicity on the one hand and religion or belief on the other hand may lead to problematic consequences. Religious adherence, membership or identity can be the result of personal choices the possibility of which constitutes an essential component of the human right to freedom of religion or belief. For this reason, freedom of religion or belief also covers the rights to search for meaning by comparing different religions or belief systems, to exchange personal views on questions of religion or belief, and to exercise public criticism in such matters. For this reason the criteria for defining religious

⁶⁰ For a discussion of these provisions see: UN Doc. CCPR/C/GC/34, para. 48.

hatred may differ from those defining racial hatred. The difficult question of what precisely constitutes religious hatred, at any rate, cannot be answered by simply applying definitions found in the area of racial hatred.⁶¹

Despite this, we can and should condemn religious ‘hatred and discrimination in any form’ with the same vigour; we should undertake ‘immediate and positive measures’ undertake efforts to eradicate such discrimination and to declare punishable by law all acts of violence or incitement to violence against persons belonging to any religion or belief by individuals, organisations and public authorities and institutions.

Quite simply, speech, interchange, opinion, vigorous debate, persuasion, the marketing of ideas, being challenged and challenging others – these have crucial significance for freedoms such as freedom of religion or belief, but do not have existential significance in relation to racial superiority; or the allegation of superiority vis-à-vis persons with disabilities, migrant status, or persons of a different age or gender. As Fariior notes, “[i]nternational law has declared that hate propaganda has no value”,⁶² whereas through discussion of values, beliefs and opinions, whether of the religious, political, scientific or other kinds, holds enormous value. Such discussion and exchange underpins, facilitates and gives meaning to a whole host of rights and should never be allowed to cynically be passed for ‘hate speech’ by timid States for political ends.

So whilst encouraging a continued emphasis on intersectionality by the CERD Committee, this needs to be pursued with the same sensitivity that CERD has already shown in relation to its intersectional tackling of gender, Roma and descent. A few examples in relation to freedom of religion or belief illustrate the need for this sensitivity. These are presented with great reluctance, as only the detailed facts of the case allow any legitimate conclusion to be drawn by an authorised and independent judicial body about the gravity of the hatred at hand. For example, this author would question Berry’s view that one can legitimately come to the *general* conclusion for a whole minority group in a particular region, regardless of the detailed facts of a particular context, that “discrimination against Muslims constitutes indirect discrimination under ICERD”.⁶³ It may do and it may not, there isn’t one determination that can be made on the question in the abstract. The author also concurs with the view of three Special Rapporteurs that

Where do we draw the line between criticism – even if deemed offensive – and hate speech? From a legal perspective, each set of facts is particular and can only be assessed and adjudicated, whether by a judge or another impartial body, according to its own circumstances and taking into account the specific context. An independent judiciary and respect for the rules of due process are

⁶¹ OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred Expert workshop on Europe (9-10 February 2011, Vienna), Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, available at http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint_SRSubmission_for_Vienna.pdf (last accessed August 2012), pp. 10-11.

⁶² Stephanie Fariior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14.1 *Berkeley Journal of International Law*, 1996, p. 93.

⁶³ Stephanie E. Berry, p. 447.

therefore essential preconditions when prohibiting certain forms of expression.⁶⁴

However, the illustrations are put forward with this proviso and merely in order to illustrate how ‘speech’ underpins different rights in such different ways:

- A chat show or documentary about religious prejudice that voices extreme objections to particular religious laws is not likely to rise to the threshold of hate speech. This would likely be the case in a documentary highlighting racial prejudice too.
- The supremacist claims of a New Religious Movement (NRM), however theologically unpalatable to other religions or beliefs, would be unlikely to rise to the threshold of hate speech. The position may indeed prove different in relation to racial supremacist claims.
- Ridiculing the claims of a religious holy figure would be unlikely to, in itself, rise to the threshold of hate speech. Burning the picture of a religious holy figure in an anti-Zionist public parade, spearheaded by government authorities, in the context of deep-seated and established religious persecution, likely may.⁶⁵
- Vilifying those that belong to a particular religion or belief at a university seminar, whilst bringing reasoned arguments as to the positions they hold and why those positions are considered to be unsustainable by the speaker, would be unlikely to rise to the threshold of hate speech. A similar seminar arguing for the intellectual, spiritual or other inferiority of those belonging to a particular race may.
- Attacking the symbols of a religion or belief community whilst verbally accusing them for all the ills of a particular country, in a context of deep seated institutional discrimination against members of that community, may rise to the threshold of hate speech.

In relation to CERD’s Article 4, therefore, it is *not* the substitution of the word ‘race’ and ‘racism’ for other forms of discrimination that will amount to an intersectional human rights approach, but isolating the ‘key analogous or transferable factors’. The key ‘transferable factors’ of Article 4 would appear to be:

- Condemning propaganda which attempts to justify and promote hatred, of any kind
- Condemning organisations based on the promotion of hatred and discrimination; whilst giving close attention to the relevance of vigorous debate to the area concerned and to allayed human rights when doing so

⁶⁴ OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred Expert workshop on Europe (9-10 February 2011, Vienna), Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, available at http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint_SRSubmission_for_Vienna.pdf (last accessed August 2012), p. 11.

⁶⁵ Qods day, Esfahan, Iran, 17 August 2012 regarding large picture of Bahá’í holy figure ‘Abdu’l-Bahá. See also: Inciting Hatred, Iran’s media campaign to demonize Bahá’ís, A special report of the Bahá’í International Community, Bahá’í International Community, United Nations Office, New York, October 2011, <http://www.bic.org/sites/default/files/pdf/inciting-hatred-book.pdf> (last accessed August 2011).

- The importance of States Parties undertaking to adopt immediate and positive measures designed to eradicate incitement
- Not to permit, or encourage, public authorities or public institutions, national or local, to promote or incite discrimination and hatred

In fact, what appears to be more ‘transferable’ from the ICERD Convention is not Article 4 but Article 5 of the Convention. This Article emphasises the need to eliminate discrimination in all its forms and guarantee the right of everyone, without distinction, the enjoyment of the rights to, *inter alia*: equality before the law, equal treatment, security of person; civil and political rights and economic, social and cultural rights; freedom of movement and residence, nationality, the right to marriage and choice of spouse; the right to own property, to inherit; to freedom of thought, conscience and religion; to opinion and expression, to peaceful assembly and association, to work and form and join trade unions; to housing, health, education and training; to equal participation in cultural activities; and access to all public services.⁶⁶

The emphasis on the enjoyment of these rights highlights the importance of countering discrimination in all its forms across all UN mechanisms and not by CERD Committee alone. In the field of discrimination and on the basis of religion or belief, for example, it also alerts us to the need for good faith co-operation with the UN Special Rapporteur on religion or belief, the realisation of the objectives of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the need to uphold Article 18 and other provisions of the ICCPR.

Conclusion

It has been suggested that the evolution of hate speech compels the CERD Committee to build on its existing record in recognising an intersectional approach in its work. This intersectional approach comes into play for the CERD Committee when discrimination on the basis of “race, colour, descent, or national or ethnic origin”⁶⁷ exists but is overlaid or compounded by other discriminations as well. This intersectional approach contains a structural and political dimension, in recognising the actual experience of discrimination and not marginalising our response to it.⁶⁸ “Hate propagandists”⁶⁹ need to be taken seriously regardless of the exact human rights classification we can ‘pigeon hole’ them into. However, they can only be identified as such with very careful attention to a whole host of other rights, not only the freedom of opinion and expression of both alleged perpetrators and victims, but also their right to life, their right to be presumed innocent before they are found guilty by an independent court of law, their equality before the law, and their minority rights and freedom of religion or belief where relevant; in fact with all the rights upheld in Article 5 of CERD, and more.

⁶⁶ UN Doc. A/RES/20/2106, ICERD, Article 5.

⁶⁷ UN Doc. A/RES/20/2106, ICERD, Article 1(1) recognises that “term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

⁶⁸ Kimberle Crenshaw, p. 1245.

⁶⁹ Jeannine Bell, (quoting Alexander Tsesis), *Restraining the Heartless, Racist Speech and Minority Rights*, 84.3 *Indiana Law Journal*, 2009, p. 979.

The serious human rights risks of assuming that the existing approach to race can serve as the basis for our response to hate speech in relation to a range of human rights matters have been illustrated. Acute attention should be given to the nature of the rights at hand, otherwise yet more rights will be violated within the very alleged effort to respond to violations. The subject specialism required to ensure human rights are not trampled on in the very process of responding to intersectional hate speech compels us to realise that CERD, alone, may not be best placed to deal with all such intersections in all scenarios. In fact, CERD may well wish to utilise existing expertise within the UN system to alert it to the risks entailed in dealing with different rights. Depending on the direction they take, the results of the Treaty Body Strengthening Process may facilitate such collaboration.