



UNHCR Submission to the Review of the Prohibition of Incitement to Hatred Act 1989

Introduction

The Office of the United Nations High Commissioner for Refugees (UNHCR) is a non-political, humanitarian organization mandated by the United Nations to lead and co-ordinate international action for the worldwide protection of refugees, asylum-seekers, internally displaced persons, and stateless persons.¹

UNHCR welcomes this opportunity to contribute to the current public consultation of the Review of the Prohibition of Incitement to Hatred Act 1989.

Racial discrimination and related intolerance are common causes of flight and can threaten the protection of asylum-seekers and refugees at subsequent stages of the displacement cycle. They can be manifested through restricted access to asylum or negatively affect the quality of asylum. Asylum-seekers and refugees may be denied equal access to public services and become targets of racially motivated acts. What often begins as subtle expressions of dislike and intolerance can develop into institutionalized discrimination, incitement to hatred, verbal and physical abuse and, ultimately, hate crimes. Ideas based on the superiority of one group over another can also hinder integration into the host society.

Fear of the 'other' typically underlies racist and intolerant sentiments. This fear has been compounded by economic conditions and the deteriorating political and social environment in some countries. It poses additional challenges to the protection of people of concern to UNHCR. The particular vulnerability of asylum-seekers and refugees to racist and xenophobic attitudes and acts is an ongoing issue that needs to be addressed. The necessary public support for the reception of asylum-seekers and refugees continues to be hindered by the tendency of certain media and politicians to confound concerns over irregular migration with those of refugee movements.²

¹ Statute of the Office of UNHCR, GA res 428(V), Annex UN Doc A/1775 (1950). In the years following the adoption of UNHCR's Statute, the UN General Assembly and Economic and Social Committee extended UNHCR's competence *ratione personae*. This was done not by amending the statutory definition of "refugee" but by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute. In such cases, the institutional competence of UNHCR is based on paragraph 9 of its Statute: "The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal."

² UNHCR, *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance through a Strategic Approach*, December 2009, available at: [link removed]

Regrettably, as recently outlined by the UN High Commissioner for Refugees, Filippo Grandi, in an address to the Security Council on 9 April 2019, the situation for persons of concern to UNHCR continues to deteriorate in this regard:

*"I have worked with refugees for well over three decades. I have seen in my career, in this field of work, much solidarity, even heroism in some of the responses that are provided on the ground ... But also in these three and a half decades, I have never seen such toxicity, such poison in the language of politics, in media, in social media, even in everyday discussions and conversations around this issue -- toxicity that focuses, sadly, tragically, often on refugees, on migrants, on foreigners. That should be of concern to us all. What we have seen in Christchurch, New Zealand is the result, also, of that toxic language of politics."*³

In this context, Ireland's review of its hate speech and hate crimes laws is a timely and most welcome initiative.

Ireland's UN commitments

On September 19, 2016, the United Nations General Assembly unanimously adopted the New York Declaration for Refugees and Migrants⁴. In so doing Member States, including Ireland, strongly condemned "acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief." States also made the following commitment:

*"Diversity enriches every society and contributes to social cohesion. Demonizing refugees or migrants offends profoundly against the values of dignity and equality for every human being, to which we have committed ourselves. Gathered today at the United Nations, the birthplace and custodian of these universal values, we deplore all manifestations of xenophobia, racial discrimination and intolerance. We will take a range of steps to counter such attitudes and behaviour, in particular with regard to hate crimes, hate speech and racial violence."*⁵

The United Nations Strategy and Plan of Action on Hate Speech⁶, launched on 18 June 2019, by Secretary-General Antonio Guterres, interprets hate speech as:

Any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. This is often rooted in, and generates intolerance and hatred and, in certain contexts, can be demeaning and divisive.

In the context of laws prohibiting hate speech it states:

³ UN's Grandi slams 'toxic language of politics' aimed at refugees, migrants, UN News, 9 April 2019, available at: [link removed]

⁴ UN General Assembly, New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1, available at: [link removed]

⁵ Ibid, para 14

⁶ Available at: [link removed]

Rather than prohibiting hate speech as such, international law prohibits the incitement to discrimination, hostility and violence (referred to here as ‘incitement’). Incitement is a very dangerous form of speech, because it explicitly and deliberately aims at triggering discrimination, hostility and violence, which may also lead to or include terrorism or atrocity crimes. Hate speech that does not reach the threshold of incitement is not something which international law requires States to prohibit. It is important to underline that even when not prohibited, hate speech may still be harmful.

On 23 September 2019, thirty independent UN experts joined together to publish an open letter⁷ calling on States and social media firms to take action to curb the spread of hate speech:

“Around the world, we observe that public figures are attempting to stoke ethnic tensions and violence by spreading hate speech targeting the vulnerable. Such rhetoric aims to dehumanise minority groups and other targeted people, and, in the case of migrants, fosters discriminatory discourse about who ‘deserves’ to be part of a community. Furthermore, hateful calls for the suppression of non-normative sexual orientations and gender identities and a limitation of the human rights of LGBT people limit progress towards the eradication of violence and discrimination against LGBT persons in various countries around the world, and a number of discriminatory legal and policy initiatives have been put forward.

The rhetoric of hatred must be countered, as it has real-life consequences. Studies have established a correlation between exposure to hate speech and the number of hate crimes committed.”

International law

The International Covenant on Civil and Political Rights

States are ultimately responsible for creating an environment in which all human beings can equally exercise their rights. The prohibition against discrimination based on race, colour, sex (including sexual orientation), language, religion, political or other opinion, national or social origin, property, birth, disability⁸ or other status is contained in all UN human rights treaties.⁹

Ireland has ratified the International Covenant on Civil and Political Rights (ICCPR), article 20 of which states:

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

A plan of action to prevent incitement to discrimination, hostility and violence, as outlined in article 20, was presented by internationally recognized experts at an event held in Geneva on 21 February 2013. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence¹⁰ recommends the adoption of comprehensive anti-discrimination national legislation with

⁷ [link removed]

⁸ UN Convention on the Rights of Persons with Disabilities (CRPD) (A/RES/61/106), available at: [link removed]

⁹ UNHCR, *Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance through a Strategic Approach*, December 2009, available at: [link removed]

¹⁰ Available at: [link removed]

preventive and punitive action to effectively combat incitement to hatred, as well as the empowerment of minorities and vulnerable groups. The report noted:

“Discussions in the various workshops demonstrated the absence of a legal prohibition of incitement to hatred in many domestic legal frameworks worldwide, while legislation that prohibits incitement to hatred uses variable terminology and is often inconsistent with article 20 of the Covenant. The broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of the laws. The terminology relating to offences on incitement to national, racial or religious hatred varies from country to country and is increasingly vague, while new categories of restrictions or limitations to freedom of expression are being incorporated in national legislation. This contributes to the risk of misinterpretation of article 20 of the Covenant and additional limitations to freedom of expression that are not contained in article 19 of the Covenant.”

Attention is also drawn to the specific recommendations of the Rabat Plan of Action with regard to the domestic legal framework for incitement to hatred¹¹:

“21. Bearing in mind the interrelationship between articles 19 and 20 of the International Covenant on Civil and Political Rights, States should ensure that their domestic legal framework on incitement to hatred is guided by express reference to article 20, paragraph 2, of the Covenant (“...advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...”), and should consider including robust definitions of key terms such as hatred, discrimination, violence, hostility, among others. In this regard, legislation can draw, inter alia, from the guidance and definitions¹² provided in the Camden Principles¹³.”

22. States should ensure that the three-part test – legality, proportionality and necessity – for restrictions to freedom of expression also applies to cases of incitement to hatred.”

In line with Ireland’s obligations under Article 20 of the International Covenant on Civil and Political Rights (ICCPR), and CERD Committee’s General Comment No. 15 of 23 March 1993, UNHCR recommends that, in reviewing the Prohibition of Hatred Act 1989, it is ensured that public incitement to violence or discrimination are also effectively prohibited by its terms.

International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which Ireland has also ratified, is the main international instrument for combating racial

¹¹ Available at: [link removed]

¹² Pursuant to principle 12, national legal systems should make it clear, either explicitly or through authoritative interpretation, that the terms „hatred“ and „hostility“ refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term „advocacy“ is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term „incitement“ refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.

¹³ These Principles were prepared by ARTICLE 19 on the basis of multi-stakeholder discussions involving experts in international human rights law on freedom of expression and equality issues. The Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations.

Article 19, *The Camden Principles on Freedom of Expression and Equality*, April 2009, available at: [link removed]

discrimination, which is defined in article 1 as discrimination on the basis of race, colour, descent, or national or ethnic origin.

The Committee on the Elimination of Racial Discrimination (CERD), which monitors States Parties' compliance with the ICERD, has clarified that these grounds of discrimination are extended in practice by the notion of 'intersectionality'.¹⁴ In other words, the CERD is competent to address situations of double or multiple discrimination – such as discrimination on grounds of gender or religion – when discrimination on such grounds appears to exist in combination with race, colour, descent, or national or ethnic origin. The CERD has elaborated on the particular relevance of the ICERD for non-citizens in its General Recommendation No. 30.¹⁵ Specifically, this General Recommendation provides guidance on recommended measures that States are advised to implement to prevent discrimination based on citizenship or immigration status.

ICERD Article 4 of states:

“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.”

In addition, the Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 35¹⁶, recommends that State parties declare and effectively sanction as offences punishable by law:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;

¹⁴ UN Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, 24 September 2009, CERD/C/GC/32, available at: [link removed]

¹⁵ UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non Citizens*, 1 October 2002, available at: [link removed]

¹⁶ UN Committee on the Elimination of Racial Discrimination (CERD), *General recommendation No. 35 : Combating racist hate speech*, 26 September 2013, CERD/C/GC/35, available at: [link removed]

(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;

(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;

(e) Participation in organizations and activities which promote and incite racial discrimination.

Attention is also drawn to CERD's recommendations, in its General Recommendation No. 35¹⁷, on the qualification of dissemination and incitement as offences punishable by law:

15. While article 4 requires that certain forms of conduct be declared offences punishable by law, it does not supply detailed guidance for the qualification of forms of conduct as criminal offences. On the qualification of dissemination and incitement as offences punishable by law, the Committee considers that the following contextual factors should be taken into account:

- The content and form of speech: whether the speech is provocative and direct, in what form it is constructed and disseminated, and the style in which it is delivered.*
- The economic, social and political climate prevalent at the time the speech was made and disseminated, including the existence of patterns of discrimination against ethnic and other groups, including indigenous peoples. Discourses which in one context are innocuous or neutral may take on a dangerous significance in another: in its indicators on genocide the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech.¹⁸*
- The position or status of the speaker in society and the audience to which the speech is directed. The Committee consistently draws attention to the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention, and has encouraged such persons and bodies to adopt positive approaches directed to the promotion of intercultural understanding and harmony. The Committee is aware of the special importance of freedom of speech in political matters and also that its exercise carries with it special duties and responsibilities.*
- The reach of the speech, including the nature of the audience and the means of transmission: whether the speech was disseminated*

¹⁷ UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35 : Combating racist hate speech, 26 September 2013, CERD/C/GC/35, available at: [link removed]

¹⁸ Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, Official Records of the General Assembly, Sixtieth Session, Supplement No. 18 (A/60/18), chap. II, para. 20.

through mainstream media or the Internet, and the frequency and extent of the communication, in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups.

- *The objectives of the speech: speech protecting or defending the human rights of individuals and groups should not be subject to criminal or other sanctions.*¹⁹

*16. 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. The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in article 4, States parties should take into account, as important elements in the incitement offences, in addition to the considerations outlined in paragraph 15 above, the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question, considerations which also apply to the other offences listed in paragraph 13.*²⁰

European Commission against Racism and Intolerance

UNHCR also takes note of the policy recommendations of the European Commission against Racism and Intolerance (ECRI)²¹ and commends them to the Irish government for their consideration.

Freedom of Expression

With regard to the implications on freedom of expression, it is noted that the right to freedom of expression is not unlimited but carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but only if they are provided by law and are necessary for protection of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals.²² In the context of hate speech, attention is drawn to the recommendations of the The UN Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 35²³:

“In addition to underpinning and safeguarding the exercise of other rights and freedoms, freedom of opinion and expression has particular salience in the context of the Convention. The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups; the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from racial discrimination in the

¹⁹ Adapted from the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, para. 22.

²⁰ Human Rights Committee general comment No. 34, para. 35; Rabat Plan of Action, para. 22.

²¹ ECRI revised General Policy Recommendation No.7 - adopted on 13 December 2002 and revised on 7 December 2017: National legislation to combat racism and racial discrimination, available at:

[link removed]

²² International Covenant on Civil and Political Rights, art. 19, para. 3.

²³ UN Committee on the Elimination of Racial Discrimination (CERD), General recommendation No. 35 : Combating racist hate speech, 26 September 2013, CERD/C/GC/35, available at:

[link removed]

exercise of that right. Racist hate speech potentially silences the free speech of its victims.”

Conclusion

UNHCR recommends that the government of Ireland, in reviewing the Prohibition of Hatred Act 1989, ensures that domestic legislation in this area fully meets its commitments under international law taking into account the interpretive guidance of Human Rights Treaty Bodies provided in the form of “general comments” or “general recommendations”.

UNHCR

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