

# THE NEXUS OF EXPRESSION AND ACTION: HATE SPEECH, INCITEMENT AND ANTI-DISCRIMINATION LEGISLATION

## CONSULTATION MEETING

### Toward the Development of

### Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation



Consultation meeting:

### The nexus of expression and action: Hate speech, incitement and anti-discrimination legislation

Convened by the Equal Rights Trust and the UN Human Rights Office (OHCHR) in connection with a joint project to develop *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*

**Tuesday, 16 February**      **15:00-17:00 CET (Geneva)**

Respondents:

Barbora Bukovska <i>Senior Director for Law and Policy Article 19</i>	Fernand de Varennes <i>UN Special Rapporteur on Minority Issues</i>	Victor Madrigal-Borloz <i>UN Independent Expert on violence &amp; discrimination based on sexual orientation and gender identity</i>
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**Registration required.** Meetings in **English**. Simultaneous translation to and from **Arabic, French, Russian and Spanish** available on request. If you require reasonable accommodation, please contact [info@equalrightstrust.org](mailto:info@equalrightstrust.org)

The United Nations Human Rights Office Indigenous Peoples and Minorities Section (OHCHR IPMS) and the Equal Rights Trust (ERT) convene a consultation meeting aimed at contributing to the forthcoming publication “Protecting Minority Rights: A Practical Guide on Developing Comprehensive Anti-Discrimination Legislation” on the issue of the intersection between the rights to freedom of expression and non-discrimination, and the necessary and permissible content of comprehensive anti-discrimination legislation in this area.

16 February 2021, 15:00-17:00 CET (Geneva time)

Register at:

<https://us02web.zoom.us/meeting/register/tZMtc-upqDIuHNRd8DoedA9g4A68WLK0WhsZ>

During 2020 and 2021, the United Nations Human Rights Office Indigenous Peoples and Minorities Section (OHCHR IPMS) and the Equal Rights Trust (ERT) are developing and producing “Protecting Minority Rights: A Practical Guide on Developing Comprehensive

Anti-Discrimination Legislation”. The publication aims to fill a long-term expressed and identified need for a go-to manual for Governments, Parliaments, NHRIs, UN staff, civil society representatives and minority and other human rights defenders in the main conceptual and content elements of anti-discrimination law, the various aspects of the comprehensive ban on all forms of discrimination and the protection of minorities, as grounded in the core international human rights treaties and related norms and standards, including as adjudicated. In addition to summarizing normative content, the publication will provide concrete country-based practices and practical guidance.

This consultation meeting – the fourth in a series of open consultation events – aims to present and discuss questions arising at the interface between freedom of expression on the one hand, and the right to non-discrimination on the other, with a particular focus on concepts, challenges and dilemmas arising in the course of drafting comprehensive anti-discrimination laws, with a view to hearing opinions of relevant affected groups. A background note is included as an Annex to this document.

### **Core Questions**

- (1) What should a comprehensive anti-discrimination law include such that states can comply with their obligations under ICCPR Articles 19 and 20, and ICERD Article 4?
- (2) What further measures to prohibit hate speech and / or incitement *could and should* be included in a comprehensive anti-discrimination law while remaining consistent with ICCPR Article 19(3)?
- (3) There is consensus at the international level that the right to non-discrimination necessitates protection from harassment, defined as “unwanted conduct related to (...) prohibited grounds (...) with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. To what extent does the right to freedom of expression as defined in ICCPR Article 19(2) and 19(3) impose limits on the prohibition of such unwanted conduct which takes the form of expression?
- (4) To what extent should measures included in a comprehensive anti-discrimination law to prohibit hate speech, incitement to discrimination and/or harassment apply in particular to digital platforms, aware of their different types and roles, which include, but are not limited to, the provision of a medium of communication and (increasingly) forums for public assembly, content moderation and curation, and mass data collection and processing?
- (5) What is the relationship between comprehensive anti-discrimination law on the one hand, and (1) the right to freedom of expression; and (2) the ban on incitement to ground-based hatred, discrimination and violence on the other? How is this distinction informed by the increasing trend for sanctions from discrimination to be located in the fields of civil and administrative law, with criminal law measures reserved for only the most severe forms of harm?

## **Agenda**

Welcome and background (10')

Introduction of legal dilemmas in the interface between hate speech and the international law ban on discrimination (10')

Open discussion and interventions (60')

### **Expert respondents:**

- Barbora Bukovska, Article 19 (10')
- Mr. Fernand de Varennes, UN Special Rapporteur on Minority Issues (10')
- Mr. Victor Madrigal-Borloz, UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity (10')

Summary and closing (10')

The meeting will be held in English, with translation to and from Arabic, French, Russian and Spanish provided upon request in advance. The consultation meetings will take place online via Zoom.

**Please Note:** Although this meeting is open to the public, pre-registration is required for each session, and the organisers reserve the right to limit participation to not more than 100 persons.

### **ANNEX: Background Note**

One frequent way of examining the legal lines concerns the question of the balance between freedom of expression on the one hand, and incitement to violence, discrimination or hatred on the other. ICCPR article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) elaborates this ban in detail with regard to racial hatred and discrimination.<sup>1</sup> The rights set out under ICCPR Article 20 are generally deemed to be in a complex relationship with other rights, in particular (although not exclusively) the rights set out at ICCPR article 19

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<sup>1</sup> ICERD Article 4 provides: "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."

to hold opinions without interference, and to freedom of expression.<sup>2</sup> As a result of ICCPR Article 19(3) ICCPR, the right to freedom of expression is a qualified right, which can be limited on grounds of named restrictions. In interpreting the requirements of ICCPR Article 19, the Human Rights Committee has that these restrictions must be construed narrowly, and has held that “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”

Extensive work has been undertaken to provide further guidance as to how States are to understand whether and in what circumstances a speech act may constitute incitement to violence, discrimination or hatred. These criteria are in particular: (1) the social and political context, (2) status of the speaker, (3) intent to incite the audience against a target group, (4) content and form of the speech, (5) extent of its dissemination and (6) likelihood of harm, including imminence.<sup>3</sup>

Less well explored is the question of how to understand speech acts or other forms of expression within the comprehensive international law ban on discrimination. Certain speech acts fall directly within the law of the ban on discrimination. This is particularly the case as concerns instruction to discriminate. It is illegal to order or otherwise instruct another person to discriminate. This is particularly the case where there exists a hierarchical relationship (such as a supervisory relationship in an employment context) between the two persons.

Similarly, harassment is generally understood as a form of unwanted conduct including matters which might otherwise be understood as speech or expression. This is particularly the case in communications mediums such as the internet, where cyberbullying and cyberhate are recognized forms of discrimination-based harassment.<sup>4</sup>

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<sup>2</sup> ICCPR Article 19 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.

<sup>3</sup> See Rabat Plan of Action, appendix to UN High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, 11 January 2013 (A/HRC/22/17/Add.4), para. 29(a)-(f); <https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>.

<sup>4</sup> The UN Committee on the Rights of Disabilities (CRPD Committee) defines harassment, within the CRPD Convention Article 5 ban on discrimination as “a form of discrimination when unwanted conduct related to disability or other prohibited grounds takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. It can happen through actions or words that have the effect of perpetuating the difference and oppression of persons with disabilities. Particular attention should be paid to persons with disabilities living in segregated places, such as residential institutions, special schools or psychiatric hospitals, where this type of discrimination is more likely to occur and is by nature invisible, and so not likely to be punished. “Bullying” and its online form, cyberbullying and cyberhate, also constitute particularly violent and harmful forms of hate crimes. ....”

Speech acts frequently also have other roles within the law of discrimination, most notably when they are evidence of discrimination.<sup>5</sup> Thus for example in its first ever finding of racial discrimination in a case concerning law enforcement, the European Court of Human Rights relied on witness statements that military personnel had uttered anti-Romani epithets just after shooting to death two Romani men. While a lower chamber of the Court initially held that this and other evidence was indicative of discrimination, the Court's Grand Chamber held that there was discrimination in the procedure, but not as substantive matter, i.e. that the anti-Romani statements and other evidence should have triggered investigation by the national authorities into the possibility that racism or racial discrimination had infected the proceedings.<sup>6</sup> The jurisprudence of the CERD, CEDAW and CRPD Committees does not appear always to follow the contours established by the Rabat Plan of Action.<sup>7</sup>

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<sup>5</sup> The twin principles of equality and non-discrimination are the bedrock of the UN human rights framework. The ban on discrimination is anchored in the two international Covenants at common Article 2, and at ICCPR Article 26 as a freestanding right. It is the only right set out in all nine of the core human rights treaties.

<sup>6</sup> European Court of Human Rights, *Case of Nachova and Others v. Bulgaria*, (*Applications nos. 43577/98 and 43579/98*), Grand Chamber, judgment of 6 July 2005. For a similar use of open expression to ground a finding of discrimination in cases brought in the UN system, see CERD/C/57/D/13/1998, Communication No. 13/1998, 8 August 2000.

<sup>7</sup> CERD in particular has regularly addressed racist public expression in its jurisprudence. For example, in the case of *Stephen Hagan v. Australia*, an aboriginal man alleged violations of the ICERD Convention in connection with a section of an important sporting ground in Toowoomba, Queensland, where he lived, named in honour of a sports figure of the past, including the nickname of the sports figure, which is today deemed a serious racial epithet. Finding Australia in violation of the ICERD Convention, the CERD Committee held: "the Committee considers that that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today." (*Stephen Hagan v. Australia*, Communication No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (2003), para. 7.3).