**CERD General Recommendation (GR) 35 on Combating Racist Hate Speech: A Short Comment**

I wish to thank the organisers of this Working Group session for their kind invitation to speak before you today. I am honoured to be in your presence.

As the title of my presentation indicates, my remarks focus on GR 35, which was, as many of you will know, adopted by the Committee on the Elimination of Racial Discrimination (CERD/the Committee) at its August 2013 session. The adoption of the recommendation followed the holding by the Committee of a thematic discussion in 2012 on the causes and consequences of racist hate speech and how the resources of the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) could be mobilized to combat it. In its own terms, GR 35 ‘seeks to contribute to the promotion of understanding, lasting peace and security among communities, peoples and States’,[[1]](#footnote-1) bearing in mind that, as the recommendation recalls, the ‘prevalence of racist hate speech in all regions of the world continues to represent a significant contemporary challenge for human rights’.[[2]](#footnote-2) The discussion and subsequent recommendation were in part stimulated by the adoption (in 2011) by the Human Rights Committee of General Comment 34 on Freedoms of Opinion and Expression (GC 34).

The title of ICERD refers to the elimination of ‘all forms’ of racial discrimination, including speech forms. The Convention is a relatively brief instrument by current UN standards, comprising twenty-five articles, the first seven of which set out substantive norms: a definition of racial discrimination, which forbids discrimination on grounds of ‘race, colour, descent, or national or ethnic origin’ (Article 1); general obligations of States parties including the taking of special measures (Article 2); a commitment to eradicate segregation, apartheid and similar practices in territories under the jurisdiction of States parties (Article 3); the proscription of racist hate speech and racist organizations (Article 4); an unclosed list of rights (Article 5) to be protected from racial discrimination, drawn largely from the Universal Declaration of Human Rights (UDHR), a list that includes freedom of opinion and expression (expressed as a single right); a provision on remedies against acts of racial discrimination (Article 6); and an undertaking (Article 7) to adopt immediate and effective measures particularly in the fields of ‘teaching, education, culture and information’, with a view to, *inter alia*, combating prejudices leading to racial discrimination and to promoting ‘understanding, tolerance and friendship among nations and racial or ethnical groups’.

Groups under the protection of the Convention include all the groups recognized in Article 1: GR 35 makes specific reference to indigenous peoples and descent-based groups, various categories of non-citizens, and women members of all such groups, as well as recalling that, in light of the principle of intersectionality, the Committee’s attention has been drawn to hate speech that includes ‘expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups’.[[3]](#footnote-3)

GR 35 outlines various provisions of the Convention as background to its principal focus on Articles 4, 5 and 7. [[4]](#footnote-4)‘Hate speech’ is not referred to as such in the Convention, though the Preamble refers to ‘racist doctrines and practices’, Article 4(a) to ‘racist activities’ and Article 4(b) in effect to racist organizations.

I preface my remarks below by suggesting that while law has a clear role to play in ‘policing’ or suppressing racist hate speech, it remains the case that custom, tradition and culture, and habit – including habits of civility - have the greater influence in inhibiting the formation and expression of racist discourse. Further, in evaluating the significance of the Convention and GR 35, it should be recalled that contemporary currents of opinion that raise the profile of freedom of expression are important aspects of a framework for understanding and situating GR 35. In addition to references to GC 34 of the Human Rights Committee, GR 35 cites the Durban Declaration and Programme of Action and Outcome Document of the Review Conference for their affirmation of the positive role of the right to freedom of opinion and expression in combating racial hatred.[[5]](#footnote-5)

Article 4(a) of ICERD requires States parties to declare as offences punishable by law ‘all dissemination of ideas based on racial superiority or hatred’ as well as incitement to racial discrimination, acts of violence or incitement to such acts ‘against any race or group of persons of another colour or ethnic origin’, and assistance to racist activities; they are also mandated (Article 4(b)) to declare illegal and prohibit racist organizations. The suppressive activities are to be undertaken ‘with due regard’ to the principles embodied in the UDHR and the rights expressly set forth in Article 5 of the Convention.

The due regard clause has been understood as intimating a relationship between the suppression and the validation of speech. Hence, GR 35 observes that the phrase ‘due regard’ implies that

in the creation and application of offences, as well as fulfilling the other requirements of Article 4, the principles of the Universal Declaration of Human Rights and the rights in Article 5 must be given appropriate weight in decision-making processes. The due regard clause has been interpreted by the Committee to apply to human rights and freedoms as a whole, and not simply to freedom of opinion and expression,[[6]](#footnote-6) which should however be borne in mind as the most pertinent reference principle when calibrating the legitimacy of speech restrictions. [[7]](#footnote-7)

Based on its reading of the Convention through the range of issues dealt with in the practice of the Committee, the specific legislative requirements of Article 4 are further elaborated in GR 35, which recommends that ‘the States 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;

(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 toviolence 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.[[8]](#footnote-8)

In terms of the integration of the Article 4 offences into systems of criminal law, GR 35 adds that:

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 is it 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[[9]](#footnote-9) the Committee emphasized the relevance of locality in appraising the meaning and potential effects of racist hate speech; **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 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.[[10]](#footnote-10)

Of the offences to be declared, that on the dissemination of ideas or theories of superiority has received a significant share of critical commentary. It is however worth recalling that in the drafting of the Convention, ideas of superiority were a particular focus of concern, a concern expressed in similar terms in the Preamble. [[11]](#footnote-11)

The Article 4 provisions on incitement sit comfortably with codes of criminal law in many countries. The Convention expresses the incitement provisions in basic terms, and does not draw questions regarding *mens rea* or intention into the text. GR 35 is more explicit and treats incitement as follows:

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 … 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 ...[[12]](#footnote-12)

Criminalization of forms of expression is a serious business. GR 35 makes a statement on the point:

The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, *inter alia*, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.[[13]](#footnote-13)

The recommendation takes a nuanced position on public denials of genocide and crimes against humanity as defined by international law, which ‘should be declared as offences punishable by law, provided that they clearly constitute incitement to racial violence or hatred’.[[14]](#footnote-14)

General Recommendation 35 is complex in structure, and is not completely devoted to an exegesis of Article 4. Important sections of the recommendation address free speech or ‘counter-speech’, and (broadly) education, highlighting their positive role in combating racist hate speech, and stressing that opposition to hate speech should not convert preachers of hate into free speech heroes or martyrs – there is a difference between free speech and prohibited hate speech. GR 35 underlines that

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 a matter 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 exercise of that right. Racist hate speech potentially silences the free speech of its victims.[[15]](#footnote-15)

The point is further developed in the final section:

The relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.[[16]](#footnote-16)

The contribution of freedom of expression to the protection of vulnerable groups is also strongly underlined:

Freedom of expression, indispensable for the articulation of human rights and the dissemination of knowledge regarding the state of enjoyment of civil, political, economic, social and cultural rights, assists vulnerable groups in redressing the balance of power among the components of society, promotes intercultural understanding and tolerance, assists in the deconstruction of racial stereotypes, facilitates the free exchange of ideas, and offers alternative views and counterpoints. States parties should adopt policies empowering all groups within the purview of the Convention to exercise their right to freedom of expression.[[17]](#footnote-17)

The final section of the recommendation engages with Article 7 of the Convention in appraising the contribution of ‘teaching, education, culture and information’ to combating racist hate speech. Recommendations are outlined on the roles ideally played by political leadership, schools, media, etc., including the potential of intercultural bilingual education ‘based on equality of respect and esteem and genuine mutuality’.[[18]](#footnote-18) Further, measures should be adopted in the field of education aimed at ‘encouraging knowledge of the history, culture and traditions’ of the racial and ethnic groups present in the State party, ‘including indigenous peoples and persons of African descent’.[[19]](#footnote-19) The recommendation encourages media pluralism, including access to and ownership of media by the groups within the purview of the Convention, including media in their own languages. The Durban Declaration and Programme of Action is again recalled in the Committee’s encouragement of ‘self-regulation and compliance with codes of ethics by Internet service providers’.[[20]](#footnote-20)

**A General Observation**

GR 35 is presented as in essence a practical exercise, suggesting forms of action that address the ‘upstream’ aspects of racist discourse, as well as their ‘downstream’ effects,[[21]](#footnote-21) while the provisions on education are suggested as necessary to deal with the ‘root causes’ of hate speech phenomena.[[22]](#footnote-22) The text values and underlines the role of law, but does not present law as sufficient in itself. The approach by the Committee represents a form of ‘aggiornamento’ of practice – under Article 4 in particular. That article remains a central plank in the work of the Committee to deliver the promise of the Convention’s ambitious title, and its significance can be understood in historical as well as contemporary contexts.[[23]](#footnote-23) On the other hand, Article 4 need not be treated as the nucleus around which all other particles of the Convention circulate. Article 4 has been subject to heavy critiques that regard it as a kind of ‘outlier’ provision in human rights – that is, outside important currents on freedom of speech that are embedded in related human rights instruments. [[24]](#footnote-24)Reservations persist in relation to it, and the sentiment has been expressed that it should be ‘deleted’ from the Convention, or disempowered in some manner. Questioners also ask what is so special about racist hate speech that it should be targeted in a more determined fashion than other forms of hate speech.[[25]](#footnote-25) GR 35 represents an attempt to address wider concerns while remaining faithful to the text and ethos of the Convention, the text of which intertwines the proscription of racist hate speech with a deep concern for the freedom and dignity of human beings. The Committee works within the framework of the Convention as its basic mandate while treating it as a living instrument responsive to contemporary challenges.[[26]](#footnote-26) It is in this light that GR 35 is best understood and appreciated.

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1. Para. 2. [↑](#footnote-ref-1)
2. Para. 46. [↑](#footnote-ref-2)
3. Para. 6 adds (citing para. 48 of GC 34) that ‘” criticism of religious leaders or commentary on religious doctrine or tenets of faith” should not be prohibited or punished’. [↑](#footnote-ref-3)
4. Para. 8. [↑](#footnote-ref-4)
5. GR 35, para. 27; references are made to the Durban Declaration, para. 90, and paras. 54 and 58 of the Outcome Document of the Durban Review Conference. [↑](#footnote-ref-5)
6. *Jewish Community of Oslo et al. v Norway* (2004), para. 10.5. [↑](#footnote-ref-6)
7. Para. 19. [↑](#footnote-ref-7)
8. Para. 13. [↑](#footnote-ref-8)
9. CERD/C/67/1. [↑](#footnote-ref-9)
10. GR 35, para. 15, 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 [Rabat Plan of Action], para. 22. [↑](#footnote-ref-10)
11. ‘*Convinced* that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous’. [↑](#footnote-ref-11)
12. Para. 16. [↑](#footnote-ref-12)
13. Para. 12, adapted from Human Rights Committee GC 34, paras. 22- 27; 33-35. [↑](#footnote-ref-13)
14. Para. 14, which goes on to underline, citing para. 49 of GC 34, that the expression of opinions about historical facts should not be prohibited or punished. [↑](#footnote-ref-14)
15. Para. 28. [↑](#footnote-ref-15)
16. Para. 45. [↑](#footnote-ref-16)
17. Para. 29, adapted from the Rabat Plan of Action, para. 25. [↑](#footnote-ref-17)
18. Para. 33. [↑](#footnote-ref-18)
19. Para. 34. [↑](#footnote-ref-19)
20. Para. 42, citing the Durban programme of Action, para. 147. [↑](#footnote-ref-20)
21. Para. 30; this terminology discussed further in J. Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012). [↑](#footnote-ref-21)
22. Gr 35, para. 30. [↑](#footnote-ref-22)
23. P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), ch.11. [↑](#footnote-ref-23)
24. Para. 4 of GR 35 recalls however that the right to freedom of expression ‘is integrated into the Convention and is not simply articulated outside it: the principles of the Convention contribute to a fuller understanding of the parameters of the right in contemporary international human rights law’. [↑](#footnote-ref-24)
25. For appreciation of the historical background to the Convention, and contemporary challenges, see Thornberry, *The International Convention*, chs. 2, 3, and 20. [↑](#footnote-ref-25)
26. *Ibid*. [↑](#footnote-ref-26)