Global Freedom of Expression
COLUMBIA UNIVERSITY

Written Observations in Response to the Public Consultation Questionnaire on Freedom of Expression and Unprotected Speech of the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights / Organization of American States

Submitted in addition to the oral observations presented by Columbia Global Freedom of Expression on July 8th, 2024, during the online public consultation hosted by the Office of the Special Rapporteur for its upcoming thematic report on the interaction between freedom of expression, equality and non-discrimination of historically marginalized groups with particular emphasis on the content and scope of Article 13(5) of the American Convention on Human Rights

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New York City, New York, United States of America

91 Claremont Avenue ● Suite 523 ● New York, NY, 10027 ● 1-212-854-6785 ● globalfreespeech@columbia.edu

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I. Introduction

1. Columbia Global Freedom of Expression (CGFoE) appreciates the opportunity to elaborate in further detail on the oral observations presented to support the work of the IACHR's Special Rapporteur on Freedom of Expression regarding his upcoming report on the content and scope of Article 13(5) of the American Convention on Human Rights and the interaction between freedom of expression and the protection from discrimination of historically marginalized groups.

2. For over a decade, CGFoE has been bringing international experts and advocates together in its mission to strengthen and advance global norms on freedom of expression. To fulfill this mission, we survey and analyze international, regional, and domestic jurisprudence, providing a comparative understanding of global trends on freedom of expression. Our resources and projects include, to name a few, the flagship Global Case Law Database and our Special Collection Papers. The Special collection papers are a series of 15 thematic papers that systematize the standards identified through the database. They include one on Hate Speech and one on the freedom of expression jurisprudence of the Inter-American System.

3. In the next sections, we will first provide an overview of the main jurisprudential approaches to "hate speech" and similar expressions in response to questions 15 and 16 of the consultation questionnaire.[1] Secondly, we will make observations regarding question 6 on whether Article 13(5) imposes an obligation to criminalize hate speech together with question 3.[2] Thirdly, we will address question 7 on the relevance and applicability of the UN Rabat Plan of Action for this report.[3] Lastly, we will briefly address oral questions raised by the Special Rapporteur's Office during the public online consultation.

II. Overview of main international and domestic approaches and standards addressing hate speech

4. Under international human rights law, while there is no internationally agreed-upon definition of hate speech, there is a consensus that States have an obligation to protect individuals from violence and discrimination, even in the context of freedom of expression.

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[1] Question 15: Domestic experiences addressing stigmatizing and hate speech, including challenges and best practices.
Question 16: Comparative experience in other human rights systems as relevant.

[2] Question 6: Does Article 13(5) impose an obligation to criminalize unprotected speech? Would prohibition through other spheres - such as civil or administrative - be sufficient?; Question 3: Criteria to be used to interpret Article 13(5) of the ACHR, given the discrepancies in terms and content between the English, Spanish, Portuguese and French versions of the ACHR.

[3] Question 7: Relevance and applicability of the UN Rabat Plan of Action criteria under the threshold of Article 13(5) of the ACHR.

As a result, the regulation of hate speech is a complex and contentious issue, with various international and domestic legal frameworks attempting to strike a balance between protecting freedom of expression and combating harmful speech. This inevitably requires weighing the interrelated rights to life and equality and the obligation to protect human dignity from acts of discrimination.

5. This overview will examine the approaches of the United States, the European Court of Human Rights (ECtHR), South Africa's and the United Nations (UN) framework, including that of its Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD).

United States

6. The United States takes a highly protective approach to freedom of speech under the First Amendment. Hate speech is generally protected unless it falls into specific categories like incitement to imminent lawless action or true threats. The Supreme Court has emphasized the prohibition of content-based regulation, meaning that the government cannot restrict speech based on its message or the group it targets. This approach prioritizes free speech over the protection of vulnerable groups from hate speech, leading to concerns about the potential harm caused by unrestricted hate speech.[4]

ECtHR

7. On the other side of the spectrum is the European Court of Human Rights (EctHR) approach. The European Court has grappled with numerous hate speech cases, primarily under Articles 10 and 17 of the European Convention on Human Rights (ECHR). While Article 10 protects freedom of expression, it allows for restrictions necessary in a democratic society to prevent disorder and protect the rights and reputations of others. Article 17, on the other hand, excludes from protection speech aimed at destroying the rights and freedoms of others.

8. The European Court has adopted a relatively low threshold for restricting hate speech, even extending to speech that is merely insulting. It has often prioritized the protection of vulnerable groups from hate speech over expanding protection to free speech rights. However, this approach has been criticized for its lack of clear guidelines and inconsistent application of Article 17, leading to concerns about the chilling effect on speech.[5]

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[4] *See for instance: Snyder v. Phelps; Brandenburg v. Ohio; Virginia v. Black.*
[5] *See for instance: Le Pen v. France; Vejdeland and Others. v. Sweden; Beizaras and Levickas v. Lithuania.*

South Africa

9. A third approach of particular importance is that adopted by South Africa. South Africa has a constitutional provision (Section 16) that protects freedom of expression but allows for limitations to prevent advocacy of hatred that constitutes incitement to cause harm. Section 36 of the Bill of Rights requires a proportionality review for any restriction of rights to ensure that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…"

10. On this basis, South African courts have developed "substantiated and objective" standards to assess whether impugned speech constitutes incitement to harm.[6] Under apartheid, laws prohibiting speech that contributed to racial hostility were often abused to suppress criticism of the system. For instance, the Constitutional Court in *Qwelane v. South African Human Rights Commission* observed that "the historical stains of our colonial and apartheid past reinforce the point that freedom of expression has a particularly important role to play in our constitutional democracy." Yet, the Court considered that "[h]ate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings" and that the way hate speech can marginalize people can lead to discrimination and violence. As a result, it emphasized the need for a high threshold for restricting speech and the importance of considering the actual impact of the speech on vulnerable groups. This position has been praised for its nuanced and context-sensitive approach to hate speech regulation.

UN Framework, HRC and CERD

11. The UN addresses hate speech through Article 19 (freedom of expression) and Article 20(2) (prohibition of advocacy of hatred) of the International Covenant on Civil and Political Rights (ICCPR). Article 19 guarantees freedom of expression but allows for restrictions to protect the rights and reputations of others. Article 20(2) specifically prohibits advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

12. The UN framework, through documents like the Rabat Plan of Action, emphasizes a high threshold for restricting speech under Article 20(2). It also clarifies that criminal sanctions should be a last resort and that restrictions must be necessary and proportionate. However, the UN framework has been criticized for its lack of a clear definition of hate speech and the varying interpretations of thresholds across different UN bodies.

13. In that regard, the HRC, responsible for monitoring the implementation of the ICCPR, has dealt with hate speech cases, particularly concerning racial and religious hatred. It has

[6] See Jacob Mchangama and Natalie Alkiviadou, *South Africa the Model? A Comparative Analysis of Hate Speech Jurisprudence of South Africa and the European Court of Human Rights,* Journal of Free Speech Law 543 (2021-2022)

emphasized the need for States to have effective legal frameworks to prohibit hate speech and provide remedies for victims. However, the HRC has not always provided clear guidance on the application of Article 20(2) and the thresholds for restricting speech.

14. Similarly, the CERD has focused on combating racial discrimination and hate speech under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 4 requires States to condemn and prohibit all forms of racial discrimination, including hate speech. The CERD has emphasized the mandatory nature of Article 4 and the need for States to implement effective measures to combat racist hate speech. However, the lack of a clear definition of hate speech in the ICERD has led to some ambiguity in its application.

III. On whether Article 13(5) imposes an obligation to criminalize "hate speech"

15. Regarding question 6 on whether Article 13(5) imposes an obligation to criminalize hate speech, we want to call attention to the experience of the UN Committee on the Elimination of Racial Discrimination with a similar provision under Article 4 of its Convention. Article 4, in brief, mandates States to declare racist speech as an offense.

16. In this regard, the Committee has recommended that criminal sanctions be reserved for the most serious cases of racist hate speech, where the speech is proven beyond a reasonable doubt to constitute incitement to hatred, discrimination, violence, or other severe forms of racial harm. In its General Comment 35 (2013), it narrowed the interpretation of Article 4 by requiring an assessment of the imminent risk of the harm as well as the intent of the speaker. It further establishes five contextual considerations that recall Rabat and includes a clause that any restrictions must be done with "due regard" to other human rights provisions.[7] For less serious cases, the CERD suggests that States utilize alternative measures outside of criminal law, such as civil remedies, administrative sanctions, or educational initiatives, to address and counter racist expressions effectively. The Committee recognizes that a balanced approach, combining legal and non-legal measures, is crucial for combating racist hate speech while upholding the principles of freedom of expression and proportionality.

17. A similar approach would be consistent with the American Convention and the Inter-American System jurisprudence. The Inter-American Court has adamantly held that criminal-law sanctions to restrict freedom of expression should be used as *ultima ratio,* or as a last resort.[8] Considering the severity of exercising punitive power, this principle entails that within democratic societies, criminal sanctions should be restricted to punish the most severe conducts in a strictly necessary manner.

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[7] For a detailed discussion on CERD Article 4 See Amal Clooney and David Neuberger, Freedom of Speech in International Law, (Oxford: Oxford University Press, 2024), 177-178.

[8] See for instance: *Herrera-Ulloa v. Costa Rica*; *Álvarez Ramos v. Venezuela*; *Uzcátegui and Others v. Venezuela*.

18. Although the Court has kept open the door for imposing criminal sanctions to restrict certain harmful or violent expressions—such as propaganda for war and any advocacy of national, racial, or religious hatred—, it has circumscribed the scope of such restrictions—which have to surpass the requirements set forth by the classic three-part test, as asserted by General Comment 34—to afford us a conceptual framework that is potentially protective of freedom of expression. In the same vein, both the UN Human Rights Committee and the UN Special Rapporteur on Freedom of Expression have laid contextual cues to evaluate when restricting freedom of expression should be an imperative. The Committee has said that, upon evaluating the "necessity" of a restrictive measure and its proportionality, States "must demonstrate in specific and individualized fashion the precise nature of the threat" and establish "a direct and immediate connection between the expression and the threat." Furthermore, the aforementioned Rapporteur argued that only the most "extreme instances of incitement to hatred [...] should be criminalized"—that is those in which there is a high degree of risk of real-life imminent harm or violence.[9]

19. Certainly, designing legislation to address Hate Speech is no easy matter. In any case, attempts to balance the aforementioned conflicting rights should bear in mind the need to use criminal law restrictively—only to prevent and sanction the most severe conducts—and the potential chilling effect that such a measure would inflict on speakers. As a result, In addition to the requirements of necessity and proportionality, any legal architecture on hate speech should strictly adhere to the principle of legality, which is not a mere formal requirement; on the contrary, it effectively demands clarity and precision from the rules limiting freedom of expression. In this context, ambiguity or vagueness could have a severe chilling effect on freedom of expression. Accordingly, the Commission should urge States to foster a better environment for freedom of expression and should prevent the proliferation of hate speech regulations, which have the potential to be instrumentalized by authoritarian governments against critical voices, dissenters, and the most vulnerable.

On treaty interpretation[10]

20. As a matter of treaty interpretation, while CERD has interpreted Article 4 of ICERD as was already explained, in the context of the American Convention on Human Rights, the rules of treaty interpretation under the Vienna Convention on the Law of the Treaties (VCLT) could lead to a conclusion where criminal sanction may not be conventionally required even as a last resort given the discrepancies between the Spanish and English version of the American Convention as referred in question 3 of the questionnaire.[11] In

[9] UN Special Rapporteur F. La Rue, *Promotion and Protection of the Right to Freedom of Opinion and Expression,* (2012) UN Doc. A/67/357, p.13.

[10] It is important to note that while Article 13(5) in English refers to ''offenses punishable by law'' which is widely understood as necessary implicating the use of criminal laws, the Spanish version refers to ''Estará prohibida por la ley (It shall be prohibited by law)'' which could encompass other spheres of law, including civil and administrative laws.

[11] Question 3: Criteria to be used to interpret Article 13(5) of the ACHR, given the discrepancies in terms and content between the English, Spanish, Portuguese and French versions of the ACHR.

this case, while the English version refers to offence that would require criminalization, the Spanish version, equally authoritative, refers to prohibition by law. As such, Article 33(4) of the VCLT provides that "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the objective and purpose of the treaty, shall be adopted".

21. By applying this rule, the discrepancies between languages of equally authentic treaty versions should be interpreted in accordance with its objective and purpose. The objective and purpose of the American Convention, according to its preamble, is to consolidate in the hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man. It is not to limit the rights recognized in the Convention or any other treaty but to reinforce their protection through international recognition. As such, it is pertinent to conclude that the Spanish version would be more in line with the objective and purpose as it would allow States to react to expressions falling within the scope of Article 13(5) without having to use criminal means to respond to it. The obligation to use criminal law against speech under Article 13(5), when there is another possible interpretation, is contrary to the objective and purpose but also to other general rules of interpretation, such as good faith, and rules particular to human rights treaty interpretation, such as the *pro homine* principle.

22. Considering the above, when interpreting whether Article 13(5) imposes an obligation to criminalize, the IACHR and its Office of the Special Rapporteur for Freedom of Expression have two potential approaches. Firstly, they could align with CERD's position, which acknowledges an obligation to criminalize hate speech but suggests this should be a last resort, complemented by other positive measures for less severe cases. Alternatively, the IACHR might adopt a more progressive stance, interpreting that Article 13(5) of the American Convention does not mandate criminalization of hate speech. Instead, it could require prohibition by law in a broader sense, utilizing non-criminal legal measures.

IV. Relevance and applicability of Rabat

23. On the applicability and relevance of the Rabat Plan, our research has shown that even before the formal adoption of the Rabat Plan, there were already judicial trends recognizing and applying various elements included in the six-part threshold test. We have also identified several cases applying the Rabat test fully or partially, explicitly or implicitly since it was adopted, including cases from Latin American Courts and non-traditional bodies like Meta's Oversight Board. For example, the jurisprudence of the ECtHR has frequently considered the context and intent of the speech when evaluating cases of incitement to hatred. In the case of *Erbakan v. Turkey* (2006), the Court emphasized the importance of the political and social context in which certain statements are made, an assessment that closely aligns with the principles of the Rabat Plan.

Similarly, in its General Recommendation No. 35 Combating racist hate speech where it examined Article 4 ICERD, the CERD referred to the Rabat Plan to provide detailed guidance for qualifying racial expressions as punishable offenses.

24. Our research shows that the elements of the test have also been implemented implicitly. For instance, in Chile, the Supreme Court in the case of *Sáez v. Kaiser* took into account the ‘‘context’’ of the speech and ‘‘the extent of its dissemination’’ to conclude that the expression in the case was, in fact, not protected by freedom of expression. In sum, the Rabat Plan has served as a valuable tool for judicial operators and adjudicators to adequately balance freedom of expression with the need to combat hate speech. This test can readily support the Commission’s efforts to guide States with respect to the application of legislation derived from Article 13(5). However, it is essential to further promote and clarify these guidelines to ensure their uniform and effective application in different jurisdictions.

25. Here, we provide a list of other cases referring to Rabat. For more implicit and explicit use of the test, please review our Database:

- Mariya Alekhina and Others v. Russia
- Qwelane v. South African Human Rights Commission
- Oversight Board Case of Former President Trump’s Suspension
- Oversight Board Case of Knin Cartoon
- Oversight Board Case of Protest in India Against France
- Oversight Board Case of Tigray Communication Affairs Bureau
- Oversight Board Case of a Myanmar Post About Muslims
- Oversight Board Case of Post in Polish Targeting Trans People
- Case of Cambodian Prime Minister
- Oversight Board Case of Iranian Woman Confronted on Street

V. On the additional questions raised during the online public consultation

Online Hate Speech

26. When it comes to online hate speech, the established standard is to apply existing offline remedies. In that sense, consideration should be given to the various contextual factors under Rabat, including the harm advocated, magnitude and intensity in terms of frequency, choice of media, reach, and extent. The reality is that the scope and scale of the harms are amplified in the online world and we have found some examples in the case law that address those issues. Two from the US are worth briefly noting here.

27. In *Dumpson v Ade*, the victim was targeted by a Neo-Nazi website for her race and gender. They used a “troll storm” to attack her, and the Court awarded significant damages finding that the coordinated behaviors reached a high intent and harm threshold, that harassment laws could apply. The Court concluded that the plaintiff had

met her burden for satisfying the three elements of a claim of intentional infliction of emotional distress: the defendants participated in "extreme and outrageous conduct, the plaintiff suffered severe emotional distress, and the defendants' conduct intentionally or recklessly caused the plaintiff's emotional distress" [p. 12-13].

28. In *Lafferty v Jones*, a well-known conspiracy theorist and his website, Infowars, were sued for spreading lies that a mass shooting at an elementary school was a hoax. The Court ruled that the actions of the defendants were motivated by profit and "their conduct was intentional, malicious, and certain to cause harm by virtue of their infrastructure, ability to spread content, and massive audience."

Expansion of Targeted Groups

29. The range of targeted groups under the American Convention, if considered in combination with key conventions and treaties such as the Inter-American Convention against all forms of Discrimination and Intolerance as well as the jurisprudence of the Inter-American Court, is quite extensive. This expansive and evolutive interpretation that should be adopted to include others is consistent with the nature of human rights treaties, which should allow for the protection of any group that can be considered vulnerable or marginalized in a given context. If a very restrictive approach is given to what should be considered hate speech under international law and, in particular, under Article 13(5), an expansive interpretation of the groups protected would not impact significantly against freedom of expression while ensuring that those severe cases against any vulnerable or marginalized group would always be addressed.

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30. Respectfully submitted to the Office of the Special Rapporteur of Freedom of Expression of the Inter-American Commission on Human Rights at the Organization of American States on July 11th, 2024, by Columbia Global Freedom of Expression.

Hawley Johnson
Associate Director
Columbia Global Freedom of Expression