Sexist Hate Speech and the International Human Rights Law: Towards Legal Recognition of the Phenomenon by the United Nations and the Council of Europe

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Abstract

For many women and girls sexist and misogynistic language is an everyday experience. Some instances of this speech can be categorized as ‘sexist hate speech’, as not only having an insulting or degrading character towards the individuals to whom the speech is addressed, but also resonating with the entire group, contributing to its silencing, marginalization and exclusion. The aim of this article is to examine how sexist hate speech is handled in international human rights law. The argument derives from the claim that legal discourse should distinguish between ‘sexist speech’ and ‘sexist hate speech’, and that the latter may be qualified as a form of violence against women. Then it analyses the approaches of two human rights protection systems—the United Nations and the Council of Europe system—towards the phenomenon of sexist hate speech, by taking their position towards hate speech in general as a point of reference. In both systems, sexist hate speech is being addressed more eagerly under the gender equality framework, including counteracting violence against women, than in their interpretation of hate speech under general human rights law. The article argues the importance of recognizing and addressing sexist hate speech both within the framework of gender equality instruments and anti-hate speech framework established by international human rights bodies.

Keywords Hate speech · Sexist hate speech · Misogony · Sexism · Women’s human rights · Violence against women

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1 Introduction

In July 2020, in front of the United States (US) Congress building, Florida's Congressman Ted Yoho approached Congresswoman Alexandria Ocasio-Cortez and after harsh criticism of her political statements, he was overheard by reporters using an offensive swear word and calling Ocasio-Cortez a "bitch" [1]. Speaking to Congress about what had happened to her, Ocasio-Cortez strongly emphasized: "This issue is not about one incident. It is cultural" [2]. She also referred to a culture "of accepting a violence and violent language against women, an entire structure of power that supports that".

This drastic example is obviously not an isolated case in the public sphere, and politics is a field that engages particularly extreme emotions (for more, see [3]). However, the event is symptomatic and should provoke reflection: if this was the way a member of the US Congress could express himself in public, we can probably expect the same of everyone, in all circumstances. There is no doubt that if Congressman Yoho had used a similarly vulgar and insulting term in the context of his adversary's ethnicity or race, the response of the public to his words would have been much more vehement. And if he had publicly expressed racist hate speech in Europe, he could even be subject to criminal liability (foreseen as a measure in [4]). So why has this sexist hate speech brought no other consequences apart from the attention of the media and women's organisations? The only partly satisfactory answer seems to be the ever-shifting boundaries of the brutalization of language and public discourse or the normalization of a certain language against women. Another factor that should be mentioned when analysing this situation is, on the one hand, the history of centuries of discrimination against women and, on the other hand, the complexity of the application of laws countering hate speech and the definition of the thresholds of hate. At the same time, we should introduce certain caveats at this point. While we use the term "sexist hate speech" and "women's human rights", we are aware that hate speech is being addressed against individuals and groups on the basis of sexual orientation and/or gender identity. Still, in this article we focus on women and girls.

The phenomenon of hate speech as a concept belonging to international human rights law is one of the most interesting and challenging legal developments that emerged from the social experience in the recent decades. The very need to introduce a legal definition of hate speech was triggered by an emerging need to indicate limits to the freedom of expression in the modern world of multinational, multicultural, and multi-religious societies. In this world, the exercise of the freedom of expression by some may violate the dignity, freedom of thought, conscience, and religion of others, or constitute a violation of the prohibition of discrimination (academic literature abounds in the matter [5–9]). However, no binding legal definition of hate speech has been included in any human rights treaties so far, and the challenge with such defining is a serious one. Like many other similar "novelties" in the field of human rights—such as the concept of vulnerability or discrimination by association—also hate speech causes a lot of controversy, especially among those who fear the excessive expansion of new

concepts and areas of protection of vulnerable groups. Notably, similar controversies and doubts emerge regarding the proliferation of human rights treaties and human rights law in general [10, 11]. In addition, in the case of hate speech, we constantly operate in the area of restrictions on the freedom of expression. According to the established jurisprudence of international monitoring bodies, such restrictions should be applied only in strictly limited situations [12]. This includes cases of racist or—in some state—also homophobic statements.¹ The inclusion into this standard of sexist hate speech, against which the law would offer protection equal to the protection against racist or—to a large extent—homophobic hate speech, has not yet fully taken place [13]. Recent scholarly discussions also encompass the issue of widening the scope of protected victims categories not only in the context of hate speech but also that of crimes [14, 15].

The highest convergence of different dimensions of hate speech is to be seen in the legislation of the member states of the Council of Europe (CoE), so it was possible to formulate in the recommendation of the Committee of Ministers of the CoE R 97 (20) a definition recognizing hate speech as:

All forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin [16].

Such a definition of hate speech certainly does not fully correspond to today's reality. Formulated almost 25 years ago, the recommendation does not refer to groups that now increasingly often become victims of hate speech.² During the time that has passed since the adoption of the recommendation, also the social and legal approach to discrimination based on gender has undergone a significant evolution, acknowledging the global dimension of this phenomenon and the urgent need to fight gender discrimination. At the same time, there exists a parallel tendency to suppress women's rights that goes hand in hand with a more general paradox, namely increasingly often the entire concept of human rights is captured by populist forces (for more, see [18]). This includes the claim by the populists that the groups against which they discriminate themselves strive to discriminate against the majority, constantly demanding new rights and freedoms, including protection against hate speech (for more, see [19]). We should also mention in this context the phenomenon of the Internet and general online sphere understood as a "battlefield" over free speech. The online world has become a space where everything can be expressed, and the

¹ The path towards the inclusion of homophobic hate speech into the catalogues of prohibited speech has not been an easy one but the complicity of such anti-homophobic hate speech regulations with the human rights law has been confirmed by the European Court of Human Rights, first in the *Vejdeland v. Sweden* judgement of 2012.

² According to the findings of the survey published in May 2020 by the EU Fundamental Rights Agency, the phenomenon of anti-LGBTQ+ hate speech is growing significantly [17].

power of this expression surpasses all other forms of communication that have ever existed before in the history of the world [20–22].

Moreover, when reflecting on the nature, scope, and legal definitional difficulties associated with the hate speech category, we should highlight the effects it causes.³ It is obvious that the words that hurt may not only have an insulting or degrading character towards the individuals to whom they were addressed. They resonate to the entire group, contributing to its further marginalization and exclusion. The example of sexist hate speech perfectly fits into this pattern.

Our aim and ambition in this article is to examine the attitude of two human rights protection systems towards the phenomenon of sexist hate speech, namely the United Nations (UN) system and the CoE system. The choice of these two systems is based on the criteria of their significance, both in terms of the number of member states and legal implications of their decisions and judgments. Another aspect we consider is the further development of legal regulations and jurisprudence in the area of racist hate speech, which constitutes the basis for any discussion on other forms of hate speech. We trace two “streams” within regulations and jurisprudence—(1) relevant human rights framework within each system and (2) instruments specifically dedicated to combating discrimination against women (women’s human rights instruments)—which we treat as equally significant and standard-forming. Although almost 30 years have passed since the Vienna Declaration and Programme of Action acknowledged that women’s rights are inalienable, integral, and indivisible part of universal human rights [24, para. I 18], it remains vital to mainstream women’s issues in the international human rights law, also in the face of the new challenges such as global backlash [25]. The specialized women’s human rights instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) gained significant recognition on the international and national levels [26], nevertheless women’s human rights should be constantly mainstreamed also in the practice of other human rights bodies. There is widespread agreement among women’s rights scholars and activists that the human rights of women can best be promoted and protected at the international legal level through this two-track approach [27, p. 34]. Thus, we argue that the problem of sexist hate speech should be tackled within the framework of gender equality instruments and anti-hate speech framework established by international human rights bodies.

This article analyses the norms derived from the selected systems in answer to the question of their relevance for counteracting sexist hate speech, by looking at all available elements, such as the decisions and judgments of monitoring bodies, treaties’ provisions, implemented policies, and other relevant material. In other words, we scrutinize how sexist hate speech is defined or dealt with by the two major human rights law actors—the UN and the CoE—by taking their attitude towards hate speech as a point of reference. Moreover, we claim that sexist hate speech may be qualified as a form of violence against women.

³ Apart from the legal perspective, other aspects of such prevention and counteracting should also be considered, in particular see [23].

This article is structured as follows. We will begin with an attempt to define “sexist hate speech”, accompanied by some of the rationales behind singling it out as a symptomatic and separate phenomenon. Furthermore, we will trace the response of the UN system of human rights protection towards sexist hate speech, and in the following part, we will move to analysing the response towards the same issue offered by the CoE. We will conclude by summarising our observations and attempting to outline the desirable scenario concerning future developments in the human rights law perception of sexist hate speech.

2 What We Talk about When We Talk about “Sexist Hate Speech”

The space that surrounds us is filled with hateful words, both in its public and private dimension. Undoubtedly, we have all come across such words directed against women as well: mocking or sexist comments, deprecating remarks, degrading taunts—all based on gender. However, for decades we did not think of them as of a separate category of expression with possible legal implications. For years, such words were handed out simply as a common way of relating to women, which led to the normalization of sexist expressions or jokes.

Hence, any scholarly discussion on the phenomenon of sexist hate speech in international human rights law should be preceded by drawing the line between sexist hate speech and other statements addressed to women, which although oppressive and hurtful, do not amount to hate speech. This issue has been clearly voiced by Louise Richardson-Self who postulates to distinguish between “sexist speech” which is not hateful and “misogynistic speech” which amounts to hate speech [28]. Although both types of speech negatively target women because of their gender, they affect women in different ways.

By referring to the concept of five faces of oppression by Iris Marion Young [29], Richardson-Self identifies sexist speech as oppressive to women, for instance through their marginalization. She uses the example of patronizing a grown woman through calling her “a girl” [28, p. 261–262]. Arguing that such kind of expression is not violent, she rightly indicates that it should not be qualified as hate speech. Thus, “sexist speech” should be distinguished from “misogynistic speech”, as the latter bears the key characteristics of hate speech: it is violent, hostile, and coercive and should be addressed by specific tools, including legal sanctions.

Richardson-Self further clarifies that misogynistic speech “appears to illustrate all the hallmark traits of hate speech. It targets a historically and contemporarily oppressed group, is characteristically hostile, systematically violent, and degrades, stigmatizes, vilifies, and disparages its targets (among other things)” [28, p. 267]. Although the term “misogyny” is recognized in legal discourse [30], it is not very commonly used in the language of international human rights law, whereas the term “sexism” is more widespread and defined [31]. Therefore instead of introducing the notion of “misogynistic speech”, we propose to distinguish between “sexist speech” and “sexist hate speech”. Consequently, in our article, we use the notion of “sexist hate speech” to describe what Richardson-Self calls “misogynistic speech”.

Notably, the discussed phenomenon is covered in the pronouncements of various international bodies by different, not always synonymous names, built around terms “sex”, “gender”, and “women” such as: “sexist hate speech” [32], “hate speech on the basis of sex or gender”,⁴ “hate speech against women” [34], “gendered hate speech” [35], “gender-based hate speech” [35]. While “gender” is usually understood as “socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men” [36, Art. 3c], names centred around this term are the most inclusive as they cover the widest category of all persons concerned because of their gender. For instance, notions of “gendered hate speech” or “gender-based hate speech” are used in the 2021 report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression [35, para. 3.2], who nevertheless focuses her considerations on women and girls [35, para. 11]. Since hate speech against women (including girls) is the focus of this study, we decided to use the term “sexist hate speech” as mirroring the women’s structural experience of sexism.

Certainly, the boundaries between sexist speech—which is “only” oppressive—and speech that is also hateful are not very strict, and these two may overlap. As always, the context of a specific statement or other form of expression plays a major role. However, we must keep in mind these distinctive nuances while addressing the issue of hate speech against women through human rights instruments. Moreover, we should also note difference with the attitude towards racist hate speech (the original concept of hate speech applied to other discriminated groups than women): if identified as racist, an expression almost automatically qualifies as hate speech. Identifying hate speech against women is more complicated and challenging. Lumping together sexist speech and sexist hate speech poses a risk of too extensive limitations to free speech, but also and perhaps paradoxically, to the attempts to counteract discrimination against women. Labelling all acts of sexist speech as “hate speech” may lead to the misinterpretation and trivialization of the problem of hate speech against women.

In the following analysis, we trace if and how the described nuances in differentiating between various kinds of “speech against women” are recognized in international human rights law. We argue that both “sexist speech” and “sexist hate speech” are human rights issues, covered in particular by specialized women’s treaties (CEDAW, the Istanbul Convention), which impose obligations on states parties to counteract gender stereotyping, for instance through education or media monitoring. In the case of sexist hate speech—which as we argue, may be qualified also as a form of violence against women—states are obligate to a more targeted reaction than usual, including introducing and implementing criminal or other legal sanctions. Against this background, we search for a clear guidance of international human right bodies how to define “sexist hate speech”.

⁴ Gender and sex are often added to other grounds included in the definition of the offence in national legislations; see [33]

3 Addressing Sexist Hate Speech in the UN Human Rights Protection System

The universal system of human rights protection emerged from the commitment of the international community to establish effective prevention mechanisms that—after the horror of the Second World War—would prevent further gross violations of human rights and introduce human rights law as a coherent legal and political concept into the global context. However, the scope of the protection translated into binding international treaties at the time of the establishing of this system had been limited by various factors, including the social perception of the meaning of discrimination and vulnerable groups. At the same time, the position of free speech guarantees in the universal dimension has been extremely strong and supported by the US-oriented approach to the free speech issues. Furthermore, the discussions around possible limitations of free speech enshrined in the human rights treaties concentrated on the fight against different forms of racism and racial discrimination and suppression of possible war propaganda. Thus, not much space was left for any further legal reaction towards other forms of hate speech—a term unknown at that time at the UN forum and even today used in a reluctant manner due to numerous collisions with the free speech guarantees. Despite these obstacles, the phenomenon of hate speech, including sexist hate speech, has gradually but clearly emerged in the UN forum. Thus, the 2019 UN Strategy and Plan of Action on Hate Speech acknowledges that: “Public discourse is being weaponized for political gain with incendiary rhetoric that stigmatizes and dehumanizes minorities, migrants, refugees, women and any so-called “other” [37]. This statement leaves no doubts that, at the UN policy level, women are now included as specific target of hatred.

3.1 Relevant Elements of the UN Human Rights Protection System

The UN Convention on the Elimination of All Forms of Racial Discrimination concentrates strictly on the manifestations of racism and racial discrimination that the ratifying states are obliged to counteract in various ways. As hate speech remains of the most common forms of racism, it is not surprising that the Convention deals with the matter. The drafters did so by introducing among its provisions article 4, often called the essential provision of the Convention. Article 4 includes commitments to limit the rights and freedoms of individuals and groups that publicly display their racist beliefs and attitudes, including their free speech.

Established by the Convention, the Committee on the Elimination of Racial Discrimination (CERD) interpreted this provision in decisions regarding individual communications, in concluding observations to periodic reports of states, and in general recommendations. Racist hate speech has been addressed in all of them [38, 39]. For example, CERD directly refers to the notion of racist hate speech in its general recommendations on African descent [40, pt. 7] and on non-citizens [41, pt. 3]. It is also interesting to search for CERD’s references to the phenomenon of sexist hate speech in the context of race and ethnicity, which is not an

entirely futile effort, despite the fact that as such, it has not been mentioned so far in CERD's decisions or concluding observations. In the case of the latter, various aspects of discrimination, intimidation, physical violence towards—but also exclusion of—women have been raised by CERD in its considerations of every single report under examination. This includes the acknowledgment of multiple intersectional discrimination faced by Roma women [42, para. 17], migrant women [43, para. 12], and women belonging to indigenous groups [44, para. 21]. However, there is no specific reference to sexist hate speech that women and girls might experience.

Simultaneously and in a meaningful manner—even though not explicit enough—CERD acknowledges the existence of a special concern towards gender-related dimensions of racial discrimination, also in the context of hate speech. In its general recommendation on descent-based communities, CERD stresses the fact that members of such communities—including women—are often subjected to dehumanizing discourses that refer to untouchability and to general disrespect of their human dignity and equality [45, para. 1a]. In the general recommendation on gender-based racial discrimination, CERD does not address sexist hate speech directly, instead focusing on perhaps more explicit examples of racial discrimination that may be directed towards women because of their gender, such as sexual violence committed in detention against women members of particular racial or ethnic groups or coerced sterilization of indigenous women [46, para. 2]. At the same time, this general recommendation calls on the states to tackle gender-based yet race-oriented discrimination in all its forms, which also means discrimination that stems from hate speech against women. Moreover, in its general recommendation on combating racist hate speech, CERD notes that the phenomenon of hate speech targets women who belong to indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees, and asylum seekers [47, para. 6].

Within the universal human rights protection system, also the International Covenant on Civil and Political Rights (ICCPR) and its Human Rights Committee (HRC) are relevant reference points for discussing hate speech and its legal implications. The ICCPR article 20 explicitly states that any war propaganda and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law. Even though a lot of controversies arose in regard to the lack of legal clarity of such notions as “advocacy” or “incitement to discrimination”, the provision gained the reputation as one of the strongest legally binding instruments against hate speech [48, p. 534–544].

As in the case of CERD, some traces of addressing the issue are to be found in general comments by the HRC. Still, any references to the phenomenon of sexist hate speech are omitted in the HRC's General Comment No. 34 on freedom of opinion and expression [49]. A reference to the issue at stake—even though still bypassing the essence of the sexist hate speech—is to be found in the HRC's General Comment No. 28 on equality of men and women [50]:

As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or

inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material [50, para. 22].

However, the matter requires yet another discussion whether the “obscene material” portraying women and girls as objects of violence can be considered hate speech in the meaning and sense of the traditional use of this notion in legal terms (for more, see the chapter on pornography in [51]).

The HRC decisions in individual cases also bring little added value to the expansion of the phenomenon of hate speech used in the context of sexism. Hate speech in the HRC jurisprudence has been so far limited to the context of racial and ethnic hatred, but also Holocaust denial. This is also the reason why the fact that the sexist hate speech surfaces directly in one of the most recent concluding observations of the HRC should be praised as a positive development. Formulating in 2021 its most recent concluding observations to the periodic report of Finland, the HRC explicitly states about hate speech that it is concerned.

About the persistence of intolerance, prejudice, hate speech and hate crimes against vulnerable and minority groups, including women, African descendants, Muslims, lesbian, gay, bisexual and transgender persons, and Roma and Jewish communities, in particular in the media and on social networks [52, para. 14].

However, such references are missing in other concluding observations issued by HRC between 2019 and 2021. Thus, we should hope that the HRC will keep bringing this issue on its agenda as proof of its progressive attitude towards protecting women.

The lack of a sufficiently satisfying response to sexist hate speech by the treaty bodies may be partly remedied by recent activities of the special rapporteurs appointed by the Human Rights Council. In particular, what is especially promising is the emerging gender-sensitivity of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. However, the path to such a recognition was not an easy one. Still in 2019, the report on addressing hate speech through international human rights law held no mention of the gender dimension of hate speech, nor any other “new” manifestation of this phenomenon such as homophobic speech [53].⁵

This omission has been remedied in 2021 by Irene Khan—the most recent holder of this mandate—in her ground-breaking report on gender justice and freedom of opinion and expression [54]. As she underlines,

The present report is the first in the 27-year history of the mandate to be devoted exclusively to gender and freedom of opinion and expression. Gender equality has been identified by the Special Rapporteur as a priority. The report

⁵ Interestingly, although focusing on online hate speech, the report has not even mentioned the 2018 report [35].

is the first step in a series of reports, consultations and activities that she will undertake during the course of her mandate [54, para. 6],

which signalizes a new era in the performance of this mandate and further developments in the field. The report maps out the key factors constraining women's equal right to freedom of expression, listing hate speech as one of such factors. The report calls hate speech "gendered hate speech" [54, para. 68], and it contains a very clear message that gendered hate speech must be addressed within the international framework of combating hate speech. Endorsing the 2018 report by the Special Rapporteur, its causes and consequences, the 2021 report addresses in a decisive way Article 20(2) of ICCPR by stating that.

Although gender and sex are not mentioned in article 20 (2), they can and should be considered grounds for protection in view of the gender equality clauses elsewhere in the Covenant and the broader intersectional approach to non-discrimination that international human rights law has consistently taken in recent decades [54, para. 70].

Thus, according to the Rapporteur, "gendered hate speech can be prohibited under international law. However, it should not be criminalized except in the most egregious cases of real and imminent danger with a clear intention to cause serious harm" [54, para. 70].

The above quote from the 2021 report again demonstrates the necessity of distinguishing between "sexist speech" and "sexist hate speech", as we argue in this article. Moreover, the 2021 report proposes a practical legal framework borrowed from the Rabat Plan of Action[55], which stresses a need for the stratification of harmful speech: it sets out three categories of speech based on the severity of harm[55, para. 71]. The first one is harmful speech that constitutes a crime because it presents real and imminent danger. This category clearly embraces sexist hate speech. The second category is harmful speech that does not reach the previous threshold but may justify civil action: it points out to expressions of fluid nature that may cause "lesser" legal reaction than a criminal sanction. The third category is offensive speech that raises concerns in terms of tolerance, hostility, or discrimination, and which should be addressed through non-legal measures, such as condemnation, awareness-raising, and education. The latter category embraces expressions that we have classified above as "sexist speech".

3.2 Specialised Women's Human Rights Instruments

While investigating the potential of UN human rights standards in counteracting sexist hate speech, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the most obvious point of reference. Although adopted more than 40 years ago, CEDAW remains the most comprehensive universal treaty dealing with women's human rights. At the same time, the legal recognition of the phenomenon of sexist hate speech seems to be too recent to be explicitly covered by this treaty. Thus, it is interesting to note that while drafting CEDAW, Philippines opted for prohibiting by law—inspired by CERD—of "any advocacy of hatred for

the feminine sex that constitutes incitement to discrimination against women” [56, p. 78–79]. This provision was thought to accompany the general anti-stereotyping framework, as established in Article 5 of CEDAW. However, most governments opposed it as possibly too broadly restricting the freedom of expression [56, p. 80].

Even though no regulation directly addressing sexist hate speech was included in CEDAW, sexist hate speech has been addressed by the Committee on the Elimination of Discrimination against Women (CEDAW Cttee)—an international monitoring body established by CEDAW—when interpreting Article 5. Article 5(a) of CEDAW acknowledges the existence of the relation between gender stereotyping and discrimination against women, and it obliges states parties to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. The scope of Article 5(a) is very broad because it addresses a wide range of attitudes that may perpetuate different forms of gender discrimination: from fixed parental roles to witchcraft accusations. Thus, Article 5(a) may be interpreted as imposing on states parties obligations related to both counteracting sexist speech and its more invidious form: sexist hate speech.

In its concluding observations on the states parties’ reports on the implementation of CEDAW, the CEDAW Cttee tackles both sexist speech and sexist hate speech. For instance, with regard to media and advertising, states are called to enact legal prohibition of sexist advertising [57, para. 18] or to establish an independent monitoring institution in charge of pre-screening advertising and investigating complaints of sexist advertising [58, para. 28]. The CEDAW Cttee also recommends “to monitor the use of sexist and misogynistic language and hate speech in the media” [59, para. 24], which demonstrates that both sexist speech and sexist hate speech may be counteracted with similar tools such as media monitoring. In the case of sexist hate speech, more radical instruments are required, too, including criminal law measures. The CEDAW Cttee recommends that states adopt legislations prohibiting sexist hate speech [60, para. 21], for instance by adding broadening the list of actions that qualify as criminal hateful expressions under criminal law [61, para.23 or by applying defamation legislation [62, para. 49].

We may notice that although the concept of sexist hate speech appears in the CEDAW Cttee’s practice, more specific deliberations on this phenomenon remain missing. In particular, until now no definition of sexist hate speech has been presented by the CEDAW Cttee, nor any comprehensive catalogue of state obligations that would draw the line between sexist speech and sexist hate speech. A framework for counteracting violence against women as a human rights violation—of which the CEDAW Cttee has been recognized as a global promoter and standard-maker—seems to be the most relevant space for such considerations. This includes in particular it’s the CEDAW Cttee’s general recommendations (GR), which are considered to be a “distillation of the case law or jurisprudence of the treaty body” [63, p. 564].

The CEDAW Cttee’s GR No. 19 of 1992 [64] has been a ground-breaking document, which set violence against women on the international human rights agenda. The document identifies gender-based violence as covered by the definition of discrimination against women contained in Article 1 of CEDAW. The established

definition is very broad, recognizing violence against women as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”. Thus, although not referring directly to hate speech, the definition developed by the CEDAW Cttee may still cover it as an act of mental suffering. Further pronouncements of the CEDAW Cttee confirm that it places sexist hate speech—sometimes called by the Cttee “verbal violence”—within the frame of violence against women [65, para. 18; 66, para. 27; 67, para. 34]. We should acknowledge that the revised CEDAW Cttee’s GR No. 35 of 2017 [68] does not directly address hate speech against women either. The only advancement related to this issue is a general reference to “contemporary forms of violence occurring online and in other digital environments” [68, para. 20].

Since the Internet is a fertile ground for spreading sexist hate speech, the recognition of specificity of this environment is an important development. In particular, the CEDAW Cttee’s intersectional focus on girls is to be noted in this respect [69, para. 22]. The CEDAW Cttee’s GR No. 36 of 2017 on right to education of girls and women refers in more detailed manner to the online victimisation of girls through cyberbullying [70, para. 70], which overlaps with online sexist hate speech—but which is a different notion.

Online violence has been tackled by another UN mechanisms dedicated to women’s issues as well, namely the Special Rapporteur on violence against women, its causes and consequences. In 2018 Dubravka Šimonović, at that time this mandate holder, submitted a report on online violence against women and girls [65] that stresses the importance and potential of human rights instruments in dealing with online violence against women. This report intentionally contains neither a definition nor a catalogue of forms of online violence against women and girls [65, para. 24], thus never explicitly listing online sexist hate speech as one of them. However, it is beyond any doubt that this kind of abuse lies in the focus of the Special Rapporteur because the report refers to the most drastic examples such as an anonymous Internet campaign calling for the gang rape of a woman human rights defender [65, para. 25]. The report also mentions anti-hate speech regulations established in Article 20(2) of ICCPR [65, para. 52] and hate speech laws established in domestic legislations [65, para. 80]. The issue of online violence was recalled by the Special Rapporteur in 2020 in her report on violence against women journalists [71, para. 80].

4 Addressing Sexist Hate Speech in the Council of Europe Human Rights Protection System

The human rights protection system of the CoE is one of the regional human rights systems that had been developed in parallel to the universal system. The system consists of binding international treaties, in particular the European Convention of Human Rights and the European Court of Human Rights—the most important European judicial body in the field of human rights protection—along with number of bodies that implement soft law. Since the 1980s, the system has played a major role

in the development of norms and concepts within the notion of gender mainstreaming, providing a new approach to gender equality and shaping its progress in Europe [72]. Importantly, the CoE has adopted a different approach towards the freedom of speech than the one accepted in the USA, allowing for limitations in certain situations, including with regard to racist hate speech. Within the last two decades, the homophobic hate speech has been included in the catalogue of prohibited speech, which has been confirmed by the European Court of Human Rights [73]. As this section shows, sexist hate speech is also addressed within the system, although, for now, only on its margins.

4.1 Relevant Elements of the Council of Europe's Human Rights Protection System

The first hate speech definition within the CoE system was adopted by the CoE's Committee of Ministers (CoM) in 1997. It covers the expressions that spread, incite, promote, or justify hatred based on intolerance, including directed toward minorities and migrants [16]. Thus, the definition does not include sexist hate speech. Along with the recommendation, an accompanying explanatory memorandum was adopted, which specifically explains that the exclusion of sex among the grounds was considered to be "necessary to avoid losing the focus of the text". The memorandum further reminds that intolerance on the grounds of sex has been addressed in the CoE's CoM's 1984 recommendation on equality between women and men in the media [74]. However, this 1984 recommendation does not deal with hate speech⁶ and as such cannot be seen as a document that addresses sexist hate speech. At the same time, according to the CoE Commissioner for Human Rights, the list included in the 1997 definition should be viewed as open-ended and one that recognizes other groups such as women and girls [75, p. 4].

While the CoE's CoM never proposed a definition of sexist hate speech or introduced a definition of hate speech that includes sex and gender as grounds, the term itself has been used in several recommendations and their appendices. In the CoE's CoM's 2011 recommendation on a new notion of media, hate speech is used without specific definition, followed by an explanation regarding the need for attention in the use of, *inter alia*, misogynist and sexist bias, which could imply the recognition of sexist hate speech [76, para. 91]. The 2015 handbook to the CoE's CoM's 2013 recommendation on gender equality and media remarks that "hate speech against women" present in the Internet still goes largely unpunished [77, p. 28]. The appendix to the CoE's CoM's 2019 recommendation on preventing and combating sexism explicitly mentions sexist hate speech in a number of places [78]. The CoE Gender Equality Strategy for 2014–2017 stipulates that to achieve its strategic objective of combating gender stereotypes and sexism, the CoE actions will focus, *inter alia*, on combating sexism as a form of hate speech [32]. As we argue throughout this article,

⁶ The closest it comes to hate speech is in the recommendation to stimulate "evaluation by national research of the impact and influence of entertainment programmes where sex stereotyping and prejudices are concerned".

not every instance of sexism is a form of hate speech. This formulation by the CoE shows that this is not always recognized on policy level. In contrast, the CoE Internet Governance Strategy for 2016–2019 does not explicitly include sexist hate speech: what is mentioned is preventing and addressing online hate speech, along with a separate mention regarding the need for protecting women from online abuse, such as cyber-stalking, sexism, and threats of sexual violence [79, para. 8(b), 10(d)]. Sexist hate speech explicitly appears in a number of CoE Parliamentary Assembly resolutions, calling states to combat “racists and sexist hate speech” [80, para. 8.1.8] or for a broad public–private cooperation to counter sexist hate speech [81, para. 14.1; see also 82, para. 16.1.1]. In a 2017 resolution, the CoE Parliamentary Assembly explicitly states that hate speech is not limited to racism and xenophobia and that it can also take the form of sexism [83, para. 2].

The CoE’s CoM’s 2019 recommendation on preventing and combating sexism contains the first attempt to define sexism in legal terms [78, Definition]. The document contains a section on hate speech, in which it highlights the widespread recognition of racist hate speech as contrary to European and international human rights standards—which is not the case with regard to sexist hate speech. Interestingly, the document mentions “sexist or misogynist hate speech” [78, I.A, II.B] without however commenting on the differentiation. “Sexism” is the term used predominantly, with “misogyny” appearing only twice, once in the context of hate speech. This might suggest that the drafters acknowledged the difference in the two terms in the context of hate speech.

Simultaneously, other CoE bodies proposed definitions of hate speech, which include sexist hate speech. The CoE European Commission against Racism and Intolerance (ECRI)—an independent human rights monitoring body specialized in combating antisemitism, discrimination, racism, religious intolerance, and xenophobia—has been particularly active in combating hate speech. In the definition of ECRI’s General Policy Recommendation No. 15 on combating hate speech, sex is included among the non-exhaustive personal characteristics [84, Explanatory Memorandum, B. para. 9]. Furthermore, the preamble to the Recommendation recognizes the “particular problem and gravity of hate speech targeting women both on account of their sex, gender and/or gender identity”. In turn, the CoE Factsheet on Combating Sexist Hate Speech adopted in 2016 proposes the following definition of sexist hate speech:

Sexist hate speech is one of the expressions of sexism, which can be defined as any supposition, belief, assertion, gesture or act that is aimed at expressing contempt towards a person, based on her or his sex or gender, or to consider that person as inferior or essentially reduced to her or his sexual dimension [32, p. 2].

Counteracting hate speech may clash with the freedom of expression covered by Article 10 of the European Convention of Human Rights, as repeatedly stated by the European Court of Human Rights (ECtHR), the regional human rights court established within the CoE [85]. The ECtHR has established a case-law according to which the freedom of expression might be subject to restriction, including for the protection of reputation or rights of others. The ECtHR generally finds that

expressions amounting to hate speech are not protected by the European Convention of Human Rights and states can sanction such forms of speech [86, 87]. At the same time, the ECtHR has never provided a definition of hate speech, associating it with “all forms of expression which spread, incite, promote or justify hatred based on intolerance” [88, para. 40]. While the court never explicitly developed its case law with regard to sexist hate speech, it did influence the CoE’s CoM’s definition by stating that homophobic speech should be prohibited just like racist hate speech [89, para. 55; 90, pp. 223–225]. This reasoning by the ECtHR allows us to speculate that when faced with a similar case concerning sexist hate speech, the Court could analogically broaden the definition. Such speculation is based on the justification provided by the ECtHR, which emphasizes the significance of the so-called harm effect and consequences of spreading hatred against specific groups. This undoubtedly also applies to women exposed to sexist hate speech.

The above analysis reveals a mixed approach of CoE bodies to sexist hate speech: while present in some documents, the notion is absent from other. At the same time, we observe an interesting trend: “sexist hate speech” appears much more consequently when addressing violence and discrimination against women, while the notion fades into the background when the CoE is dealing more broadly with hate speech (for rare exceptions, see [81, para. 14.1]). There seems to be more awareness about the phenomenon when dealing explicitly with women than when speaking generally about hate speech.

The CoE has repeatedly addressed hate speech also regarding the presence of such speech taking place in online shared spaces [76, para. 91]. For example, the CoE’s CoM’s 2013 Recommendations on gender equality and media include guidelines concerning sexist hate speech—although without calling the notion this way. Member states are called upon to adopt appropriate legal framework intended to ensure the prohibition of incitement to hatred and any form of gender-based violence within the media [77]. While the 2013 Recommendation does not specify online violence, the increased level of online harassment and “hate speech against women” are highlighted in the 2015 handbook on its implementation. In the context of our focus in this article, the handbook is particularly interesting as it states that such hate speech largely goes unpunished and that online harassment and threats against women deserve particular attention, considering that there exist few regulatory mechanisms [77, p. 28]. The 2013 Recommendation’s suggestions to address the matter include developing “an online platform for reporting sexist content and speech in news and everyday life” [77, p. 29].

The CoE’s CoM’s 2016 Recommendation on the protection of journalism and safety of journalists and other media actors highlights the necessity to develop a systemic, gender-sensitive approach to address the dangers and threats that female journalists face [91, para. 17]. A 2019 Resolution of the CoE Parliamentary Assembly called upon Internet intermediaries to actively cooperate with public, social, and private entities to counter sexist hate speech [81, para. 14.1].

The CoE’s CoM has also adopted a recommendation on the roles and responsibilities of Internet intermediaries [92], foregrounding the huge relevance of those actors. The responsibilities of Internet intermediaries with respect to human rights and fundamental freedoms are listed in part two of the appendix and include actions

with regard to transparency and accountability, content moderation, personal data use, and access to effective remedies (Appendix to [92]). At the same time, the recommendations do not specifically speak about hate speech or sexist hate speech.

Correspondingly, the case-law of the ECtHR shows that companies running Internet platforms can be held liable for user-generated hate speech on their portals [93], showing that—under certain circumstances—private parties must participate in the protection against hate speech. As the ECtHR has not decided cases dealing specifically with sexist hate speech, this has not yet been tested regarding such statements.

4.2 Specialised Women's Human Rights Instruments

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)—known as a “golden standard” for combating violence against women and girls—does not mention sexist hate speech explicitly, nor does its Explanatory report [94]. Reports of the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO), the drafting committee of the Istanbul Convention, do not refer to this problem either [95]. Nevertheless, we may notice that the Istanbul Convention embraces this issue already in its definition of violence against women formulated as

A violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

What derives from this definition is the fact that to classify a given act as violence against women, there must occur some sort of harm or suffering, or their likelihood. In the case of sexist hate speech, the psychological harm or suffering are mostly at stake. For us, this element draws the line between sexist speech and sexist hate speech. Only if resulting (or likely to result) in harm or suffering does sexist speech become sexist hate speech and, consequently, a form of violence against women.

Inspired by the CEDAW Article 5, the Istanbul Convention obliges states parties to eradicate prejudice, customs, traditions, and all other practices based on the idea of the inferiority of women or on stereotyped roles for women and men (Article 12). Consequently, we argue that Istanbul Convention Article 12 thus requires states to address sexist speech—which although not hateful, feeds prejudice towards and stereotyping of women—along with combating sexist hate speech, which is violence against women itself that may trigger other acts of such violence. Obligations imposed by the Istanbul Convention Article 12 are developed in further provisions of Chapter III of Istanbul Convention. The Istanbul Convention Article 17 is of particular relevance for counteracting sexist speech and sexist hate speech because it requires states parties to promote active the involvement of media and ICT sector against violence against women. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the Istanbul Convention monitoring body, stresses the importance of encouraging the national media to enforce

self-regulatory standards that prevent the dissemination of content that “feeds into hate and/or sexist speech against women” [96, para. 88]. As derives from this excerpt, distinction between sexist speech and sexist hate speech is visible in GREVIO’s practice.

The Istanbul Convention Articles 33–40 oblige states parties to prohibit various forms of conduct that amount to violence against women. Two of the articles are reported to be of particular relevance for addressing sexist hate speech [32, p. 9], namely Article 34 (stalking) and 40 (sexual harassment). In the case of stalking—which requires criminal sanction—sexist hate speech is covered if it has a character of “repeated behaviour of a threatening nature against an identified person which has the consequence of instilling in this person a sense of fear” [94, para. 182]. Contrary to stalking, sexual harassment also embraces one-time behaviour, but one that must be of “sexual nature”. Article 40 explicitly expresses that sexual harassment may take the form of verbal conduct, which refers to “words or sounds expressed or communicated by the perpetrator, such as jokes, questions, remarks, and may be expressed orally or in writing” [94, para. 208]. States parties are obliged to suppress such behaviours. Although criminal sanction is preferred, states parties are free to address sexual harassment through other legal sanctions, for instance under civil or labour law [94, para. 207].

We may argue that not all possible forms of sexist hate speech would be covered by stalking or sexual harassment. For instance, this may be a one-time sexist insult that is not of sexual nature, such as declaring hate—or threatening violence—against someone because she is a woman or is perceived as such. Moreover, sexist hate speech usually has a more public dimension than stalking and sexual harassment, which are committed in the private sphere. This lacuna could be potentially filled by Article 33, which obliges states parties to criminalize psychological violence defined as “intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats”. However, as explained by the drafters, this provision refers to a course of conduct rather than a single event [94, para. 181]. Thus, it is clear that this applies to other forms of behaviour than episodic acts of sexist hate speech that are at stake as far as “psychological violence” is concerned. Therefore, there is no provision in the Istanbul Convention that explicitly obliges states parties to prohibit all forms of sexist hate speech, through criminal or other form of sanctions such as administrative fines. Nevertheless, the Istanbul Convention offers an extremely important guidance in addressing violence against women by international human rights bodies, including ECHR [97]. Against this background, the Istanbul Convention can be used as an interpretative tool in order to mainstream the gender dimension of hate speech in general human rights framework.

5 Conclusions

There is no doubt that sexist hate speech is becoming an emerging human rights issue, and that developments in the field of race-related hate speech meet gender equality framework. Bearing in mind the growing dynamics of this

phenomenon—disseminated in particular through online channels—we should establish an adequate response of the international human rights protection systems.

Based on the existing scholarship, we argue that hate speech against women requires a particularly nuanced approach. Thus, we should distinguish in legal discourse between sexist speech and sexist hate speech. Although hurtful to women for instance through marginalising or patronising, sexist speech does not generally meet the threshold of being hateful. In contrast, sexist hate speech that derives from misogyny can be violent, hostile, and coercive.

Both sexist speech and sexist hate speech are human rights issues, in particular handled through the anti-stereotyping framework of CEDAW and the Istanbul Convention, which impose on states parties obligations to counteract gender stereotyping, for example through education or media monitoring. However, in the case of sexist hate speech, which may be qualified as a form of violence against women, a more targeted reaction is required, including under some jurisdictions, criminal or other non-criminal sanctions. Thus, a clear guidance of international human right bodies how to define “sexist hate speech” and what measures should be applied in reaction to it is of vital importance for responding to the matter on a national level.

Certainly, the problem of sexist hate speech is present on the human rights agenda of both the UN and the CoE, but there is still much room left for necessary progress. In the case of the UN human rights treaty bodies—the Human Rights Committee and the CERD Cttee—some early signs of interest towards sexist hate speech are noticeable, yet still indirectly. More intersectional approach could definitely contribute to further desired developments. Moreover, the regular review of states parties through monitoring procedure gives a good opportunity to address this issue. Sexist hate speech is better recognized in the practice of a women rights specialized body: the CEDAW Cttee. Unfortunately, its recently revised General Recommendation No. 35 on violence against women seems to be a lost opportunity in this regard because it does not pronounce on sexist hate speech directly.

Recent activities of Special Rapporteurs appointed by the UN Human Rights Council demonstrate their notable role in spotlighting sexist hate speech in international human rights law. The figures that are voicing their concerns are not just the holders of thematic mandates who specialize in gender discrimination but also those who deal with the general human rights framework. What is more than promising in the latter area is the 2021 report of the Special Rapporteur on the promotion and protection of freedom of opinion and expression. While addressing gender justice in terms of the freedom of expressions, the 2021 report sends a very clear message: sexist hate speech must be addressed within the international framework of hate speech.

With regard to the second human rights protection system that we analysed in the present article, namely the system under the auspices of the Council of Europe, the fact that the ECtHR has not had a chance to pronounce on the sexist hate speech so far is of great significance. Having in mind the dynamic interpretation by the ECtHR of the standards on hate speech while addressing its homophobic form, we may anticipate—and postulate—its progressive approach also towards sexist hate speech. Future interpretation of ECHR may be also influenced by the standard developed

by the CoM bodies, such as the 2019 recommendation of CoM on preventing and combating sexism.

Obligations to address sexist hate speech may be clearly derived from the Istanbul Convention. Its anti-stereotyping provisions require states parties to counteract sexist hate speech and sexist statements that do not amount to hate speech. Among the variety of steps that could be undertaken by states, triggering strategies in education and media sector is of the utmost importance. Moreover, states parties should penalize sexist hate speech as violence against women. Although the Istanbul Convention does not define sexist hate speech as a form of violence against women per se, sexist hate speech may amount to various forms of conduct covered by this treaty, including stalking and sexual harassment. However, one could debate to what extent does the Istanbul Convention address other manifestations of sexist hate speech, such as episodic statements of non-sexual nature. Further interpretative work of GREVIO can offer crucial elucidation here.

Nevertheless, one of the most important conclusions is that both in the case of the UN and the CoE, sexist hate speech is being addressed more eagerly under the gender equality framework—including counteracting violence against women in particular—than in the discourse on hate speech animated by these bodies while interpreting general human rights law. We do not criticize this approach as we find any human-rights-oriented attempts to address the issue as valuable and demanded. Bearing in mind that “women’s rights are human rights”, we simultaneously insist on the importance of noticing and addressing sexist hate speech also outside of the gender equality agenda.

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