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Draft additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems[1]

Draft report

Committee on Legal Affairs and Human Rights
Rapporteur: Mr Ignasi Guardans, Spain, LDR

I. Draft opinion

1. The Assembly refers to its Opinion N°226 (2001) on the draft Convention on Cybercrime and its Recommendation 1543 (2001) on racism and xenophobia in cyberspace. It believes that the arguments expounded in those two texts concerning the dissemination of racist propaganda and the unlawful hosting of hateful messages remain relevant.

2. It welcomes the large number of signatures of the Convention on Cybercrime (thirty-three signatures and one ratification), to which it gave its political support, and trusts that it will soon enter into force.

3. It salutes the speedy action by the Committee of Experts on the Criminalisation of Acts of a Racist or Xenophobic Nature committed through Computer Networks (PC-RX). The Committee has worked efficiently and in line with the Assembly's general recommendations. The Assembly accordingly believes that the final protocol could be opened for signature in the year following the opening for signature of its parent Convention.

[1] See Doc 9530.

4. It realises that the text adopted by the European Committee on Crime Problems is a compromise between differing legal and cultural traditions, which strikes a broadly satisfactory balance between combating racism and freedom of expression.

5. However, the Assembly cannot go along with the Committee's refusal to include unlawful hosting, a concept which it defended in its opinion and repeated in its recommendation. The opposition of a single non-member state of the Council of Europe cannot override the defence of the European continent's common values when the states that share them join together in drafting an instrument of such importance, even if that State threatens not to accede to the instrument in question.

6. It is gratified that the protocol, if the current version is confirmed, will be the first international instrument to penalise negationism.

7. Accordingly, the Assembly recommends that the Committee of Ministers make the following amendments to the draft protocol:

i. add the notion of unlawful hosting and make any reservation in respect of the criminal and civil offences it provides for subject to the recognition of this notion in domestic law;

~~ii. delete the references to religion in Articles 2, 4, 5 and 6 of the draft protocol;~~

ii. add the words “language” between “colour” and “descent” in Articles 2(1), 4, 5 and 6(2);

iii. delete paragraph 3 from Article 3 of the draft protocol, because it would represent an abusive reservation;

iv. replace, in Article 4, the words " threatening, through a computer system, with the commission of a serious criminal offence" by the words "disseminating or otherwise making available to the public through a computer system, threats to commit a serious criminal offence (…)";

v. replace, in paragraph 1 of Article 5, the words "insulting publicly, through a computer system" by the words "disseminating or otherwise making available to the public through a computer system, insults to (…)";

vi. delete in paragraph 1 of Article 6, the words "and recognised as such ~~by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 April 1945, or of~~ by international law and/ or by any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party".

II. Explanatory memorandum

by Mr Guardans, Rapporteur

1. The Committee of Ministers set up the Committee of Experts on the Criminalisation of Acts or a Racist or Xenophobic Nature committed through Computer Networks (PC-RX) with instructions to draft by 30 April 2002 a Protocol to the Convention on Cybercrime opened for signature on 23 November 2001, which has been signed by 34 states (30 member and 4 non-member states), to deal with the criminalisation of conduct consisting in the dissemination of messages or material of a racist or xenophobic nature by computerised means. This subject had been kept out of the parent convention owing to opposition from certain delegations on freedom-of-expression grounds. Twenty-five member and non-member states who had participated in the drafting of the Convention on Cybercrime took part in the negotiations.

2. The protocol does not in any way alter the parent convention, but supplements it by widening its scope to include the offences of racist and xenophobic propaganda. On 22 July 2002, the Parliamentary Assembly was asked by the Committee of Ministers for an opinion on the text approved by the European Committee on Crime Problems (CDPC) on 22 June 2002.

3. During the preparatory work on the Convention on Cybercrime, the question of criminalising hate speech on the Internet and other computer media was left aside at the insistence of certain delegations who wished at all costs to protect freedom of speech, despite the insistence of members of the Parliamentary Assembly when the latter was asked for its opinion on a virtually final draft. In the Assembly, there was an impassioned debate between defenders of the principle and the protagonists of a more pragmatic line, including myself, arguing that too wide a convention would not have been endorsed by the United States and that, without signature and ratification by the US government, the convention would have carried little weight.

4. The Committee of Ministers responded to the expectations of the majority of parliamentarians by setting up this committee of experts, which has worked with commendable speed. It was right to draft a strict protocol, which adheres to the principle. The draft has been prepared with the active participation of American experts, which explains why it is so worded as not to infringe that country's fundamental constitutional principles, particularly freedom of speech (First Amendment to the American Constitution, forming part of the *Bill of Rights*[2]). A delicate balance has been struck in the wording of the draft between the tradition common to the English-speaking and Scandinavian countries and that of countries which have adopted legislation to combat racist discourse. In view of this balance, we believe that there should be no reservations in the protocol enabling countries to ratify it wthout applying its content, ie without incorporating its main provisions in their domestic law. For a distinction will be made in the eyes of the "global" world in which we live between states that want to combat racism in the 21st century with all the legal means at their disposal, and those that do not really wish to do so.

5. The Convention on Cybercrime (hereinafter, "the Comvention") makes a clear distinction between offences relating to content and other offences. And offences relating to content include only child pornography. In addition to the reasons already mentioned, the basic reason for this restriction must not be lost sight of. It would be wrong to impose more prohibitions on the Internet than on other means of expression and communication in our society. Any restriction of freedom to express ideas, ideologies, sentiments and principles must be quite exceptional, however much they may be confined to a minority or contrary to the majority sentiment in the society in which they are expressed. Statements cannot be banned on the Internet if they are not banned in other media. The principle of the restrictive nature of criminal law must always be preserved.

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

6. Racism and xenophobia cannot be regarded as opinions freely expressed in a democratic society: at least, that was the tenor of discussion in the Committee when the draft report in racism and xenophobia in cyberspace was adopted. Gradually, but very widely, social and occupational discrimination of all kinds based on racist or xenophobic considerations have been outlawed in European countries. Some have gone on to make racist speech a separate criminal or civil offence. These laws are usually so neutrally worded as to be perfectly applicable to racist speech on the Internet and other electronic media. One cannot speak of a legal vacuum as regards racism on the Internet, as Mr Tallo noted in his report.

7. However, it is also true that racist discourse on the Internet is on the increase and needs to be specifically addressed by the criminal law. The Internet permits a degree of trivialisation of racist and xenophobic discourse, particularly among the young, that would virtually never be achieved through more conventional media. At the same time, the Internet enables veritable racist and xenophobic communities to be formed which cannot be tolerated in its midst by a democratic society. Lastly, the instruments of police, judicial and technological co-operation established by the Convention need to be extended to include combating racism and xenophobia.

8. The first racist websites appeared in the 1990s. There are now 4,000, including 2,500 in the United States (there were only 160 in 1995). Despite the proliferation of racist sites in the United States, the amount of racist activity there is not considerable. Messages are circulated on websites or via kiosks, forums or e-mail (the latter being regarded as private correspondence). Books, records, revisionist songs and journals are also available to all and sundry. The sites are easy to access and free of charge.

9. Differing views of the limits to freedom of speech have produced different legal reponses to racist and xenophobic discourse in the United States and in Europe. According to the case law of the US Supreme Court, hate speech is punishable only if there is an imminent threat to a specific person (see Brandenburg v Ohio, 395 U.S. 444 (1969) and Watts v United States, 394 U.S. 705 (1969)[3]; R.A.V. v St Paul[4]; Chaplinsky v New Hampshire (1942)[5]; Wisconsin v Mitchell (1992) and Ohio v Wyant)[6]. At a hearing organised by the Committee in Paris on 6 March 2001, an expert from the Swiss Institute of Comparative Law showed that this case law did not afford the protection of the American courts to racist messages posted on the site of an American server intended exclusively for a foreign audience as a way of circumventing another country's legislation. But sites containing racist or xenophobic messages are frequently placed on American servers with the aim of avoiding prosecution.

10. I cannot subscribe to the point of view expressed in the Tallo[7] report, to the effect that the United States cannot be asked to sign up to a general rule making hate speech on the Internet an offence. The principle must be stated with all clarity, as Europe has done in other cases of profound disagreement between our legal conceptions and those of the United States, for example concerning the death penalty. However, it might be appropriate to allow for reservations, subject to the condition of introducing a mechanism to prevent recourse to American legislation and case-law for the purpose of circumventing the stricter legislation of another country.

[3] cf. "Report of the expert seminar on the role of the Internet in the light of the provisions of the International Convention on the Elimination of all forms of Racial Discrimination" (54th session of the United Nations Commission on Human Rights, 6 January 1998).
[4] cf. "Human Rights: Group Defamation, Freedom of Expression and the Law of Nations", T.D. Jones, Kluwer Law International 1998.
[5] cf. "Freedom of Speech and Incitement against Democracy", ed. Kertzmer and Kershman Hazan, Kluwer Law International.
[6] cf. "Freedom of Speech and Incitement against Democracy", ed. Kertzmer and Kershman Hazan, Kluwer Law International.
[7] See Doc. 9263, para. 17 of the explanatory memorandum.

11. That is the basis of the proposals made by the Swiss Institute of Comparative Law, which suggests instituting the "unlawful hosting" which already exists in Article 16 of the European Convention on Transfrontier Television[8]. Only if such a mechanism is introduced can it be justified to permit a state to enter a reservation concerning the application of a criminal or civil penalty as provided for in the draft protocol.

12. Paragraph 8 ii. of Recommendation 1543 (2001) proposed specifically mentioning "unlawful hosting" in the terms of reference of the Committee of Experts responsible for the protocol. Unfortunately, this has not been taken into account in the draft protocol and, since no explanation is given in the explanatory report accompanying the draft, there is no way of knowing whether this important issue was discussed by the experts and for what reasons they did not include it in the text. It may be assumed that certain states had a decisive influence in keeping the issue out of the Committee's preparatory discussions.

13. It is therefore important that the Assembly re-state its position and recommend that the Committee of Ministers introduce the notion of unlawful hosting into the protocol and make any reservation concerning the criminal and civil offences it provides for subject to the recognition of this notion in domestic law. Otherwise, the protocol, even if ratified by the United States, would be of limited effectiveness.

14. It is important to note that the Protocol affects neither the procedural principles of the Convention nor international co-operation, which will apply directly, or *mutatis mutandis*, as the case may be, to the new offences. In particular, there will be no change in the definition of what constitutes aiding and abetting the racist and xenophobic offences provided for in the Convention. This means that service providers will be liable only where their complicity is willing and intentional ("when committed intentionally"). This does not prevent states from adopting more restrictive measures based on strict liability, as Spain has done in a law recently enacted by Parliament[9].

15. With regard to more detailed amendments to the draft Protocol, I suggest the following.

16. The definition of what is meant by "racist and xenophobic material" (Article 2, paragraph 1) is obviously one of the most substantial and most difficult aspects of the draft protocol. In our view, the draft explanatory report justifies the proposed definition fairly well, even though it relies on legal concepts contained in international treaties and lacking in sufficient legal foundation, as in the case of "descent" and "national origin", which may give rise to problems of interpretation.

[8] Article 16 – Advertising specifically intended for a single Party, § 1: " In order to avoid distortions in competition and endangering the television system of a Party, advertising and tele-shopping which are specifically and with some frequency directed to audiences in a single Party other than the transmitting Party shall not circumvent the television advertising and tele-shopping rules in that particular Party.".

[9] cf. Law 34/2002 of 11 July 2002, on information society and electronic commerce services », BOE 12/07/2002 [BOE 06/08/2002].

17. However, the inclusion in the same paragraph of the phrase " as well as religion if used as a pretext for any of these factors" is quite unjustified. This reference to religion, where it conceals racist or xenophobic motives, may cause more problems than it sets out to resolve. The experience of conflicting perspectives surrounding the publication of Salman Rushdie's "Satanic Verses" is a perfect example of how freedom of expression must be preserved, even if one community may legitimately take offence, and of how in any case this debate must be kept quite separate from the debate on racism and xenophobia. I accordingly suggest deleting the references to religion in Articles 2, 4, 5 and 6 of the draft Protocol.

18. Paragraph 3 of Article 3 should be deleted in order not to empty the draft Protocol of all substance. Any reservation in respect of the principle stated in paragraph 1 of this Article and of the effective remedies provided for in paragraph 2 cannot be justified unless the notion of "unlawful hosting" is introduced, as explained above..

19. Article 4 is so worded as to include not only public, but also private threats. This is confirmed by the explanatory report. The whole of the Convention and the other provisions of this draft Protocol do not cover offences between individuals, but only public offences. The definition of the offence proposed by the draft protocol must therefore be restricted to threats made in public or, to use similar terminology to Article 3, to " disseminating, or otherwise making available to the public, through a computer system threats to commit a serious criminal offence (…)".

20. The wording of Article 5 paragraph 1 could likewise be aligned on the description of other offences, using the following text: "disseminating or otherwise making available to the public via a computer system, public insults … ".

21. Article 6 deals, for the first time in an international treaty, with denial, minimisation, approval or justification of genocide or crimes against humanity. This form of racist discourse, which takes the devious course of belittling crimes against humanity whose memory we have a duty to preserve for future generations, is probably among the most dangerous because of its subtlety and one of the most contemptible because it constitutes an additional affront to the victims' memory. I would remind my colleagues of the names Violeta Friedman[10] or Mel Mermelstein[11] who were among those who courageously succeeded through in thwarting attempts at negation.

22. However, the conversion of this principle into positive law has not met with a positive response in comparative law, either as to its precise definition, or as to the possible legal (criminal or civil) response. But while it may be appropriate to allow for the reservations mentioned in Article 6.2 of the draft protocol, it is much more questionable to limit the definition of negation to cases of genocide or crimes against humanity recognised by the Nuremberg Military Tribunal or other international tribunals with established jurisdiction (as for Bosnia and Herzegovina, Cambodia or Rwanda). That could be interpreted as requiring documentary proof and justification, which would in fact diminish the protection at present provided in many countries. It should be for the trial judge to interpret whether there is approval or justification of genocide or crimes against humanity, without it being necessary to produce in court the "official verdict" of an international tribunal. My suggestion is therefore to delete from paragraph 1 of Article 6 the words "and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 April 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party".

[10] Survivor of Auschwitz (May 1944-early 1945).
[11] Survivor of Auschwitz (May-July 1944).

23. We are pleased to note that the Committee of Experts on the Criminalisation of Acts of a Racist or Xenophobic Nature committed through Computer Networks (PC-RX) has worked rapidly and efficiently, thus filling the gap which was left in the Convention for practical reasons and of compromise, and thus enabling the final protocol to be opened for signature in the year following the opening for signature of the parent-Convention.

24. It is therefore necessary and logical that this new international instrument be solid in its principles and efficient in its content, even at the risk – indeed avoided on the occasion of the drafting of the parent-Convention – that some States do not take up the fight by refusing to implement all the legal instruments at their disposal to fight against racism and xenophobia.

25. Some of the other amendments proposed could improve the draft protocol, by specifying its field of application and the definition of the offences which are foreseen therein.