

TAKING STOCK OF THE  
**IMPACT  
OF THE RABAT  
PLAN OF ACTION**

TOWARDS ITS IMPLEMENTATION  
AND REINVIGORATION

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# 01 INTRODUCTION

1. This paper takes stock of the ‘Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’ (‘Rabat Plan of Action’ or ‘RPA’) since its adoption in October 2012<sup>1</sup>. The aim is to consider the impact of the Rabat Plan of Action over the intervening years, its weaknesses, and to propose recommendations for its broader and more enhanced implementation. An earlier version of this paper served as the background text for an NGO-organised roundtable on the subject of the ‘Rabat Plan of Action and Asia’ held on 29 June 2018 in Geneva. The meeting brought together representatives of civil society organisations and human rights activists from the Asia region, the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, as well as several staff members of the UN Office of the High Commissioner for Human Rights (‘OHCHR’). Although the focus of the roundtable was upon the Asia region, this paper’s reflections and recommendations are intended to be of more general relevance. This paper argues that, given both the existing influence and the shortfalls of the RPA, a deliberative consultation process to reinvigorate and update the RPA ought to be initiated by the OHCHR, one that should build on that which led to the adoption of the RPA itself.

2. Since the adoption of the RPA in 2012, across many parts of the world, hatred and division between and within communities, groups and nations has been on the rise, fuelled by the rise of populist, illiberal and nativist politics<sup>2</sup>. Growing attention – by civil society organisations<sup>3</sup>, intergovernmental human rights bodies<sup>4</sup> and scholars<sup>5</sup> – on the impact of the current political environment upon the incidence of ‘hate crimes’ and/or ‘hate speech’ has therefore been understandable. Various bodies of the UN human rights system have also necessarily emphasised such human rights challenges in recent times. In relation to the region of Asia for instance, at the 37th session of the Human Rights Council, the High Commissioner for Human Rights highlighted the vulnerability of ethnic and religious minorities to incited violence and discrimination in Pakistan and Sri Lanka<sup>6</sup>.

At the same session, the Special Rapporteur on the situation of human rights in Myanmar expressed ongoing concern about 'high levels of hate speech and incitement to hostility, discrimination and violence, particularly on social media and how this has a stifling impact on assertion of sensitive and unpopular views' in Myanmar<sup>7</sup>. In a panel discussion, Adam Abdelmoula, Director of the Human Rights Council and Treaty Mechanisms Division at the OHCHR, also highlighted that incitement to hatred and discrimination was generally on the rise and, in so doing, echoed the High Commissioner's own multiple warnings on the issue<sup>8</sup>. Against this understandably alarming backdrop, it is only appropriate that the scope and adequacy of the existing international legal framework concerning incitement to hatred are now being considered.

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<sup>1</sup> Appendix, Addendum, Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013. The RPA is on pp 6 – 15.

<sup>2</sup> On the impact of populist politics on human rights, see generally, K Roth, 'The Dangerous Rise of Populism: Global Attacks on Human Rights Values' Human Rights Watch World Report 2017 <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>; P Alston, 'The Populist Challenge to Human Rights' (2017) *Journal of Human Rights Practice* 1 – 15.

<sup>3</sup> A report published by the Southern Poverty Law Center ('SPLC') in February 2018 showed a marked rise in the number of hate groups in the United States during President Trump's first year in office. See SPLC, '2017: The Year in Hate and Extremism' <https://www.splcenter.org/fighting-hate/intelligence-report/2018/2017-year-hate-and-extremism>; See also SPLC's 'Hate Map' at <https://www.splcenter.org/hate-map>

<sup>4</sup> In its 2017 annual report of activities, the European Commission against Racism and Intolerance ('ECRI') reported: 'In several countries, there is a trend to depict multiculturalism as a dangerous notion and to pursue a pattern that seems to negate and deny the value of human rights and their universality. This trend can fundamentally damage social cohesion and incite committing acts of hostility, discrimination, hate speech or violence...ECRI has observed that social media and other Internet tools encourage self-segregation and deepen social divides. Similarly, a considerable number of media outlets either knowingly or intentionally spread xenophobic rhetoric' CRI(2018)26, June 2018.

<sup>5</sup> See, for instance, the project 'Centre for Cyberhate Research and Policy: Real-Time Scalable Methods and Infrastructure for Modelling the Spread of Cyberhate on Social Media' at the Social Science Data Lab at Cardiff University.

<sup>6</sup> 37th session of the Human Rights Council, Item 2: Annual Report and Oral Update by the High Commissioner for Human Rights on the activities of his Office and recent human rights developments, Statement by the UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, 7 March 2018

<sup>7</sup> Report of the Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, A/HRC/37/70, 9 March 2018, para 14 and 69(b).

<sup>8</sup> Debate on promoting tolerance, inclusion, unity and respect for diversity in the context of combating racial discrimination, 19 March 2018. The High Commissioner for Human Rights had previously warned, for instance: 'hate speech aiming to incite violence, hostility, and discrimination is dramatically on the rise, as is violence against women, children, ethnic, religious or belief groups, persons with disabilities, sexual minorities, migrant and many other groups.' See address by the High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, for Human Rights Day, Saturday 10 December 2016.

# 02

## THE VALUE OF THE RABAT PLAN OF ACTION

3. The RPA presents a ‘global blueprint for combatting “hate speech”’, as I have argued elsewhere. It provides a valuable tool for advocates, courts and policy-makers for five important reasons<sup>9</sup>.

4. First, the RPA has certain legitimacy due to the participatory nature of the OHCHR-led consultative process leading to its adoption. That ‘long, transparent and deep reflection’ encompassed four regional workshops which brought together dozens of experts from the UN human rights system (including special procedures mandate holders and members of relevant treaty bodies) and civil society organisations, as well as state representatives<sup>10</sup>. Each of the regional workshops was informed by a substantive regional study of major trends in legislation, jurisprudence and policy relating to the prohibition of incitement<sup>11</sup>. The process leading up to the RPA has thereby resulted in a repository of knowledge on comparative approaches to incitement to hatred up to the time, which has not been matched since. Notwithstanding the various methodologies deployed by the background papers, the research contained therein provides important baseline data upon which to gauge states’ progress on the fulfilment of the RPA.

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<sup>9</sup> See further the arguments put forward in: S Parmar, ‘The Rabat Plan of Action: A Global Blueprint for Combating “Hate Speech”’ (2014) 1 *European Human Rights Law Review* 21; S Parmar ‘The Rabat Plan of Action: A Critical Turning Point in International Law on “Hate Speech”’ in P Molnar (ed), *Free Speech and Censorship Around the Globe* (Budapest: CEU Press, 2015) 211; S Parmar, ‘Uprooting “defamation of religions” and the emergence of a new approach to freedom of expression at the United Nations’ in T McGonagle and Y Donders (eds), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge: CUP, 2015) 373.

<sup>10</sup> RPA para 13, *supra* n 1. For the documentation from the workshops, see <http://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/ExpertsPapers.aspx>

<sup>11</sup> See the background studies on Europe (Louis-Léon Christians), Africa (Doudou Diène), Asia Pacific (Vítit Muntarbhorn) and the Americas (Eduardo Bertoni), *ibid*.

5. Second, the RPA surveyed both manifestations of incitement across the world at the time<sup>12</sup> and also the problems associated with current legal frameworks, jurisprudence and policies in response, particularly due to the vagueness and variability of such approaches<sup>13</sup>. Significantly, it identified: a stark ‘dichotomy of (1) non-prosecution of “real” incitement cases and (2) persecution of minorities under the guise of domestic incitement laws [which] seems to be pervasive’;<sup>14</sup> the discriminatory and counterproductive nature of blasphemy laws; the ‘often very low recourse to judicial and quasi-judicial mechanisms’ due to a number of factors including the complete absence of or deficiencies in legislation and legal assistance and a ‘lack of trust in the judiciary’;<sup>15</sup> and the lack of proper policy approaches on incitement issues.<sup>16</sup>

6. Third, the RPA reinforced existing international human rights law on the incitement to hatred. Its text fleshes out what treaty provisions – particularly Article 20(2) of the International Covenant on Civil and Political Rights (‘ICCPR’) and Article 19(3) of the ICCPR<sup>17</sup>, but also Article 4 of the International Convention on the Elimination of Racial Discrimination (‘ICERD’)<sup>18</sup> – mean for a range of actors in terms of their implementation.<sup>19</sup> It also bolsters the position of the Human Rights Committee in General Comment No 34 that prohibitions on blasphemy are incompatible with the ICCPR<sup>20</sup> and helps to consolidate the shift away from resolutions on ‘defamation of religions’ at the UN Charter-based human rights bodies.<sup>21</sup>

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<sup>12</sup> RPA Introduction para 2, RPA paras 2, 7, supra n 1.

<sup>13</sup> RPA para 7, 11, 15, supra n 1.

<sup>14</sup> RPA para 11, supra n 1.

<sup>15</sup> RPA paras 19, 28, supra n 1.

<sup>16</sup> RPA para 11, supra n 1.

<sup>17</sup> RPA para 17 supra n 1.

<sup>18</sup> RPA paras 14 and 17, and RPA Introduction, paras 8 and 9, supra n 1.

<sup>19</sup> RPA paras 20 – 26, and RPA Introduction, paras 8 and 9, supra n 1.

<sup>20</sup> The Human Rights Committee stated: ‘[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant’; Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 11 September 2011, para 48. See generally, M O’Flaherty, ‘Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34’ (2012) Human Rights Law Review 627.

<sup>21</sup> RPA Introduction para 13 and RPA 41, supra n 1. See Human Rights Council resolution 16/18 of 24 March 2011 on ‘combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief’, A/HRC/RES/16/18.

Yet the RPA goes further, expressly recommending that states which ‘have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.’<sup>22</sup> The RPA thus remains a – if not the – stand-out international soft law instrument against the application and maintenance of legal prohibitions on blasphemy.<sup>23</sup>

7. Fourth, the RPA embraces a comprehensive, holistic approach to the obligations of state actors and responsibilities of non-state actors to ensure the proper implementation of international human rights law on incitement to hatred.

a. States should only impose criminal sanctions as ‘last resort measures to be only applied in strictly justifiable situations’ and should instead ensure that there are in place ‘civil sanctions and remedies ... including pecuniary and non-pecuniary damages, along with the right of correction and the right to reply’ and ‘administrative sanctions and remedies ... including those identified and put in force by various professional and regulatory bodies’<sup>24</sup>, as well as ‘comprehensive anti-discrimination legislation that includes preventive and punitive action to effectively combat incitement to hatred’<sup>25</sup>. The RPA proposes a diversity of policies, practices and measures to promote ‘a culture of peace, tolerance and mutual respect’ in society including through the education of children and the training of teachers, security forces and the police,<sup>26</sup> as well as the ‘systematic collection of data’ on offences on incitement to hatred.<sup>27</sup>

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<sup>22</sup> RPA para 25, supra n 1.

<sup>23</sup> Yet the RPA is not referenced in this Brookings research paper, which nonetheless states that ‘blasphemy laws violate international standards of freedom of expression, religion, and belief, as defined by the United Nations’ and, in doing so, recalls General Comment No 34 para 48 supra n 20 and also the reports of the Special Rapporteurs on freedom of religion or belief and on freedom of opinion and expression. See J Fiss, ‘Anti-blasphemy offensives in the digital age: When hardliners take over’ Brookings Project on US Relations with the Islamic World, Analysis Paper No 25, September 2016 at 6.

<sup>24</sup> RPA para 34, supra n 1.

<sup>25</sup> RPA para 26, supra n 1.

<sup>26</sup> RPA para 43 – 45, supra n 1.

<sup>27</sup> RPA paras 47, supra n 1.



b. The media has a ‘moral and social responsibility’, which means that journalists should, among other things: report in a sensitive manner; bring acts of discrimination to the attention of the public; be aware of exacerbating discrimination or negative stereotypes and avoid unnecessary references to group characteristics such as race, religion and gender; give members of different groups the opportunity ‘to speak and to be heard’; and reflect the principle of equality in voluntary professional codes of conduct.<sup>28</sup>

c. NGOs, national human rights institutions and civil society organisations should ‘foster intercultural understanding and learning’ and political parties ‘adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speech’.<sup>29</sup>

d. There should be greater cooperation and coordination amongst UN human rights treaty bodies, as well as cooperation and information-sharing between these bodies with other intergovernmental organisations, including the Association of South Asian Nations.<sup>30</sup> The OHCHR should be ‘properly resourced to adequately support’ the work of relevant special procedures mechanisms, should ‘consider developing tools, including a compilation of best practices and elements of a model legislation on the prohibition of incitement [sic]’ and ‘organising “regular judicial colloquia” in order to update national judicial authorities and stimulate the sharing of experiences relating to the prohibition of incitement to hatred’.<sup>31</sup>

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<sup>28</sup> RPA paras 58 and 59, supra n 1.

<sup>29</sup> RPA paras 56, supra n 1

<sup>30</sup> RPA para 54, supra n 1.

<sup>31</sup> RPA paras 50 and 51, supra n 1.

8. Fifth, the RPA sets out a six-part ‘threshold test’ that should be applied when assessing whether a particular form of expression should be considered as criminal incitement.<sup>32</sup> Each of the following six elements are identified as relevant to determining whether speech is severe enough to qualify as a criminal offence: (1) the social and political context; (2) the speaker’s position or status, particularly in relation to the audience; (3) the intent of the speaker (negligence or recklessness are not sufficient); (4) the content and form of the speech; (5) the extent of the speech act, including its public nature, its magnitude and size of its audience; (6) the likelihood of inciting actual action against the target group, including imminence of such action. As a concrete elaboration of the requirements of international law on incitement to hatred, and Article 20 of the ICCPR in particular, the so-called ‘threshold test’ has come to characterise the RPA, perhaps more than any other of its other distinctive features. The test certainly has a practical utility in addressing what is arguably the most recurrent question concerning so-called ‘hate speech’ – namely, ‘when should incitement constitute a criminal offence?’ It is therefore not surprising that it is the ‘threshold test’ that is showcased in the ‘One-pager on “incitement to hatred”’ produced by the OHCHR in both English and French.<sup>33</sup>

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<sup>32</sup> RPA para 29, supra n 1.

<sup>33</sup> See also OHCHR, ‘One-pager on incitement to hatred’

[https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_threshold\\_test.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_threshold_test.pdf)

# 03

## RELIANCE UPON THE RABAT PLAN OF ACTION

9. An appropriate gauge of the RPA's 'success' would be to measure the extent to which it has been implemented through the domestic laws and policies of states, in particular, and also the approaches of non-governmental actors it identifies, including the media. Such a comprehensive and systematic analysis of the practical impact of the RPA would be a challenging task, one that goes beyond the limited scope of this paper. Furthermore, it may be difficult to draw a clear and direct causal nexus between the recommendations of the RPA and actual advances in law and policy on incitement to hatred, particularly in the absence of express references to the RPA in the justifications for legal or policy reforms. What can be more easily evaluated, however, is the quality of the RPA's influence upon the UN human rights system itself and through the work of civil society bodies over the years since its adoption. This is therefore the focus of this section, which also addresses the impact of the RPA upon civil society advocacy initiatives and the European Court of Human Rights ('ECtHR').

### 3.1. UN HUMAN RIGHTS SYSTEM

10. There are three discernible ways in which the RPA has generated effects within the UN human rights system. First, the RPA has prompted the Rabat+5 symposium. Second, the RPA has been relied and expanded upon through other related processes and texts produced under the auspices of the UN. And third, the RPA has also been referenced by a diversity of UN human rights bodies. All these effects of the RPA have served to build up the text's status as the leading global soft law instrument on incitement to hatred. In addition, the RPA has been drawn upon in civil society organisations' advocacy and standard-setting work, including through the Jakarta Recommendations on Freedom of Expression in the Context of Religion.

It is apparent that, to date, the RPA's greatest influence upon the UN human rights system has been in the realm of initiatives countering discrimination on the grounds of religion or belief and in the sphere of so-called 'atrocious crimes'. Although the OHCHR has necessarily remained the focal point for initiatives building on the RPA, the UN Office on Genocide Prevention and the Responsibility to Protect has sought to build on the RPA through its own parallel projects.

### 3.1.1. RABAT+5 SYMPOSIUM

11. On 6 and 7 December 2017, five years after the RPA was adopted, more than one hundred states, national human rights institutions, regional organisations, religious authorities and faith-based civil society actors participated in the Rabat+5 symposium. The meeting provided a forum for civil society organisations and the OHCHR Regional Office for the Middle East and North Africa 'to present their projects and areas of future cooperation on combatting discrimination on the basis of religion and enhancing the role of faith-based actors in the defence of human dignity'.<sup>34</sup> It also provided a forum for reinforcing the 18 commitments on 'Faith for Rights' on 'the deep, and mutually enriching, connections between religions and human rights' with the aim of '[fostering] the development of peaceful societies, which uphold human dignity and equality for all and where diversity is not just tolerated but fully respected and celebrated'.<sup>35</sup> Moreover, the Rabat+5 Symposium provided an opportunity for participants to engage with many of the experts who had contributed to the elaboration of the RPA.

### 3.1.2. UN PROCESSES AND TEXTS EXPRESSLY BUILDING ON THE RABAT PLAN OF ACTION

#### 3.1.2.1 BEIRUT DECLARATION AND 'FAITH FOR RIGHTS' COMMITMENTS

12. The Beirut Declaration on 'Faith for Rights', which emerged from an OHCHR-organised expert workshop in Beirut on 28 and 29 March 2017, references the RPA as its 'founding precedent'.<sup>36</sup> Like the RPA, the Beirut Declaration was 'conceived and conducted under the auspices and with the support of the United Nations ... and enriched by UN human rights mechanisms such as Special Rapporteurs and Treaty Body members'.<sup>37</sup>

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<sup>34</sup> See <https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>

<sup>35</sup> See <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/FaithForRights.aspx>

<sup>36</sup> Beirut Declaration on Faith for Rights, para 7

<https://www.ohchr.org/Documents/Press/21451/BeirutDeclarationonFaithforRights.pdf>

<sup>37</sup> Ibid.

The declaration reinforces the plan's recommendations, especially in relation to the following three core responsibilities of religious leaders:<sup>38</sup>

- (a) Religious leaders should refrain from using messages of intolerance or expressions which may incite violence, hostility or discrimination;
- (b) Religious leaders also have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech; and
- (c) Religious leaders should be clear that violence can never be tolerated as a response to incitement to hatred (e.g. violence cannot be justified by prior provocation).<sup>39</sup>

13. The 18 commitments on 'Faith for Rights', which are linked to the Beirut Declaration, are all intended to give concrete effect to these responsibilities of religious leaders, as they have been first expressed in the RPA.<sup>40</sup> More specifically, the faith-based and civil society actors who participated in the process pledged to:

- i. ... stand up and act for everyone's right to free choices and particularly for everyone's freedom of thought, conscience, religion or belief...
- ii. ...[support] the present declaration on 'Faith for Rights' as a common minimum standard for believers (whether theistic, non-theistic, atheistic or other) ...
- iii. ...promote constructive engagement on the understanding of religious texts...
- iv. ...support and promote equal treatment in all areas and manifestations of religion or belief and to denounce all forms of discriminatory practices [and] prevent the use of the notion of "State religion" to discriminate against any individual or group...
- v. ... ensure non-discrimination and gender equality...
- vi. ...stand up for the rights of all persons belonging to minorities...
- vii. ...publicly denounce all instances of advocacy of hatred that incites to violence, discrimination or hostility...

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<sup>38</sup> Beirut Declaration on Faith for Rights, supra n 36, paras 7, 13, 20, 22.

<sup>39</sup> Beirut Declaration on Faith for Rights, supra n 36, para 22 referencing RPA, para 36.

<sup>40</sup> 18 Commitments on 'Faith for Rights' <https://www.ohchr.org/Documents/Press/Faith4Rights.pdf>

- viii. ...establish, each within [their] respective spheres, policies and methodologies to monitor interpretations, determinations or other religious views that manifestly conflict with universal human rights norms and standards...
- ix. ...condemn any judgemental public determination by any actor who in the name of religion aims at disqualifying the religion or belief of another individual...
- x. ...not to give credence to exclusionary interpretations claiming religious grounds in a manner that would instrumentalize religions, beliefs or their followers to incite hatred and violence...
- xi. ...not to oppress critical voices and views on matters of religion or belief, however wrong or offensive they may be perceived, in the name of the 'sanctity' of the subject matter and [they] urge States that still have anti-blasphemy or anti-apostasy laws to repeal them...
- xii. ...refine the curriculums, teaching materials and textbooks wherever some religious interpretations, or the way they are presented, may give rise to the perception of condoning violence or discrimination...
- xiii. ...build on experiences and lessons learned in engaging with children and youth, who are either victims of or vulnerable to incitement to violence in the name of religion...
- xiv. ...promote, within [their] respective spheres of influence, the imperative necessity of ensuring respect in all humanitarian assistance activities of the Principles of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programmes...
- xv. ...neither to coerce people nor to exploit persons in vulnerable situations into converting from their religion or belief, while fully respecting everyone's freedom to have, adopt or change a religion or belief and the right to manifest it...
- xvi. ...leverage the spiritual and moral weight of religions and beliefs with the aim of strengthening the protection of universal human rights...
- xvii. ...support each other at the implementation level of this declaration through exchange of practices, mutual capacity enhancement and regular activities of skills updating for religious and spiritual preachers, teachers and instructors...
- xviii. ...use technological means more creatively and consistently in order to disseminate this declaration and subsequent Faith for Rights messages to enhance cohesive societies enriched by diversity...

### **3.1.2.2 POLICY OPTIONS PREVENTING INCITEMENT TO VIOLENCE**

14. The UN Office on Genocide Prevention and the Responsibility to Protect has developed the 'Policy Options Preventing Incitement to Violence', which are expressly rooted in the RPA.<sup>41</sup> These recommendations, which were published in November 2013, address a range of actors with the aim of preventing incitement to violence that could lead to atrocity crimes. Referencing the RPA, the text indicates: 'States should ensure that any laws criminalizing incitement to violence that could lead to atrocity crimes do not unduly limit the right to freedom of expression and opinion'.<sup>42</sup> Later, the text recommends that the OHCHR 'could provide guidance to the Human Rights Council on how to support 'efforts to prevent incitement to violence that could lead to atrocity crimes' and, in doing so, could 'draw' on the RPA.<sup>43</sup>

### **3.1.2.3 FEZ PROCESS AND THE PLAN OF ACTION ON ATROCITY CRIMES**

15. Also spearheaded by the UN Office on Genocide Prevention and the Responsibility to Protect, the 'Fez Process' brought together religious leaders, faith-based and secular organisations, regional organisations and experts from all regions in a series of consultations between April 2015 and December 2016. The 'Fez Declaration', which was adopted early on in the process, 'recalls and endorses' the RPA, particularly its six-part threshold test for incitement.<sup>44</sup> The process eventually led to the development of the 'Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes' ('Plan of Action on Atrocity Crimes'), which was launched on 14 July 2017.<sup>45</sup>

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<sup>41</sup> See <http://www.un.org/en/genocideprevention/advising-and-mobilizing.html>

<sup>42</sup> Ibid at para 11 and fn 2.

<sup>43</sup> Ibid at para 21.

<sup>44</sup> See Fez Declaration, Morocco, 24 April 2015, preamble at p 20 <http://www.un.org/en/genocideprevention/documents/Plan%20of%20Action%20Advanced%20Copy.pdf>

<sup>45</sup> Ibid UN Office on Genocide Prevention and the Responsibility to Protect, 'Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes', 14 July 2017.

16. The Plan of Action on Atrocity Crimes considers that incitement to violence is 'both a warning sign and an early indicator' of atrocity crimes – namely, genocide, war crimes and crimes against humanity – taking place.<sup>46</sup> It expressly builds on the RPA in seeking to elaborate on the responsibilities of 'less obvious but nevertheless influential actors in the prevention and countering of hate speech'.<sup>47</sup> The Plan of Action on Atrocity Crimes further draws on the RPA's definition of incitement and its recommendation that religious leaders should refrain from using language which may increase intolerance or incite to hatred but rather speak out against instances of 'hate speech'.<sup>48</sup>

### 3.1.3. REFERENCES BY UN HUMAN RIGHTS BODIES

17. Since its adoption, the RPA has been referenced by a broad range of UN actors, including by its most senior figures. In his 'Plan of Action to Prevent Violent Extremism', published in 2015, the Secretary-General clearly recommended that states should implement the RPA (which is acknowledged to require the '[involvement of] all relevant actors, such as national human rights institutions, civil society, political parties and the media') in order to 'reduce the appeal of violent extremism' and 'strengthen trust between government institutions and communities'.<sup>49</sup> The OHCHR has recognised the value of the RPA through the High Commissioner's own speeches,<sup>50</sup> official reports,<sup>51</sup> and the presentations of staff members of the OHCHR.<sup>52</sup>

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<sup>46</sup> Definition of atrocity crimes, *ibid* at p 20.

<sup>47</sup> *Ibid* p 4 – 5.

<sup>48</sup> *Ibid* p 2.

<sup>49</sup> General Assembly, Plan of Action to Prevent Violent Extremism: Report of the Secretary General, 24 December 2015 A/70/674 para 50 (i).

<sup>50</sup> N Pillay, 'Freedom of expression and incitement to hatred in the context of International Human Rights Law', Lecture at the London School of Economics, 15 February 2013; N Pillay and D Grossman, 'The International Human Rights Treaty System: Impact at the Domestic and International Levels' (2014) Human Rights Brief 32 at 33 (remarks of the High Commissioner of Human Rights at American University Washington College of Law to honor Dean Claudio Grossman, Chair of the UN Committee against Torture and recently elected Chair of the UN Human Rights Treaty Bodies). See also OHCHR press release, 'Between Free Speech and Hate Speech: The Rabat Plan of Action, a practical tool to combat incitement to hatred', 21 February 2013.

<sup>51</sup> Report of the High Commissioner for Human Rights, Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, 6 March 2014, A/HRC/25/34 at para 73; Report of the High Commissioner for Human Rights on the situation of human rights in Ukraine, 19 September 2014, A/HRC/27/75 at fns 47, 91; Report of the High Commissioner for Human Rights, Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, 16 March 2017, A/HRC/34/35 at paras 88, 91, 96 and 100; Report of the High Commissioner for Human Rights, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/32/18, 28 June 2016 at paras 23, 76(b).

<sup>52</sup> See for example, Presentation by Peggy Hicks, Director, Thematic Engagement, Special Procedures, and Right to Development Division, OHCHR at Geneva Conference on Preventing Violent Extremism, 7 April 2016 (Session III: Priorities for National PVE Plans of Action).



In his opening statement at the Rabat+5 Symposium in December 2017, High Commissioner Zeid recognised that the RPA 'was an audacious start in articulating the human rights responsibilities of a number of actors' and has already left an 'impressive' mark.<sup>53</sup>

Significantly, the Annual Report of the High Commissioner for Human Rights, for the period of 1 December 2016 to 30 November 2017, indicates particular practical initiatives involving the OHCHR providing assistance to state authorities in their implementation of the RPA. More specifically, the report records that the OHCHR provided support to the Tunisian independent high authority for audio-visual communication in developing 'a national barometer to monitor incitement to hatred' based on the RPA, a model which is apparently 'being replicated in Côte d'Ivoire and Morocco.'<sup>54</sup>

18. The RPA has been referenced in successive resolutions of the Human Rights Council and the General Assembly on 'combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief', which have been adopted on the basis of consensus.<sup>55</sup> It has also been recalled in Human Rights Council 34/8 on the 'effects of terrorism on the enjoyment of all human rights', which was adopted after a vote.<sup>56</sup>

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<sup>53</sup> Opening statement of Zeid Ra'ad Al Hussein, High Commissioner for Human Rights (as delivered in Rabat by Ibrahim Salama on 6 December 2017), at Rabat+5 Symposium on the follow-up to the Rabat Plan of Action, Rabat, 6 – 7 December 2017. High Commissioner Zeid said: 'Within the last five years, the Rabat Plan of Action has been referred to in more than 120 UN documents by States, civil society organizations and human rights mechanisms; this means that every second week a UN document was published with a reference to the Rabat Plan of Action.'

<sup>54</sup> Annual report of the United Nations High Commissioner for Human Rights, A/HRC/37/3, 26 January 2018, para 69.

<sup>55</sup> Though neither the first Human Rights Council resolution, 16/18 of 24 March 2011 supra n 21 nor the next, 19/25 of 23 March 2012, A/HRC/RES/19/25 could reference the RPA as they predated its adoption, subsequent ones on the subject have. See Human Rights Council resolutions: 22/31 of 22 March 2013, A/HRC/RES/22/31 at para 4; 25/34 of 28 March 2014, A/HRC/RES/25/34 at para 5; 28/29 of 27 March 2015, A/HRC/RES/28/29 para 5; 31/26 of 24 March 2016, A/HRC/RES/31/26 para 5; 34/32 of 24 March 2017, A/HRC/RES/34/32 para 5; and 37/38 of 23 March 2018, A/HRC/RES/37/38 para 5. See also General Assembly resolutions 66/167 of 19 December 2011, A/RES/66/167 (which pre-dated the RPA) and 68/169 of 18 December 2013, A/RES/68/168, neither of which referenced the RPA, and the following General Assembly resolutions on the same subject, which have: 67/178 of 20 December 2012, A/RES/67/178 (preamble); 69/174 of 18 December 2014 A/RES/68/174 (preamble), 70/157 of 17 December 2015, A/RES/70/157 (preamble); 71/195 of 19 December 2016, A/RES/71/195 (preamble); 72/176 of 19 December 2017, A/RES/72/176 (preamble).

<sup>56</sup> Human Rights Council resolution 34/8 of 23 March 2017, A/HRC/RES/34/8 (preamble). The resolution was adopted by a vote of 28 states in favour to 15 states against, with 4 abstentions.

19. Interestingly, the Human Rights Council resolution extending the mandate of the Special Rapporteur on the situation of human rights in Myanmar contains an express acknowledgement of the relevance of the RPA to discrimination in Myanmar. It states that the council:<sup>57</sup>

Strongly encourages the Government of Myanmar to take the measures necessary to address discrimination and prejudice against women, children and members of ethnic, religious and linguistic minorities across the country, and to take further action to publicly condemn and speak out against national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and to adopt measures against incitement to imminent violence based on nationality, race or religion or belief, while upholding freedom of expression, and to increase efforts further to promote inclusion, respect for diversity and peaceful coexistence in all sectors of society, in accordance with Human Rights Council resolution 16/18 of 24 March 2011 and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence by, inter alia, further facilitating interfaith and intercommunal dialogue.

20. This explicit mandate has empowered the Special Rapporteur on the situation of human rights in Myanmar to recall the RPA on several occasions.<sup>58</sup> But the RPA has also been referenced through the reports of other special procedures mandate-holders whose mandates make no mention of the RPA, specifically: the Special Rapporteur on freedom of religion or belief,<sup>59</sup> the Special Rapporteur on racism, racial discrimination, xenophobia,<sup>60</sup> the Special Rapporteur on freedom of opinion and expression<sup>61</sup>, and the Special Rapporteur on minority issues.<sup>62</sup>

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<sup>57</sup> Human Rights Council resolution 37/32 of 23 March 2018 A/HRC/RES/37/32, para 18.

<sup>58</sup> Report of the Special Rapporteur on freedom of opinion and expression, Yanghee Lee, A/HRC/34/67, 23 March 2015, fn 3; Report of the Special Rapporteur on freedom of opinion and expression, Yanghee Lee, A/HRC/34/67, 1 March 2017, para 11.

It has also been referenced by the Ad Hoc Committee on the Elaboration of Complementary Standards<sup>63</sup> and the Forum on Minority Rights.<sup>64</sup> Moreover, the RPA has also been referenced in the recommendations emerging out of the Universal Periodic Review process – but only once, so far. In the second cycle review of Qatar, Syria called on the state to ‘integrate’ the RPA ‘in the national legislation regulating the media and religious institutions and ensure the actual implementation of the Plan’.<sup>65</sup>

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<sup>59</sup> Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, A/HRC/22/51, 24 December 2012 at para 63; Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, A/HRC/25/58, 26 December 2013 at paras 54 – 63; Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, Mission to Kazakhstan, A/HRC/28/66.Add.1, 23 December 2014 at paras 42, 43, 69(j), (o); Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, A/HRC/28/66, 29 December 2014 at paras 49, 50, 101; Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, Mission to Jordan, A/HRC/25/58/Add.2, 27 January 2014 at paras 47, 48, 61, 62; Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, Mission to Lebanon, A/HRC/31/18/Add.1, 21 August 2015 at para 13; Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, A/HRC/31/18, 23 December 2015 at paras 4, 10, 11, 57, 58, 59, 62, 63, 74, 81, 84, 86, 90, 91; Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, Mission to Bangladesh, A/HRC/31/18/Add.2, 22 January 2016 at paras 97, 104 (h); Report of the Special Rapporteur on freedom of religion, Ahmed Shaheed, A/HRC/37/49, 28 February 2018 at para 2; Report of the Special Rapporteur on freedom of religion, Ahmed Shaheed, Mission to Uzbekistan, A/HRC/37/49/Add.2, 22 February 2018 at para 101(g).

<sup>60</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/23/56, 2 April 2013 at para 9; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/26/49, 6 May 2014 at para 28, 64, 68; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/26/50, 10 April 2014 at para 51; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/29/46, 20 April 2015 at para 31; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/29/47, 13 April 2015 at para 58.

<sup>61</sup> Report of the Special Rapporteur on freedom of opinion and expression, Frank la Rue, A/HRC/23/, 17 April 2013 at para 8; Report of the Special Rapporteur on freedom of opinion and expression, Frank la Rue, A/67/357, 7 September 2012 contained numerous references to the workshops leading to the development of the Rabat Plan of Action.

<sup>62</sup> Report of the Special Rapporteur on minority issues, Rita Izsak, A/HRC/28/64, 5 January 2015, paras 48, 107,

<sup>63</sup> Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its fifth session, A/HRC/25/69, 14 March 2014, paras 33, 63, 65, 66, 67, 71, 72, 73; Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its sixth session, A/HRC/28/81, 30 January 2015, paras 12, 14, 112; Report of the Ad Hoc Committee on the Elaboration of Complementary Standards on its seventh session, A/HRC/31/74, 26 February 2016, paras 59, 103;

<sup>64</sup> Recommendations of the Forum on Minority Issues at its sixth session, Guaranteeing the rights of religious minorities, A/HRC/25/66, 22 January 2014, at para 35 state: ‘All States should take steps to implement the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’

<sup>65</sup> Report of the Working Group on the Universal Periodic Review, Qatar, A/HRC/27/15, 27 June 2014, recommendation 124.34.

21. Amongst the treaty bodies, it seems the RPA has so far only been recalled by the Committee on the Elimination of Racial Discrimination in General Recommendation No 35 of the 'Combating racist hate speech'.<sup>66</sup>

## 3.2. IMPACT UPON CIVIL SOCIETY ACTIVITIES AND ADVOCACY

22. The RPA has undoubtedly shaped the work of civil society organisations. This is perhaps most clearly evidenced in the context of Asia by the development of the Jakarta Recommendations on Freedom of Expression in the Context of Religion. These recommendations – the outcome of a civil society-led regional consultation held in Jakarta, Indonesia in June 2015 – endorse the repeal of laws criminalising blasphemy, call for an assessment of the RPA and urge the revision of 'hate speech' laws on the basis of the RPA.<sup>67</sup>

23. The presentations of civil society representatives at the Rabat+5 Symposium in December 2017 showcased existing or proposed projects, which serve to advance the implementation of the RPA in various ways.<sup>68</sup> These projects included: a broad range of activities on improving 'FORB literacy' and campaigning against blasphemy laws;<sup>69</sup> a learning platform to promote awareness and understanding of individuals, communities and decision-makers on issues of freedom of religion or belief;<sup>70</sup> the creation of a publicly accessible 'Faith for Human Rights Portal' to serve as a digital repository of relevant advocacy and activism campaigns and initiatives;<sup>71</sup> and the G20 Interfaith Summit initiative.<sup>72</sup> ARTICLE 19 presented its series of activities to advance the implementation of the RPA at the global, regional and national levels, including a series of projects in Malaysia, Myanmar and Bangladesh.<sup>73</sup>

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<sup>66</sup> Committee on the Elimination of Racial Discrimination, General Recommendation No 35, 26 September 2013 CERD/C/GC/35, at paras 15 and 16, 29 and 35. See also Committee on the Elimination of All Forms of Racial Discrimination, Communication No 48/2010, TBB Turkish Union v Germany, decision of 26 February 2013, individual opinion of Committee member Mr Carlos Manuel Vazquez (dissenting), 4 April 2013, footnotes 4, 7, and 11.

<sup>67</sup> See <https://www.forum-asia.org/?p=19179>

<sup>68</sup> See the presentations of civil society representatives: <https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>

<sup>69</sup> International Humanist and Ethical Union, 'Brief overview of IHEU projects advancing the implementation of the Rabat Plan of Action & Faith 4 Rights initiative'.

<sup>70</sup> The Freedom of Religion or Belief Learning Platform, Launch March 2018 [www.forb-learning.org](http://www.forb-learning.org)

<sup>71</sup> Alliance of Inclusive Muslims, Rabat Plan of Action+5 Project Proposal.

<sup>72</sup> Interfaith Summit, Argentina, 16 – 18 August 2018.

<sup>73</sup> ARTICLE 19, 'Projects advancing the implementation of the Rabat Plan of Action' <https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Article19.pdf>

24. The RPA has also had a significant impact upon the international advocacy work of human rights organisations. ARTICLE 19, which played a crucial role in the drafting of the plan, has continued to promote the plan's standards through its statements and submissions at the Human Rights Council,<sup>74</sup> its publications (particularly on implementing Human Rights Council Resolution 16/18 and on tackling 'hate speech' which promote the national implementation of the RPA) and other submissions to human rights bodies.<sup>75</sup>

25. On occasion, the RPA has also been relied upon at the national and sub-national level. For instance, it has been cited by the Human Rights Law Centre as a major source in the Australian NGO's submission to a consultation into the law on racial vilification in New South Wales.<sup>76</sup>

### 3.3. REFERENCE BY EUROPEAN COURT OF HUMAN RIGHTS

26. Reliance upon the RPA by courts is also an important indicator of the text's influence. While an assessment of the impact of the RPA upon domestic courts has not been possible for this paper, it is observed that the RPA has been referenced in one judgement of a regional human rights court to date: the decision of the ECtHR of 17 July 2018 in *Mariya Alekhina and others v Russia*.<sup>77</sup>

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<sup>74</sup> See, for example, ARTICLE 19, 'UN HRC: States must implement resolution 16.18 and the Rabat Plan of Action' Item 9 General Debate Oral Statement, 27 September 2016; ARTICLE 19, 'Advisory Committee should oppose study to examine the creation of a global grievance forum for perceived defamation of religion' Briefing Note, August 2015.

<sup>75</sup> ARTICLE 19, 'Implementing UN HRC Res 16/18: A framework for inclusivity, pluralism and diversity', February 2017; ARTICLE 19, "'Hate Speech' Explained: A Toolkit', 2015 Edition. See also A Smith, 'Implementing Resolution 16/18: the role of Rabat and the importance of civil society space' 18 February 2016.

<sup>76</sup> Human Rights Law Centre, 'Striking the right balance – freedom of speech and hate speech: submission to the inquiry into racial vilification law in New South Wales', 19 March 2013.

<sup>77</sup> *Mariya Alekhina v Russia*, App No 38004/12 (ECtHR, 17 July 2018).

27. In this case, which concerned the criminal convictions and imprisonment of members of the punk band Pussy Riot, the ECtHR quoted from para 15 of the RPA, which highlights the problems of existing domestic legal frameworks from the point of view of Article 20 of the ICCPR, under the section UN sources in the part on 'Relevant International Materials'.<sup>78</sup> This extract from the RPA follows a reference to the submission of three special procedures mandate holders to one of the expert workshops leading to the development of the text, particularly their identification of 'public intent' as one of the 'objective criteria to prevent arbitrary application of national legal standards pertaining to incitement'.<sup>79</sup> In her partly dissenting opinion, Judge Elósegui claims her 'conclusions are also strengthened' by RPA, specifically its recommendation that a range of domestic sanctions in response to incitement to hatred should be clearly distinguished and its six-part threshold test to determine whether a particular expression constitutes a criminal offence.<sup>80</sup>

28. It is arguable as to whether para 15 is the most pertinent part of the RPA to the present case and whether it was necessary to refer to the submission of special procedures mandate holders on the criterion of intent at all, given that it is one of the criteria of the six-part threshold test of the RPA itself. Nonetheless, the ECtHR's recognition of the RPA as a relevant source in this case – undoubtedly a result of the high value placed upon the text in the third-party interventions of ARTICLE 19, Amnesty International and Human Rights Watch – is positive.<sup>81</sup> Not only does this acknowledgement of the RPA pave the way for future references to the text by the ECtHR, it also suggests how the implementation of the RPA by states can be furthered through the deliberations and rulings of regional courts more generally.

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<sup>78</sup> Ibid para 110.

<sup>79</sup> Joint submission by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance for the expert workshop on the prohibition of incitement to national, racial or religious hatred, 9 – 10 February 2011, Vienna; *ibid* paras 109.

<sup>80</sup> RPA Introduction, para 12, *supra* n 1.

<sup>81</sup> *Ibid* paras 187, 190, 191.

# 04 SHORTFALLS OF THE RABAT PLAN OF ACTION

29. Notwithstanding its positive attributes, the RPA displays a number of weaknesses, in terms of its text and as an instrument of international human rights soft law. These shortfalls, which are even more apparent six years after its adoption, have contributed to a lack of concentrated attention upon the text, including from scholars, and momentum surrounding its implementation.<sup>82</sup>

30. First, the scope of the RPA is restricted to “the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” only. This exclusive focus upon speech that incites discriminatory behaviour on the grounds of nationality, race or religion is obviously due to the RPA’s legal basis in international treaty law on incitement to hatred, particularly Article 20 para 2 of the ICCPR and Article 4 of ICERD. This means though that the text does not explicitly cover a broader spectrum of grounds – such as sex, sexual orientation, gender identity and disability – upon which individuals may experience incitement to hatred and may also be covered by states’ national laws.<sup>83</sup>

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<sup>82</sup> Besides the dedicated considerations of the RPA indicated above at fn 6, the text has been considered in surprisingly few scholarly texts. See: G Taylor, ‘Austria’s Law Against Defamation of Religion: A Case Study’ (2015) *Journal of Law and Religion* 80 at 104, 106; A T Uddin, ‘Free Speech and Public Order Exceptions: A Case for the US Standard’ (2015) *Brigham Young University Law Review* 725 at 757, 758, 778. It has also been referenced in the footnotes of other pieces: E M Aswad, R Hussain and M A Suleman, ‘Why the United States Cannot Agree on Blasphemy Laws’ (2014) *Boston University International Law Journal* 119 at fn 91; A Clooney and P Webb, ‘The Right to Insult in International Law’ (2017) *Columbia Human Rights Law Review* 1 at fns 97 and 162

<sup>83</sup> For instance, in the UK, the Criminal Justice and Immigration Act 2008 amends provisions on incitement to religious hatred in the Public Order Act 1986 so that they are extended to cover hatred on the grounds of sexual orientation. For discussion, see K Goodall, ‘Challenging hate speech: incitement to hatred on grounds of sexual orientation in England, Wales and Northern Ireland’ (2010) *International Journal of Human Rights* 211.

Yet the process leading up to the RPA's adoption – ad hoc, involving a range of experts and outside the parameters of authoritative interpretation of particular treaty provisions by treaty bodies (i.e. through a General Comment or General Recommendation) – and the fact that the RPA sought to interpret the prohibition to incitement to hatred in international law in a holistic manner – in other words, both Article 20 of the ICCPR but also Article 4 of the ICERD<sup>84</sup> – shows that the RPA 'model' presents an innovative approach to the progressive development and understanding of international human rights law, one that might also be further evolved to encompass a broader range of individuals vulnerable to incitement to hatred.<sup>85</sup>

31. Second, the RPA's practical effects to date have overwhelmingly involved measures to combat incitement to hatred on the grounds of religion, with much less focus on measures to counter incitement to national or racial incitement. The RPA's impact upon the international system has thus been rather narrow, even from the perspective of Article 20 of the ICCPR, have been felt almost exclusively in relation to hatred based on one ground of discrimination, instead of across all three grounds indicated in Article 20 of the ICCPR, or the expansive and non-exhaustive range of grounds recognised under international human rights law more generally.<sup>86</sup>

32. Third, UN processes building upon the RPA, such as the Beirut Declaration on 'Faith for Rights', have usefully brought together religious authorities and faith-based civil society organisations; such actors are important players in implementing strategies to combat discrimination, particularly on religious grounds, as well as policies on preventing and countering violent extremism.<sup>87</sup>

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<sup>84</sup> RPA Introduction, para 17, supra n 1.

<sup>85</sup> The expert workshops leading to the RPA discussed the problem of the 'harassment of journalists and human rights defenders'; RPA Introduction para 9, supra n 1.

<sup>86</sup> Article 2(1) of the ICCPR requires states to 'respect and ensure to 'all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 26 of the ICCPR then states: 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground' including those referenced in Article 2(1) of the ICCPR.

<sup>87</sup> Religious leaders are identified in several places in the Secretary-General's Action Plan, supra n 49 at para 44(a), 49(e), 51(f).



But such religious actors are also potential allies in countering discrimination and incitement to hatred on a much broader range of grounds, including sex, sexual orientation and gender identity. UN processes stemming from the RPA may have therefore under-emphasised or overlooked the particular relevance of religious actors to combatting incitement to hatred on such broader grounds. Furthermore, UN processes appear to have hitherto paid little attention to other significant players – such as political leaders and parties, and the media – who are also explicitly identified in the RPA.<sup>88</sup>

33. Fourth, the RPA does not address the issue of intersectionality as such – the lived experience of those individuals who may be especially vulnerable to incitement to hatred because of their complex, multiple and interwoven identities (e.g. as female, gay, belonging to a religious minority).<sup>89</sup> The RPA does urge states to ‘promote intercultural understanding, including on gender sensitivity’ and the media to ‘[avoid] unnecessary references to race, religion, gender and other group characteristics that may promote intolerance’ (emphasis added).<sup>90</sup> But in focussing on three grounds of discrimination indicated in Article 20 of the ICCPR and as discrete categories, the RPA does not embrace an intersectional analysis or reflect an intersectional approach through its recommendations. As the RPA is an interpretive document of the relevant international law framework, and given the restricted mandates of the relevant treaty bodies (namely the Human Rights Committee and the Committee on the Elimination of Racial Discrimination) under their own treaties, any process towards updating the RPA could provide a valuable opportunity for the UN human rights system to account for ‘intersectional incitement to hatred’, both in terms of how it is experienced and how it should be responded to.<sup>91</sup>

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<sup>88</sup> ARTICLE 19 has indicated that its ‘projects at the national and regional level seek to engage the full diversity of stakeholders who must be mobilised to implement the Rabat Plan of Action: law-makers, the judiciary, relevant domestic ministries, the media, social media companies, national human rights institutions, educators, religious leaders and civil society.’ ARTICLE 19, ‘Projects advancing the implementation of the Rabat Plan of Action’, based on comments delivered to the ‘Rabat Plus 5’ symposium on 6 – 7 December 2017.

<sup>89</sup> K Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color’ (1991) *Stanford Law Review* 1245.

<sup>90</sup> RPA para 43 and 58(c), *supra* n 1.

<sup>91</sup> Ghanea has argued that the ‘methodology of intersectionality ... is a long-standing one in the CERD Committee practice’, but that the committee ‘alone, may not be best placed to deal with all such intersections in all scenarios’. See N Ghanea, ‘The Concept of Racist Hate Speech and its Evolution over time’, paper presented at the UN Committee on the Elimination of Racial Discrimination’s day of thematic discussion on Racist Hate Speech, 81st session, 28 August 2012.

34. Fifth, the RPA pays little attention to the Internet, which has become the principal forum through which 'hate speech' is spread. It is recognised that the RPA does: recognise the impact of 'new technologies (including digital broadcasting, mobile telephony, the Internet and social networks)'; consider whether the Internet has been used to disseminate the expression as a relevant factor in determining whether incitement amounted to a criminal offence (under 'extent of speech act' in the six-part test); and recommend that 'states ... have in place a public policy and a regulatory framework which promote pluralism and diversity of the media, including new media'.<sup>92</sup> At the same time, the RPA's recommendations do not address the information and communications technology ('ICT') sector or many rights-related challenges associated with recent state and private sector efforts to control and regulate user-generated online content which may constitute incitement to hatred.<sup>93</sup> These efforts include far-reaching laws and policies at the regional and national level purporting to tackle online 'hate speech', such as Germany's 'NetzDG' which penalises social media companies' failure to remove 'hate speech'.<sup>94</sup>

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<sup>92</sup> RPA, paras 29(e), 40, 48, supra n 1. In a subsequent reflection on the possibilities of the Internet to combat racism, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance stated: 'Special Rapporteur encourages States, civil society and individuals to use the opportunities provided by the Internet and social media to counter the dissemination of ideas based on racial superiority or hatred and to promote equality, non-discrimination and respect for diversity. One possible way of countering racism on the Internet and social media networks is through content diversification, in particular by promoting local content and initiatives. Directing more local content to the global network can contribute to greater understanding, tolerance and respect for diversity and offer great potential for reducing information asymmetry and misperceptions that feed racist and xenophobic sentiment.' Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, A/HRC/26/49, 6 May 2014 at para 68.

<sup>93</sup> On the 'areas of concern around content standards', see Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, on regulation of user-generated online content, A/HRC/38/35, 6 April 2018 paras 26 – 31. See also ARTICLE 19, 'Side-stepping rights: regulating speech by contract' Policy Brief, 2018 pp 14 – 17; ARTICLE 19, 'Self-regulation and "hate speech" on social media platforms' Policy Brief, 2018 fn 10.

<sup>94</sup> Act to Improve Enforcement of the Law in Social Networks ('Network Enforcement Act' or 'NetzDG'), 30 June 2017, entered into force 1 October 2017, Federal Law Gazette 2017 I, Nr 61, p 3352. See, also, European Commission, Code of Conduct on Countering Illegal Hate Speech Online, 31 May 2016; Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Official Journal L 328, 6.12.2008, p 55 – 58 (the legal basis for the code); European Commission, Recommendation on measures to effectively tackle illegal content online, 1 March 2018, C(2018) 1177 final.

They also include the application of companies' 'community standards': Facebook's community standards, for instance, provide that the platform does 'not allow hate speech ... because it creates an environment of intimidation and exclusion and in some cases may promote real-world violence'.<sup>95</sup> Companies are also applying automated moderation tools, such as algorithms and trusted-flagger systems, to detect and regulate online 'hate speech' and other forms of objectionable content. The dearth of references to the RPA in very live policy discussions on the responses of Internet intermediaries to online 'hate speech' shows that its relevance to such debates seems limited or remote.<sup>96</sup>

35. Sixth, there is uncertainty about the broader context of the RPA, in particular its relationship between other parallel initiatives, particularly the so-called 'Istanbul Process' on the operationalisation of Human Rights Council resolution 16/18 which seeks to combat, amongst other things, 'incitement to violence' against a person based on religion or belief. The scope of the RPA and that of the Istanbul Process overlaps and they are often mentioned in the same context and should thus be seen as complementary. Yet there are differences: the latter covers a broader range of discriminatory behaviour (not only incitement to hatred), does not purport to interpret the international legal framework on incitement as such (particularly under Article 20(2) of the ICCPR) and is fundamentally an intergovernmental, state-driven process, which is lacking in transparency and possibilities for civil society participation.<sup>97</sup> There should be no room for states or others to argue that such differences justify any limitations on the implementation of the RPA.

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<sup>95</sup> See [https://www.facebook.com/communitystandards/objectionable\\_content/](https://www.facebook.com/communitystandards/objectionable_content/) Civil society organisations have argued that there is a lack of information and transparency about the application of such standards in practice and concerning company responses to third party requests, as well as a lack of comprehensive impact assessments of such policies and appropriate grievance and remedy mechanisms for users who have had their content removed. See Ranking Digital Rights, 'Submission to UN Special Rapporteur for Freedom of Expression and Opinion David Kaye: Content Regulation in the Digital Age', 15 December 2017.

<sup>96</sup> The Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, launched a consultation on 'combatting glorification of Nazism, neo-Nazism and other practices that contribute to fuelling contemporary forms of racism, racial discrimination' which accepted submissions with information regarding, amongst other things: 'existing policies of technology companies, social media platforms, and internet service providers applicable to neo-Nazi and related racist and xenophobic content in the digital space (including information on how these policies balance the protection of freedom of opinion and expression with incitement to violence and other threats to racial equality)'; and also 'key legal and government policy measures at national, regional and international levels that combat glorification of Nazism, neo-Nazism and other practices promoting racist and xenophobic views and incitement to violence in the digital space'. See <https://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/CombattingGlorificationOfNazism.aspx>

<sup>97</sup> For a critique of the Istanbul Process, see S Parmar, 'Uprooting "defamation of religions" and the emergence of a new approach to freedom of expression at the United Nations' *supra* n 9 at 407 – 408.

36. Seventh, notwithstanding the numerous references to the RPA by UN actors indicated above, there is a sense that such reliance on the text by UN human rights actors, including special procedures mandate holders, is inconsistent and sporadic, rather than coherent and systematic. While the emphasis upon the RPA by the Special Rapporteur on freedom of religion or belief is understandable, it is curious that only the Special Rapporteur on Myanmar, amongst the country specific mandate holders, has referenced the RPA. It may also be surprising, for example, that the RPA has hardly been highlighted as a relevant source in the context of the Universal Periodic Review process. As a result of the varying levels of support for building upon the RPA outside the context of incitement to religious hatred, there is a sense that the support for the RPA has been waning, even amongst the UN human rights bodies themselves, and there is little public awareness about the RPA beyond.

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# 05 RECOMMENDATIONS

37. To reinvigorate the implementation of the RPA as it stands, but also to inspire the updating and evolution of its text, the following recommendations are put forward for consideration.

## 5.1. FOR THE IMPLEMENTATION OF THE EXISTING FRAMEWORK

38. States should publicly endorse and implement the recommendations of the RPA, particularly those indicating that states should:

- a. establish a domestic legislative framework on incitement to hatred and freedom of expression, repeal blasphemy laws and adopt comprehensive anti-discrimination legislation;<sup>98</sup>
- b. guarantee the rights to a fair and public hearing and to an effective remedy, and provide legal and other assistance for minority and vulnerable groups;<sup>99</sup>
- c. provide appropriate teacher training and school curriculum, and the training of security forces, law enforcement officials and those involved in the administration of justice;<sup>100</sup>
- d. ‘promote intercultural understanding, including on gender sensitivity’;<sup>101</sup>
- e. establish equality bodies or enhance the equality function of existing national human rights institutions;<sup>102</sup>

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<sup>98</sup> RPA paras 20 – 26, supra n 1.

<sup>99</sup> RPA paras 30 – 34, supra n 1.

<sup>100</sup> RPA paras 42 – 49, supra n 1.

<sup>101</sup> RPA para 43, supra n 1.

<sup>102</sup> RPA para 46, supra n 1.

f. ensure ‘mechanisms and institutions in order to guarantee the systematic collection of data in relation to incitement to hatred offences’,<sup>103</sup>

g. establish a ‘public policy and a regulatory framework which promote pluralism and diversity of the media, including new media, and which promotes universal and non-discrimination in access to and use of means of communication’,<sup>104</sup>

h. support, including through financial contributions, the work of the OHCHR in order to strengthen the human rights treaty bodies and special procedures mechanisms.<sup>105</sup>

39. ‘Political parties should adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speech’.<sup>106</sup>

40. National and regional courts should undertake a ‘thorough analysis’ of cases concerning incitement to hatred on the basis of the RPA’s threshold criteria, and courts should view criminal sanctions as ‘last resort measures to be applied only in strictly justifiable situations’.<sup>107</sup>

41. National human rights institutions (and/or equality bodies) and NGOs should ‘promote intercultural and interreligious understanding and learning’, including when designing national policies and through in their exchanges with each other on best practices on combating incitement to acts of hatred.<sup>108</sup>

42. Journalists and media organisations should, ‘as a moral and social responsibility and through self-regulation (including via professional codes of conduct), play a role in combating discrimination and promoting intercultural understanding’.<sup>109</sup>

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<sup>103</sup> RPA para 47, supra n 1.

<sup>104</sup> RPA para 48, supra n 1.

<sup>105</sup> RPA para 50, supra n 1.

<sup>106</sup> RPA para 57, supra n 1.

<sup>107</sup> RPA para 29, 30 and 34 supra n 1.

<sup>108</sup> RPA para 56, supra n 1. See also Report of the Special Rapporteur on freedom of religion, Heiner Bielefeldt, A/HRC/31/18, 23 December 2015, paras 90 and 91.

<sup>109</sup> RPA paras 58 – 59, supra n 1.

43. The OHCHR should '[develop] tools, including a compilation of best practices and elements of model legislation on the prohibition of incitement to hatred as reflected in international human rights law' and '[organise] regular judicial colloquia in order to update national judicial authorities and stimulate the sharing of experiences relating to the prohibition of incitement to hatred'.<sup>110</sup>

44. UN human rights treaty bodies and special procedures mandate holders should cooperate to 'denounce' instances of incitement, whilst all relevant parts of the UN human rights system – including the UN Office on Genocide Prevention and the Responsibility to Protect – should cooperate to 'maximise synergies and stimulate joint action'.<sup>111</sup>

45. 'Cooperation and information-sharing between regional and cross-regional mechanisms' – including the Council of Europe, the Organization for Security and Co-operation in Europe, the European Union, the Organization of American States, the African Union, the Association of Southeast Asian Nations, as well as the Organisation of Islamic Cooperation – and between such organisations and the UN system should be strengthened.<sup>112</sup>

## **5.2. TOWARDS THE DEVELOPMENT AND ADOPTION OF A 'RABAT PLAN OF ACTION+10'**

46. The OHCHR should consider launching a deliberative consultation process to take stock of the impact of the RPA, to assess its successes and limitations, and also to update and advance on its recommendations for the digital age. Such a process – which ought to be launched to give sufficient time for meaningful consultations to be undertaken across the regions and at the global level – should have as its ultimate goal the development of an RPA+10 text to be adopted on the tenth anniversary of the original RPA in October 2012.

47. The RPA+10 process would require the allocation of appropriate human and financial resources, including a designated budget, by the OHCHR.

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<sup>110</sup> RPA para 51, supra n 1.

<sup>111</sup> RPA para 52 and 53, supra n 1.

<sup>112</sup> RPA para 54, supra n 1.

48. The RPA+10 process should include regional workshops which should mirror, but also build upon, the process leading up to the RPA. The RPA+10 process should be informed by background studies which should comprehensively assess the implementation of the RPA by:

- a. state actors, particularly government departments/ministries of education, defence, interior/home affairs and justice; the police and security forces; courts; communications' regulators; and national human rights institutions and equality bodies;
- b. other actors at the domestic level, particularly, political parties, media organisations and civil society organisations;
- c. the OHCHR, including through its regional and country offices and centres, through the work of national human rights advisors/officers, and through its participation in peace missions;
- d. other parts of the UN system, including UN human rights treaty bodies and special procedures mandate holders, and other UN agencies;
- e. regional organisations.

49. The background studies should also:

- a. assess the broader impacts of the RPA by identifying reliance upon it in policy documents, legal submissions to courts, media or scholarly articles;
- b. identify the RPA's strengths and weaknesses, and how the framework of the RPA may be developed to address the latter, especially how to address the challenges of intersectional incitement to hatred and 'hate speech' in the digital age.



50. Efforts should be made to ensure that the RPA+10 process is transparent and as participatory as possible. In particular:

- a. There should be a call for contributions to the consultation process, and a broader range of stakeholders should be encouraged to submit their views, including: civil society organisations and experts, especially those working on digital rights/Internet freedom issues; the private sector, including Internet intermediaries; national human rights institutions and equality bodies; associations of legal practitioners and judges; regional human rights bodies; communications regulators and media self-regulatory bodies;
- b. All submissions and reports of the regional meetings should be easily accessible on the website of the OHCHR.

51. The text of the RPA+10 document should, at minimum:

- a. Interpret the existing international legal framework on the prohibition of incitement to hatred, under Articles 19 and 20 of the ICCPR in particular, to cover in its scope all the protected grounds of discrimination under international law, including sex, sexual orientation, gender identity, and disability;<sup>113</sup>
- b. Expressly recognise the existence of 'intersectional incitement to hatred', when incitement is based on the compounding of multiple grounds of discrimination, and offer solutions which emphasise that everyone should be able to exercise the full range of their human rights – including the rights to life, liberty and security of the person, equality before the law, equal treatment, freedom of religion or belief, and freedom of opinion and expression – without distinction;

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<sup>113</sup> ARTICLE 19, Prohibiting incitement to discrimination, hostility or violence, Policy Brief, December 2012, at p 21. Interestingly, Facebook defines 'hate speech' as 'a direct attack on people based on what we call protected characteristics – race, ethnicity, national origin, religious affiliation, sexual orientation, sex, gender, gender identity and serious disability or disease'. *Supra* n 95.

c. Identify the potentially significant role that could be played by a broad range of state and non-state actors in promoting the implementation of international human rights law on incitement to hatred – including those actors expressly identified by the RPA, such as political parties and media organisations, as well as others which are not, such as parliamentary committees, communications regulators, donor agencies and grant-making organisations;

d. Recognise the particular role and responsibilities of the ICT sector, especially social media companies, in the online dissemination of user-generated content that may constitute incitement to hatred, in accordance with international human rights law;

e. Indicate that the policies of ICT companies on the regulation of online incitement to hatred should recognise and comply with international human rights law, including Articles 19 and 20 of the ICCPR as the ‘authoritative global standard for ensuring freedom of expression on their platforms’ and should, in particular:<sup>114</sup>

i. Set out the basis for restrictions of any content (particularly content which is considered ‘hate speech’) clearly and accessibly;

ii. Show the necessity and proportionality of any restrictions on content (e.g. removals or account suspensions);

iii. Ensure ‘meaningful and consistent transparency about enforcement of hate speech policies, through substantial reporting’;<sup>115</sup>

iv. Engage with civil society organisations, media organisations, experts and other stakeholders, including in the exploration of new models of independent self-regulation, such as that of a ‘social media council’;<sup>116</sup>

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<sup>114</sup> See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, on regulation of user-generated online content, A/HRC/38/35, 6 April 2018, paras 64 – 72.

<sup>115</sup> Ibid para 28.

<sup>116</sup> ARTICLE 19, ‘Self-regulation and “hate speech” on social media platforms’ supra n 93.

- f. Encourage UN human rights bodies, particularly the human rights treaty bodies and the special procedures mechanisms of the Human Rights Council, and other actors in the UN system, to reinforce the RPA/RPA+10 through their work;
- g. Encourage stakeholders, particularly civil society organisations and national human rights institutions, to make regular reference to the RPA/RPA+10 text in their submissions in relation to states' periodic reports the human rights treaty bodies and the Universal Period Review process;
- h. Clarify the relationship between the RPA+10 text, on the one hand, and other relevant texts – notably the Beirut Declaration and 'Faith for Rights' commitments and the Fez Declaration and Plan of Action on Atrocity Crimes – and processes – particularly the Istanbul Process – which are assumed to be complementary;
- i. Consider the possibility of putting such the RPA+10 on a firmer footing than the RPA through inclusion within a declaration of states at the Human Rights Council and, eventually, within a resolution of the Human Rights Council;

52. To ensure the awareness of the RPA+10 through its dissemination to the widest possible audience:

- a. the text of the RPA+10 and a summarised version should be immediately translated into all official UN languages and made clearly and accessible available on the site of the OHCHR;
- b. the text of the RPA+10 should be publicised through a media campaign and outreach activities done by OHCHR in partnership with civil society organisations.

