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ONLINE VIOLENCE:
A LEGAL STUDY OF THE INTERNATIONAL, EUROPEAN AND
ITALIAN LEGAL FRAMEWORKS ON COUNTERING HATE
SPEECH AND NON-CONSENSUAL DISSEMINATION OF
INTIMATE PRIVATE PHOTOS.

Supervisor

Ch. Prof. Sara De Vido

Assistant supervisor

Ch. Prof. Arianna Vettorel

Graduand

Chiara Martin
858546

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ABSTRACT

Questa ricerca è iniziata con la necessità di rispondere a una domanda specifica: determinare se i diritti umani siano violati all'interno del cyberspazio. La risposta affermativa a tale domanda, ci ha permesso di indagare la sfera della cyber violenza, scoprendo che si tratta di un fenomeno ampio, in evoluzione e complesso che può essere suddiviso in diverse sottocategorie. In particolare, abbiamo deciso di focalizzare la nostra attenzione sulle cyber molestie, poiché particolarmente interessati al "grave disagio emotivo" che i fenomeni appartenenti a questa categoria possono causare alle vittime. Infatti, è possibile presumere che le molestie informatiche mirino a danneggiare gruppi o individui mirati, attraverso molestatore che invadono la privacy delle vittime, manipolando le loro informazioni personali con l'intento di umiliare e diffamare. Così, gli effetti destabilizzanti di questo tipo di violenza fanno temere le vittime per la loro sicurezza sia online, dove sono al centro della cosiddetta "tempesta di abusi"; e offline, dove si isolano dalle relazioni sociali, temendo per la loro incolumità fisica. Per questo motivo, tra i numerosi fenomeni che possono essere inclusi nel tema della violenza online, abbiamo selezionato il cosiddetto "hate speech" e la diffusione non consensuale di foto intime private, basando la nostra scelta sulla categoria di appartenenza delle molestie informatiche e sull'impatto che tali fenomeni hanno sulle loro vittime. A questo punto, ci siamo posti le domande che ci avrebbero accompagnato lungo tutta la nostra ricerca: questi fenomeni sono contrastati a livello internazionale ed europeo? Sono criminalizzati dalla legislazione italiana? Quali sono i limiti dell'attuale quadro giuridico sulla lotta alla violenza online?

Per rispondere a queste domande, la nostra ricerca inizierà con una panoramica sulla violenza. Dopo una breve descrizione delle caratteristiche principali della violenza, rivolgeremo la nostra attenzione sulla sua dimensione online, studiando la terminologia appropriata da utilizzare e osservando le ragioni per cui la violenza informatica ha una significativa rilevanza a livello sociale, coinvolgendo maggiormente le donne. Una volta introdotta la cyber violenza, il focus della nostra attenzione si sposterà verso il discorso d'odio online e la diffusione non consensuale di foto intime private.

In primo luogo, studieremo il fenomeno del discorso d'odio. Come vedremo, non esiste consenso tra gli studiosi e tra gli strumenti giuridici internazionali sulla definizione di tale fenomeno. Certamente, questo può trovare una spiegazione nella terminologia utilizzata per descriverlo. Sarà quindi necessario differenziare tre termini principali: espressioni offensive, discorso d'odio e incitamento all'odio. Per fare ciò, ci appoggeremo allo studio di Susan Benesch, la quale chiarisce le differenze sostanziali tra espressioni offensive e incitamento all'odio. Vedremo come le prime comprendano tutte le espressioni o opinioni che, sebbene possano essere offensive per gli individui, non possano essere criminalizzate in quanto opinioni legittime; mentre constateremo come l'incitamento all'odio si basi su azioni atte a danneggiare o convincere di danneggiare un individuo o un gruppo mirato. Pertanto, il fenomeno del discorso d'odio potrà essere posto tra le espressioni offensive e l'incitamento all'odio in quanto si rivolge a gruppi o individui con commenti o espressioni odiose, con l'obiettivo di umiliare le vittime a causa di caratteristiche identitarie precise. Una volta terminato lo studio circa la terminologia corretta da utilizzare, osserveremo la natura discriminatoria del fenomeno, evidenziando i gruppi mirati più colpiti e osservando come l'odio, a seconda della sua intensità, possa essere considerato un aggravante.

In secondo luogo, analizzeremo la diffusione non consensuale di foto intime private, studiandone la terminologia corretta e spiegando le ragioni per cui il termine “revenge porn” sia erroneamente utilizzato. Successivamente, mostreremo come questo reato possa essere considerato un fenomeno di genere, con una percentuale di donne colpite che supera il 90%. Inoltre, osserveremo come esso venga attuato attraverso la diffusione online di materiale sessualmente esplicito, con lo scopo di danneggiare e umiliare la vittima. Verrà precisato come la diffusione non consensuale di foto intime private colpisca non solo la sfera personale della vittima, ma anche la sua vita sociale, avendo delle gravi conseguenze, sia a livello psicologico e fisico, che a livello economico.

Sulla base di questa introduzione, dedicheremo il secondo e il terzo capitolo all'analisi giuridica sulla lotta alla violenza online. Come vedremo, né il quadro giuridico internazionale, né quello europeo comprendono strumenti per contrastare il discorso d'odio online e la diffusione non consensuale di foto intime private. Di conseguenza, abbiamo deciso di basare la nostra indagine sul principio di non discriminazione e sulle disposizioni sulla libertà di espressione. Sulla base di questo approccio metodologico,

inizieremo la nostra analisi partendo dal quadro giuridico internazionale. Prendendo in considerazione i discorsi d'odio, osserveremo le disposizioni contenute nell'art. 19 (Patto internazionale sui diritti civili e politici) sulla libertà di espressione, evidenziandone la doppia natura. Infatti, se da un lato tale articolo tutela il diritto alla libertà di espressione, dall'altro impone delle restrizioni. Successivamente, focalizzeremo la nostra attenzione sull'art. 20, il quale condanna la propaganda basata sulla superiorità razziale e l'incitamento alla discriminazione. Inoltre, potremmo osservare come l'articolo 4 della Convenzione internazionale sull'eliminazione di ogni forma di discriminazione razziale sia la disposizione più completa contro i comportamenti discriminatori, poiché vieta tutte le forme di diffusione di idee basate sull'odio. Tuttavia, sebbene queste limitazioni possano essere considerate un primo passo verso il contrasto del discorso d'odio, non sono prive di critiche. Ricordando l'assenza di una definizione comune di "hate speech", sarà possibile evidenziare la difficoltà di differenziare espressioni basate sull'odio o sulla discriminazione da quelle offensive ma legittime. In sostanza, dimostreremo come le restrizioni non proporzionate del discorso d'odio possano compromettere il diritto alla libertà di espressione, con la possibilità di incorrere nella censura. A tal proposito, menzioneremo il lavoro dello Special Rapporteur, il quale ha espresso le proprie riserve in merito alle limitazioni del discorso d'odio, sottolineandone l'ambiguità circa il godimento del diritto alla libertà di espressione. Infine, osserveremo come, sebbene i contenuti illegali online abbiano iniziato ad essere considerati una crescente preoccupazione all'interno degli organi internazionali, la dimensione online del discorso sull'odio sia completamente esclusa dagli strumenti giuridici internazionali.

In maniera simile, prenderemo in considerazione la diffusione non consensuale di foto intime private. Sarà quindi possibile osservare come le disposizioni su questo recente reato siano quasi nulle. Infatti, dimostreremo come la Convenzione sull'eliminazione di ogni forma di discriminazione nei confronti della donna non sia uno strumento rilevante per il contrasto a suddetto fenomeno, in quanto risalente al 1979. Tuttavia, prenderemo in considerazione il contributo dello Special Rapporteur, la quale ha introdotto il concetto di cyber violenza, sottolineando il grave impatto che ha sulle donne.

Il secondo capitolo proseguirà con l'analisi del quadro giuridico europeo. Sebbene non esistano Convenzioni che affrontino direttamente il discorso d'odio online, sarà possibile supporre che sia il Consiglio d'Europa che l'Unione Europea si stiano muovendo verso la

proibizione dei discorsi d'odio. Tenendo conto del quadro giuridico del Consiglio d'Europa, menzioneremo il protocollo aggiuntivo della Convenzione sulla criminalità informatica che introduce alcune restrizioni per la diffusione online di qualsiasi materiale "che promuova, sostenga o inciti l'odio o la discriminazione". Sebbene alcune imprecisioni sulla terminologia possano essere trovate all'interno del Protocollo, si tratta di uno strumento significativo che integra le disposizioni sui contenuti illegali online. Inoltre, osserveremo il contributo della Corte europea dei diritti dell'uomo sull'incitamento all'odio, sottolineando le disposizioni contenute nell'art. 8 -diritto alla vita privata-, art. 10-libertà di espressione- e art. 14 -divieto di discriminazione-. Invece, tenendo conto del quadro giuridico dell'Unione Europea, ci concentreremo su due strumenti principali. Vedremo come la decisione quadro 2008/913/GAI sia uno strumento giuridicamente vincolante che introduce la criminalizzazione di atti basati sul razzismo e la xenofobia, nonché la criminalizzazione del negazionismo e della grossolana banalizzazione dei crimini contro l'umanità. Sebbene si tratti di uno strumento significativo per gli Stati membri, non potrà essere considerato un documento pertinente per contrastare il discorso sull'odio. Inoltre, studieremo il codice di condotta, contenente disposizioni per la rimozione di contenuti illegali online, tra cui discorsi di odio online, osservandone il limite principale, ovvero la sua natura non giuridicamente vincolante.

Allo stesso modo, osserveremo come a livello europeo non esistano Convenzioni che si occupino direttamente della diffusione non consensuale di foto intime private. Per questo motivo, indagheremo i documenti europei sulla violenza contro le donne, al fine di trovare somiglianze tra le conseguenze della VAW e la diffusione non consensuale di foto intime private. Di conseguenza, analizzeremo le disposizioni della Convenzione del Consiglio d'Europa sulla violenza contro le donne e gli abusi domestici, osservando come la diffusione non consensuale di foto intime e private possa rientrare nelle disposizioni della Convenzione a causa delle ripercussioni psicologiche che ha sulle vittime. A questo punto, considereremo la possibilità di includere suddetto fenomeno nel contesto della violenza domestica. Confrontando le caratteristiche di tale fenomeno con le disposizioni sugli abusi domestici, verrà sottolineato come entrambi i tipi di abuso colpiscano in modo sproporzionato le donne; come, avendo una natura basata sul genere, il controllo e il potere utilizzati dagli uomini sulle donne siano fattori che caratterizzino entrambi i fenomeni; infine, come gli autori di entrambi i tipi di violenza abbiano solitamente un rapporto affettivo con le loro vittime. Tutti questi elementi comuni ci porteranno ad

indagare la giurisprudenza per dimostrare se la diffusione non consensuale di foto private intime sia stata inclusa nella violenza domestica. Pertanto, esamineremo due recenti sentenze della Corte europea dei diritti dell'uomo, in cui la Corte ha decretato la violenza online come possibile forma di abuso domestico. Analogamente vedremo come il quadro giuridico dell'Unione Europea non contenga disposizioni rilevanti sulla diffusione non consensuale di foto private intime. Sebbene la Commissione europea abbia attuato una serie di strategie per affrontare la violenza online, non vi sarà la possibilità di studiarne i risultati a causa della loro recente creazione.

A questo punto, dopo aver indagato il quadro giuridico internazionale ed europeo, rivolgeremo la nostra attenzione al sistema giuridico italiano, per verificare se il discorso d'odio online e la diffusione non consensuale di foto intime private siano criminalizzati. Innanzitutto, descriveremo brevemente gli obblighi internazionali dell'Italia derivanti dalla ratifica o dall'attuazione di strumenti giuridici internazionali ed europei. In particolare, ai fini della nostra tesi, amplieremo il ruolo dell'attuazione italiana della decisione quadro 2008/913/GAI nel contesto dell'incitamento all'odio e studieremo gli effetti della ratifica e dell'esecuzione della Convenzione di Istanbul del Consiglio d'Europa. Successivamente, ci concentreremo sul Codice penale italiano. Considerando i discorsi d'odio, osserveremo come l'Italia includa da un lato la criminalizzazione della propaganda basata sulla superiorità razziale e l'istigazione all'odio e alla violenza ai sensi dell'articolo 604-bis c. p.; dall'altro, dichiara ai sensi dell'art. 604-ter c. p., circostanza aggravante per tutti i crimini perpetrati con un movente discriminatorio basato su razza, nazionalità, etnia e religione. Tuttavia, osserveremo come queste disposizioni presentino importanti debolezze. Dimostreremo infatti che il discorso d'odio online non è criminalizzato da tali articoli. Inoltre, rileveremo che il Codice penale italiano non prevede atti discriminatori o di incitamento all'odio sulla base dell'identità di genere, dell'orientamento sessuale e della disabilità.

Considerando la diffusione non consensuale di foto intime private, noteremo come questa sia criminalizzata ai sensi dell'articolo 612-ter c.p. Dimostreremo come questa disposizione sia completa poiché non solo criminalizza la diffusione, pubblicazione e furto di materiale sessualmente esplicito, ma decreta anche il cyberspazio come un elemento fondamentale per dichiarare l'aggravante. Tuttavia, rileveremo anche alcuni

limiti, tra cui l'assenza di una solida giurisprudenza al riguardo e una società basata sul sessismo e misoginia, che rende l'efficacia dell'articolo 612-ter ancora poco chiara.

In conclusione, potremmo affermare che sia il quadro giuridico internazionale che quello europeo mancano di una legislazione contro la violenza online. Nonostante il quadro giuridico europeo rimanga il più focalizzato sulla questione dell'incitamento all'odio, introducendo disposizioni sulla rimozione dei contenuti illegali online, tale fenomeno viene contrastato per la maggior parte dei casi escludendone la dimensione online. Inoltre, il dibattito tra la salvaguardia della libertà di espressione e la restrizione dell'incitamento alla discriminazione è ancora acceso. D'altra parte, la diffusione non consensuale di foto private intime non trova alcuna restrizione significativa né a livello internazionale né a livello europeo. Tuttavia, un'importante considerazione da sottolineare è la recente inclusione della violenza online come forma di abuso domestico. Al contrario, il quadro giuridico italiano ha una disposizione più forte sulla divulgazione non consensuale di foto private intime rispetto a quella sul discorso d'odio, che manca nella criminalizzazione di alcuni motivi di discriminazione, escludendo anche la dimensione online del fenomeno. In altre parole, potremmo affermare come la violenza online sia un fenomeno crescente che non viene prontamente contrastato né a livello internazionale, né a livello nazionale.

TABLE OF ABBREVIATIONS

CoC: Code of Conduct for Countering Illegal Hate Speech Online

COE: Council of Europe

CRC: Convention on the Rights of the Children

ECHR: European Convention on Human Rights

ECtHR: European Courts of Human Rights

ECRI: European Commission against Racism and Intolerance

EIGE: European Institute for Gender Equality

FCNM: Framework Convention for the Protection of National Minorities

GREVIO: Group of Experts on Action against Violence against Women and Domestic Violence

ICCPR: International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of all Forms of Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICT: Information and communication technologies

LGBTIQ/LGBT+: Lesbian, gay, bisexual, transgender, intersex, and questioning community

ODIHR: Office for Democratic Institutions and Human Rights

OHCHR: United Nations High Commissioner for Human Rights

OSCE: Organization for Security and Co-operation in Europe

TEU: Treaty on European Union

TFSV: technology-facilitated sexual violence

UDHR: Universal Declaration of Human Rights

UN: United Nations

VAW: Violence against women

WHO: World Health Organization

WRVH: World Report on Violence and Health

INTRODUCTION

The starting point of this work was the question: are human rights violated within cyberspace? After having answered in an affirmative way, we started to investigate the context of cyberspace in relation to violence. We observed that the arrival of the Internet and technological development allowed people to move from offline environments to cyberspace, making a significant change in the way of communication, information, and socialization. Notwithstanding the Internet brought numerous advantages at social level, on the other hand, it can be affirmed that cyberspace has extended the scope of violence, making the so-called *cyberviolence* even more complex and controversial. As a matter of fact, this new social phenomenon incorporates several typologies of violence, such as the ICT-related violation of privacy, ICT-related direct threats or physical violence, ICT-related hate crime and cyber harassment, which are in turn divided into numerous subcategories.¹

At this point, we decided to focus our attention on cyber harassment, since we were interested in the “severe emotional distress” that the phenomena belonging to this category may cause to victims. Essentially, it is possible to assume that cyber harassment aims to harm targeted groups or individuals. Indeed, harassers invade victims’ privacy, manipulating their personal information with the intent to humiliate and defame them. Thus, the destabilizing effects of this type of violence make victims fear for their safety both online, where they are at the centre of the so-called “storm of abuse”; and offline, where they isolate themselves from social relations, fearing for physical repercussions.² Among the phenomena included within the subcategory of cyber harassment, we selected online hate speech and non-consensual dissemination of intimate private photos. The choice to investigate these two socially debated phenomena relies on the serious impact they have on their victims. Indeed, both phenomena are based on discrimination against targeted groups or individuals, aiming at degrading and destroying the dignity and the identity of a person.

¹ Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe. Retrieved from <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914>

² Ibid.

Having determined the sphere we wanted to broaden, we asked ourselves a few other questions: are these phenomena countered at the international and the European levels? Are these phenomena criminalised by the national legislation? What are the limits of the current legal framework on the countering of online violence? Essentially, the purpose of this Master Degree's thesis is to investigate the international, the European and the Italian legal frameworks to demonstrate whether and how online hate speech and non-consensual dissemination of intimate private photos are countered.

In order to do so, a general overview on violence and cyberviolence will be necessary. For this reason, the first chapter will open with a brief presentation on the concept of violence, providing the definition and a brief description on the main characteristics. This will be necessary to introduce the online dimension of violence. Hence, we will investigate the proper terminology to use while analysing cyberviolence; we will outline the characteristics of the phenomenon and we will observe how this issue may be considered a gender-based phenomenon, supporting our analysis with some statistical data and a description about online gender-based violence against women. Once cyberviolence is introduced, the focus of our attention will move towards online hate speech and non-consensual dissemination of intimate private photos. Firstly, we will study the phenomenon of hate speech. As we will see, there is not a common definition of the phenomenon yet, making it even more complex to deal with. Therefore, we will investigate the proper definition attributed to the phenomenon, highlighting the differences between the term "hate speech" and the term "incitement to hatred"; then, we will outline its characteristics focusing on the targeted groups or individuals against which hate speech is perpetrated. Finally, we will dedicate a paragraph to the concept of hate, observing the significant role it covers in the context of crimes. Similarly, we will analyse non-consensual dissemination of intimate private photos. Hence, we will concentrate our attention on the terminology attributed to the phenomenon, explaining the reasons why *revenge porn* should not be considered the proper term to be used. Subsequently, we will outline the characteristics and the consequences of the phenomenon, observing the gender-based nature of it. Finally, we will provide a few examples.

On the basis of this introduction, we will dedicate the second chapter to the legal analysis on the countering of online violence. As we will observe, neither the international, nor the European legal frameworks include instruments for the countering

of online hate speech and non-consensual dissemination of intimate private photos. For this reason, our work will consist in the investigation of the legal documents and instruments to underscore whether they may be used for the countering of these phenomena. Therefore, the chapter will be divided into four parts. The first one, will be dedicated to the analysis of the international legal frameworks. Particularly, we will focus our attention on the major legally binding documents -UDHR, ICCPR, ICERD and CEDAW- studying the principle of non-discrimination, the provisions on freedom of expression and their limits. Moreover, we will underscore the action of the Human Rights Committee and the Human Rights Council on countering hate speech, supporting the analysis with the HRC General Comments and the Reports of the Special Rapporteur.

The second part of the chapter will be dedicated to the Council of Europe legal framework. Similarly, we will investigate the ECHR focusing on the principle of non-discrimination -art. 14 and protocol 12-, the regulation of freedom of expression -art. 10- and the provisions about the right to respect for private and family life -art.8- to underscore whether they might be used in the fight against online hate speech and non-consensual dissemination of intimate private photos. This analysis will be supported by the study of a few ECtHR judgments. Particularly, we will highlight the contribution of the Court, demonstrating whether online violence may be considered a form of domestic abuse. Finally, we will concentrate on the study of two CoE Conventions: the Budapest Convention on Cybercrime and its Additional Protocol on the criminalisation of racist and xenophobic acts, and the Istanbul Convention on violence against women and domestic abuse.

Moving on, the third part of the chapter will take into consideration the European Union legal framework. Therefore, we will highlight the European treaties which enshrine the principle of non-discrimination; then, we will emphasize the importance of the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia, within the context of hate speech; lastly, we will concentrate on the soft European law, studying whether the Code of Conduct should be considered an instrument for combating online hate speech.

Lastly, the final part of the chapter will explain the concept of rule of law, illustrating the European Commission Roadmap on online violence.

The purpose of the third and final chapter will be to analyse how online hate speech and non-consensual dissemination of intimate private photos are countered at domestic level, taking into consideration the Italian legislation. Before engaging in the analysis of the Italian criminal Code, we will briefly outline the international obligations of Italy derived by the ratification or the implementation of international and European legal instruments. Particularly, for the purpose of our thesis, we will broaden the role of the Italian implementation of the Framework Decision 2008/913/JHA within the context of hate speech; and we will study the effects of the ratification and execution of the Council of Europe Istanbul Convention, illustrating the interconnection between such Convention and the so-called *Red Code*. Subsequently, we will focus on the Italian criminal Code, observing whether and how hate speech and non-consensual dissemination of intimate private photos are criminalised. Hence, we will explain article 604-bis c.p. on racial propaganda and instigation to violence and hate, and article 604-ter c.p. on hate as an aggravating circumstance. Accordingly, we will examine the limits of such provisions, highlighting the absence of the prohibition of discrimination based on gender and disability, and the exclusion of crimes perpetrated within cyberspace. Subsequently, we will take into examination article 612-ter on non-consensual dissemination of intimate private photos, analysing the way it criminalises the phenomenon and highlighting the paramount role that cyberspace has in the perpetration of such criminal offence. Lastly, a final reflection will be made upon the potential limits of article 612-ter, supporting it with a brief analysis of an Italian case of “revenge porn”.

CHAPTER 1

ONLINE VIOLENCE: ANALYSIS OF THE NOTIONS OF HATE SPEECH AND NON-CONSENSUAL DISSEMINATION OF INTIMATE PRIVATE PHOTOS

Premise

Violence has always played an influential role in history. In all of its shapes, this phenomenon has always been present all over the world, having a notable impact on human lives.³ During the last decades, the arrival of the Internet and the development of ICT-technologies transformed communication and social relations, making the separation of the offline environment from the online one even more arduous.⁴ As a consequence, technological advancement covered a significant role in the dissemination of new forms of violence and dangers, making cyber violence a central concern for society.⁵

Before engaging in the analysis of the online dimension of violence, we need to question what the proper term is to use. Indeed, with the arrival of cyber violence, a debate on the appropriate word to describe it has started, since the terminology linked to this issue, and the issue itself are still evolving.⁶ As we will see along the chapters, the international and European legal documents -as well as academic articles- name the phenomenon in different ways: "ICT-facilitated violence", "online violence", "digital violence" or "cyberviolence". For instance, the Special Rapporteur Šimonović states that *online violence* is more "user-friendly", but that *ICT-facilitate violence* is the most inclusive term to use.⁷ Whereas, recalling the Council of Europe Convention on Cybercrime, the term *cyberviolence* has been preferred among the others. Therefore, considering the

³ World Health Organization. (2002). *World report on violence and health*. Geneva: Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano, p. 3.

⁴ Neris, N., & Valente, M. (2018, July). Are we going to feminise the internet? *International Journal on Human Rights, English ed; São Paulo Vol. 15, No. 27*, p.102.

⁵ Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe. Retrieved from <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914>, p. 14.

⁶ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 5.

⁷ Ibid.

analysis that we will carry out along this dissertation, and taking into consideration the international and European documents that will be examined, “online violence” and “cyberviolence” will be used as interchangeable synonyms.

The following chapter is aimed at introducing the topic of cyberviolence and at defining its features. As we will illustrate, the phenomenon of online violence is wide and complex, including numerous forms. Among the typologies of cyberviolence, particularly cyber harassment, we selected two increasing, highly debated and related phenomena to be analysed along this dissertation: hate speech and non-consensual dissemination of intimate private photos.

Therefore, the chapter will open with an introduction to the general concept of violence, which will be needed to explain the online dimension of violence. We will demonstrate how online violence disproportionately affects women; thus, we will explain gender-based violence against women perpetrated online. Subsequently, the chapter will go on with the analysis of the two phenomena. Hence, we will question the proper terminology to use, examining the definitions attributed to hate speech and non-consensual dissemination of intimate private photos. Moreover, it will outline the main characteristics of both phenomena. Finally, the chapter will close with a paragraph by mentioning the analysis that we are going to carry out in the subsequent chapters.

1.1 A reflection on the notion of violence within cyberspace: a general overview.

As anticipated, it is important to provide a general overview of violence itself. Usually, violence is associated with the use of physical strength with the aim of harming someone.⁸ However, this definition is quite reductive. De Vido asserts that in international law, the term “violence” is associated with two main typologies, namely, violence against the representative of a State, and violence against the State itself.⁹ Nonetheless, the evolution

⁸ Treccani defines violence as “Each act or behaviour that make use of physical strength [...] in order to harm an individual or his/her property or rights[...]” See *Violenza* Enciclopedia Italiana Treccani, Treccani SpA, 2020, *treccani.it*; the Oxford Dictionary defines it as “violent behavior that is intended to hurt or kill someone.” See *Violence*, Oxford Learner’s Dictionaries, 2021 *oxfordlearnersdictionaries.com*.

⁹ De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d’Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI, pp. 25-26.

of the international human rights law permitted the association of violence with the individual dimension.¹⁰ Here, we may collocate the online dimension of violence, particularly the phenomena we will analyse thereafter. As a matter of fact, we will illustrate how they are related with the violation of the principle of non-discrimination, which jeopardizes equality and freedoms of individuals.

Among the definitions of violence, it is important to mention the one of WHO. Indeed, in 1996, the Forty-nine World Health Assembly of WHO declared for the first-time violence a public health priority, defining it as:

The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.¹¹

Focusing on the terminology used in this definition, it needs to turn the attention on a few words. Using the term *power* the WHO incorporates all acts of threats and intimidation, but also all types of physical and psychological abuses, suicide and self-abusive acts.¹² Accordingly, scholars affirm that violence is strictly interconnected with power and control; indeed, violence is considered at the same time the consequence and the expression of power, which manifests itself with the control of individuals on other individuals.¹³ Whereas, *psychological harm*, *maldevelopment* or *deprivation* reflect the need to extend the concept of violence also to acts that do not result automatically in injury or death. This is particularly true with some forms of violence against women, children and the elderly: violence can result in physical, psychological and social problems, the consequences of which might last for years and affect not only the individual, but also the whole community or society.¹⁴

¹⁰ Ibid.

¹¹ WHO, Violence Prevention Alliance, from <https://www.who.int/violenceprevention/approach/definition/en/> (accessed 17-03-21)

¹² World Health Organization. (2002). *World report on violence and health*. Geneva: Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano, p. 5.

¹³ De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI, p.24.

¹⁴ See *supra* note.

1.1.1 The online dimension of violence: a study on the main features.

During the last decade, the major advances in technology have enlarged the list of crimes, especially in cyberspace.¹⁵ Harassers are more likely to operate in cyberspace because they feel less personally involved and less at risk with respect to act in real space.¹⁶ It can be affirmed that online phenomena of hate and violence are distinguished from offline ones because of five factors. Firstly, hateful and violent manifestations remain accessible or can be disseminated within cyberspace; secondly, “abusive actions using technologies require less time and effort”¹⁷; thirdly, viral dissemination relates cyberspace with offline environments, expanding the scope of hate speech or violent acts; fourthly, anonymity permits offenders to hide behind fake accounts; and lastly, there is not a common legislation on countering all violent manifestations of hate.¹⁸

For these reasons, *cyberviolence* has become a primary concern for society and the law. According to the T-CY Working Group¹⁹ of 2016, implemented by the Budapest Convention on Cybercrime, cyberviolence is:

[...] the use of computer systems to cause, facilitate, or threaten violence against individuals that results in, or is likely to result in, physical, sexual, psychological or economic harm or suffering and may include the exploitation of the individual’s circumstances, characteristics or vulnerabilities.²⁰

According to the *Mapping study on cyberviolence* of the Council of Europe, the term cyberviolence encloses numerous phenomena, such as cybercrime, ICT-related violation of privacy, threats or physical violence and hate crime, online sexual exploitation and sexual abuse of children and cyber harassment. These categories in turn include different

¹⁵ De Keseredy, W., & Schwartz, M. (2016). Thinking sociologically about image-based sexual abuse: The contribution of male peer support theory. *Sexualisation, Media & Society*. Retrieved February 14, 2021, p.1.

¹⁶ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press, p. 12.

¹⁷ Cyber Violence Against Women and Girls. A World-wide Wake-up Call, Website: https://www.unwomen.org/~media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?d=20150924T154259&v=1 (accessed 27-04-21)

¹⁸ L’Hate Speech e la violenza verbale online, 17 October 2019, Website: <http://www.dirittodellinformatica.it/ict/web/lhate-speech-e-la-violenza-verbale-online.html> (accessed 27-04-21)

¹⁹ The Working Group was established in 2016 in order to study cyberviolence, especially the one against women and children and to document legislation and measures of states. The mandate of the Group was extended to July 2018.

²⁰ Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe. Retrieved from <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914>, pp. 5.

typologies of acts, whose gravity might be different, from the most serious to the one which does not need the intervention of criminal law.²¹

Among all these forms of cyber violence, it is important to focus our attention on cyber harassment, which is considered the “broadest form of cyberviolence.”²² The main characteristic of cyber harassment is the overkill against a targeted individual, aiming at humiliating and harming the victim. Usually, the harassment is characterized by a “storm of abuse”, in which offenders threaten, manipulate and defame the victims.

Taking into examination the victims, it can be affirmed that cyberspace has become highly risky especially for women. As we will investigate in the following paragraphs, the coming of new technologies, such as high-tech smartphones, computers or professional digital cameras, and the increasing use of social networks -especially Facebook, Instagram and Twitter- boosted the phenomenon of TFSV²³ -technology-facilitated sexual violence-.²⁴ Moreover, a study of the Pew Research of the United States revealed that, although men are more at risk to be insulted online -a more “soft” violence online-²⁵, women are the major victims of more violent forms of cyber harassment, online sexual abuse and sexist hate speech.²⁶ Accordingly, an 11-year analysis (2000-2011) revealed that 72% of women were victims of online harassment,²⁷ and that 71% of victims under 35 knew their harassers.²⁸ Moreover, women victims of online abuse reported that 46% of comments were sexist and 62% of them used abusive language.²⁹ Hence, it is evident that cyberviolence affects women in a disproportionate way. In the following paragraph, we will provide a general overview on gender-based violence against women, focusing on its online dimension.

²¹ Cybercrime Convention Committee, op. cit, p. 6.

²² Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe. Retrieved from <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914>, pp. 6-7.

²³ Gender-based online harms such as revenge porn, virtual rape, cyberstalking, gender-based hate speech, and more “traditional” crimes. See *supra* note p. 398.

²⁴ Rentschler, C. A, *Rape culture and the feminist politics of social media*. *Girlhood Studies*, Vol.7, No. 1, pp.71-72

²⁵ Pew Research Center, Online Harassment, 22 October 2014. <https://www.pewresearch.org/internet/2014/10/22/online-harassment/> (accessed 19-12-20)

²⁶ European Union, FEMM committee, *Cyber violence and hate speech online against women*. September 2018, p. 11

²⁷ <http://www.haltabuse.org/resources/stats/Cumulative2000-2011.pdf> (accessed 27-04-21)

²⁸ <https://www.statista.com/statistics/784833/online-harassment-women-types/> (accessed 27-04-21)

²⁹ *Ibid.*

a. The online dimension of gender-based violence against women.

Before taking into examination the online dimension of gender-based violence against women, it is important to define the offline dimension of the phenomenon.

The WHO affirms that globally one woman out of three has experienced some forms of physical and/or sexual violence by their intimate partner or by a stranger in their lifetime.³⁰ According to the United Nations Declaration on the Elimination of Violence against Women, resolution 48/104 of 1993:

[...] the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.³¹

Similarly, the General Recommendation no.35 of the CEDAW, in conjunction with no. 19, explains that violence against women shall be considered a form of gender-based violence,³² since it is based on discrimination against women, that prevents them the enjoyment of equality, rights and freedoms.³³ Additionally, the CEDAW Committee acknowledges violence against women as one of the forms of violence that emphasizes the “subordinate position of women with respect to men and their stereotyped roles.”³⁴ Moreover, the Committee recognizes the patriarchy ideology behind the phenomenon, decreeing the need “to assert male control or power” and the enforcement of gender role as causes of gender-based violence against women:

“These factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered as a private matter, and to the widespread impunity for it”³⁵

³⁰ De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI. p. 15.

³¹ Declaration on the Elimination of Violence against Women, Proclaimed by General Assembly resolution 48/104 of 20 December 1993, art. 1.

³² General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017, p. 4.

³³ CEDAW, General recommendation No. 19: Violence against women, Eleventh session (1992), art. 1.

³⁴ See *supra* note, p. 4.

³⁵ CEDAW, General recommendation No. 19 op. cit. p. 7.

Equally important is the contribution of the Council of Europe Istanbul Convention, which provides the definition of the term *gender*, defined as social construction roles attributed to men and women and characterized by stereotyped behaviours, and *gender-based violence against women*, which:

[...] shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately; [...]³⁶

Therefore, placing the term *gender-based* by the side of violence against women shall be interpreted as the result of unequal power relations based on prejudice between sexes.³⁷ Additionally, it refers to any type of harm that is perpetrated to “mark” the subordination of women with respect to men, underscoring that “women and girls are exposed to a higher risk of gender-based violence than men.”³⁸

Focusing on cyberviolence, we have previously observed that cyberviolence has a significant impact on women. For instance, 25% of young women have been sexually harassed online (only 13% of young men); 90% of “revenge porn” victims were women; and 70% of young women and girls prefer to hide their gender to avoid possible online harassment.³⁹

On the basis of this premise, in the OHCHR report A/HRC/38/47⁴⁰, the Special Rapporteur Dubravka Šimonović argues that gender-based violence against women affects women and *girls* in “all spaces and spheres of human interaction, whether public or private.”⁴¹ Taking into consideration all spaces and all spheres, she underscores how

³⁶ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210, art. 3.

³⁷ It needs to underline that we cannot replace the word gender uniquely with woman, as we cannot interpret gender-based violence as exclusively violence against women. Indeed, violence against women is just one example of gender-based violence, in which violence is perpetrated on individuals who traditionally are targeted in a determined way. Another example of gender-based violence is violence against LGBT+ individuals. See De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI. pp. 33-34.

³⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210, p. 6.

³⁹ https://www.womensmediacenter.com/speech-project/research-statistics#_ftn10 (accessed 27-04-21)

⁴⁰ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018.

⁴¹ Report of the Special Rapporteur A/HRC/38/47, op. cit. p. 5-6.

cyberspace have facilitated the perpetration of various forms of violence against women and harassment:

Emerging forms of ICT have facilitated new types of gender-based violence and gender inequality in access to technologies, which hinder women's and girls' full enjoyment of their human rights and their ability to achieve gender equality.⁴²

Additionally, precisely because the major international and European legal documents lack in the provisions of norms countering online violence against women,⁴³ the Special Rapporteur underscores the necessity for equal treatment for both offline and online offences, highlighting the duty of States in respecting positive obligations to ensure equality and eliminate discrimination within their territories. Moreover, she stresses how “women and girls across the world have increasingly voiced their concern at harmful, sexist, misogynistic and violent content and behaviour online.”⁴⁴

There is a significant risk that the use of ICT without a human rights-based approach and the prohibition of online gender-based violence could broaden sexual and gender-based discrimination and violence against women and girls in society even further.⁴⁵

Looking at the general phenomenon of cyberviolence, women are commonly addressed with sexist and racist language, and oftentimes threats and harassment they suffer from, both offline, making them feeling afraid and anxious.⁴⁶ According to this, Amnesty International affirmed that hateful and violent treatments has become frequent and ordinary, especially for women with disabilities, lesbian or transsexual women and women part of religious or ethnical minorities.⁴⁷ Moreover, the Special Rapporteur Dubravka Šimonović assumes that the arrival of the ICT tools permitted the emergence of new

⁴² Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 5.

⁴³ Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe, p. 17.

⁴⁴ See *supra* note.

⁴⁵ Cybercrime Convention Committee op. cit. p. 6.

⁴⁶ UN women. (2020). *Online and ICT facilitated violence against women and girls during COVID-19*. United Nations, p. 3.

⁴⁷ Website: <https://www.amnesty.it/6-cose-sapere-sulla-violenza-le-donne-online/> (accessed 28-04-21)

forms of gender-based violence. Particularly, she notes the increasing phenomena of “sextortion” (para 35), “doxing” (para 36), “trolling” (para 37) and “revenge porn”.⁴⁸

Lastly, it can be affirmed that consequences of cyber violence are as severe as those offline: victims cannot separate their real life with their online one because the two spheres overlap with each other.⁴⁹ At the end, victims feel worried and not safe, sometimes they might also feel blamed and shamed. As we will study in the following paragraphs, a significant example of what we have just illustrated is non-consensual pornography. Indeed, non-consensual dissemination of intimate private images victims are usually depicted as guilty because certain behaviour considered “ordinary” for men, are seen shameful and scandalous if made by women. Namely, the public opinion reveals the patriarchal ideology that permeates our society, moving the focus of the crime from the perpetrator to the victim. At the end, the victim is blamed and most of the time, insulted -especially on social networks-.⁵⁰

In the light of what has already been presented, the purpose of the following paragraphs will be the introduction of hate speech and non-consensual dissemination of intimate private photos as two examples of cyber harassment. Particularly, we will investigate the correct terminology, the definitions and the main characteristics of the phenomena.

⁴⁸ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018.

⁴⁹ Ibid.

⁵⁰ It is interesting to show how victim blaming and sexist hate speech are also offline. Indeed, in the current Italian affairs, the rapist Alberto Genovese kidnapped an 18-year-old girl, drugged her, and abused her uninterruptedly for 20 hours. Media and newspapers depicted the victim using stereotyped and biased language, accusing her of being “naive” and “irresponsible” because she was partying in an unsafe place. For example, Il Messaggero presented the issue with the following title: Genovese, droga e feste tra Ibiza e Formentera. La chat degli ospiti: «Grazie per averci coccolato» (https://www.ilmessaggero.it/italia/alberto_genovese_instagram_feste_patrimonio_chi_e_chat_stupro_news_oggi-5587802.html 19 december 2020); Vittorio Feltri, the editor of Libero Quotidiano, on twitter writes as follows: Procede il massacro di Genovese mentre inizia la corsa ai risarcimenti. Ho il sospetto che lo stupro sia una ricca fonte di reddito (<https://twitter.com/vfeltri/status/1336665629072498691> 9 December 2020); La Stampa introduced the possibile responsibility of Genovese’s girlfriend with: Attente a Lolita, ragazze (<https://www.lastampa.it/rubriche/lato-boralevi/2020/12/06/news/attente-a-lolita-ragazze-1.39627407> 6 December 2020) and Caso Genovese: ci sono anche le donne malvagie (<https://www.lastampa.it/rubriche/lato-boralevi/2020/12/10/news/caso-genovese-ci-sono-anche-le-donne-malvagie-1.39643365> 10 December 2020), while La Repubblica describes the perpetrator as: Alberto Genovese, chi è l'imprenditore mago delle startup accusato di violenza sessuale (<https://video.repubblica.it/edizione/milano/alberto-genovese-chi-e-l-imprenditore-mago-delle-startup-accusato-di-violenza-sessuale/370952/371560?ref=search> 11 November 2020).

1.2 Investigating the phenomenon of hate speech: definition and characteristics.

1.2.1 Hate speech or incitement to hatred: some definitions.

The term “hate speech” comes from the English American language and it was used for the first time in the 80s, even though the origins of the phenomenon are more ancient.⁵¹ Nowadays, hate speech has become a “menace to democratic values, social stability and peace.”⁵² Namely, it is one of the most controversial and widespread phenomena in our society, since its usage affects both offline and online environments.

In 2019, the United Nation Secretary-General Guterres launched the UN Strategy and Plan of Action on Hate Speech, defining the phenomenon as:

[...] an attack on tolerance, inclusion, diversity and the very essence of our human rights norms and principles. More broadly, it undermines social cohesion, erodes shared values, and can lay the foundation for violence, setting back the cause of peace, stability, sustainable development and the fulfilment of human rights for all.⁵³

Nevertheless, providing a specific and detailed definition of hate speech is not simple. Susan Benesch highlights the absence of a common definition accepted by international law, assuming that the term *hate speech* has a generic connotation.⁵⁴ Indeed, the difficulty in defining it relies on the distinction between “unpleasant statements”, incitement to act violently against a targeted group and speeches that aim to victimize and dehumanize the object toward whom the speech is addressed. Generally, it can be argued that hate speech can be placed between simple advocacy and incitement, as its consequences can be.⁵⁵

⁵¹ Faloppa, F. (2020). *Odio: manuale di resistenza alla violenza delle parole*. Torino: UTET, p. 23

⁵² United Nations. (September 2020). *United Nations Strategy and Plan of Action on Hate Speech, Detailed Guidance*. United Nations.

⁵³ UN Secretary-General Antonio Guterres. (18 June 2019). *Secretary-General's remarks at the launch of the United Nations Strategy and Plan of Action on Hate Speech*

⁵⁴ Benesch, S. (2011). *Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred*. Vienna: OHCHR, p.3.

⁵⁵ Cohen-Almagor, R. (2011). Fighting Hate and Bigotry on the Internet. *Policy & Internet*, Vol. 3, Iss. 3, Art. 6, 1-26. p.2.

If we investigate hate speech, several definitions come to light. For instance, the Council of Europe Committee of Ministers submitted in 1997 the Recommendation No. R (97) 20 on hate speech, condemning all expressions that “undermine democratic security”⁵⁶:

[...] all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin.⁵⁷

From this definition, we can understand that hate speech is used to target individuals or groups on the basis of their identity or because of specific characteristics they have, in order to hurt or to disrespect the entire category they belong to.⁵⁸ Although the Recommendation recognizes the “damaging impact” of hate speech disseminated through the media, it can be affirmed that this definition is not yet sufficiently precise, since it focuses only on racist hatred.⁵⁹

Three years later, the European Commission against Racism and Intolerance (ECRI) responded with the general policy Recommendation n.6 on combating the dissemination of racist, xenophobic and antisemitic material via the internet. The document fosters the necessity of a specific protocol on discriminatory offences perpetrated online and the implementation of new international measures on cybercrime, opening the door for the Convention on cybercrime (2001) and its Additional Protocol on hate speech (2003).

Subsequently, in 2015 the ECRI general policy Recommendation No. 15 recognizes hate speech as an increasing issue which involves all forms of media, fostering intolerance and discrimination:

[...] hate speech is to be understood [...] as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or

⁵⁶ Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies).

⁵⁷ Ibid.

⁵⁸ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, p. 110.

⁵⁹ For example, women, LGBT+ community, religious or disable individuals. See also Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, pp. 108-118.

group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat [...]”⁶⁰

This document highlights the different forms that the phenomenon may take, claiming that its dissemination “through electronic forms of communication [...] magnify its impact.”⁶¹ Essentially, ECRI underscores that hate speech is increasingly used within the media and the Internet, challenging the purpose of these tools to communicate and to promote freedom of expression.

Nonetheless, these definitions are still incomplete and superficial. The Special Rapporteur La Rue stresses the complexity in finding a common definition precisely because “many forms of hate speech do not meet the level of seriousness set out in article 20, paragraph 2, of the International Covenant.”⁶² Looking at the definitions, the environments in which hate speech may be spread are not mentioned, nor is it defined by the nature of the speech. Indeed, analysing hate speech shall include on one hand, the study of the anatomy of the speech -so the content, the tone, the nature, the target and the consequences-, and on the other, the historical and socio-political context in which it is perpetrated, the forms it should take and the intention of the offender.⁶³

Taking into consideration the definitions provided by scholars, Bayer and Bard define it as “all expressions and manifestations of racism, xenophobia, homophobia.”⁶⁴ However, it is a rough definition which does not take into consideration important elements of the phenomenon. According to this, it needs to be mentioned the one of Cohen-Almagor, who asserts that hate speech is “bias-motivated and hostile” speech against individuals’ “innate characteristics”, with the purpose to discriminate, intimidate, express disapproval on the basis of their race, gender, sexual orientation, language or ethnicity:

⁶⁰ ECRI General Policy Recommendation No. 15 On Combating Hate Speech, CRI (2016)15 Adopted on 8 December 2015, p.3.

⁶¹ ECRI General Policy Recommendation No. 15 op. cit. p. 4.

⁶² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/66/290, 10 August 2011, pp. 9-10.

⁶³ Youth Department Council of Europe (2014) *Starting points for combating hate speech online*. Council of Europe, pp. 9-10.

⁶⁴ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*. p.20

[...] Hate speech is intended to injure, dehumanize, harass, intimidate, debase, degrade, and victimize the targeted groups, and to foment insensitivity and brutality against them.⁶⁵

Lastly, Benesch underscores the necessity for a clarification on the terminology used to describe this type of violation, focusing her attention on three terms: hatred, hate speech and incitement. Firstly, she asserts that *hatred* should be conceived as a state of mind, characterized by a feeling of hate towards certain groups of people.⁶⁶ Essentially, she agrees with the definition provided by ECRI, which explains that “hatred” shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.⁶⁷ Secondly, *hate speech* should be understood as “speech that attacks or disparages a group or a person, for characteristics purportedly typical of the group.”⁶⁸ As such, it can have direct or indirect effects: the direct effect occurs when the speaker’s aim is to offend or humiliate directly his/her victims; while, the indirect effect occurs when the speech is used to convince the audience to act against the victims -inflammatory speech-. If the latter succeeds in making the audience harm a person or o a group, then we can talk about *incitement*. ECRI Recommendation No. 15 defines it as “statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them.”⁶⁹ In other words, Benesh distinguishes the two terms stating that incitement should refer to the “intended or actual effects of hate speech”⁷⁰, while hate speech refers to all forms of hateful or offensive speech.⁷¹ Moreover, incitement refers also to “speech intended to motivate a

⁶⁵ Cohen-Almagor, R. (2011). Fighting Hate and Bigotry on the Internet. *Policy & Internet, Vol. 3, Iss. 3, Art. 6*, 1-26, pp. 1-2.

⁶⁶ Human Rights Council, Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, p. 12.

⁶⁷ ECRI General Policy Recommendation No. 15 On Combating Hate Speech, CRI (2016)15 Adopted on 8 December 2015, p. 15.

⁶⁸ See *supra* note, p.4.

⁶⁹ ECRI General Policy Recommendation No. 15 op. cit. p. 15.

⁷⁰ Benesch, S. (2011). *Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred*. Vienna: OHCHR.

⁷¹ Following the reasoning of F. Faloppa, several scholars are inclined to change the word *hate* with other exhaustive terms, such as extreme (Hare I. and Weinstein J), harmful (McGowan M.K.) or dangerous (Susan Benesch). See Faloppa F. *#Odio: manuale di resistenza alla violenza delle parole*. Torino, UTET 2020, p. 27.

Moreover, Ghanea claims that hateful speeches may be divided into five categories: discriminatory speech, hate s., incitement to hatred, incitement to terrorism and incitement to genocide. See, Ghanea, N. (2013). Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination. *Human Rights Quarterly, Vol. 35, No. 4*, pp. 940-941.

third party to harm a victim group” because it “is likely to harm the victim group directly as well, as long as the victim group is exposed to the speech.”⁷²

1.2.2 The online dimension of hate speech: analysing the different typologies of the phenomenon.

It can be assumed that the phenomenon of hate speech is embedded in our society, involving offline and online environments. If we place the accent on online hate speech, we may argue that it has become increasingly present and even more complicated because of the introduction of ICT, which has turned hate speech faster, cruel and able to reach a large number of users. This is because on the Internet people may experience different effects, bringing them to express hateful messages without realizing the gravity of their speeches. Firstly, there is the *mere exposure*, which refers to the consequences that exposition on social networks could have on people. Indeed, in cyberspace people are continuously bombarded by information and inputs which influence users to incorporate ideas, concepts, news and stereotypes just “scrolling” their Facebook home.⁷³ Secondly, the *halo effect* and consequently the *confirmation bias*, reflects the perception that people have of individuals, objects or events “at first sight”: the more people believe in a prejudice, the more people are incentivized to search for information that confirms it.⁷⁴ Finally, there is the *devil effect*, which refers to the major resistance of negative messages instead of positive one: people more easily remember the negative events and judge them with others.⁷⁵

⁷² Benesch, S. (2011). *Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred*. Vienna: OHCHR, p.4.

⁷³ Bornstein, R. F., & Craver-Lemley, C. (2016). Mere exposure effect. In R. Pohl, *Cognitive Illusions: Intriguing Phenomena in Judgement, Thinking and Memory* (pp. 215-234). Psychology Press.

⁷⁴ Faloppa F. *#Odio: manuale di resistenza alla violenza delle parole*. Torino, UTET 2020, p. 127. Moreover, under the linguistic level, it is interesting the *priming effect*, so the association of a word to a prejudice. In Italy, for example, when we say “barconi” or “sbarchi” we immediately think to immigrants; or when we say “roulotte” we think to Roma people. This effect is relevant in the analysis of hate speech due to the fact that people are surrounded by constant references to prejudices and stereotypes.

⁷⁵ Faloppa F. *#Odio: manuale di resistenza alla violenza delle parole*. Torino, UTET 2020, p. 129.

Cohen-Amalgor believes that hate on the web started to be spread in 1995, when Don Black founded his website, where extremist racist and antisemitic content was posted.⁷⁶

The Internet is that opportunity we've been looking for [...] We never were able to reach the audience that we can now so easily and inexpensively.⁷⁷

Especially, in the past five years political populism, migration, terroristic attacks by ISIS and the COVID-19 pandemic have been the causes of an increasing concern about future and an increasing disinformation,⁷⁸ which brought both politicians and individuals to use hate speech against targeted groups without inhibition.⁷⁹ Undoubtedly, the major consequence that hate speech could have is the destruction of identity and dignity of the victims: "hate speech can cause subordination but can also *constitute* subordination"⁸⁰ of the targeted groups or individuals. Fundamentally, the sense of unsafety that people feel, brings them to find a scapegoat for society problems, usually, minorities or vulnerable people.⁸¹ This is particularly true in social networks, where most of the time users are free to express their extreme "opinion" without being prosecuted. Haters online gain attention

⁷⁶ Cohen-Almagor, R. (2011). Fighting Hate and Bigotry on the Internet. *Policy & Internet*, Vol. 3, Iss. 3, Art. 6, 1-26. p. 4.

⁷⁷ Werts, D. 2000. "How the Web Spawns Hate and Violence." *Newsday*, October 23, 2000. In Cohen-Almagor, R., "Fighting Hate and Bigotry on the Internet".

⁷⁸ The covid-19 pandemic offered several opportunities to negationists and haters to express their conspiracy theories against the virus. Especially regarding vaccines, the so-called *no-vax* are uninterruptedly promoting a message of anger and disapproval against the cure through manifestations in real life and posts on social networks. Clearly, it would not be a problem if the messages were not aggressive or violent. Regarding the case of Claudia Alivernini, the first nurse to be vaccinated in Italy, haters insulted, threatened (i.e., "*vediamo quando muori*") and created fake accounts stealing her identity, so much that she decided to isolate from social networks. This is a clear example of hate speech whose purpose was to humiliate, subordinate and destroy the reputation of the victim. (https://roma.repubblica.it/cronaca/2020/12/29/news/coronavirus_insulti_sui_social ALLA PRIMA VACCINATA L'INFERMIERA CHIUDE I SUOI PROFILI-280279420/ Accessed 29/12/20)

⁷⁹ Bayer, J. & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, pp. 20-21.

⁸⁰ Bayer, J. & Bard, P. op. cit. p. 56.

⁸¹ Usually, populist politicians see migrants as people who want to steal jobs or to impose their culture. For example, an Italian politician has affirmed more than once that ports must be closed to block the entrance of illegal immigrants in Italy, this because they are considered dangerous for the community. In his social networks he posts "*I nostri servizi segreti lanciano l'allarme invasione: almeno 20mila immigrati pronti a partire per l'Italia. Un ulteriore problema che si aggiunge alla sanatoria nel caos con l'ombra del racket pronto a comprare e offrire documenti, i porti spalancati alle Ong, l'aumento delle spese per l'accoglienza con numerose questure che segnalano irregolarità e anomalie.*

[...] Questo governo mette in pericolo l'Italia." (<https://www.facebook.com/salviniofficial/posts/10157790827828155> Accessed 28-12-20) or again "*Grazie a Conte e Lamorgese sbarchi triplicati in un anno, complimenti! Per gli italiani il drone, per i clandestini libero barcone.*" (<https://twitter.com/matteosalvinimi/status/1335523532030287874> accessed 28-12-20)

easily and populist politicians may promote hate messages in order to create consensus among the electors. Therefore, hate speech should be considered not only a rising social problem, but also a symptom of a society that is not well-managed.⁸² Clearly, this is a valid claim also for the offline environment, although it remains particularly evident in cyberspace.

Deepening the issue of online hate speech, we acknowledge various forms of hate speech, reflecting the categories of people it wants to hit. Looking at the analysis of Amnesty International of 2019, it can be affirmed that online hate speech is most aggressive against Muslim (19,5%), migrants (15,5%) and women (7,7%).⁸³ However, the percentages of online offensive comments increased with the COVID-19 pandemic, making hate speech even more hostile, especially against Muslim (46%) and women (31.3%).⁸⁴ Accordingly, Chetty and Alathur divided the phenomenon into four main groups: sexist hate speech, religious hate speech, racist hate speech and hate speech based on disability.⁸⁵ In addition to it, it is useful to take a closer look at the category of political hate speech, since it is exponentially increasing nowadays.⁸⁶

Firstly, we want to concentrate our attention on sexist hate speech, which can be defined as:

[...]any supposition, belief, assertion, gesture or act that is aimed at expressing contempt towards a person, based on her or his sex or gender, or to consider that person as inferior or essentially reduced to her or his sexual dimension.⁸⁷

Generally, both sexes may become the object of gender-based hate speech. However, it needs to be emphasized that women are the foremost victims of sexist and violent action based on gender.⁸⁸ Young women are especially the most subject to sexist hate speech

⁸² Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p. 21.

⁸³ Amnesty International Italia, Barometro dell'odio. Elezioni europee 2019, 2019.

⁸⁴ Amnesty International Italia, Barometro dell'odio. Intolleranza pandemica, 2021.

⁸⁵ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, p. 112.

⁸⁶ Clearly, these are simplified categories that may help analysing the phenomenon of hate speech. Nevertheless, hate speech cases are more complex, and most of the time these categories are interconnected with each other, creating the so-called "hybrid hate speech" (Chetty, N., Alathur, S, 2018, pp. 115-116)

⁸⁷ Council of Europe. (April 2018). *Gender equality strategy 2018-2023*. Council of Europe. Retrieved from <https://rm.coe.int/strategy-en-2018-2023/16807b58eb>

⁸⁸ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, pp. 115-116.

perpetrated online.⁸⁹ Accordingly, Amnesty International argues that 1 comment out of 3 against a woman is sexist or misogynist (33%).⁹⁰ Taking into account the European context, we can argue that illegal sexist speech counts for 3.1% on internet platforms.⁹¹ Social networks, more than cyberspace in general, are one of the primary places in which women, and more precisely black women, are more likely to be at the centre of hate phenomena.⁹² According to Rita K. Whillock, the aim of hate speech should be the following:

Rather than seeking to win adherence through superior reasoning, hate speech seeks to move an audience by creating a symbolic code for violence. Its goals are to inflame the emotions of followers, denigrate the designated out-class, inflict permanent and irreparable harm to the opposition, and ultimately conquer.⁹³

Precisely, the aim of sexist hate speech is to humiliate and objectify the victim, discriminating her on the basis of her sex or gender identity.⁹⁴ In addition to this assumption, Donna Lillian highlights that the purpose of hate speech is not eliminating a certain category of people, but deeply harming them. Following her reasoning, it needs to be stressed:

“that irreparable harm of other kinds can be wrought by sexist and anti-woman hate discourses and that these forms of harm should be recognized and challenged.”⁹⁵

Similarly, gender-based hate speech may include speeches against LGBT+ community. This type of hate speech is widespread both offline and online and it is explicitly classified as hate speech or hate crime in aggravating circumstances.⁹⁶ Especially, cyberspace is increasingly characterised by the presence of homophobic people and politicians,

⁸⁹ Council of Europe. (April 2018). *Gender equality strategy 2018-2023*. Council of Europe. Retrieved from <https://rm.coe.int/strategy-en-2018-2023/16807b58eb>

⁹⁰ Amnesty International Italia, *Barometro dell'odio. Sessismo da tastiera*, 2020.

⁹¹ European Union, FEMM committee, *Cyber violence and hate speech online against women*. September 2018. p. 40.

⁹² Barlow, C., & Awan, I. (2016). You need to be sorted out with a knife: The attempted online silencing of women and people of Muslim faith within academia. *Social networks + Society*, pp.2-4.

⁹³ Whillock, R., & Slayden, D. (1995). *Slayden Hate Speech*. London: SAGE, p.32.

⁹⁴ Council of Europe. (April 2018). *Gender equality strategy 2018-2023*. Council of Europe. Retrieved from <https://rm.coe.int/strategy-en-2018-2023/16807b58eb>

⁹⁵ Lillian, D. (2007). A thorn by any other name: sexist discourse as hate speech. *Discourse and Society*, Vol. 18, No. 6, p. 732.

⁹⁶ Commissione Jo Cox. (6 luglio 2017). *Relazione finale sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia*. Roma: Camera dei deputati XVII LEGISLATURA, p.68.

promoting hostile messages against the LGBT+ community.⁹⁷ For example, in social networks racist and homophobic manifestations have the same seriousness, and their impact is much higher than sexist hate speech against women.⁹⁸ Homosexual people are seen by society as “contradictory to nature, perverted, sinful, morally abominable” individuals.⁹⁹ Usually, they are addressed as paedophiles, diseased people, who threaten the safety of the community and the safety of religious symbols. Hate speech against them is cruel, it destroys their reputation, humiliating and isolating them from the community.¹⁰⁰

Secondly, it needs to be mentioned the religious hate speech, which is addressed against religions -in particular the Muslim religion- and religious people. In this case, hate speech usually aims to harm the entire religious community and not the single individual, taking religious symbols and stereotypes as the main topic of the speech. Especially after the first terrorist attacks, Arab people¹⁰¹ have been depicted as violent, dangerous and extremist and hate speech has been the stepping stone for hate crimes, such as vandalic acts in mosques or violence against Muslim women.¹⁰² They are “demonized and vilified” on the internet because haters see them as a threat for their safeness or because they believe that Muslim will conquer the Occident to impose their culture and religion.¹⁰³ Generally, this type of hate speech is made by common users who focus their speech on symbols that distinguish religious people. In the case of Muslim, for example, the clothing -especially the hijab- is seen as a peculiar characteristic and an element that triggers the stereotype and the prejudice thought against them. A concrete example of religious hate speech may be found in *Norwood v. the United Kingdom*.¹⁰⁴ The applicant required the

⁹⁷ In the past five years in Italy there has been protests against LGBT+ community, where the conservative parties declared their indignation for civil unions and above all, adoption for homosexual couples. They created the so-called “family day”, and they opposed the legislative proposal against homotransphobia, using their social networks to promote their ideology, claiming that this law discriminates heterosexual individuals, and that it compromises freedom of others.

⁹⁸ Commissione Jo Cox sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia. Relazione finale. Camera dei deputati XVII LEGISLATURA, Roma, 6 luglio 2017, pp- 71-72.

⁹⁹ Cohen-Almagor, R. (2011). Fighting Hate and Bigotry on the Internet. *Policy & Internet*, Vol. 3, Iss. 3, Art. 6, p. 5.

¹⁰⁰ Ibid.

¹⁰¹ We are aware of the fact that not all Arabs are Muslim, however the general idea of them is that all Arabs are Muslim, for this reason we used this term.

¹⁰² Awan, I., & Zempi, I. (2016). The affinity between online and offline anti-Muslim hate crime: Dynamics and impacts. *Aggression and Violent Behavior*, Vol. 27, p. 2.

¹⁰³ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, p.113.

¹⁰⁴ ECtHR, Decision on admissibility, 16 November 2004, *Norwood v. the United Kingdom*, application no. 23131/03.

intervention of the Court after showing a racist and extreme picture inviting Muslim to leave Britain (“Islam out of Britain – Protect the British People”).¹⁰⁵ He applied to the Court stressing the right of freedom of expression. The Court responded referring to article 17 of the Convention declaring the inadmissibility of the case. In conclusion, it argued that:

[...] such a general, vehement attack against a religious group, implying the group as a whole was guilty of a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.¹⁰⁶

Similarly, in *Smajić v. Bosnia and Herzegovina*¹⁰⁷ the Court declared the inadmissibility of the case after the applicant required its intervention. In this case, after the applicant published some hateful posts on a website, the domestic court convicted him to one year of imprisonment for “inciting national, racial and religious hatred, discord or intolerance online.”¹⁰⁸ In the application to the Court, the applicant alleged that there was a violation of article 10 of the Convention (freedom of expression). Nevertheless, the Court considered the content of the posts as an “highly inappropriate form of dialogue advocating a strategy of behaviour towards one of the ethnic groups”, declaring the domestic penalty “proportionate and justified.”¹⁰⁹

Continuing with the analysis, we may easily deduce that religious hate speech is strictly related to racist hate speech. Therefore, it is fundamental to deepen the issue of racist hate speech, which can be described as one of the more classic forms of hate.¹¹⁰ Racism is a widespread and complex phenomenon and providing a general definition of it is not immediate. Essed described racism as

¹⁰⁵ Ibid.

¹⁰⁶ Global Freedom of Expression. (n.d.). *Norwood v. United Kingdom*. *Columbia University*. Retrieved March 19, 2021, from <https://globalfreedomofexpression.columbia.edu/cases/norwood-v-uk/>

¹⁰⁷ ECtHR, Decision on admissibility, 16 January 2018, *Smajić v. Bosnia and Herzegovina*, application no.48657/16.

¹⁰⁸ Global Freedom of Expression, *Smajić v. Bosnia and Herzegovina*, *Columbia University*. Retrieved March 19, 2021, from: <https://globalfreedomofexpression.columbia.edu/cases/smajic-v-bosnia-herzegovina/>

¹⁰⁹ Ibid.

¹¹⁰ Commissione Jo Cox. (6 luglio 2017). *Relazione finale sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia*. Roma: Camera dei deputati XVII LEGISLATURA, p.75.

[...] ideology, structure and process in which inequalities inherent in the wider social structure are related, in a deterministic way, to biological and cultural factors attributed to those who are seen as a different 'race' or 'ethnic group';¹¹¹

Wodak and Reisigl, instead, prefer to associate racism to an action or practice. In fact, they assert that “racism is both an ideology of a syncretic kind and a discriminatory social practice that could be institutionalized and backed by the hegemonic social groups”.¹¹² Namely, the racist ideology legitimizes discrimination because it believes in the hierarchization of races.¹¹³ Taking into account racist hate speech, we may assume that it reflects the consequences of an important and dangerous phenomenon. Here, haters perceive people of different ethnicity or race as a danger that might jeopardize the social equilibrium. In particular, social networks have a key role in the spreading of racist messages by their users, because they give the possibility to share posts and content. Online platforms are built as a tool to communicate and to spread information. However, this may lead haters to promote racist beliefs, which are allowed to circulate freely on the net, making the control and the removal of them more and more difficult.¹¹⁴ For example, at the beginning of the Covid-19 pandemic, social networks have been inundated of racist comments and posts against Chinese people because, in the social belief, they were the principal cause of the virus spreading: the pandemic was their responsibility and Chinese people were automatically depicted as dangerous individuals. This had an important impact on their life because it provoked economic consequences: people, in fact, refused to buy Chinese products or to go to Chinese restaurants, blocking the economic development of China. Moreover, according to the Jo Cox Commission, the increasing intolerance towards different ethnicities can be attributed once again to the refugees’ crisis and the ISIS terrorist attacks.¹¹⁵

Moving ahead with our analysis, with the term hate speech on disability we are referring to hateful speeches addressed to people with mental or physical disabilities.

¹¹¹ Essed, P. (1991). *Understanding Everyday Racism: An Interdisciplinary Theory*. London: Sage, p. 43.

¹¹² Wodak, R., & Reisigl, M. (1999). Discourse and racism: European perspectives. *Annual Review of Anthropology*, Vol. 28, No. 1, pp. 179-181.

¹¹³ Commissione Jo Cox. (6 luglio 2017). *Relazione finale sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia*. Roma: Camera dei deputati XVII LEGISLATURA, p.76.

¹¹⁴ Even if there is a mechanism on social networks that eliminates hate and violent messages - usually platforms use “bots”-, the high number of posts make this work harder.

¹¹⁵ See *supra* note.

Disability is considered a social category on a par of race and gender, and it reflects the important obstacle that health, mental or physical problems may have on individuals. The condition of disability is *per se* challenging and limiting, moreover, disabled people are seen as a burden to society. Hate speech hits the physical and mental weaknesses of people, humiliating them and making them feel misplaced and not accepted by the community. Therefore, being disabled is subjected to a series of judgements that can cause isolation, fear and mental disorder. The complexity of this type of hate speech is that everyone may become disabled. Moreover, we can affirm that the more categories of people intersect with each other, the more hate speech will be serious: for example, a disabled black woman will be more vulnerable than a disabled white man¹¹⁶. However, even though people with disabilities are considered more vulnerable to violence in general and to hate speech too, the reporting mechanisms are not efficient as they are with violence or hate against gender or race.¹¹⁷

Finally, the last ground of discrimination we are going to stress is the political hate speech. Notably populist politicians, in the last decade exploited the possibility to connect directly with their electors and to express themselves without the press filter. Their rhetoric sees two factions against each other: the ingroup -to protect and defend- and the outgroup -the main cause of society problems-.¹¹⁸ The analysis of UNICRI stresses the fact that politicians and the Internet are vehicles for the racist hate speech, fostering intolerance and violence.¹¹⁹ Accordingly, social networks -particularly, Twitter and Facebook- are immediate and easy-to-understand tools of information and messages; on the other hand, politicians *per se* have an institutional role, thus their claims may influence the credibility of the spread message.¹²⁰ Essentially, the more politicians use

¹¹⁶ This is because of intersectionality.

¹¹⁷ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, p.115.

¹¹⁸ In Italy for example conservative parties launched the hashtag #primagliitaliani promoting the ideology of "us against them". Matteo Salvini for example affirmed: *Prima di regolarizzare centinaia di migliaia di immigrati irregolari, il governo dovrebbe pensare and aiutare i milioni di italiani disoccupati a trovare un lavoro pagato legalmente, senza puntare il dito contro i nostri agricoltori, pescatori e allevatori, che vanno ringraziati e tutelati!* (<https://www.facebook.com/salviniofficial/posts/10157715381883155> accessed 29-12-20); in Hungary it is forbidden to show refugee children on television to prevent people to sympathize with them. (see Bayer, J, Bard, P. p. 58)

¹¹⁹ Found in Commissione Jo Cox. (6 luglio 2017). *Relazione finale sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia*. Roma: Camera dei deputati XVII LEGISLATURA, p.78

¹²⁰ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*. p. 56

hateful adjectives in their speeches, or share racist, homophobic or disrespectful messages, the more their electors will be involved in using the same linguistic register: “everything can be published and accessed on interactive online platforms.”¹²¹ Moreover, political hate speech may “have the potential of demolishing moral barriers and of giving a free ticket to racial violence.”¹²²

Although this division may simplify the analysis of hate speech, this categorization presents some weaknesses. If on one hand these typologies of hate speech make the phenomenon more recognizable, on the other, there could be some difficulties in classifying speeches when there is no incitement to discriminate. In this case, the intention and the content of the speech have a paramount role, since they are fundamental elements to declare its hateful nature and to classify it as hate speech.¹²³ In other words, to analyse if a speech is hate speech we have to deconstruct it into three main parts: the first is the content which refers to the use of symbols -i.e. swastika- and offensive phrases for society, especially for minorities; the second element is the intent of the speaker to discriminate, to raise a feeling of hate towards a certain category or an individual, or to promote violence against them; and the last one is the harm, which refers to the consequences that hate speech has on its victims.¹²⁴ If one or more of these elements is present in the speech, the latter can be considered hate speech.¹²⁵

Nevertheless, the issue of hate speech is still controversial for several reasons. As we have underscored in the first chapter and at the beginning of this paragraph, the driving force of hate speech is *hate*, which is a complex emotion that may flow into violence and crime. Secondly, hate speech may be the forerunner of serious hate crimes, which once again are criminal acts based on prejudice. And finally, it is strictly interconnected with discrimination. Basically, hate speech may be conceived as an extreme form of intolerance, which may lead to criminal acts, but also the symbol of a discriminatory

¹²¹ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union.*, pp.56-57.

¹²² Bayer, J. & Bard, P. op. cit. p. 58.

¹²³ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal, Vol. 40*, p.110.

¹²⁴ CLIP report, *Online Harassment, Defamation, and Hateful Speech: A Primer of the Legal Landscape*, 2014, p. 16-17.

¹²⁵ CLIP report, op. cit. p. 16.

society.¹²⁶ These elements added together with its proper features, makes hate speech difficult to be recognized and consequently punished by law.¹²⁷ Even though serious cases of hate speech are included within hate crimes and consequently are criminalised,¹²⁸ in the second chapter we will realise the hurdles that international law has to cope with hate speech prohibition, highlighting the weaknesses and the strengths of the legal framework and emphasizing the challenge of national legislation in removing illegal content from the Internet.

1.2.3 A reflection on the concept of hate.

In the light of the analysis that we carried out in the previous paragraphs it is important to reflect on the concept of hate within the context of online hate speech.

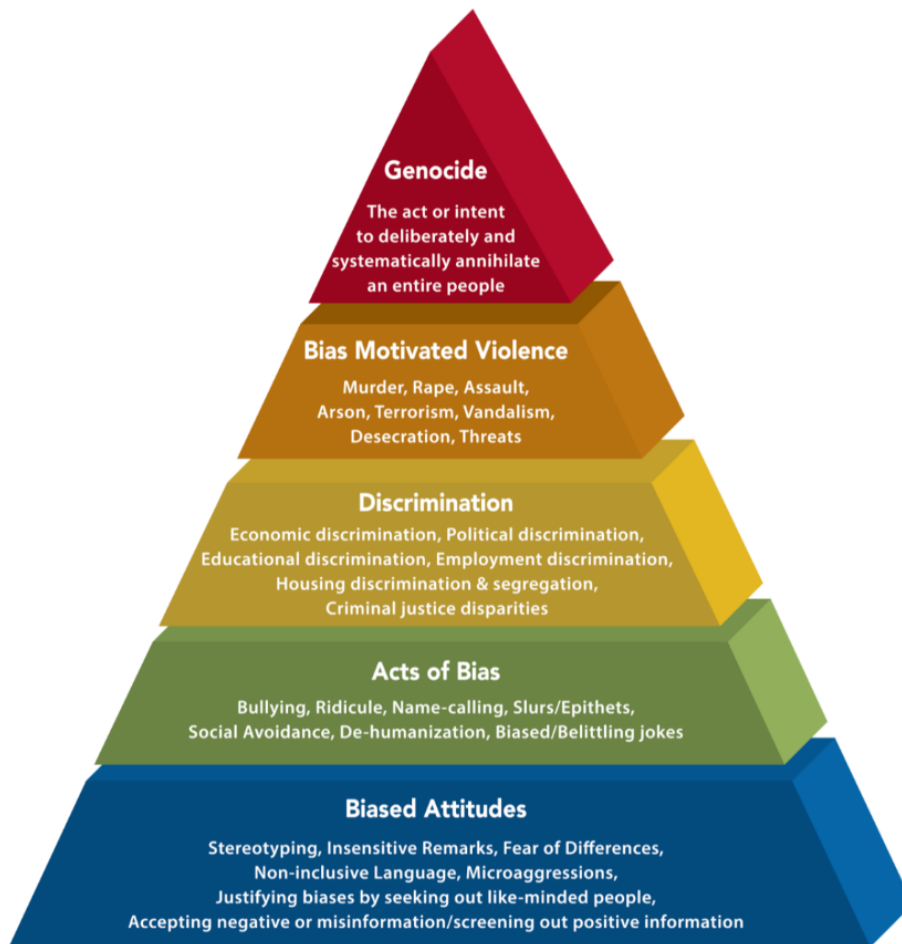
It can be affirmed that *hate* has different stages of seriousness, which permit to split it into a hierarchical pyramid. Among the pyramids of hate, Faloppa embraces the accuracy of the *Anti- Defamation League* “Pyramid of Hatred” which reflects a detailed and complete image of the offences related to hate. Although the Pyramid does not explicitly include the phenomenon of hate speech, Faloppa emphasizes the inclusion of non-inclusive language as a crucial parameter in hate phenomena.¹²⁹

¹²⁶ Commissione Jo Cox. (6 luglio 2017). *Relazione finale sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia*. Roma: Camera dei deputati XVII LEGISLATURA, p. 10.

¹²⁷ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p. 55.

¹²⁸ Bayer, J. & Bard, P., op. cit. p. 22.

¹²⁹ Faloppa, F. (2020). *Odio: manuale di resistenza alla violenza delle parole*. Torino: UTET, pp. 30-33.



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As illustrated, the Pyramid distributes the phenomena of hate into different levels, according to their intensity: the higher we go, the higher will be the gravity of acts. Therefore, the Pyramid shows a real escalation of violence, demonstrating how low intensity phenomena, if not adequately countered, may degenerate in more serious phenomena, up to hate crimes and genocide.¹³¹

Similarly, the UN Strategy and Plan of Action on Hate Speech defines three levels of hate speech gravity. Following its reasoning, at the *bottom level* we may find all forms that shall not be criminalized by international law, such as offensive expressions, “the condoning or denial of historical events, including crimes of genocide or crimes against

¹³⁰ See Anti-Defamation League “Pyramid of Hate”. Available at <https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf>

¹³¹ Combattere tutte le forme di discriminazione per evitare il rischio di degenerazioni, 23 Marzo 2021. Website: <https://www.interno.gov.it/it/notizie/combattere-tutte-forme-discriminazione-evitare-rischio-degenerazioni> (accessed 25-04-21)

humanity”,¹³² blasphemy and disinformation. Subsequently, we may encounter the *intermediate level* which includes all forms that *may* be prohibited by international law - such as threats to violence-; and finally, we arrive at the *top level*, which refers to the several forms of hate speech -such as genocide incitement- that must be prohibited by international criminal law.¹³³

If we consider the online dimension of the phenomenon, we may highlight that technologies and anonymity permit people to feel a sense of impunity and to be free to act without limits.¹³⁴ One of the difficulties in reducing the phenomenon online is that online platforms allow vicious and hateful language because their terms of condition are not sufficient to prevent this type of speech. Faloppa asserts that nowadays the internet - and more specifically social networks- are pervaded by verbal aggressiveness. Users address their speech object without conceiving him or she as a person, but as a “generic narrative element”. He affirms that once online, users feel legitimized to aggressively express whatever, forgetting that the racist or sexist messages they write are against real people, and that this is becoming ordinary, spontaneous and unconscious.¹³⁵ He is firmly convinced that social networks have amplified and spread the phenomenon of hate speech. Indeed, online hate speech gives the possibility to easily disseminate messages of hatred, which can navigate the internet remaining visible to other users and present on platforms for years. For instance, platforms such as Twitter or Facebook, give the possibility to share content not only within the platforms but also out of it. In doing so, hate messages continuously navigate the platforms, even if the original content has been eliminated. Furthermore, online hate speech has also enlarged the way through which the message is expressed: if offline hate speech may be just written or oral, in cyberspace it can be expressed also through images -the so-called meme- and new written forms, such as hashtags and emoji.¹³⁶ These are easy-to-understand ways to communicate a certain thing, immediate and above all, they are accessible to everyone. As we have stressed several times so far, online hate speech is a more explicit, devious and risky evolution of

¹³² United Nations. (September 2020). *United Nations Strategy and Plan of Action on Hate Speech, Detailed Guidance*. United Nations. pp. 12-15.

¹³³ United Nations. (September 2020). *United Nations Strategy and Plan of Action on Hate Speech, Detailed Guidance*. United Nations. pp. 12-15.

¹³⁴ Barlow, C., & Awan, I. (2016). You need to be sorted out with a knife: The attempted online silencing of women and people of Muslim faith within academia. *Social networks + Society*, p.2.

¹³⁵ Faloppa, F. (2020). *Odio: manuale di resistenza alla violenza delle parole*. Torino: UTET, pp. 123-124

¹³⁶ Faloppa, F. (2020). *Odio: manuale di resistenza alla violenza delle parole*. Torino: UTET, p. 125.

the original phenomenon: cyberspace provides basic and uncomplicated instruments and tools which allow people to send violent messages, share hateful images and threaten people on the web, without being aware of the consequences they might have.

a. Hate as an aggravating circumstance: the hate crime

Recalling the Pyramid of Hatred, the analysis will be concluded with a description of the maximum expression of hate: hate crimes. *Hate* is associated with acts of abuse, violence or hostility against the social identity of a person. In these cases, the offender usually acts or expresses prejudice and hatred against certain people precisely because they have specific characteristics, such as a specific race, sexual orientation, religion, physical or mental disability.¹³⁷ When hate is combined with a crime, the criminal act can be considered a hate crime. Focusing on the definition, the OSCE recognizes hate crimes as:

[...] criminal acts motivated by bias or prejudice towards particular groups of people. [...] First, the act must constitute an offence under criminal law; second, the act must have been motivated by bias.¹³⁸

In other words, any criminal act perpetrated with a biased motive can be included under hate crime, no matter the gravity of the offence.¹³⁹

It needs to be noted that the classification of a crime as a hate crime calls for specific factors to be considered. Particularly, we want to focus our attention on the context, the offender, the victim and the impact of hate crime.

Firstly, it is crucial to consider the importance of the context in which hate crimes are perpetrated. Indeed, hate crime is a dynamic social issue in which the crime itself is committed in a precise social and cultural context and in a social structure of power. Thus,

¹³⁷ Ibid.

¹³⁸ OSCE/ODIHR: Office for Democratic Institutions and Human Rights. <https://hatecrime.osce.org/what-hate-crime>

¹³⁹ Hamad, R. (June 2017). *Hate Crime: Causes, Motivations and Effective Interventions for Criminal Justice Social Work*. City of Edinburgh Council, p. 16.

society appears to be a community in which advantages and rights are attributed just to a portion of it, and violent acts are made against some social or biological groups.¹⁴⁰

Therefore, we may affirm that the offender's violent act is justified by a sense of insecurity. He or she feels threatened under several spheres of life, such as economic stability or social safety.¹⁴¹ Additionally, the offender may be moved by other factors in addition to hate, such as jealousy, revenge or the desire for approval.¹⁴² For these reasons, the offender decides to act against the societal group he or she believes is the most dangerous. The hate crime is an instrument to declare how much the victim and his/her targeted group are unwelcome and not accepted in the society they live in.

Usually, the victim belongs to a targeted group against which the offender acts. However, the victim may be just the representative of a category hated by the offender. In this case, an individual's innate characteristics are decisive factors that trigger hate against the victim.¹⁴³ Moreover, the offender may commit the crime according to the perception he or she has towards a specific characteristic.¹⁴⁴ Here, the perpetrator could misunderstand the meaning of symbols or characteristics of an individual, providing a wrong interpretation on them. As a result, the act would affect not only the victim, but also the entire community erroneously linked with the victim.¹⁴⁵ Also, the author of hate crime could act against activists or individuals associated with a specific social category, precisely because the activist defends the rights of a minority.

Lastly, one of the characteristics by which hate crimes can reasonably differentiate from ordinary crimes is the severe impact that hate crime has on victims, their community and the entire society. The hatred of the offender affects immutable characteristics or typical behaviour of both the victim -the colour of skin, the genre or the language- and the community where he or she lives. If on one hand, the victim may fear for his/her own safety, at social level, the act provokes a feeling of inadequacy and powerlessness within

¹⁴⁰ APAV. (2018). *Manuale HATE NO MORE, supporto delle vittime di crimini d'odio*. APAV, pp.9-10.

¹⁴¹ APAV, op. cit. p.10

¹⁴² Ibid.

¹⁴³ APAV, op. cit. p.11.

¹⁴⁴ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p.12.

¹⁴⁵ For example, a different way of dressing that does not "respect" the genre standards -a man who decides to dress with female clothing- may be perceived as a typical characteristic of the LGBTIQ community; otherwise, the national origin could be associated with a religion -the community of Sikh is perceived as muslim even if it is no-.

the targeted group.¹⁴⁶ As a consequence, the social equilibrium may be jeopardized: criminal acts might provoke counter-violence, retaliation and further tensions, ultimately entering in a vicious circle of violence.¹⁴⁷ Accordingly, hate crime has a strong collective impact on several societal groups, turning out a common sense of uncertainty. As we have stressed so far, violent acts may affect the integrity of the victim, both physically and psychologically, but also the stability of the community.¹⁴⁸

To conclude, it is important to recognize that hate constitutes an aggravating circumstance. Indeed, the main feature of hate crime is that the offender may be pushed to act against his or her victim just by the feeling of hatred against the entire societal group the victim belongs to.¹⁴⁹ According to this, in the third chapter we will deepen articles 604-bis c.p. and 604-ter c.p. of the Italian criminal Code, which condemn crimes motivated by hatred and discrimination based on race, religion and ethnicity, and establish these factors as aggravating circumstances.¹⁵⁰

1.3 Non-consensual dissemination of intimate private photos: a study on the phenomenon.

So far, we have provided a general overview of the issue of cyber violence, highlighting the significant impact it can have on women and girls. Focusing our attention on the so-called “revenge porn”, it needs to highlight the contribution made by the Special Rapporteur Šimonović. Indeed, the Special Rapporteur emphasizes the importance of the definition of the phenomenon, which she outlines as

¹⁴⁶ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p. 23.

¹⁴⁷ Ibid.

¹⁴⁸ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, pp.11-12.

¹⁴⁹ Ibid.

¹⁵⁰ Articolo 604 ter Codice Penale (R.D. 19 ottobre 1930, n. 1398) [Aggiornato al 28/02/2021] Circo stanza aggravante. Website: <https://www.brocardi.it/codice-penale/libro-secondo/titolo-xii/capo-iii/sezione-i-bis/art604ter.html> (accessed 21-04-21) Further information will be provided in chapter 3.

[...] non-consensual online dissemination of intimate images, obtained with or without consent, with the purpose of shaming, stigmatizing or harming the victim.¹⁵¹

Moreover, she illustrates how this type of violence shall be considered not only a dangerous form of violence against women, since it jeopardizes the safety and the mental health of women, but also a violation of human rights, since it disproportionately affects women (90%).¹⁵² According to this, Harry and Powell assert that TFSV, to which non-consensual dissemination of intimate private photos belongs, should be considered a gendered phenomenon for three reasons. Firstly, “women and girls are the main targets of online digital sexualized violence”¹⁵³, meaning that women are more likely to send intimate photos because of their partners’ pressure or coercion; secondly, the consequences of the abuse are gendered since the sphere of sexuality is stereotyped for women; and finally, the patriarchal-based society defines the roles associated with both sexes.¹⁵⁴

In the following paragraphs, we will firstly deepen the terminology linked to this type of online violence, showing the reasons why the term “revenge porn” is not considered the right term to be used; subsequently we will provide a general overview on the phenomenon, highlighting the main features of it and offering a reflection on a few examples.

1.3.1 Revenge porn, non-consensual pornography or image-based sexual abuse? Investigating the terminology.

At the beginning of this chapter, we illustrated how naming the online dimension of violence has been challenging, since it is an evolving phenomenon. Similarly, this

¹⁵¹ See Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 10.

¹⁵² In addition to it, the Special Rapporteur claims that abusers “may threaten the disclosure of private information online to maintain power and control over their victims to prevent them from leaving the relationship and/or from reporting abuse and pursuing their legal rights in court.” See Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 9.

¹⁵³ Henry, N., & Powell, A. (2016). Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law. *Social & Legal Studies*, Vol. 25(4), 397–418.

¹⁵⁴ Ibid.

happened also with non-consensual dissemination of intimate private photos, which counts several denominations. Among them, we selected four main terms that need to be explained: non-consensual pornography, TSFV, revenge porn and imaged-based sexual abuse.¹⁵⁵

By definition, non-consensual pornography is “the act of uploading and diffusing online nude or semi-nude images and videos of a person without their consent.” Moreover, the term includes the acquisition of images with or without the consent of the victim, such as images or videos taken by hidden cameras.¹⁵⁶ This denomination has been highly criticized for the inclusion of the word “pornography”, since it leads back to pornographic content created for public consumption. Contrary, Maddocks assumes that the term “non-consensual pornography” incorporates not only the dissemination of intimate private images but also its distribution within porn websites, which “normalise revenge porn through the creation of communities of abusers.”¹⁵⁷ Nevertheless, many experts rejected this denomination.¹⁵⁸

Technology facilitated sexual violence (TFSV) is another term to describe non-consensual dissemination of intimate private photos. It incorporates:

[...] a range of criminal, civil, or otherwise harmful sexually aggressive and harassing behaviours that are perpetrated with the aid or use of communication technologies.¹⁵⁹

It can be affirmed that this term is strictly interconnected with gender and sexual harassment. Indeed, the Special Rapporteur Šimonović uses it in her report A/HRC/38/47 on violence against women.¹⁶⁰ Nevertheless, this denomination shifts the responsibility of the offence on technology, which is a wrong consideration. Additionally, the terms

¹⁵⁵ Kirchengast & Crofts (2019) The legal and policy contexts of ‘revenge porn’ criminalisation: the need for multiple approaches, *Oxford University Commonwealth Law Journal*, 19:1, 1-29.

¹⁵⁶ Stroud R. S. & Henson J, *Social Media, Online Sharing, and the Ethical Complexity of Consent in Revenge Porn*, *Online Consumer Behavior: The Dark Side of Social Media*, Angeline Close Scheinbaum (ed.), Routledge, forthcoming. p.8.

¹⁵⁷ Maddocks, S. (2018). From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names. *Australian Feminist Studies* 33:97, p. 349.

¹⁵⁸ Ibid.

¹⁵⁹ Henry, N., & Powel, A. (2018). Technology-facilitated Sexual Violence: A Literature Review of Empirical Research. *Trauma, Violence and Abuse, Vol. 19, No. 2*, p. 12.

¹⁶⁰ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018.

“sexual” and “private” are fundamental to distinguish whether the posted material should be considered “abuse”. “Sexual” is the most difficult word to define: if on the one hand it could mean “every sexual activity”, on the other it could refer to “specific body parts”. What is important to underline is that “sexual” refers to everything which is part of a person’s sexual identity and which has “the potential to be exploited”¹⁶¹ in a sexual context, provoking harm. “Private” is a further important element to highlight while analysing this type of abuse. Intention and circumstances are relevant to categorize an image private or not. Concerning intention, individuals are free to voluntarily expose or not their sexual self in public: if they do not want their images to be distributed, the images must remain private. As regards circumstances, the analysis is more complicated because even if a sexual image is taken in public, and there is no consent to post it, the image must be considered private.¹⁶² Therefore, although “online sexual harassment maintains gender inequalities”¹⁶³; the inclusion of the word “sexual” may strengthen the victim blaming. For these reasons, the terms “intimate” or “private” are preferred.¹⁶⁴

It can be affirmed that “revenge porn” is the most common denomination used for non-consensual dissemination of intimate private photos. However, the terminology notably reduces the sphere of action of the phenomenon.¹⁶⁵ Indeed, the word “revenge” lets us understand that the offence occurs with a specific motive.¹⁶⁶ Namely, the offender uploads the sexual private material of the partner as revenge for the rupture.¹⁶⁷ As far as Bloom is concerned, revenge porn can be classified as sexual offense as it is similar to sexual assault or sexual harassment.¹⁶⁸ Nevertheless, there are several cases in which the victim’s photos are hacked by his/her perpetrator, as it happened to some celebrities¹⁶⁹,

¹⁶¹ Maddocks, S. (2018). From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names. *Australian Feminist Studies* 33:97, p. 541.

¹⁶² This is the case of “upskirt”: where a person takes a non-consensual photo of underwear or genitals under another person’s skirt.

¹⁶³ Henry, N., & Powel, A. (2017). *Sexual Violence in a Digital Age*. London: Palgrave MacMillan, p. 182.

¹⁶⁴ Maddocks, S. (2018). From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names. *Australian Feminist Studies* 33:97, p.351.

¹⁶⁵ Maddocks, S. op. cit. p. 347.

¹⁶⁶ Bates, S. (2017). Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors. *Feminist Criminology, Vol. 12, No. 1*, p. 23.

¹⁶⁷ Cecil, A. (2014). Taking back the internet: Imposing civil liability on interactive computer services in an attempt to provide an adequate remedy to victims of non-consensual pornography. *Washington and Lee Law Review, No.71*, p. 2520.

¹⁶⁸ Bloom, S., *No vengeance for “revenge porn” victims: Unravelling why this latest female centric, intimate-partner offense is still legal, and why we should criminalize it*. Fordham Urban Law Journal, 2014. No. 42, pp 278.

¹⁶⁹ I.e., Pamela Anderson, Rihanna, Belen Rodriguez, Prince Harry, Scarlett Johansson, Jennifer Lawrence: they were all hacked, and images were leaked on the net.

or pictures can be taken when the victim is asleep, unconscious, during a sexual assault, or under drug/alcohol effects and then share in social network¹⁷⁰; or again images can be stolen from social networks to put them into revenge porn websites or chats. In these cases, the term revenge porn is approximate, because the motive behind the act is not personal revenge.

Consequently, the term “image-based sexual abuse” could be more specific and proper. Indeed, it explains that the act is sexual abuse and that it is based on images. Moreover, it includes not only the first distributor, so the person who takes the photos and posts them on the internet, but also the secondary distributors, so people that forward the images and make them go viral. This is a paramount element which can trigger a series of consequences for the victim, such as threats, offline repercussions and escalation of psychological harm.¹⁷¹ It can be affirmed that:

[...] image-based sexual abuse is embedded in two wider categories: it is a type of image-based abuse and a type of sexual abuse.¹⁷²

Nevertheless, some scholars include this term within the context of TFSV.¹⁷³

We might argue that all the denominations analysed present some weakness. Revenge porn refers to a precise case of private sexual images distribution, in which the perpetrator and the victim are related and the first acts specifically because he or she wants to retaliate against the partner. This term is the most commonly used, especially by the media, which refer both to specific types of non-consensual image-based harm and to related events. However, this expression risks to minimize the real problem behind non-consensual imaged-based harm, namely sexual harassment and abuse.¹⁷⁴ Contrary, image-based sexual abuse explains directly the fundamental elements of this phenomenon: sexual abuse based on images. As well, non-consensual pornography may be considered as the broaden term which includes several typologies of online abuse. Nevertheless, for the purpose of this thesis, we will use non-consensual pornography and image-based sexual

¹⁷⁰ Henry, N., & Powell, A. (2016). Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law. *Social & Legal Studies*, Vol. 25(4), p. 400.

¹⁷¹ McGlynn, C., & Rackley, E. (2017, Autumn). Image-Based Sexual Abuse. *Oxford Journal of Legal Studies*, Vol. 37, Issue 3, pp. 536-538.

¹⁷² Maddocks, S. (2018). From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names. *Australian Feminist Studies* 33:97, p. 350.

¹⁷³ Ibid.

¹⁷⁴ See *supra* note.

abuse as synonyms of non-consensual dissemination of intimate private photos, leaving aside the expression “revenge porn”.

1.3.2 A general overview on the features of non-consensual dissemination of intimate private photos.

It has already been pointed out along this chapter that ICT tools may facilitate the diffusion of online violence against women.¹⁷⁵ Essentially, some typologies of cyber violence may affect women in an overblown way: “the internet is not creating new forms of crimes against women, but it is creating new ways and means for crimes to be perpetrated.”¹⁷⁶ Especially, women are more at risk in the case of cyber harassment, which can be identified with cyber stalking and non-consensual pornography.¹⁷⁷

Accordingly, some scholars recognize non-consensual dissemination of intimate private images as a gender-based phenomenon that “disproportionately impacts women.”¹⁷⁸ Recalling the analysis of Harry and Powell on TFSV, it can be underlined how this phenomenon is gender-based. Indeed, women are not free to act in their sexuality: people expect and idealize specific behaviours for women, whose body is seen as a “sacred temple” that cannot be violated, not even from women themselves. Moreover, men are less likely than women to send sexual pictures under coercion, because of the “historically constructed pattern of power relations between men and women and definitions of femininity and masculinity.”¹⁷⁹ In addition to it, the statistics of Cyber Civil Rights supports that the majority of non-consensual dissemination of intimate private images’

¹⁷⁵ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 5.

¹⁷⁶ Banks, J. (2010). Regulating hate speech online. *International Review of Law, Computers & Technology*, Vol. 24, No.3, p. 163.

¹⁷⁷ EIGE. (2017). *Violenza virtuale contro le donne e le ragazze*. Istituto europeo per l’uguaglianza di genere. Unione Europea, p.2.

¹⁷⁸ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press.

¹⁷⁹ Connell, R. (1987). *Gender and Power: Society, the Person and Sexual Politics*. Cambridge: Polity Press, pp. 98-99.

victims are women (90%)¹⁸⁰ and that the perpetrator is an ex-boyfriend (57%) or an ex-friend (23%).¹⁸¹

The aim of the image-based sexual abuse is the humiliation of the victim, especially if she is a woman. Indeed, Waldman assumes that “cyber harassment devastates its victims.”¹⁸² This is because non-consensual pornography, as well as rape or domestic violence, “punishes women and girls for engaging in activities that their male counterparts regularly undertake with minimal negative consequences.”¹⁸³ Offenders might act in different ways: they might create false ads in order to involve victims in sex requests from strangers or destroy the victim’s dignity creating false accounts to defame the victim; they might threaten their victims or they might spread intimate photos or videos of victims on the net, violating their privacy. One of the most common tools through which perpetrators obtain sexual private material is *sexting*, which refers to the sending and receiving provocative or explicit images via mobile phone chats.¹⁸⁴ However, perpetrator might also get images or intimate video from hidden cameras, or they can record a sexual assault and exploit the video on porn websites. Generally, these acts destroy the victim’s ability to interact with others, making them fragile and vulnerable both online and offline.¹⁸⁵

Taking into consideration the non-consensual pornography victims, Citron assumes that being part of the LGBT+ community or being a non-white woman might raise risk to be abused online. Indeed, sexual minorities are more vulnerable to cyber harassment. In the case of female victims, non-consensual dissemination of intimate private images aims to humiliate them. In fact, once the sexual private images are exposed on the internet, the

¹⁸⁰ It needs to be noted that also men might be victims of image-based sexual abuse, since TSFV affects both women and men, and their impact on victims is likewise relevant in both sexes. Citron affirms that the remaining 10% of non-consensual pornography victims are usually part of the LGBT+ community. In this case, harassers aim to diminish the maleness accusing them to be “gay” or to act like a woman. Also, in the case of homosexual victims, harassers might accuse the victim of being a sexual offender.

¹⁸¹ EndRevengePorn, *Cyber Civil Rights statistics on revenge porn*, October 2013 <http://www.cybercivilrights.org/> (accessed 12 Dec 2020)

¹⁸² Waldman, A. (2015). *Amplifying Abuse: The Fusion of Cyber-harassment and Discrimination*. *Boston university law review online*. Retrieved January 22, 2021, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678026

¹⁸³ Franklin, Z. (2014, October). Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites. *California Law Review, Vol. 102, No.5*, pp. 1308-1309.

¹⁸⁴ It is interesting to note that young people are the most participative in this new practise. See Anderson, J., & Prasad, S. (2015). Prosecuting image exploitation. *Strategies: The Prosecutors’ Newsletter on Violence Against Women, issue 15*, pp.2.

¹⁸⁵ Brison, J., & Gelber, K. (2018). *Free Speech in the Digital Age*. Paperback, p. 130.

victim starts receiving hateful and humiliating comments, which may result in sexist hate speech.¹⁸⁶ Thus, harassers act to humiliate their victims and most of the time they threaten them, not only in cyberspace but also in real life, where outcomes might affect the victim's life.¹⁸⁷ Here, gender has a paramount role. Harassers are aware of the consequences that a woman would have if her images were posted online: from the work dismissal and the increasing risk of sexual assault offline, to the "sl*t shaming" online. Concerning the latter, users usually lash out against the victim highlighting her responsibility and transforming her into a sinner. At the end, the perpetrator is cast aside, as it is his act; instead, the victim is in the spotlight, continuously under the people's moral judgement. This provokes a sense of inadequacy and a feeling of being "dirty": it pushes the victim to go offline and to reduce her social contact, impeding her to have a career and to live her life without fear.¹⁸⁸ The images will always lead back to their owner, who will be targeted as a "no good".

DeKeseredy and Schwartz speak about the *male peer support theory* to explain abuse against women:

[...] abusive patriarchal men situated in a patriarchal rape-supportive culture have male friends with similar beliefs and values who act to develop and then reinforce beliefs and values that promote the abuse of women, and in particular those women who represented a threat to male patriarchal authority.¹⁸⁹

This theory might be a key concept for the causes of image-based sexual abuse. Male peers act, encourage and justify abuse because they feel that the patriarchal masculinity is compromised. In the case of non-consensual pornography, male peers encourage men to "lash out" against the woman, after she ended the relationship, because she cannot be controlled anymore. Therefore, the ex-partner might decide to post her sexual private images or videos to unleash a series of consequences, first online and then offline, that

¹⁸⁶ For instance: "She is just a sl*t" or "First I'll r*pe you, then I'll k*ll you" or again "I will f*ck you're a*s to death". See Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press, p. 16-17.

¹⁸⁷ Oftentimes, offenders who know the victim well might distribute and spread the victim's personal information, such as email addresses, house addresses, social network accounts. Also, they might contact their workplace to make them be fired. This involves not only the perpetrator, but also all the people who decide to post comments against the victim, or just to spread images on social networks or chats.

¹⁸⁸ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press.

¹⁸⁹ De Keseredy, W., & Schwartz, M. (2016). Thinking sociologically about image-based sexual abuse: The contribution of male peer support theory. *Sexualisation, Media & Society*, p. 4.

would humiliate and make her vulnerable to the point where she is under male control again.

Furthermore, Citron adds a further element to the analysis of non-consensual pornography, arguing that intimate pictures are often shared after the partner's insistence or coercion, which are significant elements attributable to domestic abuse.¹⁹⁰ Accordingly, the Women's Aid found out that 48% of domestic abuse victims reported to have experienced harassment or online abuse by their ex-partners and that 38% of them also experienced online stalking.¹⁹¹

Therefore, it is important to provide a brief description of domestic abuse, in order to understand the reasons why non-consensual dissemination of intimate private photos may be included within this category of abuse.

The Council of Europe Istanbul Convention defines domestic violence as:

[...] all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;¹⁹²

Johnson divides domestic violence into two typologies: the common couple violence, motivated by everyday-life conflicts, and the patriarchal terrorism which is deeply rooted in patriarchal traditions. Here, men are moved by a feeling of possessiveness towards their wives, considering them as a property: "the central motivating factor behind the violence is a man's desire to exercise general control over "his" woman."¹⁹³ In addition to it, Lee explains that domestic violence is characterized by:

[...] a pattern of abusive behavior in any relationship used by one partner to gain or maintain power and control over another intimate partner. These behaviors [...]

¹⁹⁰ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press, p.17; See also Lee, E. (2017). *Domestic Violence and Criminal Justice (1st ed.)*. Routledge, for further information on domestic violence.

¹⁹¹ Laxton, C. (2014). Women's Aid, Virtual World, Real Fear, Women's Aid report into online abuse, harassment and stalking. Retrieved April 27, 2021, from <http://bit.ly/2h0W4OX>

¹⁹² Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210, Art. 3(b).

¹⁹³ Johnson, M. (1995). Patriarchal terrorism and common couple violence: Two forms of violence against women. *Journal of Marriage and the Family*, No. 57, pp. 286-287.

intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.¹⁹⁴

Focusing on the aforementioned behaviours, we may note a similarity with the one attributed to non-consensual pornography. The Council of Europe Istanbul Convention recognizes that domestic violence “constitute[s] a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men.”¹⁹⁵ Similarly, the Special Rapporteur Šimonović affirms that the purpose of non-consensual pornography is to shame, stigmatize and harming the victim; generally, online violence against women, may “form part of a pattern of domestic violence and abuse.”¹⁹⁶

Lastly, it needs to be shown the severe consequences that this type of online violence itself has on victims. At the social level, image-based sexual abuse is often minimized as “scandal”.¹⁹⁷ The public opinion towards the victims usually reflects the patriarchal-based ideology that our society is made of. Victim blaming is a phenomenon in which the victim of a crime is seen as partially or totally responsible for the violence he/she has suffered for.¹⁹⁸ Usually, it happens under articles of rape cases. Here, the victim is accused of being responsible for the abuse because of her dress, or because she was drunk. This behaviour shows itself especially on social networks, where people are free to comment or share newspaper articles.¹⁹⁹

Whereas, at the personal level, one of the first consequences to be underlined is the impossibility to remove the intimate image of the victim from the internet, neither by the victim, nor by the police. The Special Rapporteur Šimonović underscores that even though there are States in which non-consensual pornography are criminalized or included as aggravating circumstances for domestic violence, in many others there is not

¹⁹⁴ Lee, E. (2017). *Domestic Violence and Criminal Justice (1st ed.)*. Routledge, p. 5.

¹⁹⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210.

¹⁹⁶ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p.9.

¹⁹⁷ Anderson, J., & Prasad, S. (2015). Prosecuting image exploitation. *Strategies: The Prosecutors' Newsletter on Violence Against Women, issue 15*, p.9.

¹⁹⁸ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press, p.49.

¹⁹⁹ Regarding non-consensual pornography on newspaper articles in Facebook, we can easily find comments such as “she was just asking for trouble”, “What did she expect? ” If you send naked images, it's your fault” or again “Wasn't it better to avoid taking those counter-productive pictures or videos?”

a solid legislation against them.²⁰⁰ Especially, there are still no cooperation agreements between all Party-States which allow the seizure of specific material contained on foreign servers.²⁰¹ Surfing the net means that multimedia materials are free to float from one server to another.²⁰² If the sexual intimate material of a victim of non-consensual dissemination of intimate private images enters a foreign server, the judicial activity cannot proceed with the seizure and the removal of it.²⁰³ Accordingly, this may jeopardize the safety of women who “cannot protect their human rights to privacy and dignity.”²⁰⁴ For this reason, victims usually isolate themselves, deleting their social accounts and limiting their social life²⁰⁵. This might have short-term and long-term detrimental psychological effects, such as anxiety, self-blame, depression or mental diseases. As a matter of fact, women feel shame for their victimization, and the continuous distribution of their images might bring them to suffer from extreme loss of self-esteem. The event might bring them to repress the memory as a defence mechanism against abuse trauma.²⁰⁶ Moreover, consequences might also be social and physical. As shown before, after an image-based sexual abuse, women might lose job, professional opportunities and they might get away from friend because of shame. Privacy is completely annihilated. They might be forced to change name or town, because the abuse is present also in real space, and many of them have reported being subjected to stalking and harassment.²⁰⁷

²⁰⁰ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 9.

²⁰¹ Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe, p. 9.

²⁰² See *supra* note, p. 10.

²⁰³ Dott. Roia “*La risposta giudiziaria contro la violenza alle donne. Buone e cattive pratiche*”. Speech for the conference I tempi delle donne e dei bambini ed i tempi della Giustizia, organized by the City of Treviso, 25 November 2020.

²⁰⁴ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018, p. 17.

²⁰⁵ Cecil, A. (2014). Taking back the internet: Imposing civil liability on interactive computer services in an attempt to provide an adequate remedy to victims of non-consensual pornography. *Washington and Lee Law Review*, No.71, pp. 2522-23

²⁰⁶ Bates, S. (2017). Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors. *Feminist Criminology*, Vol. 12, No. 1, pp. 26-27.

²⁰⁷ Franklin, Z. (2014, October). Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites. *California Law Review*, Vol. 102, No.5, pp. 1304-05.

Law should have a crucial role in the resolution of this crime. According to this, the Special Rapporteur highlights the paramount role of States in prohibiting non-consensual pornography, assuming that:

States should clearly prohibit and criminalize online violence against women, in particular the non-consensual distribution of intimate images, online harassment and stalking. [...] The threat to disseminate non-consensual images must be made illegal so that advocates and prosecutors may intervene and prevent the abuse before it is perpetrated.²⁰⁸

However, many victims do not report the abuse to the police “because they think that nothing can be done.”²⁰⁹ As Citron reported in her book, police officers refused to act against non-consensual dissemination of intimate private images’ harassers because “boys will be boys” or because officers found the case too personal and too complex to be solved. In absence of an effective law intervention, some of non-consensual dissemination of intimate private images’ victims committed suicide.²¹⁰

a. Some examples.

To conclude, we will provide two examples of image-based sexual abuse happened in Italy. These two episodes have been classified as cases of revenge porn.

In 2018, a kindergarten teacher and a football player living in Torino, Italy, fell in love and started a relationship. During those months, the 22-year-old girl sent eighteen erotic pictures and a video to his boyfriend. Between them, there was a picture with the teacher’s name on, consequently these images were attributable to her, but she was confident that these pictures would have remained confidential.

However, it did not go as imagined. Once the relationship ended, the football player decided to share the images in the “Whatsapp” chat of his teammates, to brag about his “conquest”. The images started to spread. When the young woman realized what was

²⁰⁸ Franklin, Z. op. cit. p. 19.

²⁰⁹ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press.

²¹⁰The Italian case of Tiziana Cantone is an example of suicide of a revenge porn victim. See <https://www.tpi.it/news/tiziana-cantone-storia-20180916146927/> (accessed 09-05-21) and <https://www.ilsole24ore.com/art/pornovendetta-sempre-piu-giovani-donne-vittime-ricatti-online-AC3IMPY> (accessed 09-05-21)

happening, she tried to convince her ex-boyfriend to remove the material from the chats, but he answered that their relationship “was based only on physical attraction” and that he felt justified to act like this.

The situation got out of control in a few days. In fact, the wife of one teammate found out the images on her husband's phone and discovered that they belonged to her son's teacher. The woman decided to warn the other mothers about the event, sharing again her private images. With the help of her husband, the woman exhorted the teacher not to denounce her ex-boyfriend, threatening her to report the scandal and to show the pictures to her headmistress.

Nevertheless, the teacher decided to file a lawsuit against her boyfriend and to ignore the threats she received from the other woman. However, pictures were still floating into the net, reaching also a colleague, who decided to share the images with some friends. For this reason, the victim decided to report the event to her headmistress, hoping she would have understood the gravity of the situation. She felt responsible for her ex-boyfriend's action, "Everybody knows that these pictures are mine" she said. She hoped to find help in her headmistress, but the woman did nothing to help her, at the end, she forced the teacher to resign²¹¹.

Two years have passed from that moment and the Italian legislation took measures: the ex-boyfriend must provide compensation for the damage and he must do community service for one year²¹². However, the teacher still feels ashamed and guilty: “I still suffer

²¹¹https://www.corriere.it/cronache/20_novembre_18/maestra-d-asilo-licenziata-un-video-hard-tradita-mio-ex-mi-fidavo-e161a554-2966-11eb-884f-3aae855c458a.shtml (accessed 9-12-2020)

²¹² As we will see in chapter 3, Art. 612-ter of the Italian criminal Code forbids the dissemination of private and intimate images without consent on the Internet, punishing it with the obligation for a compensation and the reclusion from 1 to 6 years. In this case, the ex-boyfriend advocates reached the compromise of community service: “the guy understood he had done the wrong thing, he paid the penalty and now he is working for community service. We highly doubt about the existence of a specific pain, the act was made without wanting to injure” (adv Pasqualino Ciricosta and Alessandro Dimauro). These words diminish the crime of revenge porn. If on one hand the Italian legislation has worked, on the other hand the victim still remains as such. The young man has been in part justified, without taking into consideration the real irreparable harm he provoked to his ex-girlfriend, who is not only a victim of non-consensual dissemination of intimate private images and defamation, but also a victim of media pillory, victim blaming and slut-shaming.

for this situation. I never thought he would have shared my intimate photos on the net. I trusted him.²¹³”

In the last two years, the platform “Telegram” was the protagonist of a tremendous episode of non-consensual dissemination of intimate private images.²¹⁴ In a few months, more than twenty-one chats were created, each of them with more than forty thousand users, for a total of thirty thousand messages per day. The aim of these group is to exchange intimate pictures, videos and other material of women, girls and even children without their consent, and to play out the “rite of virtual rape group”. Furthermore, in these chats we could also find private numbers or addresses of the victims, requests to “ruin the life” of their ex-partners, and to exchange child pornographic material.

The chat works in the following way: men gained access by means of an anonymous account. In this way, reaching the real author of the messages, and punishing them, is more difficult. The anonymity makes the individual behind it capable of acting following just his sexual instincts, according to his reason and not to the law. The users vary from adolescents to family men and most of them participate in the chats actively asking for details of the victim. Somebody affirmed to be a child to justify his interest in child pornography, others exchanged personal photos of their daughters.

Messages such as “do you have a 12-year-old girl’s photo?”, “how can I r*pe my daughter without making her cry”, “exchange pedo” or “While 90% of you post shit, I post a nice thirteen-year-old girl” confirms the aim of the group: revenge and rape. A user posts a photo or a video of a girl so that other users can contact him to have further images or, even, the women's social or real addresses in order to contact the victim directly.

No matter the rules of the social platform, these groups re-opened continuously. There are a large number of reserve groups and users float from one group to another. Once a group reaches the maximum number of users and Telegram deletes it because of the diffusion of pornography content inside the platform, members log into in another group, with a different name but with the same aim. This is for all intents violence online: “sex is a tool used to affirm the dynamic power there are perpetrators and victims” affirms the

²¹³https://torino.repubblica.it/cronaca/2020/11/19/news/la_maestra_d_asilo_tradita_dall_ex_le_mie_foto_hot_sulla_chat_del_calchetto_sono_riuscite_a_uccidermi_dentro_-275005763/ (accessed 9-12-2020)

²¹⁴https://www.repubblica.it/cronaca/2020/11/25/news/telegram_covo_di_pornografia_non_consensuale_e_revenge_porn_-275647052/?ref=search (accessed-12-Dec 2020)

journalist Simone Fontana, “It happens online, but consequences have not just a virtual impact.”²¹⁵

Conclusion

Considering what has been assessed along this chapter, it is important to note that cyber violence is a vast and evolving phenomenon.

At the beginning of the chapter, we provided a brief explanation of violence, highlighting the main aspects. Accordingly, we introduced cyberviolence, illustrating how it may take different forms, such as cybercrimes, ICT-related violation of privacy and cyber harassment. Particularly, we demonstrated that online violence may be considered a gender-based phenomenon, since it affects women and young girls in an unbalanced way.²¹⁶

Among the subcategories of cyber violence, we selected two increasing phenomena, basing our choice on their social impact: hate speech and non-consensual dissemination of intimate private photos. According to this, we analysed the main definitions attributed to these phenomena, questioning on the proper terminology to use. On one hand, we underscored that hate speech is a controversial and intricate phenomenon. One of the main difficulties relies in the absence of a common definition, but also on the appropriate denomination. Accordingly, the phenomenon of hate speech includes either incitement to hatred or unpleasant statements, which are not punishable by law.²¹⁷ On the other hand, we investigated the terminology related to non-consensual dissemination of intimate private photos, highlighting the limits of the term “revenge porn”.²¹⁸

Moreover, we illustrated the main characteristics of the phenomena, taking into consideration the targeted victims and the impact of the abuse. Accordingly, it can be affirmed that the purpose of both phenomena is the humiliation and the harming of the

²¹⁵ <https://www.wired.it/internet/web/2020/04/03/revenge-porn-network-telegram/> (accessed 10-12-20)

²¹⁶ Henry, N., & Powell, A. (2016). Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law. *Social & Legal Studies*, Vol. 25(4), 397–418.

²¹⁷ UN Secretary-General Antonio Guterres. (18 June 2019). *Secretary-General's remarks at the launch of the United Nations Strategy and Plan of Action on Hate Speech*. Retrieved from <https://www.un.org/sg/en/content/sg/statement/2019-06-18/secretary-generals-remarks-the-launch-of-the-united-nations-strategy-and-plan-of-action-hate-speech-delivered> (accessed 25-04-21)

²¹⁸ McGlynn C., (2017). Beyond ‘Revenge Porn’: The Continuum of Image Based Sexual Abuse. *Fem Leg Stud*, Vol. 25.

victim. Incitement to hatred aims at destroying the identity of a targeted group, discriminating individuals because of their innate characteristics -gender, race, religion etc-. Similarly, non-consensual dissemination of intimate private photos aims to humiliate and blame the victim to such a point that the impact of the abuse falls onto the offline environments.

The next chapter will be dedicated to the analysis of the international and the European legal framework. As we will see, none of these phenomena has been treated on the current legal instruments. For this reason, an attentive investigation on the legal documents will be needed to illustrate whether hate speech and non-consensual dissemination of intimate and private photos are countered or not.

CHAPTER 2

ANALYSIS OF THE INTERNATIONAL AND THE EUROPEAN CURRENT LEGAL FRAMEWORK ON COUNTERING ONLINE VIOLENCE

Methodological approach

In the previous chapter, we analysed the notion of hate speech and non-consensual dissemination of intimate private photos within the context of online violence, defining the phenomena and emphasizing their features.

The purpose of this chapter is to study how the current legal framework tackles online violence and to demonstrate whether and how international and European legal instruments can be used to combat it. As already anticipated, it needs to be noted that neither hate speech, nor non-consensual dissemination of intimate private photos are included within the international and European legally binding instruments. Essentially, there are no Conventions or legal instruments that tackle directly and explicitly hate speech or other forms of online violence.

On the basis of this assumption, this chapter will investigate the current legal framework, analysing whether these phenomena might be countered, starting from the prohibition of discrimination and the limitation of the right of freedom of expression.

Therefore, the chapter will open with the study of the international legal framework. Particularly, we will focus our attention on three major UN Conventions: ICCPR, ICERD and CEDAW. Moreover, we will support our analysis with the General Comments of the Human Rights Committee and the contribution of the Special Rapporteurs of the Human Rights Council.

Subsequently, we will investigate the European legal framework. Hence, we will examine the Council of Europe Conventions, especially the ECHR, the CoE Cybercrime Convention and the CoE Istanbul Convention, supporting our analysis with the contribution of the European Court of Human Rights.

Lastly, we will conclude with the study of the European law, investigating the principle of non-discrimination, the soft law on hate speech and the European Commission roadmaps on illegal content online.

2.1 The international legal framework: from the Universal Declaration of Human Rights to the drafting of legally binding instruments on human rights protection.

2.1.1 The principle of non-discrimination of the Universal Declaration of Human Rights.

Taking into consideration the Universal Declaration of Human Rights, we can note a few relevant articles for our analysis. Article 2 fosters the equality between individuals, declaring that rights and freedom must be preserved for each individual without distinction based on sex, race, nationality, religion or political opinion.²¹⁹ Additionally, article 7 of UDHR prohibits the phenomenon of discrimination and its incitement, promoting the equal treatment before the law:

All are equal before the law and are entitled -without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.²²⁰

Taking into account the phenomenon of hate speech, we may suppose that Article 7 is crucial. As a matter of fact, discrimination refers to “unequal treatment of persons or groups” on the basis of their identity -race, sex, religion etc-. However, being classified as a behaviour, it is important not to mistake discrimination with racism, racial prejudices or racial stereotypes, even though they are extremely interconnected with each other. Therefore, it is possible to deduct that discrimination may be motivated by external factors and that racism or racial stereotypes may be influenced by discriminatory behaviours.²²¹ Consequently, discrimination could be considered a central element that

²¹⁹ Universal Declaration of Human Rights, 10 December 1948 Art. 2.

²²⁰ UDHR, op. cit. art. 7.

²²¹ Pager, D., & Shepard, H. (2008). The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets. *Annual Review Sociology*, Vol. 34, p. 182.

triggers hate speech and hate crimes. In the next paragraph, we will illustrate how discrimination is tackled by the International Covenant on Civil and Political Rights and the International Convention on the Elimination of all forms of Racial Discrimination. These legally binding documents counter the unequal treatment of individuals based on their identity characteristics, in order to respect the principle of freedom and equality. Essentially, we will study whether those instruments might be used for the countering of online hate speech, or not.

Considering the second form of online violence -namely the phenomenon of non-consensual dissemination of intimate private photos- we have already demonstrated that it can be included within violence against women. For this reason, in addition to racial discrimination it is important to highlight also discrimination on the basis of sex. Therefore, later on we will investigate how the principle of non-discrimination of the UDRH has been resumed by the CEDAW, which aims at countering discrimination against women.²²²

2.1.2 The International Covenant on Civil and Political Rights (ICCPR).

As we noted at the beginning of this chapter, the countering of online violence is not included within the international legally binding instruments. Nevertheless, we can refer to the provisions of the prohibition of discrimination and the limitation of freedom of expression to demonstrate whether the hate speech might be countered or not, on the basis of international conventions and instruments.

As we have already demonstrated, it is important not to confuse hate speech with discrimination, even if they may have similar approaches. Indeed, discrimination is classified as a *behaviour*, while hate speech is a phenomenon based on bias motives: discrimination may be considered just a stepping-stone or a consequence for violent phenomena, including hate crimes and violence. Essentially, perpetrators are moved by a sense of insecurity, fearing who is different; in their belief there is a juxtaposition between “us” and “them”, where victims usually belong to vulnerable categories of people, divided by race, sex, religion, minorities, disable, language etc. In other words, we may deduct

²²² Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, p.1.

that these are factors that can arise discriminatory behaviours which may lead to the creation of a vicious circle of hate and discrimination towards the most vulnerable. In the ICCPR, discrimination is mentioned in several articles. In particular, article 2(1) affirms that States Party shall respect and ensure to everybody the rights enshrined in the 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.²²³

Moreover, this article highlights the legal obligations that States Parties must respect, in protecting rights within the territories under their jurisdiction.²²⁴ In doing so, the article declares the universality of the rights, rejecting any forms of discrimination. Namely, article 2 undertakes the implementation of the Covenant at the national level, declaring the fundamental principle of non-discrimination that States Parties must respect and ensure.²²⁵

Moving on with our analysis, it needs to be mentioned the right of freedom of expression. According to scholars, freedom of expression is considered as a “*meta* rights” due to its interconnection with the enjoyment of other rights.²²⁶ Being considered as one of the “indispensable conditions for the full development of the person”²²⁷ the right of freedom of speech has been covered in several conventions and legal documents, such as ICERD (art. 5)²²⁸ and UDHR (art.19)²²⁹. Taking into consideration the International Covenant on Civil and Political Rights, we can note that freedom of expression is declared under article

²²³ International Covenant on Civil and Political Rights, Adopted 16 December 1966, entry into force 23 March 1976, Art. 2 para. 1.

²²⁴ General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21, Adopted on 29 March 2004 (2187th meeting), p.1.

²²⁵ Alston, P. (1997). *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments*. Geneva: UN office of the High Commissioner for Human Rights (OHCHR), p. 185.

²²⁶ O’Flaherty, M. (2012, December 12). Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34. *Human Rights Law Review, Vol. 12 No.4*, p. 631.

²²⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019, p.5.

²²⁸ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19, art. 5: “[...] *States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone [...] (viii) The right to freedom of opinion and expression;*”

²²⁹ Universal Declaration of Human Rights, 10 December 1948, art. 19 “*Everyone has the right to freedom of opinion and expression [...]*”

19, which states that everyone shall be free to express their ideas and hold opinions, using any communication channel:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; [...] ²³⁰

Placing this article within the legal framework for the countering of hate speech, it is fundamental to underscore not so much what it protects, as for its limitations. Indeed, we can easily deduct that limiting freedom of opinion should be required for the prohibition of the aforementioned phenomenon. Accordingly, article 29(2) of UDHR reflects the derogable nature of freedom of expression right, namely the inclusion of it within “those rights that contain limitations clauses”,²³¹ declaring that the only acceptable limitation to freedom of expression occurs to secure freedoms and rights of others:

In the exercise of his rights and freedoms, -everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.²³²

If we focus our attention on the International Covenant on Civil and Political Rights, we can affirm that the term hate speech is not *explicitly* mentioned. However, there are two articles of the Covenant which refer to *incitement* to “discrimination, hostility or violence”, that we can interpret as a synonym of hate speech.²³³

Considering article 19, we can affirm that it can be divided into two parts. On one hand, it guarantees the right of freedom of expression, comprising the action of “seek, receive and impart information and ideas of all kinds.”²³⁴ On the other hand, it states when the right should be limited.²³⁵ Indeed, paragraph 3 of article 19 declares that rights and

²³⁰ International Covenant on Civil and Political Rights, Adopted 16 December 1966, entry into force 23 March 1976, art. 19.

²³¹ Malcom, E. (2003). *International Law*. UK: Oxford UP, p. 161.

²³² Universal Declaration of Human Rights, 10 December 1948, art. 29(2).

²³³ See Benesch, S. (2011). *Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred*. Vienna: OHCHR. Retrieved from <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Others2011/SBenesch.doc>

²³⁴ International Covenant on Civil and Political Rights, Adopted 16 December 1966, entry into force 23 March 1976, art. 19(2).

²³⁵ Malcom, E. (2003). *International Law*. UK: Oxford UP, p. 234.

For further information on article 19 see also O'Flaherty, M. (2012, December 12). Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human

reputation of others shall be protected, as they should be national security and public order:²³⁶

[...]The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary [...]²³⁷

The Special Rapporteur Davide Kaye underlines the necessity to consider those restrictions in an exceptional way, assuming that they must not jeopardize the right itself.²³⁸ Specifically, the limitations mentioned in this article shall follow three conditions: legality, necessity and proportionality and legitimacy. With *legality* we refer to restrictions “provided by law”, which should be adopted by regular legal processes. *Necessity and proportionality* need to demonstrate that restrictions “imposes the least burden on the exercise of the right and actually protects, or is likely to protect, the legitimate State interest at issue.”²³⁹ Essentially, restrictions should at once protect individuals from violation and ensure the freedom of expression right. Finally, *legitimacy* means that restrictions should involve only the elements mentioned in article 19(3): reputation of others, national security, public order, health and morals.²⁴⁰

In addition to these limitations, we may notice that the ICCPR adds supplementary restrictions for incitement to discrimination, incitement to hostility and incitement to violence²⁴¹, making article 20 one of the “strongest condemnations of hate speech”²⁴²:

Rights Committee’s General Comment No 34. *Human Rights Law Review*, Vol. 12 No.4, p. 636-644.

²³⁶ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, p. 111.

²³⁷ International Covenant on Civil and Political Rights, Adopted 16 December 1966, entry into force 23 March 1976, art. 19(3).

²³⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019, p. 5.

²³⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018, p. 4.

²⁴⁰ Report of the Special Rapporteur A/HRC/38/35, op. cit. p.4.

²⁴¹ Benesch, S. (2011). *Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred*. Vienna: OHCHR. Retrieved from <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Others2011/SBenesch.doc>

²⁴² Heinze, E. (2006). Viewpoint Absolutism and Hate Speech. *Mod. L. Rev.*, Vol. 69, pp. 543-544

1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.²⁴³

Essentially, these two articles of ICCPR underscore that freedom of expression is not an absolute right, and that there needs to be limitations to avoid interference with other human rights.²⁴⁴ Furthermore, ICCPR provides a “narrowly” definition of what can be considered hate speech and it imposes obligations on States to act equally and to eradicate discriminatory behaviours, making it a fundamental instrument for the countering of the phenomenon.²⁴⁵

Nevertheless, these two articles were highly criticised. International law always conceived freedom of expression as one of the pillars of the human rights system.²⁴⁶ However, article 19(3) and article 20 introduce significant restrictions. If we consider the drafting of article 20, it needs to highlight the opposing position of the United States, which expressed serious concerns about it.²⁴⁷ Indeed, they advocated that paragraph 3 of article 19 was sufficient to regulate dangerous speeches and that the supplement of article 20 could have encouraged censorship due to the lack of clarity of “incitement of discrimination and hostility” meaning.²⁴⁸

According to this, the Special Rapporteur David Kaye, in 2019 advocated the relevance of freedom of expression, moving serious critics towards its limitation. As first, he underscores the ambiguity in the language used in article 20 and in article 4 of ICERD, since both of them introduce the “difficult-to-define language of emotion (hatred, hostility) and highly context -specific prohibition (advocacy of incitement).”²⁴⁹ Subsequently, the Special Rapporteur questions about “advocacy of hatred.”

²⁴³ International Covenant on Civil and Political Rights, Adopted 16 December 1966, entry into force 23 March 1976, art. 20.

²⁴⁴ Ghanea, N. (2013). Intersectionality and the Spectrum of Racist Hate Speech: Proposals to the UN Committee on the Elimination of Racial Discrimination. *Human Rights Quarterly*, Vol. 35, No. 4, p.936.

²⁴⁵ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, pp. 27-28.

²⁴⁶ O’Flaherty, M. (2012, December 12). Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34. *Human Rights Law Review*, Vol. 12 No.4, p. 630.

²⁴⁷ Aswad, M. (2018). The future of freedom of expression online. *Duke Law & Technology Review*, Vol. 17, No. 1, p. 37.

²⁴⁸ Ibid. See also O’Flaherty M. op. cit. p. 635.

²⁴⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019, p. 7.

Accordingly, he underscores the presence of different types of hate speech: particularly, he differentiates a speech that aims at inciting discrimination or violence from a speech reflecting hateful statement. Hence, if hate speech does not constitute incitement to discrimination or violence, then States should be responsible for its restriction. However, while States may counter hate speech with educational programs and civil or administrative sanctions, when it comes to legal restriction it needs to respect the standards of human rights law.²⁵⁰ Moreover, considering article 19(3) on the countering of hateful speech, the Special Rapporteur emphasizes the relevant role that States have in demonstrating the “necessity and proportionality of taking action” against a determined hate speech.²⁵¹ In addition to it, the Special Rapporteur underscores some further limits of article 19. Firstly, he highlights the lack of protection of religious ideas and beliefs from abuse and criticism; secondly, he notes the interpretation of the Human Rights Committee about the denial of crimes against humanity, stating that it should not be “subject to general prohibition” without further evaluation of the context in which the speech is perpetrated; finally, the Special Rapporteur stresses the ambiguity of the aforementioned article, claiming that some offensive expressions, while not threatening the rights of others, are not so severe to fall under article 19(3) and to be punished by the law.²⁵²

In other words, the Special Rapporteur observes that hate speech has become a serious concern for the society, especially when perpetrated online.

Left unchecked and viral, [online hate speech] can create an environment that undermines public debate and can harm even those who are not users of the subject platform.²⁵³

However, it is evident his protective position towards freedom of expression right. Indeed, throughout the document he questions whether restrictions of freedom of expression are necessary to counter hate speech, or whether they may be considered as an obstacle for the enjoyment of such rights.²⁵⁴

²⁵⁰ Report of the Special Rapporteur, A/74/486, op. cit. p. 9.

²⁵¹ Report of the Special Rapporteur, A/74/486, op. cit. p. 10.

²⁵² Report of the Special Rapporteur, A/74/486, op. cit. pp. 10-11

²⁵³ Report of the Special Rapporteur, A/74/486, op. cit. p. 22

²⁵⁴ *Ibid.*

Contrary, in 2019 the UN Secretary-General Guterres claimed that countering hate speech does not limit freedom of expression:

It means keeping hate speech from escalating into more something more dangerous, particularly incitement to discrimination, hostility and violence, which is prohibited under international law.²⁵⁵

2.1.3 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

As we anticipated at the beginning of the chapter, it is important to mention the International Convention on the Elimination of all forms of Racial Discrimination, adopted by the General Assembly in December 1965. In a similar way to the ICCPR analysis, we will concentrate on the ICERD provisions on discrimination and promotion of racial hatred.

The Convention provides in Article 1 a guidance on the meaning of “racial discrimination”, stating that it can be conceived as:

[...] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.²⁵⁶

On the basis of this definition, we can understand that racial discrimination is a complex phenomenon, which is based both on race and colour of skin, but also on descent or ethnic origin. Additionally, it needs to emphasize the serious impact that racial discrimination has on its victims, namely the deprivation of human rights enjoyment.²⁵⁷

²⁵⁵ UN Secretary-General Antonio Guterres. (18 June 2019). *Secretary-General's remarks at the launch of the United Nations Strategy and Plan of Action on Hate Speech*. Retrieved from <https://www.un.org/sg/en/content/sg/statement/2019-06-18/secretary-generals-remarks-the-launch-of-the-united-nations-strategy-and-plan-of-action-hate-speech-delivered> (accessed 25-04-21)

²⁵⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted 21 December 1965, entry into force 4 January 1969, art. 1(1).

²⁵⁷ Malcom, E. (2003). *International Law*. UK: Oxford UP, pp. 271-272.

Once defined the concept of racial discrimination, the Convention enshrined the obligations that States must respect to avoid the phenomenon. In particular, Article 4 contains provisions on the prohibition of dissemination of ideas based on racial superiority and incitement to discrimination.²⁵⁸ Comparing article 20 of ICCPR with article 4 of ICERD, we can note that article 4 is more detailed, since it prohibits not only racist propaganda, but also it invites States to adopt positive obligations to eradicate incitement to discrimination and violence.²⁵⁹

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination [...]²⁶⁰

Additionally, the article declares “punishable by law” all acts and dissemination of ideas that reflect racial hatred or incite violence against a target group on basis of race; it declares illegal all organizations and activities which promote racial discrimination; and it condemns racial discrimination perpetrated by public authorities and institutions.

In other words, this article comprises on one hand the condemnation of all activities interconnected with racial discrimination; on the other the engagement in the adoption of measures to counter the phenomenon.²⁶¹ Therefore, the Convention obliges the state to criminalize both incitement and acts of discrimination against any race or ethnicity.²⁶² Moreover, it requires states to create the legal and institutional base to prevent, protect and repair any discriminatory damage (art.6).²⁶³

²⁵⁸ Malcom, E. op. cit. p. 281.

²⁵⁹ Chetty, N., & Alathur, S. (2018, May-June). Hate speech review in the context of online social networks. *Aggression and Violent Behaviour Journal*, Vol. 40, p. 111.

²⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted 21 December 1965, entry into force 4 January 1969, art. 4.

²⁶¹ Mahalic, D., & Mahalic, J. (1987, February). The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. *Human Rights Quarterly*, Vol. 9, No. 1, pp. 91-94.

²⁶² In the analysis of hate speech countering, we must also mention the Convention on the Prevention and Punishment of the Crime of Genocide (1948) which undertakes the elimination of genocide. In particular, we should underline article 3(c) which prohibits “*public or direct incitement to commit genocide*”.

²⁶³ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p. 27.

Generally, article 4 of ICERD is considered one of the pillars of the fight against hate speech, however, there were several critics towards it, especially addressed by Amnesty International. Although the Committee on the Elimination of all Forms of Racial Discrimination (CERD) affirmed that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression”,²⁶⁴ Amnesty International urged it to clarify the article. First of all, the ONG underlined the need for narrowly and detailed restriction of hate speech to avoid any violation of freedom of expression right: “the interdependence between the rights to freedom of expression and non-discrimination requires States to pay detailed attention to laws and policies on “hate speech.”²⁶⁵ Then, it highlighted the need for distinguishing offensive expression from “expression which may or must be restricted in the interests of the rights of others.”²⁶⁶ Finally, it made reference to the principles of necessity and proportionality, stating the need for an elucidation of “offence punishable by law”: in particular, it stressed the inclusion of other civil and administrative positive measures - starting from education- to be implemented, depending on the gravity of the act.²⁶⁷

In this context, the General Recommendation No. 35 of CERD illustrates the impact of racist hate speech, declaring it a widespread challenge for human rights and providing further explanation about article 4. Firstly, it contains positive and immediate measures to tackle incitement of hatred and discrimination, in order to combat hate speech and ensure the right of freedom of expression. According to the Convention, racist hate speech is conceived as a “form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society”²⁶⁸, and the most serious cases shall be criminalized. Secondly, the recommendation specifies that article 4 is not self-executing.

²⁶⁴ CERD, General recommendation No. 15 on article 4 of the Convention, Forty-second session (1993), p.1.

²⁶⁵ Amnesty International. (28 August 2012). *Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the UN CERD*. Retrieved from <https://www.amnesty.org/download/Documents/24000/ior420022012en.pdf>, p.1.

²⁶⁶ See *supra* note, p. 4.

²⁶⁷ Amnesty International, *op. cit* p. 5.

We should highlight that in the CERD/C/GC/35, General recommendation No. 35 on combating racist hate speech, 26 September 2013, the Committee states as follow: “*As a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively.*”

²⁶⁸ General recommendation No. 35 on combating racist hate speech, CERD/C/GC/35, 26 September 2013, p.4.

As such, States should adopt legislation to counter hate speech within their territories. For this reason, the document illustrates five cases in which hate speech should be punished by law. Hence, when there is dissemination of ideas based on racial superiority; in the case of the incitement to hatred or discrimination on the basis of race; in the case of the incitement of violence or threats on the basis of race; when “expression of insults, ridicule or slander” and justification of racial hatred result in incitement to discrimination; and finally, when racial discrimination involves activities and organizations.²⁶⁹

Moreover, it declares that denials or justification of genocide crimes and crimes against humanity shall be punished by law, since they constitute incitement to hatred.²⁷⁰ Finally, it is important to note that the forms of hate speech should be considered crucial to determine its gravity. On the basis of this assertion, we may recall the UN Strategy and Plan of Action on Hate Speech which divides hate speech gravity into three main levels, including the most serious forms of offences in the top level, and all the forms that are not criminalized by the law in the bottom one.²⁷¹ The recommendation specifies that the analysis of the context in which hate speech is made, the status or the position of the offender, the objectives of the speech and the environment in which hate speech is spread may be paramount to declare the case punishable by the law. In particular, the environment may be a key element in the resolution of online hate speech cases since the dissemination of hateful messages and the accessibility of certain types of content are easy and frequent to reach in cyberspace.²⁷²

2.1.4 The International Convention on the Elimination of Discrimination against Women (CEDAW).

As anticipated at the beginning of the chapter, discrimination can also be linked with violence against women. Accordingly, in the Preamble of the Convention on the Elimination of Discrimination against Women (adopted 1979), the General Assembly highlights the necessity to counter discrimination against women and to change traditional

²⁶⁹ Ibid.

²⁷⁰ General recommendation No. 35, CERD/C/GC/35, op. cit. pp.4-5.

²⁷¹ United Nations. (September 2020). *United Nations Strategy and Plan of Action on Hate Speech, Detailed Guidance*. United Nations, pp. 12-15.

²⁷² General recommendation No. 35 on combating racist hate speech, CERD/C/GC/35, 26 September 2013, p.5.

roles associated to both sexes, in order to achieve equality between men and women. Indeed, it recalls the UDHR²⁷³ principle of the inadmissibility of discrimination, stating that “discrimination against women violates the principles of equality of rights and respect for human dignity.”²⁷⁴

Accordingly, article 1 of the Convention provides the definition of discrimination against women, which results in:

[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁷⁵

We might affirm that the Convention fosters the equality of women and men, declaring that all types of discrimination based on sex should be considered a violation of human rights.²⁷⁶ Moreover, similarly to ICCPR and ICERD, the Convention establishes the CEDAW Committee (article 17), which is responsible for the monitoring of States’ obligations and the provision of General Recommendations on the implementation of the Convention.²⁷⁷ For instance, it is worth mentioning the General Recommendation No. 19, which adds an important element, neglected in the Convention: the definition of *gender-based violence*. Accordingly, the document recognizes the serious and disproportionate impact of gender-based violence on women, declaring that:

[...]Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.²⁷⁸

²⁷³ UDHR, Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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 [...]”

²⁷⁴ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, p.1.

²⁷⁵ CEDAW, op. cit. art. 1.

²⁷⁶We ought to underline the non-binding nature of the document, making it difficult to be implemented in States that decided not to ratify it.

²⁷⁷ WHO, *Women’s health and human rights: Monitoring the implementation of CEDAW*, Geneva, 2007, p. 11

²⁷⁸ CEDAW, General recommendation No. 19: Violence against women, Eleventh session (1992), para. 6-7.

Moreover, following article 6 of the Convention which prohibits women exploitation, and making a reference to article 2(f), 5 and 10(c) on the elimination of stereotyped roles of women, the General Recommendation No. 19 declares propagation of pornography as “gender-based violence”.²⁷⁹

Furthermore, recalling the interconnection between non-consensual dissemination of intimate private photos and domestic violence,²⁸⁰ it is important to mention the contribute of the General Recommendation, which introduces the concept of family violence:

[...] women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. [...] These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.²⁸¹

Nevertheless, although the document adds further elements to tackle women’s discrimination and recommends the implementation of measures to prevent it, being drafted in 1992 makes it lacking in the analysis of online violence against women.

Considering a more recent document, the General Recommendation No. 35 of 2017 provides further information on the prevention of gender-based violence against women, assuming that gender-based violence against women affects women and *girls* in “all spaces and spheres of human interaction, whether public or private.”²⁸² Nevertheless, cyberspace is not explicitly included in the “general legislative measures”. It is mentioned in the prevention section though, fostering the avoidance of women discrimination within all media. Indeed, the Recommendation encourages the implementation of “self-regulatory mechanisms” of online and social media, in order to eradicate gender stereotypes and foster the protection of women against violence within cyber environments. Moreover, the document invites States Parties to:

c) [Establish] and/or [strengthen] the capacity of national human rights institutions to monitor or consider complaints regarding any media that portray gender

²⁷⁹ CEDAW, General recommendation No. 19, op. cit. pp. 12-13.

²⁸⁰ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press, p. 17.

²⁸¹ See *supra* note, para. 23.

²⁸² CEDAW Committee, *General recommendation No. 35*, op. cit. para. 5-6.

discriminatory images or content that objectify or demean women or promote violent masculinities.²⁸³

However, even though *all spheres* may suggest the inclusion of cyberspace in the context of violation of women's right, we may not affirm certainly that abuse based on the diffusion of intimate private images on the Internet should be considered as international violation of human rights, since it is not mentioned in the Recommendation's analysis.

Nonetheless, concerning non-consensual pornography, it is worth mentioning two further documents. On one hand, it can be found the resolution 29/14 of the Human Rights Council, in which domestic violence is conceived as one of the most common forms of VAW, recognizing it as a serious violation of human rights since it discriminates women, and including acts "such as" cyber-bullying and cyber-stalking.²⁸⁴ On the other hand, it needs to be mentioned the resolution 71/199 of 2016 on the right to privacy in the digital age. Accordingly, the Special Rapporteur Šimonović underscores that most of the violence perpetrated online also violates the right to privacy, especially in the case of distribution/dissemination of intimate images without consent, since the victim's dignity is violated.²⁸⁵ Indeed, pursuant to article 17 of ICCPR and to UDHR, the right to privacy is recognized as one of the fundamental human rights:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.²⁸⁶

To conclude, we can affirm that the CEDAW cannot be considered an instrument tackling online violence, nor counters the non-consensual dissemination of intimate private photos. Certainly, this is because these phenomena are quite recent, while the Convention dates 1979. Nevertheless, we believe that the contribution of the General Recommendations and the Human Rights Council resolutions may be helpful in the recognition of online violence, since they introduce the concept of cyberviolence and the necessity to monitor online media in the context of gender-based violence against women.

²⁸³ CEDAW Committee, *General recommendation No. 35*, op. cit. p. 12.

²⁸⁴ Resolution adopted by the Human Rights Council on 2 July 2015, 29/14. Accelerating efforts to eliminate all forms of violence against women: eliminating domestic violence, A/HRC/RES/29/14, p. 3.

²⁸⁵ See *supra* note, pp.12-13.

²⁸⁶ Universal Declaration of Human Rights, 10 December 1948, art. 12.

2.1.5 The Human Rights Committee and the Human Rights Council on combating hate speech.

Focusing on hate speech, the HRC General comment No. 34 turns the attention to article 19 of the Covenant. As stated in the Comment, freedom of expression right is considered an “indispensable condition for the full development of the person” and due to the binding nature of the Covenant, States Parties shall respect their responsibility and obligations, in order to protect and ensure this right.²⁸⁷ Considering cyberspace, the Comment focuses more on the importance that the media has to ensure freedom of opinion, instead of communicating the risks that online platforms could have. It highlights the necessity “to foster the independence of these new media and to ensure access of individuals thereto.”²⁸⁸ Moreover, it underlines how essential it is expressing ideas about public and political issues. It is interesting how the Committee illustrates the applicability of article 19: even though the article mentions the possibility of freedom of expression restrictions, the Comment stresses the idea that these must not jeopardize the right itself.²⁸⁹

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.²⁹⁰

Moreover, it highlights the principles of necessity and proportionality. The document is clear: “Paragraph 3²⁹¹ may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”²⁹² nor it must

²⁸⁷ General comment No. 34 on article 19: Freedoms of opinion and expression, 102nd session, CCPR/C/GC/34, Geneva, 11-29 July 2011, pp. 1-2

²⁸⁸ General comment No. 34 on article 19, CCPR/C/GC/34, op. cit. p. 4.

²⁸⁹ General comment No. 34 on article 19, CCPR/C/GC/34, op. cit. pp.5-6.

The Comment recalls the provision of article 5 of ICCPR which states that “*nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms [...]*”

²⁹⁰ General comment No. 34 on article 19, CCPR/C/GC/34, op. cit. p. 8.

²⁹¹ “3. [...] *It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For respect of the rights or reputations of others.*

(b) *For the protection of national security or of public order (ordre public), or of public health or morals.”* See ICCPR art. 19(3).

²⁹² General comment No. 34 on article 19, CCPR/C/GC/34, op. cit. p. 6.

be used to attack a person while exercising his or her right of opinion. Regarding political speech, the General comment expresses itself claiming that restriction should be “constructed with care”²⁹³ to avoid coercion and intimidation and at the same time protecting the political debate. Similarly, the considerations made upon cyberspace let us understand the position of the Committee. Indeed, the internet and the media should be subjected to restriction only if the event is compatible with paragraph 3:

[...] It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.²⁹⁴

Another point which is worth to be mentioned is the comparison with article 20 of the Covenant. In fact, the Committee distinguishes the articles, stating that article 20 requires the intervention of the States, which are “obliged to adopt the necessary legislative measures prohibiting the actions referred to therein.”²⁹⁵ As a matter of fact, according to the General Comment No. 11 on article 20, the Committee affirms that any propaganda for war or incitement to discrimination shall be prohibited by law. Moreover, it “believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained.”²⁹⁶

Examining hate speech regulation, a few reports made by Special Rapporteurs²⁹⁷ to the General Assembly need to be mentioned. The Report A/66/290 focuses on online content and the risks that the Internet might have towards freedom of expression right. The Special Rapporteur, Frank La Rue, points out the double nature of the Internet, claiming that on one hand, cyberspace should be seen as an essential opportunity to express ideas and spread information; on the other, it may include risks for users’ privacy or it might be used for illegal activities.²⁹⁸ Furthermore, he states that the application of article 19 of the ICCPR should be valid both for real space and online environment, as it should be the restrictions expressed in the above article: “the types of information or

²⁹³ General comment No. 34 on article 19, CCPR/C/GC/34, op. cit. p. 7.

²⁹⁴ General comment No. 34 on article 19, CCPR/C/GC/34, op. cit. p. 11.

²⁹⁵ CCPR General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred, 29 July 1983, p. 1.

²⁹⁶ Ibid.

²⁹⁷ Experts of the Human Rights Council, an inter-governmental body within the United Nations system which aims at promoting and protecting human <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx> (accessed 25-01-2021)

²⁹⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/66/290, 10 August 2011, pp. 5-6

expression that may be restricted under international human rights law in relation to offline content also apply to online content.”²⁹⁹ In addition, La Rue claims that being aware of the different typologies of a speech, may be a crucial element for the right “legal and technological responses.” For this reason, in a similar manner as the UN strategy plan, he underscores three types of expression:

(a) expression that constitutes an offence under international law and can be prosecuted criminally; (b) expression that is not criminally punishable but may justify a restriction and a civil suit; and (c) expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.³⁰⁰

Turning our attention to the online content regulation, the Special Rapporteur asserts that three typologies of expression should be prohibited by international criminal law and human rights law. First of all, he mentions online child pornography since the internet has become one of the first vehicles through which it is disseminated. Even though the phenomenon is prohibited by international law (CRC and its Optional Protocol), he stresses the fact that dissemination of child pornography throughout the internet is serious violation of children right.³⁰¹ Secondly, he assumes that the Internet may become a tool for incitement to commit genocide. As such, he suggests that the phenomenon prohibition should start in domestic law, being aware not to violate freedom of expression right:

[...] through blocking or removing such expression via the Internet, must only be applied after a careful assessment of the threat of such expression to directly incite genocide, including factors such as the speaker, the intended audience, the content or meaning of the speech, the socio-historical context, the mode of transmission [...]³⁰²

Finally, the Special Rapporteur focuses on the dissemination of hate speech through the Internet. He underlines the difficulty to define hate speech as a whole and it concludes asserting that hate speech may take different forms. Regarding its restriction, he refers to article 19(3) and 20 of ICCPR which states that “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”³⁰³ should be prohibited by law. Therefore, it is important recognizing when advocacy becomes an

²⁹⁹ Ibid.

³⁰⁰ Report of the Special Rapporteur, A/66/290, op. cit. p.7.

³⁰¹ Report of the Special Rapporteur, A/66/290, op. cit. p.8.

³⁰² Report of the Special Rapporteur, A/66/290, op. cit. p. 9.

³⁰³ International Covenant on Civil and Political Rights, Adopted 16 December 1966, entry into force 23 March 1976, art. 20(2).

offence, namely when the expression overlaps with discrimination or incitement to violence. In this case, the statement should be prohibited by law since it jeopardizes the human dignity and the fundamental rights of individuals. However, the main difficulty in regulating hate speech online at international level relies on the fact that many forms of hate speech are not included in the international regulation, because they do not cover the seriousness set out in article 20.³⁰⁴ In conclusion, La Rue recommends States to support ICT companies to both promote freedom of expression and to protect users from violation of rights, suggesting educational school programs about safety on the Internet.

One year later, the same Special Rapporteur proceeded with his work on hate speech. In the report A/67/357 he claims the rapid escalation of hate speech within cyberspace, highlighting the worldwide importance of the phenomenon, assuming that freedom of expression should be limited to avoid discriminatory circumstances:

The growing number of expressions of hate, incitement to violence, discrimination and hostility in the mass media and on the Internet serves as a reminder that the struggle against intolerance is both an urgent and permanent task.³⁰⁵

He claims that regulation by Governments is not enough to stop the wave of hate that endures all over the world. He underscores the need for further measures to tackle hate speech, since legal prohibition alone resulted insufficient to eliminate the “human sentiment of hatred.”³⁰⁶ Moreover, he stresses the necessity of governments and the media to cooperate in order to foster equality and avoid acts of discrimination within their territories and platforms. Finally, he provides recommendations for States parties. The most relevant in our study are firstly, the criminalisation of incitement to hatred and/or discrimination based on “severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context.”³⁰⁷ Secondly, the adoption of civil law for every types of hate speech which do not include incitement or discrimination. In this case, he recommends “restoring reputation, preventing recurrence and providing financial compensation.”³⁰⁸ Finally, he recommends the removal from office and sanctions for

³⁰⁴ See *supra* note, p.10.

³⁰⁵ Report of the Special Rapporteur on the Promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, p.9.

³⁰⁶ *Ibid.*

³⁰⁷ Report of the Special Rapporteur, A/67/357, *op. cit.* p. 22.

³⁰⁸ *Ibid.*

politicians who use hate speech.³⁰⁹ As shown, the rapid escalation of hate speech revealed the controversial nature of freedom of expression right: if one hand, it is one of the most crucial human rights, on the other there are obstacles and difficulties that jeopardize it.

Focusing on cyberspace, the report A/HRC/38/35 of the Special Rapporteur David Kaye provides a study of the Internet regulation of hate speech. As far as freedom of expression is concerned, States shall allow all individuals to access the Internet and express themselves without interference, and to promote media diversity. Regarding company responsibilities, the Special Rapporteur shows what States and companies have done to avoid illegal content on the Internet. Firstly, he mentions the Guiding Principles on Business and Human Rights which highlights the conduct that companies should take towards human rights protection, such as the avoidance of adverse human rights impact within the enterprise (principle 13), “Make high-level policy commitments to respect the human rights of their users (principle 16)”³¹⁰, the conduction of due diligence to identify and mitigate negative impacts concerning human rights³¹¹ (principle 17) and fostering the prevention of international human rights (principle 23).³¹² Secondly, he highlights the role of the States in asking companies to restrict illegal content within their online platforms, such as child pornography, incitement to violence or threats.³¹³ Finally, he mentions the EU Code of Conduct (2016), an agreement between the European Union and four major companies which undertakes to avoid illegal hate speech online.³¹⁴ Furthermore, Kaye analyses the problems that companies’ terms of services may have, defining their drafting inconsistent and vague. For example, it is difficult to find a policy which defines what type of content should be considered harassment or abuse.

Users and civil society report violence and abuse against women, including physical threats, misogynist comments, the posting of non-consensual or fake intimate images and doxing; [...] ethnic groups suffering from violent persecution; and abuse directed at refugees, migrants and asylum seekers.³¹⁵

³⁰⁹ Report of the Special Rapporteur, A/67/357, op. cit. p. 23.

³¹⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018, p. 5.

³¹¹ OHCHR. (2011). *Guiding Principles on Business and Human Rights: implementing the United Nations “Protect, Respect and Remedy” Framework*. Geneva: United Nations. pp. 17-18.

³¹² See *supra* note, pp. 5-6.

³¹³ Report of the Special Rapporteur, A/HRC/38/35, op. cit. p. 6.

³¹⁴ Report of the Special Rapporteur, A/HRC/38/35, op. cit. p. 8. See section 3.3.2 on European soft law.

³¹⁵ Report of the Special Rapporteur, A/HRC/38/35, op. cit. p.10.

However, the complexity of the phenomenon and inaccurate policies may lead companies to enforce serious restrictions without taking into consideration the principles of necessity and proportionality. For this reason, the Special Rapporteur recommends the implementation of human resources to analyse the context in which a possible abuse is perpetrated. For example, images of nudity are usually “banned” from social networks, however, a careful analysis of the context may avoid censorship of artistic images, paintings or sculptures depicting naked bodies. Moreover, he underscores the importance of anonymity in special cases, such as activists using pseudonyms to protect themselves, or in the case of vulnerable users. Also, he mentions the major challenge of disinformation. In this case, companies have the power to block or remove profiles, jeopardizing freedom of expression. For these reasons, nowadays companies are using both automation tools -used for the analysis of content or copyright- and human evaluation before removing a content or suspending a profile. In other words, the regulation of Internet companies still has important “holes in the system”: if on one hand they foster human rights, trying to eliminate illegal content from their platforms and ensuring transparency with periodic reports, on the other hand policies are imprecise, lacking in precise definitions for illegal content. Moreover, the excessive removal of content from online platforms, without an attentive analysis of its context, may lead to a serious violation of human rights. Therefore, according to Kaye, companies should clarify their terms of services, taking into consideration the principles of necessity, proportionality, transparency and legality. Also, they should cooperate with governments and following the international human rights law to promote and protect human rights, avoiding any type of discrimination, abuse or harassment.³¹⁶

To conclude, we want to provide a final analysis of the report A/74/486 of 2019. Here, the Special Rapporteur D. Kayes highlights the relation between States and online companies. Firstly, States should not use internet companies to limit freedom of expression, but they shall cooperate to create a rightful regulation compatible with article 19(3) of the ICCPR on freedom of expression.³¹⁷ Secondly, States should adopt rules both for real space and for companies online to remove illegal hate speech or illegal content. Thirdly, States should restrict unlawful content respecting the principle of legality,

³¹⁶ Report of the Special Rapporteur, A/HRC/38/35, op. cit. pp. 15-16 and p. 20.

³¹⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019, pp. 12-13.

transparency and proportionality, as they should be Internet companies. Finally, the Rapporteur stresses the implementation of human rights policies for Internet companies, underscoring the following characteristic of the mechanism:

- (a) Conduct periodic reviews of the impact of the company products on human rights;
- (b) Avoid adverse human rights impacts and prevent or mitigate those that arise;
- (c) Implement due diligence processes to “identify, prevent, mitigate and account for how they address their impacts on human rights” and have a process for remediating harm.³¹⁸

Fundamentally, Kaye recommends States to act on offline hate speech and online one in the same way, avoiding intermediary interference. He stresses companies to include policies in favour of human rights, taking into consideration the international legal framework on freedom of expression rights.³¹⁹

2.2. The Council of Europe legal framework.

One of the tasks of the Council of Europe is the creation of human rights campaigns with the purpose to create awareness, educate and protect people from violation of human rights. For example, in the action to prevent hate speech it is important to mention the campaign “No Hate Speech Movement” (2013-2017) that the Youth Department of the Council launched with the purpose of combating hate speech, especially the one perpetrated on the Internet. The Council of Europe believes that the hate speech phenomenon threatens democracy and human rights.³²⁰ For this reason, the campaign aimed at promoting human rights online, implementing an efficient educational system and creating strategies to prevent the phenomenon.³²¹ We might argue that the No Hate Speech Movement was a complete campaign since on one hand, it stressed States to use legal mechanisms; on the other, it fostered freedom of speech, education, awareness of the danger of hate speech and support for victims.

³¹⁸ Report of the Special Rapporteur, A/74/486, op. cit. p. 17.

³¹⁹ Report of the Special Rapporteur, A/74/486, op. cit. pp. 22-23.

³²⁰ For further information see Georgescu, M., & Keen, E. (2016). *BOOKMARKS: A manual for combating hate speech online through human rights education*. Ukraine: Council of Europe, p. 11.

³²¹ Ibid.

In addition to the above instruments, the Council of Europe is responsible for the creation of several further conventions. According to our study, there are two legally binding Conventions that are crucial in the analysis of hate speech and non-consensual pornography. For this reason, in this section we will provide a selective study on articles and documents related to these Conventions, highlighting the articles that may prevent violence online and underscoring the possible limits of them. We will start with the European Convention on Human rights and the analysis of some judgments of the Court on hate speech. Subsequently, we will mention the Budapest Convention on cybercrime regulation and its Protocol on racist and xenophobic content. Finally, we will conclude with the description of the Istanbul convention on violence against women and domestic violence to demonstrate whether and how it can be used for combating non-consensual dissemination of intimate private photos.

2.2.1 The European Convention on Human Rights: an instrument for countering online violence?

The Convention provides crucial articles preventing discrimination and fostering equality. However, there are not specific articles tackling the phenomenon of hate speech, nor there are against non-consensual pornography. Nevertheless, ECHR contains a few articles that may be used as a solid basis on which we can start our analysis. First of all, if we take into consideration hate speech and gender-based violence, article 14 on the prohibition of discrimination is one of the first articles to be addressed. However, its formulation raises doubts on its efficiency. In fact, the article declares that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.³²²

Indeed, this statement reflects the “accessory” role of discrimination, since it shows how the phenomenon should be tied to other rights set forth in the Convention, to be considered

³²² European Convention on Human Rights, 1953- ETS 005, art. 14.

before the Court.³²³ Moreover, precisely because the application to the Court could be done upon the violation of a single right of the Convention, complaints based on discrimination may be difficult to be examined.³²⁴ For this reason, in many cases the Court decided not to take into consideration applications based exclusively on article 14.³²⁵ Nonetheless, in 2000 Protocol No. 12 was adopted, introducing a more detailed provision on discrimination. The explanatory report on Protocol 12 explains that:

[...] while the equality principle does not appear explicitly in the text of either Article 14 of the Convention or Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined.³²⁶

Article 1 of the Protocol extends to “any right set forth by law” the protection from discrimination and it includes discrimination perpetrated by public authority.³²⁷ If we compare article 14 with article 1 of the protocol, we may deduct that both prohibit discrimination based on the identity of individuals, without including discriminatory treatments.³²⁸ However, the ECtHR notes that including a restriction clause in the Protocol was not necessary due to the general character of non-discrimination:

[...] In addition, it should be recalled that under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.³²⁹

Thus, both provisions reflect on one hand, the necessity to consider discrimination as human rights violation and consequently to prohibit it “on any ground”; on the other, they highlight the responsibility of States in respecting the positive obligations to prevent it

³²³ Gerards, J. (2013). The Discrimination Grounds of Article 14 of the European Convention on Human Rights. *Human Rights Law Review*, Vol. 13, No. 1, p. 100.

³²⁴ Ibid.

³²⁵ ECHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, 2020, pp.7-8.

³²⁶ Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 177, Rome, 4.XI.2000, p. 3.

³²⁷ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 177, Rome, 4.XI.2000, art. 1.

³²⁸ ECHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, 2020, p. 24.

³²⁹ Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 177, Rome, 4.XI.2000, p. 4.

and reduce it. Nevertheless, concerning hate speech, the Convention does not provide any article prohibiting incitement to hatred or discrimination.

If we proceed with our analysis, it is crucial to mention freedom of expression right, enshrined in article 10 of the Convention. The article declares that everyone is free to hold opinion and to receive and impart information, however it supplements a restriction clause, stating that limitations of freedom of expression:

[...] are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others.
[...]³³⁰

The characteristic of article 10 relies in the fact that it protects both individuals and legal entities,³³¹ and it takes into consideration both the content and the means of its dissemination. According to the Court, the limitations imposed on the means may constitute a serious interference with the enjoyment of the right itself.³³² However, at European level, freedom of expression is not considered an absolute right. Moreover, differently from ICCPR, it is not clear if freedom to hold opinions, included in the article, should be considered absolute or not. As a matter of fact, we can see that paragraph 2 of the aforementioned article provides some restrictions. Focusing on restrictions, article 10 outlines three main characteristics of them. Firstly, they must be “prescribed by law”, since only the legislature “should have the power to put in place measures that limit this fundamental right”³³³; secondly, they must be “necessary in a democratic society”, meaning that “the Court must determine whether the reasons [...] were ‘relevant and sufficient’ and whether the measure taken was ‘proportionate to the legitimate aims pursued;’”³³⁴ and finally, they must protect the interests listed in article 10(2). Moreover, the Court recognizes to Member States a certain margin of appreciation, which allows them, with the European supervision, to limit freedom of expression according to their

³³⁰ European Convention on Human Rights, 1953- ETS 005, art. 10.

³³¹ One of the first cases in which article 10 was taken into consideration was between a newspaper publisher and the UK; see *Sunday Times v. the United Kingdom*, 1979.

³³² Mendel, T., *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Centre for Law and Democracy. Council of Europe, p. 6.

³³³ Mendel, T., *op. cit.* p. 34.

³³⁴ See *Cumpănă and Mazăre v. Romania*, 2004, *cit. para.* 90.

culture, history or legal system.³³⁵ Regarding hate speech, the Court defines it a “breach” of freedom of expression right. In worst cases, the Court referred to hate speech as a violation of both article 10 and article 17:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.³³⁶

Nevertheless, the application of article 17 depends on the gravity of the speech: in many cases the Court found reasonable restrictions based exclusively on article 10, other times it declared restrictions a violation of the right of freedom of expression. For example, in *Belkacem v. Belgium, 2017*³³⁷ the applicant required the intervention of the Court after publishing a series of videos in which he invited people to “dominer les personnes non-musulmanes, à leur donner une leçon et à les combattre.”³³⁸ In this case, the Court declared the facts not only a freedom of expression right abuse, but also a violation of non-discrimination, tolerance and social peace values. In *Balsytė -Lideikienė v. Lithuania, 2008*³³⁹, the ECtHR claimed that the restriction was necessary to protect ethnic groups living in Lithuania from aggressive nationalism and incitement to hatred. Instead, in *Vejdeland v. Sweden, 2012*³⁴⁰ the Court declared there was not a violation of article 10. After having distributed leaflets on homosexual propaganda, the applicants were “charged with agitation against a national or ethnic group.” They defended their position claiming that they wanted to “start a debate about the lack of objectivity” in Sweden schools, without the intention of spreading a hateful message against homosexual individuals. Therefore, the Court claimed that the leaflets were discriminatory against homosexual people, accusing them to be paedophiles and to be the main cause of AIDS disease:

[...] according to the leaflets, homosexuality was “a deviant sexual proclivity” that had “a morally destructive effect on the substance of society” [...] In the Court’s

³³⁵ Mendel, T., op. cit. p. 3 and p. 40.

³³⁶ European Convention on Human Rights, 1953- ETS 005, art. 17.

³³⁷ ECtHR, judgment 20 July 2017, *Belkacem v. Belgium*, application no. 34367/14.

³³⁸ ECtHR, *Belkacem v. Belgium*, cit. para. 33.

³³⁹ ECtHR, judgment 4 November 2008, *Balsytė -Lideikienė v. Lithuania* application no. 72596/01.

³⁴⁰ ECtHR, judgment 5 September 2012, *Vejdeland v. Sweden*, application no. 1813/07.

opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.³⁴¹

As we can see, hate speech and incitement to hatred are two phenomena that are difficult to contain, due to their inescapable interconnection with freedom of expression. It is crucial for the Court to understand if hateful messages may constitute a violation of fundamental rights or if they fall within freedom of expression. In addition:

[...]the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech [...]³⁴²

Therefore, focusing on hate speech, we may deduct that its restriction should pass an attentive analysis of the context, the means -which may be the media, social environments or cyberspace- and the harm of individuals involved before declaring them justifiable and proportionate.

Finally, we want to conclude our analysis of the Convention, talking about article 8 on right to respect for private and family rights. The article states as follow:

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...]³⁴³

With “private life”, the Court does refer to both personal choices of an individual, and his personal development and autonomy. Moreover, it highlights that private life rights may be applied in a public context.³⁴⁴

If we focus on attention on non-consensual dissemination of intimate private photos, the Court expressed itself stating that “a person’s image constitutes one of the chief attributes of his or her personality [...] The right to the protection of one’s image is thus one of the

³⁴¹ ECtHR, *Vejdeland v. Sweden*, cit. para. 54.

³⁴² ECtHR, *Vejdeland v. Sweden*, cit. para. 55.

³⁴³ European Convention on Human Rights, 1953- ETS 005, art. 8.

³⁴⁴ ECHR, Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence, 31 august 2020, p.21.

essential components of personal development.”³⁴⁵ Moreover, States have positive obligations to implement legal measures prohibiting filming without consent. According to this, it is interesting to take into consideration the case of *Söderman v. Sweden, 2013*.³⁴⁶ Indeed, the 14-year-old applicant required the intervention of the Court after her stepdad took photos and videos without her consent, while she was naked.³⁴⁷ She also complained because the Sweden legal system, lacking in the prohibition of filming without consent, did not protect her integrity. For these reasons, the Court declared that there has been violation of article 8 because:

In view of the Convention obligation to criminalise non-consensual filming and photography regardless of any sexual purpose on the part of the perpetrator and to provide compensation based directly on breaches of Article 8, the national legislature’s failure to satisfy the first obligation, and the domestic courts’ unwillingness to satisfy the second.³⁴⁸

Furthermore, article 8 protects individuals from defamation, declaring that attacking someone’s reputation would violate his private life. For example, in *Egill Einarsson v. Iceland, 2017*³⁴⁹, the applicant asked for the intervention of the Court after receiving a serious offensive comment - he has been called a “rapist”- under a photo posted on Instagram. The Court declared that those types of comments constitute “interference with the applicant’s private life in so far as it had attained a certain level of seriousness.”³⁵⁰

In this context, States have a wide margin of appreciation in managing the regulation of internet content and data protection. Indeed, in *K.U v. Finland, 2009*³⁵¹ the Court found violation of article 8, after a 12-year-old boy was victim of online personal data theft.

Moreover, the Court stresses the importance of the seriousness of comments within cyberspace, in order to prevent violation of article 8 and article 10. On one hand, considering hate speech, protecting someone’s reputation, this article becomes a key factor for the prevention of hateful comments dissemination on the internet, since States should adopt positive obligations to reduce incitement to hatred and hate speech content.

³⁴⁵ ECtHR, Guide on Article 8, op. cit. p. 39.

³⁴⁶ ECtHR, judgment 12 November 2013, *Söderman v. Sweden*, application no.5786/08.

³⁴⁷ Being the applicant a minor, this case falls under the category of child pornography. However, it is necessary to include it in our analysis because of the contribution of the Court examining non-consensual pornography.

³⁴⁸ See ECtHR, *Söderman v. Sweden* under “conclusion”.

³⁴⁹ ECtHR, judgment 7 November 2017, *Egill Einarsson v. Iceland*, application no.24703/15.

³⁵⁰ ECtHR, *Egill Einarsson v. Iceland*, cit. para. 52.

³⁵¹ ECtHR, judgment 2 March 2009, *K.U v. Finland*, application no.2872/02.

On the other hand, regarding non-consensual pornography, the Court has not already expressed itself. However, starting from the analysis of article 8, we may highlight several aspects of the phenomenon which can fall under it. First of all, the article protects the reputation and privacy of individuals. In non-consensual dissemination of intimate private images cases, victims are usually humiliated and insulted after their private and intimate photos or videos have been disseminated within the internet. In addition, they have repercussions not only on their online activities, but also on their real life -workplace, relations and social life-. Therefore, non-consensual pornography jeopardizes the reputation, the personal development and the private life of an individual. Protecting all the aforementioned elements, we may deduct that article 8 may be a key instrument to tackle the phenomenon.

2.2.2 The European Court of Human Rights judgments: an analysis.

In the following paragraphs we want to turn our attention to the work of the European Court of Human Rights. The starting point will be the study of some cases of hate speech, focusing on the Court response. Finally, we will analyse how the Court coped with two cases of cyber violence.

- a. Court examination of hate speech judgments: analysing racist, political and gender-based hate speech.

It has already been pointed out that article 8 on private life, article 10 on freedom of expression and article 14 on discrimination are three crucial and interconnected articles to consider if talking about hate speech. Regarding this phenomenon, the Court expressed itself more than once. For this reason, we decided to analyse a few judgments in which the Court tackled racist, political and gender-based hate speech.

In *Balázs v. Hungary, 2015*³⁵², the applicant, Mr János Krisztián Balázs, presented the application against the Hungarian Government. The chamber was composed by seven

³⁵² ECtHR, judgment 20 October 2015, *Balázs v. Hungary*, application no.15529/12.

judges³⁵³ and the judgment became final on 14th March 2016. In January 2011, after leaving a club, the applicant and his girlfriend received degrading comments from three men based on his Roma origin and on her physical appearance.³⁵⁴ Subsequently, the applicant contested the attitude of a fourth man, the penitentiary officer Mr. E.D., with whom got into a fight. After the fight, both men were visibly injured, however, only Mr. E.D. was examined immediately by doctors. The applicant was examined only two days later, discovering that he had bruises on his chest, back, neck and face.³⁵⁵ For these reasons, the applicant decided to lodge a criminal complaint against Mr. E.D. in February 2011, underscoring the aggressive behaviour and comments of the other three men. Moreover, he complained about the fact that Mr. E.D. posted on a social network a series of posts in which he described that he “had been kicking in the head a gypsy lying on the ground.”³⁵⁶ In addition, Mr. E.D. posted a link to a video with intolerant and explicitly racist language claiming that it reflected “some other types of rubbish living among us.”³⁵⁷ In May 2012, after the analysis of the Prosecutor's Office, Mr. E.D. was sentenced to one-year probation for having got into a fight, without taking into consideration the discriminatory behaviour against the applicant. Having the Hungarian authorities failed in the rightful investigation of the racist attack suffered by the applicant, he asked the Court to examine if there was a violation of article 14 and article 3 on the prohibition of torture. In the examination, the Court noted that the authorities were “reluctant” to investigate the applicant’s accusation of being attacked because of his Roma origin, and that they did not consider the biased motives behind the attack.

Moreover, the applicant contended that the domestic authorities had failed to take all the necessary measures to identify further witnesses who could have given an account of the fight between him and Mr E.D. He also pointed out that the Prosecutor’s Office had dismissed his request for further investigative measures[...]³⁵⁸

In front of these facts, the Court claimed that, even if the harm was not so serious, the punishment on adolescents may be considered “degrading treatment” and fall under article 3. Moreover, being beaten by a State official constituted an aggravating

³⁵³ Işıl Karakaş, *President*, András Sajó, Nebojša Vučinić, Helen Keller, Egidijus Kūris, Robert Spano, Jon Fridrik Kjølbro, *judges*, and Stanley Naismith, *Section Registrar*.

³⁵⁴ ECtHR, *Balázs v. Hungary*, cit. para. 6.

³⁵⁵ ECtHR, *Balázs v. Hungary*, cit. para. 9.

³⁵⁶ ECtHR, *Balázs v. Hungary*, cit. para. 11.

³⁵⁷ *Ibid.*

³⁵⁸ ECtHR, *Balázs v. Hungary*, cit. para.42.

circumstance. According to Várnagy E., the difficulty of the applicant in convincing the public authority to be a victim of racist attack, derived from the “institutional racism” which is deeply rooted in the Hungarian State.³⁵⁹ Besides, the Court stressed the fact that authorities must investigate whether racism, hatred or prejudice have played a central role in the criminal act.

The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.³⁶⁰

For these reasons, the Court declared that there was an effective violation of article 14, in conjunction with article 3 of the Convention, since the authorities failed in their obligation to investigate the fact.³⁶¹

As it is possible to assume, this example should not be placed under hate speech cases, but under hate crime one. However, we emphasized this judgment since there is a strong interconnection between the two phenomena. As we have already stressed along this thesis, hate speech could be interpreted as the stepping-stone of hate crime: both are based on biased motives. However, hate speech usually includes discriminatory, hateful comments and/or incitement to violence, while the key element that differentiates hate crime is the perpetuation of violent acts that can be criminalized by the national legislation. In this case, the Court covered an important role, since on one hand it “realise[d] the difficulty of marginalised people seeking redress in situations where the authorities are likely biased”; on the other, although it did not make doctrinal progress, it stressed States to investigate on racist episodes against Roma.³⁶²

In *Pastörs v. Germany, 2019*³⁶³, the applicant, a Member of the Parliament, presented an application against the German Government by July 2014, declaring that

³⁵⁹ Várnagy, E. (11 June 2016). *Balázs v Hungary*. The recognition of institutional racism in anti-Roma violence cases. Retrieved from <https://www.lawyr.it/in>

³⁶⁰ ECtHR, *Balázs v. Hungary*, cit. para. 52.

³⁶¹ The compensation for the applicant was 10.000€ to be paid within three months.

³⁶² Várnagy, E. (11 June 2016). *Balázs v Hungary*. The recognition of institutional racism in anti-Roma violence cases. Retrieved from <https://www.lawyr.it/in>

³⁶³ ECtHR, judgment 3 October 2019, *Pastörs v. Germany*, application no. 55225/14.

there was a violation of article 10 and 6.³⁶⁴ The chamber was composed by seven judges³⁶⁵ and the judgment became final on 3rd January 2020. The fact started during in January 2010, during the Holocaust Remembrance Day in Parliament, when the applicant explicitly denied the Holocaust, defining it as a political and commercial tool:

Because people can sense that the so-called Holocaust is being used for political and commercial purposes [...] Since the end of the Second World War, Germans have been exposed to an endless barrage of criticism and propagandistic lies [...] You are hoping, ladies and gentlemen, for the triumph of lies over truth.³⁶⁶

After being revoked from his position and being accused of defamation and to have violated the memory of the dead, in August 2012 the Regional court sentenced the applicant for eight months of imprisonment, “suspended on probation.”³⁶⁷ In March 2013, the Regional court held a hearing declaring that “the applicant had thereby denied in a qualified manner the systematic, racially motivated, mass extermination of the Jews carried out at Auschwitz during the Third Reich.”³⁶⁸ Moreover, according to the court, the applicant’s speech was capable of “defaming the persecution of the Jews in Germany”³⁶⁹ and it claimed that the applicant’s intention was to spread his conviction of the Holocaust denial, since the speech was spread also in the Internet. Regarding the statements of the applicant, the ECtHR underscored that, in order to have violation of article 10 in conjunction with article 17, statements should:

[...] stirring up hatred or violence, or whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.³⁷⁰

The Court continued highlighting that its role was not to examine the elements of the speech, but “to protect the reputation and the rights of others.”³⁷¹ In this case, it stressed the fact that the Regional court analysed just a part of the applicant’s speech.

³⁶⁴ Right to a fair trial. See ECHR, art. 6.

³⁶⁵ Yonko Grozev, *President*, Angelika Nußberger, André Potocki, Síofra O’Leary, Mārtiņš Mits, Gabriele Kucsko-Stadlmayer, Lado Chanturia, *judges*, and Milan Blaško, *Deputy Section Registrar*.

³⁶⁶ ECtHR, *Pastörs v. Germany* cit. para. 5.

³⁶⁷ ECtHR, *Pastörs v. Germany* cit. para. 7.

³⁶⁸ ECtHR, *Pastörs v. Germany* cit. para. 9.

³⁶⁹ ECtHR, *Pastörs v. Germany* cit. para. 14.

³⁷⁰ ECtHR, *Pastörs v. Germany* cit. para. 37.

³⁷¹ ECtHR, *Pastörs v. Germany* cit. para. 41.

Nevertheless, the ECHR affirmed that the application of article 17 “was to be considered on a case-by-case basis.”³⁷² In this case, precisely because “the applicant intentionally stated untruths in order to defame the Jews and the persecution that they had suffered during the Second World War,”³⁷³ the Court declared that there was no violation of article 10, with the consequent rejection of the applicant’s complaint. The intentionality of the applicant and his choice to use “certain words deliberately”, have been decisive elements for the Court to declare the incompatibility of the applicant’s speech with the “text and spirit of the ECHR.”³⁷⁴

Similarly, in *Willem v. France, 2009*³⁷⁵, the applicant was a mayor of a French town, who presented an application against the French republic, by 17 March 2005, claiming that article 10 was violated. Analogously, the chamber was made by seven judges and the judgment became final in December 2009.³⁷⁶ The applicant required the intervention of the Court after he held a speech in front of the journalists in which he announced his intention to boycott Israeli products. As a consequence of these facts, the French Appeal Court decided to arrest the applicant declaring that his statement had the purpose to discriminate Israeli nationals, with the aggravating circumstance of the publication of the speech on the City website.³⁷⁷ The ECHR underscores that on one hand, the competent authorities had acted following the national legislation, and on the other hand, it highlighted that the applicant’s speech constituted “incitement to discrimination against Israeli suppliers simply on the basis of their nationality.”³⁷⁸ Comparing this case with *Pastörs v. Germany, 2019*, it can be noted that the political position of the applicant facilitated the Court decision. Indeed, differently from *Baldassi & Others v. France*³⁷⁹, in which the Court found violation of article 10, the Court stressed the fact that Willem had

³⁷² Curtis, J. (11 October 2019). Holocaust denial in a parliamentary speech: criminal conviction not a breach of Article 10. Retrieved from <https://ukhumanrightsblog.com/2019/10/11/holocaust-denial-in-a-parliamentary-speech-criminal-conviction-not-a-breach-of-article-10/>

³⁷³ ECtHR, *Pastörs v. Germany* cit. para. 48.

³⁷⁴ Curtis, J. (11 October 2019). Holocaust denial in a parliamentary speech: criminal conviction not a breach of Article 10. Retrieved from <https://ukhumanrightsblog.com/2019/10/11/holocaust-denial-in-a-parliamentary-speech-criminal-conviction-not-a-breach-of-article-10/>

³⁷⁵ ECtHR, judgment 16 July 2009, *Willem v. France*, application no 10883/05.

³⁷⁶ Peer Lorenzen, *President*, Jean-Paul Costa, Karel Jungwiert, Renate Jaeger, Mark Villiger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, *judges*, Claudia Westerdiek, *Section Registrar*.

³⁷⁷ ECtHR, *Willem v. France*, cit. para. 6.

³⁷⁸ Mendel, T. *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*. Centre for Law and Democracy. Council of Europe, p. 72

³⁷⁹ ECtHR, judgment 11 July 2020, *Baldassi & Others v. France*, application no 15271/16.

the power to adopt policies against Israeli products, and therefore boycott them³⁸⁰; while in the case of Pastörs the intention behind his speech decreed the Court decision. Accordingly, the Court declared that there was no violation of article 10, rejecting the applicant's complaint.³⁸¹

Turning our attention to online hate speech, it can highlighted the different methodology employed by the Court. Indeed, differently from the previous judgments, we are going to examine a case where the applicants were victims of discriminatory acts perpetrated online. In *Beizaras and Levickas v. Lithuania, 2020*³⁸² the applicants were a homosexual couple of Lithuanian nationals, Mr Pijus Beizaras and Mr Mangirdas Levickas, who originated an application against the Republic of Lithuania by August 2015. The chamber was composed by seven judges³⁸³ and from May 2020 the judgment is final. The facts are the following: from December 2013 to 2014 both applicants publicly posted some photos of them on Facebook, and in July 2014 they announced to be “in a relationship.” On 8 December 2014 the first applicant posted a photo in which he was kissing the second applicant, making it visible not only to his friends, but to the entire community of Facebook. The photo immediately “went viral online” reaching more than two thousand likes and eight-hundred comments.³⁸⁴ The two applicants affirmed that the majority of the comments received were threatening and inciting hatred and violence against the LGBT+ community. Later, in December 2014, the applicants lodged a request to the LGL association, submitting the complaint on the hateful comments received. They claimed that those comments were not only incitement to hatred, but that they were discriminatory and aiming to destroy their dignity. However, the competent authorities refused to prosecute their case, stating that the applicants' behaviour did not correspond to “traditional family values” appreciated by Lithuanian nationals.³⁸⁵ Moreover, they affirmed that:

³⁸⁰ Wintemute R., (17 July 2020) *Baldassi & Others v. France: Article 10 protects the right to call for a boycott of goods from Israel*. Retrieved from <https://strasbourgobservers.com/2020/07/17/baldassi-others-v-france-article-10-protects-the-right-to-call-for-a-boycott-of-goods-from-israel/>

³⁸¹ ECtHR, *Willem v. France*, cit. para. 42.

³⁸² ECtHR, judgment 14 January 2020, *Beizaras and Levickas v. Lithuania*, application no. 41288/15

³⁸³ Robert Spano, *President*, Marko Bošnjak, Egidijus Kūris, Ivana Jelić, Arnfinn Bårdsen, Darian Pavli, Saadet Yüksel, *judges*, and Stanley Naismith, *Section Registrar*.

³⁸⁴ ECtHR, *Beizaras and Levickas v. Lithuania*, cit. para. 10.

³⁸⁵ ECHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention, 2020.

[...] a person who posted in the public space (viešoje erdvėje) a picture “of two men kissing” should and must have foreseen that such “eccentric behaviour really did not contribute to the cohesion of those within society who had different views or to the promotion of tolerance.”³⁸⁶

The applicants affirmed that the proceeding in the domestic courts was in the spotlight of the media, raising hostility against them and making them feel unsafe in both public and private life. For these reasons, the applicants alleged that they had been victims of discrimination based on their sexual orientation, by appealing to article 14. Besides, they claimed that the public authorities refused “to launch a pre-trial investigation into hateful comments left on the first applicant’s Facebook page,”³⁸⁷ violating article 8.

In the legal analysis, the Court mentioned the report by the European Commission against Racism and Intolerance (ECRI) on Lithuania, 2016. The report stressed the fact that Lithuania not only had a high number of racist hate speech incidents but also an increasing problem of intolerance against LGBT+ community, which is disseminate both offline and online:

Human rights activists monitoring hate speech in Lithuania noticed a trend towards creating webpages hosted on US servers to post hate speech and attempt to circumvent Lithuanian anti-hate speech legislation. [...] Online hate speech goes largely unchecked and unpunished.³⁸⁸

Besides, according to ECRI, hate speech is “a first step in the process towards actual violence.”³⁸⁹ Therefore, States should enforce their measures to tackle the dissemination of hateful content within cyberspace and foster equality and tolerance towards minorities.

As we have already analysed, article 8 of the Convention shall protect the integrity of the individuals, including physical and psychological human rights. In doing so, States have the positive obligation to protect and defend their citizens against all actions that might fall under the above article. In this case, Lithuania failed in its positive obligation, since it did not defend the applicants from threats and intimidation.³⁹⁰ The Court found that the

³⁸⁶ ECtHR, *Beizaras and Levickas v. Lithuania*, cit. para. 21.

³⁸⁷ ECtHR, *Beizaras and Levickas v. Lithuania*, cit. para. 3.

³⁸⁸ ECRI Report on Lithuania (fifth monitoring cycle) CRI (2016)20 Adopted on 18 March 2016. Retrieved from <https://rm.coe.int/fifth-report-on-lithuania/16808b587b>, para. 25-26.

³⁸⁹ ECRI Report on Lithuania, op. cit. para. 28.

³⁹⁰ Łukaszewski, P. An analysis of the European Court of Human Rights (ECHR) judgment of 14 January 2020 in the case of *Beizaras and Levickas v. Lithuania*. Retrieved March 20, 2021, from

homosexuality of the applicants played a fundamental role “in the way they had been treated by the authorities after they lodged the complaint”, which may constitute one of the reasons why the national authorities did not protect them.³⁹¹ Furthermore, the Court stressed the fact that “[e]xpressions inciting violence, containing punishable threats, promoting totalitarian ideologies were always – and rightly – recognised in the case law of the Court in Strasbourg as an abuse of the right to freedom of expression”, declaring them hate speech.³⁹²

For these reasons, the Court declared that hateful and violent comments were instigated by bigotry behaviour towards the LGBT+ community and that the discriminatory behaviour of public authority avoided the rightful legal treatment of the case, in breach of the States positive obligations. Finally, the Court claimed that there had been violation of articles 13 and 14 in conjunction with article 8:

In the light of those findings the Court also considers it established that the applicants suffered discrimination on the grounds of their sexual orientation. It further considers that the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention.³⁹³

Nevertheless, in the light of the analysis we carried on, we want to put the attention on the reasoning of Paweł M. Łukaszewski. He uses *Beizaras and Levickas v. Lithuania* as an example to demonstrate the complexity of hate speech, underlining how the watershed between simply assumption and violation of human rights is still tricky and imprecise. Indeed, he stresses the fact that freedom of expression shall also include criticism, allowing people not to agree with some types of behaviours. In this case, freedom of expression might be “matched” with freedom of religion. Łukaszewski highlights that the three monotheist religions recognise homosexuality as “morally ignoble.”³⁹⁴

<http://en.ordoiuris.pl/civil-liberties/analysis-european-court-human-rights-echr-judgment-14-january-2020-case-beizaras>

³⁹¹ Milkaite I., (7 February 2020) A picture of a same-sex kiss on Facebook wreaks havoc: *Beizaras and Levickas v. Lithuania*. Retrieved March 3, 2021, from: <https://strasbourgobservers.com/2020/02/07/a-picture-of-a-same-sex-kiss-on-facebook-wreaks-havoc-beizaras-and-levickas-v-lithuania/#:~:text=The%20judgment%20in%20the%20case,violation%20of%20Article%2013%20ECHR>

³⁹² Łukaszewski, P. M., op. cit.

³⁹³ ECtHR, *Beizaras and Levickas v. Lithuania*, cit. para. 129; In addition, the Court declared that States must pay €5000 to each applicant within three months.

³⁹⁴ Łukaszewski, P. (n.d.). An analysis of the European Court of Human Rights (ECHR) judgment of 14 January 2020 in the case of *Beizaras and Levickas v. Lithuania*. Retrieved March 20, 2021, from <http://en.ordoiuris.pl/civil-liberties/analysis-european-court-human-rights-echr-judgment-14-january-2020-case-beizaras>

Accordingly, religious people should be legitimised to express their dissenting opinion against homosexual couples. However, those critics must not cross the line of the human rights respect:

[...] when the criticism begins to be accompanied by punishable threats or incitement to violence against LGBT persons, the state should present a strong response in the form of penal sanction.³⁹⁵

Fundamentally, emphasizing the fact that this reasoning should be applied to all societal groups, it is important to recognize whether an assumption is mere criticism or not. If the speech threatens, intimidates, discriminates or incites to violence, therefore it should be considered hate speech, and consequently criminalised.

- b. May be violence online considered as a form of domestic abuse? The response of the ECHR: *Volodina v. Russia* and *Buturuga v. Romania*.

In *Volodina v. Russia*³⁹⁶ the applicant required the intervention of the Court after she declared to be a victim of domestic abuse. The applicant alleged that she was threatened and intimidated by her ex-partner who “shared [her] private photographs on a social network without her consent” and stalked her by putting a GPS device in her purse.³⁹⁷ Leaving aside the major offences she suffered, we want to place the emphasis on the Court's consideration on the inclusion of violence online within the context of domestic abuse. Indeed, the Court referred to the ex-partner stating that his action was disrespectful and humiliating. In addition to it, the Court argued that:

[...] The feelings of fear, anxiety and powerlessness that the applicant must have experienced in connection with his controlling and coercive behaviour were sufficiently serious as to amount to inhuman treatment within the meaning of Article 3 of the Convention [...]³⁹⁸

As first, the Court recognized the existence of violation of article 3 (prohibition of torture). According to the judges, the feeling of anxiety and fear of the victim towards her aggressor reached such a high “level of severity” to include the fact under inhuman

³⁹⁵ Ibid.

³⁹⁶ ECtHR, judgment 9 July 2019, *Volodina v. Russia*, application no. 41261/17.

³⁹⁷ ECtHR, *Volodina v. Russia*, cit. para. 30.

³⁹⁸ ECtHR, *Volodina v. Russia*, cit. para. 75.

treatments.³⁹⁹ Essentially, Russia failed in establishing “adequate legal framework” for the prohibition of domestic violence, as the national authorities failed in the action of prevention and investigation.⁴⁰⁰ Finally, the ECtHR also found that there had been violation of article 14, declaring that violence against women and domestic violence should be considered forms of discrimination based on gender⁴⁰¹:

Substantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions that takes into account the factual inequalities between women and men and the way they impact women’s lives.⁴⁰²

Comparing the above case with *Buturuga v. Romania*⁴⁰³ judgment, it can be noted some similarities, either on the criminal acts and on the Court judgments. In *Buturuga v. Romania*, the applicant filed several complaints for the national authorities on death threats and physical violence suffered, before filing a further complaint in 2014, requiring an “electronic search of the family computer”. In the complaint, she claimed that her husband was interfering with her privacy, controlling her private conversations and personal social network accounts and making copies of her photos.⁴⁰⁴ For these reasons, and for the complaints being still pending, in 2015 the applicant applied for the intervention of the Court, declaring to be a victim of domestic abuse.⁴⁰⁵ The Court examined the complaint focusing on violation of articles 3(prohibition of torture) and 8 (right to private life) of the Convention, and analysing whether Romania had respected all positive obligations regarding domestic violence.⁴⁰⁶ The question that raised from this judgment was if the national authorities had had to investigate cyber violence suffered by the victim. While Romania argued that cyber violence should have been treated in a

³⁹⁹ Certomà, S. (2020, March 4). Il caso Volodina, la Corte EDU denuncia la sistematicità della violenza domestica in Russia. Retrieved March 15, 2021, from <https://www.iusinitinere.it/volodina-russia-corte-europea-diritti-uomo-2-gennaio-2020-24952>

⁴⁰⁰ Volodina v Russia Case Summary. (Volodina v Russia Case Summary). Retrieved from <https://ehrac.org.uk/resources/volodina-v-russia>

⁴⁰¹ See *supra* note.

⁴⁰² ECtHR, *Volodina v. Russia*, cit. para.111.

⁴⁰³ ECtHR judgment 11 June 2020, *Buturuga v. Romania*, application no. 56867/15.

⁴⁰⁴ Van Leeuwen, F. *Cyberviolence, domestic abuse and lack of a gender-sensitive approach - Reflections on Buturuga versus Romania*, 11 March 2020. Website: <https://strasbourgobservers.com/2020/03/11/cyberviolence-domestic-abuse-and-lack-of-a-gender-sensitive-approach-reflections-on-buturuga-versus-romania/#more-4542> (accessed 15-03-21)

⁴⁰⁵ ECtHR, *Buturuga v. Romania*, cit.

⁴⁰⁶ Van Leeuwen, F. (2020, March 11). *Cyberviolence, domestic abuse and lack of a gender-sensitive approach - Reflections on Buturuga versus Romania*. Retrieved April 02, 2021, from <https://strasbourgobservers.com/2020/03/11/cyberviolence-domestic-abuse-and-lack-of-a-gender-sensitive-approach-reflections-on-buturuga-versus-romania/#more-4542>

different manner with respect to domestic violence, the Court recognized it as a possible form of violence against women, recalling the final judgment of *Volodina v. Russia*. In addition, among cyber violence, the Court included the violation of privacy and the manipulation of personal data and images.⁴⁰⁷

The Court therefore accepts the applicant's argument that acts such as monitoring, accessing or safeguarding the spouse's correspondence without right can be taken into account when the national authorities investigate domestic violence.⁴⁰⁸

Essentially, the Court declared that domestic authorities of Romania had failed in the investigation of domestic abuse, bypassing many forms of the phenomenon.⁴⁰⁹ At the end, the Court declared that there had been violation of articles 3 and 8.

Following the reasoning of the ECHR, we can now analyse the double nature of non-consensual dissemination of intimate private photos. It has already been pointed out in this dissertation that such a phenomenon should be included under cyber violence. In addition to it, Citron asserts that the phenomenon should be recognized as cyber harassment to be included under domestic abuse.⁴¹⁰ In the cases we have analysed, domestic abuse was defined by the Court as a discriminatory gender-based phenomenon, making a significant change in the jurisprudence. In both cases, the applicants' private images were stolen by their partner, in order to control and manipulate the victims. Therefore, we may claim that they were victims of cyber violence and more specifically, of non-consensual dissemination of intimate private photos. Being cyber violence declared as a possible form of domestic abuse and being non-consensual dissemination of intimate private images included under cyber violence, we may conclude arguing that non-consensual dissemination of intimate private images should be recognized as a form of domestic abuse. Indeed, the Court "recognise[d] the multifaceted nature of domestic abuse and acknowledge[d] that 'cyber violence' may be one of the forms in which this abuse manifests itself."⁴¹¹

⁴⁰⁷ Ibid.

⁴⁰⁸ ECtHR, *Buturuga v. Romania*, cit. para. 74.

⁴⁰⁹ European Court recognises cyberbullying as an aspect of violence against women and girls (12 February 2020). Retrieved March 17, 2021, from <https://altadvisory.africa/2020/02/12/european-court-recognises-cyberbullying-as-an-aspect-of-violence-against-women-and-girls/>

⁴¹⁰ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press, p. 17.

⁴¹¹ Van Leeuwen, F. (2020, March 11). Cyber violence, domestic abuse and lack of a gender-sensitive approach - Reflections on Buturuga versus Romania. Retrieved April 02, 2021, from

2.2.3 The Council of Europe's Convention on Cybercrime and the Additional Protocol on the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

At the beginning of the new millennium, technology lived its golden era: personal computers, mobile phones and electronic devices started to appear in people's every-day life. With the appearance of the so-called cyberspace, cybercrimes also started to show their impact: there was an increasing need for repression of criminal actions perpetrated online, both at international and at national level.⁴¹² For these reasons, in 2001 the Council of Europe established the first international treaty on cybercrime, the so-called Budapest Convention. The Convention may be divided into four chapters. The first one provides a series of definitions, such as computer data, computer system and traffic data (art.1). The second chapter purpose is to provide “measures to be taken at domestic level” for example on illegal interception (art.3), data interference (art.4), and child pornography (art.9). Chapter three of the Convention is responsible for the provisions on international cooperation, especially on extradition (art.24) and mutual assistance (art.25, 27,33 and 34), and the last chapter states the final provisions. The Convention aims to satisfy three main goals: the inclusion of cybercrimes within the domestic criminal law, the provision of “domestic criminal procedural law powers” for the investigation and the criminalisation of such crimes, and the promotion of international cooperation to tackle the phenomenon.⁴¹³ Generally, the document refers to crimes committed “by means of a computer system or evidence in relation to which is in electronic form.”⁴¹⁴

Although the Convention dedicates an entire article to the definition of child pornography (art. 9), it lacks in the provisions against non-consensual pornography. Nonetheless, regarding online hate speech, in 2003 the Council of Europe adopted the Additional

<https://strasbourgobservers.com/2020/03/11/cyberviolence-domestic-abuse-and-lack-of-a-gender-sensitive-approach-reflections-on-buturuga-versus-romania/#more-4542>

⁴¹² Amato, G. (2015). *I reati informatici: nuova disciplina e tecniche processuali di accertamento*. Casa editrice dott. Antonio Milani, p.2.

⁴¹³ Explanatory Report to the Convention on Cybercrime, European Treaty Series - No. 185, Budapest, 23.XI.2001, p. 4.

⁴¹⁴ Ibid.

Protocol on the criminalisation of acts of a racist and xenophobic nature committed through computer systems. The Protocol purpose is to “supplement the provision of the Convention on Cybercrime”, in order to counter hate speech and racist acts online, fostering simultaneously the freedom of expression right.⁴¹⁵

Firstly, article 2 of the Protocol focuses on the concept of *racist and xenophobic material*, defining it as:

[...] any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.⁴¹⁶

Generally, the article refers to the way certain contents are used and disseminated within the internet, instead of the way they express the concept. Nonetheless, an explanation of the vocabulary used in this article is necessary to understand the meaning of this article. The Explanatory Report to the Additional Protocol defines *advocates*, as “plea in favour of hatred, discrimination or violence”, *promotes* as “an encouragement to or advancing hatred, discrimination or violence” and *incites* as the action of “urge others to hatred, discrimination or violence.”⁴¹⁷ Moreover, it distinguishes the term violence with the term hatred, conceived as “dislike or enmity” (para 14).

Subsequently, the Protocol prohibits the distribution of racist and xenophobic material through a computer system (art. 3), the threat of people on the basis of their race (art. 4) and the denial or the justification of genocide crimes (art.6). The Explanatory report stresses the fact that all offences mentioned in the Protocol shall include *intentionality* as a crucial element to criminalise them. Moreover, it underscores the role of the States in declaring what intentionality means and to act accordingly to it.⁴¹⁸

⁴¹⁵ Additional Protocol to the Convention on Cybercrime, 28 January 2003 -ETS 189, art. 1.

⁴¹⁶ Additional Protocol to the Convention on Cybercrime, op. cit. art. 2(1).

⁴¹⁷ Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. European Treaty Series - No. 189, Strasbourg, 28.1.2003 p. 3.

⁴¹⁸ Explanatory Report to the Additional Protocol to the Convention on Cybercrime, op. cit. p. 5.

Finally, we believe that article 5(1) on racist and xenophobic motivated insult is worth to be mentioned. The article states that States shall implement new measures and establish a criminal offence when:

[...] insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.⁴¹⁹

Here, *insulting* refers to the action of expressing hateful comments, based on prejudice, towards a person or a group of people because they belong to a different race, ethnicity or religion. It is important to stress that this article refers only to public racist insults, since it does not cover the private sphere of communication.⁴²⁰ As we may deduct, the Protocol adds important provisions to the Budapest Convention. However, the definition of hate speech and incitement to discrimination is still unprecise. As we have already demonstrated, the term *incitement to discrimination* should be used when the speech inflames others' behaviour to harm someone, while hate speech should be seen as a general term, including all types of hateful comments.⁴²¹ Therefore, we may conclude affirming that the Additional Protocol is not precise in the use of terminology. Moreover, the term "insulting" in article 5, may lead States to adopt severe measures on Internet regulation, which may jeopardize the freedom of expression right, set out in article 10 of ECHR.

2.2.4. The Council of Europe's Istanbul Convention as an instrument tackling online violence.

Taking into account the phenomenon of non-consensual dissemination of intimate private photos, in the previous chapter we noted that it disproportionately affects women and girls. However, there are still no Conventions that include provisions on this phenomenon, nor on online violence in general. Therefore, the aim of this paragraph will be to find provisions that may be useful for the countering of this type of online violence, even

⁴¹⁹ Additional Protocol to the Convention on Cybercrime, 28 January 2003 -ETS 189, art. 5(1).

⁴²⁰ See *supra* note.

⁴²¹ *Ibid.*

though they do not address explicitly non-consensual dissemination of intimate private photos. For this reason, it is worth mentioning the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011), which can be considered one of the most significant documents with “universal aspirations”.⁴²² The Convention is based on four pillars: prevention, protection, prosecution and coordinated policies; and it counts 81 articles divided into 12 chapters. Indeed, this document tackles both domestic violence and psychological violence, which are two main features that characterize non-consensual pornography.

In the paragraph dedicated to the ECtHR, we illustrated how non-consensual dissemination of intimate private photos and domestic abuse are related,⁴²³ recalling the cases of *Volodina v. Russia*⁴²⁴ and *Buturuga v. Romania*.⁴²⁵ According to article 3 of the Istanbul Convention, domestic violence is conceived as:

[...] all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim; [...]⁴²⁶

If we take into consideration the aforementioned cases, we may highlight a few fundamental aspects. Firstly, both women suffered from serious forms of domestic abuse.⁴²⁷ Among these forms of domestic abuse, the Court noted two forms of online violence: in both cases, women were victims of non-consensual dissemination of intimate private photos; in addition to it, in the case of *Buturuga v. Romania*, the applicant suffered also from online stalking. These forms of online violence related to “offline” domestic abuse, resulted in such a serious psychological impact that the Court decided to include the cases under inhuman treatment (art.3).⁴²⁸

⁴²² De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI, p. 183.

⁴²³ Citron, D. (2014). *Hate crimes in cyberspace*. Harvard: Harvard University Press.

⁴²⁴ ECtHR, judgment 9 July 2019, *Volodina v. Russia*, application no. 41261/17.

⁴²⁵ ECtHR judgment 11 June 2020, *Buturuga v. Romania*, application no. 56867/15.

⁴²⁶ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210, art. 62(4).

⁴²⁷ See paragraph 2.2.2 (b.) *May violence online be included under domestic abuse?*

⁴²⁸ Certomà, S. (2020, March 4). Il caso Volodina, la Corte EDU denuncia la sistematicità della violenza domestica in Russia. Retrieved March 15, 2021, from <https://www.iusinitinere.it/volodina-russia-corte-europea-diritti-uomo-2-gennaio-2020-24952>

On the basis of this analysis, we may therefore study the provisions of the Istanbul Convention, since it condemns psychological violence. In particular, it is worth mentioning article 33 on psychological violence, article 34 on stalking and article 40 on sexual harassment. The latter states that:

Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.⁴²⁹

According to the explanatory report on the Istanbul Convention, psychological violence may occur both in social environments -workplace, school, etc- and within family. For this reason, article 33 includes not only general threats but also all the behaviours that aim to damage the integrity of the victim. As a matter of fact, this type of violence may be considered the stepping-stone for physical or sexual violence, especially in the domestic context.⁴³⁰ Focusing our attention on article 40, the explanatory report explains the meaning of *verbal*, *non-verbal* and *physical conduct*:

Verbal conduct refers to words or sounds expressed or communicated by the perpetrator, such as jokes, questions, remarks, and may be expressed orally or in writing. Non-verbal conduct, on the other hand, covers any expressions or communication on the part of the perpetrator that do not involve words or sounds, for example facial expressions, hand movements or symbols. Physical conduct refers to any sexual behaviour of the perpetrator and may include situations involving contact with the body of the victim.⁴³¹

This article might be a key element in the resolution of non-consensual pornography, since the victims are sexually exposed and humiliated within the Internet. However, both article 40 and the entire Convention do not mention the so-called “technology-based violence against women.” According to this term, cyberviolence includes not only hate speech and image-based sexual abuse, but also hacking, cyber harassment, grooming and cyberstalking. These new forms of violence disproportionately affect individuals on the

⁴²⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210, art. 40.

⁴³⁰ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series - No. 210, Istanbul, 11.V.2011, p. 31.

⁴³¹ Explanatory Report to the CoE Istanbul Convention, op. cit. p. 35.

basis of their gender and are increasingly present on social networks and technological messaging tools.⁴³²

Although the Istanbul Convention is a paramount instrument for the prevention of violence against women and domestic violence, the non-inclusion of online gender-based violence constitutes a serious limit.⁴³³ If we analyse the Council of Europe Gender Equality Strategy 2018-2023, we can see that violence online has not been sufficiently deepened. The strategy highlights the necessity to eliminate sexist hate speech (online and offline) and to remove all the gender-based stereotypes. It stresses that, especially on social networks, women are threatened by sexist offences, but that the phenomenon is still “under-reported”.⁴³⁴ However, regarding non-consensual pornography, it does not mention the necessity to implement measures tackling the phenomenon. Therefore, being the international and the European legal framework still incomplete regarding the specific online violence form of non-consensual pornography, the regulation of this increasing phenomenon is responsibility of the national legislations.

2.3 The European Union.

So far, we have been providing an analysis of the legal instruments in the international and the Council of Europe legal frameworks, demonstrating that there are still no documents tackling explicitly online violence. In the following paragraphs we will take into account the European Union legal framework, in order to illustrate whether there are legal instruments that counter cyberviolence, and more specifically hate speech and non-dissemination of intimate private photos.

⁴³² De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI, pp. 224-227.

⁴³³ It needs to be noted that from October 2020, GREVIO is working on a General Recommendation on the application of the Istanbul Convention in relation to online violence. However, the document is still unpublished <https://www.coe.int/en/web/istanbul-convention/-/grevio-s-working-group-on-a-general-recommendation-on-the-digital-dimension-of-violence-against-women-holds-its-first-meeting> (accessed 05-04-21)

⁴³⁴ Council of Europe. (April 2018). *Gender equality strategy 2018-2023*. Council of Europe. Retrieved from <https://rm.coe.int/strategy-en-2018-2023/16807b58eb> p. 18.

2.3.1 The principle of non-discrimination within European Law.

In a similar way to what we demonstrated in the previous paragraphs, also at the European Union level there are no instruments countering online violence. However, we may note that the European Union includes in its documents the principle of non-discrimination, which is a recurring element in the phenomena we are analysing. Especially concerning hate speech cases, victims are discriminated against on the basis of gender, ethnicity, colour and disability. Therefore, human dignity, equality, non-discrimination are fundamental elements that might exclude the perpetration of hateful and sexist acts, and the limitation to unequal treatment between people. Taking into account European law on discrimination, it is important to mention a few documents.

The Charter of fundamental rights of the European Union enshrines the principle of non-discrimination under article 21. Generally, article 21 can be considered the first “explicit general prohibition” of discrimination introduced in the European law,⁴³⁵ condemning the phenomenon as follow:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.⁴³⁶

As we can see, the article highlights the certain tough grounds of discrimination, adding in paragraph 2 the prohibition of discrimination based on nationality.⁴³⁷ In addition to it, with article 23, the Charter declares that equality between men and women must be ensured within the Union, avoiding discrimination based on sex.⁴³⁸

⁴³⁵ Petersen, N. (2018, January). The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law. *Contemporary Issues in Human Rights Law*, p. 136.

⁴³⁶ Charter of Fundamental Rights of the European Union, C 326/391, Official Journal of the European Union, 2012/C 326/02, 26.10.2012, Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>

⁴³⁷ Petersen, N. (2018, January). The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law. *Contemporary Issues in Human Rights Law*, p. 136.

⁴³⁸ Indeed, equality should be considered as a synonym of non-discrimination. See Kellerbauer, M., Klamert, M., & Tomkin, J. (2019). *The Treaties and the Charter of Fundamental Rights – A Commentary*. Oxford: Oxford University Press, p. 8.

Similarly, the Treaty on European Union includes a few articles opposing the phenomenon of discrimination. Article 2 of TEU opens with a declaration of the fundamental values on which the European Union is based, such as the rule of law, respect for human dignity and rights, freedom, democracy and equality.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.⁴³⁹

Accordingly, scholars affirm that those values may be considered the “untouchable core” of the European legal order, which lay the groundwork for the human rights protection within the European Union.⁴⁴⁰ Regarding the principle of non-discrimination, TEU enshrines it under article 3, which declares that the Union:

[...] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.⁴⁴¹

However, TEU does not focus much on the prohibition of discrimination, since it is a crucial document defining the parameters to enter the European Union. Nonetheless, the principle of non-discrimination is laid out in other treaties, especially within the Treaty on the Functioning of European Union.⁴⁴²

Generally, the TFEU declares *equality* as a fundamental value that the Union shall enjoy (art.8), promoting the countering of discrimination on any grounds (art. 10).⁴⁴³ Specifically, the principle of non-discrimination is enshrined under article 18 and article

⁴³⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 - Tables of equivalences *Official Journal C 326, 26/10/2012 P. 0001 – 0390*. Retrieved from: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

⁴⁴⁰ Kellerbauer, M., Klamert, M., & Tomkin, J. (2019). *The Treaties and the Charter of Fundamental Rights – A Commentary*. Oxford: Oxford University Press, p.3.

⁴⁴¹ See *supra* note, art. 3(3)(c).

⁴⁴² Kellerbauer, M., Klamert, M., & Tomkin, J., op. cit. p.5.

⁴⁴³ Consolidated version of the Treaty on the Functioning of the European Union, C 326/47, *Official Journal of the European Union*, 26.10.2012. Retrieved from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

19.⁴⁴⁴ We can affirm that article 18, prohibiting “any discrimination on grounds of nationality”⁴⁴⁵ presents two fundamental limits. Firstly, it excludes the condemnation of discrimination based on any other grounds, such as sexual orientation, gender, and race; and secondly, “it only has normative force within the scope of application of the European treaties”, namely States are free to discriminate outside the scope of these treaties.⁴⁴⁶ On the other hand, article 19 invites the Parliament and the Council of the European Union to take action against discrimination:

[...] the Council, acting unanimously in accordance with [...] the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁴⁴⁷

Accordingly, this provision has been reputed significant, since it stressed the necessity for the European community to combat against racial discrimination.⁴⁴⁸

In addition to it, the TFEU ensures equal treatment and equal pay between women and men within workplaces (art. 157). However, comparing article 157 of TFEU with article 23 of the EU Charter of fundamental rights, we can affirm that the latter provides a more general provision, condemning inequality in *all areas*:

Equality between men and women must be ensured in all areas, including employment, work and pay.⁴⁴⁹

⁴⁴⁴ See Kellerbauer, M., Klamert, M., & Tomkin, J. (2019). *The Treaties and the Charter of Fundamental Rights – A Commentary*. Oxford: Oxford University Press, p. 8.

⁴⁴⁵ See *supra* note. art. 18.

⁴⁴⁶ Petersen, N. (2018, January). The Principle of Non-discrimination in the European Convention on Human Rights and in EU Fundamental Rights Law. *Contemporary Issues in Human Rights Law*.

⁴⁴⁷ Consolidated version of the Treaty on the Functioning of the European Union, C 326/47, Official Journal of the European Union, 26.10.2012. Retrieved from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

⁴⁴⁸ Non-discrimination Legislation, 17th Jul 2019. Retrieved from <https://www.lawteacher.net/free-law-essays/european-law/non-discrimination-legislation-law-essays.php>

⁴⁴⁹ of Fundamental Rights of the European Union, 2012/C 326/02, C 326/391, Official Journal of the European Union, Charter, 26.10.2012, Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>

2.3.2 The Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

Moving on with our analysis, we should highlight another European document that may be useful to understand how to regulate online violence. In the Preamble of the Framework Decision 2008/913/JHA, the Council of the European Union focuses on racism and xenophobia, defining them as a “direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law” and “a threat against groups of persons which are the target of such behaviour.”⁴⁵⁰ Despite the initial difficulties in reaching an agreement between member States, the Framework Decision aims at balancing the right to free speech and the criminalisation of crimes related to racism and xenophobia.⁴⁵¹ In other words, its purpose is the supplement of further legislative norms and the definition of a common criminal law against the two phenomena, in order to have an homogeneous treatment of the two crimes in all Member States. Although the document is an important instrument tackling racism and xenophobia, it needs to be noted that it does not directly address online violence. Nevertheless, we may question whether this Framework Decision may be relevant for the countering of hate speech. Article 1 affirms that States should consider punishable the incitement to violence or hatred based on race, ethnicity and religion; disseminate personal data and images with the intent of discriminate; and:

[...] publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, [...] when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.⁴⁵²

If placed in the hate speech analysis, the importance of this Article relies on the use of the term *incitement*. In fact, recognizing incitement to violence or hatred as a crime punishable by law, may be extremely relevant in the legal process against hate speech.

⁴⁵⁰ 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 of the European Union L 328/55, 6.12.2008. Retrieved from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008F0913>, art. 1 and 5.

⁴⁵¹ Kučs, A. (2013). The European Union’s Framework Decision on the Use of Criminal Law to Combat Specific Types and Manifestations of Racism and Xenophobia and the Implementation of the Decision in the Latvian Law. *Juridiskā zinātne / Law, No. 5*, pp.175-176.

⁴⁵² See *supra* note, Art.1 (1)(a)(b).

Moreover, we find interesting the inclusion of the distribution of hateful and violent material, since it provides further elements to identify hate speech.

Nonetheless, this article presents some weaknesses. The first one refers to the fact that women, disables and the LGBT+ community are not mentioned, neither is it the incitement to violence through political hate speech. The second refers to the absence of a precise description of what forms incitement and hatred may take. As we have already explored in the second chapter, hate speech is a peculiar phenomenon precisely because it can have several forms in different contexts: from the oral one to the written one, from offline environments to cyberspace. Therefore, this article is not sufficient to condemn hate speech in its entirety, but it may just be a support for racist hate speech. Moreover, according to Gliszczynska-Grabias and the Rapporteur Martine Roure, this article reflects a serious obstacle for the limitation of Holocaust denial. Indeed, following the reasoning of the Framework Decision, States may criminalize the denial and trivialisation only if they are accompanied by incitement to violence and hatred or are punished by the national legislation.⁴⁵³ Also, in line with the statement of the Rapporteur, “trivialisation of the crime of genocide is a form of racism, and Member States should be able to punish it even where incitement to hatred or violence is not involved.”⁴⁵⁴

Proceeding with the analysis, article 2(1) provides a further element to condemn: the instigation. Instigation to violence or to hate may be a significant characteristic of hate speech. For example, if we focus on political hate speech, we can argue that the impact of a speech would be greater, because its visibility is higher. Essentially, instigation to violence may be an instrument for politicians to promote hateful messages and violent acts towards specific categories of people, at the same time. However, also this article presents a shortcoming, if limited to hate speech analysis. As a matter of fact, the Article affirms that “[e]ach Member State shall take the measures necessary to ensure that instigating the conduct referred to in Article 1(1)(c) and (d) is punishable[...]”⁴⁵⁵, referring

⁴⁵³ Gliszczynska-Grabias, A. (2013, January 01). Penalizing Holocaust Denial: A View from Europe. pp. 237–256. Retrieved April 22, 2021, from <https://brill.com/view/book/edcoll/9789004265561/B9789004265561-s023.xml>, p.244.

⁴⁵⁴ European Parliament (14.11.2007) Report A6-0444/2007 on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007 – C6-0246/2007 – 2001/0270(CNS)). Retrieved from <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0444+0+DOC+PDF+V0//EN&language=EN>, p. 14.

⁴⁵⁵ 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 of the

precisely to paragraph (1)(c), against genocide, crimes against humanity and war crimes, and paragraph (1)(d), which denies crimes described in Art. 6 of the Charter of the international Military Tribunal. Therefore, this Article must be excluded in the legal analysis of hate speech.

Finally, Article 4 may be considered a significant element for the punishment of racist and xenophobic acts:

For offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.⁴⁵⁶

As illustrated in the article, the racist and xenophobic component of acts mentioned in Article 1 and 2, results in an aggravating circumstance. Essentially, Member States are encouraged to include criminalisation of racist and xenophobic motivation, or “ensure that their courts take such motivation into consideration in the determination of penalties.”⁴⁵⁷ If we reflect this norm on hate speech regulation, we can argue that at least racist hate speech should be included in criminal acts punishable by law. Nonetheless, even if this Framework Decision may be a support for the creation of a regulation *ad doc* on hate speech, it is not sufficient to outline the principal characteristics attributable to the phenomenon, especially if perpetrated online.

In the light of what we have already analysed, we might be aware of the fact that this document found some impediments along its drafting. For example, the initial drafting included only the crimes recognized by the military tribunal at Nuremberg, namely the document “applied most directly to statements which justify, deny or grossly trivialise the Holocaust”.⁴⁵⁸ The main question raised from the first draft was the limits that this document would impose on freedom of speech. For instance, Great Britain was one the

European Union L 328/55, 6.12.2008. Retrieved from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008F0913>, art. 2(1).

⁴⁵⁶ Council Framework Decision 2008/913/JHA, op. cit. art. 4.

⁴⁵⁷ Commissione Europea, (27.1.2014). Relazione della Commissione al Parlamento Europeo e al Consiglio sull’attuazione della decisione quadro 2008/913/GAI del Consiglio sulla lotta contro talune forme ed espressioni di razzismo e xenofobia mediante il diritto penale, COM (2014) 27 final, Bruxelles. Retrieved from <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52014DC0027&from=EN>, p. 6.

⁴⁵⁸ Kučs, A. (2013). The European Union’s Framework Decision on the Use of Criminal Law to Combat Specific Types and Manifestations of Racism and Xenophobia and the Implementation of the Decision in the Latvian Law. *Juridiskā zinātne / Law, No. 5*, p. 177.

primary states to emphasize the enormous obstacle towards “free exchange of viewpoints about history” of Holocaust.⁴⁵⁹ Furthermore, the Rapporteur Roure stressed the fact that this Framework Decision would have been effective and successful if promptly included within a system of “European instruments for combating all forms of discrimination”.⁴⁶⁰

Nevertheless, although this document lacks in the inclusion of some important provisions, we may assume that it can be considered a “first move towards stepping up the fight against racism and xenophobia”, since the prohibition of hate crimes and hate speech - conceived as dissemination of denial- are the stepping-stone for the elimination of racism and intolerance.⁴⁶¹

2.3.3 Soft European law about hate speech.

The term *soft law* refers to all agreements, instruments, documents that are not legally binding. This is especially present at the international level: the UDHR, the UN General Assembly resolutions are examples of soft law.⁴⁶²

Focusing on the European soft law, in the field of hate speech there are a few documents that are worth mentioning: the Code of Conduct on countering illegal hate speech online, the Code of Practice on Disinformation, and their respective Communication issued by the European Commission.⁴⁶³ The first document mentioned above (CoC) may be considered one of the most influential, and at the same time debated, documents regarding the prevention of hate speech online.⁴⁶⁴ It is the result of a debate between the European

⁴⁵⁹ Kučs, A., op. cit. p. 176.

⁴⁶⁰ European Parliament (14.11.2007) Report A6-0444/2007 on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007 – C6-0246/2007 – 2001/0270(CNS)). Retrieved from <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0444+0+DOC+PDF+V0//EN&language=EN>

⁴⁶¹ Ibid. See also Gliszczyńska-Grabias, A. (2013, January 01). Penalizing Holocaust Denial: A View from Europe. p. 245.

⁴⁶² <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (accessed 14-01-2021)

⁴⁶³ European Commission (26.4.2018) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach, COM/2018/236 final, Brussels. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0236&rid=2>; See also Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p.53.

⁴⁶⁴ Bayer, J, Bard, P., op. cit. p. 53.

Commission, Member States, the IT companies⁴⁶⁵ and the civil society organizations.⁴⁶⁶ The Commissioner Věra Jourová claimed that online hate speech is increasing, especially within social media, and that the impact of this phenomena has “devastating effect” on the discriminated groups. In addition to it, the Commissioner stated:

Working with IT companies to fight hate speech at the Colloquium last October, many participants called for cooperation with online intermediaries to remove hate speech and develop counter-narratives. And they stressed the need for clearer procedures to prosecute and take down hate speech on the internet [...]⁴⁶⁷

For these reasons, the CoC aims at promoting the removal of “illegal hate speech” and modifying the Terms of Service of the IT companies.⁴⁶⁸ However, to talk about this Code, we must before mention the European Commission Communication "Tackling Illegal Content Online Towards an enhanced responsibility of online platforms" of September 2017, in which a guidance on what is illegal content online can be found. In the introduction of the Communication the European Commission asserts that

What is illegal offline is also illegal online. Incitement to terrorism, xenophobic and racist speech that publicly incites hatred and violence [...] are illegal in the EU. The increasing availability of terrorist material online and the spreading of such content is a serious threat to security and safety, as well as to the dignity of victims.⁴⁶⁹

The Communication explicitly affirms that “[a] harmonised and coherent approach to removing illegal content does not exist at present in the EU.”⁴⁷⁰ For this reason, it

⁴⁶⁵ Facebook, Microsoft, Twitter and YouTube.

⁴⁶⁶ Bukovská, B. (2019). *The European Commission's Code of Conduct for Countering Illegal Hate Speech Online. An analysis of freedom of expression implications*. The Netherlands: Article 19, p. 2.

⁴⁶⁷ European Commission, *Press Release: Speech by Commissioner Věra Jourová at the launch of the EU High Level Group on Combating Racism, Xenophobia and Other Forms of Intolerance*, 14 June 2016, available at <https://bit.ly/1XU6wbC> (accessed 14-01-2021)

⁴⁶⁸ Bukovská, B. (2019). *The European Commission's Code of Conduct for Countering Illegal Hate Speech Online. An analysis of freedom of expression implications*. The Netherlands: Article 19, p.6

⁴⁶⁹ European Commission (28.9.2017) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM (2017) 555 final, Brussels. Retrieved from <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF> , p. 2.

⁴⁷⁰ European Commission, COM (2017) 555 final, op. cit. p. 5.

In addition, the document mentions the EU E-Commerce Directive 2000/31/EC, and it focuses the attention especially on Article 14(3) “*This Article shall not affect the possibility for a court or*

highlights the major impact that a common legislation would have in countering online illegal content. Furthermore, it illustrates that online platforms and authorities should cooperate to define, recognize and remove illegal content. Moreover, the Communication highlights the difficulty that the removal of content may have for platforms and Member States. In fact, distinguishing illegal content from legal one is a fundamental factor in order to respect the right of freedom of expression⁴⁷¹, and not to incur censorship:

Robust safeguards to limit the risk of removal of legal content also should be available, supported by a set of meaningful transparency obligations to increase accountability of the removal processes.⁴⁷²

Therefore, with this Communication, the Commission invites both Member States, authorities and online platforms to engage themselves in the countering of illegality on the Internet, especially in the terrorism and illegal hate speech sphere.⁴⁷³ Regarding the last one, the Code of Conduct may be an instrument to tackle and prevent it. The Code appeals to the implementation of the Framework Decision 2008/913/JHA in all Member States both online and offline, as a basis for the prevention of illegal hate speech. Furthermore, it declares that the Code itself:

[...] must be complemented with actions geared at ensuring that illegal hate speech online is expeditiously acted upon by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate timeframe. To be

administrative authority [...] of requiring the service provider to terminate or prevent an infringement" and Article 15(2) "*Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.*"

⁴⁷¹ It is interesting to take into consideration the Directive 2005/29/EC on unfair commercial practices. (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32005L0029&qid=1616350622362>) Focusing our attention on Article 9 we see that "*In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of: (b) the use of threatening or abusive language or behaviour;*". Hate speech is not explicitly mentioned as a danger, and it has been chosen to use the generic term "threatening or abusive language". Therefore, we might ask ourselves: why is hate speech not mentioned? Can we consider it as part of the "threatening abusive language", even if they are two different phenomena?

⁴⁷² European Commission (28.9.2017) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, COM (2017) 555 final, Brussels. Retrieved from <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF>, p.14.

⁴⁷³ For further information see *supra* note.

considered valid in this respect, a notification should not be insufficiently precise or inadequately substantiated.⁴⁷⁴

For these reasons, the IT companies ensure their commitment in preventing the spread of online hate speech with the following actions: firstly, they guarantee effective “processes to review notification” and eliminate the illegal hateful content on their platforms; the timing of elimination must not exceed 24 hours from the publication of illegal hate speech content; secondly, they commit themselves in raising awareness and educate their users about the risks and the consequences of sharing hate speech contents; thirdly, the IT companies engage themselves in the provision of a regulation to be implemented on their platforms, in order to prevent the diffusion of illegal content, and to cooperate together to “enhance best practice sharing”; finally, they undertake to let Member States and CSO reporters access in their platforms to monitor the regulation and its application.⁴⁷⁵ Hence, the engagement of IT Companies is fundamental for the prevention and the elimination of illegal hate speech online. However, the Code of Conduct presents some drawbacks. The first one relies on the definition of “illegal online content” which refers to the EU Framework Decision 2008/913/JHA.⁴⁷⁶ In the Code illegal hate speech is defined as “all conduct publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.”⁴⁷⁷ Therefore, the Code itself limits certain forms of hate speech, such as the political, the gender-based or the disability-based hate speech. Moreover, since it is a soft law document, it does not bind IT companies and Member States to implement the regulation on their national legislation. Bayer and Bard define the level of interference with the market as “comparable to that of a directive, but without the need to operationalise the legislative process of the EU, or that of the MSs.”⁴⁷⁸ This means that this instrument is based on a voluntary choice to monitor the phenomenon of hate speech,

⁴⁷⁴ Council of the European Union, Brussels, Code of conduct on countering illegal hate speech online, May 2016. Retrieved from https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/assessment_of_the_code_of_conduct_on_hate_speech_on_line_-_state_of_play_0.pdf, pp. 1-2.

⁴⁷⁵ Council of the European Union, Code of Conduct, op. cit. pp. 2-3.

⁴⁷⁶ 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 of the European Union L 328/55, 6.12.2008. Retrieved from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008F0913>

⁴⁷⁷ Council of the European Union, Code of Conduct, op. cit. p. 1.

⁴⁷⁸ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p.53.

without any obligations. Essentially, if on one hand it aims to control without hindering freedom of expression, on the other hand it does not implement constitutional rules to prevent the phenomenon and to protect victims from it. Finally, the Code “puts companies – rather than the courts – in the position of having to decide the legality of content”, and it focuses on the importance of removing illegal content rather than prosecuting the responsible for its sharing.⁴⁷⁹ On the basis of this analysis, we may believe that the Code could be a misleading support which may increase the phenomenon rather than stop it: if online platforms and Member States do not take into consideration the perpetrators of hate speech, but just the content, hate speech itself will continue to be spread in other forms and other environments. Nevertheless, the anti-racism Strategy 2020-2025 of the European Commission underscored that online hate speech has notably been reduced thanks to the Code of conduct, even though it needs to improve the cooperation between States and social media platforms.⁴⁸⁰

Another soft law document which we believe is significant to be mentioned is the Code of Practice on Disinformation of 2018. In the European Communication “Tackling online disinformation: a European Approach” (April 2018), the phenomenon of disinformation is presented as a danger that jeopardizes democracies and security by favouring extremist ideas and activities.⁴⁸¹ This Communication highlights the primary role that social networks and online platforms have in the spread of disinformation.

First, the spread of disinformation is a symptom of wider phenomena that affect societies facing rapid change. Economic insecurity, rising extremism, and cultural shifts generate anxiety and provide a breeding ground for disinformation campaigns to foster societal tensions, polarisation, and distrust.⁴⁸²

⁴⁷⁹ Bukovská, B. (2019). *The European Commission's Code of Conduct for Countering Illegal Hate Speech Online. An analysis of freedom of expression implications*. The Netherlands: Article 19, p.6-7.

⁴⁸⁰ European Commission (18-9.2020) Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions. A Union of equality: EU anti-racism action plan 2020-2025, COM (2020) 565 final, Brussels. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A0565%3AFIN>

⁴⁸¹ European Commission (26.4.2018) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach, COM/2018/236 final, Brussels. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0236&rid=2>, p. 2.

⁴⁸² European Commission, Tackling online disinformation, op. cit. p. 5.

We can read this claim as a key element for the interpretation of the phenomenon of hate speech. As we showed, hate speech is based on a sense of uncertainty for the future, the fear of “the other”, the separation between *us* and *them*, who became the scapegoat of social and economic problems. Hence, disinformation becomes a significant vehicle to spread illegal hate content both offline, and especially online. Cyberspace is a complex environment in which there are specific factors that may help the diffusion of a content, such as algorithms, advertisement announcements and automated services (fake accounts, bots, troll factories). In addition, users are free to spread and share content, especially through social media. If we put together these characteristics and the fact that hate speech is powered by disinformation, we can easily reach the following conclusion: the absence of a regulation about disinformation might have implications on the diffusion of all types of illegal content.⁴⁸³ Therefore, having a regulation on disinformation may prevent the diffusion of hateful content towards vulnerable people with a rigorous control on the content shared inside the internet platforms. However, we cannot assert that disinformation and hate speech are the same thing. Even though they may be related to each other, they are two different phenomena. Disinformation “is understood as verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm”⁴⁸⁴; instead, hate speech may be considered more as one of the forms that disinformation can take. Some of the purposes of the Code are interesting for hate speech regulation. For example, “(v) Intensify and demonstrate the effectiveness of efforts to close fake accounts and establish clear marking systems and rules for bots to ensure their activities cannot be confused with human interactions”⁴⁸⁵ illustrates the close monitoring to have while eliminating fake accounts and supervising bots. Furthermore, Signatories commit themselves to present yearly a report on their work to counter disinformation and to work with the European Commission to “achieve transparency but also uphold fundamental rights in order to make meaningful progress.”⁴⁸⁶ Nonetheless, the following claim could present a limit:

⁴⁸³ This is true not only for hate speech, but also for non-consensual pornography. We believe that if users are not aware of the risks of sharing sensitive content online, because there is not a specific regulation about it, they will be impelled to distribute it. This is the main difference with real space: in real space there are specific rules to follow. Hence, the majority of citizens respect those norms to have a safe society. In cyberspace instead, rules are not well defined, therefore users are not concerned of the consequences that a content would have if spread online.

⁴⁸⁴ European Commission, Tackling online disinformation, op. cit. p. 4.

⁴⁸⁵ European Code of Practice on Disinformation, 2018, retrieved from <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>, p.3

⁴⁸⁶ EU Code of Practice, op. cit. p.9.

(vii) Consistently with Article 10 of the European Convention on Human Rights and the principle of freedom of opinion, [...] Signatories should not be compelled by governments, nor should they adopt voluntary policies, to delete or prevent access to otherwise lawful content or messages solely on the basis that they are thought to be "false".⁴⁸⁷

If on one hand, the Code's Signatories cannot eliminate content without verifying it is disinformation, and cannot incur censorship, on the other hand, hateful contents are not mentioned as an aggravating circumstance. Thus, the Code of Practice cannot be considered an essential document to counter hate speech, even if it can be useful for the limitation of it because hate speech may be used to spread fake news.

Finally, it is important to take into consideration the European Commission strategies 2020-2025. As first, it needs to be mentioned the contribution of the EU Strategy on victims' rights (2020-2025) concerning online violence. Indeed, the Commission notes that the impact of cybercrimes and online violence has increased with the COVID-19 pandemic.⁴⁸⁸ Nevertheless, this Strategy only mentions the issue of online violence, concentrating more on hate and fraud crimes perpetrated online.⁴⁸⁹

Whereas "A Union of Equality: Gender Equality Strategy 2020-2025" includes the analysis of online violence. Specifically, its purpose is to eradicate all forms of gender-based violence, promoting equality between men and women, incorporating new forms of crimes with a high impact on women, and implementing prevention of violence programs.⁴⁹⁰ Concerning online violence, the European Commission defines it as an "unacceptable" obstacle for women:

⁴⁸⁷ EU Code of Practice, op. cit. p.3.

⁴⁸⁸ European Commission (24.6.2020) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), COM (2020) 258 final, Brussels. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1593432832093&uri=CELEX:52020DC0258> p. 5.

⁴⁸⁹ Ibid.

⁴⁹⁰ European Commission (5.3.2020) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025, COM (2020) 152 final, Brussels, Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>, pp. 2-4.

Bullying, harassment and abuse on social media have far-reaching effects on women's and girls' daily lives.⁴⁹¹

For this reason, the Commission proposes the creation of the *Digital Service Act*, a document which will elucidate the measures that online platforms should adopt to avoid the dissemination of online illegal content. Moreover, the Commission will create a “framework for cooperation between internet platforms” with the purpose to combat all activities that have severe impact on online users.⁴⁹²

Similarly, the “Union of Equality: LGBTIQ Equality Strategy 2020-2025” emphasizes the online dimension of violence against the LGBTIQ community, assuming that “LGBTIQ people suffer disproportionately from hate crime, hate speech and violence.”⁴⁹³ In addition to it, the Commission notes that the COVID-19 pandemic has increased not only discrimination and hatred against the targeted group, but also political online hate speech against them. For this reason, the Commission undertakes the creation of a *Digital Services Act* addressing illegal content online, in order to remove hate speech from Internet platforms and protect freedom of speech.⁴⁹⁴

2.4 The rule of law and the monitoring mechanisms of Europe.

To conclude this chapter on the current international and European legal framework, we want to finally turn our attention to the rule of law and the so-called monitoring mechanisms, in order to show whether or not the three phenomena we have been studying so far, are included in the monitoring action of States.

We can assert that the Council of Europe is based on three pillars: democracy, freedom and the rule of law. With the term *rule of law*, the United Nations means

⁴⁹¹ A Union of Equality: Gender Equality Strategy 2020-2025, op. cit. p. 5.

⁴⁹² Ibid.

⁴⁹³ European Commission (12.11.2020) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM (2020) 698 final, Brussels. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0698>, p. 13.

⁴⁹⁴ Union of Equality: LGBTIQ Equality Strategy 2020-2025, op. cit. p. 14.

[...] a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.⁴⁹⁵

The rule of law mechanism includes monitoring action, which aims to prevent national and international risky situations, to control decisions and to report actions of Member States. Regarding hate speech and gender-based violence, the rule of law monitoring could be a fundamental element for the countering of them. Bayer and Bard claim that Europe should cooperate with its Member States, asking them to report their achievements in the fight against hate speech, to show outcomes of their obligations, and to add norms contained in soft law and recommendations in their national legislation. Moreover, they believe that the disrespect of binding norms should be considered as “serious and persistent breaches by a MS of human dignity, equality, or the principle of non-discrimination.”⁴⁹⁶ For example, if Member States would not respect the Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, or the Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography, fundamental rights would be jeopardized. For this reason, the rule of law monitoring has a prominent role for the prevention of such situations, and it should be undertaken in reporting decisions and mistakes of Member States, to avoid dangerous consequences for individuals and for fundamental rights: “systemic breaches should entail a loss of privileges or the suspension of rights deriving from the application of the Treaties.”

At the Council of Europe level, the most well-known monitoring mechanisms are MONEYVAL, on money laundering and financing terrorism and GRECO on corruption. However, they are not the only ones. For example, the Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (OSCE/ODIHR) is responsible first of all for the monitoring and the reporting of hate crimes; secondly, it raises awareness on the phenomenon and finally it helps States in the drafting of legislation and in the implementation of justice systems.⁴⁹⁷

⁴⁹⁵ Rule of Law <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (accessed 23/01/21)

⁴⁹⁶ Bayer, J., & Bard, P. (2020, July). Hate Speech and Hate Crime in the EU and the evaluation of online content regulation approaches. *European Union*, p. 124.

⁴⁹⁷ Bayer, J., & Bard, P, op cit. p. 29.

2.4.1 The European Commission Roadmap: “Measures to further improve the effectiveness of the fight against illegal content online.”

Moving on with our analysis, it is important to include in this paragraph the Roadmap of the European Commission on illegal content online. We have already demonstrated that in recent years the European Commission has started to cope with illegal content in different ways.⁴⁹⁸ Namely, it issued the Communication on Tackling Illegal Content Online COM (2017)288 that we have already explored in paragraph 2.3.3, and the Recommendation on Measures to effectively tackle illegal content online C (2018)1177. In the latter, the European Commission underscores the increasing presence of illegal content within the Internet, stressing States to take concrete action to remove it.⁴⁹⁹ In addition to these documents, and the provisions fostered in the e-Commerce Directive, the Directive on Combatting Terrorism, the Directive against Child Sexual Abuse, the Roadmap on the measures to further improve the effectiveness of the fight against illegal content online, underlines the negative impact that illegal content might have on users and on human right in general, assuming that the more the illegal content remains online, the more severe will be its impact. However, the document stresses the necessity to safeguard the right to freedom of expression, assuming that the dividing line between restriction and protection may be particularly thin.

A careful balance is therefore needed between measures to tackle illegal content and essential safeguards to promote and protect fundamental rights, such as freedom of expression and information, the protection of personal data, the freedom to conduct a business, and access to justice.⁵⁰⁰

On the basis of these assumptions, the Commission engages itself in two main monitoring actions. On one hand, it will monitor States implementing the Recommendation on illegal content; on the other, it will examine the action of Internet platforms in the voluntary removal of illegal content. This will be made by following two legislative options: the first will consist in the creation of binding obligations to define and remove the most

⁴⁹⁸ See paragraph 3.3.2; see also European Commission Roadmap on Measures to further improve the effectiveness of the fight against illegal content online.

⁴⁹⁹ European Commission, Recommendation on Measures to effectively tackle illegal content online C (2018)1177, 1 March 2018, p. 1.

⁵⁰⁰ European Commission (2 March 2018), Measures to further improve the effectiveness of the fight against illegal content online, Ref. Ares (2018)1183598. Retrieved from : https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1613-Measures-to-further-improve-the-effectiveness-of-the-fight-against-illegal-content-online_it

serious examples of terrorist illegal content; the second will reflect a legislative instrument including all the measures explored in the Recommendation C (2018)1177.⁵⁰¹ Lastly, in recent days the European Commission proposed further legislative initiatives concerning cyberspace. Particularly, it is worth mentioning the Digital Services Act, aiming to safeguard users' fundamental rights within digital space.⁵⁰²

Conclusion

In this chapter, we investigated the international and the European legal framework on cyber violence. As previously anticipated, the current legal framework does not include provisions on online violence, making its countering quite fragile.

Considering hate speech, we demonstrated that the thin line between the phenomenon and freedom of expression creates serious concerns especially within the Internet: if on one hand freedom of expression right *must* be preserved, on the other, incitement to discrimination and hatred may become a serious challenge for the protection of human rights.⁵⁰³ According to this, it can be affirmed that internationally freedom of expression has a paramount relevance. Indeed, the Special Rapporteur claims that the countering of hate speech must not prevail on the safeguard of freedom of expression.⁵⁰⁴ Whereas, at the European level, there is an increasing concern on hate speech, especially in soft European law, which supports the countering of hate speech. However, the absence of a precise definition of hate speech and the non-binding nature of some European legal documents may lead States to have difficulties in the removal of hateful content or to adopt disproportionate restrictions against hate speech.

Concerning non-consensual dissemination of intimate private photos, it can be affirmed that neither at the UN level, nor at the European one, there are enough legal documents fostering women's rights within cyberspace. As we demonstrated, the phenomenon of image-based sexual abuse is a serious violation of human rights, affecting all spheres of human dignity, that can be included within domestic abuse.⁵⁰⁵ Victims may incur serious

⁵⁰¹Ibid.

⁵⁰² <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> (accessed 10-05-21)

⁵⁰³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019.

⁵⁰⁴ Report of the Special Rapporteur, A/74/486, op. cit. p. 5.

⁵⁰⁵ As declared by ECHR. See Van Leeuwen, F. (2020, March 11). Cyberviolence, domestic abuse and lack of a gender-sensitive approach - Reflections on Buturuga versus Romania.

consequences, such as psychological harm, victimization and physical consequences, which may be reflected in “real life”. Moreover, women are obliged to isolate and protect themselves from humiliation and misogynist insults. Accordingly, we illustrated that the psychological impact of non-consensual dissemination of intimate private photos may be a key factor that relates this phenomenon with the provisions of the CoE Convention on preventing and combating violence against women and domestic violence. However, this is not sufficient to counter the phenomenon, since offences within cyberspace are not adequately mentioned.

Retrieved April 02, 2021, from <https://strasbourgobservers.com/2020/03/11/cyberviolence-domestic-abuse-and-lack-of-a-gender-sensitive-approach-reflections-on-buturuga-versus-romania/#more-4542>

CHAPTER 3

THE ITALIAN LEGISLATION AND ITS CRIMINAL CODE ON COMBATING ONLINE VIOLENCE

Premise

Recalling the analysis that we carried out in the previous chapters, it can be noted that cyberviolence is a phenomenon with an increasing significant social role.⁵⁰⁶ Moreover, we observed that some typologies of online violence have a relevant impact at social level, provoking serious harm on victims.⁵⁰⁷ For this reason, we centred our analysis on two phenomena, which can be included within the category of cyber harassment: online hate speech and non-consensual dissemination of intimate private photos. Particularly, in the previous chapter we explored the international and European legal frameworks on cyberviolence, questioning whether these phenomena were countered and how.

The purpose of this chapter is to move our attention at the domestic level, specifically to the Italian system. Accordingly, it can be affirmed that the technological development and the creation of social networks, brought people to move from the offline environment to cyberspace. This event had as a consequence not only the increase in disinformation, online hate speech and new criminal offences, but also the opening of a heated debate concerning cyberviolence.⁵⁰⁸

Therefore, in a similar way to chapter two, we are going to investigate the Italian legal system, in order to illustrate what provisions are in force and how Italy counters online violence. The starting point of this chapter will be a general overview on the obligations of Italy derived by the ratification of international and European treaties. Particularly, we will focus on the implementation of the Framework Decision 2008/913/JHA on

⁵⁰⁶ Cybercrime Convention Committee. (July 2018). *Mapping study on cyberviolence with recommendations*. Council of Europe. Retrieved from <https://rm.coe.int/t-cy-2017-10-cbg-study-provisional/16808c4914>

⁵⁰⁷ Amnesty International. (2020). *Barometro dell'odio. Sessismo da tastiera*. Amnesty International Italia.

⁵⁰⁸ Article 19. (2019, July 25). *Comments on new Italian regulation on 'hate speech'*. Retrieved from Article 19: <https://www.article19.org/resources/article-19-comments-on-new-italian-regulation-on-hate-speech/>

combating racism and xenophobia, to illustrate the amendments concerning hate speech; and the ratification and execution of the Council of Europe Istanbul Convention, as a stepping-stone for the Italian integration of the so-called “Red Code” on violence against women.

Subsequently, we will investigate the Italian criminal Code, in order to illustrate whether the analysed phenomena are included as criminal offences and to explain how they are countered. Thus, we will explore article 604-bis c.p. and 604-ter c.p. on hate speech, taking a look also at their limits; and lastly, we will investigate the integration of article 612-ter on non-consensual dissemination of intimate private photos.

3.1 The international obligations of Italy.

Italy embraces numerous international and European treaties and conventions concerning the human rights protection. Among the conventions we analysed in the previous chapter, Italy ratified the International Convention on the Elimination of all forms of Racial Discrimination in 1975⁵⁰⁹, the International Covenant on Civil and Political Rights in 1977⁵¹⁰, and the Convention on the Elimination of all forms of Discrimination Against Women in 1985⁵¹¹.

Moreover, being a founding member of the Council of Europe, Italy also ratified the European Convention on Human Rights in 1955⁵¹², the Council of Europe Convention on Cybercrime in 2008⁵¹³ and the Council of Europe Istanbul Convention on violence against women and domestic violence in 2013⁵¹⁴, accepting the obligations enshrined in those Conventions.

Lastly, being a European Member, Italy has the obligation to respect the European legislation. In other words, it must respect all ratified treaties -primary legislation-, and

⁵⁰⁹ L. 13 ottobre 1975 n. 654, GU n. 337 del 23-12-1975 - Suppl. Ordinario.

⁵¹⁰ L. 25 ottobre 1977 n. 881, GU n. 333 del 07-12-1977 - Suppl. Ordinario.

⁵¹¹ L. 14 marzo 1985, n. 132, GU n.89 del 15-04-1985 - Suppl. Ordinario.

⁵¹² L. 04 agosto.1955 n. 848, GU n.221 del 24-09-1955.

⁵¹³ L. 18 marzo 2008 n. 48, GU n.80 del 04-04-2008 - Suppl. Ordinario n. 79.

⁵¹⁴ L. 27 giugno 2013 n. 77, GU n. 152 del 01-07-2013.

all the regulations, directives and decisions “derived from the principles and objectives set out in the treaties”.⁵¹⁵

On the basis of this introduction, our attention can be now turned on the integration of two significant European documents within the Italian system, to investigate whether they are relevant for the countering of online violence at domestic level.

3.1.1 Hate speech and the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

Concerning hate speech, it is necessary to focus our attention on the implementation of the European Framework Decision 2008/193/JHA on racism and xenophobia, within the Italian system. As explained in the previous chapter, the purpose of this Framework Decision is to supplement further provisions on hate crimes and incitement to hatred and violence in the national criminal Codes, making this document a relevant element for the countering of hate speech.⁵¹⁶ Specifically, it considered criminal offences all incitement to hate and violence against a targeted individual or group on the basis of race, ethnicity, religion or nationality (art. 1(1)(a)); and the apology, denial or the trivialise of genocide, war crimes and crimes against humanity (art. 1(1)(c)).⁵¹⁷

In light of the purpose of this document, in 2014 the European Commission provided a report evaluating the process of the implementation of the Framework Decision of each Member State. For instance, art. 1(1)(a) of the Framework Decision condemns incitement of hate on the basis of race, colour, religion, ethnicity and nationality.⁵¹⁸ Although the

⁵¹⁵ https://europa.eu/european-union/law_en (accessed 11-05-21)

⁵¹⁶ Commissione Europea. (27.1.2014). RELAZIONE DELLA COMMISSIONE AL PARLAMENTO EUROPEO E AL CONSIGLIO sull'attuazione della decisione quadro 2008/913/GAI del Consiglio sulla lotta contro talune forme ed espressioni di razzismo e xenofobia mediante il diritto penale COM (2014) 27 final. Bruxelles. Retrieved Aprile 28, 2021, from <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:52014DC0027&from=EN>

⁵¹⁷ 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 of the European Union L 328/55, 6.12.2008. Retrieved from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008F0913>

⁵¹⁸ Montanari, M. (18 febbraio 2014). L'attuazione italiana della decisione quadro 2008/913/GAI in materia di negazionismo, nel rapporto della Commissione Europea. Retrieved May 01, 2021, from <https://archiviodpc.dirittopenaleuomo.org/d/2845-l-attuazione-italiana-della-decisione-quadro-2008913gai-in-materia-di-negazionismo-nel-rapporto-del>

conduct of incitement to violence and incitement to hatred is properly sanctioned in Italy, the European Commission underscored that there was no reference to the requirements of colour and nationality.⁵¹⁹ Additionally, contrary to what is declared under article 1(1)(b) of the Framework Decision, Italy condemns the “dissemination of ideas” aiming at discriminating on the basis of race.⁵²⁰ Essentially, Italy condemns the “propaganda of ideas based on racial hatred”, whereas the Framework Decision requires the prohibition of “public instigation to hatred”.⁵²¹ Therefore, according to the European Commission, the term “propaganda” would not include the “dissemination of images and personal data with the intent to discriminate”, but only the ideas based on racial superiority.⁵²² Moreover, the European Commission underscored that neither denial nor grossly trivialise are prohibited within the Italian legal system, highlighting that Italy only condemns apology and genocide.⁵²³ Finally, focusing on the further provisions of the Framework Decision, it can be noted that Italy does not include specific incriminating rules on incitement to hatred and incitement to violence (art. 2), nor does it provide for the liability of legal persons for hate speech (art. 5-6).⁵²⁴

On the basis of this premise, it can be highlighted that Italy implemented the Framework Decision with the so-called *Legge europea 2017*, law n. 167 of 20 November 2017.⁵²⁵ Accordingly, law n. 167 in conjunction with law n. 163 of 2017,⁵²⁶ completes the previous law n. 234 of 2012 on the participation process of Italy in the fulfilment of its European obligations.⁵²⁷ Particularly, law n. 167 is made up of 30 articles divided into 8 sections, each addressing a different area of competence, dealing with three infringement

⁵¹⁹ Commissione Europea, relazione sull’attuazione della Decisione Quadro 2008/193/GAI, op. cit. p.4.

⁵²⁰ Commissione Europea, relazione sull’attuazione della Decisione Quadro 2008/193/GAI, op. cit. p. 4-5.

⁵²¹ Senato, Legge Europea 2017, Schede di lettura. A.S. n. 2886, settembre 2017, p. 38.

⁵²² Senato, Legge Europea 2017, op. cit. p. 39.

⁵²³ Commissione Europea, relazione sull’attuazione della decisione quadro 2008/193/GAI, op. cit. p.5.

⁵²⁴ Montanari, M. (18 febbraio 2014). L’attuazione italiana della decisione quadro 2008/913/GAI in materia di negazionismo, nel rapporto della Commissione Europea. Retrieved May 01, 2021, from <https://archivioldpc.dirittopenaleuomo.org/d/2845-l-attuazione-italiana-della-decisione-quadro-2008913gai-in-materia-di-negazionismo-nel-rapporto-del>

⁵²⁵ L. 20 novembre 2017 n. 167, GU n. 277 del 27-11-2017; See Castellaneta, M. (5 Gennaio 2018). In vigore la legge europea e di delegazione europea. Retrieved April 28, 2021, from <http://www.marinacastellaneta.it/blog/in-vigore-la-legge-europea-e-di-delegazione-europea.html>

⁵²⁶ L. 25 ottobre 2017 n. 163, GU n. 259 del 06-11-2017

⁵²⁷ See *supra* note.

procedures and eight EU pilot cases.⁵²⁸ Among them, article 5 needs to be analysed since it is the article under which the Framework Decision has been implemented. Indeed, article 5 supplements amendments on law n. 654 of 1975, which ratified and executed the ICERD. Before exploring such amendments, it needs to be noted that law n. 654 has been subject to changes, additions and replacements, all aimed at extending the scope of its application.⁵²⁹ Among them, it is worth mentioning the decree-law n. 122/1993⁵³⁰, converted into law 205/1993⁵³¹.

Accordingly, the original article 3 of law n. 654 condemned criminal offences based on racial and xenophobic discrimination, condemning all associations or organizations with the aim to discriminate or incite to hate on the basis of race, with imprisonment from one year to five years.⁵³² Whereas, law n. 205/1993 integrated the article with the punishment of discrimination based on religious belief, and the inclusion of public manifestations of hate or the use of symbols with discriminatory motives as a hypothetical criminal offence.⁵³³ Additionally, it increased the penalty for the dissemination of ideas based on racial superiority from one year to three years of imprisonment and it supplements the aggravating circumstance for crimes with a discriminatory motive, based on racial, xenophobic and religious hatred.⁵³⁴ Moreover, law n. 85/2006⁵³⁵ made a significant change in the terminology. Indeed, it uses the term “propaganda” based on racial superiority and racial hatred instead of “dissemination in any way”; and it changes “incitement” with “instigation”.⁵³⁶ In addition, law n. 85/2006 punished propaganda based on racial superiority and racial hatred with up to one year and six months

⁵²⁸ Dipartimento per le Politiche Europee. (2017). *Legge europea 2017*. Governo Italiano. Retrieved from <http://www.politicheeuropee.gov.it/it/normativa/legge-europea/legge-europea-2017/>

⁵²⁹ Meola, M. (2020, dicembre 30). *L'art. 604bis c.p. e la discriminazione per motivi di orientamento sessuale e di genere*. Retrieved from opiniojuris.it: <https://www.opiniojuris.it/lart-604bis-c-p-e-la-discriminazione-per-motivi-di-orientamento-sessuale-e-di-genere/>

⁵³⁰ D.l. 26 aprile 1993 n. 122, GU n.97 del 27-04-1993.

⁵³¹ L. 25 giugno 1993 n. 205, GU n. 148 del 26-06-1993.

⁵³² Supplemento ordinario alla Gazzetta ufficiale della Repubblica Italiana, n. 337, 23 dicembre 1975, Roma.

⁵³³ Pavic, G. & Bonomi A., (13 ottobre 2014), Reati in tema di discriminazione: il punto sull'evoluzione normativa recente, sui principi e valori in gioco, sulle prospettive legislative e sulla possibilità di interpretare in senso conforme a costituzione la normativa vigente, in *Diritto Penale Contemporaneo*, p. 3.

⁵³⁴ Pavic, G. & Bonomi A., op. cit. p. 3-4.

⁵³⁵ L 24 febbraio 2006 n. 85, GU n.60 del 13-03-2006.

⁵³⁶ Pavic, G. & Bonomi A., op. cit. p. 4.

imprisonment or with a fine of 6000€; and the incitement to violence on the base of race, ethnicity, nationality and religion with imprisonment from six months to four years.⁵³⁷

Focusing our attention on the provisions of law n. 167, it can be noted that article 5(1) modifies the provision of article 3 declaring punishable by law the denial and the grossly trivialisation of crimes against humanity and war crimes, “in a way which incites violence or hatred against such a group or its members.”⁵³⁸ Namely, it extends the scope of the aggravating circumstance of genocide denial or grossly trivialise, supplementing the imprisonment from 2 to 6 years.⁵³⁹

As illustrated, these amendments refer to incitement to hate or violence only within offline environments, relating the phenomenon to the denial, trivialisation or apology of crimes against humanity and excluding the integration of online hate speech prohibition. Therefore, although the implementation of the Framework Decision 2008/913/JHA made changes on the Italian legal system, it cannot be affirmed that it is a relevant instrument for the countering of online hate speech.

3.1.2 The implementation of the Council of Europe Istanbul Convention on violence against women at the Italian level.

Taking into consideration the countering of non-consensual dissemination of intimate private photos, it is necessary to concentrate our attention on the ratification and the execution of Italy of the Council of Europe Istanbul Convention.⁵⁴⁰ Indeed, as we will explain thereafter, the enforcement of the Red Code on violence against women has its roots on such Convention:

⁵³⁷ Dipartimento per le Politiche Europee. (2017). *Legge europea 2017*. Governo Italiano. Retrieved from <http://www.politicheeuropee.gov.it/it/normativa/legge-europea/legge-europea-2017/>

⁵³⁸ Montanari, M. (18 febbraio 2014). L'attuazione italiana della decisione quadro 2008/913/GAI in materia di negazionismo, nel rapporto della Commissione Europea. Retrieved May 01, 2021, from <https://archivioldpc.dirittopenaleuomo.org/d/2845-l-attuazione-italiana-della-decisione-quadro-2008913gai-in-materia-di-negazionismo-nel-rapporto-del>

⁵³⁹ Senato, Legge Europea 2017, Schede di lettura. A.S. n. 2886, settembre 2017, p. 34.

⁵⁴⁰ L. 27 giugno 2013, n. 77, GU n.152 del 01-07-2013.

Several legislative reforms, including the recent Law No. 69 of 19 July 2019 (known as the Red Code) have led to the development of a solid legislative framework in line with the requirements of the convention [...]⁵⁴¹

Contrary to what happened with the Framework Decision 2008/913/JHA, it was not an obligation for Italy to ratify the Convention. Nonetheless, after an increasing attention on the issue of violence against women at the Italian level, and the consequent criminalisation of violent acts, such as the female genital mutilation (2007) and stalking (2009),⁵⁴² Italy proceeded to the ratification of the Convention in September 2013, which entered into force in August 2014.⁵⁴³ According to the provisions of such Convention, Member States have the obligation to limit violence against women and domestic violence with the integration of new criminal offences set out in the document. Namely, the Convention requires a series of amendments to the national legislation, or the supplement of new criminal laws.⁵⁴⁴ Moreover, States must work efficiently through four categories of actions: prevention, protection, punishment of those responsible and support for victims, emphasizing migrant women and asylum seekers.⁵⁴⁵ Additionally, the Convention obliges States to adopt measures in order to eradicate costumes based on gender stereotypes.⁵⁴⁶ Finally, the Convention establishes the monitoring mechanism of GREVIO, which is a group of experts on action against violence against women and domestic violence, made of 10 to 15 members, elected every four years. Basically, the work of GREVIO is similar to the UN committees on human rights. Indeed, it undertakes the examination of reports submitted by member states, in which they evaluate what measures were implemented for prevention and protection of victims. Moreover, in emergency cases or when information provided by States is insufficient, GREVIO may decide to organize visits to States, in order to collect data and submit a report stressing the difficulties of the States and suggesting measures to adopt.⁵⁴⁷ Finally, article 69 of the

⁵⁴¹ GREVIO, Baseline Evaluation Report: Italy. Adopted 15th November 2019, p.11.

⁵⁴² GREVIO, Donne in Rete contro la Violenza, L'attuazione della Convenzione di Istanbul in Italia. October 2018, p. 6.

⁵⁴³ Ibid.

⁵⁴⁴ For example, Italy has the obligation to adapt art. 18 on the forced interruption of gravidance, following the provision of article 39 of the Convention. Additionally, it should integrate the criminal offence of forced marriage and forced sterilization. See Pascale, G. (2014, settembre). *L'entrata in vigore della Convenzione di Istanbul sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*. Retrieved from [https://www.osservatorioaic.it/images/rivista/pdf/Osservatorio%20AIC_Pascale_fin%20\(1\).pdf](https://www.osservatorioaic.it/images/rivista/pdf/Osservatorio%20AIC_Pascale_fin%20(1).pdf)

⁵⁴⁵ Pascale, G., op. cit. p. 3.

⁵⁴⁶ Pascale, G., op. cit. p. 4.

⁵⁴⁷ De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI, p. 181.

Convention declares that “GREVIO may adopt, where appropriate, general recommendations on the implementation of this Convention.”⁵⁴⁸ However, differently from the UN treaty-bodies, GREVIO does not have “quasi-judicial competence”, since it is not responsible for the examination of individual complaints.⁵⁴⁹

Being a quite recent mechanism, there are not yet general recommendations on online violence to analyse. Nonetheless, an attentive evaluation of the efficient integration of the Convention within the Italian system, has been made by the monitoring mechanism of GREVIO.⁵⁵⁰ For these reasons, we want to focus our attention on the Italian situation on violence online, examining both the Italian report -*Shadow Report*- to GREVIO and the GREVIO evaluation on Italy.

In October 2018, an Italian NGO published a report on the Italian response to violence against women and domestic violence within the State, highlighting both the outcomes achieved and the difficulties in managing the issue. If on one hand the report underlines that Italy had implemented three plans of action on gender-based violence and stalking, sexual gender-based violence and men’s violence against women, on the other, it underscores the deep-rooted problem of sexism of the Italian society and its patriarchal nature.⁵⁵¹ Regarding the phenomenon of sexism, the report claims that Italy has a serious problem with it, since it is embedded in the culture and deeply-rooted in the customs of Italian nationals:

The unrelenting pervasiveness of sexism and gender bias in Italian society must be considered as well as the fact that in recent years nothing has been done to address this situation. Prescriptive rules are not enough to change a prejudice that is so deeply rooted.⁵⁵²

In the previous chapter we observed that sexist hate speech against women has seriously increased in recent years.⁵⁵³ Accordingly, the Shadow Report also underlines how sexism and hate speech against women is increasing within the media and the Internet platforms,

⁵⁴⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. -ETS 210, art. 69.

⁵⁴⁹ De Vido, S., op. cit. p. 181.

⁵⁵⁰ Istanbul Convention -ETS 210, art. 66.

⁵⁵¹ GREVIO, Donne in Rete contro la Violenza, L'attuazione della Convenzione di Istanbul in Italia. October 2018, pp. 2-3.

⁵⁵² Donne in Rete contro la Violenza, op.cit. p. 15.

⁵⁵³ Amnesty International (2021). *Barometro dell'odio. Intolleranza pandemica*. Amnesty International Italia.

where users are free to exchange hateful and offensive comments with others. For this reason, the report strictly recommends adopting “a law against sexism in the media (advertising, press, social networks, television shows etc.) as a matter of urgency”⁵⁵⁴ and it suggests the implementation of “effective monitoring and sanctioning mechanisms on all types of media and communication behaviour.”⁵⁵⁵ Nevertheless, the report does not dedicate much space to violence online, lacking in the analysis of non-consensual dissemination of intimate private photos.

At this point, it is useful to take a look at the evaluation that GREVIO did about Italy. The GREVIO Report on Italy of 2019 highlights the consistent problem of misogyny and inequality between men and women. In the field of violence online, the Report underscores that sexist hate speech is rapidly increasing, especially against women politicians.⁵⁵⁶ Moreover, it stresses the presence of misogyny within social networks and the media, highlighting the “disturbing” nature of some sexist episodes against “prominent women figures”.⁵⁵⁷ On the other hand, GREVIO also recognizes the engagement of Italy in the countering of new types of violence against women. One of the first actions that Italy made at the legislative level was the integration of law n. 119/2013.⁵⁵⁸ Indeed, the law supplements the criminal code with new aggravating circumstances and enlarges the field of protection for victims of abuse.⁵⁵⁹ Specifically, the law declares the relationship between the victim and the offender as a relevant factor for the investigation.⁵⁶⁰ Essentially, the affective and emotional bond with the victim of sexual violence, inhuman treatment or domestic abuse must constitute an aggravating circumstance.⁵⁶¹ Although it can be affirmed that law n. 119 makes changes on the Italian criminal system, it needs to note a few limitations. Namely, the law provides for a common aggravation for every crime committed in detriment of a pregnant person or a disabled person, but it does not include any crime that explicitly punishes the killing of

⁵⁵⁴ Donne in Rete contro la Violenza, op.cit. p. 25.

⁵⁵⁵ Donne in Rete contro la Violenza, op.cit. p. 17.

⁵⁵⁶ GREVIO, Baseline Evaluation Report: Italy. Adopted 15th November 2019, p. 19.

⁵⁵⁷ GREVIO, Baseline Evaluation, op. cit. p. 34.

⁵⁵⁸ L. 15 ottobre 2013, n. 119, GU n.242 del 15-10-2013.

⁵⁵⁹ (2014, febbraio 24). *Femminicidio: conversione in legge, con modificazioni, del D.L. n. 93/2013. Violenza donne: aggravanti e più tutele, i punti chiave della legge*. Retrieved from altalex.com: <https://www.altalex.com/documents/leggi/2014/02/26/femminicidio-conversione-in-legge-con-modificazioni-del-d-l-n-93-2013>

⁵⁶⁰ Van der Aa, S. (2018). New Trends in the Criminalization of Stalking in the EU Member States. *Eur J Crim Policy Res*, Vol. 24, p. 322.

⁵⁶¹ Ibid.

the woman. In other words, femicide remains a murder to all intents and purposes.⁵⁶² Subsequently, the Report underscores the adoption of the so-called Red Code (2019). As we will illustrate thereafter, the Red Code is a norm which criminalizes new forms of violence, such as non-consensual dissemination of intimate private photos and, at the same time, strengthens “the sanctions for the crimes of stalking, sexual violence and domestic violence and increased the applicable sanctions for aggravated circumstances.”⁵⁶³

Generally, although Italy has integrated its legal system with new criminal laws, GREVIO reveals significant gaps in the Italian engagement in protecting women and preventing violence against them. Indeed, the Report stresses the necessity of educational programs in order to avoid gender-based stereotypes and the belief in women’s inferiority. On the other hand, GREVIO does not dedicate a detailed section on violence online and on measures to counter it. Nevertheless, it needs to be noted that GREVIO is a recent monitoring mechanism, as they are the recent provision of Italy. Therefore, it is difficult to have a complete overview on its work.⁵⁶⁴

3.2. Countering hate speech (604-bis and 604-ter) and non-consensual dissemination of intimate private images (612-ter) in Italy: analysis of the Italian criminal Code.

In the previous paragraphs, we explored the international obligations of Italy, emphasizing the Framework Decision 2008/913/JHA and the ratification of the CoE Istanbul Convention on violence against women and domestic abuse. On the basis of this analysis, it is useful to take a look at the Italian criminal Code, in order to deepen the countering of hate speech and non-consensual dissemination of intimate private photos within the Italian legal system.

⁵⁶² Acquaviva, M. (2020, febbraio 17). *Legge sul femminicidio: cosa prevede*. Retrieved from [laleggepertutti.it: https://www.laleggepertutti.it/367845_legge-sul-femminicidio-cosa-prevede](https://www.laleggepertutti.it/367845_legge-sul-femminicidio-cosa-prevede)

⁵⁶³ GREVIO, Baseline Evaluation, op. cit. p. 12.

⁵⁶⁴ De Vido, S. (2016). *Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d’Europa del 2011*. Milano – Udine: MIMESIS EDIZIONI, p.181.

3.2.1 The Italian criminal Code on countering hate speech and the draft legislation “DDL Zan”.

It can be affirmed that Italy integrated its criminal Code with the punishment of criminal offences based on racial discrimination after the ratification of the International Convention on the Elimination of all forms of Racial Discrimination (l. n. 654/1975).⁵⁶⁵ As we observed at the beginning of the chapter, such law was subject to several amendments, which stipulated the provisions of article 604-bis of the Italian Criminal Code⁵⁶⁶. Accordingly, art. 604-bis c.p. declares that:

Salvo che il fatto costituisca più grave reato, è punito: [...] chi propaganda idee fondate sulla superiorità o sull'odio razziale o etnico; [...] chi, in qualsiasi modo, istiga a commettere o commette violenza o atti di provocazione alla violenza per motivi razziali, etnici, nazionali o religiosi. [...]⁵⁶⁷

Additionally, the article prohibits all organizations, associations, movements or groups with the scope of discriminate on the basis of race, ethnicity and religion. Also, it condemns those who promote, direct or participate in such organisations, associations, movements or groups, increasing the penalty whether incitement to violence or hate results in the denial, grossly minimization or apology of crimes against humanity, genocide or war crimes.⁵⁶⁸ Therefore, the purpose of this norm is to safeguard the respect for human dignity and protect the principle of equality against all manifestations of hate and violence against targeted groups.⁵⁶⁹ Additionally, it needs to emphasize art. 604-ter c.p. which defines the principles for the aggravating circumstance. Indeed, the articles reads:

⁵⁶⁵ Dipartimento per le Politiche Europee. (2017). *Legge europea 2017*. Governo Italiano. Retrieved from <http://www.politicheeuropee.gov.it/it/normativa/legge-europea/legge-europea-2017/>

⁵⁶⁶ R.D. 19 ottobre 1930, n. 1398, GU Serie Generale n.251 del 26-10-1930.

⁵⁶⁷ Art. 604-bis c.p.

⁵⁶⁸ Brocardi. *Articolo 604 bis Codice Penale (R.D. 19 ottobre 1930, n. 1398) Propaganda e istigazione a delinquere per motivi di discriminazione razziale etnica e religiosa [Aggiornato al 28/02/2021]* . Retrieved from <https://www.brocardi.it/codice-penale/libro-secondo/titolo-xii/capoo-iii/sezione-i-bis/art604bis.html>

⁵⁶⁹ Ibid.

Per i reati punibili con pena diversa da quella dell'ergastolo commessi per finalità di discriminazione o di odio etnico, nazionale, razziale o religioso, [...] la pena è aumentata fino alla metà.⁵⁷⁰

Essentially, the article provides for a general aggravating circumstance for all discriminatory offences against a targeted group or individual, that cannot be punished with life imprisonment.⁵⁷¹

On the basis of these articles, the Italian Supreme Court recently ruled on a case of racial propaganda, specifying what factors must be considered before pronouncing the judgement. Investigating the case, it can be noted that the defendants were accused for having exposed an advertising poster on a truck, depicting a guillotine and a dead head of a black man, with the following message: “clandestino uccide tre italiani a picconate – pena di morte subito.”⁵⁷² According to the Supreme Court, a crime may fall under articles 604-bis c.p. and 604-ter c.p. when the conduct complained of has led to the actual danger of discriminatory conduct.⁵⁷³ In this specific case, the accused persons claimed that their advertising poster aimed at requiring the death penalty for the murderer because of the gravity of his acts, rejecting the creation of such poster with discriminatory motives.⁵⁷⁴ Accordingly, the Supreme Court stated that it was a legitimate personal opinion which did not discriminate the murderer on the basis of the race:

⁵⁷⁰ Art. 604-ter c.p.

⁵⁷¹ Brocardi. *Articolo 604 ter Codice Penale (R.D. 19 ottobre 1930, n. 1398) Circostanza aggravante [Aggiornato al 28/02/2021]*. Retrieved from brocardi.it: <https://www.brocardi.it/codice-penale/libro-secondo/titolo-xii/capo-iii/sezione-i-bis/art604ter.html>

⁵⁷² Sent. Corte di Cassazione n. 1602 del 2020.

See also: Castellaneta, M. (24 gennaio 2020). La Corte di Cassazione sull'odio razziale – The Italian Supreme Court on hate crimes and incitement to racial discrimination. Retrieved May 06, 2021, from <http://www.marinacastellaneta.it/blog/la-corte-di-cassazione-sullodio-razziale-the-italian-supreme-court-on-hate-crimes-and-incitement-to-racial-discrimination.html#:~:text=1602%2F20%20depositata%20il%2016,un%20manifesto%20con%20il%20messaggio%20%E2%80%9C>

⁵⁷³ (gennaio 2020). Fonti dell'Unione europea e internazionali, L'incitamento all'odio razziale secondo la Corte di Cassazione. Retrieved May 06, 2021, from <https://www.osservatoriosullefonti.it/rubriche/fonti-unione-europea-e-internazionali/2754-osf-1-2020-ue-1>

⁵⁷⁴ Izzo, L. (20 gennaio 2020). Odio razziale: non basta la parola clandestino. Retrieved May 06, 2021, from <https://www.studiocataldi.it/articoli/37097-odio-razziale-non-basta-la-parola-clandestino.asp>

[...] sicché se di odio si tratta esso riguarda indifferentemente tutti coloro che si rendono responsabili di un triplice omicidio, valutazione che attiene alla libertà di espressione dell'individuo.⁵⁷⁵

Additionally, it claimed that the term “clandestine” was not sufficient to condemn the defendants for discriminatory propaganda. Indeed, the Supreme Court emphasized the significant role of the context in which a crime is perpetrated, since racial and xenophobic hate must determine a real danger for individuals to be punished as a criminal offence.⁵⁷⁶ For these reasons, the Supreme Court rejected the judgment of the Court of Appeal.⁵⁷⁷

As it has observed, Italy does criminalise the propaganda of discriminatory ideas in the cases in which it results in a possible danger for the targeted groups or individuals. One of the limits of such articles that can be highlighted is the absence of a law or criminal rule aiming at countering incitement to hate or violence on the basis of gender, sexual orientation and disability.⁵⁷⁸ In the last decade, several drafts on homo-transphobic discrimination were presented to the Parliament, however none of them passed.⁵⁷⁹ Nevertheless, in recent days, the Draft n. 2005 (DDL Zan) has been approved by the Chamber of Deputies, waiting to be approved or rejected by the Parliament.⁵⁸⁰ Such Draft provides for the extension of the targeted groups or individuals against whose are committed the criminal offences enshrined in art.604-bis c.p. and 604-ter c.p., integrating discrimination based on sex, gender, sexual orientation, gender identity and disability.⁵⁸¹ However, it can be affirmed that the so-called DDL Zan is nowadays at the centre of a social and political heated debate. Indeed, although freedom of expression is safeguarded with article 4, an Italian political Party highly criticizes the draft, assuming that the approval of DDL Zan would jeopardize such right. Accordingly, the political Party enacted a concrete obstructionism against the draft, causing several postponements to the

⁵⁷⁵ Sent. Corte di Cassazione n. 1602 del 2020.

⁵⁷⁶ See *supra* note.

⁵⁷⁷ Castellaneta, M. (24 gennaio 2020). La Corte di Cassazione sull'odio razziale – The Italian Supreme Court on hate crimes and incitement to racial discrimination. Retrieved May 06, 2021, from <http://www.marinacastellaneta.it/blog/la-corte-di-cassazione-sullodio-razziale-the-italian-supreme-court-on-hate-crimes-and-incitement-to-racial-discrimination.html#:~:text=1602%2F20%20depositata%20il%2016,un%20manifesto%20con%20il%20messaggio%20%E2%80%9C>

⁵⁷⁸ Goisis, L. (2020, December 30). Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homotransphobic, Gender and Disability Hate Crimes. *Genlus*, p. 6

⁵⁷⁹ Goisis, L., op. cit. p. 8.

⁵⁸⁰ *Ibid.*

⁵⁸¹ DDL, Atto Senato n. 2005, XVIII Legislatura, 5 novembre 2020, artt. 2-3.

scheduling for the approval.⁵⁸² Nonetheless, after months of social protests, flash mobs and collections of signatures in favour of the draft, it was scheduled last April.⁵⁸³

Lastly, it needs to be noted the absence of a criminal provision for the countering of *online* hate speech within the Italian Criminal Code. In accordance with this, last March a legislative proposal was presented to the Chamber of Deputies.⁵⁸⁴ The drafting law declares the responsibility of the Internet platforms managers with regard to illegal content, providing for the punishment of all criminal offences enshrined in artt.604-bis.c.p. and 604-ter c.p, but also in artt.612-bis c.p. and 612-ter c.p.⁵⁸⁵

3.2.2 The Italian law Red Code and article 612-ter c.p on the prohibition of non-consensual dissemination of intimate private images.

As previously anticipated, law n. 69/2019⁵⁸⁶ introduced a series of amendments concerning the substantive, procedural and criminal law relating to criminal execution, in relation to the protection of victims of violence against women and domestic abuse.⁵⁸⁷ Specifically, such law incorporated the criminal offence of non-consensual dissemination of intimate and private photos (art. 10), criminalised under art. 612-ter c.p.⁵⁸⁸

Focusing on the provisions of article 612-ter c.p., it can be noted that it condemns individuals who produce, disseminate, steal, send or post images or videos with sexually explicit content:

⁵⁸²

See https://www.repubblica.it/politica/2021/04/07/news/omofobia_senato_comissione_justizia_calendarizzazione-295404295/ (accessed 10-05-21); <https://www.ilsole24ore.com/art/il-ddl-zan-e-disconoscimento-chi-e-oggetto-forme-aggressione-AExM2tC> (accessed 10-05-21)

⁵⁸³https://www.repubblica.it/politica/2021/04/28/news/omofobia_ddl_zan_ostuzionismo_ostellari_lega_cei-298453635/ (accessed 10-05-21)

⁵⁸⁴Atto Camera n. 2936. Proposta di legge presentata il 10 marzo 2021.

⁵⁸⁵ Atti persecutori; Diffusione illecita di immagini o video sessualmente espliciti

⁵⁸⁶ L. 19 luglio 2019, n. 69, GU n.173 del 25-07-2019.

⁵⁸⁷ Gatta, G. L. (2019, aprile 15). *Il testo del disegno di legge "codice rosso" (revenge porn, costrizione o induzione al matrimonio, deformazione/sfregio del viso, e molto altro ancora)*. Retrieved from [dirittopenaleuomo.com: https://archiviodpc.dirittopenaleuomo.org/d/6622-il-testo-del-disegno-di-legge-codice-rosso-revenge-porn-costrizione-o-induzione-al-matrimonio-defor](https://archiviodpc.dirittopenaleuomo.org/d/6622-il-testo-del-disegno-di-legge-codice-rosso-revenge-porn-costrizione-o-induzione-al-matrimonio-defor)

⁵⁸⁸ Corte Suprema di Cassazione. (27 ottobre 2019). *Relazione n. 62/2019, Legge 19 luglio 2019, n. 69, Modifiche al codice penale, al codice di procedura penale e altre disposizioni in materia di tutela delle vittime di violenza domestica e di genere.*

[...]chiunque, dopo averli realizzati o sottratti, invia, consegna, cede, pubblica o diffonde immagini o video a contenuto sessualmente esplicito, destinati a rimanere privati, senza il consenso delle persone rappresentate, è punito con la reclusione da uno a sei anni e con la multa da euro 5.000 a euro 15.000.⁵⁸⁹

It is interesting to highlight the analysis of Sorgato on the terminology of such an article and its meaning. Accordingly, the scholar focuses on the meaning of three verbs: *realizzare*, *sottrarre* and *diffondere*. Indeed, in the context of article 612-ter c.p., *realizzare* is intended as a synonym of “to create” and “to obtain”, meaning that the offender had a significant role in the creation of the sexually explicit context.⁵⁹⁰ Following this interpretation, the so-called *selfie* would be excluded from the provisions of article 612-ter c.p., unless the victim was forced or threatened to send it by the perpetrator.⁵⁹¹ Secondly, although the action of stealing is already criminalised within the criminal Code, the scholar underlines how the verb *sottrarre* in this context recalls the need to protect personal privacy.⁵⁹² According to the jurisprudence, the Supreme Court asserted that the access to the profile of an ex-partner may constitute a criminal offence, whether the action is made without consent.⁵⁹³ Lastly, Sorgato emphasizes the use of the verb *diffondere*, specifying that, differently from the term “to distribute”, to disseminate involves an indeterminate number of receivers. In other words, non-consensual dissemination of intimate private photos cannot be considered a criminal offence unless the sexually explicit content reaches a relevant number of individuals.⁵⁹⁴

Moving on with the analysis, it can be affirmed that the article condemns all individuals who, having received the sexually explicit content, “send, deliver, cede, publish or disseminate without the consent of the persons represented in order to cause them harm.”⁵⁹⁵ On this point, it needs to be specified that “send, deliver and cede” are actions intended either within cyberspace and within offline environments, while “publish

⁵⁸⁹ Art. 612-ter (1) c.p.

⁵⁹⁰ Sorgato, A. (2020). *Revenge porn: aspetti giuridici, informatici e psicologici*. Milano: Giuffrè Francis Lefebvre, pp. 42-43.

⁵⁹¹ Sorgato, A. op. cit. p. 43.

⁵⁹² Sorgato, A. op. cit. pp. 44-45.

⁵⁹³ Cass.pen., sez. V, 2 ottobre 2018, n. 2905, in CED Cass.pen., rv. 27459601.

⁵⁹⁴ Sorgato, A. (2020). *Revenge porn: aspetti giuridici, informatici e psicologici*. Milano: Giuffrè Francis Lefebvre, p. 47.

⁵⁹⁵ Art. 612-ter (2) c.p.

and disseminate” may include the posting on social networks or on pornographic websites, where the explicit content may reach thousands of users.⁵⁹⁶

Lastly, it needs to be emphasized the aggravating circumstances set out in paragraph 3 of article 612-ter c.p.:

La pena è aumentata se i fatti sono commessi dal coniuge, anche separato o divorziato, o da persona che è o è stata legata da relazione affettiva [...] se i fatti sono commessi attraverso strumenti informatici o telematici. [...] se i fatti sono commessi in danno di persona in condizione di inferiorità fisica o psichica o in danno di una donna in stato di gravidanza.⁵⁹⁷

It can be affirmed that the aggravating circumstance originating by the affective relationship between the offender and the victim, recalls the one set out in article 612-bis c.p., derived from law n. 119/2013, which strengthened the provisions on violence against women.⁵⁹⁸ Additionally, it is significant the role of ICT-tools within the context of non-consensual dissemination of intimate private photos. As previously anticipated, the use of ICT-tools represents one of the possible vehicles to perpetrate such crime, and at the same time it is one of the most dangerous for the victims, given the large number of users the content may reach.⁵⁹⁹ Finally, it needs to be noted that the aggravating circumstances of non-consensual dissemination of intimate private photos does not include minors, but only pregnant women and “people in physical or mental inferiority.” According to this, Sorgato argues that in the case of dissemination of sexually explicit content depicting minors, a different criminal offence will be assumed, looking at the provisions of article 600-ter c.p. on child pornography.

As observed, the Italian criminal Codes provides for the criminalisation of non-consensual dissemination of intimate private photos, taking into consideration, not only

⁵⁹⁶ See, Caletti, G. M. (2019, aprile 29). *"Revenge porn". prime considerazioni in vista dell'introduzione dell'art. 612-ter c.p.: una fattispecie "esemplare", ma davvero efficace?* Retrieved from [dirittopenaleuomo.com: https://archiviodpc.dirittopenaleuomo.org/d/6648-revenge-porn-prime-considerazioni-in-vista-dell-introduzione-dell-art-612-ter-cp-una-fattispecie-es](https://archiviodpc.dirittopenaleuomo.org/d/6648-revenge-porn-prime-considerazioni-in-vista-dell-introduzione-dell-art-612-ter-cp-una-fattispecie-es) ; and Ficco, E. (2021, marzo 11). *Revenge Porn tra tutela penale e irrimediabilità del danno: profili introduttivi, analisi normativa e le criticità della prassi.* Retrieved from [diritto.it: https://www.diritto.it/revenge-porn-tra-tutela-penale-e-irrimediabilita-del-danno-profil-introduttivi-analisi-normativa-e-le-criticita-della-prassi/](https://www.diritto.it/revenge-porn-tra-tutela-penale-e-irrimediabilita-del-danno-profil-introduttivi-analisi-normativa-e-le-criticita-della-prassi/)

⁵⁹⁷Art. 612-ter (2) c.p.

⁵⁹⁸ Sorgato, A. op. cit. p. 55.

⁵⁹⁹ Sorgato, A. op. cit. pp. 57-58.

the dissemination and publication of sexually explicit content, but also emphasizing the consent and the use of ICT-tools.

Conclusion

In this chapter, we investigated the Italian legal system on two typologies of cyber harassment: hate speech and non-consensual dissemination of intimate private photos. As observed, Italy includes the criminalisation of both phenomena within its criminal Code. Nevertheless, it needs to highlight some weaknesses.

Concerning hate speech, it can be affirmed that the Italian provision is still incomplete. Indeed, articles 604-bis c.p. and 604-ter c.p. does not include the criminalisation of instigation to hate (or violence) on the basis of gender, sexual orientation and disability. Accordingly, the Final Report of the Italian Jo Cox Commission⁶⁰⁰ on the phenomena of hate, intolerance, xenophobia and racism, provides the examination of hate speech in Italy, stressing the idea that hate and intolerance should be criminalised in all its forms.⁶⁰¹ Moreover, it can be noted that the criminal Code does not conceive online hate speech as a criminal offence, excluding all episodes of incitement to hate perpetrated within cyberspace.

Differently from hate speech, it can be emphasized the exhaustiveness of article 612-ter c.p. on non-consensual dissemination of intimate private photos. Indeed, such article provides not only for the criminalisation of the dissemination, publication and theft of intimate private photos, but also it provides for the aggravating circumstance for the use of ICT-tools in the perpetration of the criminal offence.⁶⁰² In other words, cyberspace has a significant role in the criminalisation of this crime. However, this phenomenon is related to several issues, among which it can be recalled the blaming of the victim, the gender stereotyping and the difficulty in removing the sexually explicit content from the Internet. Accordingly, we can emphasize the case of Tiziana Cantone, who is considered one of

⁶⁰⁰ The Commission Jo Cox has been implemented by the Italian President of the Chamber (Legislation n.XVII). It is composed by one deputy of each political party, experts and representatives of institutions and organizations. The purpose of the Commission is to monitor, and study hate speech at the Italian level.

See Senato, Legge Europea 2017, Schede di lettura. A.S. n. 2886, settembre 2017.

⁶⁰¹ Commissione Jo Cox. (6 luglio 2017). *Relazione finale sull'intolleranza, la Xenofobia, il Razzismo e i Fenomeni di Odio, La piramide dell'odio in Italia*. Roma: Camera dei deputati XVII LEGISLATURA, p. 119.

⁶⁰² Sorgato, A. (2020). *Revenge porn: aspetti giuridici, informatici e psicologici*. Milano: Giuffrè Francis Lefebvre, pp. 57-58.

the first victims of non-consensual dissemination of intimate private photos. After being victim of the diffusion of a sexually explicit video within the Internet platforms, she had initiated the procedure for the change of her name, in order to safeguard her privacy and dignity, and she had asked the Tribunal of Naples for the right to be forgotten.⁶⁰³ Nonetheless, this was not sufficient to stop the uncontrolled dissemination of her video, which pushed her to commit suicide.⁶⁰⁴ Nowadays, the Tribunal has opened an inquiry to investigate whether there was instigation to suicide. However, the judgment is still unpublished.⁶⁰⁵

In conclusion, although Italy made some changes within its legal and criminal system, it cannot be affirmed that they are sufficiently enough to counter cyberviolence. On one hand, it will be necessary to wait for the approval of the Draft n.2005⁶⁰⁶ and the legislative proposal n. 2936⁶⁰⁷ on the integration of incitement to hate perpetrated online. On the other hand, given the fact that non-consensual dissemination of intimate private photos is a recent criminal offence, there is still no jurisprudence supporting the criminal procedure of such crime.

⁶⁰³ Created by a sentence of the Supreme Court of Italy, which asserted that an individual has the right to privacy, in order to avoid additional harm. See Cass. pen. 9 april 1998, n. 3679.

⁶⁰⁴ Lax, G. (2016, settembre 14). *Diritto all'oblio: quando la rete uccide*. Retrieved from studiocataldi.it: <https://www.studiocataldi.it/articoli/23378-diritto-all-oblio-quando-la-rete-uccide.asp>

⁶⁰⁵ Ibid.

⁶⁰⁶ DDL, Atto Senato n. 2005, XVIII Legislatura, 5 novembre 2020. On the integration of the aggravating circumstance based on sexual orientation, gender and disability discrimination.

⁶⁰⁷ Atto Camera n. 2936. Proposta di legge presentata il 10 marzo 2021.

CONCLUSIONS

This work started with the necessity to answer a specific question: to determine whether human rights are violated within cyberspace. The affirmative answer to such a question, enabled us to investigate the sphere of cyberviolence, discovering that it is a wide, evolving and complex phenomenon which can be divided into several subcategories. For this reason, among the numerous phenomena that can be included within the issue of online violence, we selected online hate speech and non-consensual dissemination of intimate private photos, basing our choice on the belonging category of cyber harassment and on the impact these phenomena have on their victims. At this point, another question came to the surface: are online hate speech and non-consensual dissemination of intimate private photos legally countered?

In order to answer this question, our research started with an overview on violence. After a brief description of the main features of the general concept of violence, we turned our attention on the online dimension of it, observing the reasons why cyber violence has a significant relevance at social level. As a matter of fact, it can be assumed that the viral dissemination, the difficulty in finding the perpetrator and the absence of a legal contrast to cyber violence are three paramount characteristics which differentiate online violence from offline one. Additionally, supporting our analysis with some statistical data, we ascertained the gender-based nature of cyber violence, claiming that its impact disproportionately affects women and young girls.⁶⁰⁸ Taking into consideration the consequences of online violence, we reached the conclusion that the impact of this phenomenon starts online to end in “real space”. Generally, victims of online violence, and more precisely of cyber harassment, suffer from psychological diseases, such as anxiety, depression and stress-related trauma.⁶⁰⁹ However, they may be subject to other repercussions, from physical threats to job loss, which may push them to distance

⁶⁰⁸ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 14 June 2018.

⁶⁰⁹ UN women. (2020). *Online and ICT facilitated violence against women and girls during COVID-19*. United Nations.

themselves from family and friends. In other words, cyber harassment has a severe impact on victims that cannot be underestimated.

Engaging in the analysis of online hate speech, we noticed that there is no consensus among scholars and among the international legal instruments about the definition of such phenomenon. Certainly, this may find an explanation in the terminology used to describe it. Recalling what we have already illustrated in the first chapter, it is necessary to differentiate three main terms: unpleasant statement, hate speech, and incitement to hatred. In accordance with Susan Benesch, it is important to clarify the differences between unpleasant statements and actions based on *hatred*.⁶¹⁰ Hence, unpleasant statements include all expressions or opinions that, although they may be offensive for individuals, cannot be criminalised since they are legitimate opinions. Instead, actions perpetrated with the purpose to harm or to convince someone to harm a targeted individual shall be considered incitement to hatred. Therefore, the phenomenon of hate speech may be placed between the unpleasant statements and the incitement to hatred since it addresses targeted groups or individuals with hateful comments or expressions, aiming at humiliating the victims because of their personal identity.⁶¹¹ Having clarified the terminology about hate speech, our work highlighted how this phenomenon affects certain targeted groups, basing the hateful expressions on race, disability, religion and gender. In other words, we observed the discriminatory nature of the phenomenon, claiming that *hate* may determine the gravity of acts: the more serious the acts are, the more hate may be considered an aggravating circumstance.

Focusing on the research question of our thesis, at the beginning of chapter 2 we noted the absence of an international or a European legal instrument tackling directly online hate speech. Accordingly, we decided to base our investigation of the current legal framework on the principle of non-discrimination and on the provisions on freedom of expression. This is because, on one hand, hate speech is based on discriminatory behaviour against targeted groups or individuals; on the other hand, it may be considered one of the factors jeopardizing the right to freedom of expression. On the basis of this methodological approach, we started our analysis taking into consideration the international legal framework. Firstly, we observed the provisions enshrined in art. 19

⁶¹⁰ Benesch, S. (2011). *Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred*. Vienna: OHCHR.

⁶¹¹ *Ibid.*

(ICCPR) on freedom of expression, highlighting its double nature. Indeed, if on one hand such an article protects the right to freedom of expression, on the other hand it imposes limitations to it. Subsequently, we focused our attention on art. 20, which can be considered as close to hate speech restriction, condemning propaganda based on racial superiority and incitement to discrimination. However, it is article 4 of ICERD to be the most complete provision on the countering of discriminatory behaviours, since it prohibits all forms of dissemination of ideas based on hatred. Notwithstanding these limitations may be considered a stepping-stone for the countering of hate speech, they are not without critics. Recalling the absence of a common definition of hate speech, it is possible to highlight the difficulty in differentiating expressions based on hatred or discrimination from offensive but legitimate ones. Essentially, unproportionate restrictions of hate speech may jeopardize the right to freedom of expression, with the possibility to incur censorship. In accordance with it, the Special Rapporteur expressed reservations about hate speech limitations, highlighting the ambiguity of the aforementioned provisions towards the enjoyment of the right of freedom of expression. Finally, although online illegal content has started to be considered as an increasing concern within the HRC General comments and the Reports of the Special Rapporteurs, the online dimension of hate speech is completely excluded by the international legal instruments.

Comparing the international legal framework with the European one, a few differences can be noticed. Although there are no Conventions tackling directly online hate speech, it is possible to assume that both the Council of Europe and the European Union are moving towards hate speech prohibition. Taking into consideration the Council of Europe legal framework, the Additional Protocol of the Convention of Cybercrime introduces some restrictions for the online dissemination of any material “promoting, advocating or inciting hatred or discrimination”⁶¹². Although some inaccuracies on the terminology can be found within the Protocol, it is a significant instrument supplementing provisions on online illegal content. Furthermore, we observed the contribution of the ECtHR on hate speech, pointing out the provisions enshrined in art. 8 -right to private life-, art. 10-freedom of expression- and art. 14 -prohibition of discrimination-. Instead, taking into account the European Union level, we need to recall two main instruments: the Framework Decision 2008/913/JHA and the Code of Conduct. The first one is a legally binding instrument which introduces the criminalisation of acts based on racism and

⁶¹² Additional Protocol to the Convention on Cybercrime, 28 January 2003 -ETS 189, art. 2(1).

xenophobia, as well as the criminalisation of denial and grossly trivialisation of crimes against humanity. Although it is a significant instrument for Member States, it cannot be considered a relevant document for the countering of hate speech. On the other hand, the Code of Conduct incorporates provisions for the removal of online illegal content, among which online hate speech, involving Member States and IT Companies. However, the major limit of this document is its non-legally binding nature, since it is included within the so-called “soft law”.

At this point, after having investigated the international and the European legal frameworks we turned our attention to the Italian legal system, in order to verify whether online hate speech is criminalised and how. We observed that Italy includes on one hand, the criminalisation of propaganda based on racial superiority and the instigation to hate and violence under article 604-bis c. p.; on the other hand, it declares under art. 604-ter c. p., the aggravating circumstance for all crimes perpetrated with a discriminatory motive based on race, nationality, ethnicity and religion. However, we noted that those provisions present important weaknesses. The first one is the exclusion of cyberspace. In other words, online hate speech is not criminalised by such articles. Moreover, the Italian criminal Code does not include discriminatory acts or incitement to hate against a targeted group on the basis of gender identity, sexual orientation and disability. Accordingly, we can notice an opposite approach with respect to the ECtHR judgment of *Beizaras and Levickas v. Lithuania*⁶¹³, where the Court declared that online hate speech on the basis of sexual orientation may be considered a violation of human rights.

In a similar way to what we have done with online hate speech, we outlined the characteristics of non-consensual dissemination of intimate private photos. Firstly, we focused our attention on the definition of the phenomenon, claiming that it is the online dissemination of sexually explicit material, with the purpose to harm and humiliate the victim. Accordingly, we found out that this phenomenon is highly gender-based, with 90% of the victims being women. Subsequently, we emphasized the proper terms to be used while analysing the phenomenon. Indeed, being a quite recent criminal offence, non-consensual dissemination of intimate private photos is erroneously denominated “revenge porn”. As we illustrated along chapter 1, the inclusion of the word “revenge” lets us intend

⁶¹³ ECtHR, judgment 14 January 2020, *Beizaras and Levickas v. Lithuania*, application no. 41288/15.

that the crime was perpetrated as a personal vengeance against the ex-partner. However, this denomination is reductive with respect to the scope of such criminal offence.⁶¹⁴ As a matter of fact, image-based sexual abuse affects not only the personal sphere of the victim, but also her social life. Precisely, victims see their personal and intimate life to be exposed to the public, the consequences of which are psychological stress, physical threats and economic repercussions. Moreover, this phenomenon is usually accompanied by victim blaming, which increases the humiliation of the victim.

Taking into consideration the international legal framework, it is possible to assume that the provisions on non-consensual dissemination of intimate private photos are almost nil. This is because the Convention we analysed (CEDAW) dates 1979, while the phenomenon taken into examination is quite recent. Nevertheless, we noted the contribution of the Special Rapporteur, who introduced the concept of cyberviolence, highlighting the serious impact it has on women.

Similarly, at the European level there are no Conventions tackling directly non-consensual dissemination of intimate private photos. For this reason, we decided to investigate European documents on violence against women, in order to find similarities between the consequences of VAW and non-consensual dissemination of intimate private photos. Accordingly, we analysed the provision of the Council of Europe Convention on violence against women and domestic abuse, observing that the phenomenon taken into analysis may fall under the Convention's provisions because of the psychological repercussions it has on victims. At this point, we considered the possibility to include non-consensual dissemination of intimate private photos within the context of domestic abuse appropriate to be explored. Comparing the characteristics of such a phenomenon with the provisions on domestic abuse, it can be noted a few similarities. Firstly, both types of abuse disproportionately affect women. Secondly, having a gender-based nature, the control and the power used by men over women are factors that characterize both phenomena. Thirdly, the purpose of non-consensual dissemination of intimate private photos coincides with the aim of domestic abuse. Indeed, both aim at manipulating, humiliating and blaming the victims. Finally, the offenders of both types of violence usually have an affective relation with their victims. All these common elements brought

⁶¹⁴ Maddocks, S. (2018). From Non-consensual Pornography to Image-based Sexual Abuse: Charting the Course of a Problem with Many Names. *Australian Feminist Studies* 33:97.

us to investigate the jurisprudence to demonstrate whether non-consensual dissemination of intimate private photos has been included within domestic violence. In accordance with it, we observed two recent judgments of the European Court of Human Right, where the Court decreed online violence as a possible form of domestic abuse. However, the Istanbul Convention does not provide any restriction to online violence, constituting one of its serious limits. Likewise, the European Union legal framework does not include provisions on non-consensual dissemination of intimate private photos. Although the European Commission implemented a series of strategies to tackle online violence, there has not been the possibility to study the results because of their recent creation.

Concerning the Italian legal system, we noticed that non-consensual dissemination of intimate private photos is criminalised under article 612-ter c.p. As we observed, such provision is quite complete since not only it criminalises the dissemination, publication and theft of sexually explicit material, but it also decrees cyberspace as an element for the aggravating circumstance. However, we noted a few limits. Firstly, the provision is too recent to have a solid jurisprudence on it; secondly, according to GREVIO, the Italian society is characterized by sexism and misogyny. For these reasons, the effectiveness of article 612-ter is still unclear.

In conclusion, it can be affirmed that both the international and the European legal frameworks lack legislation against online violence. Notwithstanding the European legal framework remains the most focused on the issue of hate speech, introducing provisions on the removal of online illegal content, such phenomenon is tackled most of the time within offline environments, excluding its online dimension. Moreover, the debate between the safeguard of freedom of expression and restriction of incitement to discrimination is still heated. On the other hand, non-consensual dissemination of intimate private photos does not find any significant restriction neither at the international nor at the European level. However, an important consideration that must be underlined is the recent inclusion of online violence as a form of domestic abuse. Contrary, the Italian level has a stronger provision on non-consensual dissemination of intimate private photos with respect to the one on hate speech, which lacks in the criminalisation of certain grounds of discrimination, excluding also the online dimension of the phenomenon. Also at the Italian level, there is a heated debate on the importance of freedom of expression, which

is holding up the final decision on the draft legislation on the supplement of article 604-ter c.p.

At the end of our work, we can affirm that online violence is an increasing phenomenon that is not promptly countered neither internationally, nor nationally. Especially, we believe that Italy should change its approach towards discrimination, integrating the aggravating circumstance for criminal acts on the basis of sexual orientation, gender identity and disability, and trying to eradicate the patriarchal ideology that characterizes our society.

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