

Module 6

**HATE
SPEECH**

*Summary Modules on
Litigating Digital Rights
and Freedom of
Expression Online*



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MODULE 6

HATE SPEECH

- Certain types of speech, known as hate speech, are prohibited by international law.
- It is important to find the right balance between speech that is offensive, yet important for freedom of expression and dissent, and speech which constitutes impermissible hate speech.
- Regulating hate speech can be particularly difficult in the online context.
- Most domestic laws mandate that hate speech requires an intention to incite violence with a reasonable chance, but not that actual harm results.
- The biggest danger with hate speech is that vagueness in defining its meaning may open up space for such laws to be used as tools to stifle criticism.
- Advocacy of genocide or denial of the Holocaust, along with religious defamation, are often treated as special cases of hate speech.

INTRODUCTION

Despite the importance of freedom of expression, not all speech is protected under international law, and some forms of speech are required to be prohibited by states. Article 20 of the International Covenant on Civil and Political Rights ([ICCPR](#)) provides that:

- (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.”

In addition, article 4(a) of the [International Convention on the Elimination of All Forms of Racial Discrimination](#) requires that the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, must be declared an offence that is punishable by law.

Hate speech provisions under international law distinguish between three categories of speech: that which must be restricted, that which may be restricted; and that which is lawful and subject to protection, according to the severity of the speech in question. Hate speech regulations vary significantly by jurisdiction, particularly in how they define what constitutes

hate speech and to what extent they differ by speech that is offline versus online. This is necessary, given the importance of contextual and cultural adaptation to a particular context.

Hate speech must, however, be clearly and narrowly defined and objective criteria must be applied. Over-regulation of hate speech can violate the right to freedom of expression, while under-regulation may lead to intimidation, harassment, or violence against minorities and protected groups.

Importantly, hate speech should not be conflated with offensive speech, as the right to freedom of expression includes speech that is robust, critical, or that causes shock or offence.¹ Hate speech is perhaps the topic that creates the most disagreement among defenders of freedom of expression, as defining the line between offensive but constructive critical speech and hate speech can be extremely difficult.

As a general principle, no one should be penalised for statements that are true. Furthermore, the right of journalists to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance, and no one should be subject to prior censorship. Finally, any sanctions for hate speech should be in strict conformity with the principle of proportionality.

There are some distinctions between hate speech online and offline that may require consideration,² but the law usually does not distinguish between the two:

- Content is more easily posted online without due consideration or thought. Online hate speech cases need to distinguish between poorly considered statements posted hastily online, and an actual threat that is part of a systemic campaign of hatred.
- Once something is online, it can be difficult (or impossible) to get it off entirely. Hate speech posted online can persist in different formats across multiple different platforms, which can make it difficult to police.
- Online content is frequently posted under the cover of anonymity, which presents an additional challenge to dealing with hate speech online.
- The internet has transnational reach, which raises cross-jurisdictional complications in terms of legal mechanisms for combatting hate speech.

The re-emergence of the use of hate speech laws in Kenya is an example of how well-meaning laws that limit supposedly dangerous speech can quickly turn into tools for the suppression of dissent. The 2008 National Cohesion and Integration Act (**NCIC**) encourages national cohesion and integration by outlawing discrimination and hate speech on ethnic grounds to prevent the kind of deadly election-related violence that Kenya experienced in 2007-2008.

¹ Media Defence, 'Training manual on digital rights and freedom of expression online, at p 57 (2020) (accessible at: <https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI-Training-Manual-on-Digital-Rights-and-Freedom-of-Expression-Online.pdf>).

² Media Defence, 'Training Manual on Digital Rights and Freedom of Expression Online' (2010) at p 57 (accessible at: <https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI-Training-Manual-on-Digital-Rights-and-Freedom-of-Expression-Online.pdf>).

However, in 2020 two Members of Parliament were arrested for speech that was critical of the President and his mother under provisions in the NCIC.³

South Africa has also recently grappled with these issues as the legislature has considered a newly proposed bill, the [Prevention and Combatting of Hate Crimes and Hate Speech Bill, 2018](#). Intended to address the rising prevalence of hate crimes and hate speech in the country, particularly online, and to give effect to the rights against discrimination in the Constitution, the Bill has nevertheless been criticised for creating the potential to silence criticism and end difficult discussions about race, gender, religion, and sexuality.⁴ The Bill would extend the protected characteristics defined in South Africa's Constitution from four to fifteen, introduce a new, broad definition of "harm" that critics say would be open to subjective interpretation, and by regulating private communications would also intrude in the right to privacy.

WAS "HATE SPEECH" INTENDED TO INCITE?

Hate speech that is intended to incite hostility, discrimination or violence falls under the type of expression that international law mandates must be restricted. Therefore, a key factor when dealing with hate speech cases is the requirement for there to have been an *intention* to incite action that is violent.

The [Rabat Plan of Action](#) on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,⁵ compiled by a meeting of experts coordinated by the United Nations Office of the High Commissioner for Human Rights (OHCHR), proposes a six-part threshold test to establish whether expression rises to the threshold of being criminal. One of these is intent: "advocacy" and "incitement" are required, rather than mere distribution or circulation. Article 20 of the [ICCPR](#) also requires intent, as does the [2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa](#).⁶ Negligence and recklessness, therefore, do not rise to the standard of hate speech.

A prime example of this distinction is the case of [Jersild v Denmark](#) before the European Court of Human Rights (ECtHR). Jersild was a television journalist who made a documentary featuring interviews with members of a racist, neo-Nazi gang. He was prosecuted and convicted for propagating racist views. However, the ECtHR found that the journalist's intent was to make a serious social inquiry exposing the views of the racist gangs, not to promote their views. There was a clear public interest in the media playing such a role:

³ Article 19 Eastern Africa, 'Kenya: Use of "hate speech" laws and monitoring of politicians on social media platforms' (2020) (accessible at: <https://www.article19.org/resources/kenya-use-of-hate-speech-laws/>).

⁴ See, for example, Tyla Dallas, 'Hate speech bill will have chilling effect on free speech and could be used to silence political opponents,' (2022) (accessible at: <https://www.dailymaverick.co.za/opinionista/2022-10-17-hate-speech-bill-will-have-chilling-effect-on-free-speech-and-could-be-used-to-silence-political-opponents/>) and Power Singh Inc, 'Submission on the Prevention and Combating of Hate Crimes and Hate Speech Bill,' (2022) (accessible at: <https://powersingh.africa/2022/05/18/hate-crimes-hate-speech-bill/>).

⁵ Office of the High Commissioner for Human Rights (OHCHR), 'Freedom of expression vs incitement to hatred: OHCHR and the Rabat Plan of Action', (2012) (accessible at: <https://www.ohchr.org/en/issues/freedomofexpression/articles19-20/pages/index.aspx>).

⁶ Principle 23.

"Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."⁷

The seminal case of *Owelane v South African Human Rights Commission in South Africa* also dealt with the issue of intent, with the Constitutional Court holding that speech must have a clear intention both to “be harmful or to incite harm” **and** to “promote or propagate hatred” before it amounts to hate speech:

“A disjunctive reading would render the impugned section unconstitutional, since merely hurtful speech, with no element of hatred or incitement, could for example constitute prohibited hate speech. This would be an impermissible infringement of freedom of expression as it would bar speech that disturbs, offends, and shocks.”

Building counter-narratives as a response to hate speech

According to the United Nations Educational, Scientific and Cultural Organization ([UNESCO](#)), non-legal methods of countering hate speech are equally important. One such measure is building a counter-narrative by promoting greater media and information literacy as a more structural response to hate speech online:

“Given young people’s increasing exposure to social media, information about how to identify and react to hate speech may become increasingly important. It is particularly important that anti-hate speech modules are incorporated in those countries where the actual risk of widespread violence is highest. There is also a need to include in such programmes, modules that reflect on identity, so that young people can recognise attempts to manipulate their emotions in favour of hatred, and be empowered to advance their individual right to be their own masters of who they are and wish to become.”⁸

MUST VIOLENCE OR HATRED ACTUALLY RESULT?

Another tenet of the Rabat Plan of Action threshold test is the likelihood and imminence of violence.⁹ Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for it to amount to a crime. Nevertheless, some degree of risk of resulting harm must be identified. This means that courts will have to determine that there was a reasonable probability that the speech would succeed in inciting

⁷ European Court of Human Rights, Application No. 15890/89, (1994) para. 33-35 (accessible at: <http://hudoc.echr.coe.int/eng?i=001-57891>).

⁸ UNESCO, Iginio Gagliardone et al, ‘Countering online hate speech’ at p 58 (accessible at: <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>).

⁹ OHCHR above n 4.

actual action against the target group. Courts in different jurisdictions have differed on just how likely the harm needs to be to constitute a criminal act.

For example, in *South African Human Rights Commission v Khumalo*,¹⁰ the High Court of South Africa found that the respondent's utterances against white people were hate speech, despite the fact that there was no evidence of actual harm having been committed as a result of his statements, though they did clearly incite and advocate for violence.¹¹

Online hate speech laws being used to stifle free speech

Many African states are increasingly resorting to new online hate speech laws to curb the flood of mis- and disinformation that arrived with the advent of the internet and social media. For example, in 2020 Ethiopia enacted the Hate Speech and Disinformation Prevention and Suppression *Proclamation* which, while having seemingly well-intentioned objectives, has been decried by civil society as a threat to freedom of expression and access to information online.¹²

Often this is because of:

- Overly broad definitions of hate speech and disinformation.
- Vague provisions that allow discretionary interpretation by law enforcement, prosecutors, and courts and that enable the laws to abuse fundamental rights.
- Holding internet intermediaries liable for content policing.
- Providing for overly harsh and punitive penalties for violations.

Kenya has passed a similar law,¹³ and more are under consideration in Nigeria¹⁴ and South Africa.¹⁵ Critics argue that these laws constitute nothing less than online censorship.

¹⁰ High Court of South Africa, Gauteng Division, Case No. EQ6/2016 & EQ1/2018 (2018) (accessible at: <http://www.saflii.org/za/cases/ZAGPJHC/2018/528.html>).

¹¹ South African Human Rights Commission, 'Media Statement: SAHRC Welcomes the Equality Court's Finding Against Velaphi Khumalo' (2018) (accessible at: <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1591-media-statement-sahrc-welcomes-the-equality-court-s-finding-against-velaphi-khumalo>).

¹² CIPESA, Edrine Wanyama, 'Ethiopia's New Hate Speech and Disinformation Law Weighs Heavily on Social Media Users and Internet Intermediaries' (2020) (accessible at: <https://cipesa.org/2020/07/ethiopias-new-hate-speech-and-disinformation-law-weighs-heavily-on-social-media-users-and-internet-intermediaries/>).

¹³ Mail & Guardian, 'Kenya signs bill criminalizing fake news' (2019) (accessible at: <https://mg.co.za/article/2018-05-16-kenya-signs-bill-criminalising-fake-news/>).

¹⁴ Amnesty International, 'Nigeria: bills on hate speech and social media are dangerous attacks on freedom of expression' (2019) (accessible at: <https://www.amnesty.org/en/latest/news/2019/12/nigeria-bills-on-hate-speech-and-social-media-are-dangerous-attacks-on-freedom-of-expression/>).

¹⁵ Daily Maverick, Pierre de Vos, 'Hate speech bill could be used to silence free speech' (2019) (accessible at: <https://www.dailymaverick.co.za/opinionista/2019-02-26-hate-speech-bill-could-be-used-to-silence-free-speech/>).

THE DANGER OF VAGUENESS

The obvious danger in regulating hate speech is that vagueness in the definition of what constitutes a criminal act will be used to penalise expression that has neither the intent nor the realistic possibility of inciting hatred.

The proposed [Prohibition of Hate Speech Bill](#) in Nigeria is an example. It proposes that:

“Any person who uses, publishes, presents, produces, plays, provides, distributes and/or directs the performance of any material, written and or visual which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up against any person or person from such an ethnic group in Nigeria.”

It further proposes punishing persons guilty of this offence with life in prison or, if the act results in the loss of life, the death sentence.

Civil society has argued that such a broad definition is open to subjective interpretation by law enforcement and would pose a threat to critical opinion, satire, public dialogue, and political commentary, and is particularly concerning in light of the exceptionally harsh penalties imposed.¹⁶

ADVOCACY OF GENOCIDE AND HOLOCAUST DENIAL: A SPECIAL CASE?

Some commentators argue that the issues of advocacy for genocide and denial of the Holocaust constitute special cases within the debate on hate speech and incitement. According to the [1948 Genocide Convention](#), “direct and public incitement to commit genocide” is a punishable act,¹⁷ following the role of the media in perpetuating hatred against Jewish people in Germany and advocating for their extermination.

Likewise, in Rwanda, the media played a crucial role during the genocide in drumming up hatred and distributing propaganda, which led to the first prosecutions at the International Criminal Tribunal for Rwanda (ICTR) for “direct and public incitement to commit genocide.” In the same way as hate speech, incitement to genocide was defined as an inchoate crime, meaning it is not necessary for genocide to actually have occurred for the crime to have been committed, but it did require intent.

¹⁶ Amnesty International, ‘Nigeria: Bills on hate speech and social media are dangerous attacks on freedom of expression,’ (2019) (accessible at: <https://www.amnesty.org/en/latest/press-release/2019/12/nigeria-bills-on-hate-speech-and-social-media-are-dangerous-attacks-on-freedom-of-expression/>).

See also Sandra Eke, ‘Nigeria: A Review Of The Hate Speech Bill,’ (2020) Mondaq (accessible at: <https://www.mondaq.com/nigeria/human-rights/880810/a-review-of-the-hate-speech-bill>).

¹⁷ United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, Resolution 260 (III) (1948), Art. 3.(accessible at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf).

One of the most notable cases brought against journalists at the ICTR was *Nahimana et al*, known as the Media Trial.¹⁸ Two of the respondents were the founders of a radio station that broadcast anti-Tutsi propaganda before the genocide and the names and licence plate numbers of intended victims during the genocide.¹⁹

The *Rome Statute* establishing the International Criminal Court also establishes the crime of incitement to genocide.²⁰

The genocide of the Jews in Nazi-occupied Europe was such a formative event in the creation of the European human rights system that Holocaust denial — claiming that the genocide did not occur — is an offence in several countries and is treated in a particular fashion within the European Court of Human Rights jurisprudence, even when compared to similar cases of historical revisionism.²¹

A more recent *case* heard by the African Court on Human and Peoples' Rights addressed speech that allegedly spread “the ideology of genocide, sectarianism, and divisionism” in Rwanda.²² The case related to the arrest of a leader of a Rwandan political party who had made statements relating to the Rwanda Genocide and, more specifically, highlighting that crimes against humanity were committed against the Hutu people and not only the Tutsi people. The Court found that Rwanda had violated the right to freedom of expression and that the restriction was not necessary and proportional, because the speech did not deny or minimise the crimes committed against the Tutsis and were statements “of the kind that is expected in a democratic society and should thus be tolerated, especially when they originate from a public figure as the Applicant is.”

RELIGIOUS DEFAMATION

Many African states have laws prohibiting the defamation of religions, and many that inherited the common law system also have the crime of blasphemous libel. For example, despite ostensibly being a secular state with no state religion, article 816 of Ethiopia's Criminal Code states that anyone who, by:²³

“...gestures or words scoffs at religion or expresses himself in a manner which is blasphemous, scandalous or grossly offensive to the feelings or convictions of others or towards the Divine Being or the religious symbols, rites or religious personages, is punishable with fine or arrest not exceeding one month.”

¹⁸ International Criminal Tribunal for Rwanda, Case No. ICTR-99-52-T, (2003) (accessible at: <https://unictr.irmct.org/en/cases/ictr-99-52>).

¹⁹ Media Defence above at no. 2.

²⁰ International Criminal Court, 'Rome Statute of the International Criminal Court' at articles 6, 25 and 33 (2002) (accessible at: <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>).

²¹ For example, see the cases of *Léhideux and Isorni v. France*, Application No. 55/1997/839/1045 (1998), and *Garaudy v. France*, Application No. 65831/01 (2003), both in the ECtHR.

²² *Ingabire Victoire Umuhoza v. Rwanda*, (2018) (accessible at: <https://globalfreedomofexpression.columbia.edu/cases/ingabire-victoire-umuhoza-v-rwanda/>).

²³ End Blasphemy Laws, 'Ethiopia,' (2020) (accessible at: <https://end-blasphemy-laws.org/countries/africa-sub-saharan/ethiopia/>).

Some countries have implemented excessively harsh penalties for the crimes of blasphemy and defamation of religion, including death. For example, Mauritania's blasphemy law, updated in 2017 to include even harsher language, ranks as the worst blasphemy law in the world, containing the penalty of death even if the accused repents for the alleged insult.²⁴ Six other African countries, including Somalia and Egypt, have scored 'higher than average' on the harshness of their religious defamation laws.²⁵

General Comment 34 states that:²⁶

"Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."

In 2017, the UN Special Rapporteur on freedom of religion or belief called on States, in his first report to the UN General Assembly, to repeal blasphemy laws because of their stifling effect on the right to freedom of religion or belief and on the ability to engage in a healthy dialogue about religion.²⁷

Many other countries have abolished the offence of blasphemy in recent years, for example, the United Kingdom in 2008,²⁸ Canada in 2018,²⁹ and Denmark in 2017.³⁰

The Constitutional Court of South Africa grappled with religious hate speech in the case of South African Human Rights Commission v Masuku,³¹ which concerns whether statements made by the respondent constitute hate speech against Jewish people in terms of the Equality Act. Ultimately, the Court applied the new definition of 'hate speech' as decided in the *Qwelane* matter (discussed above) and found that while one of the statements made did constitute hate

²⁴ United States Commission on International Religious Freedom, 'Apostasy, blasphemy, and hate speech laws in Africa: Implications for freedom of religion or belief,' at page 16 (2019) (accessible at: <https://www.justice.gov/eoir/page/file/1243281/download>).

²⁵ *Ibid* at page 15.

²⁶ UN Human Rights Council, 'General Comment No. 34 at p 12 (2011) (accessible at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>).

²⁷ UN Special Rapporteur on the right to freedom of religion or belief, 'Elimination of all forms of religious intolerance,' (2017) (accessible at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf?OpenElement>).

²⁸ Media Defence, 'Training Manual on International and Comparative Media and Freedom of Expression Law', Richard Carver, (2020) (accessible at: <https://www.mediadefence.org/wp-content/uploads/2020/06/MLDI.FoEManual.Version1.1.pdf>).

²⁹ Global News Wire, 'Repeal of Canada's Blasphemy Law Applauded by National Secularist Organization' (2018) (accessible at: <https://www.globenewswire.com/news-release/2018/12/14/1667079/0/en/Repeal-of-Canada-s-Blasphemy-Law-Aplauded-by-National-Secularist-Organization.html>).

³⁰ The Guardian, 'Denmark scraps 334-year old blasphemy law' (2017) (accessible at: <https://www.theguardian.com/world/2017/jun/02/denmark-scraps-334-year-old-blasphemy-law>).

³¹ Constitutional Court of South Africa, Case CCT 14/19 (2019) (accessible here: <https://collections.concourt.org.za/handle/20.500.12144/36612?show=ful>).

speech, the others did not as they did not specifically target members of the Jewish faith or ethnicity.

CONCLUSION

Hate speech is a highly contentious issue in Africa, dividing the community of freedom of expression defenders on where the line should sit between protecting speech that is harmful to minority groups and enabling important dissent and criticism. The challenges of dealing with hate speech are particularly salient in online hate speech cases, where intent can be more complicated and remedies harder to implement. Defamation of religion and particularly tragic past events such as genocides are sometimes treated as special cases, but there are questions around whether this is justified. Related crimes such as blasphemy are beginning to be removed in progressive jurisdictions, and African states who have not yet removed these crimes should be encouraged to follow suit.