Hate Speech and Incitement

The issue of “hate speech” and incitement is one that creates an enormous amount of disagreement among defenders of freedom of expression. Free speech advocates usually have little difficulty uniting against infringement of press freedom in the name of national security, say, or the reputation of politicians, yet there is much less unanimity in defence of expressions of hatred.

This is because, in principle, speech that expresses or incites hatred is not only potentially subject to limitation under Article 19(c) of the ICCPR, but also conflicts directly with an explicit obligation in Article 20 of the ICCPR to prohibit incitement to hatred:

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.

The balance between freedom of expression and protection against incitement is understood very differently in different jurisdictions. On the one hand, the United States, given the near absolute character of the First Amendment to its Constitution protecting free speech and press freedom, has permitted hate speech and will only draw a line when there is a “clear and present danger” of hateful expression resulting in violence. By contrast, the ECtHR has applied its usual reasoning in determining the legitimacy, lawfulness and necessity of any given restriction on freedom of expression, with differing outcomes. National jurisdictions have taken a wide range of approaches, with none as permissive as the United States. Even within Europe, which is more restrictive on this issue than the US, there is a considerable divergence between countries like France and Germany, with extensive legal prohibitions on hate speech, and the United Kingdom, which is traditionally more permissive.

Incitement, or a similar offence, exists in many legal systems. It is an inchoate crime – that is to say, it is not necessary that the action being incited actually has to occur. The question, therefore, is what test should apply to determine that speech is in fact incitement.

- Should specific past events be off limits for discussion because of their sensitive or offensive character?
- How far can the general protection of political speech be understood to protect hateful speech?
- To what extent can the media be held liable for reporting hateful sentiments expressed by others?
In addition to Article 20 of the ICCPR, which can be properly interpreted as being consistent with the requirements of Article 19(3), another international instrument requires the prohibition of hate speech. The Convention on the Elimination of Racial Discrimination, in Article 4, requires that States Parties:

“Shall declare an offence punishable by law all 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, and also the provision of any assistance to racist activities, including the financing thereof;

Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

The difficulty is that the jurisprudence of the Committee on the Elimination of Racial Discrimination (CERD) has been extremely problematic in its inconsistency with the Human Rights Committee – charged with interpreting ICCPR Articles 19 and 20 – and with most regional and national case-law.

The CERD itself recognises the inherent tension between freedom of expression and prohibition of speech that incites to discrimination, referring to the need for Article 4 to be interpreted in line with the principles contained in the Universal Declaration of Human Rights. However, the CERD committee has sometimes been inclined to disregard this tension, as for example in the recent case of TBB v Germany,


303 Id.

304 Id.


In Ross v Canada,

305 the Human Rights Committee observed that:

“[R]estrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”

This implies that the same three-part test – legitimate aim, prescribed by law, necessary in a democratic society – that is required for applying a restriction under Article 19(3) applies equally to the restrictions required by Article 20. Importantly, this contrasts with
the way in which Article 4 of the Convention on the Elimination of Racial Discrimination has usually been understood and applied.

The Human Rights Committee has decided a number of cases involving hate speech, generally in favour of restrictions on freedom of expression, but offering a clearer line of reasoning to be emulated. In *Ross v Canada* the Human Rights Committee made clear how freedom of expression may be limited for the “rights and reputations of others.” In this instance, Ross was a school teacher responsible for anti-Semitic statements and publications, who had been removed from his teaching position. The Human Rights Committee remarked that others had the “right to have an education in the public school system free from bias, prejudice and intolerance”.

In *Faurisson v France*, the Human Rights Committee made clear that the interests to be protected by restricting freedom of expression were those of the community as a whole. Faurisson was a professor of literature convicted of violating the Gayssot Act, which makes it a crime to contest the facts of the Holocaust. He had expressed doubts in his publications about the existence of gas chambers for extermination purposes.

The Human Rights Committee analysed whether the restrictions “were applied for the purposes provided for by the Covenant.” These included not only “the interests of other persons [but also of] those of the community as a whole”. In particular, such interests included the interest “of the Jewish community to live free from fear of an atmosphere of anti-Semitism”.

**Was Hate Speech Intended to Incite**

One important strand in the case law on hate speech has been the requirement that the speaker (or author) intended to incite hatred. Perhaps the key case in this regard is *Jersild v Denmark* before the 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 – indeed the case was included in Denmark’s report to the CERD as an example of its commitment to suppress racist speech.

When Jersild took his case to the ECtHR, however, the Court took a different view. The journalist’s *intent*, clearly, 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:

“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.”

306 Id.


308 ECtHR: *Jersild v Denmark* supra note 151.

309 Id at paras 33-35.
In its consideration of the case, the ECtHR made an observation, often repeated subsequently, about the courts having no role in determining how journalists go about their work:

“[T]he methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.”

Hence:

“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.”

The ECtHR has similarly dealt with this issue of intent in some of its Turkish cases. In Gokceli v Turkey, the Court invoked the “attitude” behind a writer’s articles on the Kurdish situation as evidence that “the tenor of the article could not be said to be an incitement to the use of violence”. In Gunduz v Turkey, where the issue was the broadcast of a television programme about Islam and sharia law, the Court said that “the simple fact of defending shari’a, without calling for violence for its establishment, cannot be said to be ‘hate speech’”.

By contrast, in Surek, in which the Court did find the publication to be “hate speech and glorification of violence”, there was found to be a “clear intention to stigmatise the other side to the conflict”, that constituted “an appeal to bloody revenge”.

Some national courts have followed a similar approach. In R v Keegstra, the Supreme Court of Canada had to determine the consistency of a section of the Criminal Code prohibiting “wilful promotion of hatred” on racial or ethnic grounds with the freedom of expression provisions of the Canadian Charter of Rights and Freedoms. Although the Court upheld the section of the Criminal Code, it did so by focusing on the word “wilful” and underlining the importance of subjective intent. “Wilfully” meant, according to the Court, that the “accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result”. The Court went on to note that “this stringent standard of mens rea is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression”.

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310 Id at para 31.
311 Id at para 35.
312 ECtHR: Gokceli v Turkey Application Nos 27215/95 and 36194/97 (2003).
313 Id at para 22, translated from French.
314 ECtHR: Gunduz v Turkey Application No 35071/97 (2003).
315 Id at para 51, translated from French.
316 ECtHR: Surek v Turkey Application No 26682/95 (1999).
317 Id at para 62.
318 Canada Supreme Court: R v Keegstra [1990] 3 SCR 697.
The special rapporteurs on freedom of expression for the UN, the Organisation for Security and Cooperation in Europe and the Organisation of American States have also taken the view that there is an intent requirement if hate speech is to be used as a ground to limit freedom of expression:

“In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following that no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.”

Must Violence or Hatred Actually Result

As incitement is an inchoate offence, there is no requirement that hatred (or violence or discrimination) actually results from it. However, there must be the possibility of demonstrating a plausible nexus between the offending words and some undesirable consequence. Courts in different jurisdictions have differed on what exactly this nexus should be.

The United States (perhaps not surprisingly) has the strictest test. Its standard – usually known as “clear and present danger” – derives from the Supreme Court decision in Brandenburg v Ohio. Brandenburg was a leader of the racist Ku Klux Klan. He and his confederates held a rally to which they invited representatives of the press. The Ku Klux Klan displayed weapons, burned crosses and made racist comments, and were convicted under a law banning “advocat[ing] … the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”

In its decision, the Supreme Court concluded that a restriction on advocacy of the use of force not only required the intent to incite but also a finding that it “is likely to incite or produce such action.”

Few other jurisdictions (with the partial exception of Israel) have such a stringent standard. Nevertheless, many do require that there is some demonstrable connection between the hateful expression and the undesirable outcome. This was the view of the Human Rights Committee in the Ross case already discussed. The reason why the suspension of the anti-semitic teacher was not a violation of freedom of expression was that his statements were partly to blame for a “poisoned school environment” experienced by Jewish children.

The Danger of Vagueness

As we have seen, the obligation to prohibit racist discrimination and violence is strongly rooted in international human rights law. It can be defined according to the intent behind

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321 Id.
322 Id.
323 Human Rights Committee: Ross v Canada supra note 305.
it and the real possibility that it will cause violent or discriminatory consequences. The danger, clearly, is that vague prohibitions are used to penalise expression that has neither the intent nor the realistic possibility of inciting hatred. Many of the Turkish cases heard by the ECtHR fall into this category.

The Constitutional Court of South Africa reflected at length and constructively on precisely this issue. In *The Islamic Unity Convention v The Independent Broadcasting Authority et al*, it was required to rule on the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services, which prohibited the broadcast of “any material which is ... likely to prejudice ... relations between sections of the population”. There is no constitutional protection for propaganda for war, incitement of imminent violence, and the advocacy of hatred. However, the Court noted that material that might prejudice relations between sections of the population might not necessarily fall into these categories.

Whereas the constitutional definition was “carefully circumscribed, no such tailoring is evident in” the language of clause 2(a). The latter, by contrast, was “so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted”. Hence, the Court found clause 2(a) inconsistent with the constitutional right to freedom of expression.  

**Advocacy of Genocide and Holocaust Denial: a Special Case?**

Within the debate on hate speech and incitement, the issues of advocacy of genocide and Holocaust denial occupy a particular place – although the phenomena are certainly not identical.

The 1948 Genocide Convention lists among its “punishable acts” “[d]irect and public incitement to commit genocide.”  

This followed the trial at the Nuremburg Tribunal of Julius Streicher, editor of the pro-Nazi newspaper *Der Stürmer*, who was convicted of crimes against humanity and hanged for his incitement of genocide, having called for the extermination of the Jews. The tribunal linked Streicher’s propaganda to the actual genocide of Jews. Another Nazi publicist, Hans Fritzsche, was acquitted on the basis that, although there was evidence of his anti-semitism, the link between his work and the genocide was less direct.

In the 1994 Rwanda genocide, the media again played a role in generating propaganda against the victims. This role led to the first prosecutions at the International Criminal Tribunal for Rwanda (ICTR) for “direct and public incitement to commit genocide.” This was defined as an inchoate offence, meaning that it was not necessary that the genocide actually occurred, but required the intent on the part of the accused that it should do so. “Direct” was defined in a broad sense, not necessarily meaning explicit, but with the implication that listeners were being called on to take some specific action. When specific action was not called for, this was defined as “hate propaganda.”

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324 South Africa Constitutional Court: *Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

325 Article III, Genocide Convention.
There were several cases brought against journalists at the ICTR, notably Nahimana et al.,\textsuperscript{326} often known as the Media Trial.\textsuperscript{327} Two of the three journalists in the latter case were the founders of a radio station that broadcast anti-Tutsi propaganda before the genocide. Once it had started, the station actually broadcast the names and licence plate numbers of intended victims.

The Tribunal found that “[t]he actual language used in the media has often been cited as an indicator of intent,” But that it is not necessary to show “any specific causation ... linking the expression at issue with the demonstration of a direct effect.”\textsuperscript{328}

The Rome Statute establishing the International Criminal Court also establishes the crime of incitement to genocide – although not incitement to any of the other crimes (such as crimes against humanity, war crimes etc) covered by the treaty.

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 ECtHR jurisprudence.

**Hate Speech against LGBT Individuals**

In southern Africa, hate speech and incitement to violence against LGBT individuals is a disturbingly common occurrence. It is particularly damaging when such statements are made by high-ranking political officials: in May 2012, the Zimbabwean Minister of Local Government, Rural and Urban Development, Ignatius Chombo, allegedly made the statement that “chiefs are there to protect and promote our cultural values and those who support same-sex marriages must be banished from the communities and dispossessed of their land”; and in January 2016, Ken Masonda, a spokesperson for the opposition Peoples Party in Malawi, said that “gays and lesbians are worse than dogs” and that “the best way to deal with this problem is to kill them.”

Fortunately, courts in southern Africa have recognised that hate speech against LGBT communities is unjustified. For example, the Ugandan High Court, in December 2010, interdicted a local newspaper, Rolling Stone, after it published the names and addresses of people it claimed were gay or lesbian, under the heading “Hang them, they are after our kids!!!”. Even though same-sex sexual conduct is criminalised in Uganda, the Court stated that this does not criminalise a person for being gay. Using an objective test, the Court concluded that the publication threatened the rights of the Applicants to respect for human dignity and protection from inhuman treatment and the right to privacy of the person and home.\textsuperscript{329}

International courts have also issued judgments that prohibit homophobic hate speech.

\textsuperscript{326} ICTR: The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze Case No ICTR-99-52-A (2003).
\textsuperscript{327} Id.
\textsuperscript{328} Id at paras 86-90.
\textsuperscript{329} Uganda High Court: Jacqueline v Rolling Stone Misc Case No 163 of 2010.
In the February 2012 judgment of *Vejdeland v Sweden*, the ECtHR stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour.

The *Vejdeland* case concerns four Swedish nationals who were convicted in Sweden for violating the Swedish Penal Code when they distributed leaflets at a school which *inter alia* stated that “homosexuality has a morally destructive effect on the substance of society”. The ECtHR held that the law’s interference with the Applicants’ exercise of their right to freedom of expression can “be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others”.

**Religious Defamation**

Many states have laws prohibiting defamation of religion, while in the common law there exists the crime of blasphemous libel.

Because of the doctrine of the “margin of appreciation,” the ECtHR has been very reluctant to find against states in matters of blasphemy and defamation of religions. Because this falls within the area of “public morals,” the Court often declines to interfere in decisions made at the national level:

“...the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States’ margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion”.

The ECtHR applies a doctrine of the “margin of appreciation.” This refers to the flexibility available to states in applying the European Convention. The margin in cases involving political speech, for example, will be very small because this is regarded as being a common value of great importance. The margin will be considerably greater for cases involving “public morals” because this is an area of greater cultural difference between European countries.

In more recent cases, however, the Court has been reluctant to find that religions have been defamed. In a French case, in which a writer published an article critically examining Roman Catholic doctrine and linking it to anti-semitism and the Holocaust, the Court found that a verdict of defaming religion was a violation of Article 10. While it invoked the margin of appreciation doctrine, the Court still underlined the importance of a liberal application of Article 10 on matters of general public concern (of which the Holocaust is undoubtedly one):

"By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in

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331 Id at para 59.
332 ECtHR: *Giniewski v France* Application No 64016/00 (2006) at para 44.
a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.333

The gradual move away from blasphemy laws and the protection of religion may derive in part from the sense that the protection offered was uneven and unfair. In *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*,334 a District Court in London ruled on the refusal of a magistrate to issue a summons for blasphemy against the author Salman Rushdie, at the request of a Muslim organisation. The court made a clear finding that the common law of blasphemy only protected the Christian church – actually, not all Christians, but those who constitute the state religion in England and Wales.

"Furthermore, the absence of a law protecting religions other than Christianity was not a breach of the United Kingdom’s obligations under the European Convention for the Protection of Human Rights and Individual Freedoms because the protection of freedom of religion in article 9 of that convention did not require a domestic law to provide a right to bring criminal proceedings of blasphemy and such proceedings would be contrary to the author’s right of freedom of expression under article 10 of the convention."335

In 2008, the offence of blasphemy was abolished in the United Kingdom.

The final word on this issue is with the Human Rights Committee:

"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."336

333 *Id* at para 51.
334 United Kingdom District Court: *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 313.
335 *Id*.
336 Human Rights Committee: General Comment 34 at para 48.
Conclusion

The manual seeks to be a resource tool for lawyers in southern Africa faced with situations in which freedom of expression of individuals or groups is threatened. It brings together jurisprudence from various countries as well as from trans-national bodies such as the African Commission, the Human Rights Committee and the African, European and American regional courts. This jurisprudence provides examples of the difficult issues courts around the world have grappled with in the sphere of freedom of expression, and assists in the development of defences based on the right to freedom of expression.

The manual recognises that the right to freedom of expression is not absolute, and that there are many justifiable ways in which the right can arguably be limited. We have provided detailed analyses of the most common limitations, and comparative jurisprudence on the extent to which these limitations can operate. Many of the thematic issues mentioned in this manual are ones that come up repeatedly in different countries, and the way in which other courts have addressed them can be of help to domestic courts grappling with the same issues.

The objective of this manual is to give domestic lawyers the tools and the confidence to use comparative jurisprudence in their litigation before domestic courts and international tribunals. It is our hope that this will contribute to a rich jurisprudence on freedom of expression in the southern Africa region.