

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT case no: 13/20202

In the matter between:

JONATHAN DUBULA QWELANE

Applicant

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

First Respondent

MINISTER OF JUSTICE & CORRECTIONAL SERVICES

Second Respondent

and

SOUTH AFRICAN HOLOCAUST AND  
GENOCIDE FOUNDATION

First *amicus curiae*

PSYCHOLOGICAL SOCIETY OF SOUTH AFRICA

Second *amicus curiae*

WOMEN'S LEGAL CENTRE TRUST

Third *amicus curiae*

SOUTHERN AFRICAN LITIGATION CENTRE

Fourth *amicus curiae*

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FOURTH *AMICUS CURIAE'S* WRITTEN SUBMISSIONS

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## INTRODUCTION

*“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. In this context, the question of when and under what circumstances the right to freedom of expression can be legitimately limited has resurfaced with renewed urgency and concern.”<sup>1</sup>*

- 1 South Africa is not alone in its efforts to distinguish between the lawful and unlawful limitation of one’s right to speak freely. Every democracy has had to navigate its way through these competing principles.
- 2 On the one hand, freedom of expression is one of the foundational rights of a free society; and its absence is the hallmark of oppression. On the other hand, history has shown that speech can cause untold suffering: from the incitement to genocide that characterised the

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<sup>1</sup> 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 (2012 report of the Special Rapporteur) para 31.

massacre of Tutsis in Rwanda in 1994,<sup>2</sup> to online hate groups that encouraged, and then rejoiced in, the 2019 attack on Muslims at prayer in Christchurch New Zealand.<sup>3</sup>

- 3 International law has long had to grapple with the distinction. While there is no one uniform definition of prohibited hate speech in international law, there are norms and standards that have crystallised into international law principles.<sup>4</sup> From these principles one can extract the constitutive elements of hate speech. These definitional elements guide states as to when offensive speech, particularly in respect of sexual orientation, morphs into hate speech.

### Overview of SALC's submissions

- 4 The purpose of SALC's intervention is to provide the Court with the international law framework regarding (i) the limits to free speech and the constitutive elements of hate speech; and (ii) the principles in international human rights law regarding the rights of LGBTI people, sexual orientation and gender identity.
- 5 It is trite that courts must consider international law when interpreting the Bill of Rights.<sup>5</sup> Section 233 of the Constitution provides that "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*" Similarly, the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (PEPUDA) acknowledges the imperative to comply with international law under section 3(b) and (c) and section 2(h).

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<sup>2</sup> *The Prosecutor v Jean-Paul Akayesu*, ICTR Judgment, Case No. ICTR-96-4-T (2 September 1998) paras 549-562.

<sup>3</sup> The massacre was livestreamed on Facebook and shared on Twitter, YouTube and WhatsApp. <https://www.theguardian.com/world/2019/oct/14/christchurch-attack-new-zealand-tries-new-tactic-to-disrupt-online-extremism>; Praveen Menon, 'One year after Mosque massacre, New Zealand is fighting rising hate', Reuters, available at: <https://www.reuters.com/article/us-newzealand-shooting-hatecrime/one-year-after-mosque-massacre-new-zealand-is-fighting-rising-hate-idUSKBN20Y0JZ> (last accessed: 28 March 2020).

<sup>4</sup> 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) (2019 report of the Special Rapporteur) para 1.

<sup>5</sup> Section 39(1)(b) of the Constitution. *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) paras 4-5.

- 6 In light of the importance of international law in South African jurisprudence, these written submissions address the following topics:
- 6.1 Whether section 10 of PEPUDA is vague: SALC demonstrates that there is a determinable threshold in international law at which expression becomes hate speech. There is therefore sufficient content in international law to inform the language of PEPUDA such that it is not overly vague.
- 6.2 Whether PEPUDA is overbroad and constitutionally impermissible: while the SCA included sexual orientation in its revision of section 10 of PEPUDA, it is important to respond to the overbreadth argument featured throughout the case.
- 6.3 The application of international law principles to Mr Qwelane’s publication: based on the analysis of international law, it is clear that the publication constituted hate speech.

### **Sources of international law**

- 7 This Court has relied on a miscellany of formally binding and non-binding sources to interpret the Bill of Rights.<sup>6</sup> These sources include those identified in Article 38(1) of the Statute of the International Court of Justice;<sup>7</sup> international and regional treaties; United Nations (UN) resolutions; decisions of international and regional courts and tribunals; decisions of UN human rights treaty bodies; and reports of UN mandate-holders.<sup>8</sup>

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<sup>6</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35. This Court accepted that, while international law regarding the death penalty was not settled, there was “a direction in which international law is developing” that could inform the Court’s approach to the death penalty. Kentridge AJ at para 198. See also *Residents of Bon Vista mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) para 17.

<sup>7</sup> Article 38(1) of the Statute of the International Court of Justice: “(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; [and] (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

<sup>8</sup> Brownlie, *Principles of Public International Law*, (Oxford University Press, 6th edition, 2003) (Brownlie) at 6.

- 8 There is a myriad of international law sources on hate speech that demonstrate a clear trajectory of standards and norms regarding the parameters of hate speech and the inclusion of LGBTI persons within its protective ambit.
- 9 The SCA did not consider the full panoply of international law and its analysis was limited to the United States, Canada and Germany.<sup>9</sup> Therefore, its analysis was not sufficiently comprehensive in order to illustrate the scope of developments under international law in relation to hate speech and LGBTI persons.<sup>10</sup>
- 10 The submissions by SALC are based on this array of sources.

## HATE SPEECH IN INTERNATIONAL LAW

- 11 In its most simplistic form, hate speech can be understood in the following terms:
- 11.1 The expression of an unpopular or discriminatory opinion on its own does not constitute hate speech; rather, expression will constitute hate speech when it seeks to violate the rights of another person or group of persons.
- 11.2 The hate speech prohibition protects individuals and groups of persons from harm; it is not designed to repress beliefs, ideologies or opinions.<sup>11</sup>
- 11.3 Speech that offends, shocks or disturbs, but that is not a threat to pluralism, the well-being of marginalised groups, or the protection of individuals and groups, is not hate speech.

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<sup>9</sup> *Qwelane v SACHR and Others* (686/2018) [2019] ZASCA 167 (29 November 2019) (SCA judgment) paras 78-83. The SCA's reliance on the United States is questionable. The United States is regularly found to be in violation of international law for its failure to regulate hate speech. See the Human Rights Committee, *List of issues prior to submission of the fifth periodic report of the United States of America*, CCPR/C/USA/QPR/5 (18 April 2019) para 24.

<sup>10</sup> SCA judgment paras 78-83.

<sup>11</sup> Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI General Policy Recommendation No 15 on combating Hate Speech*, 8 December 2015 (ECRI Recommendation).

## Obligation to prohibit hate speech

- 12 The right to freedom of expression in international law contains two parts. The first imposes on states the obligation to protect the right to free speech. The second part makes it *equally mandatory* for states to prohibit hate speech.<sup>12</sup> Therefore, while every state is obliged to protect freedom of expression, there is an adjacent obligation to limit freedom of expression when it amounts to hate speech.
- 13 The Universal Declaration of Human Rights (UDHR)<sup>13</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>14</sup> entrench these conjoint obligations.
- 14 Both parts of the freedom of expression obligation are constitutive of democracy. While free speech upholds democracy, hate speech is destructive of democracy.<sup>15</sup> The European Court of Human Rights (ECtHR) has emphasised that pluralism, diversity and social cohesion are seminal to democracy and all are compromised by hate speech.<sup>16</sup>
- 15 In 2019, 26 United Nations human rights mandate holders, including the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the Special Rapporteur on freedom of expression), published an open letter noting that:

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<sup>12</sup> International Covenant on Civil and Political Rights (1966) U.N. DOC. A/6316(1966), 999 U.N.T.S. 171 (ICCPR); Inter-American Court on Human Rights and the Inter-American Commission on Human Rights, established in terms of article 33 of the American Convention on Human Rights 1969; the African Court on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights (which was adopted by Member States of the then Organisation of African Unity (now the African Union)) (June 1998) (African Court); the European Commission on Human Rights; and the European Court of Human Rights; the United Nations Committee on Human Rights, established under article 28 of the ICCPR.

<sup>13</sup> Article 19 of the UN General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UNDHR).

<sup>14</sup> Article 19 of the ICCPR.

<sup>15</sup> *Vejdeland and others v Sweden* Application no. 1813/07 ECHR (9 February 2012), concurring opinion of Judge Spielmann joined by Judge Nussberger para 5. *Handyside v The United Kingdom* 1 EHRR 754-756.

<sup>16</sup> *Beizaras and Levickas v Lithuania* Application no. 41288/15 ECHR (14 January 2020) para 107.

*“Hate speech has become mainstream in all different political systems and is threatening democratic values, social stability and peace. Hate-fuelled ideas and advocacy coarsen public discourse and weaken the social fabric of countries.”<sup>17</sup>*

## **Terminology**

16 One of the questions before this Court is whether the language of section 10 is vague. To some extent vagueness is impossible to avoid, precisely because the terms applicable to hate speech *“involve difficult-to-define language of emotion (hatred, hostility) and highly context-specific prohibition (advocacy of incitement).”<sup>18</sup>* Nonetheless, international law has developed a series of definitions, many of which inform the terminology contained in PEPUDA.

17 Hatred: The Special Rapporteur on freedom of expression adopted the interpretation of hatred as *“a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.”<sup>19</sup>*

18 The **United Nations Strategy and Plan of Action on Hate Speech** defines the term **“hate speech”** as communication that:

*“attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are... This is often rooted in, and generates intolerance and hatred and, in certain contexts, can be demeaning and divisive.”<sup>20</sup>*

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<sup>17</sup> Joint Open Letter on Concerns about the Global Increase in Hate Speech, signed by 26 Mandates of the United Nations, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25036&LangID=E>.

<sup>18</sup> 2019 report of the Special Rapporteur above n 4 para 12.

<sup>19</sup> 2012 report of the Special Rapporteur above n 1 para 44.

<sup>20</sup> United Nations Strategy and Plan of Action on Hate Speech 2, available at <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>.

- 19 The **Camden Principles on Freedom of Expression and Equality (Camden Principles)**, which represents a consensus in the international community,<sup>21</sup> defines “hatred” and “hostility” as “*a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group.*”<sup>22</sup>
- 20 The **European Commission against Racism and Intolerance identified hate speech** as “*the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons...*”<sup>23</sup>
- 21 **Hurtful**: International law does not use the language of speech that is hurtful but it is accepted that speech which causes psychological harm i.e. subjective hurt, may constitute hate speech. Hurtful speech would have to cause or have the potential to cause psychological harm. In *Beizaras and Levickas v Lithuania*,<sup>24</sup> the ECtHR had to determine whether Lithuania had failed in its obligation to protect the right to private life of a gay person who had been the subject of vicious attacks on his Facebook profile. The ECtHR held that the case concerned “*undisguised calls on attack on the applicants’ physical and mental integrity [...] which require protection by the criminal law.*”<sup>25</sup> Psychological harm is also recognised by the Special Rapporteur on freedom of expression.<sup>26</sup>
- 22 **Advocacy and incitement**: The language of hatred alone does not constitute hate speech. The prohibition applies when an opinion or statement “*constitutes incitement to*

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<sup>21</sup> 2012 report of the Special Rapporteur above n 1 para 44. See also Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, A/HRC/22/17/Add.4, 11 January 2013 (Rabat Plan of Action).

<sup>22</sup> Article 19, Principle 12.1 of the Camden Principles on Freedom of Expression and Equality (Camden Principles), available at: <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>. The Special Rapporteur on freedom of expression adopts a definition of ‘hostility’ as ‘a manifestation of hatred beyond a mere state of mind. 2012 report of the Special Rapporteur above n 1 para 44.

<sup>23</sup> Preamble to the ECRI Recommendation above n 11.

<sup>24</sup> *Beizaras and Levickas v Lithuania* above n 16 para 107.

<sup>25</sup> Id para 128.

<sup>26</sup> 2012 report of the Special Rapporteur above n 1 para 44.

*discrimination, hostility or violence, or when the speaker seeks to provoke reactions on the part of the audience.*<sup>27</sup> According to the Special Rapporteur on freedom of expression, “advocacy” is explicit, intentional, public and active support and promotion of hatred towards the target group.<sup>28</sup>

- 23 Both the Camden Principles and the Special Rapporteur on freedom of expression define incitement as statements that “*create an imminent risk of discrimination, hostility or violence against persons belonging to the targeted groups.*”<sup>29</sup>

### **The test in international law**

- 24 International law adopts a three-part test to determine whether the limitation of freedom of expression is lawful. This test has been adopted and developed by the African Commission on Human and Peoples’ Rights;<sup>30</sup> the UN Special Rapporteur on freedom of expression;<sup>31</sup> the European Court of Human Rights,<sup>32</sup> and international experts.<sup>33</sup>

- 25 The test demands that restrictions on freedom of expression: (1) must be prescribed by law; (2) must have a “legitimate aim” which is furthered by the prohibition of the speech in question; and (3) it must be “necessary in a democratic society”.

#### **(1) Prescribed by law**

- 26 The UN Human Rights Committee notes that restrictions on free speech “*must be formulated with sufficient precision to enable an individual to regulate his or her conduct*

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<sup>27</sup> Id para 43.

<sup>28</sup> Id para 44.

<sup>29</sup> Camden Principles above n 22 principle 12.1. 2012 report of the Special Rapporteur above n 1 para 44.

<sup>30</sup> African Commission on Human and Peoples’ Rights, *Declaration of Principles on Freedom of Expression in Africa*, 32nd Session, 17 - 23 October 2002: Banjul, The Gambia (African Commission 2002 Declaration).

<sup>31</sup> 2019 report of the Special Rapporteur above n 4 para 6; 2012 report of the Special Rapporteur above n 1 para 36.

<sup>32</sup> *Vejdeland v Sweden* above n 15 paras 47-60.

<sup>33</sup> <https://www.article19.org/data/files/pdfs/tools/africa-foe-checklist.pdf>.

accordingly and it must be made accessible to the public.”<sup>34</sup> In *Sunday Times v United Kingdom*,<sup>35</sup> the ECtHR held that it was not necessary to know with exact precision what would fall foul of a prohibition. It was only necessary that “*the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article might fall foul of the [doctrine]*.”<sup>36</sup>

## (2) Legitimate aim

27 Free speech restrictions must further a “legitimate aim.” A legitimate aim typically entails protecting the rights of others, prohibiting discrimination and ensuring that one person’s rights cannot legitimately be used to destroy the rights of others.<sup>37</sup> This is evident from the UDHR, the ICCPR,<sup>38</sup> the African Charter on Human and Peoples’ Rights,<sup>39</sup> the European Convention on Human Rights,<sup>40</sup> and the Inter-American Convention on Human Rights.<sup>41</sup>

## (3) Necessary and proportionate

28 Restrictions must be necessary and proportionate in a democratic society. The ECtHR held that the test of “*necessity in a democratic society*” requires the Court to determine (i) whether the interference corresponds to a “*pressing social need*,”<sup>42</sup> and (ii) whether it is “*proportionate*” in that no other, less restrictive measures would be effective.<sup>43</sup>

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<sup>34</sup> ICCPR, General comment No. 34: Article 19: Freedoms of opinion and expression, (12 September 2011), (CCPR/C/GC/34) para 25.

<sup>35</sup> *Sunday Times v United Kingdom* Application no. 6538/74, (26 April 1979).

<sup>36</sup> Id para 52.

<sup>37</sup> Rabat Plan of Action above n 21 para 38.

<sup>38</sup> Articles 19(3) and 20(2) of the ICCPR.

<sup>39</sup> Article 27(2) and 28 of the ACHPR.

<sup>40</sup> Article 10(2) of the European Convention on Human Rights. See also *Vejdeland v Sweden* above n 15 paras 54-55; *Molnar v Romania* Application no 16637/06 (23 October 2012) para 23.

<sup>41</sup> Article 32(2) of the IACHR.

<sup>42</sup> *Vejdeland v Sweden* above n 15 paras 50-1.

<sup>43</sup> African Commission 2002 Declaration above n 30. 2012 report of the Special Rapporteur above n 1 para 36.

29 The Human Rights Committee has underlined that restrictions to free speech, even when warranted, “*may not put in jeopardy the right itself*”.<sup>44</sup>

### Relevant factors

30 International law identifies six factors that justify the curtailment of freedom of expression.<sup>45</sup>

These are (1) the prevailing social and political context; (2) status of the speaker in relation to the audience; (3) existence of a clear intent to incite; (4) content and form of the speech; (5) extent and reach of the speech; and (6) the real likelihood and imminence of harm.

31 **Context:** Hate speech generally occurs in a context where the targeted group has been the subject of discrimination, oppression and/or violence. An analysis of hate speech must evaluate the speech within the social and political context prevalent at the time the speech was made and disseminated.<sup>46</sup> Usually, hate speech is linked to pre-existing tensions within society and where the targeted group has been the subject of marginalisation, discrimination or violence.<sup>47</sup>

32 **Speaker:** The speaker’s position or status in the society should be considered. The more influential the speaker, the greater the obligation to ensure the harmonious publication of ideas.<sup>48</sup>

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<sup>44</sup> 2019 report of the Special Rapporteur above n 4 para 6.

<sup>45</sup> Rabat Plan of Action above n 21 para 29. 2019 ACHPR Declaration para 53. 2012 report of the Special Rapporteur above n 1; *Mariya Alekhina and Others v Russia* Application no. 38004/12 ECHR (17 July 2018); IACHR, ‘Hate speech and incitement to violence’, in Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (2015) chapter IV, paras 18, 24, 27 and 35. Committee on the Elimination of Racial Discrimination, General recommendation No. 35 Combating racist hate speech, CERD/C/GC/35 (26 September 2013) (CERD General Recommendation 35) para 15.

<sup>46</sup> Rabat Plan of Action at para 29. The Special Rapporteur on Freedom of Expression and Access to Information in Africa, appointed by the African Commission on Human and Peoples’ Rights identified the “*prevailing social and political context*” as one of the factors relevant to the determination of hate speech. Declaration of Principles on Freedom of Expression and Access to Information in Africa Draft issued by the Special Rapporteur on Freedom of Expression and Access to Information in Africa, for consultation with States and other Stakeholders, pursuant to Resolution 350 (ACHPR/Res.350 (EXT.OS/XX) 2016) of the African Commission on Human and Peoples’ Rights. 30 April 2019.

<sup>47</sup> ECRI Recommendation above n 11 para 16.

<sup>48</sup> Rabat Plan of Action at para 29. CERD General Recommendation 35 above n 45 para 15.

33 **Intent:** There must be “a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.”<sup>49</sup> This requires the activation of a triangular relationship between the object and subject of the speech and the audience.<sup>50</sup>

34 **Content and form:** Content analysis includes the degree to which the speech was provocative and direct, the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.<sup>51</sup> Hate speech will often incorporate misinformation, negative stereotyping and stigmatisation.<sup>52</sup>

35 It is not necessary for the publication to incite violence. In *Vejdeland v Sweden*, the ECtHR held that “inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts.”<sup>53</sup> Therefore, speech that does not “directly recommend individuals to commit hateful acts” may still reach the threshold of hate speech.<sup>54</sup> In the same judgment, the ECtHR held that

*“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 in the face of freedom of expression exercised in an irresponsible manner.”*<sup>55</sup>

36 Hate speech often uses language that dehumanises a group. For example, in the Rwandan genocide, perpetrators of the genocide compared Tutsis to cockroaches that needed to be

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<sup>49</sup> ECRI Recommendation above n 11.

<sup>50</sup> Rabat Plan of Action at para 29. 2019 report of the Special Rapporteur above n 4 para 16.

<sup>51</sup> Rabat Plan of Action at para 29. 2019 report of the Special Rapporteur above n 4 para 16. CERD General Recommendation 35 above n 45 para 26.

<sup>52</sup> ECRI Recommendation above n 11 para 16.

<sup>53</sup> *Vejdeland v Sweden* above n 15 para 55.

<sup>54</sup> Id.

<sup>55</sup> Id. See also *Féret v Belgium* Application no. 15615/07 (16 July 2009) para 73 and *Molnar v Romania* above n 40 para 20.

exterminated.<sup>56</sup> The Nazi propaganda machine described Jews as rats, which carried disease; like rats, Jews needed to be exterminated.<sup>57</sup> Dehumanising language is a hallmark of large scale murder, genocide and ethnic cleansing. Comparing a group to animals means that it is acceptable to treat that group in the same way one would the analogous animal.

37 Extent of the speech and means of communication: The ECtHR has held that when it comes to the “*proportionality*” analysis, “*the means of communication is a relevant factor, since the impact of speech is proportional to the size of the audience it is likely to reach.*”<sup>58</sup> Extent includes the reach of the speech, its public nature, the size of its audience, the means of dissemination (for example by a single leaflet or broadcast in the mainstream media or via the internet), the frequency with which the message has been communicated, and whether the audience had the means to act on the incitement.

38 Likelihood and imminence: While it is not necessary for the speech to lead to actual harm, some degree of risk of harm must be identified. The test is whether there is a reasonable probability that the speech would succeed in inciting actual action against the target group.

39 International law therefore provides clear and certain content to the notions of hate speech. This content informs the prohibition on hate speech in PEPUDA. PEPUDA is therefore not impermissibly vague.

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<sup>56</sup> The *Prosecutor v Ferdinand NAHIMANA*, Case No. ICTR-96-11 paras 25-29.

<sup>57</sup> D. A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account* (University Press of America 1999) 515.

<sup>58</sup> *Vejdeland v Sweden* above n 15 para 43.

## THE PROHIBITION OF DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN INTERNATIONAL LAW

- 40 One of the questions before the SCA was whether PEPUDA's "*extension of 'prohibited grounds' to include sexual orientation is constitutionally permissible.*"<sup>59</sup> The SCA concluded that "*the legislature intended widening the protection against hate speech, even though it did so in constitutionally impermissible terms.*"<sup>60</sup> This notwithstanding, the SCA included sexual orientation as a prohibited ground in its interim reading of section 10.<sup>61</sup>
- 41 SALC identifies three principles of international law that underscore the constitutionality of including sexual orientation (and the other prohibited grounds of discrimination in section 9) as a prohibited ground under section 16(2).

### The right to equality is evolutionary

- 42 The first is that international human rights law is not static but evolutionary.
- 43 International human rights law is responsive to the fundamental principle that "*all human beings are born free and equal in dignity and rights.*"<sup>62</sup> Article 2 of the ICCPR reflects the evolutionary nature of international human rights law by including as a prohibited ground of discrimination "*distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*" [own emphasis].
- 44 In keeping with sections 39(1) and 233 of the Constitution, PEPUDA ought to be interpreted in a manner that is consistent with international law. Such an interpretation demands an expansive and not a restrictive application of the protection against hate speech. It would

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<sup>59</sup> SCA judgment para 54.

<sup>60</sup> Id para 93.

<sup>61</sup> Id para d of the Order. The SCA stated that it was "*not unmindful of the threat to life, limb and psyche that members of the LGBTI community face.*" Id para 94.

<sup>62</sup> Article 1 of the UDHR.

be entirely inconsistent with international human rights law to remove LGBTI persons from the constitutional protection against hate speech.

### **International law prohibits hate speech against LGBTI persons**

45 Customary international law prohibits hate speech against LGBTI persons.<sup>63</sup>

46 The UN and the African Commission have noted that that homophobic and transphobic violence is “*especially vicious compared to other bias-motivated crimes.*”<sup>64</sup> The extent of violence and discrimination against LGBTI persons globally has led to the recognition that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour or sex.<sup>65</sup> In *Vejdeland v Sweden* the ECtHR held that:

“*Sexual orientation should be treated in the same way as categories such as race, ethnicity and religion, which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person’s sense of self.*”<sup>66</sup>

47 This position was entrenched in the International Commission of Jurists’ Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.<sup>67</sup> A decade later, in 2016, the UN appointed an independent expert to examine the “*the multiple, intersecting and aggravated forms of violence and discrimination faced by persons on the basis of their sexual orientation and gender*

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<sup>63</sup> 2019 report of the Special Rapporteur above n 4 para 9. Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23 (4 May 2015).

<sup>64</sup> Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity* (17 November 2011), A/HRC/19/41 paras 20 and 22. African Commission on Human and Peoples’ Rights, ‘Resolution 275 on Protection against Violence and Other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity’, ACHPR/Res.275(LV)2014.

<sup>65</sup> *Vejdeland v Sweden* above n 15 para 42.

<sup>66</sup> *Id.*

<sup>67</sup> International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

*identity*".<sup>68</sup> This was a seminal step in the concretisation of the right to equality of LGBTI persons in international law.

48 South Africa therefore has an international obligation to prevent discrimination against LGBTI persons, which includes the obligation to prohibit hate speech targeted at LGBTI persons. If South Africa were to excise sexual orientation as a prohibited ground of discrimination for the purposes of hate speech, it would be in violation of international law.<sup>69</sup>

### **Gender and sexual orientation are inextricably linked**

49 International law has developed a relatively new concept of "sexual orientation and gender identity" (SOGI). SOGI is based on the recognition that gender is a socially constructed concept that is independent of one's biological sex. Gender-based discrimination extends beyond the male-female binary and produces vulnerabilities linked to the way societies organise male and female roles and how they exclude those who transgress such roles. Gender discrimination therefore is not only about the oppression of women but it also entails discrimination and violence on the basis of real or perceived gender, sexual orientation and gender identity.

50 As such, the prohibition of discrimination based on sexual orientation falls under the general rubric of gender equality.

51 Therefore, the term "gender" in section 16(2) of the Constitution, according to international law, refers not only to the distinction between women and men, but also to any discriminatory distinction based on sexual orientation or gender identity. Thus, even though

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<sup>68</sup> United Nations General Assembly, Resolution adopted by the Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity* A/HRC/RES/32/2 (30 June 2016) Article 3.

<sup>69</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) (SA) 347 (CC) para 92: International agreements are "binding on South Africa on the international plane and failure to observe the provisions of this agreement may result in South Africa incurring responsibility toward other signatory states".

section 16(2) does not use the language of sexual orientation, it can be understood to include it under the term “gender”.

52 This was the position adopted by the Human Rights Committee in *Toonen v Australia*, where it held that the reference to “sex” under the prohibition of discrimination in Article 2 of the ICCPR includes sexual orientation.<sup>70</sup> Similarly, the Inter-American Court of Human Rights (IACHR) has held that “*sexual orientation and gender identity of persons is a category protected by the Convention*”, despite the Convention not referring in terms to sexual orientation.<sup>71</sup>

53 The ECtHR has also held that discrimination on the grounds of sexual orientation is “*undoubtedly covered*” by the non-discrimination clause in Article 14 of the ECHR.<sup>72</sup>

## **APPLICATION OF INTERNATIONAL LAW STANDARDS TO THE PUBLICATION**

54 On 20 July 2008, Mr Qwelane published an article in the Sunday Sun entitled “Call me Names but Gay is Not Okay” (the publication). Based on the principles of international law discussed above, it is clear that the publication constitutes hate speech under international law.

55 The publication was made in the context of brutal violence, including rape and murder, committed against LGBTI people.<sup>73</sup> The denigration of LGBTI persons is different from prejudicial statements, for example, about lawyers. While some portions of the population

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<sup>70</sup> *Toonen v Australia*, Human Rights Committee, Communication no. 488/1992, UN Doc. CCPR/C/50/D/488/92 (1992).

<sup>71</sup> *Atala Riffo and Daughters v Chile* (24 February 2010) IACHR para 91.

<sup>72</sup> *Salgueiro da Silva Mouta v Portugal* Application no. 33290/96 ECHR (1999) para 28.

<sup>73</sup> SCA judgment paras 15-17.

may align lawyers with negative stereotypes, there is no context of violence and prejudice against lawyers that could be exacerbated by negative speech. The publication contributes to an environment of intolerance that may further normalise discrimination and violence against LGBTI people in South Africa. This is particularly important in Southern Africa where LGBTI people have been the victims of violence and discrimination and, in certain circumstances, criminalisation.

56 The status of the applicant as a respected anti-apartheid activist and journalist is relevant. His position as a commentator and influential “public opinion-former”<sup>74</sup> comes with a moral leadership that influences thousands of people. His denigration of LGBTI people comes with an authority that legitimises homophobia and discrimination against LGBTI persons.

57 Mr Qwelane was intentional in his advocacy of hatred against LGBTI persons. He expressly calls for politicians to “*rewrite the Constitution... to excise those sections which give licence to men ‘marrying’ other men, and ditto women.*” He was not negligent but deliberate, as is evident from his comment to “*please tell the Human Rights Commission that I totally refuse to withdraw or apologise for my views.*”<sup>75</sup>

58 The content of the publication contains three dangerous components that are recognised in international law as constitutive of hate speech:<sup>76</sup>

58.1 The publication appeals to the fear of moral corruption, linking stereotypes of homosexuality to the “*degradation of values*” in society;

58.2 The publication endorses the dehumanisation of LGBTI persons by comparing gay men to animals, albeit indirectly with reference to Robert Mugabe’s statements. The use of animal comparators is a hallmark ingredient of genocide and mass killings

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<sup>74</sup> CERD General Recommendation 35 above n 45 para 15.

<sup>75</sup> SCA judgment para 4.

<sup>76</sup> ECRI Recommendation above n 11 para 16.

in international law. In the Rwandan genocide, the Hutus compared Tutsis to cockroaches and in the Holocaust, the Nazis compared Jews to rats and lice. These animals are associated with the contamination of disease and are legitimate targets of extermination. This narrative reduces the humanity of the targeted group and justifies attacks, discrimination, and exclusion from society.

58.3 The publication seeks to exclude gay people from constitutional protection. The rolling back of legal protections for a minority group can often be the thin end of the wedge, leading to further discrimination and the erosion of fundamental rights.

59 The extent of the speech was clearly significant. It was circulated in a national newspaper and reached areas where LGBTI persons report pronounced vulnerability.<sup>77</sup>

60 Given the context of discrimination against LGBTI persons, it is likely that the publication did or may succeed in inciting discrimination against LGBTI persons.

## CONCLUSION

61 International law provides clear parameters for the lawful limitation of the right to freedom of expression. While notions of hatred and hostility, advocacy and incitement, are difficult to define, international law has developed clear tests that allow for the curtailment of speech without compromising the essence of the fundamental right to freedom of expression.

62 It is equally clear that international law prohibits hate speech on the basis of sexual orientation. South Africa therefore must ensure that protection against hate speech is extended to LGBTI persons. Based on the principles of SOGI, it is arguable that section 16(2) already caters for this protection under the rubric of gender equality.

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<sup>77</sup> SCA judgment paras 20-21.

63 Finally, the publication, far from being protected speech, is a gold standard of hate speech. Its fearmongering, dehumanisation, and call for the exclusion of LGBTI persons from the ambit of constitutional protection makes the publication the paradigm of that which should never be allowed.

64 We therefore submit that the appropriate remedy in this case is to set aside the SCA's dismissal of the complaint in paragraph 2(b) of its order and reinstate paragraphs 1, 2, 3 and 4 of the High Court's order.

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**10 April 2020**