



Toward a Media Regulatory Reform in Middle East and North Africa: Workshop on Criminal Restrictions on Media Content

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Background Paper: Hate Speech and Incitement

Freedom of expression is a core human right and a free and vibrant public discourse is vital to maintaining a democratic system. At the same time, it is recognised that certain types of speech can cause harm. The Nuremburg Tribunal, which was established after World War II, recognised this by trying Julius Streicher, the publisher of a major newspaper affiliated with the Nazi regime. Streicher was convicted of crimes against humanity for his role in promoting the genocide against Germany's Jewish population. Media figures, particularly on the radio, played a key role in inciting and even directing the Rwandan genocide in 1994. Some of these men were tried and sentenced by the International Criminal Tribunal for Rwanda for "incitement to genocide".

The dangers of hate speech are recognised in the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR, which protects the right to freedom of expression, is directly followed by Article 20, which requires States to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (as well as propaganda for war).

The right to freedom of expression protects the expression of controversial, and even offensive ideas. The question over where the line should be drawn between legal content and hate speech is a matter of significant controversy. The International Convention on the Elimination of all Forms of Racial Discrimination (CERD), adopted by the UN General Assembly in 1965, identifies four kinds of hate speech:

1. dissemination of ideas based on racial superiority;
2. dissemination of ideas based on racial hatred;
3. incitement to racial discrimination; and
4. incitement to acts of racially motivated violence.

CERD, as well as international human rights law more broadly, recognises that like all limitations on freedom of expression hate speech restrictions must be drafted according to the established standards of being clearly enumerated in law, strictly necessary to achieve their aim and proportional to that aim and minimally impairing.

There are three key aspects of hate speech: intent, incitement and proscribed results. The first of these, intent, requires that the speech be intended to generate hatred. A good example of the importance of this element is the case of Jens Olaf Jersild, a journalist who was convicted under Denmark's hate speech laws for airing a report which included interviews with racist extremists. In an appeal, the European Court of Human Rights found that the ruling breached Mr. Jersild's freedom of expression since, although the statements within the programme were certainly hate speech, Mr. Jersild's intent had not been to propagate those views but rather to expose the existence of the racist subculture within Denmark.

Incitement is difficult to define, but can be understood according to the context and the existence of causation between a statement and the proscribed outcome (i.e. hatred). A tangible result, such as an act of violence or even a hostile environment, can be a clear marker here, but context is extremely important. Statements which may not have crossed the line into hate speech under ordinary circumstances could be deemed to do so if spoken in a particularly unstable climate. If ethnic tensions are already simmering, and especially if violent acts are already being carried out, the bar for what constitutes incitement will be lower.

In terms of the proscribed results, statements which incite actual violence clearly qualify, although it is worth noting that most countries have general rules prohibiting any incitement to commit crimes. Inciting hatred as a pure state of mind is more complex. Hate as a mere opinion is clearly protected under international law but international law also requires States to prohibit incitement to that state of mind. It is reasonable to expect that hate will inevitably manifest itself in some tangible form and society should not have to wait until hatred actually spills over into action before providing protection to potential victims. One line of reasoning which may be useful in distinguishing hate speech from protected forms of speech is that expression which targets ideas, however harshly and unfairly, will generally be protected, while speech which attacks human beings based on their nationality, race or religion will cross the line.

A Joint Statement by the UN, OSCE and OAS Special Mandates on the right to freedom of expression set out several conditions for hate speech legislation, including that it should not penalise statements which are true, that it should not be imposed via prior censorship, that the right of journalists to make their own editorial decisions around reporting on racism and intolerance should be respected, and that sanctions for hate speech should always be proportionate.