

ENFORCING THE LAW ON HATE SPEECH



National Cohesion and Integration
Commission Kenya
with the support of

USAID and International Foundation for Electoral Systems

POLICE TRAINING MANUAL

Enforcing the law on hate speech

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LIST OF ABBREVIATIONS

ICCPR	International Convention on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
MCK	Media Council of Kenya
NCI	National Cohesion and Integration Act
NCIC	National Cohesion and Integration Commission
OCS	Officer in Charge of Station
OCPD	Officer Commanding Police Division

FOREWORD

One of Kenya's greatest challenges to national cohesion, is the tendency of Kenyans to consider national issues from an ethnic perspective. Hate speech is so ingrained in day to day relations at all levels of society in Kenya, even though it is often attributed to politicians. The use of negative or derogatory ethnic speech is sometimes associated with the advent multi-party politics in Kenya in the early 1990s, which were characterized by virulent verbal campaigns, often accompanied by insults and demeaning comments against proponents of a multi-party system. It is in this context that use of hate speech and other forms of negative stereotyping has assumed a central role in Kenya's politics, leading to periodic electoral cycles of violence since 1992. Reports by state-sanctioned Commissions of Inquiry into violence and as well as those by human rights institutions attest to the continued use of hate messages with destructive consequences on the citizenry.

In response to the post elections violence and political crisis that ensued following the disputed presidential election in 2007-2008, the Kenya National Dialogue and Reconciliation team proposed various constitutional, legal and policy measures for purposes of promoting fairness which would result in a harmonious existence and national cohesion. There was a unanimous acknowledgement and realization that the issue of ethnicity in Kenya can no longer be ignored. One of the outcomes of the national reconciliation process was the creation of the National Cohesion and Integration Commission (NCIC) under the National Cohesion and Integration (NCI) Act, 2008. The Commission has broad objects and functions, some of which are:

1. To promote the elimination of all forms of discrimination on the basis of ethnicity.
2. Discourage persons, institutions, political parties and associations from advocating or promoting discrimination or discriminatory practices on grounds of ethnicity or race.
3. Promote tolerance, understanding and acceptance of diversity in all aspects of national life and encourage full participation by all ethnic communities in the social, economic, cultural and political life of other communities.
4. Plan, supervise, coordinate and promote educational and training programmes to create public awareness, support and advancement of peace and harmony among ethnic communities and racial groups.
5. Promote respect for religious, cultural, linguistic, and other forms of diversity in a plural society.
6. Promote equal access and enjoyment by persons of all ethnic communities and racial groups to public or other services and facilities provided by the government.

Since its establishment, the NCIC has been at the forefront in addressing the issue of hate speech. In spite of its commitment to promoting national cohesion, it has faced many challenges. Some of the challenges include the issues of interpretation of what constitutes hate speech under the NCI Act relate to the difficulties in addressing hate speech. Others relate to the investigation, collection and preservation of evidence and conducting prosecutions in a manner that can sustain convictions.

It is against this background, that the NCIC with the support of the Kenya Electoral Assistance Program / USAID implemented by IFES, in collaboration with the media and other stakeholders in the justice sector to tackle the issue of hate speech. This manual will be used in building capacity of law enforcement officers in understanding the legal meaning of hate speech, its context, investigation requirements and prosecution and monitoring hate speech, and is one of the key initiatives through which the NCIC seeks to achieve its mandate. We thank the United States Agency for International Development (USAID) and the International Foundation for Electoral Systems (IFES) for support in reviewing and printing this manual.

Xavier Ole Kaparo, EGH, SS

Chair,

National Cohesion and Integration Commission.

PURPOSE OF THE TRAINING TOOL

Since its establishment in 2009, the Commission has gained a reputation for taking a strong stance against individuals whose pronouncements violate the provision of the Act, in particular sections 13 and 62 of the Act. Several cases have been investigated and individuals charged based on the provisions relating to hate speech. Further efforts to address hate speech have been made by a tripartite task force, bringing together the National Cohesion and Integration Commission, The Director of Public Prosecution and the Kenya Police service, whose objective is to provide guidance in the enforcement of the legal provisions relating to hate speech.

One of the main roles of the Police Service, is to render support to government agencies in the enforcement of administrative functions and the exercise use of lawful duties. The police service is also mandated to co-ordinate with and complement government agencies in conflict management and peace building. The NCI Act creates offences that are not included in the existing police training curriculum, which poses a problem in dealing with the offence at law enforcement level.

It is against this background, that the NCIC has developed this Training Manual on the Enforcement of the law on Hate Speech, which is intended to better prepare police officers, particularly Officers in Charge of Stations (OCSs), Officers Commanding Police Divisions (OCPDs) and officers in charge of crime and investigators and prosecutors to deal with incidences of hate crime. It will be used as a guide in training law enforcement officers in processes relating to the identification, investigation, monitoring, securing and preserving evidence and prosecuting hate speech.

GOALS AND OBJECTIVES

A key component of attaining national cohesion, sustaining peaceful co-existence and harmonious relations is reproofing elements that constantly provoke unrest and cause disharmony among the diverse Kenyan communities. The NCI Act criminalizes hate speech for purposes of dealing with errant members of the community, who frustrate the process of national cohesion and integration. It is therefore imperative that the police, who have the constitutional mandate to investigate crime, have an understanding of hate speech and be equipped with skills to effectively deal with it.

This training tool therefore has two objectives:

1. To provide a reference tool or guide to police officers and prosecutors dealing with cases of hate crime.
2. To provide a training tool, that will allow training facilitators to focus on the various components of hate speech, namely identification, investigation, evidence preservation, preparation, prosecution and monitoring of hate speech.

Structure and Content

This training manual has been organized into six modules. Each module is divided into sections containing guiding notes and learning resources.

ORGANISATION OF THE TRAINING MANUAL

The training manual has been organized into six modules each containing the following sub sections:

Module 1: Facilitation methods and techniques

Module 2: The Law: Ingredients, components and interpretive jurisprudence on hate speech

Module 3: Investigating hate speech

Module 4: Preparing for prosecution of hate speech

Module 5: Prosecution of hate speech

Module 6: Monitoring hate speech

TIMING GUIDELINES FOR TRAINING

MODULE	TOPIC	DURATION
MODULE 1	Facilitation methods and Techniques Training methods	2 hours
MODULE 2	Hate Speech: Ingredients and components of hate speech	4 hours
MODULE 3	Investigating hate speech	2 hours
MODULE 4	Preparation of hate speech case	2 hours
MODULE 5	Prosecution of hate speech	2 hours
MODULE 6	Monitoring hate speech	2 hours

GLOSSARY AND TERMS

Commission

The National Cohesion and Integration Commission

Community

A social, religious or occupational group whose members reside in a specific locality, often have a common cultural and historical heritage, sharing common characteristics and interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists. It may also refer to a locality inhabited by such a group.

Discrimination

The prejudicial treatment of an individual based on their membership in a certain group or category. It involves the actual behaviors towards groups, such as excluding or restricting members of one group from opportunities that are available to another group.

Ethnicity

Characteristic of a human group having racial, religious, linguistic, and certain other traits in common. It relates to the classification of mankind into groups, especially on the basis of racial characteristics, denoting or deriving from the cultural traditions of a group of people.

Freedom of Expression

Right to express one's own ideas and opinions freely through speech, writing, and other forms of communication, but without deliberately causing harm to others' character and/or reputation by false or misleading statements. Freedom of press is part of freedom of expression.

Hate Speech

A communication that contains expression of hatred for some group, especially in circumstances in which it is likely to provoke violence. It is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, among others. It can be any form of expression regarded as offensive to racial, ethnic and religious groups, women, and other discrete minorities.

Stereotypes

Stereotypes are qualities assigned to groups of people related to their race, nationality and sexual orientation, to name a few. They generalize groups of people in manners that lead to discrimination and ignore the diversity within groups.

Subversive Acts

Supporting, propagating or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice.

MODULE 1

FACILITATION OF METHODS AND TECHNIQUES

SECTION A: Process of Conducting Training Sessions

Introduction

All activities should be learner-centred, where the trainer should focus on creating an environment that enables the learner to interact with the various activities and ultimately be responsible for their own knowledge sharing. This includes a conducive environment for the learning of the offence of hate speech.

Session aims

By the end of the training, the learner should be able to:

- Describe the process of conducting a training session in a manner that is conducive to learning.
- Explain suitable methods of facilitation in a training on hate speech.

Learning resources

- Flip chart and markers
- Writing paper
- Masking tape/pins
- LCD projector and laptop/desktop

Facilitation Techniques

The trainer should apply various methods for effective facilitation of the training. These include:

- Climate setting
- Team building
- Energizers

Climate Setting

Time required: 30 Minutes

Ice breaking is important to enable learners introduce themselves and get acquainted with each other, which is important for a conducive learning environment.

Suggested Ice Breakers

The introductions may be done through various ways, including the following examples:

Example 1

Let all participants leave their seats and find a partner they have never met before. Ask them to find out their partner's name, station, one thing they know about hate speech, what they expect of the training, and what fears or anxieties they have about the programme. Allow about 5 minutes for this exercise. If any participant has no partner, they will pair up with the trainer. Each learner should introduce his/her partner. All their statements on hate speech will be captured on flip chart, as well as the expectations on separate flip charts.

Example 2

Let each participant write on a piece of paper his/her name, station, how long they have served as police officers, and what concerns them most about dealing with hate speech, and their expectations of and fears/concerns. Mix up the pieces of papers and let each participant picks up one piece. They must not pick up their own piece. Let each one stand up in turns and read out the name appearing on the piece picked. The person whose name is called out (the writer) will then stand up as the reader reads out audibly what he/she has written. Capture all the concerns and expectations on flip chart for reference in the course of the training.

Example 3 – Kenya My Home

Let each participant write on a piece of paper his/her name, station, how long they have served as police officers, and their vision for a unified and prosperous Kenya, and their fear about hate speech in this election and expectations from this training.

Mix up the pieces of papers and let each participant picks up one piece. They must not pick up their own piece. Let each one stand up in turns and read out the name appearing on the piece picked. The person whose name is called out (the writer) will then stand up as the reader reads out audibly what he/she has written. Capture all the positive visions, concerns and expectations on flip chart for reference in the course of the training.

The purpose of capturing the 'hate speech' statements written by the learners is so that the trainer, can make reference to them from time to time in the course of the training. This is important for reinforcing the participants' understanding of the various aspects and concepts of hate speech.

Note: These exercises help the learners to open up and feel at ease from the beginning of the training. The exercises should be prepared in advance and instructions to the participants given in clear, simple terms, in a manner that is sensitive to the different levels of learners.

Rules of Engagement/Ground Rules

To regulate group behaviour and conduct during the sessions, ground rules should be set by the participants themselves at the beginning of the training. The participants also have the collective responsibility of enforcing those rules. The purpose of the ground rules is to manage behaviour that may affect the learning atmosphere and at the same time encourage passive participants to be more active. The agreed rules will be noted on flip chart and displayed on the wall throughout the training, as it may be necessary to make reference to them as the sessions progress.

Explain to the learners that the training is about hate speech and that to run the training in an orderly manner, there must be agreed rules to guide the process. The agreed rules may include:

- Time management (appoint a time keeper).
- Phones off /silent mode.
- No laptops except the rapporteur's or the facilitators'.
- Mode of participating.
- Mode of asking questions.
- Need for brief and clear contributions.
- Sanctions for rule breaking

Trainers' Guiding Notes

The purpose of the climate setting, is to set the general mood to discuss hate speech, having emphasized the rights and obligations of the learners as provided by the ground rules agreed upon. The facilitator should be careful not to impose rules on the learners, but should rather guide them in coming up with their own rules. It is advisable to display the ground rules on a wall, so that each time there is a breach of the rules, the trainer can keep reminding the learners about them so that the training can proceed in an orderly way.

Expectations and Fears

Expectations refer to what the learners hope to achieve from the training. This is important, because it enables the facilitator to understand the extent to which the training objectives tally with what the participants hope to get out of the training. It also enables the trainer to link those expectations to the objectives. The trainer may write down all the expectations on a flip chart or on a PowerPoint. After each participant

has indicated their expectations, the trainer should take the learners through the list, indicating which expectations are likely to be met and which ones might not. This way, it is made clear to the learner up front what the training will entail so that they are not under the wrong impression that will lead to disappointment. The list of expectations will also be referred to at the end of the training to evaluate the extent to which the promised expectations have been met. The expectations also help the trainer establish the entry point of the learners.

The learners should also be given a chance to express their fears or anxieties about the training. For example, a learner may state as follows:

We are supposed to finish this programme at 6.00pm tomorrow and due to the topics to be covered, I fear that I may not be able to complete the programme within the available time.

The trainer must address fears raised in a satisfactory manner, and can also take the opportunity to emphasize the need for punctuality. He/she may request the learners to keep their contributions brief and to the point for the effective use of time. When learners get carried away in their contributions, the facilitator should refer them back to the ground rules to enforce order and strict observation of time.

Training Objectives

Training objectives are the desired achievements of the training and they should be clearly stated and explained to the learners. For example:

“The objective of this training is to equip law enforcement officers with skills for investigating and prosecuting hate speech.”

They are broader than session aims which relate to specific topics of the training.

Team Building

Team building is important not just at the beginning of the training, but throughout the sessions. It involves establishing an environment of mutual trust and respect among learners. This allows learners to express their views, opinions and concerns freely. How the trainer relates to the learners is a determining factor in establishing group spirit and will have a major influence on the learning environment as the training progresses.

Some of the following techniques can be considered by the trainer for purposes of team-building:

- Encourage learners to share experiences.
- Ensure respect for everyone’s contributions.
- Create and maintain a spirit of belonging among learners.

- Allow learners to express themselves at their own pace, taking into account the available time.
- Endeavour to build consensus on matters discussed.
- Encourage learners to be responsible for their own learning.
- Allow for open and positive criticism.

Team building also requires the control of disruptive behavior. This should be envisaged and accounted for when developing the ground rules. This is important if the facilitator is to maintain focus during the training. Disruptive behavior may occur for different reasons which include:

- Boredom
- Arguments between a learner and the trainer or between a learner and other learners.
- When learners are not answering questions or engaging in discussions.
- When a few participants dominate the discussions.

Energizers

Learners may get tired or bored due to too much information or long sitting hours. This is particularly common during afternoon sessions. It is the responsibility of the trainer to constantly look out for the mood and energy levels of the participants. Energizers are useful for re-energizing learners. These may include:

- Story telling
- Jokes
- Singing games
- Mind games
- Dancing
- Stretches

The trainer must ensure time used for energizers is limited and does not significantly take up time for a given session.

SECTION B

Training Methods

It is important to consider certain factors in selecting the facilitation methods for the training. Some factors to be taken into account are:

1. The target group. For police officers, it is important to consider their level in terms of rank and respective positions. For example, training approaches for police constables or corporals may require a different method from a training for officers in charge of stations or officers commanding police divisions. It is important to note that with disciplined forces sometimes the junior officers cannot, for example, contradict their seniors. It is therefore important to have the learners shed off their ranks right at the beginning through emphasizing equality for purposes of the training.
2. Objectives: These should be clarified at the beginning of the training programme, and the aims of the sessions must also be indicated at the beginning of each session.
3. Content: The methods selected must be appropriate for the content being discussed. Illustrations and examples therefore should be suited to the information being passed to reinforce understanding.
4. Time frame: Each activity should be allocated adequate time, which must be adhered to as much as possible. Proper coordination of the time ensures that the learners' and trainer's time is respected and all activities carried out as expected.
5. Resources: Appropriate resources should be used for the respective sessions. It is important to consider the adequacy and availability of resources in choosing what is required.
6. Sitting arrangement: The sitting arrangement should be suitable for the training, allowing for easy movement, for example, when proceeding for group work. An overcrowded arrangement may hamper learning due to discomfort experienced by learners. Allowing adequate space also allows the trainer to move around the room as appropriate.

Facilitator Attributes and Competences

For training on hate speech to be effective, the trainer is required to have certain basic attributes and competences. These include:

Effective Use of Core Methods

The Facilitator must be able to lead large or smaller group processes through the discussions. He /she must be familiar with the process of creating and sequencing questions that move the group from surface considerations into the substantive implications of any topic. The trainer must be able to decide which bracket of facilitation methods and techniques best fits the learners' needs.

Appropriate Use of Time and Space

The facilitator has to know how to create an environment that is conducive for the learners. If the space is not clean and tidy the facilitator has to attend to that. The trainer has to decide how best to arrange the space, so that it works for both the process and the group. This means checking the space ahead of time and making sure there are walls appropriate for holding flip charts, there is sufficient lighting and so on. Where face-to-face participation is required, the arrangement should be such that it is maximized.

Sensitivity to the Learners

The facilitator should be able to sense the rhythm that is most enlivening at a particular time of day; pacing the activities so as to capitalise on the mood of the group.

Evoking Participation and Creativity

The facilitator also has to believe in the group's wisdom and creativity needed to achieve the training objectives. He or she must be able to create a climate of participation and therefore must know how to elicit participation. He or she must be able to involve the whole group in taking responsibility for its own decisions. The trainer must apply objective skills to get the group to focus on the discussions.

Respect for the Group

The learners will be a group of diverse personalities from different background and communities, some of which have been adversely affected by hate speech. Given the sensitive nature of hate speech, the learners must all be made to feel equal and important, which will create confidence among them. They should be made to feel free to trust the process. This requires a constant decision to refer to situations positively.

Neutrality and Objectivity

A key role of the facilitator is to provide objectivity to the group process. As the facilitator guides the process, he or she must also play the role of a neutral referee. The facilitator must set aside personal opinions about perception and stereotypes about the various communities, being careful not to react negatively to people's insights, and maintaining detachment from the group-generated information. He/she must have the capacity to buffer criticism, anger and frustration with a non-defensive stance whenever the group energy overheats.

Appreciation of Underlying Dynamics in the Group

The facilitator should be able to sense dynamics in the group. In particular, the facilitator should be able to interpret silence of the group, and identifying individual issues and hidden agendas that may be present. In such situations, the trainer should take appropriate action to allay any fears that may be present. She/he should be able to pick up non-verbal cues and the significance of what lies behind participants' words. She/he should have the skills to interpret negatively phrased responses and deal with them, as well as vague answers and probe for their fuller meaning.

Flexibility

The facilitator should be able to adopt to changing situations and know how to balance the process on one hand and the results of the process on the other. She/he should be able to harmonise the needs of the participants at any one moment with the total demands of the training. This is based on an understanding that the process for arriving at the results is just as important as the results themselves.

Reporting

Coming up with a documentary record of the group's insights is important in facilitation. With the help of an assigned rapporteur who inputs the group data and decisions; the participants should all get a copy of the training report after the training.

Personal Integrity

The facilitator must maintain personal integrity. This includes learning to relate to rejection, hostility and suspicion, letting go of personal feelings arising from a programme and be able to take care of personal renewal.

Other important attributes are:

- Knowledge of Kenya's socio- cultural and political context
- Adequate knowledge on the issue of hate speech
- Commitment to addressing hate speech
- Ability to reach out to other people
- Patience
- Good listening skills
- Good communication skills
- A sense of humour
- Willingness and ability to work with others
- Being non judgmental
- Ability to critically examine his/her own prejudices and addressing them

The trainer should be able to use a variety of methods to cover the different topics, in a manner that best conveys the intended message. The more interactive and participatory the method is, the better. This can be done through asking learners to share their experiences or thoughts on an issue and appropriately apply the lessons learned to relevant situations.

Some methods that can be adopted include:

- Case studies
- Role plays
- Brainstorming
- Discussions
- Resource person lectures
- Reflection exercises

1. Case Study

The objective of the case study method is to get the learners to apply concepts they already know and ascertain new ones. This method emphasizes on approach to see a particular problem rather than a solution. Their solutions are not as important as the understanding of the issues or concepts.

Suggested Procedure of the Case Study Method:

Give the learner some written material on an imaginary scenario on hate speech, with a set of questions at the end of the case study. The questions are designed to guide the learners in giving their opinion on the point being discussed. The learners may be asked to deal with the hypothetical case individually or in groups. They may also work on the set of facts individually then discuss their individual answers in groups before presenting their views to the larger groups.

The hypothetical facts should be prepared well in advance and must be relevant to the point of discussion.

2. Role Plays

Role-playing involves assuming a role and acting it out. In a learning environment, role play can be a very flexible and effective tool. The tenet 'I hear and I forget, I see and I remember, I do and I understand' is very applicable in role plays. It is a good tool for making sense of the theory and gathering together concepts into a practical experience. It is also useful for clarifying new and unfamiliar concepts.

If used badly in the training environment the role-play tool can be ineffective or even damaging, taking into account the attitude or emotional state of the people taking part. Some

times people are nervous or terrified, at the prospect of participating in a role play.

The advantage with role plays is that they can be spontaneous, therefore do not require early preparation.

Suggested procedure for conducting role plays:

- *Ask for volunteers, encouraging as many as possible to participate.*
- *Assign roles or let the volunteers pick out their respective roles.*
- *Give them time to study and understand their roles, and guidelines for performing those roles.*
- *Give adequate time for the performance and stop it at the appropriate time.*
- *Allow other participants to comment on their observation; taking into account what the concepts they have learned.*
- *Ask questions to the actors on their experience.*
- *If time allows as many participants as possible should take part.*

3. Brainstorming

Brainstorming is a group creativity technique through which a group tries to find a solution for a specific problem. It is more effective for problem solving than when an individual works alone in generating ideas. The disadvantage of brainstorming is that groups tend to digress from the relevant issue, and this can decrease effectiveness.

Suggested procedure for guiding brainstorming sessions:

- *Ask a question relating to the topic under discussion.*
- *Note the answers given by participants on flip chart and display on the wall.*
- *Allow discussion on each answer noted.*
- *At the end, let the group evaluate the ideas based on a given criteria and make their own conclusion.*

4. Discussions

In a discussion, the participants share ideas or experiences, facts, opinions in groups or in plenary. This is important for clarifying concepts, getting others' opinions, generating ideas and building consensus.

Suggestions for the discussion process:

- *Ask a question relating to the topic of discussion.*
- *Divide the learners into groups to discuss specific aspects of the question posed.*
- *Let the learners know how much time they have for the discussion.*

- *Encourage active participation.*
- *Let the respective groups choose a chair to guide the discussion and a secretary to take note and present back to the larger group.*
- *Summarize the discussion, highlighting what was well done and what could have been done differently.*

5. Resource Person Lectures

To enrich the training, the trainer may find it necessary to utilize a resource person in conducting specific parts of the training. The resource person must be an expert or have specialized knowledge in a certain area. It is preferable if the person has practical experience and a track record in the subject he or she will be facilitating. The possible expert in a training on hate speech may include a lawyer, a human rights practitioner, experienced investigators, prosecutors, administrators dealing with community tensions, or scholars. The purpose for this could be multi-pronged, including:

- Clarifying a controversial issue
- Explaining a new concept
- Providing real life examples to reinforce the learning of the concepts
- Discussing a technical aspect

Suggested procedure for engaging a resource person or expert:

- *Identify the controversial or difficult topic that requires expert input.*
- *Identify the expert and provide the terms of reference.*
- *Let the learners know in advance about the engagement of the expert and the area he/she will be handling.*
- *Allow adequate time for the presentation, question and answers, and response by the expert.*
- *Summarize key highlights.*

6. Reflection Exercises

These are activities that give the participants a chance to think through issues, consider the available options and the likely consequences of those options. They should be able to come up with a solution based on the options they choose.

7. Evaluation

At the end of the training, it is important to assess the extent to which the training objectives and the expectations of the participants have been met. This can be done through reminding the learners about the objectives of the training and asking for their honest opinion as to whether those objectives were met. It can also be undertaken through a questionnaire developed in advance which they should answer, without necessarily indicating their names on the questionnaire.

MODULE 2

HATE SPEECH: Ingredients, Components and Interpretive Jurisprudence on Hate Speech

Methodology

- Short lectures
- Case studies
- Discussions
- Role plays

Learning Resources

- Newspaper extracts
- Flip charts/markers
- Writing paper
- Masking tape
- LCD projector
- Computer

Objectives:

By the end of this session, the participants will be able to:

1. Name the relevant national and international statutes and Instruments that address hate speech.
2. Explain the provisions of those statutes and instruments.
3. Distinguish freedom of expression from what constitutes hate speech.
4. Explain the legal interpretations advanced by courts on the ingredients and components of hate speech.

This session may begin by asking the participants whether they have heard any statements that they consider to be hate speech. Let share those examples. List all the shared statements on flip chart and display them on the wall.

Time required: 10 Minutes

(As the trainer goes through the presentation on components and ingredients of hate speech, she/he could keep referring back to those statements to check whether they actually amount to hate speech)

Exercise 2

Read out the following case study to the learners;

Kileleni is a forest complex which is the largest water tower in Kibarani County. The Kibarani county is predominantly occupied by the Kilenenis and the Jambini minority. The Kileleni forest complex has recently been a subject of debate following heavy destruction through illegal logging and settlement leading to severe water shortage in the country. The government has made a decision to evict all the members of the Kileleni community currently occupying the forest. The issue has been highly politicized with some legislators saying it would be inhuman to vacate the settlers without giving them an alternative. Tensions are high A task force has been appointed to, among others, oversee the evictions of the illegal inhabitants of the forest. The head of the task force is from the Jambini community. There have been historical tensions between the two communities since independence and there have been several conflicts over resources in the past. In a political rally attended by over 5000 members of the Kileleni Community, Kajogoo, a popular politician swears that if the if the threatened evictions take place, members of the community of “short people” (in reference to the Jambini community) will “face the music.”

Ask the participants whether this amounts to hate speech, and if so, why? Let them point out the specific aspects that makes it hate speech as opposed to the exercising of the right to freedom of expression.

Note on a flip chart what the participants say.

Time Required: 15 Minutes

The purpose of this exercises is to introduce the legal definitions of hate speech in an interactive manner, as a basis for the discussion on what constitutes hate speech. At the end of the session, the responses on flip chart will serve to extent to which the responses noted challenge meet the legal threshold of hate speech.

SECTION A

What is hate speech?

There is no universally agreed definition of hate speech. Most countries have adopted legislations banning expressions that can be included in this concept, but with slight differences. It generally refers to as words of incitement and hatred against individuals based on certain group characteristics they share. It includes speech that advocates or encourages violent acts against a specific group, and creates a climate of hate or prejudice, which may in turn foster the commission of hate crimes. The identification of expressions that could be qualified as “hate speech” can be difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal. It often entails inter-ethnic hostility.

The International Legal Framework for Hate Speech

Hate speech is not unique to Kenya and the international community has had to make provisions for addressing it in different contexts. Even though freedom of speech is internationally recognized, certain limitations are placed to ensure that this freedom does not infringe on the rights of others. For purposes of this training, we will consider a few examples;

Trainers Guide

As the trainer goes through the provisions, he she should write down all the key words such as “dissemination” “ racial superiority” ‘hatred’ “incitement”, “discrimination”. This will help the learners internalize the key components of hate speech.

1. The International Convention on the Elimination of Racial Discrimination

The International Convention on the Elimination of Racial Discrimination (CERD) Article 4 states that:

“All dissemination of ideas on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin , and the provision of any assistance to racist activities, including the financing thereof” is an offence punishable by law.”

This convention also declares illegal and prohibits propaganda activities which promote and incite racial discrimination. It further prohibits national and local public authorities and institutions from inciting racial discrimination. Note this definition does

not include gender-based hate speech but gender is covered in other definitions.

2. European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms states in Article 10 that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers....”

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions and penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the convention.”

In 1997 the Committee of Ministers of the Council of Europe adopted a Recommendation on hate speech which stated the term *“shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”*

The European Commission against Racism and Intolerance (ECRI) has also recommended criminalizing expressions which can be considered racist speech, notably when it intentionally and publicly incites to violence, to hatred, or discrimination on grounds of race, colour, language, religion, nationality or national or ethnic origin.

These provisions bring out the importance of respecting rights of others while exercising the freedom of expression. This implies that the freedom of expression is not absolute and can be restricted for the public good, including the need to protect everyone from any kind of harm.

3. Broadcasting Complaints Commission of South Africa

Another strong definition can be found from South Africa: “Material which, judged within context, sanctions, promotes, or glamorizes violence based on race, national or ethnic origin, color, religion, gender, sexual orientation, age, or mental or physical disability.”

4. Here are commonly accepted grounds for incitement to hatred:

<ul style="list-style-type: none">• Language• Race• Ethnicity• Social origin• IDP, Migrant or refugee status• Culture	<ul style="list-style-type: none">• Religion• Birth status• Indigenous origin or Identity• Sex & Gender• Gender identify• Sexual orientation	<ul style="list-style-type: none">• Political or other opinion• Property ownership• Mental or physical disability
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SECTION B

Interpretative Jurisprudence of Hate Speech

Currently in Kenya, jurisprudence on hate speech has not extensively developed. However, reference can be made to experiences of courts in other jurisdictions which have made pronouncements that are useful in guiding the interpretation of what constitutes hate speech. A few examples are given below:

1. The International Criminal Tribunal for Rwanda (ICTR)

The following observation was made by the international Criminal Tribunal for Rwanda (ICTR) in the case of *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, case no. ICTR-99-52-T (the 'Media Trial');

Speech constituting ethnic hatred resulted from the stereotyping of ethnic groups combined with denigration. The court examined the tone of a broadcast that stated about the Tutsi that "they are the ones who have all the money", observing it was a generalization that has been extended to the Tutsi population as a whole. It further observed that the tone of the broadcast conveyed the hostility and resentment of the journalist, noting that while this broadcast, did not call on listeners to take action of any kind, it demonstrated the progression from ethnic consciousness to harmful ethnic stereotyping.

In the case of *Prosecutor v Akayesu* the court observed that:

"In light of the culture of Rwanda, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof." (ICTR 1998a: para. 558).

The ICTR also further observed that culture, including the nuances of the Kinyarwanda language, were important in determining what constitutes direct and public incitement to commit genocide. The principal consideration is the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context.

2. Turkey

Ibrahim Incal v Turkey case no 41/1997/825/1031

In this case the applicant, a council member of a political party was convicted under the Turkish Penal Code for involvement in the intended distribution of pamphlets. The pamphlets claimed that the restrictions imposed on street vendors were a part of a larger plan to drive Kurds back to their region, and called on "patriots and democrats" to organize

themselves and resist the plans.

3. South Africa

R.V Nkatlo 1950 (1) SA 26 (c) p30-31

In South Africa, the court has held that the absence of actual intent to promote feelings of hostility constitutes a complete defense, even where objectively viewed, the words in question would have had the proscribed effect.

In *R Vs Nkatlo* the appellant had been convicted for charges related to comments he made at an African National Congress (ANC) meeting and which were considered to be promoting racial hostility. The words attributed to him were that *“the only hope we have to change affairs is by a revolution and a revolution means bloodshed”*

The court observed that;

“In applying the test that a person is to be presumed to intend the natural and probable consequences of his acts, the courts must be astute to see that the inference of intention to promote feelings of hostility is the only inference which can be reasonably drawn. If the language used is reasonably capable of another explanation, the inference of intent cannot be drawn.”

4. India

S. Rangarajan v P.J. Ram (1989)(2)(SRC) 204p.266

Indian jurisprudence establishes a very close link between an expression and threat of disturbance is necessary. The Supreme Court observed in the case of *S. Rangarajan v P.J. Ram (1989)(2)(SRC) 204p.266* stated;

“Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should have proximate and direct nexus with the expression. The expression should be inseparably locked up with the action contemplated, like the equivalent of a ‘spark in a powder keg.’”

5. The European Court of Human Rights

The criteria used by the European Court of Human Rights places the following limitations to freedom of expression:

- Limitations prescribed by law specific to hate speech, for example, for the preservation of law and order.
- There must be a legitimate aim of the limitation, for example, the public order.
- The limitation must be necessary in a democratic society, for example, to protect social needs.
- The Court is stricter with politicians and insists on their special responsibility in not using language that contributes to fueling intolerance.

The Court is stricter with politicians and insists on their special responsibility in not using language that contributes to fueling intolerance.

Trainer's Input

These pronouncements by the different court all appreciate the importance of preserving the freedom of expression. They are all unanimous in observing that when the greater good of the society is threatened by utterances that constitute hate speech, that freedom must be restricted.

SECTION C

The Constitutional and Legal Framework for Addressing Hate Speech in Kenya

a) The Constitutional Framework

In Kenya, hate speech is specifically addressed by different instruments. Article 27 (1) of the Constitution of Kenya guarantees the right to equal protection of the law and states that;

“Every person is equal before the law and has a right to equal protection and equal benefit of the law”

If any group of persons is under threat as a result of inflammatory statements that constitute hate speech, they are entitled to protection by the law.

Article 27 (2) states that;

“Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”

If hate speech is targeted at a group or section of the population, the consequences such as violence or harm committed against the group as a result of hate speech infringe on the rights of that particular group. The affected group therefore cannot enjoy full and equal enjoyment as guaranteed by this provision.

Under Article 27(4) provides that;

“The state shall not discriminate directly or indirectly against any person on any ground, including race...ethnic and social origin, colour, ...religion, conscience, belief, culture ...or birth”

A responsibility is placed on the state not to discriminate against any part of the population. The Commission has undertaken several initiatives to address discrimination, for example, to ensure no discrimination in public jobs opportunities. This provision also protects the citizens from possible hate speech by agents of the state.

Article 27(5) provides that;

“A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)”

This provision protects everyone from discrimination by individuals on similar grounds as those envisaged by article 27(4) above.

Article 33 (1) of the Constitution provides that;

“Every person has the right to freedom of expression which includes

- a) Freedom to seek or receive or impart information or ideas*
- b) Freedom of artistic creativity; and*
- c) Academic freedom and freedom of scientific research.*

(2) The right to freedom of expression does not extend to

- a) propaganda of war*
- b) Incitement to violence*
- c) hate speech; or*
- d) advocacy of hatred that
 - i) Constitutes ethnic incitement, vilification of others or incitement to cause harm; or*
 - ii) Is based on any ground of discrimination specified or contemplated in Article 27(4)**

(3) In the exercise of the right of freedom of expression, every person shall respect the right and reputation of others”.

Article 91(2) stipulates that *“a political party shall not, among others, (a) be founded on religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis; (b) engage in or encourage violence by, or intimidation of its members, supporters, opponents or any other person or (c) establish or maintain a paramilitary force, militia or similar organization.”*

Trainer’s Input

These provisions of the Constitution reinforce the mandate of the Commission in addressing hate speech by way of law enforcement. The Commission does not have its own law enforcement or prosecutorial structures to deal with hate speech, or protect those against whom hate speech is directed. It therefore has to rely on the police to enforce those rights as guaranteed in the constitution, through investigation, arrest and preparation of evidence for the prosecution of suspects. The police therefore have an important role in supporting the NCIC in their efforts to ensure protection of the right not to be discriminated against or violated in any other way through hate utterances.

b) The Legal Framework

Although hate speech is specifically mentioned in the NCI Act, other laws make provisions relating to certain aspects of hate speech:

1. The Penal Code

The Penal Code prohibits incitement to violence. Section 77 (1) provides;

“Any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do any act with a subversive intention, or utters any words with a subversive intention, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years”

Subversion is defined under section 77 (3) to include:

a) supporting, propagating, or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice.

b) incitement to violence and/or other disorder or crime, or counseling defiance of or disobedience to the law or lawful authority.

c) supporting or intending to support persons who have acted in a manner prejudicial to public order or disobedience to the law or public order

d) indicating support, connection or association or affiliation with any unlawful society, other expressly or by implication.

e) acts intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya. (Criticisms and comments made in good faith or intended to remove any causes of hatred between communities are excluded from the subversion definition).

f) acts intended to bring into hatred or contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of their duties.

Section 96 of the penal Code addresses threatening breach of peace or violence and states that;

“Any person, who without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated;”

a) to bring death or physical injury to any person or to any class, community or body of persons; or

b) to lead to the damage or destruction of any property; or

c) to prevent or defeat by violence or by other unlawful means the execution or enforcement of any written law or to lead to defiance or disobedience of any such law, or of any lawful authority, is guilty of an offence and is liable to imprisonment for a term not exceeding five years.”

Trainers Input

Section 77 of the penal code does not specifically talk about hate speech, neither does section 98 of the Penal Code. However, some aspects are in tandem with what constitutes hate speech. Section 77 contains words whose meaning fit within the components of hate speech, for example, incitement to violence and promoting feelings of hatred or enmity between different races or communities. Section 98 introduces uttering, printing or publishing words that may cause physical injury or death among classes of people or community. These provisions give the police some leeway and there is the option to charge a suspect under these sections of the penal code if the offense in question does not meet the threshold of hate speech under sections 13 and 62 of the NCI Act.

2. The Media Act, 2007

According to the Media Act No. 3 of 2007, Second Schedule to the Act, titled “Code of Conduct for the Practice of Journalism in Kenya”, Regulation 25 provides that;

“Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.”

This Code binds journalists accredited to the Media Council of Kenya (MCK) to a basic ethical conduct and where there is an infringement by its member(s), an internal arbitral process may be commenced resulting to penalties being meted out on the journalist and or the media house involved. Other orders may include a requirement for an apology.

3. The National Cohesion and Integration Act, 2009

Section 13 (1) of the National Cohesion and Integration Act 2009 states that a person who:

“(a) uses threatening, abusive or insulting words or behaviour, or displays any written material.

(b) Publishes or distributes written material;

(c) presents or directs the public performance of a play;

(d) distributes, shows or plays, a recording of visual images; or

(e) provides, produces or directs a programme;

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.

(2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both.

(3) In this section, 'ethnic hatred' means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins."

From these provisions, the key components are;

'Any person' this may be an individual or a juristic person. A juristic person could be a registered entity such as a company, which may include a media house.

"Who uses threatening, abusive or insulting words;" this gives a very wide interpretation to hate speech. Not all abuses and insults are hate speech. Words only become hate speech if the intention of the maker of the statement is to stir up hatred.

"who utters, prints, publishes, directs play/show." There has to be an utterance or spoken word. The words may also be written in a book, a newspaper, a pamphlet, a brochure, or expressed in a public performance.

Section 62 of the NCI Act provides that:

"(1) Any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both."

The media plays an important role in keeping us informed of developments. Where a media house airs hate speech comments, it has to be balanced and show other parties that oppose the comments so that a person viewing the programme is not convinced of what is being presented.

It has to ensure that it adopts a responsible attitude to hate speech and should not form the view that hate speech is acceptable. A media house or newspaper would be guilty of hate speech if it prints articles and caricatures that are easy to comprehend, even to a largely illiterate community, especially if the articles and caricatures serve to reinforce a message that reinforces hate against a given community, taking into account the cultural context of the country.

Other agencies that have powers to address hate speech include:

Registrar of Political Parties:

- Regulating the behavior of members and office holders of political parties, aspiring candidates, candidates and their supporters.
- Sanctioning political parties who violate the Act and the code of conduct for political parties.

National Police Service:

- Maintain of law and order
- Preserve peace
- Protect of life and property
- Investigate Crimes
- Enforce all laws and regulations relating to elections

Director of Public Prosecutions:

- Conduct investigations, arresting and prosecution of electoral offences.
- Institute criminal proceedings against any person involved in electoral malpractices.

SECTION D

How do we identify hate speech?

Hate crimes in Kenya tends to be fueled by the following:

- Stereotypes, particularly cultural.
- Hate filled speeches especially at political rallies.
- Political advertisements.

Once a climate of hate is created, it can trigger a wave of hate crimes.

A statement does not amount to hate crime unless it:

- Causes hatred
- Makes a group or community look inferior
- Makes a group or community be viewed with contempt
- Degrades a group or community in front of others
- It dehumanizes a group or community

Main characteristics of hate speech

The statement often contains:

- threatening,
- abusive,
- or insulting messages, sometimes using coded language.

These messages must be in respect of a targeted group. These insulting or abusive utterances must be for purposes of stirring hatred on the basis of;

- Race,
- Colour,
- Nationality,
- Ethnicity,
- Gender (though the NCIA does not state this explicitly, this is included in international standards)
- or any other National origin.

Hate speech does not victimize the immediate target only, but every member of a group that the immediate target represents.

Important considerations

1. *The Context*: The context in which the statement is made is important, for example, a statement provoking resentment against members of an ethnic group would have a heightened impact in a politically charged, and ethnically polarized environment.
2. *Ripple effect*: The statement should be such that it can cause a ripple or discomfiture among members of a targeted group.
3. *Fear*: The statement should be capable of spreading feelings of fear or loathing across an entire community.
4. *Possible retaliation*: It should be statement that can create tides of retaliation and counter retaliation.
5. *Violence*: it must be speech that advocates or encourages violent acts or crimes of hate.
6. *Hostility*: It must be a statement that creates a climate of hate or prejudice, which may lead to the commission of other crimes
7. *Impact*: hate speech carries far more weight than other criminal acts.

Who can perpetrate hate crime?

Exercise

Read out the following examples to learners, one at a time, and ask them if the speakers can be charged with hate speech and why.

1. A handcart pusher carrying a heavy load shouts at a group chatting while standing in the way- *"tokeni njiani nyinyi mafala wa Kisumu, au mrudi kwenu."*
2. Youth in an estate want to choose a representative to the local county committee. In an animated conversation among them one remarks *"Wameru kazi yao ni kutafuna miraa tu, hawawezi kazi nyingine. Huyo mkimchagua ni shauri zenu"*
3. A female trader at Wakulima Market having lost her purse remarks *"Shida ya hii soko ni kwamba wakikuyu ni wengi sana. Sijui tutawafanyaje?"*

Discuss each response while identifying what components should be there for the speech to fall within the threshold of hate speech.

Guiding Notes

The status of the speaker is important to consider. It must be someone that is known by the community being addressed as:

- A public official
- A prominent political figure
- An opinion leader

The Place the statement was made is also important, such as a public place and in the presence of a gathering. The amount of publicity given to the speech is also important. This means that if the conversation that may express hate against a certain community is made in a private conversation, it will not meet the threshold of hate speech.

From the laws cited above, and the court pronouncements, it is clear that the law recognizes the far reaching implications of hate speech. An officer investigating hate crime has the flexibility to charge an offender under the different laws, in event that the case in question does meet the threshold of hate speech under the NCI Act.

The Media

Mass media plays an important role in keeping the public informed. It is critical that they do not go beyond the right to analyze, criticize, and hold public figures accountable. Its messages must always be crafted in such a way that they do not violate the rights of any community. The media can be held responsible for hate speech when their publications or broadcasts contain hate speech through:

- documentation
- drawing pictures
- using signs
- directing play in the media
- playing show characterizing hate speech

Media articles must not portray any community as inherently wicked, or couch its messages in a manner that clearly intends to fan the flames of resentment and anger directed at a particular community.

In dealing with hate speech in the media, it is important to distinguish the responsibility of the author of the statement from that of the media which reports it.

In Jersild v. Denmark, the Danish government prosecuted and convicted a journalist for disseminating the racist views of others on television.

MODULE 3

INVESTIGATING HATE SPEECH

Session aims

By the end of this part, participants will be able to describe the steps to be followed when conducting investigations on hate speech.

Methodology

- Short lectures
- Case studies
- Discussions
- Role plays

Learning resources

- The National Cohesion and Integration Act
- Flip charts
- Markers
- Lap top
- LCD projector

Trainers' Guiding Notes

Using the plenary discussions, request the learners to identify the difficulties they experience or anticipate in investigating hate speech. Write these down on flip chart or on power point and display. At the end of the presentation, go through the items noted at the beginning to check whether all the challenges expressed are addressed, and making appropriate comments on each.

Trainers' Input

Determining whether a particular expression violates the law is an exercise that depends upon the context in which the expression was communicated. It is a matter of when the speech was made and the circumstances under which it was made. Some of the challenges that may be experienced in investigating hate speech include:

- Lack of awareness or proper understanding of the provisions of the NCI Act on hate speech.
- Hostility against police officers when collecting evidence.
- Lack of cooperation or commitment by journalists who may be reluctant to participate in the court processes.

- Lack of monitoring equipment by police officers.
- Absence of police on the ground at the time the utterances in question are made.
- Difficulty in distinguishing between fair reporting and actual participation in hate speech by the media.
- Reliance on secondary evidence such as tapes and videos which may not be admissible in court.
- Interference by influential politicians.
- Fear of witnesses to come forward due to lack of adequate witness protection framework.
- Language barriers, especially where the investigator is not conversant with the language in which the hate speech was made.
- Deciphering hate speech from innuendo.
- Difficulty in showing intent if the hate speech alleged did not result in violence.
- Establishing the socio-political and historical context within which the crime is committed.
- Difficulties in determining authors of hate speech leaflets.
- Police officers must be able to identify, record and act on hate speech in an effective and timely manner.

To determine whether a statement made amounts to hate speech, an officer must ask the following questions:

- Is the motive of the perpetrator known to be bias?
- Do the victims perceive a bias?
- Are there factors that might create resentment or bias?
- Are there specific words used that might create resentment or bias?
- Do the words inflict injury or tend to incite violence?
- Are the words likely to trigger physical violence?
- Does any group feel humiliated by the statement?

Once these questions are answered, a further review takes place at the police station before the suspected crime can be classified as hate speech.

If it is the print media being investigated, it will be necessary to study relevant parts of the newspaper for purposes of establishing whether the statements in question meet the required threshold.

Where the publication is in vernacular, it will need to be translated. The cost of translation may be reduced by using services of colleagues or witnesses who are fluent in both English and the language used by the suspect.

The selected issues of the newspaper can be put together in hard copy and also in CD-ROMs to be read in court during presentation of evidence.

Electronic Media

With regards to radio transmissions, witnesses who heard the radio broadcasts must be called to record statements for purposes of testifying in court on what they heard. Their evidence should include how the transmission directly affected them.

The programme aired on television must be taken as a whole and not just a part of the clip. This will help show the context and environment within which the statement was made.

In a case where a politician uttered words constituting hate speech while being interviewed by a journalist, the court held that only the politician should be punished. Punishing the journalist for assisting in dissemination of statements made by another person in an interview would seriously hamper the contribution of the press in discussions of matters of public interest. (A Turkish case)

Possible Challenges by the Defense

A hate speech charge may be challenged on the grounds that:

- the statement in question was not intended to incite to violence or cause hatred against any group.
- they violate the Bill of Rights as regards freedom of speech and expression.
- it may be viewed as discrimination.

The suspected newspaper or station may adduce the following arguments:

- The circulation of the paper is not wide
- The literacy levels are low among the community
- Copies sold were insignificant

The prosecution can overcome this hurdle by ensuring there are a few lay witnesses to give evidence of a system of oral reporting that is unique to the community. These witnesses should be prepared through asking them a series of questions on the events, the cultural practices and their community. They should also be able to provide information on what they heard and saw, how they felt and their emotional reaction to what they heard and saw. They should also be prepared to provide evidence on how the rest of the public or different groups within the community reacted to the speech in question.

For example, a witness may state that in their community, although literacy levels are low, those who can read often explain to the illiterates what is contained in the newspapers, and that way a lot of information is disseminated to the general public. The witness may be able to recount that even though most people do not buy

newspapers either due to illiteracy or lack of money, they are able to borrow from neighbours and friends to read. The witness can also testify that this is a common practice.

Further evidence can also be adduced to the effect that the newspaper or radio station has certain tendencies that may be seen as sensational or promoting hatred against certain groups or communities, and for that reason it is widely talked about. The witness may also testify on the observations they have made regarding conversations about the newspaper or radio/TV station.

Rapid and effective responses to hate speech show the community that police will take reports of potential hate speech seriously. Attention given to the public will encourage the public to report the crimes. For journalists and producers, they should try and air hate speech as soon as they get it, but should always be balanced with views of other people who are critical to the hate speech, so that viewers are not persuaded by the hate speech views. Journalists should never air un-criticized hate speech in the pretext of exposing it.

MODULE 4

PREPARATION AND PROSECUTION OF HATE SPEECH CASES

Teaching aims

By the end of this session, the learners will be able to:

1. Describe the steps a prosecutor to be taken during investigations,
2. Describe how to frame charges on hate speech
3. Explain the procedures of making presentations and submissions in court

Methodology

- Short lectures
- Case studies
- Discussions
- Role plays

Learning Resources

- Flip charts/markers
- Writing paper
- Masking tape
- LCD projector
- Computer

Trainer's Guide

Begin the session by asking the learners to name some of the aspects that must be taken into account generally during investigation of any crime. Note the responses on flip chart. As the session progresses, keep referring back to the flip chart to relate the ideas shared to the principles guiding prosecution of hate speech.

Trainer's Input

In preparing a case of hate speech for prosecution, the investigator should seek to ensure that the evidence gathered covers the following:

- Proof of elements of the crime as per the relevant provisions on hate speech (the NCI Act or Penal Code).
- Proof of identity of the person responsible.
- Credibility of the witnesses.
- Evidence to diffuse possible defenses.

- Comprehensive evidence of the social political and cultural context in which the hate statement was made.
- If possible, expert witnesses.

It is important to examine how the speech was understood by the intended audience in order to determine its true message. The guilty intention, or mens rea may be inferred from specific actions within the political atmosphere. For example, a statement regarding a specific group of people may be determined as hate speech or incitement to hatred at a specific time such as an election year in a public gathering and may not be considered hate speech at a different time.

Cases Against the Media

The issue as to when to charge media with perpetrating hate speech is not always easy to determine. To bring hate speech charges against the media, one must show that the broadcast or publication in question appears to be glorifying the hate speech, for example, through numerous repetitions, or failure to broadcast or publish views to the contrary. For production in evidence, in such a way that the name of the newspaper and the date are visible. If the paper is written in languages other than English or Kiswahili, it must be translated and certified as a true translation from that language to English.

Culture and nuances of the language in which the communication was made is a key factor in determining what constitutes hate speech. With regards to newspapers, there has to be evidence that:

- The message published by the media was read,
- That the message was grasped within the context of the given community
- The statement was taken seriously by the community
- The community reacted to the statement in a certain way.

The responses to these messages by the community must be captured for testimony in court.

Radio

As regards radio, the evidence prepared may contain a description of the gradual build-up of the broadcasts over the time the hate message was aired, if any.

Cartoons and Caricatures

The issues of cartoons and caricatures should be treated on a case by case basis as their interpretation will depend on the socio economic and political context and the environment at the relevant time.

The Danish Cartoon Controversy

This case exemplifies the precarious balance between freedom of expression and the repression of expression. In 2006 a Danish newspaper published a series of cartoons depicting the prophet Mohammed as a possible terrorist, in one instance with a bomb in his turban. Many Muslims were outraged because depictions of Mohammed are prohibited in the majority of Muslim communities and likening Muslims to terrorists could incite discrimination and prejudice. Other factions upheld the right of the paper to publish the cartoons as a freedom of expression issue. The Danish cartoon incident sparked mass demonstrations throughout the world resulting in death and extensive damage of property in addition to sparking a fiery debate on international law, freedom of expression and permissible limitations of this right.

If a cartoon or caricature in a newspaper communicates hatred or discrimination against a group or community in a way that meets the threshold of the law, it may be taken as hate speech.

Music

Hate speech may be contained in a song that has hate messages against a community. In preparation for the case, the investigating officer should have the recorded music and a player so that it can be played in court. If the song is not in English or Kiswahili, it should be transcribed in its original language and accompanied by a certified translation of the same.

The Role of Experts

The role of experts in a hate speech case varies from case to case. The expert may:

- Serve only as a consultant to the lawyer to provide insights on the matter.
- Support an element of the case in court.
- Support the case both at pre-trial and trial stages as a witness.

Possible Types of Experts

The following are examples of experts who may provide useful insights in preparing case for hate speech:

- a. A professor in history to give the historical /cultural context within which the offending statements were made.
- b. A linguistics expert to provide the linguistic background and insights about the use of the words and how they are understood by a given community.
- c. A media expert to examine the editorial policy of the newspaper in question and themes that may be promoting hate speech, as well as the impact of their publications.

Framing of Charges

Exercise

Divide the participants into groups of five. Give them a set of hypothetical facts and ask them to draw up a charge sheet on hate speech under the NCI Act, the Media Act or the Penal Code on flip charts. Let them put up their charge sheets on the wall. (10 minutes).

Let them regroup and consider each charge sheet one by one, looking out for the required mandatory aspects.

Trainer's Input

The charge is the fundamental accusatory document, and how it is drafted has a bearing on the possible outcome of the case. It must be drafted in compliance with the provisions of the Criminal Procedure Code (CPC) which provides for the mandatory aspects of a charge sheet. A charge should not contain more than one offence in each count. For example, a charge related to creating a disturbance in a manner likely to cause a breach of peace under sec 98 of the Penal Code cannot be contained in a cannot be on the same count as on incitement to violence under section 77. Each has to be drawn up as a separate count.

The court can reject a charge if it does not disclose an offence known to the law according to section 89 (5) CPC. A rejection of the charge under that section acts as a bar to any subsequent prosecution based on the same facts.

In framing the charge, care must be taken to include all the required ingredients, for example, the date, time, place, a quote of the exact words uttered, the intention of the speaker, the community targeted, and the likelihood of violence.

MODULE 5

PROSECUTING HATE SPEECH

Trainers' Guide

You may begin this session by asking the participant to point out some of the challenges they have experienced or envisage in prosecuting hate speech. Note the points and flip chart. As the session progresses, keep making reference to the information on the flip chart. This enables the learners to relate what their learning with the practicalities of their work.

Trainer's Input

Prosecuting cases relating to Hate Speech poses challenges due to the fact that it is relatively new and therefore lacks in precedent cases for reference. Lessons, may however, be picked from regional and international jurisdictions which have experience in prosecuting hate speech.

The *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, case no. ICTR-99-52-T (the 'Media Trial')

This case determined the issue of responsibility of the media and journalists, and their role in the crimes committed in conflict situations without jeopardizing press freedom. The communications giving rise to criminal liability in the Rwandan Genocide of 1994 were published in the newspaper *Kangura* (Awake in Kinyarwanda), which was instrumental in systematically spreading propaganda against the Tutsis. The newspaper was owned and directed by one Hassan Ngeze. The trial also examined the broadcasts on *Radio-Television Libre des Mille Collines*, which was popular amongst the youth and the general population at large, it projected racist propaganda against Tutsis, moderate Hutus, Belgians, and the United Nations Mission in Rwanda (UNAMIR)). It is regarded as having played a crucial role in creating the atmosphere of charged racial hostility that allowed the genocide to occur.

The above trial (Media Trial) was centered on the delicate balance of protecting the right of individuals to express opposing opinions and the right of individuals not to be the objects of discrimination.

In conducting the prosecution, the following strategies may focus on the following themes:

- a. Proof of the elements of the crime as provided for under the NCI Act, 2009 and the Penal Code, Chapter 63 laws of Kenya.
- b. Proof of identity of the person responsible for making the hate statements.
- c. Credibility of the evidence, both oral and documentary.
- d. Anticipating and diffusing possible defense strategies.

Leading evidence of the socio political context

One of the challenges of prosecuting a Hate speech case is the socio-political and historical dynamics of a given community that makes a particular communication Hate Speech. In proving the elements of the crime, the Prosecutor should lead evidence to set the scene by establishing the context in which the crime was committed. The role of the expert here is very important.

In conducting the prosecution, it is important to lead evidence showing that:

- a. the statement in question provoked resentment against members of an ethnic group.
- b. the provocation did or was likely to lead to violence in the circumstances.
- c. the environment was such that incitement to violence was the intent of the statement.

In each hate speech case before the ECHR, it considers:

- The objective of the person whose speech was subject to restrictions.
- The content of the speech.
- The context of the speech.
- The profile of the people who are the targets of the alleged hate speech.
- The publicity and potential impact of the speech, e.g. how widely was it disseminated; and,
- The nature and gravity of the restrictions applied.

The ICTR Media Trial

During the trial, the Prosecution adduced evidence that during the politically explosive period of 1990-1994 Kangura printed articles and caricatures that were easy to comprehend to a largely illiterate community. The Prosecution led evidence that established that these articles and caricatures with their graphic images served to reinforce a message of morbid psychological preparation of the Hutu masses against the Tutsi ethnic group, and any one opposed to the Kangura ideology. In a country at war, and in the cultural context of Rwanda, the prosecutor case was that the "Kangura" newspaper went beyond the right to analyze, criticize and hold public figures accountable and violated the rights of the Tutsi ethnic group in the country. The Trial Chamber agreed with the prosecution and opined that the writings in the Kangura portrayed the Tutsi as inherently wicked and ambitious in language clearly intended to fan the flames of resentment and anger, directed against the Tutsi population.

Leading Evidence on the Cultural Context

The culture, including the nuances of the language in which the communications are made, is important in determining what constitutes hate speech. It is therefore crucial to lead evidence that shows how a speech was understood by its intended audience in order to determine its true message. The intention of the speaker may be inferred from the cultural beliefs within which the communication is made. The witness should be well versed with the culture of the community, including stereotypes.

The Use of Expert Witness Testimony

When the expert is called as a witness, it will be important lead him/her to state his/her qualification and experience. This is crucial for purposes of credibility and reliability. For example, if he/she has conducted any relevant research, the prosecution should ensure this comes out in evidence. Any interactions the expert has had with the particular community that go to show the reactions to the speech would add value to the prosecution case. The nuances and meanings of certain words within the given community must be comprehensively explained so that the court has all that full appreciation of the context and circumstances of the case.

It may be important to keep consulting with the expert through all the stages of the trial. The expert's input in preparing the final submissions will be particularly important.

Leading Evidence by Lay Witnesses on the Cultural Context

The prosecutor should lead evidence through several lay witnesses on the system of oral reporting unique to the particular community. The example of the ICTR media Trial below demonstrates how this can be done;

Through a series of questions, the prosecutors drew out the story of the events which explained the cultural practices in Rwanda, what the witness saw, heard and felt, as well as their emotional reaction to the "Kangura" publications. A witness stated that in Rwanda, illiterate people commonly get literates to read to them other. Another witness testified that those who could read Kangura were able to explain it to those who could not read and thus the messages were widely disseminated. Yet another Witness testified that although he did not buy the paper, he borrowed copies from his neighbors and friends to read. All the witnesses agreed that this was a common practice in Rwanda. Another witness stated that because "Kangura" was extremist in nature, everyone spoke of it, in buses and everywhere and so the news easily spread given its sensational nature. The Prosecution also adduced evidence through many lay witnesses on the effect of "Kangura" in Rwanda during the period of 1990-1994.

Translation

It will be important to prepare translators in advance to be available to translate evidence adduced in languages other than the language of the court. Translated and certified copies of media publications be in the custody of the prosecutor, ready for identification and production by witnesses with the original the publication. Translated versions of audio visual clips may be stored on CD-ROM or recorded with English or Kiswahili sub titles, which should be played in court. The necessary facilities required to project the clips should be brought to court in advance.

Leading Evidence on Radio Transmissions

With regard to the Radio transmissions, the Prosecution should call witnesses who heard the Radio transmissions and were directly influenced by those transmissions. This is can be demonstrated by the Rwanda Media Trial as below;

Two prosecution witnesses were called to testify against the radio station. One was a civil servant in the Ministry of Information whose job included monitoring the radio station, and the other a human rights activist who followed the transmissions of the radio station from its inception. The tone of the broadcast conveyed the hostility and resentment of the journalist. The Chamber noted that while this broadcast, did not call on listeners to take action of any kind, it demonstrated the progression from ethnic consciousness to harmful ethnic stereotyping.

Leading Evidence on the Impact of the Transmission

With regard to the impact of the radio transmissions the prosecution should lead evidence from both lay and expert witnesses on its impact. The evidence should be led in such a way that it shows the gradual build-up of the effect of the broadcasts over the time it aired.

Recording of a Plea of Guilty

The procedure of recording a plea of guilty is as follows:

- The charge and all the essential ingredients of the offence should be explained to the accused in his own language or in a language he understands;
- The accused person's own words should be recorded and, if they are an admission, a plea of guilty should be recorded;
- The prosecution should then state the facts and the accused should be given an opportunity to dispute or explain the facts, or to add any relevant facts;
- If the accused does not agree with the facts or raises any question of his guilt, his reply must be recorded and a change of plea entered;

- If there is no change of plea, a conviction should be entered followed with a statement of facts relevant to the sentence together with the accused person's reply thereto.

MODULE 6

MONITORING HATE SPEECH

Session aim

By the end of this session, the participants will be able:

1. To explain the purpose and importance of monitoring
2. To detail the items that need to be recorded for monitoring purposes, and the importance of those details.

Monitoring generally means being aware of the state of a system or an issue. It involves the systematic collection, analysis and use of information relating to a specified subject programme or project that we are interested in.

Monitoring hate speech entails collecting data on speech that manifests prejudice based on race, religion, sexual orientation, or ethnicity. This is important for purposes of providing empirical data needed to inform strong and effective policies for the control of hate speech.

There needs to be official data that tracks reported incidents right from the arrest to the prosecution stage to give a complete picture of the disposition of hate speech incidents in the courts and the implementation of the hate speech laws.

Purpose of Monitoring

Monitoring is important for three main purposes:

1. The learning function, which relates to with learning from experiences.
2. The monitoring function, which is connected with accounting internally and externally for the resources used and the results obtained.
3. The steering function, which implies taking the right decisions and making appropriate choices for dealing with a problem, in this case hate speech.

To be able to deal effectively with hate speech, the policy interventions need to be evidence based, hence the need for proper data collection and record keeping. This would help determine concerns such as hate speech trends, whether it is on the increase, decrease, which are the 'hot spots', which events in the government calendar generates more hate speech, and so forth.

It is important that the data collected be broken down to include:

- The incident or event (What?)
- Date (When?)
- Details of the offender or suspect (Who?)
- Place (Where?) Targeted group (On Whom?)
- Content (How?)

Annual reporting on this type of information will provide important indicators on progress toward protecting all citizens against serious forms of violent discrimination caused by hate speech.

To be able to deal effectively with hate speech, there is need for proper data collection. This would help determine the trends, whether it is on the increase, decrease, which are the 'hot spots'.

It is important that the data collected be broken down to include:

1. The Incident

This should include a brief description of the circumstances, for example, was it a political rally, a Baraza, a church function? Was it a campaign rally, a "homecoming" party, an initiation ceremony, etcetera.

2. The Date

The date is useful because at the time of analyzing the data it will be possible to tell, for example, whether hate speech is associated with events at specific times of the year. This will be a useful indicator as to the possible triggers of hate speech. From the trends revealed, it will be possible to design measures to be put in place to stem the problem when it is most likely to occur.

3. Details of the Offender or Suspect

The details of the offender are important. It will be possible from the records to tell, for example, whether there is repeat offending by certain individuals as well as the characteristic of the hate speakers. Due to the nature of the offence, it will be necessary to include the ethnicity or perceived ethnicity of the perpetrator for purposes of determining case trends.

4. The Place/Venue

Keeping record of the place where hate speech has occurred will inform on whether, for example, hate speech is prevalent all over the country or whether certain areas are more

notorious for hate speech. This is important for addressing the problem where it is needed most.

5. Target

It will be important to keep data on who the hate speech is directed at. This will show, for example, whether there is any particular community that is disproportionately affected.

6. Content

What was the nature of the hate speech? How severe was it? Did it advocate harm? What was the form, style, tone? Did the speech specifically call for violence, hostility, or discrimination? Was it clearly understood by the audience?

Annual reporting on this type of information, will provide important indicators on progress toward protecting all citizens against serious forms of violent discrimination caused by hate speech.

Monitoring Hate Speech in the Media

Hate speech in the media can be monitored through press cuttings, regarding what may be feared to be hate speech or recording of broadcasts. This can be done internally by the police or provided by an external agency or in collaboration with NGOs. A report will be written, taking into account both the monitoring of print and clips of audiovisual media. This will help to assess the implementation of the hate speech laws relating to media responsibility and also to provide a basis for appropriate interventions on hate speech.

Benefits of Working with Civil Society to Counter Hate Speech

- NGOs play a leading role in advancing the promotion and protection of human rights;
- NGOs bring together diverse groups to engage in inter-group dialogue;
- NGOs have greater leeway than government institutions to facilitate informal interactions;
- NGOs often represent and support groups most adversely affected by human rights violations, discrimination, hate speech, and violence;
- NGOs bring valuable grass-roots networks and community connections that government institutions lack;
- NGOs bring creative thinking and innovative approaches to the challenge of combating

hate speech and incitement to hatred;

- Government institutions, NGOs, and the private sector can leverage their respective capacities and resources to achieve greater scope and more significant results.

(Adapted from a listing in Hate Speech Explained: A Toolkit by Article 19, p. 50)



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