



## **COMMENT**

**on**

### **Prohibition of Hate Speech Bill, 2007 Kenya**

November 2009  
London

## I. Introduction

1. In this Comment, ARTICLE 19 sets out its concerns about the Prohibition of Hate Speech Bill, 2007 of Kenya (the “draft law”). The draft law was prepared in 2007 by members of the Kenya Human Rights Commission (“the KHRC”), a leading non-governmental organisation in Kenya whose mission it is to “promote, protect and enhance the realization of all human rights for all individuals and groups”.<sup>1</sup> ARTICLE 19 understands that there may well be significant public support for such a draft law in Kenya, particularly following the post-election violence of late 2008/2009. However, ARTICLE 19 believes that the draft law in its current form falls short of international human rights standards and raises serious concerns from the point of protection of the right to freedom of expression.
2. ARTICLE 19’s Comment of the draft law is informed by international human rights law, in particular the right to freedom of expression as protected by Article 19 of the Universal Declaration of Human Rights, as well as Articles 19 and 20 of the International Covenant on Civil and Political Rights (“ICCPR”), one of key international human rights treaties to which Kenya acceded on 1 May 1972.<sup>2</sup> As a result of ratifying the ICCPR, Kenya is not only bound as a matter of international law by the provisions of the ICCPR, but is obliged to give effect to that treaty through national legislation.<sup>3</sup> It is important to note that Kenya has made no reservation or declaration in relation to Article 20 of the ICCPR.
3. ARTICLE 19 also notes that Kenya has ratified the African Charter on Human and Peoples’ Rights on 15 July 1983 which also guarantees freedom of expression.<sup>4</sup> As of 26 May 2009, 53 states have ratified the African Charter, the primary reference point for the African system of human rights protection.
4. Although ARTICLE 19 relies on international human rights provisions on the right to freedom of expression in particular, this Comment is based on a comprehensive and coherent understanding of international human rights law as contained in other provisions of the ICCPR, including its provisions on equality.<sup>5</sup> In addition to such international human rights authorities, ARTICLE 19 also relies on *The Camden Principles on Freedom of Expression and Equality* (the “Camden Principles”), a progressive interpretation of international law and standards prepared by ARTICLE 19 in consultation with high-level inter-governmental officials, civil society representatives and academic experts.<sup>6</sup>

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<sup>1</sup> Kenya Human Rights Commission is an autonomous national human rights Institution established by an Act of Parliament in 2002. Its mandate is to further the protection and promotion of human rights in Kenya. For the mission statement of the KHRC, see <http://www.khrc.or.ke/default.asp>. The full text of the draft law is reproduced in the Annex to this Comment.

<sup>2</sup> See UN Treaty Collection [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)

<sup>3</sup> Articles 2(1)(b), 14(1) and 16, Vienna Convention on the Law of Treaties 1969. Kenya acceded to the ICCPR on 1 May 1972.

<sup>4</sup> See [http://www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf) Article 9 of the African Charter on Human and Peoples’ Rights states: “1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.” Kenya ratified the African Charter on Human and Peoples’ Rights on 23 January 1992.

<sup>5</sup> See notably Articles 2, 3, 14, 26 and 27 ICCPR.

<sup>6</sup> ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality* (April, 2009). See <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>

5. This Comment builds upon ARTICLE 19's work on the situation of human rights, in particular freedom of expression, in Kenya over recent years. This has encompassed work in support of the current process of constitutional review as well as statements on the role of the media during the post-election crisis as well as during and in the run-up to those elections that took place on 27 December 2007.<sup>7</sup>
6. ARTICLE 19 suggests that the draft law is adopted with the amendments recommended in this Comment. While ARTICLE 19 acknowledges that there is a need for the Kenyan state authorities to implement Kenya's international human rights obligations under Article 20 of the ICCPR by adopting legislation on hate speech, we argue that it should be firmly in line with international human rights law and best practice standards on freedom of expression and equality. As it currently stands, the draft law falls short of those standards in a number of ways. Most significantly, the draft law makes intention to promote hatred publicly against a target group optional rather than a necessary criterion for hate speech and also reverses the burden of proof so that the defence has to prove a lack of intention in hate speech offences.

## **II. The context of the draft law**

7. At the outset of this Comment, ARTICLE 19 acknowledges that the particular political context within which the draft law emerged and is currently being discussed. We view this context as especially relevant when considering the draft law because it serves to highlight some of the societal problems, such as inter-ethnic tensions, which the draft law may be used to address in Kenya.
8. ARTICLE 19 notes that the draft law was proposed *before* the post-election crisis of late 2007 and early 2008;<sup>8</sup> though proponents of the draft law may argue that there is an obvious and overwhelming need for such a law to prevent any new threats of the resurgence of ethnic violence. The post-election violence of 2007-2008 and its aftermath involved a range of very serious human rights violations as highlighted by the reports of a range of domestic, international and non-state actors including: the Commission of Inquiry into Post-Election Violence, a government established commission of inquiry

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<sup>7</sup> ARTICLE 19, "Kenya: ARTICLE 19 Calls for Expansion of Freedom of Expression Rights to be Integrated into the New Draft Constitution of Kenya" 15 May 2009 <http://www.article19.org/pdfs/press/kenya-article-19-calls-for-expansion-of-freedom-of-expression-rights-to-be-i.pdf>; ARTICLE 19, "Kenya: Civil Society Adopt the Machakos Declaration on Freedom of Expression in Kenya" 8 May 2009 <http://www.article19.org/pdfs/press/kenya-civil-society-adopt-the-machakos-declaration-on-freedom-of-expression-.pdf>; ARTICLE 19, "Kenya: ARTICLE 19 Welcomes Adoption of Truth and Reconciliation Commission Bill" 31 October 2008 <http://www.article19.org/pdfs/press/kenya-article-19-welcomes-adoption-of-truth-justice-and-reconciliation-commi.pdf>; ARTICLE 19, "Kenya: Fact-Finding Mission Reports Fear Factor In Kenyan Media Coverage of Political Crisis" 3 March 2008 <http://www.article19.org/pdfs/press/kenya-media-rpt-pr.pdf>; ARTICLE 19, International Media Support and Reporters Sans Frontieres, *How Far To Go? Kenya's Media Caught In the Turmoil Of A Failed Election* 3 March 2008 <http://www.article19.org/pdfs/publications/kenya-how-far-to-go.pdf>; ARTICLE 19, "ARTICLE 19 Condemns Muzzling Of Media" 3 January 2008 <http://www.article19.org/pdfs/press/kenya-muzzling-media-pr.pdf>; ARTICLE 19, Kenya Correspondents Association, The Kenyan Section of the International Commission of Jurists, *Guidebook on Election Coverage for Media Correspondents in Kenya* 5 December 2007 <http://www.article19.org/pdfs/tools/kenya-elections.pdf>

<sup>8</sup> For the history of the draft law, See *Preparation of "Hate Speech" Draft Legislation for the Kenya National Commission on Human Rights, Final Report*, 11 May 2007.

chaired by Justice Philip Waki (the “Waki Commission” or “CIPEV”);<sup>9</sup> the national human rights statutory institution, the Kenya National Commission on Human Rights (“KNCHR”);<sup>10</sup> international authorities, most notably the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston;<sup>11</sup> and prominent international human rights non-governmental organisations, such as Human Rights Watch.<sup>12</sup> Indeed, such has been the gravity of the post-election human rights violations that the materials compiled by the Waki Commission along with an envelope containing a list of suspects have been brought to the attention of the Prosecutor of the International Criminal Tribunal (“ICC”).<sup>13</sup>

9. The reports, in particular those produced by the Waki Commission and the KNCHR which have collected together many stories of human rights violations during the post-conflict crisis, emphasise incitement to violence as one of the main causes of the inter- and intra-ethnic violence. For example, the report by KNCHR gathered 1,102 statements recounting over 7,500 episodes of violence or incitement to violence.<sup>14</sup> One of the key findings of that report was that the violence “was largely instigated by politicians throughout the campaign period and during the violence itself via the use of incitement to hatred”.<sup>15</sup> In addition, it found that the “mass media, the short message service in mobile phones and the internet were used to propagate hate speech and in some instances, to

<sup>9</sup> The Report of the Waki Commission, available at [http://www.eastandard.net/downloads/Waki\\_Report.pdf](http://www.eastandard.net/downloads/Waki_Report.pdf). It was delivered to Prime Minister Raila Odinga on 15 October 2008.

<sup>10</sup> See the report of the KNCHR, 15 August 2008 (“KNCHR Report”), available at <http://www.knchr.org/dmdocuments/KNCHR%20doc.pdf>. The report indicates some of the rights which were violated. It states: “[t]he post-election violence heralded violation of fundamental human rights such as the right to life, the right not to be forcibly evicted or displaced from one’s home, the right to hold opinions without interference, the right to participate in public affairs and to vote in periodic elections, the right to property, the right to education, the prohibition not to engage in incitement to discrimination, and the right to freedom of movement”, at paragraph 22, p 5.

<sup>11</sup> See Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston on his Mission to Kenya, A/HRC/11/2/Add.6 26 May 2009. See also Statements of Special Rapporteur: Statement on his Mission, 25 February 2009, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/52DF4BE7194A7598C125756800539D79?opendocument>; Statement of Clarification in relation to Kenya, 2 July, available at <http://www2.ohchr.org/english/issues/executions/index.htm>; Statement Calling on Kenyan Government to Establish an Independent Investigation into the Assassination of Two Prominent human Rights Defenders, 6 March 2009, available at <http://www2.ohchr.org/english/press/newsFrameset-2.htm>; Statement Calling on Kenya to Stop Systematic Intimidation of Human Rights Defenders, 7 April 2009, available at <http://www2.ohchr.org/english/press/newsFrameset-2.htm>

<sup>12</sup> Chris Albin-Lackey and Ben Rawlence, “The Right Way for Kenya” *The Standard*, 30 January 2008; Human Rights Watch, *Ballots to Bullets, Organized Political Violence and Kenya’s Crisis of Governance*, <http://www.hrw.org/en/reports/2008/03/16/ballots-bullets>; Human Rights Watch, *All the Men Have Gone*, 27 June 2008 <http://www.hrw.org/en/reports/2008/07/27/all-men-have-gone-0>; Human Rights Watch, World Report, Chapter on Kenya <http://www.hrw.org/en/world-report/2009/kenya>

<sup>13</sup> ICC, “ICC Prosecutor Receives Materials on Post-Election Violence in Kenya”, 16 July 2009 ICC-OTP-20090716-PR438, available at [http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/icc%20prosecutor%20receives%20materials%20on%20post\\_election%20violence%20in%20kenya](http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/icc%20prosecutor%20receives%20materials%20on%20post_election%20violence%20in%20kenya). The situation in Kenya has been under preliminary examination by the Office of the Prosecutor since 2008. At this stage, no decision has been made whether or not to open an investigation.

<sup>14</sup> KNCHR Report, *supra*note 10, paragraph 11, p. 10.

<sup>15</sup> KNCHR Report, *supra*note 10, p 3 . See also paragraph 207 at pp 58, paragraph 262 at 71. The report states: “[s]ome of the statements made by the politicians especially during the campaign period incited the local community to commit violent acts following the announcement of the election results”; paragraph 468 at 121. See findings in detail paragraphs 601-609 at pp 148-149.

incite acts of violence” in both the pre- and post-election period<sup>16</sup>. The KNCHR concluded that such incidents engaged and violated international human rights law, in particular Article 20 of the ICCPR. It stated that:

[s]uch conduct is inconsistent with Article 20 of the International Covenant on Civil and Political Rights prohibits advocacy of national, racial or religious hatred that leads to incitement to discrimination, hostility or violence...The Convention obliges States not to engage in conduct that would ‘sponsor, defend or support’ ethnic discrimination. States are obliged to protect the security of the person ‘against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.’ Clearly the advocacy of certain leaders, individuals and institutions such as radio stations may have resulted in hostility and violence against certain ethnic groups throughout the country. In Central province, Kikuyus targeted the Luo and Kalenjin communities; in the Rift Valley, the Kalenjin targeted the Kikuyu, Kisii and Kamba in particular while in Western and Coast provinces, the Kikuyu were targeted. In all these instances, the State failed in meeting its obligation to ensure individuals were not targeted for violence because of their ethnicity. Further, the incitement to this ethnically charged violence constitutes a violation of the prohibition of advocacy of hatred and it ought to be further investigated.<sup>17</sup>

10. Similarly, the Waki Commission reported that politicians, local elites as well as the media contributed to the building up of tensions in the lead up to the elections through “inciteful utterances” and the “incitement to and the organisation of violence”<sup>18</sup>. These examples of incitement included the “circulation of malicious cell-phone text messages ... propagated hate speech ...”, statements on the “denigration of individual political actors and their affiliate political parties” and “demeaning references ...to persons of other tribes”.<sup>19</sup> As to the role of the media, while many individuals told the Waki Commission that the radio station KASS FM had “contributed to a climate of hate, negative ethnicity, and having incited violence in the Rift Valley”,<sup>20</sup> the Chairman of Editors Guild, Macharia Gaitho, said that the media had behaved responsibly in lessening tensions and used discretion in deciding what it printed.<sup>21</sup> The Waki Commission showed that the National Security Intelligence Service (NISS) had predicted even before the crisis erupted that “violence could engulf different parts of the country if cases of incitement are not legally addressed as they emerge”<sup>22</sup> and that “neither the provincial administration nor the police investigated claims of incitement by politicians or media stations”.<sup>23</sup> It concluded that

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<sup>16</sup> *Ibid.*, paragraph 271 at p74; paragraph 558 at p 141.

<sup>17</sup> *Ibid.*, paragraph 687 at p 163.

<sup>18</sup> Waki Commission Report, *supranote* 9, p 68-71.

<sup>19</sup> Waki Commission Report, *supranote* 9, p 216-217.

<sup>20</sup> Waki Commission Report, *supranote* 9, p 295. ; KNCHR Report, *supranote* 10, paragraph 556, 140. Paragraph 692 of the KNCHR report also states: “the information investigators gathered of incitement particularly by Rift Valley politicians as well as the virulent ethnic nationalism and hatred preached in ethnic radio stations prior to the elections in addition to a very closely contested election set the atmosphere of mistrust of the government and suspicions and hatreds among the various ethnic communities in Kenya that set the stage against which the violence eventually occurred. Notably, information relating to oathings and other preparations such as the timing of circumcision ceremonies as noted in the chapter on patterns and trends of violence strongly suggest that the violence was neither spontaneous nor abrupt.”

<sup>21</sup> Waki Commission Report, *supranote* 9, p 287.

<sup>22</sup> Waki Commission Report, *supranote* 9, p 58.

<sup>23</sup> Waki Commission Report, *supranote* 9, p 63. The Commission found that administrators were in fear of the general population as well as the political leadership and therefore “not a concerted effort to arrest and prosecute those who are alleged to have incited, funded and promoted violence. p 457, Waki Commission Report above.

there must be “an end to this cowardice and pious sense of self-preservation in public service”.<sup>24</sup>

11. Thus, ARTICLE 19 acknowledges that the post-election violence that gripped the country in late 2007 and early 2008 appears to have created a compelling sense of momentum for the establishment of at least a proper legislative framework to address underlying social tensions that precipitated the humanitarian crisis. The constitutional reform process currently in progress under the Committee of Experts on Constitutional Review is intended to “help prevent a recurrence of the crisis and violence experienced after the 2007 elections”.<sup>25</sup>

### **III. Analysis of the Prohibition of Hate Speech Bill, 2007**

12. The draft law is structured in fourteen provisions which are entitled the following: 1. Short title; 2. Interpretation; 3. Objects of the Act; 4. Use of words or behaviour or publishing written material; 5. Broadcast intended to or likely to stir up hatred; 6. Preparation and possession of material likely to stir up; 7. Exemptions; 8. Penalties; 9. Offences by corporate bodies; 10. Search and seizure; 11. Powers of arrest; 12. Forfeiture; 13. Amendment of Cap.63; 14. Application of the Act. In addition, there is a “Memorandum of Objects and Reasons” at the end of these fourteen sections.

13. At the beginning of this analysis, ARTICLE 19 notes three basic features of the draft law as a piece of criminal legislation concerning hate speech and the claims that underlie them. These fundamental characteristics, and the claims underlying them, are borne in mind when considering the substantive of provisions. *First*, according to its title, the draft law concerns “hate speech, rather than the broader category “hate crimes” which states also often prohibit. According to one definition, a hate crime is:

A) any criminal offence, including offences against persons or property, where the victim, premises, or target of the offence is selected because of a real or perceived connection, attachment, affiliation, support, or membership of a group as defined in part B.

B) A group may be based upon a characteristic common to its members, such as real or perceived “race”, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or other similar factor.<sup>26</sup>

14. In contrast, hate speech should be taken to refer to types of speech which are prohibited under Article 20 of the ICCPR, which is indicated above. Hate speech may be taken to refer to:

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<sup>24</sup>Waki Commission Report, *supranote* 9, p 460..

<sup>25</sup> See the Committee of Experts on Constitutional Review, available at <http://www.coekenya.go.ke/index.php/about-us>; Eric Ombok, “Kenya Needs New Constitution in 18 Months, Annan says”, Bloomberg Press, 5 October 2009, available at <http://www.bloomberg.com/apps/news?pid=20601116&sid=aLU6hsdG6iQQ>

<sup>26</sup> This is the working definition of the OSCE Office for Democratic Institutions and Human Rights which is indicated in OSCE/ODIHR, *Hate Crimes in the OSCE Region – Incidents and Responses Annual Report for 2007*, October 2008 at p 11. See also definition in OSCE (ODIHR), *Hate Crimes: A Practical Guide* (OSCE/ODIHR, 2009) p 16.

[f]orms of expression that are motivated by, demonstrate or encourage hostility towards a group — or a person because of their membership of that group ... Since hate speech may encourage or accompany hate crimes, the two concepts are interlinked.<sup>27</sup>

15. *Second*, the draft law is a piece of *criminal* legislation on hate speech. The criminal prohibition of incitement to discrimination, hostility and violence is a feature of domestic legislation which Article 20 of the ICCPR actually requires. This is for good reason: responses to hate speech “should be rooted in the criminal law so as not to be used simply to suppress unpopular ideas”.<sup>28</sup> The criminal law is presumed to come with procedural safeguards, such as those relating to fair trial, including the burden of proof.
16. *Third and finally*, there are two essential elements of the offence of hate speech – or rather, in terms of Article 20 of the ICCPR, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence – that the prosecution should be required to prove in the context of cases brought under domestic hate legislation. An accused must be shown to have had the necessary bias motives and he or she must also be shown to have committed particular acts before being convicted of a hate speech offence, from the perspective of international human rights law. More specifically, he or she must be shown to have: first, intended to promote hatred towards a target group; second, made statements about national, racial or religious groups which have created an imminent risk of discrimination, hostility or violence against persons belonging to those groups.<sup>29</sup>

#### **A. Purpose, Legal Basis, Definitions**

##### *i. Purpose*

17. The first paragraph of the “Memorandum of Objects and Reasons” indicates the overall purpose of this draft law is “to make provision for the prohibition and criminalization of hate speech and related forms of incitement of the public along ethnic, racial, religious or similar discriminatory criteria with the intention of invoking hatred or violence against any section of the public.” The general purpose of the draft bill as set out here is obviously laudable. However, to fully reflect international human rights law, in particular Article 20(2) of the ICCPR, the first sentence should state that the draft law “is to make provision for prohibition and criminalization of hate speech and related forms of incitement of the public along ethnic, racial, religious or similar discriminatory criteria with the intention of invoking *discrimination, hostility or violence* against any section of the public”.
18. The first paragraph of the Memorandum goes on to state that the draft law “is premised on the experience that hate speech and other forms of incitement to violence involve a violation of the right to be free from discrimination”. ARTICLE 19 supports the underlying premise and we note that instances of “hate speech” may go beyond incitement on ethnic, racial or religious grounds, but may include incitement on other grounds of discrimination. We therefore support the definition of “section of the public” indicated in

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<sup>27</sup> See OSCE (ODIHR), *Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region* (OSCE/ODIHR, 2009) p 17.

<sup>28</sup> See OSCE, *Final Report, OSCE Supplementary Human Dimension Meeting on “Hate Crimes – Effective Implementation of Legislation”*, 4-May 2009 at 4.

<sup>29</sup> See Principle 12 of the Camden Principles.

Section 2 of the draft law which defines the term in non-exhaustive terms as “any group identifiable by - (a) race, ethnic or social origin, religion, conscience, belief, culture, language, gender, marital status, age, disability or birth; or (b) any other characteristic where discrimination on that other characteristic – (i) causes or perpetuates systemic disadvantage; or (ii) undermines human dignity; or adversely undermines the equal enjoyment of an individual’s rights and freedoms”. At the same time, in our view, given that a range of different grounds of discrimination beyond race, religion and ethnic origin appear in (a), it is only reasonable and appropriate that that provision should also expressly identify sexual orientation as a grounds upon which an individual may face discrimination. After all, sexual orientation remains a major ground of discrimination, hostility and violence in Kenya<sup>30</sup> and beyond. Moreover, there is a growing global movement towards recognition of sexual orientation as a legitimate and express ground of discrimination in constitutions and legislation at the national and supranational level.<sup>31</sup>

19. It is somewhat confusing that the “Objects” of the draft law appear in Section 3, while the Memorandum of Objects and Reasons deal with the purposes draft law at the end of the end. This confusion may become especially significant in the adjudication of cases under the draft law. This is because a judge or court may attach lesser weight to the provisions contained in the Memorandum as compared with those contained in Section 3 when interpreting the aims of the draft law. ARTICLE 19 points out that the purpose of the draft law is defined in the Memorandum in rather different terms to the objects in Section 3, although there is obvious overlap. To eliminate any confusion about the goals of the draft law, we suggest that the first paragraph of the Memorandum on the purpose of the draft law should be included as the first substantive provision of the draft law. In other words, a provision on the “purpose” should precede the provision on “objects” which is currently numbered as Section 3.

**Recommendation:** The first sentence of the Memorandum of Objects and Reasons should state that the purpose of the draft law is to “make provision for prohibition and criminalization of hate speech and related forms of incitement of the public along ethnic, racial, religious or similar discriminatory criteria with the intention of invoking discrimination, hostility or violence against section of the public”.

**Recommendation:** The grounds of discrimination identified in Section 2(a) of the draft law should include “sexual orientation and identity”.

**Recommendation:** The first paragraph of the Memorandum of Objects and Reasons should be moved to the beginning of the draft law as its first substantive provision.

## *ii. Objects*

20. The objects of the draft law which are contained within Section 3 are clearly connected to the overall purpose discussed above. According to this provision, the objects of the draft law are four-fold:

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<sup>30</sup> Article 162 of Kenya's criminal code, an inheritance from British colonialism, punishes consensual homosexual conduct with up to 14 years' imprisonment. See Human Rights Watch, *World Report 2009: Country Chapter on Kenya* January 2009 <http://www.hrw.org/en/node/79219>

<sup>31</sup> See, for example, Section 9 of the Constitution of the Republic of South Africa and Article 13 of the Treaty establishing the European Communities.



- (1) To foster national unity by promoting responsible exercise of the freedom of expression in political and other public discourse;
- (2) To preserve public order within Kenya;
- (3) To preserve and promote the ethnic and cultural diversity of Kenya; and
- (4) To promote a democratic society.

21. ARTICLE 19 views the objects identified in (2)-(3) as important aims for any law on the prohibition of hate speech. Indeed, under Article 19 of the ICCPR, an interference with the right to freedom of expression may be justified if it is for the protection of legitimate aims, including public order, provided that the restriction is necessary to secure that objective and is proportionate.<sup>32</sup> The preservation and promotion of ethnic and cultural diversity and a democratic society should be the direct goals, or at least the long-term objectives, of any legal and policy framework for the protection of the rights to freedom of expression and equality.<sup>33</sup> It is therefore valuable that the draft law states these objects here.
22. In relation to Section 3(1), ARTICLE 19 acknowledges that freedom of expression as protected by Article 19 of the ICCPR “carries with it special ... responsibilities” and may “be subject to certain restrictions” and recalls that “these shall only be such as are provided by law and are necessary”. However, ARTICLE 19 is concerned about the particular way in which Section 3(1) refers to “responsibility”. There is no mention of the limitations on restrictions on freedom of expression as in Article 19 of the ICCPR in this, the first object of the draft law. But beyond this obvious fact, there are a number of other problems with this provision.
23. *First*, it is difficult to know what kinds of speech “in political and public discourse” may be classified as “responsible” and what kinds of such speech may be categorised as “irresponsible”. *Second*, and relatedly, the parameters of acceptable speech in the field of political discourse, with respect to criticism of politicians in particular, are actually *wider* than those that might be imposed in relation to the criticism of private individuals. As the European Court of Human Rights stated:
- ... the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.<sup>34</sup>
24. This reasoning has been followed by other human rights bodies.<sup>35</sup> That politicians must tolerate harsh *words* as well as harsh criticism has also been confirmed by the European Court of Human Rights.<sup>36</sup> That regional human rights court has made it clear that the wider margin of criticism applies to all public officials, not only politicians.<sup>37</sup>

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<sup>32</sup> *Lingens v Austria*, Application No 9815/82, Judgment of 8 July 1986, paras 39-40 (European Court of Human Rights).

<sup>33</sup> See Principles 2, 3, 5, 11 and 12 of the Camden Principles.

<sup>34</sup> *Lingens v Austria*, 24 June 1986, Application No. 9815/82 (European Court of Human Rights), para 42.

<sup>35</sup> See, for example, *Canese v Paraguay*, 31 August 2004, Series C 111 (Inter-American Court of Human Rights) and 23 January 2006, Communication No 1180/2003, UN Doc CCPR/C/85/D/1180/2003, para. 7.2 (UN Human Rights Committee).

<sup>36</sup> After Jörg Haider, leader of the Austrian Freedom Party, had delivered a speech praising Austrian soldiers who had fought in the Wehrmacht and SS during the Second World War, a newspaper ran an article under the

25. *Third*, the provision makes unreasonable assumptions in suggesting that national unity may actually be fostered by promoting the “responsible exercise of freedom of expression in political and public discourse”. The causal link between national unity and the “responsible” exercise of political speech is difficult to make. Even if it were possible to adequately define and distinguish “responsible” and “irresponsible” speech, it is not clear why “irresponsible” speech may actually fragment national unity. One could easily argue that political or public speech which may be classed as “irresponsible” may equally rally and unify the public in opposition against it.

**Recommendation: Section 3(1) should be amended to state that the first object of the draft law is to “to foster national unity by promoting equality and freedom of expression as mutually reinforcing human rights”.**

*iii. Constitutional and international legal basis*

26. ARTICLE 19 notes that the draft law is not expressly based upon any constitutional provision. Although this should not be strictly necessary, an express reference to any relevant provisions of the Kenyan Constitution on the right to freedom of expression and its limitations (including any protections against hate speech) and on equality should be included in a preambular section because they would serve to emphasise the domestic constitutional foundations of the draft law which effectively establishes a clear legislative framework for realising freedom of expression and the right to equality for Kenya.<sup>38</sup> Once a new Constitution for Kenya is adopted, the draft law should obviously refer to relevant provisions of the new Constitution on the right to freedom of expression and equality.

27. ARTICLE 19 would also welcome express references to relevant provisions of international human rights law, in particular Articles 19 and 20 of the ICCPR, as these provisions set out the international legal standards which the Kenyan state authorities should implement domestically.

**Recommendation: The Preamble of the draft law should be expanded to refer to the relevant provisions of the Kenyan Constitution on equality and freedom of expression and Articles 19 and 20 of the ICCPR as legal sources of the draft law.**

*iv. Definition of “Hate Speech”*

28. Section 1 of the draft law indicates that the title of the legislation once adopted shall be the “Prohibition of Hate Speech Act”. Section 2 then defines various provisions of the draft law. Given the titular purpose of the draft law and the definitions of key terms that follow, it is somewhat surprising that the draft law fails to define the concept of “hate

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title “P.S.: ‘idiot,’ not ‘Nazi’.” The Court found that the use of the word “idiot” to describe Haider did not overstep the boundaries of what should be permissible in a democracy. See, for example, *Oberschlick v Austria* (No 2), 1 July 1997, Application No 20834/92, para 35. See also *Dichand and others v Austria*, 25 February 2002, Application No 29271/95.

<sup>37</sup> See, for example, *Thoma v Luxembourg*, 29 March 2001, Application No 38432/97, para 47.

<sup>38</sup> ARTICLE 19, “Kenya: ARTICLE 19 Calls for Expansion of Freedom of Expression Rights to be Integrated into the New Draft Constitution of Kenya” 15 May 2009 <http://www.article19.org/pdfs/press/kenya-article-19-calls-for-expansion-of-freedom-of-expression-rights-to-be-i.pdf>

speech” as such. ARTICLE 19 acknowledges that Section 2 does define “stir[ring] up hatred” as those activities which, among other things, “threaten, abuse or otherwise incite harm or provoke violence against any section of the public”. In ARTICLE 19’s opinion, Section 2 of the draft law should ideally define not only the actions (verbs) which might be caught by the draft law, but also the concept of “hate speech” itself as that is the subject (noun) of the draft law.

29. In our opinion the definition of “hate speech” should be “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” to properly reflect Article 20(2) of the ICCPR. We also believe that Section 2 of the draft law can be further improved by elaborating upon key concepts within that definition of “hate speech” in the Camden Principles, in particular Principle 12 which states:

- i. The terms “hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group
- ii. The term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group.
- iii. The term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
- iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

**Recommendation: Section 2 of the draft law should define hate speech in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. It should state that hate speech is “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.**

## **B. Offences and defences**

30. The central provisions of the draft law are contained in Sections 4-6 and concern the offences which are criminalised by the draft law. The Memorandum of Objects and Reasons at the end of the draft law states that: Section 4 “seeks to make it an offence to publish or distribute written material, to use words, behave or display written material if the written material, words, behaviour, visual images or sounds, as the case may be, are intended or, having regard to all the circumstances it is a foreseeable consequence that they will stir up hatred against a section of the public”; Section 5 “prescribes offences related to dissemination of hate propaganda and incitement to hatred or violence through means of public broadcast”; and Section 6 “seeks to create an offence of possession of material or any recording not held for private use which is intended to or, considering all the circumstances, is likely to result in stirring up of hatred”. These sections also provide for defences to each of the offences. This Comment discusses each of these sets of offences in more detail below.

### *i. Use of words, behaviour or publishing written material*

31. Section 4(1) makes it an offence to “publish or distribute written material”, “use of words, behave or display written material – (i) in any place other than inside a dwelling house, or (ii) inside a dwelling house, so that the words behaviour or material are heard or seen ...

by persons outside”, “distribute, show or play a recording of visual images or sounds if the written material, words or behaviour, visual images or sounds ... are intended or having regard to all the circumstances are such that the foreseeable consequence would be to stir up hatred”.

32. In ARTICLE 19’s opinion, the activities indicated in Section 4(1) should only be prescribed if they constitute hate speech from the perspective of Principle 12 of the Camden Principles on Freedom of Expression and Equality which is set out above. Section 4(1) falls short of the standards contained in Principle 12 in several ways. *First*, there is no definite requirement for there to be an intention to promote hatred publicly towards a target group in Section 4(1)(ii). Instead, Section 4(1) requires an intention to stir up hatred *or* that the stirring up of hatred is a foreseeable consequence of the activity. *Second*, there is no requirement in Section 4(1) that the activity concerned creates an *imminent risk* of discrimination, hostility or violence against persons belonging to the target group. The draft law instead refers to the different and much lower threshold of the foreseeability of hatred being stirred up as already indicated, but this is presented as an alternative instead of additional to the requirement of intent. *Third*, Section 4(1)(b) focuses on words, behaviour or displays of written material outside or inside a dwelling house if those words, behaviour or materials are heard or seen outside the dwelling house. Yet, the location or venue of hate speech should be irrelevant and is not a criterion for reaching the threshold of hate speech under Article 20 of the ICCPR or Principle 12 of the Camden Principles. All that is required is that there is advocacy of hatred towards a target group which creates an imminent risk of discrimination, hostility or violence against persons belonging to that group.
33. In addition, one might question whether this, a draft law prohibiting hate speech, is the proper place for prescribing behaviour (other than speech) – a term which would presumably cover physical threats, harassment or violent assaults – that would stir up hatred. As it currently appears within Section 4, the term “behaviour” is rather confusing. Is this draft law about hate crimes more generally than simply hate speech (incitement)? In our view, hate crimes beyond forms of expression which stirs up hatred should not be confusedly prescribed in Section 4, but should be covered in its own provision within the draft law in recognition of the overlap between hate speech and other forms of behaviour which stirs up hatred, or ideally in a different piece of criminal legislation entirely.<sup>39</sup>
34. In terms of defences, Section 4 provides several possibilities: *first*, “if the accused person is not shown to have intended to stir up hatred against a section of the public, it shall be a defence for the accused person to prove not having been aware of the content of the material or recording concerned and not have having suspected and having had no reason to suspect, that the material or recording might stir up hatred” (Section 4(2)). *Second*, if the person can “prove being inside a dwelling house at the relevant time and having had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the dwelling house” (Section 4(3)(a)). *Third*, “if it is not shown that such accused person had intention to stir up hatred, to prove not to have intended that the words, behaviour or material concerned would stir up hatred and not to have been aware that the words, behaviour or material might stir up hatred or provoke violence” (but

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<sup>39</sup> The OSCE has stated recently that “[t]here is also a common confusion between incitement (hate speech), hate crimes and discrimination which continues to be a challenge in many countries”. However, the OSCE reported that there is “no consensus on how to approach hate speech”. See OSCE, *Final Report, OSCE Supplementary Human Dimension Meeting on “Hate Crimes – Effective Implementation of Legislation”*, 4-May 2009 at 7.

this defence cannot be available “where a dwelling house is used as a public place”) (Section 4(3)(b)).

35. In relation to Sections 4(2) and 4(3)(b), ARTICLE 19 emphasises that intention to promote hatred publicly should be a requirement for an offence of hate speech and that the absence of intention should be a sufficient defence to a charge of hate speech in itself. In hate speech cases, therefore, it should be for the prosecution to prove such an intention, rather than for the defence to prove the absence of such an intention. Yet both Sections 4(2) and 4(3)(b) make the absence of demonstrable intention of the accused a pre-requisite for a defence, rather than a defence in its own right. If an accused is not shown to have intended to stir up hatred against a section of the public, these provisions *only* accord a defence if, in the case of Section 4(2), the accused can prove that he or she was not aware of the content of the material or recording or did not suspect or had no reason to suspect that the material might stir up hatred, or in the case of Section 4(3)(b), the accused can prove not to have intended the words, behaviour, or material concerned would stir up hatred and not to have been aware that the words, behaviour or material might stir up hatred or provoke violence. Thus, if there a lack of intention to stir up hatred, these provisions shift the burden of proof – which is ordinarily upon the prosecution in criminal cases to prove beyond reasonable doubt that the defendant committed the crime with which he or she has been accused – to the accused or defendant to prove a lack of awareness or reason to suspect. These provisions thereby impose severely high burdens on the defence such that it would be very difficult to defend a hate speech accusation or charge brought under the draft law. As indicated earlier, the absence of intention to promote hatred publicly should be enough of a defence to a charge brought under these provisions.
36. Section 4(3)(a) requires an accused to prove that he or she was inside a dwelling house and had no reason to believe that the words, behaviour or material would be seen by a person outside the dwelling house. In this way, it also shifts the burden of proof to the defence. The defences, indicated in both Sections 4(3)(a) and (b), are unavailable if a dwelling house is used as a public place. In ARTICLE 19’s opinion, these provisions serve do not conform the standards for properly defined hate speech offences and defences by referring “the dwelling house”. As indicated above, under international human rights law, the venue of the hate speech is irrelevant to establishing whether a defence may be relied upon, just as it is irrelevant in determining whether an offence has been committed in the first place. The effect of the references to “dwelling house” in the draft law simply also serve to obfuscate the scope of the draft law.

**Recommendation:** Section 4(1) should be amended in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. More specifically, Section 4(1) should require: (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group. Additionally, Section 4(1) should exclude any reference to the venue as an irrelevant criterion for reaching the threshold of hate speech.

**Recommendation:** The word “behave” should be deleted from Section 4(1)(b).

**Recommendation:** Sections 4(2) and 4(3)(b) should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element

**of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for an accused person if it is not shown (by the prosecution) that he/she had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused had intention to promote hatred publicly against the target group.**

**Recommendation: Section 4(3)(a) should be omitted.**

*ii. Broadcast intended or likely to stir up hatred*

37. In a similar fashion to Section 4(1), Section 5(1) prescribes the broadcast of items involving visual images or sounds intended, or those whose foreseeable consequence would be, to stir up hatred “if there was the intention to stir up hatred or, having regard to all the circumstances, the foreseeable consequence would be to stir up hatred thereby”. Persons who may be found guilty of such offences are set out in Section 5(2) are: “(a) the person providing the broadcasting service concerned; (b) any person by whom the item concerned is produced or directed; and (c) any person whose words or behaviour in the item concerned are intended, or considering the circumstances foreseeable consequence would be, to stir up hatred. As above, ARTICLE 19 emphasises that intention to promote hatred publicly should be an essential criteria for any hate speech offence. Any “foreseeable consequences” of hatred being stirred should not be an alternative to the requirement of such intention. The additional criteria of imminent risk of discrimination, hostility or violence against persons belonging to the target group needs also to be met before a hate speech offence is established.
38. Section 5(3) provides that if a person is not shown to have intended to stir up hatred, a defence may only be invoked if such a person is able to prove “(a) not to have had any knowledge and reason to suspect that the item concerned would involve the material to which the offence relates”; or (b) in a case other than one to which paragraph (a) relates, that, having regard to the circumstances in which the item was broadcast, it was not reasonably practicable for the person to secure the removal of the material aforesaid or to prevent the broadcast”. Section 5(3)(a) is rather similar to earlier defences so ARTICLE 19 repeats its concerns about the difficulty for the defence or the accused being able to prove the absence of any knowledge or reason to suspect. Both Section 5(3)(a) and (b) reverse the burden of proof and impose additional criteria in circumstances when a person is not shown to have intended to stir up hatred which should be a defence in its own right.
39. Section 5(4)-(6) provide for additional defences where an individual can prove not to have any knowledge and reason to suspect: that the item would be broadcast or that in the circumstances in which the item would be broadcast it was a foreseeable consequence that it would stir up hatred (in proceedings against producers or directors) (Section 5(4)); that an item involving the use of the material to which the offence relates would be broadcast or the circumstances in which such an item would be broadcast might result in stirring up hatred (in proceedings against persons referred to in Section 5(2)(c)) (Section 5(5)); or that material to which the offence relates would stir up hatred. Again, the reversal of the burden of proof to impose the burden on the defence to prove these facts is problematic.
40. Sections 5(7) and (8) concern the evidence which may be submitted in relation to an alleged offence under Section 5. According to Section 5(7), “[i]n any proceedings for an

offence under this section to have been committed in respect of an item: (a) a script on which the item was based shall be evidence of what was included in the item and of the manner in which the item or any part of it was performed; and (b) if such a script is given in evidence on behalf of any party to the proceedings, then, except in so far as the contrary is shown, whether by evidence given on behalf of the same or any other party, the item shall be taken to have been performed in accordance with that script”. Section 5(8) states that “script ... means the text of the item (whether expressed in words or in musical or other notation) together with any directions for its performance, whether contained in a single document or not”.

**Recommendation: Section 5(1) should be amended in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. More specifically, Section 5(1) should require: (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group. Accordingly, Section 5(1) should exclude any reference to “foreseeable consequence”.**

**Recommendation: Sections 5(3)-(6) should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for an accused person if it is not shown (by the prosecution) that he/she had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused had intention to promote hatred publicly against the target group.**

*iii. Preparation and possession of material likely to stir up hatred*

41. Section 6(1) makes it an offence for a person: “(a) to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in Kenya or elsewhere, whether by the person or by another; or (b) to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in Kenya or elsewhere, whether by the person or by another; if the material or recording is intended to stir up hatred, or having regard to all the circumstances, including such distribution, display, broadcasting, showing, playing or other publication thereof, that the foreseeable consequence would be to stir up hatred.” Like other provisions on offences discussed above, the problem with this provision is that the intention to promote hatred publicly is not a requirement but is presented as an alternative to the foreseeability of stirring up hatred for an offence to be established.

42. Section 6(2) states that “[i]n proceedings under this section, if the accused person is not shown to have intended to stir up hatred, it shall be a defence for the accused person to prove not having been aware of the content of the material or recording concerned and that such person did not suspect, and had no reason to suspect, that the material or recording may, in the circumstances stir up hatred.” Like other defences before it, this provision shifts the burden of proof to the defence where an accused person is shown not to have intended to stir up hatred and requires the defence to prove that the accused was not aware, did not suspect and had no reason to suspect that the material may stir up

hatred. This is an onerous burden on the defence and, in any event, an unnecessary requirement since hate speech requires intention to promote hatred.

43. Under Section 6(3) in circumstances where it is “proved that the accused person was in possession of material or a recording such as is referred to in subsection (1) and it is reasonable to assume that the material or recording was not intended for the personal use of the accused person, the accused person shall be presumed, until the contrary is proved, to have been in possession of the material or recording in contravention of sub-section (1)”. This further marginalises the role played by intention to promote hatred publicly even more so than earlier defences, establishing a presumption in favour of having committed a criminal offence under the law on the basis of a “reasonable assumption that the material or recording was not intended for the personal use of the accused”. This might mean that a film which considers the dangers of racism and religious hostility might fall foul of this provision if it shows instances of hatred. On the other hand, it might be argued that the system of exceptions would ensure that such a film, which would be intended to promote debate on ethnic issues, would remain permissible under the draft law. The system of exemptions is discussed below.

**Recommendation: Section 6(1) should be amended in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. More specifically, Section 6(1) should require: (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group. Accordingly, Section 6(1) should exclude any reference to “foreseeable consequence”.**

**Recommendation: Sections 6(2)-(4) should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for an accused person if it is not shown (by the prosecution) that he/she had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused had intention to promote hatred publicly against the target group.**

### **C. Exemptions**

44. Section 7 of the draft law provides for three types of exemptions. “[A]nything said or done reasonably and in good faith: (1) in the performance, exhibition or distribution of an artistic work; (2) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (3) in making or publishing a fair and accurate report of any event or matter of public interest”.
45. This regime of “exceptions” is welcome particularly because other parts of the draft law clearly overstep the definition of hate speech under Article 20 of the ICCPR with regard to the requirement of intention in particular. At the same time, it may be argued, that such a regime of exemptions should not serve to address the shortfalls of the draft law; after all, such a system would not be necessary if the draft law was really carefully tailored to meet its objects.



46. In any event, these provisions reflect the position that has been reached in international jurisprudence on relation to forms of expression which have a clear public value in exposing racial discrimination. For example, in the case of a journalist who had been convicted of hate speech by a domestic court after he included racist statements made by disaffected youths in a television programme, the European Court of Human Rights held that his conviction constituted an infringement of the right to freedom of expression, on the basis that the broadcast had clearly been designed to expose and analyse the attitude of racist youths, not to promote their point of view. According to the European Court, it was a serious programme, intended for a well-informed audience, and made a valuable contribution to public debate.<sup>40</sup>

#### **D. Penalties**

47. Section 8 of the draft law provides that “a person guilty of an offence under this Act shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both”. The maximum fine equates to approximately €8,900, which, in ARTICLE 19’s opinion, may be viewed as excessive for a country whose GDP per capita is estimated as being about US\$1,600.<sup>41</sup> A maximum criminal sentence of up to 10 years may also be viewed as excessive.

48. It should be noted that in cases involving any form of expression, the imposition of a penalty whatever the character of that sanction engages the right to freedom of expression. This restricts the type of penalties or sanctions that may be imposed, their amount in the case of fines or length in the case of custodial sentences. Under international law, it is well established that an excessive sanction, even for otherwise legitimate restrictions, represents a breach of the right to freedom of expression in its own right. The European Court on Human Rights, for example, has noted that excessive sanctions exert an unacceptable chilling effect on freedom of expression. In view of this, ARTICLE 19 considers that further safeguards should be included within Section 8 of the draft law, to ensure that the penalties imposed are proportionate and in compliance with international standards concerning the protection of the right to freedom of expression.

**Recommendation: Section 8 should be amended to state that a person guilty of an offence under the draft law shall be liable to a penalty which is proportionate to the offence.**

#### **E. Offences by corporate bodies**

49. Section 9 of the draft law provides that “[w]here an offence prescribed in this Act has been committed by a body corporate, such a body corporate and or every person charged with, or concerned or acting in control of such corporate body shall be guilty of that offence unless it is proved by such person that through no act or omission by the person, such person was not aware that the offence was being or was intended or about to be committed, or that the person took all reasonable steps to prevent its commission.”

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<sup>40</sup> *Jersild v Denmark*, 23 September 1994, Application No 15890/89 (European Court of Human Rights) paras 33-35.

<sup>41</sup> CIA World Factbook on Kenya <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>

50. This provision positively recognises the potentially influential role of corporations in promoting hate speech and the obligations of non-state actors in relation to equality. In doing so it facilitates findings of corporate criminal liability in cases where it might be difficult to prove intention. However, we are concerned about whether it is necessary to impose a burden once again on the defence to show that persons controlling the corporation were not aware that an offence was being or was intended or about to be committed, or that the person took all reasonable steps to prevent its commission.

**Recommendation: Sections 9 should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for accused persons controlling the corporation if it is not shown (by the prosecution) that they had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused persons controlling the corporation had intention to promote hatred publicly against the target group.**

#### **F. Search and seizure**

51. According to Section 10, if “a Magistrate is satisfied upon the sworn evidence of a police officer not below the rank of Inspector that there are reasonable grounds for suspecting that material or a script or recording the possession of which would be in contravention of this Act is in or at any premises or other place, the magistrate may issue a warrant authorising members of the police force, at any time or times within one month from the date of the issue of the warrant, on production if so requested of the warrant, to enter and search the premises or other place specified in the warrant and to seize any such recording, material or script as aforesaid found”.

52. ARTICLE 19 notes that the power to issue to issue a search and seizure warrant for the mere possession of material “in contravention of this Act” is far-reaching – not least because all that is required is evidence from a police officer that there are reasonable grounds for suspecting that offensive material is held at particular premises. In other words, search and seizure requires no previous accusation, charge, let alone conviction of an individual. Searches and seizures of property, including business premises, are clearly possible in the absence of such pre-existing criminal processes (in relation to allegations of anti-competitive practices, for example).<sup>42</sup> However, such searches and seizures clearly need to be respectful of other human rights, in particular human rights to home and private life as well as the protection of property.

**Recommendation: Section 10 should indicate that procedures for searches of property and seizures of material under the draft law should respect the right to home and private life and the protection of property.**

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<sup>42</sup> In *Niemetz v Germany*, the European Court of Human Rights ruled that the right to respect for private life in Article 8 of the European Convention on Human Rights did extend to business premises, stating that “to interpret the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities”. *Niemetz v Germany*, Application No 13710/88, Series A, No 251 European Court of Human Rights.

## **G. Powers of Arrest**

53. Under Section 11(1) of the draft law, “[i]f a member of the police force reasonably suspects that a person has committed an offence under section 3 (1) (b), the police officer may arrest such a person without a warrant.” Section 11(2) states that a “member of the police force acting under the authority of a warrant issued in accordance with section 10 may arrest without a warrant a person reasonably suspected of having committed an offence under section 5(a) and (b).

54. ARTICLE 19 find these sections are problematic because Section 3(1)(b), which is referred to in Section 11(1), and Section 5(a) and (b), which is referred to in Section 11(2), do not exist. This provision therefore needs to be clarified. In addition, the provision should expressly protect an individual accused’s rights to liberty and fair trial.

**Recommendation: The provisions referred to in Sections 11(1) and (2) need to be clarified.**

**Recommendation: Section 11 requires another subsection that should indicate that an individual accused’ human rights to liberty and fair trial should be protected.**

## **H. Application of the draft law**

55. The importance of this draft law is underscored by the final provisions on its application once it is adopted. Section 14(1) states that the draft law “does not exclude or limit the concurrent application of any other law in so far as the provisions of such other law are no inconsistent with this Act”. Section 14(2) then stipulates that “[i]f any conflict relating to a matter dealt with in this Act arises between this Act and any other law, other than the Constitution or an Act of Parliament expressly amending this Act, this Act shall prevail.

56. In order for this draft law to reach the status of an adopted piece of legislation that would trump all other legislation except for another Act of Parliament expressly amending its terms, it is important that the amendments which we recommend are integrated into the draft law.

**Recommendation: All the amendments recommended in this Comment should be adopted before this draft law is enacted into law and is able to trump all other legislation except for another act of the Kenyan Parliament expressly amending its terms or the Kenyan Constitution.**

## **IV. Recommendations**

57. In summary, ARTICLE 19 proposes the following recommendations in relation to the draft law.

1. To ensure that the draft law properly reflects international human rights law and best practice standards on freedom of expression and equality in protecting against future instances of hate speech in Kenya, the draft law should be amended in accordance with the Camden Principles.
2. The first sentence of the Memorandum of Objects and Reasons should state that the purpose of the draft law is to “make provision for prohibition and criminalization of hate speech and related forms of incitement of the public along ethnic, racial, religious or similar discriminatory criteria with the intention of invoking discrimination, hostility or violence against section of the public”.
3. The grounds of discrimination identified in Section 2(a) of the draft law should include “sexual orientation and identity”.
4. The first paragraph of the Memorandum of Objects and Reasons should be moved to the beginning of the draft law as its first substantive provision.
5. Section 3(1) should be amended to state that the first object of the draft law is to “to foster national unity by promoting equality and freedom of expression as mutually reinforcing human rights”.
6. The Preamble of the draft law should be expanded to refer to the relevant provisions of the Kenyan Constitution on equality and freedom of expression and Articles 19 and 20 of the ICCPR as legal sources of the draft law.
7. Section 2 of the draft law should define hate speech in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. It should state that hate speech is “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.
8. Section 4(1) should be amended in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. More specifically, Section 4(1) should require: (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group. Additionally, Section 4(1) should exclude any reference to the venue as an irrelevant criterion for reaching the threshold of hate speech.
9. The word “behave” should be deleted from Section 4(1)(b).
10. Sections 4(2) and 4(3)(b) should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for an accused person if it is not shown (by the prosecution) that he/she had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused had intention to promote hatred publicly against the target group.
11. Section 4(3)(a) should be omitted.

- 12. Section 5(1) should be amended in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. More specifically, Section 5(1) should require: (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group. Accordingly, Section 5(1) should exclude any reference to “foreseeable consequence”.**
- 13. Sections 5(3)-(6) should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for an accused person if it is not shown (by the prosecution) that he/she had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused had intention to promote hatred publicly against the target group.**
- 14. Section 6(1) should be amended in accordance with Article 20 of the ICCPR and Principle 12 of the Camden Principles. More specifically, Section 6(1) should require: (1) an intention to promote hatred towards a target group as a necessary requisite for hate speech; and (2) that the activity concerned creates an imminent risk of discrimination, hostility or violence against persons belonging to that group. Accordingly, Section 6(1) should exclude any reference to “foreseeable consequence”.**
- 15. Sections 6(2)-(4) should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for an accused person if it is not shown (by the prosecution) that he/she had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused had intention to promote hatred publicly against the target group.**
- 16. Section 8 should be amended to state that a person guilty of an offence under the draft law shall be liable to a penalty which is proportionate to the offence.**
- 17. Sections 9 should be amended to indicate that intention to promote hatred publicly against the target group is a necessary element of the crime of hate speech. Accordingly, these provisions should indicate that there should be a defence for accused persons controlling the corporation if it is not shown (by the prosecution) that they had intention to promote hatred publicly against the target group. Therefore, the burden of proof should rest on the prosecution to prove beyond reasonable doubt that the accused persons controlling the corporation had intention to promote hatred publicly against the target group.**
- 18. Section 10 should indicate that procedures for searches of property and seizures of material under the draft law should respect the right to home and private life and the protection of property.**

- 19. The provisions referred to in Sections 11(1) and (2) need to be clarified.**
- 20. Section 11 requires another subsection that should indicate that an individual accused' human rights to liberty and fair trial should be protected.**
- 21. All the amendments recommended in this Comment should be adopted before this draft law is enacted into law and is able to trump all other legislation except for another act of the Kenyan Parliament expressly amending its terms or the Kenyan Constitution.**

**Annex: Text of the Prohibition of Hate Speech Bill, 2007**

**PROHIBITION OF HATE SPEECH BILL, 2007**

**ARRANGEMENT OF SECTIONS**

***Section***

- 1- Short Title
- 2- Interpretation
- 3- Objects of the Act
- 4- Use of words or behaviour or publishing written material
- 5- Broadcast intended to or likely to stir up hatred
- 6- Preparation and possession of material likely to stir up hatred
- 7- Exemptions
- 8- Penalties
- 9- Offences by corporate bodies
- 10- Search and seizure
- 11- Powers of arrest
- 12- Forfeiture
- 13- Amendment of Cap. 63
- 14- Application of the Act

**PROHIBITION OF HATE SPEECH BILL, 2007**

**A Bill for**

**An Act of Parliament to make provision for the prohibition of Hate Speech  
and for connected purposes.**

**BE IT THEREFORE ENACTED** by the parliament of the  
Republic of

Kenya, as follows:-

**Short Title**

1. — This Act may be cited as the Prohibition of Hate Speech Act.

**Interpretation**

2. — In this Act unless the context otherwise requires—

"broadcast" means the transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the public;

"dwelling-house" includes any building or structure or part of a building or structure (including a tent, caravan, vehicle, vessel or other temporary or moveable structure) which is for the time being kept by a person who is the owner or occupier for the residence therein of such person, the person's family or the person's servants or any of them;

"print" has the meaning assigned thereto by section 4 of the Penal Code;

—police force has the meaning assigned thereto by section 4 of the Penal Code;

—police officer has the meaning assigned thereto by section 4 of the Penal Code;

"possession" has the meaning assigned thereto by section 4 of the Penal Code;

"public" has the meaning assigned thereto by section 4 of the Penal Code;

"public place" has the meaning assigned thereto by section 4 of the Penal Code;

—publish means to cause the print, writing, painting, effigy or other means by which the material is conveyed to be so dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, that the material becomes known or is likely to become known to the public;

—section of the public means any group of persons identifiable by-

(a) race, ethnic or social origin, religion, conscience, belief, culture, language, gender, marital status, age, disability or birth; or

(b) any other characteristic where discrimination based on that other characteristic-

(i) causes or perpetuates systemic disadvantage; or

(ii) undermines human dignity; or

(iii) adversely undermines the equal enjoyment of an individual's rights and freedoms;

—stir up hatred includes to threaten, abuse or otherwise incite harm or provoke violence against any section of the public;

"written material" includes electronic records, any sign or other visual representation.

**Objects of the Act**

3. — The objects of this Act shall be:

(1) To foster national unity by promoting responsible exercise of the freedom of expression in political and other public discourse;

(2) To preserve public order within Kenya;

(3) To preserve and promote the ethnic and cultural diversity of Kenya; and



(4) To promote a democratic society.

**Use of words or behaviour or publishing written material**

**4.** — (1) It shall be an offence for a person—

(a) to publish or distribute written material;

(b) to use words, behave or display written material—

(i) in any place other than inside a dwelling house, or

(ii) inside a dwelling house, so that the words, behaviour or material are heard or seen, as the case may be, by persons outside the dwelling; or

(c) to distribute, show or play a recording of visual images or sounds if the written material, words, behaviour, visual images or sounds, as the case may be, are intended or, having regard to all the circumstances are such that the foreseeable consequence would be to stir up hatred.

(2) In proceedings for an offence under subsection (1), if the accused person is not shown to have intended to stir up hatred against a section of the public, it shall be a defence for the accused person to prove not having been aware of the content of the material or recording concerned and not having suspected, and having had no reason to suspect, that the material or recording might stir up hatred.

(3) Where the offence under subsection (1) is committed in the circumstances contemplated under paragraph (b) of that subsection, it shall be a defence for the accused person—

(a) to prove being inside a dwelling house at the relevant time and having had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the dwelling house;

(b) if it is not shown that such accused person had intention to stir up hatred, to prove not to have intended that the words, behaviour or material concerned would stir up hatred and not to have been aware that the words, behaviour or material might stir up hatred or provoke to violence.

Provided that this defence shall not be available in circumstances where a dwelling house is used as a public place.

**Broadcast intended or likely to stir up hatred**

**5.** — (1) Where an item involving visual images or sounds intended, or having regard to all the circumstances the foreseeable consequence would be, to stir up hatred is broadcast, each of the persons mentioned in subsection (2) shall be guilty of an offence if such persons intended thereby to stir up hatred or, having regard to all the circumstances, the foreseeable consequence would be to stir up hatred thereby.

(2) The persons referred to in subsection (1) are-

- (a) the person providing the broadcasting service concerned;
- (b) any person by whom the item concerned is produced or directed; and
- (c) any person whose words or behaviour in the item concerned are intended, or considering the circumstances the foreseeable consequence would be, to stir up hatred.

(3) In proceedings against a person referred to in paragraph (a) or (b) of subsection (2) for an offence under this section, if the person is not shown to have intended to stir up hatred, it is a defence for such person to prove—

- (a) not to have had any knowledge and reason to suspect that the item concerned would involve the material to which the offence relates; or
- (b) in a case other than one to which paragraph (a) relates, that, having regard to the circumstances in which the item was broadcast, it was not reasonably practicable for the person to secure the removal of the material aforesaid or to prevent the broadcast.

(4) In proceedings against a person referred to in subsection (2) (b) for an offence under this section, it is a defence for the person to prove not to have had any knowledge and reason to suspect:

- (a) that the item would be broadcast; or
- (b) that in the circumstances in which the item would be broadcast it was a foreseeable consequence that it would stir up hatred.

(5) In proceedings against a person referred to in subsection (2) (c) for an offence under this section, it is a defence for the person to prove not to have had any knowledge and reason to suspect:

- (a) that an item involving the use of the material to which the offence relates would be broadcast; or
- (b) that the circumstances in which such an item would be broadcast might result in stirring up hatred.

(6) In proceedings for an offence under this section, it is a defence for the accused person to prove not to have had any knowledge and reason to suspect that the material to which the offence relates would stir up hatred.

(7) In any proceedings for an offence under this section alleged to have been committed in respect of an item—

- (a) a script on which the item was based shall be evidence of what was included in the item and of the manner in which the item or any part of it was performed; and-
- (b) if such a script is given in evidence on behalf of any party to the proceedings, then, except in so far as the contrary is shown, whether by evidence given on behalf of the same or any other party, the item shall be taken to have been performed in accordance with that script.

(8) In this section, 'script', in relation to an item, means the text of the item (whether

expressed in words or in musical or other notation) together with any directions for its performance, whether contained in a single document or not.

### **Preparation and possession of material likely to stir up hatred**

**6.** — (1) It shall be an offence for a person—

(a) to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in Kenya or elsewhere, whether by the person or by another; or

(b) to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in Kenya or elsewhere, whether by the person or by another;

if the material or recording is intended to stir up hatred or, having regard to all the circumstances, including such distribution, display, broadcasting, showing, playing or other publication thereof, that the foreseeable consequence would be to stir up hatred.

(2) In proceedings for an offence under this section, if the accused person is not shown to have intended to stir up hatred, it shall be a defence for the accused person to prove not having been aware of the content of the material or recording concerned and that such person did not suspect, and had no reason to suspect, that the material or recording may, in the circumstances, stir up hatred.

(3) In proceedings for an offence under this section, where it is proved that the accused person was in possession of material or a recording such as is referred to in subsection (1) and it is reasonable to assume that the material or recording was not intended for the personal use of the accused person, the accused person shall be presumed, until the contrary is proved, to have been in possession of the material or recording in contravention of sub-section (1).

### **Exemptions**

**7.** — This Act does not render unlawful anything said or done reasonably and in good faith:

(1) in the performance, exhibition or distribution of an artistic work;

(2) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(3) in making or publishing a fair and accurate report of any event or matter of public interest.

### **Penalties**

**8.**— A person guilty of an offence under this Act shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.

### **Offences by corporate bodies**

**9.—Where** an offence prescribed in this Act has been committed by a body corporate, such a body corporate and or every person charged with, or concerned or acting in control of such corporate body shall be guilty of that offence unless it is proved by such person that through no act or omission by the person, such person was not aware that the offence was being or was intended or about to be committed, or that the person took all reasonable steps to prevent its commission.

### **Search and seizure**

**10.—If** a Magistrate is satisfied upon the sworn evidence of a police officer not below the rank of Inspector that there are reasonable grounds for suspecting that material or a script or recording the possession of which would be in contravention of this Act is in or at any premises or other place, the magistrate may issue a warrant authorising members of the police force, at any time or times within one month from the date of the issue of the warrant, on production if so requested of the warrant, to enter and search the premises or other place specified in the warrant and to seize any such recording, material or script as aforesaid found.

### **Powers of arrest**

**11. —** (1) If a member of the police force reasonably suspects that a person has committed an offence under section 3 (1) (b), the police officer may arrest such person without warrant.

(2) A member of the police force acting under the authority of a warrant issued in accordance with section 10 may arrest without warrant a person reasonably suspected of having committed an offence under section 5(a) and (b).

### **Forfeiture**

**12.—** (1) The court may order any written material or recording shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or otherwise disposed of in such manner as the court may determine.

(2) A court shall not order written material or a recording to be forfeited under this section if a person claiming to be the owner of it or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to such person to show cause why the order should not be made.

(3) An order under this section shall not take effect until the ordinary time for instituting an appeal against the conviction or order concerned has expired or, where such an appeal is instituted, until it or any further appeal is finally decided or abandoned or the ordinary time for instituting any further appeal has expired.

### **Amendment of Cap. 63.**

**13.—The** Penal Code is amended in section 77 by deleting paragraph (e) appearing in subsection 3.

### **Application of the Act**

**14.—** (1) This Act does not exclude or limit the concurrent application of any other law in so far as the provisions of such other law are not inconsistent with

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and any other law, other than the Constitution or an Act of Parliament expressly amending this Act, this Act shall prevail.

### **Memorandum of Objects and Reasons**

The purpose of this Bill is to make provision for the prohibition and criminalization of hate speech and related forms of incitement of the public along ethnic, racial, religious or similar discriminatory criteria with the intention of invoking hatred or violence against any section of the public. It is premised on the experience that hate speech and other forms of incitement to violence involve a violation of the right to be free from discrimination.

**Section 2** provides for the interpretation of the various terms used in the Bill. The phrase —section of the public|| is defined to mean any group of persons identifiable by race, ethnic or social origin, religion, conscience, belief, culture, language, gender, marital status, age, disability or birth; or any other characteristic where discrimination based on that other characteristic causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner. The phrase —stir up hatred is defined to include to threaten, abuse or otherwise incite harm or provoke violence against any section of the public.

**Section 3** outlines the intended objectives of the Bill if passed into law.

**Section 4** seeks to make it an offence to publish or distribute written material, to use words, behave or display written material if the written material, words, behaviour, visual images or sounds, as the case may be, are intended or, having regard to all the circumstances it is a foreseeable consequence that they will stir up hatred against a section of the public.

**Section 5** prescribes offences related to dissemination of hate propaganda and incitement to hatred or violence through means of public broadcast.

**Section 6** seeks to create an offence of possession of material or any recording not held for private use and which is intended to or, considering all the circumstances, is likely to result in stirring up hatred.

**Section 7** seeks the exemption of the application of the Act with regard to particular forms of expression provided these are done reasonably and in good faith. These forms of expression include performance of artistic works, discourse for any genuine academic, scientific or other genuine purpose and also the making or publication of a fair and accurate report of any event of public interest.

**Section 8** provides the penalties for the offences under the Act. A person guilty of an offence under the Act shall be liable for imprisonment for a term of up to ten years or to a fine of up to one million shillings or to both.

**Section 9** makes provision with respect to offences by corporate bodies.

**Section 10** provides for seizure of materials etc which may be used in committing an offence under the Act.

**Section 11** provides for the police to arrest without a warrant in certain instances.

**Section 12** provides for forfeiture of materials, etc. used in the commission of an offence under the Act.

**Section 13** seeks to amend section 77 of the Penal Code so as to align the provisions of the Penal Code with the new provisions contained in the Bill.

**Section 14** provides for the application of the provisions in the Bill. The enactment of the Bill shall not occasion expenditure of public funds.