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COMPARATIVE HATE SPEECH LAW: MEMORANDUM

Research prepared for the Legal Resources Centre, South Africa

March 2012

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We would like to thank:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Dr Tarunabh Khaitan**, **Dr Jane Donoghue, Ms Dhvani Mehta, Ms Emma Dunlop, Ms Alecia Johns, Ms Meghan Campbell** and **Mr Paolo Ronchi**, for their support and assistance with the project.

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TABLE OF CONTENTS

INTRODUCTION

1. This memorandum has been prepared for the Legal Resources Centre, South Africa (LRC) to assist in the preparation of submissions in two hate speech cases to be heard by the Supreme Court of Appeal: *Herselman v Geleba*[1] and *Afriforum v Malema*.[2]

a) Nature of the research

2. Our research addresses three questions:
   a. *Contextualising the balancing exercise:* The prohibition on hate speech must be interpreted in a way that strikes a balance between the values of free expression, equality and human dignity. How have other jurisdictions sought to achieve this balance? Most importantly, what role does the historical and socio-political context play in striking this balance?
   b. *Hate speech and context:* What role does context play in determining whether speech amounts to hate speech?
   c. *Hate speech and popular culture:* How have courts in other jurisdictions dealt with alleged hate speech in songs or other forms of cultural or artistic expression?

3. In answering these questions, we have surveyed hate speech laws and judgments in ten jurisdictions, selected because of the sophistication of their hate speech jurisprudence and based on the expertise of our researchers. These include international law (including the decisions of international human rights committees and international criminal tribunals), Australia, the United Kingdom, the Republic of Ireland, India, Canada, the United States, the European Court of Human Rights, Germany and Slovenia.

4. This memorandum sets out our answers to the three questions. It is supplemented by an annexure which provides more information on hate speech laws in the selected jurisdictions. We hope that the annexure will be a useful resource should the LRC wish to explore the points covered in this memorandum in greater detail. In addition, OPBP has prepared a full research pack containing all primary and secondary sources referred to in this memorandum and the annexure.

b) The possibilities and dangers of comparative hate speech law

5. South Africa's hate speech jurisprudence is still in its infancy. As a result, it is important to look to other jurisdictions for guidance. However, as the LRC's submissions in *Geleba* indicate,

[1] Appeal against the judgment of the Eastern Cape High Court (Grahamstown), Case no 231/2009 (2011).
[2] Appeal against the judgment of the Equality Court, Johannesburg, Case no 20968/2010 (2011).

comparative hate speech law presents a number of difficulties. Hate speech laws are profoundly shaped by the ideological, historical and social context in each country, making it problematic merely to graft foreign approaches onto South African law. Furthermore, there is no universally agreed definition of hate speech and the legal prohibition on hate speech takes many forms. These prohibitions differ in at least four ways:[3]

a. *The nature of the prohibition:* prohibitions may take the form of criminal offences, regulatory offences or civil claims;

b. *The nature of the harm:* there are substantial differences in the nature of the harm protected against, which can include *inter alia* incitement to violence, incitement or 'stirring up' of hatred, inciting discrimination, promoting racial superiority, causing insult, hurt or humiliation;[4]

c. *The likely effects*: most prohibitions require that the speech must be likely to bring about the harms protected against;[5]

d. *The mental element*: some jurisdictions require intention while others treat lack of intention as a defence or dispense with the need for intention entirely, focusing instead on the likely effects of the speech.[6]

6. The prohibition on hate speech in s 10(1) of South Africa's Equality Act[7] contains two distinctive features, setting South Africa apart from our ten selected jurisdictions. The first is that it does not require proof of actual or likely harm. Second, the requirement that a reasonable person should understand the words to demonstrate the 'clear intention' to bring about the listed harms is not found in the jurisdictions considered in this study. It is important to be aware of these textual differences in seeking guidance from international and foreign law.

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[3] See Annexure, 'Background' which sets out the hate speech prohibitions in the ten jurisdictions considered in this research.

[4] For example, compare the position in the US, which only allows restrictions on hate speech that amounts to incitement to 'imminent lawless action' (see Annexure paras 25-29); with the prohibition on hate speech in the Australian Race Relations Act, which covers offence, insult or intimidation (see Annexure paras 9-12).

[5] For example, the Australian Race Discrimination Act prohibits speech that is 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate that person or group' (see Annexure para 9) while the UK and Ireland prohibit speech that is either intended or is likely to 'stir up' racial hatred (Annexure paras 13 and 15). The Canadian Criminal Code requires that hate speech must be likely to breach the peace (see Annexure para 22) and the German Criminal Code requires that the speech must be likely to result in public disorder (see Annexure para 32).

[6] Intention is generally a requirement where hate speech is a crime (see for example Canada and Slovenia). Civil prohibitions on hate speech generally dispense with intention, focusing on the likely harm (see for example the UK and Ireland).

[7] Promotion of Equality and the Prevention of Unfair Discrimination Act, 4 of 2000.

7. Despite these difficulties, courts in other jurisdictions have grappled with many of the issues raised in *Geleba* and *Malema*, and the approaches and solutions they have adopted provide useful insights.

QUESTION 1: CONTEXTUALISING THE BALANCING EXERCISE

8. The prohibition on hate speech in s 10(1) of the Equality Act must be interpreted in a way that strikes a constitutionally appropriate balance between freedom of expression, on the one hand, and the interests in promoting and protecting 'human dignity, equality, freedom, the healing of the divisions of the past and the building of a united society' on the other.[8]

9. The question is whether this balancing exercise takes place in a contextual vacuum, or whether it ought to take into account South Africa's history of oppression and continuing inequality, among other contextual factors.

10. Our research indicates that the balancing exercise can be contextualised in at least three ways:
    a. The value attached to freedom of expression is often made dependent on the nature of the expression under consideration;
    b. The identity of the group targeted by the alleged hate speech is important, as the courts appear to be more willing to come to the aid of historically or currently oppressed groups;
    c. The identity of the alleged perpetrator is also important, as there is a tendency to adopt a more lenient approach where the alleged perpetrator is from an oppressed or marginalised group.

a) The nature of the expression

11. The value attached to free expression in the balancing exercise is contingent on the nature of the expression under consideration. The Canadian Supreme Court emphasised this point in *R v Keegstra*, holding that the balancing exercise must consider the 'nature of the expressive activity that the state seeks to restrict'.[9] The Court argued that it is 'destructive of free expression values … to treat all expression as equally crucial to those principles at the core of s 2(b) [the free expression guarantee in the Canadian Charter]'.[10] As a result, the Court determines whether the type of expression under consideration advances the purposes of free expression, which it

[8] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) [45].
[9] *R v Keegstra* [1990] 3 SCR 697 (Canadian Supreme Court) 67.
[10] ibid.

identifies as democratic discourse, truth-finding and self-fulfilment.[11] The more expression advances these purposes the greater its value.

12. A similar approach has been adopted by the Committee on the Elimination of All Forms of Racial Discrimination (CERD),[12] the European Court of Human Rights (ECtHR)[13] and the German Constitutional Court,[14] among others, as they all afford greater or lesser value to different types of expression.

13. Political expression has obvious value as it directly contributes to democratic discourse. This is demonstrated in the ECtHR's jurisprudence, as restrictions on political expression are subjected to strict scrutiny. In *Incal v Turkey*,[15] the Court explained the rationale for this approach:

> While precious to all, freedom of expression is particularly important for political parties and their active members … They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician … call for the closest scrutiny on the Court's part.[16]

14. The depiction and contestation of history is also an important form of expression, contributing to democratic discourse, truth finding and self-fulfilment. This assumes particular significance where vulnerable or marginalised groups have been denied a voice. This point was made by the Australian High Court in *Davis v Commonwealth*[17] striking down legislation that restricted Aboriginal groups' ability to protest the 200th anniversary of Australia's colonisation:

> The limits on the legislative power to enact penal laws … is of especial importance when the relevant activity undertaken in execution of an executive power is the commemoration of an historical event. Such a commemoration may take many forms, according to the significance placed upon it. The form of national commemorations of historical events usually reflects the significance which the majority of people place upon the event. But there may well be minority views which place a different significance on the same event, as the present case illustrates. It is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights.[18]

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[11] *Grant v Torstar Corporation* [2009] 3 SCR 640 (Canadian Supreme Court) [47], cited with approval in *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (4) SA 191 (CC) [100], fn 120.

[12] See for example CERD, *Jewish Community of Oslo et al. v Norway*, Communication No. 30/2003, 15 August 2005, [10.1]: the right to free speech in international law 'has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies'. See further, Annexure para 43.

[13] See for example *Féret v Belgium* App no. 15615/07 (ECtHR 16 July 2009) see Annexure paras 72 and 112.

[14] See *Lüth*, BverfGE 7, 198 (1958) 198, 210, 211, see Annexure para 75.

[15] *Incal v Turkey Incal v Turkey*, App no 22678/93 (ECtHR 9 June 1999).

[16] ibid [46], see also *Féret* (n 13) [63]-65].

[17] (1988) 166 CLR 79 (High Court of Australia).

[18] *Davis v Commonwealth* (1988) 166 CLR 79, 116-7. See also (1998) 116 CLR, 79, 100; 114.

15. The importance of historical representation has also been demonstrated in India, where the courts have repeatedly blocked attempts to use hate speech and censorship laws to suppress the depiction of India's painful history of religious conflict.[19] The Delhi High Court summed up the reasoning behind these decisions:

> The scenes and visuals…are in one sense a recalling of the memory of an historical event. The recall may be imperfect. It may contradict the collective memory of that historical event. It may revive tensions over the events being recalled. Yet, that by itself does not invite censorial intervention to obliterate the scenes of recall. [20]

16. However, not all forms of historical representation are equal, as seen in foreign courts' treatment of Holocaust denial, which is generally afforded little or no value as it is seen to undermine truth-finding.[21] This demonstrates that the weight attached to historical representation depends on whether it advances the values underpinning the right to free expression.

17. It could be argued that resistance songs, such as *Dubula ibhunu*, are an important form of political expression and, in some contexts, a valuable way of remembering and depicting history. We did not find case law directly addressing this issue, but this argument could be developed from the principles outlined in the cases above. As a form of political expression, these songs continue to have relevance for vulnerable and marginalised groups who may harness the memories of togetherness, determination and courage that they evoke to confront current challenges. As Martin Luther King Jr. said of resistance songs in the US civil rights movement: 'it is not just a song, it is a resolve'.[22] Furthermore, these songs may allow individuals to recapture memories and emotions surrounding historical events in a way that other forms of historical representation cannot. Therefore, this valuable form of expression should be afforded greater weight in the balancing exercise.

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[19] See for example *Ramesh v Union of India* (1988) 1 SCC 668; *Anand Patwardhan v Union of India* AIR 1997 Bom 25; *F.A. Picture International v Central Board of Film Certification* AIR 2005 Bom 145; discussed in the Annexure at paras 55-60.

[20] *Shrishti School v Chairperson, Central Board of Film Certification* WP (C) 6806 of 2010 [23].

[21] See for example, *Lehideux and Isorni v France* App no. 55/1997/839/1045 (ECtHR 23 September 1998) [47] and *Garaudy v France* App no. 65831/01 (ECtHR 3 July 2003) where the ECtHR held that because the Holocaust is 'clearly established historical fact', Holocaust denial is 'removed from the protection' of the art 10 free expression guarantee under the ECHR. In contrast, see the Canadian Supreme Court decision in *R v Zundel* [1992] 2 SCR 731 (Canadian Supreme Court) [36] where the majority argued that falsehoods may still have value as a form of expression.

[22] Martin Luther King Jr. *Why We Can't Wait* (Signet 2000).

b) The identity of the target group

18. The identity of the victim or group targeted by alleged hate speech is also important for the balancing exercise. The more vulnerable the individual and the group, the more likely it is that inflammatory language could lead to violence, cause psychological harm and do damage to what Jeremy Waldron calls the value of 'assurance': the 'sense of security' that vulnerable groups derive from knowing they will receive 'decent treatment and respect as [they] live their lives and go about their business in public'.[23] This is evident in the fact that hate speech prohibitions in international and foreign law were drafted with the primary purpose of protecting vulnerable groups. For example:

    a. The hate speech prohibitions in the ICCPR and CERD were motivated by the experience of Nazi propaganda;[24]

    b. In Germany, the criminal prohibitions on hate speech were enacted to combat rising anti-Semitism in the 1960s;[25]

    c. India has adopted specific hate speech laws to protect members of the *dalit* or 'untouchable' caste.[26]

19. This is also seen in some foreign courts' willingness to come to the aid of vulnerable groups who are the targets of alleged hate speech.[27] Conversely, speech is scrutinised less strictly where it is targeted at powerful or dominant figures, particularly where it is directed at politicians[28] or governments. The ECtHR has justified this approach to speech directed at governments as follows:

> [T]he dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.[29]

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[23] Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate (2009 Oliver Wendell Holmes Lectures)' (2010) 123 Harvard Law Review 1596, 1613 and 1626.

[24] See I Currie and J De Waal *Bill of Rights Handbook* (5th edn, Juta 2005) 374-5.

[25] See Annexure para 31.

[26] See Annexure, para 19.

[27] See for example the ECtHR decisions in cases of anti-Semitic, anti-immigrant or homophobic speech, see Annexure para 72.

[28] See *Lingens v Austria* App no. *9815/82* (ECtHR 8 July 1986) [42]:

> [T]he limits of acceptable criticism are accordingly 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.

[29] *Incal v Turkey* (n 16) [54].

c) The identity of the alleged perpetrator

20. The identity of the alleged perpetrator is also important in at least three ways. First, the more privileged and powerful the perpetrator is relative to the victim or target group, the greater the potential harm. This can be attributed to a range of factors, such as the greater potential for humiliation due to the power disparity between the individuals or the potential for the message to reach a wider audience. These factors are apparent in the ECtHR cases on anti-immigrant speech by politicians[30] as the ECtHR has held that the greater threat of harm requires the Courts to subject politician's speech to closer scrutiny for potential hate speech.

21. Second, the identity of the perpetrator may also affect the value attached to his or her expression. As considered above,[31] the ECtHR attaches great value to political speech and will therefore subject restrictions on this type of speech to a stricter standard of scrutiny,[32] requiring states to offer a compelling justification for these restrictions. This approach to political speech is potentially in tension with the stricter approach adopted in the case of politicians. However, this tension is partially resolved by seeing these concerns as operating on two levels. On the one hand, the ECtHR affords a lesser margin of appreciation to states where political speech has been restricted, requiring states to provide a compelling justification for these restrictions. On the other hand, when interpreting a politician's speech, the Court will subject this speech to greater scrutiny and, the case law suggest, it is more willing to interpret this speech as hate speech.[33] However, some commentators argue that this approach threatens to erode the protection afforded to political speech.[34]

22. Third, where the alleged perpetrator is a member of a vulnerable or historically oppressed group, this may call for greater tolerance of offensive speech. Michael Rosenfeld[35] argues that it is understandable that groups that have experienced historical oppression and on-going disadvantage may vent their frustration or seek to build a sense of solidarity by using language that is less than temperate and may amount to hate speech if used by historically dominant groups. This 'venting' could even be justified as a form of self-fulfilment. As a result, Rosenfeld

[30] See para 41 below.
[31] See para 13.
[32] See para 4 above.
[33] See Anne Weber *Manual on Hate Speech* (Council of Europe 2009) 37.
[34] See Stefan Sottiaux "'Bad Tendencies" in the ECtHR's "Hate Speech" Jurisprudence' (2011) 7 EuConst 40.
[35] Michael Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 Cardozo L R 1523, 1528.

argues that '[r]eaction by the oppressed even if tinged with hatred should … be somewhat more tolerated then hate messages by members of traditionally oppressor groups.'[36]

23. There is also the danger that oppressed or marginalised groups may be silenced or further marginalised by hate speech laws. The history of hate speech laws in the UK highlights this danger. While the Race Relations Act of 1965 (the predecessor to the Public Order Act 1986) was passed primarily in response to growing racism against minority groups, the first person to be convicted for hate speech under this law was a black man who directed racial abuse at a white policeman.[37] Throughout the 1960s and 1970s, members of the Black Liberation Movement in the UK were regularly prosecuted under the hate speech legislation for 'stirring up' racial hatred. For example, in *R v Malik,*[38] a black defendant was convicted and sentenced to a year in prison for stating that whites are 'vicious and nasty people'. He admitted that his speech was offensive but argued that this was a response to the intolerance and discrimination that he had experienced at the hands of white people.[39]

24. Perhaps it is because of these concerns that courts tend to adopt a more lenient approach to alleged hate speech by vulnerable groups. This is clearly evident in the Australian Federal Magistrates Court decision in *McLeod v Power*[40] where the applicant, a white prison official, accused an Aboriginal woman of violating the Race Discrimination Act by calling him a 'white piece of shit', among other racial epithets. The Magistrate dismissed the case. In so doing, he held that the primary purpose of the Act was to protect vulnerable minority groups.[41] He proceeded to find that given the applicant's position of power relative to the respondent and the fact that white people in Australia are a historically and culturally dominant group, the term 'white' was not reasonably likely to cause offence.[42] A more lenient approach is also apparent in the ECtHR's treatment of hate speech charges against members of the Kurdish minority in Turkey.[43] In these cases, the Court has tended to protect the free expression of members of this group where their speech did not reach the level of incitement to violence. This contrasts with

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[36] ibid
[37] ibid, 1525.
[38] [1968] 1 All ER 582, 58.
[39] Rosenfeld (n 35) 1546-7.
[40] (2003) 173 FLR 31. See Annexure para 49.
[41] ibid [54].
[42] ibid [69].
[43] See for example *Sürek and Özdemir v Turkey* App no. 23927/94 (ECtHR 8 July 1999); *Ceylan v Turkey*, App no. 23556/94 (ECtHR 8 July 1999); *Karatas v Turkey*, App. no. 23168/94 (8 July 1999); *Incal v Turkey*, App no 22678/93 (ECtHR 9 June 1999). However counter-examples exist where the applicant did not prevail. See *Sürek v Turkey* (No 1), App no. 24122/94 (ECtHR 7 July 1999). See Annexure, para 73.

other hate speech cases before the ECtHR, such as the anti-Semitic[44] and anti-immigrant propaganda cases,[45] where the absence of incitement to violence generally has limited or no impact on the outcome. However, the Court has never expressly acknowledged or justified its different treatment of these cases.

QUESTION 2: HATE SPEECH AND CONTEXT

25. Context is vital in determining whether speech amounts to hate speech. The European Court of Human Rights (ECtHR) has routinely insisted that-

> it is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 [the free expression guarantee] and that which forfeits its right to tolerance in a democratic society.[46]

26. None of the courts in our study has developed a clear and consistent test or framework for assessing speech in context. Instead, they appear to rely on a common-sense approach to weighing the various contextual factors. However, a number of common themes emerge from this case law.

27. Before considering these themes, it is important to note the different roles that context can play in hate speech cases. It can be used to determine:
    a. The meaning of words, gestures or symbols;
    b. The intentions of the alleged perpetrator; and
    c. The likely effects of the speech.

    Point c. has less relevance in the South African context because s 10(1) of the Equality Act does not require proof of the actual or potential consequences of hate speech.

28. In most cases, the inquiry into the meaning of the words or actions and the inquiry into the intentions of the actor, reasonably construed, are closely connected. However, they are conceptually distinct inquiries and can be pulled apart. An obvious example would be the difference between a cross-burning depicted in a film and a real-life cross-burning (as discussed by O'Connor J in *Virginia v Black*).[47] Both acts would have the same symbolic meaning,

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[44] See for example, *Lehideux and Isorni v France* and *Garaudy v France* (n 21).
[45] See *Féret* (n 13); *Le Pen v France*, App no. 18788/09 (ECtHR 20 April 2010).
[46] *Vajnai v Hungary* App. no 33629/06 (ECtHR, 8 July 2008) [53]; *Fratanolo v Hungary* App no 29459/10 (ECtHR 3 November 2011).
[47] 538 US 343; 123 S. Ct. 1536 (2003) 366; 1551.

representing racial hatred. However, no reasonable person would think that the cross-burning in the film is done with the real intention of instilling fear or propagating racial hatred. As a result, decoding the meaning of words or actions is one thing, determining whether the actor had the required intention, reasonably construed, is another. This is one of the flaws in Lamont J's judgment in *Malema*, as he appears to suggest that because the words '*dubula ibhunu*' mean 'shoot the Boer / Afrikaner', a reasonable person would construe these words as intending to be 'hurtful, to incite harm and promote hatred against the white Afrikaans speaking community' in all contexts. This fails to recognise that meaning and intentions can pull apart, a point that is discussed in greater detail below.[48]

29. Turning to the key themes in the case law, it appears that five contextual factors play an important role in determining the meaning of the words or the intentions of the actor, although these are far from exhaustive:

a. Historical and cultural associations;
b. The identity of the speaker;
c. The identity of the target;
d. The setting and the audience;
e. The prevailing social conditions.

a) Historical and cultural associations

30. *Malema* and *Geleba* both turn on the fact that the words used have strong historical and cultural associations which colour their meaning.

31. In most cases these associations will be widely understood, giving the words or actions a reasonably determinate meaning. For example, in *Hagan v Trustees of the Toowoomba Sports Ground Trust*[49] the Federal Court of Australia noted that calling an Aboriginal person a 'nigger' will almost always be prohibited:

> There can be no doubt that the use of the word 'nigger' is, in modern Australia, well capable of being an extremely offensive racist act. If someone were, for example, to call a person of indigenous descent a 'nigger', that would almost certainly involve unlawfully racially-based conduct prohibited by the [Race Discrimination Act].[50]

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[48] See paras 53-56 below.
[49] *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615. This case was brought under s 9(1) of the Race Discrimination Act as a complaint of racial discrimination, rather than a complaint of hate speech under s 18C of the Act.
[50] ibid [7].

However, as is discussed below,[51] the Court suggested that this term may not be objectionable when used between Aboriginal people.

32. Similarly, in *Faurisson v France*,[52] the Human Rights Committee (HRC) noted that while Holocaust denial is not included in the list of prohibited forms of hate speech in art 20(2) of the International Covenant on Civil and Political Rights (ICCPR), its historical association with anti-Semitism in France entails that it generally amounts to incitement to hatred against Jewish people.[53]

33. However, words, gestures or symbols will often have very different associations for different sections of society, as is the case in *Malema*. The ECtHR's judgments in *Vajnai v Hungary*[54] and *Fratanoló v Hungary*[55] provide important insights on this issue. The applicants were left-wing politicians who were found guilty of the offence of wearing or displaying the 'red star', a symbol associated with the Soviet Union. The offence prohibited all displays of the red star or other totalitarian symbols, irrespective of the context. Both applicants claimed that their convictions violated their right to freedom of expression under art 10 of the ECHR. In *Vajnai*, the ECtHR noted that the red star has very different associations for different sections of Hungarian society: for some it is a hated symbol of Soviet occupation and totalitarianism, while for others it is a symbol of social justice and worker solidarity.[56] As a result, it stressed that states should exercise the 'utmost care' when imposing restriction on speech that may have multiple meanings, particularly in the political context:

> [W]hen freedom of expression is exercised as political speech – as in the present case – limitations are justified only in so far as there exists a clear, pressing and specific social need. Consequently, utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings. In such situations, the Court perceives a risk that *a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be justified.*[57]

34. The Court suggested that restrictions on the display of the red star and other totalitarian symbols would only be permissible where the display of these symbols amounts to the propagation of totalitarian ideology. However, the offence was overbroad and potentially restricted legitimate

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[51] See para 40 below.
[52] HRC, *Faurisson v France*, Communication No. 550/93, views adopted on 8 November 1996. See Annexure para 83.
[53] ibid.
[54] Above n 46.
[55] ibid.
[56] *Vajnai* (n 46) [52].
[57] ibid [51] (emphasis added); see also *Fratanolo* (n 46) [25].

forms of expression, as it applied to any display of these symbols, independent of the context. This was demonstrated on the facts, as the Court found that both politicians were members of left-leaning political parties with no totalitarian ambitions and they displayed the red star as a form of political expression that did not amount to the propagation of totalitarian ideology. The Court went on to note that the violation of art 10 could not be addressed through the selective prosecution of the offence as this would produce uncertainty that would have a 'chilling effect' on political expression, leading to self-censorship.[58]

35. In *Vajnai*, the Court concluded with a powerful passage, emphasising that public feeling alone cannot justify a blanket ban on forms of expression that have multiple, potentially legitimate meanings:

> The Court is of course aware that the systematic terror applied to consolidate Communist rule in several countries, including Hungary, remains a serious scar in the mind and heart of Europe. It accepts that the display of a symbol which was ubiquitous during the reign of those regimes may create uneasiness amongst past victims and their relatives, who may rightly find such displays disrespectful. *It nevertheless considers that such sentiments, however understandable, cannot alone set the limits of freedom of expression*. Given the well-known assurances which the Republic of Hungary provided legally, morally and materially to the victims of Communism, such emotions cannot be regarded as rational fears. *In the Court's view, a legal system which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgement*. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto.[59]

36. This has clear relevance for *Malema*. Like the red star, *Dubula ibhunu* has multiple meanings. Thus, it could be argued, there are contexts where singing *Dubula ibhunu* at public or private meetings of the ANC would not have a hateful meaning nor would it demonstrate the intention (reasonably construed) to be hurtful, harmful or to incite harm or hatred. The result is that a blanket ban on the song would restrict potentially legitimate forms of expression. Echoing the ECtHR's reasoning, the mere fact that the song may cause feelings of unease among certain sections of society would be no justification for this inflexible restriction.

b) The identity of the target group

37. The identity of the target group also has a bearing on meaning and the reasonable imputation of intentions to the speaker. This can occur in at least two ways:

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[58] *Vajnai* ibid [54]; *Fratanolo* ibid.
[59] *Vajnai* ibid [57] (emphasis added).

a. First, identity has a predictive role. If certain words or actions have been used as hate speech against a group in the past then it is likely that their future use against that group is a continuation of this pattern.

b. Secondly, identity may shape conventions. The repeated use of certain words or actions to express hatred toward a group may transform those words or actions into conventional vehicles of hatred toward that group, even though they may be innocuous or meaningless in other settings. Cross-burning in the US is a clear example of this.

38. The Federal Court of Australia's decision in *Eatock v Bolt*[60] demonstrates both elements at work. In this case a right-wing columnist wrote an article in which he questioned the aboriginality of several people whom he described as 'fair-skinned', alleging that they had procured commercial and professional gain through their 'choice' of racial identity. The Court was primarily influenced by the painful history of racially categorising Aboriginal Australians in finding that this amounted to racial vilification under s 18C of the Race Discrimination Act 1975: [61]

> The manner in which aboriginal people have identified, and have been identified, by others since the British settlement of Australia is a background matter of some significance to a number of issues in the case, including whether the articles were reasonably likely to offend and the extent to which Mr Bolt should have realized that to be so. [62]

And further,

> It is a notorious and regrettable fact of Australian history that the flawed biological characterisations of many aboriginal people was the basis for mistreatment, including for policies of assimilation involving the removal of many aboriginal children from their families until the 1970s. It will be of no surprise that a race of people subjected to oppression by reason of oppressive racial categorisation will be sensitive to being racially categorised by others. [63]

39. This case also presents useful insights on contextualising the reasonable person. The Court held that in determining whether the articles were reasonably likely to cause offence, insult or humiliation under the Race Discrimination Act, the articles had to be assessed from the perspective of the group that is being targeted: lighter-skinned Aboriginal people.[64] This has clear parallels with the High Court's approach in *Geleba* where Dawood J held that the reasonable person should be conceived of as a black person in construing the magistrate's intentions in calling the applicant a 'baboon'.

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[60] [2011] FCA 1130. See Annexure, para 93.
[61] See Annexure para 9 for an overview of the Act.
[62] ibid [167].
[63] ibid [171].
[64] ibid [243]-[252] and [273].

c) The identity of the alleged perpetrator

40. The identity of the alleged perpetrator plays a similar role in shaping the meaning of speech. On the one hand, if a person from a historically dominant, oppressor group uses language that is conventionally associated with hate speech then a reasonable person would generally interpret it as hate speech. On the other hand, the identity of the perpetrator may transform speech that is conventionally understood to be abusive or hateful into something benign. For example, in *Hagan*,[65] discussed above, the Federal Court of Australia indicated that if a white person calls an indigenous person a 'nigger' this will almost always constitute hate speech under the Race Discrimination Act. However, the Court suggested that the use of the word 'nigger' *between* Australian indigenous people would be *unlikely* to breach this prohibition. Drummond J cited the views of Clarence Major, to the effect that the use of the word 'nigger' between black people in the US could be considered 'a racial term with undertones of warmth and goodwill – reflecting, aside from the irony, a tragicomic sensibility that is aware of black history'.[66]

41. The identity of the perpetrator may also aggravate the harm. In *Féret v Belgium*[67] and *Le Pen v France*,[68] two cases involving anti-immigrant speech by right-wing politicians, the ECtHR noted that while restrictions on political speech must be strictly scrutinised, genuine hate speech by politicians can be more damaging than hate speech by regular citizens and, as a result, politicians have a greater responsibility to avoid hate speech.[69]

d) The setting and the audience

42. The setting and the nature of the audience are also important factors in foreign courts' jurisprudence.

43. On one level, the setting may transform potential hate speech into merely offensive or distasteful speech. For example, in the ECtHR decision in *Gündüz v Turkey,*[70] the applicant appeared on a late-night talk-show on Turkish television during which he called for the introduction of *sharia* law and labelled all children of civil marriages '*piç*'- a highly derogatory word for children born outside of religious marriages. The Court held that his conviction for hate speech was in breach of art 10 of the ECHR. A key element of the Court's reasoning was that the talk-show was a lively forum in which the applicant's views were vigorously debated and criticised. The Court

[65] Above n 49. Discussed above, para 31.
[66] Ibid [7]. Clarence Major, *Dictionary of Afro-American Slang* (International Publishers, New York, 1970).
[67] Above n 13.
[68] *Le Pen v France*, App no. 18788/09 (ECtHR 20 April 2010).
[69] *Féret* (n 13) [73]-[76].
[70] App no. 35071/97 (ECtHR, 4 December 2003).

did not explain precisely why this contextual factor was important, although it appeared to suggest that this factor demonstrated that the applicant's intention was not to hurt or to incite hatred, but rather to mount a robust defence of his view-point.

44. In contrast, the forum could also transform neutral speech into hate speech. In *Bropho v Human Rights & Equal Opportunity Commissioner,*[71] French J suggested that:

> The publication of a genuine scientific paper on the topic of genetic differences between particular human populations might, for one reason or another, be insulting or offensive to a group of people. Its discussion at a scientific conference would no doubt be reasonable. Its presentation to a meeting convened by a racist organisation and its use to support a view that a particular group of persons is morally or otherwise 'inferior' to another by reason of their race or ethnicity, may not be a thing reasonably done in relation to par (b) of s 18D [of the Race Discrimination Act][72]

45. The importance of the audience is reflected in a case decided by the German Federal Court of Justice involving anti-Semitic speech.[73] The defendant addressed a demonstration of the far-right NPD party during which he cited a passage from the Talmud which could be interpreted as allowing sexual intercourse with children.[74] The Court held that while the passage was accurately cited, the circumstances in which it was cited were of major importance. The Court drew on the fact that the speaker was a member of a far-right party and was aware that his audience was also far-right and could not be expected to engage in serious discourse over Jewish theology.[75] Moreover, it was clear that his audience expected him to make anti-Semitic remarks in his speech and was ready to interpret his speech in this light.[76]

46. The nature of the audience assumes even greater prominence where the speech is alleged to amount to incitement to hatred or violence. This is because the potential for harm depends on how the audience understands the speech. The audience was particularly important in the *Media*[77] and *Bikindi*[78] cases before the International Criminal Tribunal for Rwanda (ICTR).[79] While these cases dealt with incitement to genocide, the Tribunal drew on comparative hate

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[71] (2004) 135 FCR 105.
[72] ibid 128.
[73] BGH [2006] NStZ 305.
[74] BGH [2006] NStZ-RR 305.
[75] ibid 306.
[76] ibid.
[77] *Nahimana et al*, Case no. ICTR 99-52-T, Trial Chamber I Judgment and Sentence (3 December 2003); *Nahimana et al*, Case No. ICTR-99-52-A, Appeals Chamber Judgement (28 November 2007).
[78] *The Prosecutor v Simon Bikindi*, Case no. ICTR-01-72-T, Trial Chamber Judgment and Sentence, (2 December 2008); upheld by the Appeals Chamber in *The Prosecutor v Simon Bikindi*, Case no. ICTR-01-72-A, Appeals Chamber Judgment (18 March 2010).
[79] See Annexure paras 85-91 and 126-132 for further discussion of these cases.

speech law in determining the meaning of the accused's speech and their intentions. Both cases dealt with nuanced language which contained veiled messages. In both, the ICTR stressed that the test is how this language is understood by its intended audience:

> [T]he culture, including the nuances of the *Kinyarwanda* language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how speech was understood by its intended audience in order to determine its true message.[80]

47. The prohibition of hate speech under s 10(1) of the South African Equality Act is, however, very different from the prohibition on hate speech in Germany or the crime of incitement to genocide. Nevertheless, the point to take from these cases is that meaning and intention in incitement or propagation of hatred cases is ordinarily construed from the perspective of the audience that is allegedly being encouraged to hate or to harm. This is because the wrongs of incitement to harm and the propagation of hatred (reflected in ss 10(b) and (c) of the Equality Act) are very different from the wrongs of 'hurtful' or 'harmful' speech (reflected in ss 10(a) and the first part of 10(b) of the Act). The potential harm in 'hurtful' or 'harmful' speech lies in how the words are interpreted by the target of the speech, making it appropriate to conceive of the reasonable person as a member of the target group (as Dawood J did in *Geleba* and as the Australian Court of Appeal did in *Eatock v Bolt*).[81] In contrast, the primary concern in cases of incitement to harm or the propagation of hatred is the possibility that the audience will adopt a hateful attitude toward the target group or will be incited to harm. As a result, the reasonable person should be contextualised as a member of this audience to determine whether the speech has this meaning and intention. While it could be argued that a group's fear that others are being incited to harm or hate them is a harm in and of itself, this fear is only reasonable where the speech is reasonably likely to incite others to hatred or harm.

48. This distinction between the constructions of the reasonable person in cases of alleged hurtful or harmful speech and cases of incitement or propagation of hatred is absent in the *Malema* judgment, as Lamont J suggests that the meaning and intention must be interpreted from the perspective of the reasonable Afrikaner in both cases.

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[80] *Nahimana* Appeals Chamber (n 77) [700]; *Bikindi* Trial Chamber (n 78) [197]-[199] and [240].
[81] See above para 39.

e) The prevailing social conditions

49. The conditions prevailing at the time can also influence the meaning of the speech and the intentions behind it. In *Catch the Fire Ministries Inc v Islamic Council of Victoria*[82] the Victorian Court of Appeal in Australia discussed an example of this phenomenon:

> It is trite to remark that the social and historical context in which words are spoken or behaviour occurs, alters from time to time. Changes in social context mean that words directed against members of a particular racial or religious group could be found to have the relevant inciting effect at one time, which they would not have at another time. For example words attacking a racial or religious group at a time when Australia was at war with a country from which members of that group originally came might be likely to incite hatred or other relevant emotion against members of that group, whilst the same words said in peace-time would not be likely to incite this response.[83]

QUESTION 3: HATE SPEECH AND POPULAR CULTURE

50. The fact that alleged hate speech is in the form of a political song can be relevant in at least two ways.

51. First, most jurisdictions recognise that political speech and artistic expression have great value, and thus afford these forms of expression significant weight in balancing free expression against other competing rights.[84] This is further reflected in hate speech prohibitions in Australia[85] and Slovenia[86] which afford greater leeway to political, artistic or cultural expression.[87]

52. Second, and more relevant to the *Malema* appeal, songs introduce important elements that influence the interpretation of meaning and intentions. This section considers two important, overlapping elements: first, the way in which the meaning and intentions may depart from the literal text and second, the importance of language, metaphors, allusions and other devices in these forms of expression.

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[82] [2006] VSCA 284; (2006) 206 FLR 56.
[83] ibid [159].
[84] See above para 13; for an example of the value attached to artistic expression with political dimensions see *Karataş v Turkey* App no. 23168/94 (ECtHR, 8 July 1999) [49].
[85] Section 18D of the Race Discrimination Act 1975, see Annexure, para 9.
[86] Section 153(3) of the Slovenian Criminal Code, see Annexure para 154.
[87] The Canadian Supreme Court in *Keegstra* (n 10) 89-90 has also suggested that the criminal prohibition of hate speech in the Canadian Criminal Code should not be interpreted as extending to genuine forms of artistic expression.

a) Words, meanings and intentions

53. A curious feature of songs is that their meanings and the intentions with which they are sung often diverge from the literal meaning of their words - perhaps more so than in other forms of expression.

54. Potentially inflammatory words or lyrics may become neutralised through time, tradition and the form of representation, as is evident in many countries' national anthems. The second verse of the UK national anthem 'God Save the Queen' is a clear example of this:

> O Lord, our God, arise / Scatter her enemies / And make them fall / Confound their politics / Frustrate their knavish tricks / On Thee our hopes we fix /God save us all.

As is the unofficial Scottish anthem, 'Flower of Scotland' which recounts Scottish military victories over the English army, ending with a call for militaristic nationalism based on that memory:

> But we can still rise now / And be the nation again / That stood against him / Proud Edward's army / And sent him homeward / Tae think again

Militarism and the threat of violence are even more apparent in the Irish anthem, *Amhran na bhFiann* (The Soldier's Song) which is a call to arms against the English 'despots'.[88] The French national anthem, *La Marseillaise* is even less subtle, exhorting citizens to take up arms against tyrants and foreigners to the chorus:

> To arms, citizens, / Form your battalions, / Let's march, let's march! / That an impure blood / Waters our furrows![89]

55. In contrast, even the most innocuous of words can be transformed into hate speech, as is demonstrated by sectarian songs at Scottish football games.[90] Kay Goodall recounts how Protestant-identified Rangers fans and Catholic-identified Celtics fans have taken to expressing their hatred for each other by using popular songs which are inoffensive in other contexts:

> Both sides have adapted apparently harmless songs such as the traditional 'Fields of Athenry' and Tina Turner's 'Simply The Best'. Now, singing even the harmless lyrics is inflammatory.[91]

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[88] See full lyrics at <http://en.wikipedia.org/wiki/The_Soldier's_Song> accessed 16 February 2012.
[89] Direct translation, available at < http://en.wikipedia.org/wiki/La_Marseillaise> accessed 16 February 2012.
[90] See Annexure paras 141-143 for further discussion of this phenomenon.
[91] Kay Goodall, 'Incitement to Religious Hatred; All Talk and No Substance?' (2007) 70 Modern Law Review 89, 110.

56. This demonstrates the power of context and history to turn even the most innocuous of words into inflammatory hate speech. Conversely, the mere fact that words may appear to be hate speech on a literal interpretation does not entail that they have this meaning in all contexts. If that were the case then many national anthems and popular songs could be subject to scrutiny.

b) Language, metaphors, imagery and allusion

57. Songs and other forms of cultural expression involve sophisticated language, metaphors, imagery and cultural and historical allusions which are often comprehensible only to those who are cultural and linguistic 'insiders'.

58. This is well illustrated by the German Supreme Court's judgment in the *Spreegeschwader*[92] case, concerning the banning of an extremist album under youth protection laws. Spreegeschwader was a far-right rock band which recorded an album containing lyrics such as the call for 'solid boots on (Berlin's) streets' and displayed the number 1488 in the booklet accompanying the album. In neo-Nazi terminology, 88 stands for HH (the 8th letter of the alphabet), meaning 'Heil Hitler' and 14 is the neo-Nazi link to the '14 words': 'We must secure the existence of our people and a future for white children'. The German youth protection authorities banned the record from being sold to minors. The group challenged this decision, arguing that the lyrics about marching boots could equally refer to soldiers of the GDR or the German Empire before 1918, and that 1488 could also refer to the year of birth of Ulrich von Hutten, a German scholar. The Constitutional Court held that the crucial point was how the band's audience would understand the message. The band's audience were primarily members of the extremist Skinhead movement, and thus the Court held that the members of the audience would interpret the lyrics and symbols as neo-Nazi propaganda. As a result, language and symbols that would otherwise be harmless were demonstrated to be harmful when interpreted from the perspective of those within the sub-culture.

59. The ICTR's judgment in *Bikindi*[93] further demonstrates the importance of understanding songs from the perspective of the intended audience. Simon Bikindi was a famous Rwandan composer and singer in the early 1990s whose songs included 'Twasezereye' ('We Said Goodbye to the Feudal Regime'), 'Nanga Abahutu' ('I Hate the Hutu'), and 'Bene Sebahinzi' ('The Sons and Fathers of the Cultivators').[94] These songs were played repeatedly on Rwandan national radio in the build-up to the 1994 genocide and were often played during massacres. Bikindi was charged

[92] App no 1 BvR 1584/07. See Annexure para 153.
[93] Above n 78.
[94] ibid [15].

with incitement to genocide for his role in composing and performing the songs. However, the songs themselves did not refer to Tutsis directly, nor did they contain explicit calls for violence. Instead, the lyrics contained sophisticated metaphors, historical allusions and images which were difficult to comprehend for those without a sound grasp of the Kinyarwanda language and an understanding of Rwanda's culture and history.[95] The ICTR stressed the importance of viewing the songs through the eyes of the intended audience, holding that '[a]lthough Bikindi's songs were filled with metaphors and imagery, their message was clearly understood'.[96] After considering evidence from various experts on Rwandan culture and language and former members of the Hutu militia, the ICTR went on to find that all three songs denigrated Tutsis and that two of the songs were composed with the specific intention of encouraging ethnic hatred.[97] However, the ICTR ultimately found that there was no evidence that Bikindi had composed the songs with the specific intention to incite genocide.

60. These cases indicate that the proper interpretation of the meaning of songs and the intentions with which they are composed and sung requires an 'insider's' perspective. This is particularly important in cases of alleged incitement to hatred or harm because, as discussed above, the wrong of incitement primarily lies in the possibility that the intended audiences will be incited. As a result, the meaning and intentions of the speech should be assessed through the eyes of this intended audience.

CONCLUSION

61. Despite the textual, historical and ideological differences in the approach to hate speech in other jurisdictions, there is much of value in foreign courts' hate speech jurisprudence. In summary:
    a. The jurisdictions in this study generally adopt a contextual approach in balancing freedom of expression against other competing rights and values (with the exception of the US). The value attached to free speech is generally dependent on the nature of the speech under consideration. Furthermore, courts generally appear to be more willing to come to the assistance of vulnerable and disadvantaged groups targeted by hate speech and, at least in the case of the ECtHR, have been shown to be reluctant to allow over-broad hate speech laws to override the free expression of vulnerable groups.
    b. The meaning and intentions of alleged hate speech are heavily dependent on the context. At least five contextual factors are relevant here: historical and cultural associations; the

[95] ibid [198].
[96] ibid [197]-[199] and [240].
[97] ibid [254].

identity of the target group; the identity of the alleged perpetrator; the setting and audience and the prevailing social conditions.

c. Songs introduce additional complexities as their meanings and the intentions with which they are sung are often decoupled from the literal meaning of their words. Furthermore, songs are often only intelligible to those who are cultural and linguistic 'insiders'.

OPBP hopes that this comparative material will provide some assistance in grappling with the issues raised in *Geleba* and *Malema*.