

## **Legal approaches to combatting hate speech**

*(Remarks to a Combatting Hate Speech event, University of Toronto, Scarborough Campus, August 27, 2023)*

by David Matas

Sarah Teich have been asked to address learn from the experience of the Jewish people in combatting hate speech. Every persecution has its own unique characteristics. Yet, there are some lessons to be learned.

One is to take hate speech seriously. Victim communities may have a tendency to ignore hate speech unless it is followed by action. To victims of hate speech, the slurs of hate speech may seem ridiculous. The targets of hate speech know that the slurs are not true. For the targets of hate speech, it may hard to believe that anyone would take the fantasy accusations against them as credible.

Yet target communities ignore hate speech at their peril. Hate speech has insidious effect, mobilizing the ignorant and undermining potential support. By the time hate speech has been widely disseminated and accepted, it is late to prevent the violations to which hate speech leads.

A second lesson I believe that one can learn from the Jewish community experience is the gap of mechanisms available for prevention and remedy. That is very much what drove Simon Wiesenthal. Simon Wiesenthal was not just attempting to invoke existing remedies. He was attempting to construct a system of remedies where none existed, to bring Nazi mass murderers to justice.

Since his days, there have been many remedies developed to prevent and remedy mass atrocities. In a bit, I will go through the existing remedies of prevention and remedy for hate speech. Yet, this institutional structure is far from complete. One advantage of invoking the existing structure is to find the gaps in the system which need filling. Because

of the unending variety of human rights violation in general and forms of hate speech in particular, there is always going to be need for still better, still more effective mechanisms of prevention and remedy. The work of constructing the edifice of justice never ends.

A third lesson we can learn from the Jewish experience is the spreading nature of human rights violations. Jewish victimization by the Nazis was far from limited to Nazi Germany. It spread round the world, either by complicity in the Holocaust in the countries which Nazi Germany invaded or denial of refugee protection to fleeing Jewish refugees, or providing a haven to Nazi war criminals after the War.

Hate speech, in particular, spreads easily and quickly. This is particularly true now with the spread of the internet. Hate speech is more than a threat. It is a warning. When you see hate speech, wherever you are, act now. Tomorrow may be too late.

I want to run through sixteen different approaches to combatting hate speech using legal standards, as well as legal regimes, legal institutions and legal remedies. For the purpose of this review, I will use the example where relevant of incitement to hatred against the Gülen or Hizmet community of Turkey. The sixteen remedies I intend to address are these.

- 1) website terms of service
- 2) e-mails terms of service
- 3) social media terms of service
- 4) Canadian human rights codes
- 5) the Canadian Criminal Code
- 6) sentencing for hate motivated crimes
- 7) dedicated enforcement units
- 8) the European Convention on Human Rights
- 9) periodic reporting to the Human Rights Committee established under the International

## Covenant on Civil and Political Rights

- 10) communications to the Human Rights Committee established under the International Covenant on Civil and Political Rights optional protocol
- 11) the UN rapporteur on religious intolerance communications to states
- 12) the UN rapporteur on religious intolerance communications state visits
- 13) Universal Periodic Review
- 14) UN Human Rights Council
- 15) education funding
- 16) foreign interference

## First

- 1) website terms of service

Every website owner has a contract with a website host setting out obligations of both parties. Those terms of service typically prohibit the use of the website to promote hatred.

There are internet services which can identify the hosts for any website. Take for instance the website of Northern Justice Watch, the primary host for this event. Their website host is OVHCloud, headquartered in France.

The terms of service of OVHCloud provide in part:

"Any ... content that is ... hateful or inflammatory, incites crimes against humanity, ... or content inciting hatred or discrimination towards individuals by reason of their ... religion ... is prohibited, and can lead to ... the immediate suspension of all or part of the Services provided under the Contract, the deactivation of the Client Account and/or the termination of the Contract by OVHcloud ..."<sup>1</sup>

OVHCloud has an abuse reporting webpage. Anyone who considers a client of OVHCloud to be violating the terms of service can report through the webpage the claimed violations.<sup>2</sup>

The Government of Turkey Ministry of Foreign Affairs has webpages that in my view incite hatred against the Gülen or Hizmet movement.<sup>3</sup> The host for those web pages though, Turk Telekomunikasyon Anonim Sirket, is, as you might guess from the name, located in Turkey. That sort of host is unlikely to responsive to a report of abuse of their services by the Government of Turkey.

## 2) e-mails terms of service

E-mail hosts have terms of service similar to those of webpage hosts. Some companies run both e-mail and webpage hosting services. That is true, for instance, of OVHCloud. Anyone who has an e-mail service hosted by OVHCloud will be subject to the same terms of service as the person or entity which runs a website hosted by OVHCloud.

If you want to find what company is hosting an e-mail you receive, look at the suffix in the e-mail address. The same internet services which provide locations for web hosts provide

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[cts/7e8a264-contrat\\_genServices-CA-8.0.pdf](https://www.ovh.com/abuse/#!/)

<sup>2</sup> <https://www.ovh.com/abuse/#!/>

<https://www.mfa.gov.tr/an-informative-note-of-the-ministry-of-foreign-affairs-on-the-failed-coup-attempt.en.mfa>

<https://www.mfa.gov.tr/sayin-bakanimizin-terorun-milliyeti-etnik-kokeni-veya-dini-yoktur--feto-tum-insanligi-tehdit-ediyor-baslikli-makalesi.en.mfa>

locations for e-mail hosts.

Practically what that means is that, if you receive spam hate mail, you can report the spam to the host of the sender. If the host is enforcing their terms of service, and typically, they, the hate spammer will lose have their e-mail service cut off.

### 3) social media terms of service

The same is true for social media. It is not exactly clear what is happening with Twitter since Elon Musk acquired it, since he keeps on changing his mind. However, the terms of service of other social media are, by comparison, stable.

Facebook, for instance, has as a component of its terms of service, a community standards section, and has a component of its community standards section, a hate speech subsection. That subsection is verbose, almost fifteen hundred words, not only setting out what is prohibited, but also attempting to justify the prohibition.<sup>4</sup> As well, many examples are given.

Where terms of service are violated, Facebook will remove the violating material. The account may be disabled. If the account is disabled, Facebook reserves the right to refuse to allow the violator to create another account.

From a cursory glance, as far as I can see, Facebook appears to be respecting its hate speech community standards terms of service for the Gülen or Hizmet movement. I have not been able to identify any offending Facebook accounts.

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<sup>4</sup> <https://transparency.fb.com/policies/community-standards/hate-speech/>

#### 4) Canadian human rights codes

The Ontario Human Rights Code provides under the heading: "Announced intention to discriminate"

"A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I."<sup>5</sup>

There are similar provisions in other human rights codes in Canada. The Code allows any person who believes that their rights under the Code have been infringed to apply to the Ontario Human Rights Tribunal for an order against the claimed infringer.

5) The Canadian Criminal Code prohibits both public incitement of hatred and willful promotion of hatred.<sup>6</sup> For a prosecution to commence, the consent of the Attorney-General in the province where the claimed offence occurred is necessary. Private prosecutions are not possible.

If consent is denied, there is no recourse to the courts. The courts will not intervene in a denial of consent, because, if the denial of consent were overturned, it would amount to making an advance ruling against the accused and compromise the fairness of later proceedings. There remains nonetheless a remedy internationally, a point to which I will return to later.

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<sup>5</sup> Revised Statutes of Ontario 1990, chapter H.19, section 13 (1)

<sup>6</sup> <https://www.torontopolice.on.ca/crimeprevention/hatecrime.php>

## 6) sentencing for hate motivated crimes

The Canadian Criminal Code provides

"A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on ... religion, ... or on any other similar factor,<sup>7</sup>

The provision has a very long list. I mentioned only the religion component because that is the one most relevant here.

This provision applies to all criminal offences, including offences for which private prosecution is possible. So, though neither incitement nor promotion of hatred can be prosecuted privately, many other crimes which are hate motivated can be.

## 7) dedicated enforcement units

Hate speech is a crime which requires understanding. Hate speech often occurs with specific, coded references which only those who are familiar with the context would understand. Hate speech accordingly requires, to be effective, dedicated enforcement units, in investigation, policing and prosecution who can bring specialized expertise to bear.

This is true both for hate speech crimes and other crimes motivated by hatred. There is a tendency for non-specialized investigative, police and prosecution units just to pursue the

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<sup>7</sup> Section 718.2

common crime and to ignore the hate motivation. With specialized units, the hate dimension of common crimes is much more likely to be noticed and brought to bear in sentencing.

Dedicated police crime units exist in many cities in Canada. There is one right here in Toronto.<sup>8</sup>

## 8) The European Convention on Human Rights

This Convention provides, under the heading, "Prohibition of abuse of rights"

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."<sup>9</sup>

The vocabulary of human rights is, like the Declaration of Human Rights itself, universal. Claims of human rights violations in general, and of hate speech in particular are not just made by victims against perpetrators but also by perpetrators against victims. What differentiates perpetrators from victims is not the vocabulary of human rights. It is factual reality.

Although the provision just quoted and the Convention do not prohibit explicitly incitement to hatred, the European Court of Human Rights, quite rightly in my view, has taken the view that allowing incitement to hatred means granting a right to engage in an activity or perform an act aimed at the destruction of the rights and freedoms set forth in the Convention.<sup>10</sup>

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<sup>8</sup> <https://www.torontopolice.on.ca/crimeprevention/hatecrime.php>

<sup>9</sup> Article 17

<sup>10</sup> [https://www.echr.coe.int/documents/d/echr/fs\\_hate\\_speech\\_eng](https://www.echr.coe.int/documents/d/echr/fs_hate_speech_eng)



This provision allows the Court to determine what is and is not hate speech.

If a person is convicted in a state party to the Convention for speech, and the Court determines that the expression is hate speech, the conviction does not violate the Convention guarantee of freedom of expression. If the Court determines that the expression is not hate speech, the conviction does violate the Convention.

There is an example of exactly that in the Hizmet/ Gülan context. Yasin Özdemir was convicted in November 2016 for comments which he had posted on the social networks in April 2015, in favour of the Gülenist organization. He appealed his conviction to the European Court of Human Rights successfully, which found that his conviction violated the Convention guarantee of freedom of expression. That finding meant that supporting the Gülen movement is not hate speech.<sup>11</sup>

9) periodic reporting to the Human Rights Committee established under the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights provides:

"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>12</sup>

Every state party to the International Covenant on Civil and Political Rights has a duty to report periodically to the expert Human Rights Committee established under the Covenant on its compliance with the Convention. The Committee after taking into consideration a variety of submissions and hearing the state party makes concluding observations.

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<sup>11</sup> [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-213773%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-213773%22]})

<sup>12</sup> Article 20(2)

Turkey has completed this once and is now going through the second cycle. The list of prior questions submitted by the Human Rights Committee which the Committee asked Turkey to address included questions about what Turkey was doing to address hate speech.<sup>13</sup> The answer Turkey, in its report, distributed just this spring, on April 26, 2023, in a nutshell, is quite a lot, and listed a sequence steps Turkey was undertaking.<sup>14</sup> The Committee will consider this report in February 2024 and make concluding observations.

10) communications to the Human Rights Committee established under the International Covenant on Civil and Political Rights optional protocol

The optional protocol to the Covenant allows for individual complaints by victims of violations of the Covenant. Turkey has been the object of a number of complaints for which Turkey has been found in violation of the Covenant, including a couple with Hizmet victims.<sup>15</sup> However, neither of these complaints were based on claims of hate speech against Hizmet.

I mentioned earlier that there is a remedy against a refusal by a Canadian Attorney-General to consent to a hate speech prosecution. This is it. Canada is also a state party to the optional protocol providing for individual communications to the Human Rights Committee about claimed violations of the Covenant. Someone who asked for Attorney-General consent and was refused could petition the Human Rights Committee claiming that the

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[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FTUR%2FQPR%2F2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FTUR%2FQPR%2F2&Lang=en)

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[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FTUR%2F2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FTUR%2F2&Lang=en)

<sup>15</sup> See UN document numbers CCPR/C/136/D/3730/2020, CCPR/C/135/D/3736/2020

refusal of consent put Canada in violation of the Covenant.

#### 11) the UN rapporteur on religious intolerance communications to states

The UN human rights system has theme mechanisms which apply to all countries. These rapporteurs, in addition to making thematic reports, can communicate directly with countries. The UN rapporteur on religious intolerance has, along with other UN expert mechanisms has requested that Turkey not deport Ahmadiyya's from Turkey.<sup>16</sup> There has, to date, been no communication from this rapporteur to Turkey about Hizmet. Yet there could be.

#### 12) the UN rapporteur on religious intolerance country visits

The thematic mechanisms of the UN Human Rights Council conduct visits to various countries on invitation and writes country reports based on those visits. The UN rapporteur on religious intolerance conducted a country visit to Turkey in late November and early December 1999 and wrote a report on that visit.<sup>17</sup> In light of the substantially different situation in Turkey today than then, it would legitimate to suggest another such visit and report, addressing in particular the situation of the Hizmet community.

#### 13) Universal Periodic Review

Every state comes up for review by the UN Human Rights Council periodically. Turkey has already come up for review three times in this system. The last time was January 2020. The next scheduled time is February 2025. During Human Rights Council sessions, all

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<sup>16</sup> <https://www.ohchr.org/en/press-releases/2023/07/turkiye-must-not-deport-members-ahmadi-religion-peace-and-light-seeking>

<sup>17</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/604/96/PDF/N0060496.pdf?OpenElement>

member states of the UN can speak, including states not members of the Council. ECOSOC registered NGOs can also speak.

#### 14) UN Human Rights Council

The UN Human Rights Council meets three times a year, in September, March and June. One recurring agenda item is "Human rights situations that require the Council's attention". Again here any state member of the UN can speak on any situation that the country speaking considers to require the Council's attention. So can ECOSOC registered NGOs. As well ECOSOC registered NGOs can host parallel events during Council sessions on human rights subjects of their choice.

#### 15) Education funding

Where hate propaganda is part of state propaganda, that hate propaganda often penetrates the school system. One way to impact on that propaganda is to work to ensure that no inter-state or international funding funds that sort of education.

There is a tendency to leave state education to the authorities of the state. Yet the international community has a legitimate interest in combatting incitement to hatred through a local school system. Inter-state and international funding of education should be contingent on that funding not being used to bring hate propaganda into the schools.

#### 16) Foreign interference

Hate propaganda does not emanate just from private institutions. Nor is hate propaganda only local. Sometimes we see state institutions propagating hatred against a target group not just at home, but abroad.

The Vienna Convention on Diplomatic Relations renders diplomats immune from criminal prosecution in countries where they have diplomatic status.<sup>18</sup> However, diplomats can be expelled, declared persona non grata where they have broken local laws in the countries where they are posted.<sup>19</sup> That power to expel can and should be invoked where diplomats use their embassies to engage in hate propaganda in the countries where they are located.

## **Conclusion**

Combatting incitement to hatred requires not just establishing and invoking remedies. It requires justification.

There are many who are free speech absolutists or who give the right to freedom a speech priority over other rights, including the right to freedom from incitement to hatred. To combat incitement to hatred means engaging in the debate about the importance of this effort. One of the best ways of doing that is point to the victimization to which incitement has led. Combatting incitement to hatred is not just preventing future wrongs. It means combatting the continuation of present wrongs.

Right now, the Hizmet community in Turkey is heavily victimized. Combatting that victimization means combatting the incitement which is generating it.

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<sup>18</sup> Article 31(1)

<sup>19</sup> Article 9