

# XIX

## ARTICLE 19

### Expert Meeting on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence

UN HCHR, October 2-3, 2008, Geneva

Dr. Agnes Callamard  
ARTICLE 19 Executive Director

#### Introduction

The objective of this paper is to assist the expert panel's considerations on whether articles 19 and 20 of the ICCPR are an indivisible whole, and particularly on whether **States can impose restrictions on freedom of expression without first embracing the full scope of such freedom?** The overriding objective is to clarify the nature of the obligations of States under article 20 (limitations as an option or an obligation) following a series of freedom of expression related incidents that have polarised societies, created tensions and fuelled xenophobia and racist attitudes and highlighted the substantive ambiguities as to the "demarcation line" between freedom of expression and hate speech, especially in relation to religious issues.

#### I - Why freedom of expression matters

Built in the aftermath of the Second World War and the Holocaust, the international human rights has placed non-discrimination as a cross-cutting and central principle, present in all the major human rights treaties. The principle applies to everyone in relation to all human rights and freedoms and it prohibits discrimination on the basis of a list of non-exhaustive categories such as sex, race, colour and so on. The principle of non-discrimination is complemented by the principle of equality, as stated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights."

The importance of non-discrimination to human rights is well known and well understood: human history is replete with instances of racism and intolerance giving rise to genocide and crimes against humanity. That the international community had identified discrimination and racism as an abuse of human dignity and equality, as well as a major cause of other massive violations, including genocide, requires thus little elaboration. Racism, intolerance and discrimination are abhorrent and must be combated with the utmost determination.

Less well known is the fact that international and national bodies and courts worldwide have insisted and demonstrated also that the right to freedom of expression is central to the international human rights regime and human dignity.

That may be the case because all the greatest man-made calamities that have plagued the world for centuries involved and required full control over expressions, opinions and at times conscience: the slave trade and slavery, the inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag, ...

Such control over freedom of expression is *“the handmaiden of power, without which it is inconceivable. It is an instrument to assist in the attainment, preservation or continuance of somebody’s power, whether exercised by an individual, an institution or a state. It is the extension of physical power into the realm of the mind and the spirit....”*<sup>1</sup>

It encompasses all interferences with the right of all individuals to hold opinions and to express them without fear. It can be pursued through a range of means, both direct and indirect, making censorship particularly complex and difficult to confront and defeat<sup>2</sup>.

For all these reasons, the importance of freedom of expression has been emphasized on numerous occasions by international courts and bodies alike.

As early as 1946, at its very first session, in the UN General Assembly adopted Resolution 59(I) which states: *“Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”*

This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said: *“The right to freedom of expression is of paramount importance in any democratic society.”*<sup>3</sup>

The European Court of Human Rights has recognised the vital role of freedom of expression as an underpinning of democracy: *“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”*<sup>4</sup>

The democratic significance of freedom of expression was also recalled by the Inter-American Court of Human Rights:

*Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently*

---

<sup>1</sup> Michael Scammell, “Censorship and its History – A personal View” in 1988 ARTICLE 19 World Report, p5

<sup>2</sup> ARTICLE 19 1988 World Report, Information, Freedom and Censorship, introduction by Kevin Boyle, 1988.

<sup>3</sup> *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

<sup>4</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

*informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.*<sup>5</sup>

The guarantee of freedom of expression applies with particular force to the media. The media is an important focus of attention for freedom of expression activists: it is *the* first medium that governments and other political and economic forces attempt to control, including through seeking their complete and forced silencing. As key vehicles of communication and expression, the ability of the media to function independently is vital to freedom of expression but also to the ability of a society to function and survive.

Amyrta Sen well demonstrated that in relation to the Chinese famine of 1958-61, not only did censorship and the resulting loss of information impacted devastatingly on poor communities, it also greatly misled the government and the policies it pursued and resulted in millions of lives being lost. There is no famine where there is freedom of the press...

Censorship of the media is exercised most effectively through censorship *by* the media itself. Those who are intent on censoring others will not always seek to silence. They may also aim at dominating and containing what is being conveyed to the public, seeking control over media ownership, imposing particular editorial lines, deciding who can have access to the airwaves and for how long, determining what gets published and what does not etc.

The European Court has consistently emphasised the “*pre-eminent role of the press in a State governed by the rule of law*” and has stated: “*Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.*”<sup>6</sup>

These and many other statements and evidence demonstrating a fundamental characteristic of the right to freedom of expression, including access to information and a free press: it is not only a fundamental human right, *on its own and in its own right*, but it is also a cornerstone right or, to use Donnelly and Howard’s categorisation, ‘*empowerment*’ right - one that enables other rights to be protected and exercised.

Freedom of expression is essential to the democracy and the democratisation process. It forms a central pillar of the democratic framework through which all rights are promoted and protected, and the exercise of full citizenship is guaranteed. A robust democratic framework in turn, helps create the stability necessary for society to develop in a peaceful and relatively prosperous manner. Through freedom of expression, politics can unfold in an unfettered and constructive manner.

Free expression allows people to demand the right to health, to a clean environment and to effective implementation of poverty reduction strategies. It makes electoral democracy meaningful and builds public trust in administration. Access to information strengthens mechanisms to hold governments accountable for their promises, obligations and actions. It not

---

<sup>5</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No 5, para 70.

<sup>6</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

only increases the knowledge base and participation within a society but can also secure external checks on state accountability, and thus prevent corruption that thrives on secrecy and closed environments.

The free flow of information increases the capacity of all to participate to the life of their nation or community and policy-making. If development is to be realised, people need the freedom to participate in public life, to put forward ideas and potentially have these realised and to demand, without fear of recrimination or discrimination, that governments uphold their obligations. Freedom of expression allows individuals the possibility of becoming active in the development process.

The media has a specific task of informing the public; it can enhance the free flow of information and ideas to individuals and communities, which in turn can help them to make informed choices for their lives. A free, independent and professional media, using investigative methods, plays a key role in providing knowledge and in giving voice to the marginalized, highlighting corruption and developing a culture of criticism where people are less apprehensive about questioning government action.

So whenever freedom of expression is unduly restricted, the realization of many other rights is attacked and undermined.

## **II – Article 19, UDHR and ICCPR**

Freedom of expression is guaranteed under Article 19 of the *Universal Declaration on Human Rights* (UDHR), and more or less in similar terms under article 19 of the *International Covenant on Civil and Political Rights* (ICCPR):

*Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.*

Freedom of expression is also protected in all three regional human rights treaties, at Article 10 of the *European Convention on Human Rights* (ECHR), at Article 13 of the *American Convention on Human Rights* and at Article 9 of the *African Charter on Human and Peoples' Rights*.

Yet, freedom of expression is **not absolute**.

Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

A similar formulation can be found in the ACHR and ECHR. It is vague enough to leave much discretion at the hands of states as to how they should restrict freedom of expression to protect the

rights of others, national security, and particularly in the matters of personal morals, such as religion.

For instance, whereas the European Court has established particularly stringent restrictions requirements of speeches that have been deemed or characterised as "political", it has left a far greater margin of appreciation to states for restrictions targeting other forms of speeches, particularly those deemed offending public morals or religion.

*"Whereas there is little scope ... for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.*

*Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended."*

In the United States, on the other hand, the Supreme Court steadfastly strikes down any legislation prohibiting blasphemy, on the fear that even well-meaning censors would be tempted to favour one religion over another, as well as because it "is not the business of government ... to suppress real or imagined attacks upon a particular religious doctrine ..."<sup>7</sup>.

In spite of this margin of appreciation, some degrees of consistency and protection have developed over time, particularly in the form of the so-called **three part test**.

For a restriction to be legitimate, all three parts of the test must be met:

- First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and "formulated with sufficient precision to enable the citizen to regulate his conduct"<sup>8</sup>.
- Second, the interference must pursue a legitimate aim. The list of aims in the various international treaties is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression.
- Third, the restriction must be necessary to secure one of those aims. The word "necessary" means that there must be a "pressing social need" for the restriction. The

---

<sup>7</sup> *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 495, 504-05 (1952).

<sup>8</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be proportionate to the aim pursued.<sup>9</sup>

In conclusion, and as stated by the European Court of Human Rights: "*Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established*"<sup>10</sup>.

### **III - Hate speech**

International law imposes one clear positive **duty** upon states as far as restrictions of freedom of expression is concerned, stated in Article 20 of the UN Covenant on Civil and Political Rights – the prohibition on war propaganda and on hate speech:

*"Any propaganda for war shall be prohibited by law"*

*"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*

This is the only duty that States must abide by, as far as restricting freedom of expression is concerned<sup>11</sup>.

There is, however, no agreed definition of propaganda or hate speech in international law. Instead, there are marked different regional or national approaches in restricting it.

At one hand of the spectrum is the US approach which *protects* hate speech unless (1) the speech actually incites to violence and (2) the speech will likely give rise to *imminent* violence. This is a very stringent standard indeed: even speech advocating violence and filled with racial insults, will be protected absent a showing that violence is likely to occur virtually immediately.

At the other hand of the spectrum are stringent restrictions on hate speeches, and the development of specific hate speech regulations for denying the Holocaust or other genocides. Nowhere are the substantial differences in the ways states will restrict hate speech clearer than in the European Union where countries have approached and dealt with hate groups and hate speeches with considerable variety, from the French or German position of high restriction, to that of the UK or Hungary where greater protection has been afforded to a variety of speeches<sup>12</sup>.

---

<sup>9</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>10</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>11</sup> The Additional Protocol to the Convention on Cybercrime invites Parties to enact prohibitions which can be very broad (for example, on the distribution of racist material through a computer system (Article 3), or on the public insulting of persons “for the reason that they belong” to a racial or ethnic group (Article 5)). However it also permits Parties to opt out of these provisions (or effectively to do so).

<sup>12</sup> The Council of Europe’s Committee of Ministers’ Recommendation (97) 20 on “Hate Speech”, *describes* the term as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.

Finding a common definition of hate speech is further complicated by the fact that the International Convention on the Elimination of Racial Discrimination (ICERD) has established a different standard, which offers the most far-reaching protections against hate speech.

CERD defines discrimination as any distinction based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the enjoyment, on an equal footing, of any human right and/or fundamental freedom. States Parties are required to take a range of measures to combat discrimination, including by not engaging in discrimination, by providing effective remedies and by combating prejudice and promoting tolerance.

Article 4(a) of CERD places a specific obligation on States Parties to declare as offences punishable by law six categories of activity:

1. dissemination of ideas based on racial superiority;
2. dissemination of ideas based on racial hatred;
3. incitement to racial discrimination;
4. acts of racially motivated violence;
5. incitement to acts of racially motivated violence; and
6. the provision of assistance, including of a financial nature, to racist activities.

The article refers to race, colour and ethnic origin but it is probably the case that this was just poor drafting, since there does not seem to be any particular logic behind the choice of terms, and these obligations probably apply to all of the prohibited grounds of discrimination, namely race, colour, descent, and national or ethnic origin. Four of these obligations, namely (1)-(3) and (5), call for restrictions on freedom of expression<sup>13</sup>.

There is no international consensus on the requirements of Article 4 and many states have entered reservations to it<sup>14</sup> – all of which have the effect that the implementation of its requirements are subject to the state's own norms on the balance between freedom of expression and anti-discrimination<sup>15</sup>.

As summarized by Parmar<sup>16</sup>, the more significant diverging aspects of various international or national law provisions relating to hate speech include:

1. The different weight attributed to *intent*, motivation, medium, context and foreseeable consequences in a given circumstance;

---

<sup>13</sup> ARTICLE 19, Memorandum Preliminary Draft Inter-American Convention Against Racism and all Forms of Discrimination and Intolerance, April 2007

<sup>14</sup> The reservation of the USA states: "The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America." See <http://www2.ohchr.org/english/bodies/ratification/2.htm#reservations>

<sup>15</sup> Yet, in a detailed legal statement on the subject of reservations, the Human Rights Committee concluded that there are certain provisions in the Covenant that reflected customary international law and these may not be the subjects of reservations by states when they ratify. One such is the duty to prohibit the advocacy of national racial or religious hatred. According to the HRC, customary international law binds all states in most circumstances whether or not they consent, and the prohibition on racial discrimination and advocacy of hatred are part of customary international law. General Comment No.24 Issues Relating to Reservations made upon ratification of accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant 52<sup>nd</sup> Sess., Nov. 11 1994

<sup>16</sup> Sejal Parmar, 2008, Op.cit

2. Whether *advocacy* of hatred is specifically required (it is not by the ICERD, but is by the ICCPR): there is international disagreement about whether the dissemination of ideas based on racial superiority or hatred, but which do not constitute incitement to discrimination or violence, can legitimately be prohibited<sup>17</sup>.
3. Whether the speech in question must *incite to a proscribed result* or it is sufficient for it merely to fall within a category of prohibited statements (the ICERD and the ICCPR prohibit incitement to discrimination and violence, the ICCPR additionally refers to hostility and ICERD to hatred); and
4. Whether a *state of mind*, without reference to any specific act, can serve as a proscribed result.<sup>18</sup>

#### **IV - Balancing Article 19 and Article 20**

Recognition of the need to balance rights, and to prevent people from using their rights as weapons to attack the rights of others, is reflected in Article 5 of the ICCPR, which states:

*Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*

Article 5 of the Vienna Declaration even more clearly and forcefully states that:

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

Balancing different competing rights is at all times a difficult exercise, but it is particularly so in international context. The prevailing position is that balancing can only be done on a case by case basis, taking into account the particular circumstances and implications of the case.

*When faced with a conflict between competing rights and interests, courts usually favour a judicial approach where the relevant rights and interests are “harmonized” with due regard to the particular circumstances of each case. Such ad hoc balancing is more an*

---

<sup>17</sup> In *JRT and the WG Party v Canada*, the committee held that application was inadmissible under Article 19(3), but reasoned that “the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit”.

<sup>18</sup> The Human Rights Committee and the Committee on the Elimination of Racial Discrimination have said that proscribed result can include a state of mind in which hostility towards a target group is harboured, even though this is not accompanied by any urge to take action to manifest itself. See T Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred* above at note 5 at 14.



*artistic exercise than a scientific one as the circumstances of each case will ultimately determine which norm shall prevail*<sup>19</sup>.

This being said, a few principles regarding articles 19 and 20 may be extracted:

**1. No hierarchy of rights:** At the heart of the balancing act is the rejection of any formal hierarchy among fundamental rights. Most considered analyses of the relationship between freedom of expression and the prohibition on discrimination seek to find a balance between the right to speak and the pursuit of racial, religious and communal justice and harmony, a balance that requires the least interference with freedom of expression in order to protect individuals from discrimination.<sup>20</sup>

As Kevin Boyle has written, “to point out that there are circumstances in which other interests shall prevail over freedom of expression is not inconsistent with a strong commitment to the value of freedom of expression”.<sup>21</sup>

At the same time, as Sejal Parmar added, “to argue that the law should not interfere with certain types of offending, insulting or denigrating publications does not mean that free speech advocates are indifferent to the rights of racial or religious minorities. Indeed, from the perspective of free expression advocates, there is a case for at least some restrictions on grounds of equality and dignity, while there is a concern about the effects of overbroad restrictions on the values underpinning free speech<sup>22</sup>.”

**2. Coherence between Articles 19 and 20:** There is strong coherence between the two articles and the risks of article 19 allowing greater restrictions on hate speech than article 20 is very negligible. The coherence has been highlighted by a number of academic researchers and the Human Rights Committee.

For instance, as Tarlach McGonagle<sup>23</sup> well elaborates:

*“It is rarely disputed that Articles 19 and 20, ICCPR, are closely related. Indeed, during the drafting of the ICCPR, the draft article that ultimately became Article 20 was realigned so that it would immediately follow Article 19, thereby emphasising the contiguity of the two articles. Indeed, one leading commentator has even referred to Article 20 as being “practically a fourth paragraph to Article 19 and has to be read in close connection with the preceding article<sup>24</sup>”. It is also noteworthy that Article 20,*

---

<sup>19</sup> Laurent Pech, Balancing Freedom of the Press with Competing Rights and Interests, A Comparative Perspective, 2006, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909507)

<sup>20</sup> See for example, the compilation Sandra Coliver, Kevin Boyle and Frances D’Souza, *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* (ARTICLE 19 and Human Rights Centre, University of Essex, 1992).

<sup>21</sup> Kevin Boyle, “Overview of a Dilemma: Censorship versus Racism”, in S Coliver, K Boyle and F D’Souza, *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* above at note 7 at 1.

<sup>22</sup> Sejal Parmar, 2008

<sup>23</sup> Tarlach McGonagle, International and European legal standards for combating racist expression: selected current conundrums, presentation for ECRI, 2006

<sup>24</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981), pp. 209-245, at p. 227.

*unlike other substantive articles in the ICCPR, does not set out a right as such. Instead, it sets out further restrictions on other rights, most notably the right to freedom of expression.”*

And he adds:

*“it is generally accepted that there is no real contradiction between Articles 19 and 20. This is borne out by the drafting history of the respective articles<sup>25</sup>, the UN Human Rights Committee’s (HRC) General Comment 11<sup>26</sup> and various HRC Opinions. It is logical that this coherence should exist: different provisions of the same treaty must be interpreted harmoniously.”*

Similarly Toby Mendel points out that<sup>27</sup>:

*While proposals to restrict Article 20(2) to incitement to violence were rejected, so were proposals to extend it, for example to include ‘racial exclusiveness’, on the basis of concern about free speech.<sup>28</sup> This suggests that the obligations of Article 20(2) are extremely close to the permissions of 19(3), leaving little scope for restrictions on freedom of expression over and beyond the terms of Article 20(2).*

Various Human Rights Committee (HRC) opinions further validate this position.

For instance, In *Ross v Canada*, the HRC recognised the overlapping nature of Articles 19 and 20, stating that it considered that “restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”<sup>29</sup>

This reflects the conclusion that any law seeking to implement the provisions of Article 20(2) ICCPR must not overstep the limits on restrictions to freedom of expression set out in Article 19(3).

Mendel also argues that support for this may be found in the jurisprudence of the European Court of Human Rights.

*In Lehideux and Isorni v. France, [...] the Court [...] noted that the Commission had, in that case, held that Article 17 could not prevent the applicants from relying on Article 10, which protects freedom of expression in terms similar to Article 19 of the ICCPR. The Court implicitly agreed as it analysed the case through the filter of Article 10, albeit*

---

<sup>25</sup> See further: Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff Publishers, 1987), pp. 403-411; Manfred Nowak, *U.N. Covenant on Civil and Political Rights* (2nd revised edition) (Germany, N.P. Engel Publisher, 2005), pp. 468-480.

<sup>26</sup> Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), General Comment 11, United Nations Human Rights Committee, 29 July 1983.

<sup>27</sup> Toby Mendel, *Does International Law Provide Sensible Rules on Hate Speech?*, Forthcoming, 2008

<sup>28</sup> See BOSSUYT, *supra* note 3, at 404-405, 408.

<sup>29</sup> Communication No 736/1997.

*interpreted in accordance with Article 17.<sup>30</sup> This again suggests close legal proximity between what may be required to protect the rights of others and what is permitted as a restriction on freedom of expression. Similar accommodation between these two interests is found in the Council of Europe Recommendation on Hate Speech, which refers to instances of hate speech which do not enjoy the protection of Article 10, because they are aimed at the destruction of rights and freedoms recognised by the ECHR, that is, which breach Article 17.<sup>31</sup>*

Before turning to the third characteristic, it should be emphasised that the same coherence cannot be found between article 4 of CERD and the other international human rights treaties. This is a major weakness inherent to the article and to what it sought to address.

**3. The three part test applies to article 20:** The implication of the coherence between articles 19 and 20 is that the States' outlawing of advocacy of hatred under Article 20(2) ICCPR must be circumscribed by the requirements of Article 19(3) ICCPR, in particular the requirement that restrictions imposed on freedom of expression be "necessary in a democratic society".

In a series of cases, the European Commission and Court on Human Rights has refused to protect attempts to deny the Holocaust, largely on the basis that these fuel anti-Semitism and states, particularly those in states with a history of anti-Semitism, have the competence to decide whether they would like to legislate specifically against such denials.<sup>32</sup> At the same time, the European Court of Human Rights has also made clear that if the statements in question do not disclose an aim to destroy the rights and freedoms of others,<sup>33</sup> or deny established facts relating to the Holocaust,<sup>34</sup> they are protected by the guarantee of freedom of expression.

In 1997, the Committee of Ministers of the Council of Europe adopted a Recommendation on "Hate Speech", laying down a number of basic principles to be followed by Council of Europe Member States. While affirming the duty of States to take steps to prohibit the advocacy of hatred, including on grounds of religion, the Recommendation warns that "hate speech laws" should not be used to suppress freedom of expression.

Principle 3 states that:

*... [t]he governments of the member states should ensure that in the legal framework referred to in Principle 2 interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria.*

---

<sup>30</sup> 23 September 1998, Application No. 24662/94, paras. 34-35. Article 19 rules out reliance on rights to justify actions which are aimed at the destruction or undue limitation of the human rights of others

<sup>31</sup> Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on 'Hate Speech', 30 October 1997, Appendix, Principle 4.

<sup>32</sup> *Glimmerveen and Hagenbeek v Netherlands*, 11 October 1979, Application No 8406/78; *Kühnen v. Germany*, 12 May 1988, Application No 12194/86; *BH., MW, HP and GK Austria*, 12 October 1989, Application No. 12774/87; *Ochensberger v Austria*, 2 September 1994, Application No 21318/93; and *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v Germany*, 29 November 1995, Application No 25992/94; *Walendy v. Germany*, 11 January 1995, Application No 21128/92; *Remer v Germany*, 6 September 1995, Application No. 25096/94; and *Honsik v Germany*, 28 October 1997, Application No 25062/94. See also *Garaudy v France*, 7 July 2003, Application No 65831/01.

<sup>33</sup> *Ceylan v Turkey*, 8 July 1999, Application No 23556/94.

<sup>34</sup> *Lehideux and Isorni v France*, 23 September 1998, Application No 24662/94.

The Explanatory Memorandum further warns of the need for “legal protection against arbitrary interferences [with freedom of expression] and adequate safeguards against abuse”.

In conclusion, any hate speech restriction on freedom of expression should be carefully designed to promote equality and protect against discrimination and, as with all such restrictions, should meet the three-part test set out in Article 19 of the ICCPR, according to which an interference with freedom of expression is only legitimate if:

- (a) it is provided by law;
- (b) it pursues a legitimate aim; and
- (c) it is “necessary in a democratic society”.

Such considerations have prompted the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative, on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression to adopt in 2001 a Joint Statement on racism and the Media<sup>35</sup> which lays down a number of principles for the restriction of freedom of expression through so-called hate speech regulations:

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal. If these safeguards are not in effect, there is a very real possibility of such measures being abused, particularly where respect for human rights and democracy is weak, and “hate speech” laws have in the past been used against those they should be protecting.

In accordance with international and regional law, “hate speech” laws should, at a minimum, conform to the following:

- no one should be penalized for statements which are true;
- no one should be penalized for the dissemination of “hate speech” unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

In 2006, in another declaration on Freedom of Expression and Cultural/Religious Tensions<sup>36</sup>, the Special Rapporteurs stated that:

- The exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful

---

<sup>35</sup> <http://www.article19.org/pdfs/igo-documents/three-mandates-statement-1999.pdf>

<sup>36</sup> <http://www.article19.org/pdfs/igo-documents/four-mandates-dec-2006.pdf>

resolution of differences. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.

- Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient 'hate speech' legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.

ARTICLE 19 further recommends that:

- Restrictions must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, whether of a religious nature or not,<sup>37</sup> from hostility, discrimination or violence, rather than to protect belief systems, religions, or institutions as such from criticism. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably,<sup>38</sup> belief systems, opinions, and institutions, including religious ones,<sup>39</sup> as long as this does not advocate hatred which incites to hostility, discrimination or violence against an individual.

### **Conclusion: Beyond hate speech laws: fulfilling the right to equality through Freedom of Expression**

As the overwhelming number of cases across the world all too well illustrates, the relationship between protecting the right to equality and resorting to criminal hate speech laws is weak.

ARTICLE 19's 20 years experience shows that restrictions on freedom of expression, including hate-speech legislations, rarely protect us against abuses, extremism, or racism. In fact, they are usually and effectively used to muzzle opposition and dissenting voices, silence minorities, and reinforce the dominant political, social and moral discourse and ideology. This is especially true in period of high stress level and duress, as currently and globally experienced.

In Russia, for instance, Article 282 of the Criminal Code has been applied in a discriminatory fashion and has been used to curtail freedom of expression. It is rarely applied in attacks against religious minorities by ultra-nationalist, neo-Nazi and anti-Semitic groups, instances where it could justifiably be used to safeguard democracy. This suggests selective implementation of the

---

<sup>37</sup> Religion as used here is to be understood broadly and does not dependent on formal State recognition.

<sup>38</sup> The right to freedom of expression includes the right to make statements that 'offend, shock or disturb'. See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

<sup>39</sup> ARTICLE 19 believes that blasphemy as a criminal offence should be abolished. Tolerance, understanding, acceptance and respect for the diversity of faiths and beliefs cannot be secured by the threat of criminal prosecution and punishment. This is becoming ever more relevant as our societies become more and more diverse.

legislation, contrary to the requirement set out in Council of Europe Recommendation 97(20) that prosecutions be based on “objective criteria”<sup>40</sup>.

Hate speech laws, as with blasphemy laws, are often used by states against the very minorities they are designed to protect. In some cases, they are even used to restrict minorities from promoting their culture and identity, or from expressing concern about discrimination against them by the majority. Turkey frequently uses Article 312 of the Penal Code – which provides for up to three years’ imprisonment for anybody who ‘incites hatred based on class, race religion, or religious sect, or incites hatred between different regions’– against those who espouse Kurdish nationalism or even express pride in Kurdish culture. There is no evidence that censoring or banning such groups has any impact on their existence or rising influence. In fact, most evidence testifies to the fact that criminalizing such groups too often results in their radicalisation. Penalising the expression of their ideas does not reduce the problem or make the proponents of such ideas disappear.

Historically, hate speech primarily has been the prerogative of governments rather than so-called extremist groups. More usually it has been the “majority” who have exercised this against minorities or groups of the dominant culture using this against groups perceived as challenging the social order or social norms.

As Kevin Boyle well reminds us, hate speech was at some point mainstream political speech<sup>41</sup>:

*“It was central to European culture. There were no hate groups espousing racism and white superiority when it was in fact the official ideology or mainstream idea. Today’s racists wear our cast offs and we have a responsibility for what is done with those cast offs...”*

*Hate speech in that sense is political speech. It seeks to restore theories and ideas that have been defeated by democratic struggle and their hatred is directed at the beneficiaries of those struggles, such as the black population. Hate speech is also about power and economic competition and that needs to be more clearly recognised in our legal analyzes. It may be that extreme individuals with personal problems are attracted to hate groups but it is mistaken to label the phenomenon as pathological. It is a struggle of ideas: the ideas of restoring white supremacy- the exclusion of Jews and other hated minorities- versus the idea of equal human dignity for all. It must not be assumed that the struggle against intolerance against what in Europe have been termed, the light sleepers –xenophobia, racism and anti- Semitism is won – it needs constant attention.*

This brief analysis on the misuse of hate speech laws is not meant to argue that hate speech regulations are useless or ineffective. But the practical test is important, indeed crucial, to ensure that whatever regulations and restrictions are put in place (both negative and positive ones) fulfill the social functions they are meant to play: protect the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life, as hate speeches have too often been associated with ethnic cleansing, wars, and genocide.

---

<sup>40</sup> See ARTICLE 19, Art, Religion and Hatred: Religious Intolerance in Russia and its Effects on Art, ARTICLE 19: London, December 2005

<sup>41</sup> Kevin Boyle, Hate Speech – The United States versus the rest of the world, Maine Law Review Vol 53 Number 2 2001 pp.488-502

From this standpoint, and in view of the objective of protecting substantive equality, hate speech regulations cannot just be reduced or limited to criminal laws and the criminalization of hate speech. They simply cannot constitute the sole or indeed central response to prejudice, racism, and discrimination. Equal or further emphasis must be placed on *positive* State obligations.

This has been increasingly recognized by a number of civil society and international bodies.

For instance, the Durban Declaration and Programme of Action and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating hate speech by targeting the hatred and intolerance from which it spawns. Central to their strategies is the promotion of counter-speech, or more accurately, more speech, or even more accurately, expressive opportunities, especially via the media<sup>42</sup>.

In 2006, the four Special Rapporteurs recommended that a range of mechanisms be used to address intolerance, particularly unleashing the power of the media to do good for tolerance such as<sup>43</sup>:

- Professional and self-regulatory bodies have played an important role in fostering greater awareness about how to report on diversity and to address difficult and sometimes controversial subjects, including intercultural dialogue and contentious issues of a moral, artistic, religious or other nature. An enabling environment should be provided to facilitate the voluntary development of self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons.
- The mandates of public service broadcasters should explicitly require them to treat matters of controversy in a sensitive and balanced fashion, and to carry programming which is aimed at promoting tolerance and understanding of difference.

ARTICLE 19 further insists that the media can be play a major function in defeating intolerance, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard;

---

<sup>42</sup> Cited by McGonagle, op cit.

<sup>43</sup> <http://www.article19.org/pdfs/igo-documents/four-mandates-dec-2006.pdf>

- ensuring that a number of voices within communities are heard rather than representing communities as a monolithic bloc – communities themselves may practice censorship;
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.

In addition, an effective response to expression that vilifies others requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education programmes about tolerance and pluralism.



## **ANNEX ONE - TERMS OF REFERENCE FOR THE STUDY**

### **The international legal framework and the interrelatedness between articles 19 and 20 of the ICCPR and States' obligations**

Questions:

- What protection does international law provide on this issue, and how has that law been interpreted by international, regional and national bodies?
- What is the relationship between articles 19 and 20 of the ICCPR, and what are the scope and links between the prohibitions and limitations contained in those articles? In particular, what are the differences / links between permissible limitations under article 19 (3), in particular when it comes to restrictions aimed at protecting the rights of others, and States' obligations under article 20 (2)?

These issues will be examined particularly in the light of national legislative and judicial patterns as well as international and regional legislation and practice.

## **ANNEX TWO - INTERNATIONAL STANDARDS**

### **Universal Declaration of Human Rights**

The UDHR does not specifically provide for prohibitions on hate speech or incitement to hatred.

Article 1(1) UDHR 1948 states: "All human beings are born free and equal in dignity and rights".

Article 2 then provides for equal enjoyment of the rights and freedoms proclaimed "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 7, however, provides for protection against discrimination, and also against incitement to discrimination.

According to article 19, Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 29 also refers to the duties of everyone in the community and states that certain limitations on rights may be necessary and legitimate to secure "due recognition and respect for the rights and freedoms of others". This clearly includes possible limitations on freedom of expression, which is guaranteed by Article 19 UDHR, for the purposes of protecting equality.

### **International Covenant on Civil and Political Rights (ICCPR)**

#### **Article 19**

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

### **International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)**

#### **Article 4**

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

### **European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)**

#### **Article 10**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### **American Convention on Human Rights**

#### **Article 13**

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- (a) respect for the rights or reputations of others; or
- (b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

### **African Charter on Human and Peoples' Rights**

#### **Article 9**

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.

## ANNEX THREE - THE THREE PART TEST

Source: ARTICLE 19 Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights – ARTICLE 19, London, 2006 – Index Number: LAW/2006/0424

According to the three-part test, interferences with freedom of expression are legitimate only if they (a) are prescribed by law; (b) pursue a legitimate aim; and (c) are “necessary in a democratic society”.

Each of these elements has specific legal meaning. The first requirement will be fulfilled only where the restriction is ‘prescribed by law’. This implies not only that the restriction is based in law, but also that the relevant law meets certain standards of clarity and accessibility. The European Court of Human Rights has elaborated on the requirement of “prescribed by law” under the ECHR:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.<sup>3</sup>

This is akin to the “void for vagueness” doctrine established by the US Supreme Court and which is also found in constitutional doctrine in other countries.<sup>4</sup> The US Supreme Court has explained that loosely worded or vague laws may not be used to restrict freedom of expression:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” (references omitted)<sup>5</sup>

Laws that grant authorities excessively broad discretionary powers to limit expression also fail the requirement of “prescribed by law”. The European Court of Human Rights has stated that when a grant of discretion is made to a media regulatory body, “the scope of the discretion and the manner of its exercise [must be] indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.”<sup>6</sup> The UN Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that treaty, has repeatedly expressed concern about excessive ministerial discretion.<sup>7</sup>

National courts have expressed the same concern. For example, the South African Constitutional Court has warned in relation to the regulation of obscenity that:

<sup>2</sup> Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

<sup>3</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para.49.

<sup>4</sup> See, for example, the Canadian Charter of Rights and Freedoms, Section 1; Dutch Constitution, Article 13.

<sup>5</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-9.

<sup>6</sup> *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90 (European Court of Human Rights), para. 40.

<sup>7</sup> Particularly in the context of media regulation: see, for example, its Concluding Observations on Kyrgyzstan, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21; and its Concluding Observations on Lesotho, 8 April 1999, UN Doc. CCPR/C/79/Add.106, para. 23.

It is incumbent upon the legislature to devise precise guidelines if it wishes to regulate sexually explicit material. Especially in light of the painfully fresh memory of the executive branch of government ruthlessly wielding its ill-checked powers to suppress political, cultural, and, indeed, sexual expression, there is a need to jealously guard the values of free expression embodied in the Constitution of our fledgling democracy.<sup>8</sup>

The second requirement relates to the legitimate aims listed in Article 10(2). To satisfy this part of the test, a restriction must truly pursue one of the legitimate aims; it is illegitimate to invoke a legitimate aim as an excuse to pursue a political or other illegitimate agenda.<sup>9</sup>

The third requirement, that any restrictions should be “necessary in a democratic society”, is often key to the assessment of alleged violations. The word “necessary” means that there must be a “pressing social need” for the limitation.<sup>10</sup> The reasons given by the State to justify the limitation must be “relevant and sufficient”; the State should use the least restrictive means available and the limitation must be proportionate to the aim pursued.<sup>11</sup> The European Court of Human Rights has warned that one of the implications of this is that States should not use the criminal law to restrict freedom of expression unless this is truly necessary. In *Sener v. Turkey*, the Court stated that this principle applies even in situations involving armed conflict:

[T]he dominant position which a 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 ... Contracting States cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.<sup>12</sup>

While States must act to protect their citizens from public order and terrorist threats, their actions must be appropriate and without excess.<sup>13</sup> This implies that the relevant criminal offences should be narrowly defined and applied with due restraint. It also implies that the offence of ‘terrorism’, which triggers the most severe restrictions on the enjoyment of rights, is particularly narrowly defined and employed only in circumstances when the accompanying serious restrictions on rights are truly “necessary”.

<sup>8</sup> *Case & Anor, v. Minister of Safety and Security & Ors*, 1996 (5) BCLR 609 (Constitutional Court of South Africa), para. 63 (per Mokgoro).

<sup>9</sup> Article 18, ECHR. See also *Benjamin and Others v. Minister of Information and Broadcasting*, 14 February 2000, Privy Council Appeal No. 2 of 1999, (Judicial Committee of the Privy Council).

<sup>10</sup> See, for example, *Handyside v. the United Kingdom*, 7 December 1976, Application no. 5493/72, para. 48.

<sup>11</sup> See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

<sup>12</sup> *Sener v. Turkey*, Application no. 26680/95, 18 July 2000, paras. 40, 42.

<sup>13</sup> See, for example, *Incal v. Turkey*, application no. 22678/93, 18 May 1998, para. 54.

## ARTICLE FOUR - ARTICLE 19 POLICY ON HATE SPEECH

ARTICLE 19 works to promote freedom of expression around the world. ARTICLE 19 takes its name and purpose from Article 19 of the *Universal Declaration of Human Rights* (UDHR),<sup>44</sup> which states:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

ARTICLE 19 takes international human rights standards as its starting point and aims to promote the interpretation and application of those standards in a manner which ensures maximum protection for the right to freedom of expression, consistently with their spirit and intent.

The right to freedom of opinion and expression is a fundamental right<sup>45</sup> which safeguards the exercise of all other rights and is a critical underpinning of democracy, which depends on the free flow of a diversity of information and ideas. Equally fundamental to the protection of human rights are the principles of the inherent dignity and equality of all human beings and the obligation of all Member States of the United Nations to take measures to promote “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”<sup>46</sup>

Ensuring respect for the right to freedom of expression is a key aspect of States’ obligation to promote equality and respect for the “inherent dignity of the human person”,<sup>47</sup> as well as security of the person and freedom of thought, conscience and religion. The exercise of the right to freedom of expression can, in particular, play a key role in promoting tolerance and mutual understanding in society, which in the longer term are essential to ensuring equality.

At the same time, certain forms of hateful expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. International law recognises that the right to freedom of expression may be subject to carefully drawn limitations to protect the right to be free from discrimination and to enjoy equality. To this end, Article 20(2) of the ICCPR provides:

*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

---

<sup>44</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

<sup>45</sup> It is guaranteed by Article 19 of the UDHR, Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976, Article 10 of the *European Convention on Human Rights* (ECHR), adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953, Article 13 of the *American Convention on Human Rights*, adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978 and Article 9 of the *African Charter on Human and Peoples’ Rights*, adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, the texts of which are reproduced in Annex One.

<sup>46</sup> Article 55(c) of the Charter of the United Nations. See also Article 55 of the Charter.

<sup>47</sup> See the first preamble paragraph and Article 1 of the UDHR and the first and second preamble paragraphs of the ICCPR.

ARTICLE 19's Position on Hate Speech, articulated below, sets out the ways in which the organisation believes respect for freedom of expression can promote tolerance. It also sets out the organisation's interpretation of where an appropriate balance lies between the right to freedom of expression and any restrictions on this right to protect equality and prevent discrimination.

### ***Promoting Tolerance***

ARTICLE 19 believes that an effective response to vilifying expression requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education programmes about tolerance and pluralism. All of these depend on respect in practice for the right to freedom of expression.

In addition, ARTICLE 19 believes that the media has a crucial role to play in preventing and counter-acting discrimination. Public service broadcasters should be legally obliged to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance, while other media organisations, media enterprises and media workers have a moral and social obligation to do so. There are many ways in which these bodies and individuals can make such a contribution, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard; and
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.<sup>48</sup>

Governments should take firm steps to eliminate discrimination (including on grounds of nationality, race, religion, colour, descent, gender, language, belief or ethnic origin) in all its forms (including in the fields of economic, social, cultural, civil and political rights, and where in trenches on the ability of different groups to exercise their right to freedom of expression), and should undertake effective measures to protect all those within their borders, including immigrants and asylum-seekers, from violence, threats of violence and incitement to violence.

### ***Restrictions***

---

<sup>48</sup> This list is based on the 2001 Joint Statement on Racism and Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

ARTICLE 19 recognises that reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred based on nationality, race, religion that constitutes incitement to discrimination, hostility or violence.<sup>49</sup>

Two key elements are involved in this standard. First, only advocacy of *hatred* is covered. Second, it must constitute *incitement* to one of the listed results.

- In this context, “hatred” is understood to mean an irrational and intense antagonism towards an individual or group of individuals based simply on one of the listed characteristics.
- “Incitement” is understood to mean instigation or encouragement which is virtually certain to lead directly to discrimination, hostility or violence. Central to the idea of incitement is the creation of an environment where enjoyment of the right to equality in dignity is not impossible.
- Incitement implies a very close link between the expression and the resulting risk of discrimination, hostility or violence, and may be distinguished, for example, from mere advocacy which supports or even calls for these results but where they are unlikely to come about.<sup>50</sup>
- Context is central to a determination of whether or not a given expression constitutes incitement; the likelihood of ethnic violence in the immediate aftermath of an ethnic conflict, for example, will be higher than in a peaceful, democratic environment.

Any so-called hate speech restriction on freedom of expression should be carefully designed to promote equality and protect against discrimination and, as with all such restrictions, should meet the three-part test set out in Article 19 of the ICCPR (see Annex Two), according to which an interference with freedom of expression is only legitimate if:

- (a) it is provided by law;
- (b) it pursues a legitimate aim; and
- (c) it is “necessary in a democratic society”.<sup>51</sup>

Specifically, any restriction should conform to the following:

- it should be clearly and narrowly defined;
- it should be applied by a body which is independent of political, commercial or other unwarranted influences, and in a manner which is neither arbitrary nor discriminatory, and which is subject to adequate safeguards against abuse, including the right of access to an independent court or tribunal;
- no one should be penalised for statements which are true;

---

<sup>49</sup> This standard is based on Article 20 of the ICCPR.

<sup>50</sup> An academic text suggesting that the world would be better off without a certain race or religion would, for example, be far less likely to meet the incitement standard than shouting out practically the same words in the midst of a racist demonstration.

<sup>51</sup> Article 19(3) of the ICCPR provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.



- no one should be criminally penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;<sup>52</sup>
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- prior censorship should not be used as a tool against hate speech;
- care should therefore be taken to apply the least intrusive and restrictive measures, in recognition of the fact that there are various available measures some of which exert less of a chilling effect on freedom of expression than others; and
- any imposition of sanctions should be in strict conformity with the principle of proportionality and criminal sanctions, in particular imprisonment, should be applied only as a last resort.<sup>53</sup>

A restriction must be formulated in a way that makes clear that its sole purpose is to protect individuals holding specific beliefs or opinions, whether of a religious nature or not,<sup>54</sup> from hostility, discrimination or violence, rather than to protect belief systems, religions, or institutions as such from criticism. The right to freedom of expression implies that it should be possible to scrutinise, openly debate, and criticise, even harshly and unreasonably,<sup>55</sup> belief systems, opinions, and institutions, including religious ones,<sup>56</sup> as long as this does not advocate hatred which incites to hostility, discrimination or violence against an individual.

All existing hate speech laws should be reviewed and amended as necessary to bring them into line with these standards. Consideration of new hate speech legislation should always be preceded by an analysis of whether existing legislation is in line with these standards and whether it is already sufficient to tackle the problem.

---

<sup>52</sup> In certain circumstances, the authorities may be able to claim reasonably and in good faith that they could not prevent injury if an expression were to occur, due to the likelihood that it will provoke a direct and serious hostile reaction. This may be the case, for example, in the context of a demonstration by a fringe political party or group. In such cases, it may be legitimate to take measures to prevent the injury, including by preventing the expression from taking place, but the speaker should not, however, be penalised.

<sup>53</sup> This list draws on the 2001 Joint Statement of the specialised mandates on freedom of expression, note 48.

<sup>54</sup> Religion as used here is to be understood broadly and does not depend on formal State recognition.

<sup>55</sup> The right to freedom of expression includes the right to make statements that 'offend, shock or disturb'. See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

<sup>56</sup> ARTICLE 19 believes that blasphemy as a criminal offence should be abolished. Tolerance, understanding, acceptance and respect for the diversity of faiths and beliefs cannot be secured by the threat of criminal prosecution and punishment. This is becoming ever more relevant as our societies become more and more diverse.