



CENTRE FOR LAW
AND DEMOCRACY

UN Human Rights Committee

**Note on Draft General Comment No.
34 on Article 19 of the ICCPR (Upon
Completion of the First Reading by the
Human Rights Committee)**

January 2011

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Introduction

This Note contains an analysis by the Centre for Law and Democracy (CLD) of Draft General Comment No. 34 (Upon Completion of the First Reading by the Human Rights Committee) (draft General Comment). This draft General Comment by the UN Human Rights Committee provides a detailed examination of the scope and implications of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It will replace General Comment No. 10, also on Article 19, which was adopted by the Committee in 1983.

CLD very much welcomes the work of the Committee in developing this new General Comment on Article 19. Article 19 is widely recognised as being a foundational right both in its own right and also as essential for the protection of all other rights and, indeed, democracy itself. At the same time, Article 19 is an extremely complex right. It covers an enormous range of means of disseminating information and ideas, which have been completely transformed in recent years by a growing arsenal of expressive tools, most importantly the Internet. The 1983 General Comment is not only outdated but, being only a few paragraphs long, it fails to address many important freedom of expression issues. In particular, the question of the proper scope of restrictions on freedom of expression is a challenging one, which occupies well over one-half of the substance of the draft General Comment.

There is much to commend in the draft General Comment. It promotes a strong interpretation of Article 19, in line with the existing statements and decisions (views) of the Human Rights Committee. It addresses a very wide range of important freedom of expression issues, and does not shy away from difficult or controversial issues. In many cases, the standards it promotes represent an appropriate accommodation among different interests which are sometimes in conflict and difficult to reconcile.

Most of the comments and recommendations in this Note focus on what may be termed gaps in the draft Comment; issues that CLD believes warrant more in-depth treatment or which have been overlooked altogether. We understand that a balance needs to be achieved between addressing every issue in detail and producing a relatively short, focused document. We have, as a result, limited these types of comments to issues which we believe it is important for the Committee to address at this point, taking into account that it is unlikely to update this document for quite some time. The Note also contains some technical suggestions to improve the flow of or to clarify the meaning of some statements in the draft General Comment. Finally, there are a few areas where CLD argues for stronger statements or actually disagrees with the standards being promoted in the draft Comment.

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This Note is organised along the same lines as the main headings in the draft General Comment, provided that a heading is only listed in this Note where CLD wishes to make an observation or recommendation pertaining to the content under that heading.

1. Freedom of Expression

The three paragraphs in this section of the draft General Comment describe in general terms the *prima facie* scope of the right to freedom of expression. Paragraph 11 lists a number of types of protected expression, such as political discourse, teaching, journalism and discussion of human rights. A reference to “commercial advertising” in this paragraph is in square brackets, suggesting that the Committee remains undecided as to whether or not this should be included.

CLD recommends the inclusion of the reference to commercial advertising, or perhaps a reference to commercial speech, which goes beyond the strict parameters of what may be considered to be advertising (for example in the form of sponsorship of events or broadcasting programmes). Commercial speech is an important mechanism for the dissemination of information and ideas and it is uncontroversial that it is protected by international guarantees of freedom of expression.¹ Although commercial speech, like other forms of speech, may be abused, it can also help citizens to make informed decisions about expenditure, an important form of human activity.

Paragraph 12 refers to the different forms of protected expression, such as the spoken and written word, images and art, as well as means of disseminating expression, such as books, newspapers, posters and the Internet. It also states that Article 19(2) does not “provide a right of free expression in any specific location”.

CLD does not agree with this statement, at least in the strong form in which it appears in the draft General Comment. We believe that there is a *prima facie* right to free expression in at least some public places (i.e. places to which the public has general access, sometimes referred to as ‘public for a’), and even in some private places (for example, where these are quasi-public in nature) subject, as with all forms and means of expression, to legitimate restrictions on the right. This aspect of the right, for example, underpins the right to demonstrate (also protected by the right to freedom of assembly) and to protest either in a group or on one’s own.

The Committee appears to have agreed with this conclusion in *Coleman v. Australia*,² where it had no difficulty at all in finding a breach of the right to freedom of

¹ See, for example, *Ballantyne and Others v. Canada*, 31 March 1993, Communication Nos. 359/1989 & 385/1989 (UN Human Rights Committee).

² 17 July 2006, Communication No. 1157/2003.

expression where the author of the complaint had been convicted for giving a speech in a public pedestrian mall without a permit. Indeed, in paragraph 7.2 of its Views, the Committee stated that the conviction “undoubtedly amounted to a restriction”, without feeling the need to support this by providing specific reasoning on the point.

Recommendations:

- A reference to ‘commercial speech’ should be included in paragraph 11.
- The claim in paragraph 12 that Article 19(2) does not “provide a right of free expression in any specific location” should be removed or at least qualified.

2. Freedom of Expression and the Media

This section of the draft General Comment contains only four rather short paragraphs despite the fact that this is an extremely complex and important area. The text does note that further provisions on the media are contained in other sections of the General Comment,³ but even taking this into account, CLD believes that more attention to issues regarding media freedom are warranted.

Paragraph 15 notes that States must promote an independent and diverse media, and protect access to the media by minority groups. The issue of media diversity has received a lot of attention by different international actors tasked with promoting freedom of expression and/or human rights more broadly. Thus, the Council of Europe has adopted various statements on media diversity,⁴ as have the four special mandates on freedom of expression at the UN, OSCE, OAS and African Commission.⁵

CLD is of the view that the issue of promoting media diversity warrants greater attention in the General Comment. Paragraph 42 does refer to the need to prevent undue concentration of control over the media by private groups, which is recognised as an important way of promoting media diversity. Paragraph 41, on licensing of the broadcast media, calls for an equitable allocation of limited resources necessary for broadcasting between public, commercial and community broadcasters. But it does not go beyond that to call on States to take steps to ensure that diversity is available on all media distribution platforms, or call for the promotion of community and public service media, both recognised as important

³ It is not always clear what rationale underlies the placement of paragraphs. For example, paragraph 42, on measures to control undue concentration of media ownership, is treated as a restriction on freedom of expression, whereas a better approach might be to treat this as a positive measure to promote media diversity, and hence the right of media consumers to receive a diversity of information.

⁴ See, for example, Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, adopted on 31 January 2007.

⁵ See, for example, their Joint Declaration on Diversity in Broadcasting, adopted on 12 December 2007.

ways of supporting media diversity. Furthermore, it does not refer to using the licensing process to promote diversity, a key means of doing so, as reflected in the practice in many States. Another possible area for attention is on measures to promote diversity of media content, such as subsidy schemes for public interest content.

Paragraph 16 addresses the need to promote the independence of public broadcasters, including through setting out their mandate in law, legislative guarantees of their independence and editorial freedom, and funding systems that do not serve as vehicles of control. In practice, a primary means of protecting the independence of public broadcasters is through governance systems which involve independent oversight bodies (governing boards).

Recommendations:

- Greater attention should be given in the General Comment to the issue of promoting media diversity as a means to protect the right of media consumers to receive a range of information and ideas.
- Reference should be made in paragraph 16 to the role of independent governing boards in protecting the independence of public broadcasters.

3. Access to Information

CLD welcomes the recognition, in paragraph 18 of the draft General Comment, that Article 19 protects the right to access information held by public bodies, commonly referred to as the right to information (or freedom of information). This right has been recognised by regional human rights courts in Latin America⁶ and Europe,⁷ and this clear recognition by the Human Rights Committee expands the scope of acknowledgment.

Paragraph 18 notes that the right of access applies to “all levels of State bodies and organs, including the judiciary” and that it might include other bodies carrying out public functions. To this should be added legislative bodies, as well as bodies which are owned, controlled or funded by public bodies.⁸

Paragraph 19 of the draft General Comment refers to a range of access to information rights which do not appear to have much relationship to each other or

⁶ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151 (Inter-American Court of Human Rights).

⁷ *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05 (European Court of Human Rights).

⁸ See, for example, Principle 2 of the Principles on the Right of Access to Information, CJI/RES.147 (LXXIII-O/08), 7 August 2008, adopted by Inter-American Juridical Committee.

to the right to information as defined in paragraph 18. It refers, among other things, to the right of the media to access information on public affairs, the right of the public to access media content, various rights in relation to one's own personal data, including for prisoners, the right to receive information on ICCPR rights in general, and the right of members of minority groups to information about decisions that may compromise their way of life and culture.

As currently structured, paragraph 19 breaks up the flow of paragraphs 18 and 20, which share a clear focus on the right to access information held by public bodies. This is confusing for the reader and detracts from the clear statement of recognition of the right to information.

Paragraph 19 also mixes up very different concepts under the heading of 'access to information'. It would be useful to indicate at the beginning that this paragraph refers to a range of other access rights which are conceptually separate from the both right to information and from each other.

Finally on paragraph 19, it omits to mention what is now probably the most important practical means to access information, namely the Internet. It is increasingly being recognised that the right to freedom of expression places a positive obligation on States to put in place measures which foster greater access to the Internet, with a view to eventually ensuring universal access.⁹ Another important tool for access to information is the need for public service broadcasters to ensure universal access to their programming.

Paragraph 20 notes that States should enact right to information legislation which establishes rapid and clear procedures for processing requests, including reasonable fees for accessing information and clear notice provisions. It also calls for a right of appeal from refusals to provide access.

These are useful elaborations of the content of the right to information. At the same time, they appear to be rather an arbitrary selection from among those attributes of the right to information regularly identified by others as being important. We understand that it is not possible to describe the content of the right in great detail in a General Comment but, at the same time, we believe that the references in paragraph 20 should be supplemented by a few further points. In particular, we believe the General Comment should refer to the following:

- The need for right to information legislation to place an obligation on public bodies to disclose on a proactive basis a wide range of information of significant public interest.

⁹ See, for example, the Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade of the special international mandates on freedom of expression of 3 February 2010, clause 10.

- The idea that exceptions to the right of access should be narrow and clearly defined, and should apply only where disclosure of the information would pose a clear risk of harm to an identified interest, and where this harm is greater than the public interest in disclosure of the information.
- The need to impose sanctions on those who wilfully obstruct the right of access, while also protecting officials who release information in good faith pursuant to the law.
- The need to put in place a range of promotional measures – including establishing good record management systems, undertaking public education measures, training officials, and requiring public bodies to report on how they have implemented the right.¹⁰

Recommendations:

- The scope of public bodies under right to information obligations should be expanded to include legislative bodies, as well as bodies which are owned, controlled or funded by public bodies.
- Paragraph 19 should be moved so that it follows, rather than breaks up, paragraphs 18 and 20, and the introductory sentence to paragraph 19 should orient the reader to the fact that it refers to a number of conceptually separate access to information rights falling within the scope of Article 19.
- The General Comment should refer to the obligation of States to promote access to the Internet, as well as the need for public broadcasters to ensure provision of their programming to as large a portion of the population as possible.
- The General Comment should describe the key features of the right to information in greater detail than it currently does, in line with the recommendations above.

4. The Application of Article 19(3)

Paragraph 25 notes that restrictions on freedom of expression must be provided by law, which may include statutory law and, in square brackets, case law, where appropriate. CLD agrees with this statement, although we suggest that the square brackets be removed from around the reference to case law.¹¹

¹⁰ All of these are found in the Principles on the Right of Access to Information noted above, as well as in other standard-setting statements on the right to information.

¹¹ The European Court of Human Rights has often accepted such norms as meeting the provided by law part of the test for restrictions. See *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 47 and *Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88, para. 50-53.

At the same time, we believe that the statement may be misleading inasmuch as it might be taken to suggest that secondary legal rules, which are authorised by primary legislation, may not restrict the right to freedom of expression. It is clear that secondary rules may restrict freedom of expression and such rules are in place in all democracies. The power to adopt secondary rules may legitimately be delegated to administrative bodies, such as broadcast regulators, as well as in government officials such as ministers. In many countries, such bodies adopt codes of conduct governing the content of broadcasting, and breach of such codes may engage various sanctions, often including, ultimately, revocation of the broadcasting licence. As long as they meet certain conditions, such systems are widely accepted as imposing legitimate limitations on the right to freedom of expression.

The Inter-American Court of Human Rights addressed the question of what might qualify as a law for purposes of restricting rights in an Advisory Opinion on this issue issued in 1986.¹² On the matter of secondary rules, the Court stated:

The above does not necessarily negate the possibility of delegations of authority in this area, provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls....¹³

CLD agrees with this assessment and believes that including some reference to it in the General Comment will help avoid possible confusion on this point.

Paragraph 29 describes, among other things, the scope of the term ‘others’ in Article 19(3). CLD believes that it would be useful to specify that this term refers to human beings and private legal entities, but that it does not extend to public entities. Any protection for the interests of public entities, which could only be justified by reference to a wider public interest, is found in the second set of legitimate grounds for restricting freedom of expression, including public order (ordre public). The term ‘others’ also does not apply to ideas, which do not have rights or reputations of their own, so that concepts such as defamation of religions cannot be used as a basis for restricting freedom of expression.

Paragraph 31 addresses the contentious issue of restrictions on freedom of expression justified by reference to the need to protect national security. The paragraph rules out a number of specific restrictions which States have sought to justify on the basis of this goal, such as prosecuting journalists and others for

¹² *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of 9 May 1986, Series A, No. 6.

¹³ *Ibid.*, para. 36. See generally, Mendel, Toby, *Restricting Freedom of Expression: Standards and Principles: Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression*. Available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>.

information on a legitimate public interest or using State secrets laws to render information about banking and scientific progress secret.

CLD believes that more could be said, at least at a principled level, about the legitimate scope of national security restrictions on freedom of expression. We note that it is notoriously difficult to define national security, and we do not recommend that the Human Rights Committee attempt to do this.

However, a few general principles might be outlined here. For example, a key way in which international and national courts have sought to limit the scope of national security restrictions is by requiring a close nexus between the expression and the risk of harm to security. Linking phrases such as ‘imminent’, ‘incitement’ and ‘direct causal link’ may be used to emphasis this nexus. The General Comment could also make it clear that criminal sanctions should not be imposed on individuals under this ground, absent a clear intention to cause harm to national security.¹⁴ There is an important difference between reporting on threats to national security and inciting to crimes against security. The former should, unless it represents direct incitement to such crimes, be protected. Finally, it might be useful to highlight the need for States to demonstrate a specific risk to national security before restrictions on this ground may be considered legitimate. Adverting to vague and general threats is not sufficient.

Paragraph 33 of the draft General Comment elaborates on ‘public morals’ as a ground for restricting freedom of expression. It might be useful to distinguish here between material that people might, on moral grounds, find offensive – which is normally protected speech – and material that is deemed to cause actual harm – which may not be protected.¹⁵ In this regard, a general distinction may be made between children and youths, who are still in a formative phase in terms of moral values, and adults, who may be considered to be more resistant to attempts to corrupt their morals. CLD believes that restrictions aimed at protecting adults against moral harm will rarely be justified. At the same time, there may be cases where this is necessary, for example where the portrayal of women is such as to effectively incite hatred towards them, which is analogous to the protection provided to other groups under Article 20 of the ICCPR.

The principle of proportionality of restrictions is addressed in paragraph 35, which aptly notes that this principle must take account of the form of expression, so that greater freedom is warranted in relation to discussion on matters of public interest. The means of dissemination of expressive content is also relevant in the assessment

¹⁴ See the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (London: ARTICLE 19, 1995).

¹⁵ It is well established that merely offensive material is subject to protection under international guarantees of freedom of expression. See, for example, *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).

of proportionality. Thus, it is generally considered appropriate to hold the publishers of books and newspapers liable for defamatory statements in those books and newspapers, whereas the analogous concept does not apply to Internet service providers.¹⁶

Recommendations:

- Paragraph 25 should acknowledge that restrictions on rights may, in appropriate cases, be set out in case law and also in secondary rules, as long as these powers are subject to certain conditions, as noted above.
- Paragraph 29 should make it clear that the term 'others' in Article 19(3) does not refer to public entities or ideas.
- The General Comment should provide more guidance, at least at the level of principle, on what constitutes a legitimate national security restriction on freedom of expression, in line with the analysis above.
- Paragraph 33 should make it clear that restrictions justified by reference to public morals should be applied only where needed to prevent harm, as opposed to mere offence, and that this will rarely be justified as necessary to protect adults.
- The General Comment should make it clear that the means of dissemination of expressive content is relevant to the assessment of proportionality.

5. Limited Scope of Restrictions on Freedom of Expression in Certain Specific Areas

Paragraph 40 notes that public figures should not benefit from special protection against criticism, so that laws providing particular protection to them, or providing for more severe penalties in such cases are not legitimate. It should, however, go even further and make it clear that such figures are actually required to tolerate a greater degree of criticism and intrusion into privacy.¹⁷ It is CLD's view that all speech on matters of public interest should benefit from this higher degree of protection, and there is a substantial body of case law, in particular from the European Court of Human Rights, to support this.¹⁸ In many countries, this is reflected in special defences against defamation claims for such statements, as well as in a public interest override to privacy claims. This is somehow reflected in

¹⁶ Many international standards protect service providers against liability at least insofar as they have not specifically been made aware of the offending material. See, for example, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Articles 12-15.

¹⁷ See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 42 (European Court of Human Rights).

¹⁸ See *Tromsø and Stensås v. Norway*, 20 May 1999, Application No. 21980/93, para. 33.

paragraph 49, on defamation, but it would be preferable to articulate the wider principle in paragraph 40.

Paragraph 41 refers to a wide range of measures to regulate the media, both print and broadcast. It is widely accepted that licensing of newspapers, whereby discretion is vested in regulatory authorities to refuse to provide authorisation to start a newspaper, other than on very technical grounds – such as that the name is already being used by another newspaper – is not legitimate as a restriction on freedom of expression.¹⁹ Even registration systems for newspapers can unduly limit freedom of expression and may be legitimate only if they meet certain minimum standards, such as that they are formal or technical in nature.

Paragraph 41 also calls for licensing systems not to impose onerous fees on the broadcast media, both community and commercial. CLD strongly supports the call for fees for community broadcasters, which are normally required to operate on a non-profit basis, to be very low and for licensing procedures to be simple. However, it is different for commercial broadcasters, which in an increasing number of countries operate as extremely large and profitable businesses, based on their exploitation of a public resource, namely the airwaves. It is not inappropriate for very significant fees to be imposed on these broadcasters. Indeed, in many countries, licences are offered to the highest bidder, or the highest bidder subject to certain other conditions. Furthermore, the licensing process is often extremely complex and technical, and needs to be to enable regulators to promote the public interest.

Paragraph 41 recommends that States which have not yet done so should establish independent authorities to licence broadcasters. CLD agrees with this statement, but believes it should be put more forcefully since the inclusion of the word ‘recommends’ in the statement somehow suggests that this is a discretionary measure. Several authoritative international statements make it clear that regulation of the media is legitimate only if undertaken by an independent body, and that direct regulation by government, for example in the form of a ministry, is not legitimate.²⁰

Paragraph 45 calls for restrictions on the Internet and other electronic information dissemination systems, including service providers, to be compatible with Article 19. CLD believes that, as with the print media, the General Comment could be more specific and state that service providers should not be subject to specific licensing or registration regimes, over and above those imposed on all businesses. The same

¹⁹ See the Joint Declaration of the special international mandates on freedom of expression of 18 December 2003.

²⁰ Perhaps the strongest such statement is found in the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples’ Rights at its 32nd Session, 17-23 October 2002.

paragraph notes that restrictions should be content-specific. CLD believes that filtering systems should be end-user controlled rather than imposed by others (whether done centrally by governments or through requirements on service providers to do so).²¹

Paragraph 46 notes that general systems of licensing or registration for journalists are not compatible with Article 19. CLD agrees with this, but not with the rationale provided for this in the paragraph, namely because journalism is a “function shared by a wider range of actors”. CLD believes that the proper underpinning for this is the fact that journalism as a profession is inherently linked to the exercise of freedom of expression, unlike other professions, and that it must therefore be open to everyone. Licensing would clearly breach this requirement, while even the lightest registration systems impose obstacles to participating in journalism, and cannot be justified by reference to any legitimate interest.²²

The issue of counter-terrorism measures that restriction freedom of expression is addressed in paragraph 48 of the draft General Comment. This paragraph calls for a number of vague terms that are found in various anti-terrorism laws to be defined clearly and for journalists not to be penalised for carrying out legitimate activities.

CLD does not necessarily recommend that the Human Rights Committee attempt the notoriously controversial task of defining terrorism, but it notes that an excessively broad definition is often one of the key problems with anti-terrorism legislation from the perspective of freedom of expression. The special international mandates on freedom of expression have defined terrorism, at least for purposes of restricting freedom of expression, as follows:

The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.²³

CLD supports the call for the various offences listed in paragraph 48 to be defined clearly, but we believe that the General Comment should go further and note that the proper test for assessing the legitimacy of such a definition is whether or not it is limited to speech that incites to terrorism, rather than simply paints it in a positive light or even advocates, in an abstract way, in favour of terrorism means.

²¹ See the Joint Declaration of the special international mandates on freedom of expression of 21 December 2005.

²² See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, (Inter-American Court of Human Rights), which ruled out imposing mandatory conditions on journalists, including minimum professional requirements and membership in a particular association.

²³ Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation of 9 December 2008.

CLD agrees that journalists should not be penalised for carrying out legitimate activities. It might be useful to add here that journalists actually have a professional obligation to report on matters of public interest. Furthermore, the public has a right to know about attempted or actual terrorist activities, a right too many States try to suppress.

The thorny issue of defamation is tackled in paragraph 49. Among other things, this paragraph calls on States to consider protecting untrue statements about public figures unless published with malice and, in any event, to recognise a defence of a public interest in the subject matter of the statement.

CLD does not believe that these statements represent the best assessment of international standards, as reflected in the many cases decided by international courts and authoritative international statements on defamation. The malice standard is employed in only a very few countries, and finds very little support in international standards. Probably this is why the Committee is only recommending that States consider it. The idea that a public interest in the content of a statement constitutes a full defence against defamation, if that is what is intended, has nowhere been recognised, at least not in the context of an untrue statement (paragraph 49 already calls for a defence of truth).

CLD is of the view that a better assessment of the complex body of international standards in this area, which is reflected in many national laws, is that it supports the idea of a reasonableness defence in the context of (false) statements on matters of public interest (or public concern). Such a defence is made out where the defendant proves that even though his or her statement was erroneous, he or she took reasonable steps, in all of the circumstances, in disseminating it. One downside of the reasonableness test is that it lacks clarity, since what will be considered to be reasonable in any particular context is not clear. However, CLD is of the view that it is the only test that is broadly consistent with the body of international standards on this issue and that it strikes a reasonable balance between freedom of expression and protection of reputation.

Paragraph 49 also calls for limits on the amount defamation defendants may be required to pay to reimburse the expenses of the successful party. Another cost-related problem is the sometimes extremely high damage awards that are assessed against defendants, which often bear no relationship whatsoever to the harm that the plaintiff has suffered.²⁴

²⁴ It is clear that the right to freedom of expression imposes limits on the level of damage awards. See *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

Paragraph 51 addresses another difficult issue, so called “memory laws”, of which Holocaust denial laws are the most common form. It notes that the ICCPR does not permit general prohibitions on expression of historical views, or on the right of a person to be wrong about past events. It also states that restrictions on freedom of expression may “not go beyond what is permitted in paragraph 3 [of Article 19] or required under article 20.”

This last phrase is a bit oblique, but CLD understands it as asserting that, in relation to advocacy of hatred, what Article 20(2) requires and what Article 19(3) permits are the same. Thus, States must ban “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (the language of Article 20(2)) but may not go beyond this. This is an approach which CLD supports. If this interpretation is correct, memory laws that go beyond this standard are not legitimate.

A good example of such an approach to memory laws is the European Union’s Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, which calls on States to prohibit,

publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.²⁵

Recommendations:

- Paragraph 40 should make it clear that statements on matters of public interest, including about public figures, are subject to a higher degree of protection.
- The General Comment should make it clear that licensing of newspapers is not legitimate and that only formal or technical registration systems conform to the standards of Article 19.
- Paragraph 41 should distinguish between the licensing process and fee structure for community broadcasters, which should not be onerous, and for commercial broadcasters, where different considerations apply.
- The General Comment should make it clear that direct regulation of the media by government is not legitimate and that licensing of broadcasters should be undertaken by independent authorities.
- Paragraph 45 should make it clear that businesses that provide Internet or other electronic information services should not be subject to special licensing or registration requirements.

²⁵ 2008/913/JHA of 28 November 2008, Article 1(1)(c).

- The rationale for ruling out licensing and registration of journalists should be based on the inherent link between this activity and the right to freedom of expression, rather than the more technical explanation currently provided in paragraph 46.
- The General Comment should go beyond simply stating that restrictions on freedom of expression in the context of terrorism should be clearly defined, and should note that the proper test for restricting speech in this context is whether it constitutes incitement to terrorism.
- Consideration should be given to referring to the right of the public to be informed about attempted or actual terrorist acts, in support of the right of journalists to report on such acts.
- Instead of asking States to consider a malice test and to provide for a public interest defence for defamation, the General Comment should refer to the reasonableness test, which finds a strong basis in international standards.
- The General Comment should call for limits on damage awards in defamation cases, in addition to limits on reimbursement for expenses.
- The last sentence in paragraph 51 of the draft General Comment should be understood as asserting that States must ban “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (the language of Article 20(2)), but may not go beyond this.

6. The Relationship of Articles 19 and 20

Paragraph 54 states that the Committee is “concerned with” forms of ‘hate speech’ that do not fall within the ambit of Article 20 of the ICCPR. While CLD applauds this concern, it might also be misunderstood, in the context of this particular General Comment, as authorising or even encouraging the restriction of such speech. A different form of words might be chosen.

The last sentence in paragraph 54 suggests that speech which is not captured by the requirements of Article 20 may still be restricted, as long as this is in conformity with Article 19. Of course this is correct but, at the same time, and in line with the interpretation of paragraph 51 given above, rules restricting advocacy of national, racial or religious hatred may not go beyond the requirements of Article 20(2). The way this last sentence is phrased may be misunderstood by some readers.

Recommendations:

- The Committee should consider replacing the term ‘concerned with’ in paragraph 54 with something along the lines of noting that such speech is very offensive.
- The Committee should rephrase the last sentence of paragraph 54 to make it quite clear that it considers Article 20(2) as defining the permissible limits of

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restrictions on advocacy of national, racial or religious hatred.