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Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34

Michael O'Flaherty*

Abstract

Freedom of expression is essential to the good working of the entire human rights system. It is inevitable that so fundamental a human right as freedom of expression is also among the most violated of rights. Responding to the array of assaults, abuses, concerns and gaps requires multi-faceted action from many actors. Crucial to the effectiveness of all such responses will be the existence of a strong normative framework in the form of international human rights law in support of freedom of expression. One should thus enquire as to whether the existing standards are adequate to their function. The present article frames a response to that question around the principal global expression of the right in Article 19 (paragraphs 2 and 3) of the International Covenant on Civil and Political Rights. The article opines that the Human Rights Committee has interpreted Article 19 in a manner that favours a wide enjoyment of free expression and that it has applied the restriction clauses narrowly. The jurisprudence, inevitably, only addresses a small range of issues and, notwithstanding the many additional indications to be found in the Committee's Concluding

* Professor of Applied Human Rights and Co-Director of the Human Rights Law Centre, University of Nottingham; Member of the United Nations Human Rights Committee (michael.o'flaherty@nottingham.ac.uk). Thanks are expressed to Pei-Lun Tsai for her assistance in completing the footnotes for this piece.

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Observations, there remain areas of uncertainty regarding the scope and application of the Article. Thus was set the context, in 2009, for the Committee's decision to develop a new General Comment on Article 19. The present author served as the Committee's rapporteur for the development of what became General Comment No 34. The article concludes with an analytical review of the drafting process and of the adopted text and assesses the first phases of the reception of the General Comment by States and others.

Keywords: freedom of expression – Article 19 International Covenant on Civil and Political Rights – Human Rights Committee General Comment No 34

1. Origins and Significance of Freedom of Expression

On the eve of his imprisonment in China, the Nobel laureate, Liu Xiaobo wrote that '[f]reedom of expression is the basis of human rights, the source of humanity and the mother of truth. To block freedom of speech is to trample on human rights, to strangle humanity and to suppress truth'.[1] Liu Xiaobo's powerful affirmation of the status of freedom of expression is well grounded both in history and in contemporary experience.

The right of freedom of expression has ancient roots.[2] Expression was important to the ideas of Aristotle—with the human considered as the *zoon politicon* or political animal. There are claims that early Islamic thought also gave a high value to what we might call 'free speech'. For instance, the Islamic scholar Hugh Goddard, argues that the modern conception of academic freedom of expression originates in the *madrasas* of the ninth century.[3] Later, the fathers of enlightenment philosophy elevated this freedom to a very high level indeed. We all know Voltaire's remark, 'Sir, I do not share your view but I would risk my life for your right to express them' (albeit it is sometimes suggested the quote is misattributed).[4] John Stuart Mill helped shape our modern understanding of the parameters of an entitlement to seek, receive and impart information and ideas. He also addressed the manner in which such rights may be limited by the State where their exercise would constitute a direct threat to life in society.[5]

1 Coonan, 'China Condemns "Insult" of Award for Jailed Dissident Liu Xiaobo', *The Independent*, 9 October 2010.
2 Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Hague: Martinus Nijhoff, 1998) at 34–7.
3 Goddard, *A History of Christian-Muslim Relations* (Edinburgh: Edinburgh University Press, 2000) at 100.
4 Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 *Tulsa Journal of Comparative & International Law* 1 at 1.
5 Mill, *On Liberty* (London: Watts & Co., 1929) at 92–115.

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Liberal theorists identified freedom of expression as essential to democracy and good governance.[6] This perception is still very much alive: the United Nations (UN) Human Rights Committee has described freedom of expression as, 'of paramount importance for any democratic society'.[7]

The identification of a relationship of freedom of expression and democracy brings into relief some philosophical tension. Enlightenment thought maintained an ambiguous double classification of freedom of expression as inhering in the person as autonomous subject and as a right in the service of society (thus the French Declaration of the Rights of Man and the Citizen (1789) identifies freedom of expression as a right of man but limits its exercise to citizens).[8] Marx would later seize with approval on the Declaration's category of citizen's rights and, as Manfred Nowak puts it, 'laid the cornerstone for the conflict between bourgeois and socialist human rights theory'.[9]

This conflict came to play an important role in the eventual articulation of international human rights law, with a tension between States that saw human rights primarily as tools for social progress and those that perceived human rights to be validated on the basis of the autonomy, the subjectivity, of the person. The former point of view is well illustrated by the statement of the Soviet Union expressed during the drafting of the International Covenant on Civil and Political Rights (ICCPR) that rights of political liberty were to be guaranteed only, 'in accordance with the principles of democracy and in the interest of strengthening international cooperation and world peace'.[10]

Ultimately though, socialist perceptions came to play little decisive role in the articulation of a right of freedom of expression in UN fora. In 1946 the General Assembly, at its first session, declared that it is, 'a fundamental human right .... The touchstone of all the freedoms to which the United Nations is consecrated'.[11] The articulation of the right, two years later, in Article 19 of the Universal Declaration of Human Rights (UDHR), is consistent with this understanding: '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.'[12]

6 Norris, *Driving Democracy: Do Power-Sharing Institutions Work?* (New York: Cambridge University Press, 2008) at 186.

7 *Tae Hoon Park v Republic of Korea* (628/1995), CCPR/C/64/D/628/1995 (1998), 20 October 1998; 6 IHRR 623 (1999) at para 10.3.

8 Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev edn (Kehl: N.P. Engel, 2005) at 438.

9 Ibid. at 438–9.

10 Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 374.

11 Preamble, GA Res 59(I), 14 December 1946, A/RES/59(I).

12 Article 19, Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810 91.

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Here we have a bold and unconditional restatement of the classic liberal position. It is not even limited by the restriction provision that would be consistent with liberal thought, which is instead addressed in the general limitations provision of Article 29 of the Declaration.[13] Subsequent legal instruments remained largely true to the liberal understanding, and the sheer extent of references to the right is indicative of the high importance accorded to it. Its first expression in treaty form was in Article 10 of the European Convention on Human Rights 1950.[14] There followed Article 5 of the Convention on the Elimination of Racial Discrimination 1965,[15] and, finally, in 1966, in Article 19 of the ICCPR 1966.[16] Two additional regional provisions followed: Article 13 of the American Convention on Human Rights 1969[17] and Article 9 of the African Charter of Human and People's Rights 1981.[18] The right is expressed with specific reference to children and in notably vibrant terms at Articles 12 and 13 of the Convention on the Rights of the Child 1989.[19] Hard law provisions are mirrored by a myriad of soft law references. Recent texts include the outcome document of the World Summit on Information Society, December 2003,[20] the Inter-American Declaration of Principles of Freedom of Expression 2000[21] and the Declaration of Principles on Freedom of Expression in Africa 2002.[22] It is notable that intergovernmental organisations have established special procedures mandates for promotion of the right, including, the special rapporteurs on freedom of expression and/or media of the UN,[23] the Organization for Security and Co-operation in Europe (OSCE)[24] and the Organization of American States (OAS).[25]

The high importance accorded to freedom of expression in international law and related discourse is not just a matter of philosophy or ideology. As a matter of empirical observation it can be seen that free expression is essential

13 Article 29 UDHR.
14 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.
15 660 UNTS 195.
16 999 UNTS 171.
17 OAS TS 36.
18 OAU CAB/LEG/67/3 rev. 5.
19 1577 UNTS 3.
20 World Summit on the Information Society, Declaration of Principles: Building the Information Society: A Global Challenge in the New Millennium, 12 December 2003, WSIS-03/GENEVA/DOC/4-E.
21 Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, adopted at its 108th regular session, 19 October 2000.
22 African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, 23 October 2002, ACHPR/Res 62(XXXII)02.
23 UNCHR Res 1993/45: Right to Freedom of Opinion and Expression, 5 March 1993, E/CN.4/RES/1993/45.
24 Organization for Security and Co-operation in Europe, Decision 193: Mandate of the OSCE Representation on Freedom of the Media, 5 November 1997.
25 Declaration of Santiago: Second Summit of the Americas, 18–19 April 1998.

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to the good working of the entire human rights system.[26] It is sometimes described as a multiplier or *meta* right because of its role in enabling enjoyment of so many other rights.[27] Political participation rights, for instance, would be meaningless without the exchange of ideas.[28] Cultural rights are to a large extent enjoyed through expression.[29] The rights to assembly and association would mean little if they did not include an entitlement to engage with others.[30] We may ask the question, though, as to whether the link is only with civil and political rights? At first sight it may not be so obvious what relevance this right may have with regard to enjoyment of such economic and social entitlements as health and shelter. However, with a little probing it is obvious that the equitable enjoyment of these rights is not possible without the respectful giving and receiving of information between duty bearer and rights holder, without the participation of the rights holder in decisions that affect his or her welfare.[31] Amartya Sen goes so far as to suggest that no country that vigorously ensures freedom of expression will experience famine.[32] Insights such as these lie behind the prominent place accorded to freedom of expression in recent theories of the rights-based approach to development (RBAD). It is notable, for instance, how centrally and obviously critical is free expression to the implementation of core RBAD principles, including accountability, transparency and empowerment.[33]

2. Threats to Freedom of Expression

It is inevitable, perhaps even axiomatic, that so fundamental a human right as freedom of expression is also among the most violated of rights. As Agnes Callamard puts it, 'the suppression of dissent and competing views of things

26 Boyle, 'Thought, Expression, Association, and Assembly', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010) at 266.

27 O'Flaherty, 'Article 19 UDHR: Contemporary Challenges and Opportunities for Freedom of Expression, Lecture at the Carr Centre for Human Rights Policy, Kennedy School of Government, Harvard University', 4 March 2009, available at: http://www.hks.harvard.edu/cchrp/events/2009/month03/article19.pdf [last accessed 18 April 2012].

28 Human Rights Committee, General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25), 12 July 1996, CCPR/C/21/Rev.1/Add.7; 4 IHRR 1 (1997).

29 Committee on Economic, Social and Cultural Rights, General Comment No 21: Right of everyone to take part in cultural life (art. 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, E/C.12/GC/21; 17 IHRR 608 (2010).

30 Boyle, supra n 26 at 257–8.

31 Hamm, 'A Human Rights Approach to Development' (2001) 23 *Human Rights Quarterly* 1005 at 1018–20.

32 Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999) at 16.

33 United Nations Educational, Scientific and Cultural Organization, 'World Press Freedom Day 2008 Concept Paper: Freedom of Expression, Access and Empowerment', available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/WPFD2009/pdf/wpfd2008.concept+engl.pdf [last accessed 18 April 2012].

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deemed immoral, heretical or offensive, has dominated world social, religious and political history', and, 'the right to freedom of expression has always been the object of tension, struggle and contest between the State and the citizens and within society itself.'[34] She draws particular attention, though, to the situation today. She considers that the old patterns have been particularly invigorated in response to such phenomena as the communications revolution and the post 9/11 climate.[35] The present writer would add as additional exacerbating phenomena the challenge of fostering multi-cultural societies and the resurgence of politicised religion. All of these elements have fostered an extraordinary array of threats to freedom of expression. Dinah PoKempner, described the current situation starkly, 'cataloguing, even anecdotally, the many encroachments on free expression . . . is a little like writing about global warming. The danger is real, catastrophic, accelerating, and yet almost invisible. So many things are going on at so many levels we fail to see the interconnections'.[36] She lists an array of grave concerns:

- The killing, imprisonment and intimidation of journalists (reportedly 67 journalists were killed in the course of their work during 2007).
- The array of new criminal offenses, such as 'glorification', '*apologie*' and 'indirect incitement' of terrorism.
- Rapidly heightening levels of internet censorship and surveillance.
- Reinvigorated recourse to blasphemy laws.
- Demand for wide criminalisation of various forms of hate speech.
- Calls for formalisation of a new right of religions to be protected from defamation.[37]

The writer would add such other threats as exaggerated recourse to contempt proceedings in reaction to forms of expression, persistence of *lèse majesté* laws and, in some one-hundred-and-sixty countries, of criminal defamation laws, the phenomenon of libel tourism, vast variations in national approaches on freedom of information and the widespread repression of the expression of gender identity.

Responding to the array of assaults, abuses, concerns and gaps requires multi-faceted action from many actors. For instance, it demands on-going monitoring and reporting; persistent advocacy; education about the role of freedom of expression in society; putting in place of self-regulatory frameworks

34 Callamard, 'Is it Possible to Move the Debate on Freedom of Expression Out of the Cultural and Religious Spheres to the Spheres of Law and Politics?', available at: http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innspill/menneskerettigheter/debate.freedom.html?id=535398 [last accessed 6 February 2012].

35 Ibid.

36 PoKempner, 'A Shrinking Realm: Freedom of Expression since 9/11', available at: http://dspace.cigilibrary.org/jspui/bitstream/123456789/19727/1/A%20Shrinking%20Realm%20Freedom%20of%20Expression%20since%20911.pdf?1 [last accessed 6 February 2012].

37 Ibid.

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for journalists; exploration of non-criminal strategies to combat hate speech; law reform; judicial restraint; accountability for human rights violations; and, policy development regarding the free expression rights of the child. It also calls for innovative transnational approaches.[38]

3. Article 19, Paragraphs 2 and 3, ICCPR

Crucial to the effectiveness of all such responses will be the existence of a strong normative framework in the form of international human rights law in support of freedom of expression. One should thus enquire as to whether the existing standards are adequate to their function? The present article frames a response to that question around the principal global expression of the right in paragraphs 2 and 3 of Article 19 of the ICCPR, which read:

> 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 reputation of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

Bearing in mind that the topic of freedom of opinion came to be addressed separately from freedom of expression (in paragraph 1 of Article 19), the formulation of paragraph 2 is notably close to that in the UDHR. Furthermore, when one considers that the schema of the treaty required that a restrictions provision (paragraph 3) had to be included, it can be concluded that freedom of expression as articulated in Article 19 of the ICCPR is faithful to the right

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38 See Council of Europe Commissioner of Human Rights, 'Ethical Journalism and Human Rights', CommDH (2011)40, 8 November 2011, available at: https://wcd.coe.int/ViewDoc.jsp?id=1863637, [last accessed 21 April 2012]; Dutton, Dopatka, Hills, Laws and Nash, *Freedom of Connection, Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet* (Paris: UNESCO, 2011); Joint Declarations of United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Organization of American States Special Rapporteur on Freedom of Expression the Representative on Freedom of the Media from the Organization for Security and Co-operation in Europe (OSCE), and the Rapporteur for the African Commission on Human and Peoples' Rights, available at: http://www.oas.org/en/iachr/expression/basic.documents/declarations.asp [last accessed 21 April 2012]; and Article 19, 'Freedom of Expression: Enforcement', available at: http://www.article19.org/pages/en/enforcement.html [last accessed 21 April 2012].

as found in the Universal Declaration. Such fidelity did not come about without extensive debate. As with all other provisions of the Covenant, the language addressing freedom of expression was subject to protracted review over a drafting period that lasted from 1947 until 1966 (albeit Article 19 was agreed in its final form in 1961, on a vote at the 3rd Committee of the General Assembly of 82 to 1, with 7 abstention[39]). Numerous proposals were made for significant variants on the UDHR formulation.[40] At least in the first phase of drafting, very many of these were fermented in the context of an unrelated UN Conference on Freedom of Information and an ultimately fruitless drafting process for a convention on that topic.[41]

Some of the drafting proposals remain of interest even at this remove. Reference has already been made to efforts of the Soviet Union to introduce words that would instrumentalise freedom of expression in the service of international cooperation and world peace.[42] Another suggestion, initially supported by many States, including the United States and the United Kingdom, would have had the scope of the right limited through a stipulation that electronically broadcast expression would only be protected to the extent that it was by means of 'legally operated visual and auditory devices'.[43] With regard to another proposal, that remains of interest because of its tangential relevance to the contemporary discussion as to whether Article 19 embraces a right of access to information (discussed below), negotiators ultimately rejected the proposal of India and others, that the word 'seek' in the term, 'to seek, receive and impart information' should be replaced with the word 'gather'.[44] Not all of the unsuccessful proposals regarding the scope of the right were intended to narrow it. For instance, a French proposal would have had the right carry with it an explicit duty on States to promote it and remove obstacles to its realisation.[45]

Negotiations on the extent to which the right might be restricted were particularly fraught and lasted throughout the drafting process. Already in 1947, the drafting committee felt unable to decide between a brief generalised statement of permissible restrictions on the right or a lengthy detailed listing.[46] Instead it referred alternative drafting proposals for the attention of the Commission on Human Rights. Its variant of a detailed listing of contained 25 permissible restrictions regarding, inter-alia, disclosures arising out of marital

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39 Bossuyt, supra n 10 at 401.
40 Ibid. at 373–4, 381–3, 386–93.
41 Ibid. at 374–5.
42 Ibid. at 374.
43 Ibid. at 383.
44 Ibid. at 384.
45 Ibid. at 381.
46 Ibid. at 374–5.

and personal relations, profanity in public places, and commercial and economic matters.[47] Early proponents of such an extensive listing included the Union of South Africa,[48] and another significant source was the proceedings of the Conference on Freedom of Information.[49] By the 1960s the Soviet bloc had become the champion of extensive restrictive language, such as with regard to racist speech and expression that manifested class prejudice—with proposals tabled unsuccessfully by the Soviet Union and Yugoslavia.[50] Ultimately, the Third Committee, by 71 votes to 7 with 12 abstentions, adopted the generalised language to be found in paragraph 3 of Article 19.[51]

Before leaving this brief review of the *travaux préparatoires* it is relevant also to take note of the drafting of the one provision of the ICCPR that specifically requires States to restrict forms of expression, Article 20. Article 20 reads:

(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.

In the scheme of the Covenant, this provision is a curiosity, imposing an obligation but not creating a right. It had a troubled passage through negotiation. The proponents of such a provision (principally the Soviet Union and other States of the communist bloc) argued that the form of expression at issue is so pernicious and dangerous that it requires an explicit prohibition.[52] Opponents, such as the United States, expressed concern that such a provision could stifle expression and encourage censorship, including prior censorship, and that, in any case, paragraph 3 of Article 19 was sufficient to empower States to regulate such speech.[53] It was also observed that some of the terms under consideration for inclusion in the article, such as 'incitement to discrimination (and) hostility', were unclear and would be difficult to interpret and apply.[54] During the protracted debate the proposal underwent considerable change—such as with the disappearance of the proposal that the provision require the criminalisation rather than just the prohibition of the impugned forms of expression[55] and the late addition (in 1961) of the prohibition on war propaganda.[56] States that spoke to the issue of the relationship of the provision with Article 19 made clear that it did not serve to exclude the application of Article 19 with regard to the impugned forms of expression—rather it added

47 Ibid. at 375.
48 Ibid. at 375–6.
49 Ibid. at 374–5.
50 Ibid. at 393–4.
51 Ibid. at 401.
52 Ibid. at 407.
53 Ibid. at 406–7.
54 Ibid. at 407–8.
55 Ibid. at 403.
56 Ibid. at 407–8.

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an additional requirement on the State to take particular forms of action against such expression.[57] On a proposal of Chile, the close nexus of the two articles was acknowledged with a re-positioning of the provision immediately after Article 19 (previously it had constituted Article 26 of the draft Covenant).[58] Ultimately, the contested nature of Article 20 was reflected in the vote for its adoption at the Third Committee: 52 in favour, 19 against and 12 abstentions.[59]

4. Article 19 in the Practice of the Human Rights Committee, 1977–2011

Article 19 comprises two elements: a statement of the right and a list of the contexts in which its exercise may be limited. The statement is broad: encompassing an entitlement 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'. The words, 'of all kinds' are not to be found in the equivalent article of the European Convention on Human Rights.[60] Commentators have taken from them that every communicable type of subjective idea and opinion is embraced[61]—a view confirmed by the Human Rights Committee in *Ballantyne, Davidson and McIntyre v Canada*.[62] Committee jurisprudence has also affirmed that the right covers political expression,[63] and, in *Ballantyne*, commercial speech,[64] albeit according a higher level of protection to the former.[65] Committee jurisprudence has frequently affirmed the application of Article 19 for journalistic expression and the Committee has a long practice of both addressing direct attacks on journalists[66] and State efforts to limit journalistic space.[67] It is interesting that, in an otherwise very scant General Comment on Article 19 (General Comment No 10, 1983), the Committee stated that, 'because of the development of modern

57 Ibid. at 398.
58 Ibid.
59 Ibid. at 410.
60 Article 10, European Convention on Human Rights.
61 Nowak, supra n 8 at 443–4.
62 (359/1989 and 385/1989), CCPR/C/47/D/359/1989 (1993); 1–1 IHRR 145 (1994), at para 11.3.
63 *Primo José Essono Mika Miha v Equatorial Guinea* (414/1990), CCPR/C/51/D/414/1990 (1994); 2 IHRR 67 (1995), at para 6.8.
64 *Ballantyne, Davidson, McIntyre v Canada*, supra n 62 at para 11.3.
65 *Zeljko Bodrožić v Serbia and Montenegro* (1180/2003), CCPR/C/85/D/1180/2003 (2006); 13 IHRR 389 (2006), at para 7.2.
66 *Philip Afuson Njaru v Cameroon* (1353/2005), CCPR/C/89/D/1353/2005 (2007); 14 IHRR 641 (2007).
67 *Rakhim Mavlonov and Shansiy Sa'di v Uzbekistan* (1334/2004), CCPR/C/95/D/1134/2004 (2009); 16 IHRR 650 (2009).

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mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression'.[68] This concern with regulation of all media—in both the public and private sectors—recalls the horizontal application of the right. This aspect is reinforced by the absence from Article 19 of the stipulation to be found in the European Convention that the right is to be protected, 'without interference by public authority'. Finally, in 2004, the Committee had the opportunity to decide a violation of Article 19 on the basis of the confiscation of an art work and the imprisonment of the artist, in *Hak-Chul Sin v Republic of Korea*.[69]

One may conclude from this overview of Committee practice that Article 19 put in place a broad protection with a wide sweep that embraces all verbal and artistic expression. Committee practice, however, left open such questions as to the extent to which Article 19 covers other forms. While in *Kivenmaa v Finland* the Committee held that Article 19 protects such non-verbal expression as the unfurling of a banner,[70] in *S.G. v France*, it refused to recognise the politically motivated defacement of road signs as a form of expression.[71] This oddity led Sarah Joseph to wonder what status graffiti might have (maybe art?).[72] In *Baban v Australia* the Committee was invited to consider a hunger strike to be a form of protected expression. While it appeared to be willing to consider such a proposition it disposed of the claim on the basis of inadmissibility.[73] In the early case of *L.T.K. v Finland*, the Committee decided that the act of refusal to perform military service was not a form of expression.[74] Interestingly, though, in *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*, it accepted that the same act could constitute a manifestation of religion or belief,[75] leading us to speculate that *L.T.K.* might be decided differently *post* 2006. And then what of the expression of identity through forms of clothing or other bodily adornment? The Committee had an opportunity to explore this when it decided *Hudoyberganova v Uzbekistan*, a case of a female student who was not permitted to wear a *hijab* at a State-run educational facility and who complained of violations of Articles 18 and 19. The Committee found a violation under Article 18 and declined to also examine the claim under

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68 Human Rights Committee, General Comment No 10: Freedom of expression (art. 19), 29 June 1983, HRI/GEN/1/Rev. 9 (Vol. I), at 181; 1–2 IHRR 9(1994), at para 2.
69 (926/2000), CCPR/C/80/D/926/2000 (2004); 11 IHRR 928 (2004), at paras 7.2, 8.
70 (412/1990), CCPR/C/50/D/412/1990 (1994); 1–3 IHRR 88 (1994), at para 9.3.
71 (347/1988), CCPR/C/43/D/347/1988 (1991), at para 5.2.
72 Joseph, Schultz and Casten, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edn (Oxford: Oxford University Press, 2004) at 521.
73 (1014/2001), CCPR/C/78/D/1014/2001 (2003); 11 IHRR 159 (2004), at para 6.7.
74 (185/1984), CCPR/C/25/D/185/1984 (1985), at para 5.2.
75 (1321/2004 and 1322/2004), CCPR/C/88/D/1321-1322/2004 (2007); 14 IHRR 389 (2007), at para 8.3.

Article 19.[76] Another open question concerned the application of Article 19 with regard to forms of expression of gender identity—a matter of obvious importance for those who are transgender.

One further aspect of the scope of freedom of expression may be considered—it is the outcome of the curious finding in *Zündel v Canada* to the effect that a failure to give a holocaust denying journalist access to a press conference facility in a parliamentary building that was available to other media did not raise issues under Article 19 since the article does not confer a right to free expression in any particular location. The Committee observed that there is no 'unfettered right of any individual or group to hold press conferences within the Parliamentary precincts . . . the Committee notes that the author remained at liberty to hold a press conference elsewhere'.[77] This seems an unfortunate decision on a number of grounds, including that it that does not take account of the special significance of the event taking place in so nationally prestigious a location. It unduly limits the scope of application of Article 19, particularly since the Committee could have still determined a non-violation through recourse to the article's limitation provisions. It may more generally be observed that laws on genocide denial appear to have tended to trigger discomfort on the part of the Committee—in *Faurisson v France*—a case of the imposition of a criminal penalty under a crimes against humanity-denial statute, the *Gayssot* Act—while the Committee considered that the penalty, in the specific circumstances of the actions of Mr Faurisson, did not constitute a violation of Article 19, it suggested that the statute itself constituted an excessive restriction on freedom of expression.[78] We will return to this issue later in the article.

Another area of uncertainty with regard to the reach of Article 19 has concerned the extent of the entitlement to access information. This had not been addressed in the jurisprudence of the Human Rights Committee before 2009, albeit it had suggested elements of such an entitlement in a number of Concluding Observations.[79] In 2006, the Inter-American Court of Human Rights, in *Claude Reyes et al v Chile*, did hold that Article 13 of the American Convention on Human Rights 'protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention'.[80] Since then, the European Court of Human Rights recognised a limited right of public access to information in

76 (931/2000), CCPR/C/82/D/931/2000 (2004); 12 IHRR 345 (2005), at para 5.3.

77 *Ernst Zündel v Canada* (953/2000), CCPR/C/78/D/953/2000 (2003); 10 IHRR 921 (2003), at para 8.5.

78 (550/1993), CCPR/C/58/D/550/1993 (1996); 4 IHRR 444 (1997), at para 9.3.

79 For example, Human Rights Committee, Concluding Observations regarding Azerbaijan, 3 August 1994, CCPR/C/79/Add.38, at para 18; and Human Rights Committee, Concluding Observations regarding the Ukraine, 12 November 2001, CPR/CO/73/UKR, at para 22.

80 Merits, Reparations and Costs, Judgment, IACtHR Series C 151 (2006), at para 77.

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the context of court proceedings.[81] The Committee's first opportunity to consider the matter arose in the 2009 case of *Mavlonov and Sa'di v Uzbekistan*. On that occasion, a majority of the Committee considered that a member of the public has the right to receive journalistic information, 'as a corollary of the specific function of a journalist and/or editor to impart information'[82]. This contentious basis for recognition of a right to receive information was subject to the dissent of two members who observed that '(t)he Committee's literalist reading [of article 19(2)] would require it to treat every potential recipient of any information or ideas that have been improperly suffered [*sic*] under article 19 as a victim.'[83] In another problematic case of 2009, this time concerning information held by the State, the Committee rejected at the admissibility stage a claim that a refusal to provide an author with information about the application of the death penalty constituted a violation of Article 19. The Committee observed that, 'the author has not explained why exactly he, personally, needed the information in question; rather he contended that this was a "matter of public interest" . . . the present communication constitutes an *actio popularis* and . . . is inadmissible'.[84] This approach was clarified (or moderated) in *Toktakunov v Krgystan* where, on similar facts, an author's claim was found to be admissible since he, as a legal consultant at a human rights organisation that had a 'watchdog' function, had demonstrated that he 'as an individual member of the public, was directly affected by the refusal of the State party's authorities to make available to him, on request, the information on use of the death penalty'.[85]

Turning to the list of the contexts in which the exercise of freedom of expression may be limited, a number of issues arise. In the first instance, the reference to, 'special duties and responsibilities', an undoubted oddity in the general scheme of the Covenant, seems to give no particular cause for concern as it does not constitutes a distinct restriction. Instead, it has been argued that it serves to emphasise the duty of the State to take positive measures to ensure an adequate space in society for free expression – for instance by ensuring that media not be controlled by monopoly interests.[86] Likewise, the absence of a provision, as found in the European Convention, that restrictions be, 'necessary in a democratic society', does not appear to have caused any difficulty in practice (with the Committee, as we have seen, frequently invoking

81 *Társaság a Szabadságjogokért v Hungary* Application No 37374/05, Merits, 14 July 2009; see also *Kenedi v Hungary* Application No 3175/05, Merits 26 August 2009 and *Gillberg v Sweden* Application No 41723/06, Merits, 3 April 2012.

82 (1334/2004), CCPR/C/96/D/1877(2009); 16 IHRR 650 (2009), at para 8.4.

83 Ibid. at Appendix, separate opinions of Committee members Sir Nigel Rodley and Mr Rafael Rivas Posada; see also the Concurring Opinion of Mr G.L. Neuman in *Toktakunov v Krgystan* (1470/2006), CCPR/C/101/D/1470 (2006); 18 IHRR 1039 (2011).

84 *S.B. v Krgyzstan* (1877/2009), CCPR/C/96/D/1877/2009 at para 4.

85 Supra n 83 at para 6.4.

86 Human Rights Committee, Concluding Observations regarding the Russian Federation, 1 December 2003, CCPR/CO/79/RUS, at para 18.

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the role freedom of expression plays in ensuring a democratic society). The permissible purposes for restriction are notably fewer than those listed in the European Convention. Thus there is no mention of restrictions in the interest of territorial integrity or public safety, for the prevention of disorder or crime, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary. [87]

Notwithstanding the relatively brief list of reasons for restriction one might assume that the provision has the potential to unravel the protected right. The point was well put by the late Committee member Rajsoomer Lallah, 're-course to restrictions that are, in principle, permissible under Article 19, paragraph 3, bristle with difficulties, tending to destroy the very existence of the right sought to be restricted'.[88] However practice has been encouraging. Jurisprudence demonstrated that restrictions must be necessary and proportionate to the goal sought to be achieved and that this is a determination that is not the exclusive prerogative of the state.[89] In *Gauthier* and subsequent cases the Commission stipulated that the State must specify and justify the precise nature of the threat posed by the exercise of freedom of expression by an individual.[90] In the 2005 decision in *Bodrozic v Serbia and Montenegro*, a case of criminal libel proceedings against a journalist who criticised a well-known public figure, the responsibility of the State to justify the limitation in its specific circumstances was re-affirmed. The Committee also took the opportunity to observe that, 'in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high'.[91] This recalled the finding of a violation in *de Moraes v Angola* on the basis of the imprisonment of a journalist who had published comments critical of the head of state. The Committee considered that, 'the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition'.[92] In *Coleman v Australia*, the fining and eventual imprisonment of a person who failed to get the required permit before delivering an innocuous speech at a shopping mall was found to be wholly disproportionate to the legitimate interest of the State in regulating the delivery of addresses in public places.[93] We find many

87 Article 10, European Convention on Human Rights.

88 *Faurisson v France*, supra n 78 at Individual Opinion by Rajsoomer Lallah (concurring), para 13.

89 *Robert Gauthier v Canada* (633/1995), CCPR/C/65/D/633/1995 (1999); 7 IHRR 7 (2000), at para 13.6.

90 Ibid. at para 13.6; and *Keun-Tae Kim v Republic of Korea* (574/1994), CCPR/C/64/D/574/1994 (1999); 6 IHRR 930 (1999), at para 12.5.

91 Supra n 65.

92 (1128/2002), CCPR/C/83/D/1128/2002 (2005); 12 IHRR 644 (2005), at para 6.8.

93 (1157/2003), CCPR/C/87/D/1157/2003 (2006); 14 IHRR 49 (2007), at para 7.3.

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other examples of a strict approach of the Committee in Concluding Observations. For example, it frequently criticised the extent of limitation of freedom of expression in counter-terrorism legislation,[94] in defamation laws[95] and blasphemy provisions.[96]

Concern has been expressed regarding restrictions on the grounds of protection of public morals. In the early case of *Hertzberg v Finland* the Committee found no violation of Article 19 in the failure of the State to interfere with the banning by its broadcasting company of programme segments dealing with issues of homosexuality. The Committee stated that 'public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities'.[97] This is the only case in which the Committee has invoked such a margin of discretion—which seems to mirror the margin of appreciation doctrine so favoured by the European Court of Human Rights.[98] It has been rightly criticised by Sarah Joseph who has observed that the purpose of the European approach—the resolution of situations where there is no common ground within all the State Parties—is inapplicable to the situation under the Covenant where globally common practice is inevitably a rare thing.[99] The Committee, in the subsequent case of *Jong Kyu Sohn v Republic of Korea*, appeared, albeit not explicitly, to reverse itself on the matter when it affirmed that it reserves to itself an assessment of whether, in any given situation, there were circumstances justifying restriction of the right.[100]

Turning to a consideration of Article 20, the Committee in *Faurisson* and in *Ross v Canada*, affirmed that the provision addresses forms of aggravated abuse that would all fall foul in any case of Article 19(3).[101] Otherwise, it has provided little guidance in the period under review, or since, and many uncertainties persist. For instance, what constitutes 'propaganda' and what

94 Human Rights Committee, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, 30 July 2008, CCPR/C/GBR/CO/6, at para 26; and Human Rights Committee, Concluding Observations regarding the Russian Federation, supra n 86 at para 19.

95 Human Rights Committee, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, supra n 94 at para 25; and Human Rights Committee, Concluding Observations regarding Italy, 24 April 2006, CCPR/C/ITA/CO/5, at para 19.

96 Human Rights Committee, Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland, 27 March 2000, CCPR/C/79/Add.119, at para 15; and Human Rights Committee, Concluding Observations regarding Kuwait, 27 July 2000, CPR/CO/69/KWT, at para 20.

97 (61/1979), CCPR/C/15/D/61/1979 (1982), at para 10.3.

98 The Committee rejected the notion of margin of appreciation in a case regarding rights under Article 27. *Länsman v Finland* (511/1992), CCPR/C/52/D/511/1992 (1994); 2 IHRR 287 (1995), at para 9.4.

99 Joseph et al., supra n 72 at 527–8.

100 (518/1992), CCPR/C/54/D/518/1992 (1995); 3 IHRR 36 (1996), at para 10.4.

101 *Faurisson v France*, supra n 78; and *Malcolm Ross v Canada* (736/1997), CCPR/C/70/D/736/1997 (2000); 8 IHRR 322 (2001).

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situations do the word 'war' address? Manfred Nowak makes an argument to limit the scope of the word, 'propaganda' by means of an application of the interpretive rules contained in the Vienna Convention on the Law of Treaties,[102] but his approach is somewhat speculative. The term, 'war', on the other hand has been interpreted by the Committee as being restricted to, 'an act of aggression or breach of the peace contrary to the Charter of the United Nations'.[103] While one may wonder how this meaning might apply in practice—since the act of propaganda will commonly precede the conflict and thus any determination of its status under the Charter—this is nevertheless a useful restriction of the term.

With regard to the second element of the Article, a number of interpretive problems arise, as was foreseen during the drafting of the provision.[104] For instance, what meaning should be given to such terms as 'advocacy', 'incitement' and 'hostility'? Most of these issues remain open and we can only speculate that they refer to forms of abuse at a level of seriousness that may exceed those addressed in Article 19. Other questions concern the relationship of Articles 19 and 20. Here, as previously observed, we do find guidance. What is less clear is when a matter should be dealt with under Article 19 and when under Article 20. This was the context for a separate opinion of Mr Lallah in *Faurisson*, referred to earlier, where he considered that the case should have been disposed of under Article 20 rather than by invocation of the limitation clauses of Article 19.[105]

The role and interplay of Articles 19 and 20 is particularly pertinent to the question of permissible responses to abusive attacks on religions.[106] This is one of the major contemporary controversies, as we see from the furore around threats triggered by the writings of Salman Rushdie,[107] the publication of the Danish cartoons,[108] recent Dutch movies[109] and so on. A number of

102 1969, 1155 UNTS 331; 8 ILM 679 (1969). See Nowak, supra n 8 at 472.

103 Human Rights Committee, General Comment No 11: Article 20, 29 July 1983, HRI/GEN/1/Rev.9 (Vol. I), at 182; 1–2 IHRR 10 (1994), at para 2.

104 Bossuyt, supra n 10 at 406–8.

105 *Faurisson v. France*, supra n 78 at Individual Opinion by Rajsoomer Lallah (concurring), para 11.

106 The present article does not consider the manner in which expression is restricted for the purpose of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195.

107 Slaughter, 'The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech' (1993) 79 *Virginia Law Review* 153.

108 Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals*, 3rd edn (Oxford: Oxford University Press, 2007) at 659–65.

109 Nijboer and Soeters, 'Death of a Filmmaker: Freedom of Expression and Tolerance under Siege', the 13th BOBCATSSS Symposium, 31 January to 2 February 2005, Budapest, available at: http://igitur-archive.library.uu.nl/DARLIN/2005-0314-013054/Freedom%20of%20expression.pdf [last accessed 21 April 2012].

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States have argued that these types of acts of disrespect of religion should be dealt with through a new international prohibition of defamation of religion.[110] So far, the topic has been aired principally in political fora of the UN, such as the Human Rights Council[111] and the General Assembly,[112] where the relevant resolutions adopted in 2011 suggest that the positions of those States that advocated the topic are moderating.[113] The issues raised are complex. On the one hand there is the need to protect the right of religious freedom, a right no less important than any other contained in international human rights law. There is also the need to take account of the very real distress that much comment causes to people of faith.[114] However, on the other hand, the proposed 'defamation' route has given cause for serious concern. In the first place, the notion of defamation of religion is utterly alien to the human rights system, in that it would protect an idea or belief rather than the individual who holds that belief.[115] Secondly, it may force a State to determine which religious beliefs may be expressed.[116] Thirdly, it would constitute an internationalisation of blasphemy laws with a potentially dramatic effect on freedom of expression.[117] For instance, it could prove to be a tool for the repression of peoples of minority faith or no faith or whose lifestyle offends the tenets of a State's dominant faith. Taking account of such considerations as these, it is important then to assess whether the existing legal provisions are capable of providing adequate protection to religions. The present author would suggest that they are. In the framework of individual rather than 'institutional' human rights, Article 19 countenances restrictions on expression for purposes of respecting religiously held beliefs and practices.[118] Article 20 expressly addresses expression intended to generate religious hatred. What is more, the Covenant, at Article 18, protects religious belief and practice, and, at Articles 2 and 26, it prohibits religious discrimination. The interplay of these provisions would appear to be sufficient to provide international legal protection from forms of expression that

110 Dobras, 'Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws' (2009) 37 *Georgia Journal of International & Comparative Law* 339 at 364–6.

111 For example, Human Rights Council Res 13/16, 25 March 2010, HRC/RES/13/16.

112 For example, GA Res 64/156, 18 December 2009, A/RES/64/156.

113 Human Rights Council Res 16/18, 24 March 2011, A/HRC/RES/16/18; GA Res 66/167, 19 December 2011, A/RES/66/167.

114 'Conference report Promoting religious freedom around the world', 3–5 July 2011, available at: http://www.wiltonpark.org.uk/resources/en/pdf/22290903/2011/wp1108-report [last accessed 23 May 2012].

115 Parmar, 'The Challenge of "Defamation of Religions" to Freedom of Expression and the International Human Rights' (2009) 3 *European Human Rights Law Review* 353 at 365.

116 Graham, 'Defamation of Religions: The End of Pluralism?' (2009) 23 *Emory International Law Review* 69 at 75–6.

117 Dobras, supra n 110 at 366–7.

118 Nowak, supra n 8 at 462.

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constitute extreme assaults on the religious beliefs and practices of any person.[119]

At this point we can draw some conclusions from this review of practice up to 2011 about the state of the law. It is clear that Article 19 is a reasonably sturdy provision. It has a wide reach and restrictively formulated limitation clauses. The Human Rights Committee interpreted it in a manner that favours a wide enjoyment of free expression and it applied the restriction clauses narrowly. Of course, there remain open questions. Some of the elements, particularly of Article 20, are unclear. The jurisprudence, inevitably, only addressed a small range of issues and, notwithstanding the many additional indications to be found in the Committee's Concluding Observations, there remained areas of uncertainty regarding the scope and application of the article. Furthermore, in some cases, the findings of the Committee were unconvincing and in need of review. Thus was set the context, in 2009, for the Committee's decision to develop a new General Comment on Article 19.

5. The Role of a General Comment

General comments are, as Philip Alston puts it, the 'means by which a UN human rights expert committee distils its considered views on an issue which arises out of provisions of the treaty, whose implementation it supervises, and presents those views in the context of a formal statement'.[120] The practice of the drafting of general comments is now widespread among the UN human rights treaty bodies, albeit, notwithstanding the remark of Alston, they do not all share a common understanding of the purpose or status of these instruments. In the case of the Human Rights Committee, the adoption of the comments is specifically mandated by Article 40 of the Covenant and the Committee intends that they constitute authoritative legal analysis of the provisions of the treaty, except to the extent that the text might indicate otherwise (such as where they constitute no more than policy-level suggestions).[121] This analysis is based principally on the experience of the Committee in applying the particular provisions that are at issue. The Committee considers that

119 This conclusion is supported by the comments of a number of speakers at an international expert workshop convened by the UN High Commissioner for Human Rights in October 2008: see Report of the Office of the UN High Commissioner for Human Rights, Expert Seminar on the links between Articles 19 and 20 of the International Covenant on Civil and Political Rights: 'Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (Geneva, 2–3 October 2008), 16 January 2009, A/HRC/10/31/Add.3.

120 Alston, 'The Historical Origins of 'General Comments' in Human Rights Law', in De Charzournes and Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality* (The Hague: Martinus Nijhoff, 2001) at 764.

121 Human Rights Committee, Summary Record of the 2674th Meeting, 23 October 2009, CCPR/C/SR.2674, at para 2.

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general comments carry considerable legal authority, adopted as they are by the body that is mandated to supervise implementation by States of the Covenant.[122] They have evolved over the years to be substantial and highly detailed commentaries on each aspect of a given article of the Covenant. They draw on all of the applicable jurisprudence of the Committee and take due account of its practice in the review of the periodic reports submitted by States Parties. They can also serve to relate the article under examination to the relevant contemporary human rights environment. Draft General Comments are subject to the comments of States and interested organisations and individuals.

As we have noted, a General Comment on Articles 19 already existed, as did one on Article 20. However, they both date from the very early days of the Committee when the practice of providing detailed commentary was not yet developed. And, of course they cannot take account of the considerable jurisprudence since then. They have long been in need of updating. For these reasons the decision of the Committee to develop the new General Comment on Article 19 was to be welcomed.

6. The Development of General Comment No 34

The Human Rights Committee adopted the decision to develop the General Comment on Article 19, to replace General Comment No 10, at its 94th session in March 2009.[123] It appointed the present writer to serve as rapporteur for development of the text. The rapporteur/present writer presented his draft text at the 97th session in October of that year.[124] The Committee reviewed that draft over the subsequent three sessions, by the end of which, in October 2010, a second revised draft was completed. That draft was then put for the comment of States Parties to the ICCPR and any other interested organisations or individuals. The second draft,[125] together with these proposals, was presented to the Committee by the rapporteur/present writer for discussion at its 101th and 102th sessions. The review concluded in July 2011 when General Comment 34 was adopted.[126]

122 Human Rights Committee, 'General Comments Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights', 19 May 1989, CCPR/C/21/Rev.1.

123 Report of the Human Rights Committee, Vol. I, GA Official Records, 94th session, Supplement No 40, A/94/40 (Vol. I) at para 41.

124 Human Rights Committee, Draft General Comment No 34: Article 19, Draft undertaken for the Human Rights Committee by the Michael O'Flaherty, 31 August 2009, CPR/C/GC/34/CRP.1.

125 Human Rights Committee, Draft General Comment No 34 (Upon completion of the first reading by the Human Rights Committee - Article 19), 25 November 2010, CCPR/C/GC/34/CRP.5.

126 Human Rights Committee, Summary Record of the 2820th meeting, 21 July 2011, CCPR/C/SR.2820, at para 86.

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The rapporteur/present writer's first draft,[127] the structure of which was retained in the final document, comprised fifty-six paragraphs, making it one of the lengthiest general comment texts ever considered by the Committee. It comprised general remarks, an examination of the scope of the two rights at issue—freedom of opinion and freedom of expression and a focussed examination of the scope of three aspects of freedom of expression in particular—journalistic expression, access to information and political expression. There followed an examination of the application of paragraph 3 of Article 19. The draft then addressed the application of the paragraph 3 restrictions in the context of political expression, journalistic/media expression, counter-terrorism measures, defamation laws, blasphemy laws and 'memory laws'. The draft concluded with a six-paragraph examination of the relationship of Articles 19 and 20.

On the occasion of the introduction of his draft, the rapporteur/present writer explained his methodology.[128] He identified four sources for its content. The first of these was the existing general comment on Article 19, General Comment No 10. He also indicated that, to the extent relevant, other general comments of the Committee had been taken account of. For example, he drew from General Comment No 27 regarding the application of restriction clauses. The third source was the jurisprudence of the Committee as found in Views adopted on individual communications. The final source was the guidance to be found in Concluding Observations. Concerning the latter he recalled that he was reverting to the practice of such referencing that had been commonplace in the Committee's general comments until falling into abeyance in recent years. He explained further that his reliance on existing practice of the Committee meant that examples given in support of various propositions sometimes seemed somewhat idiosyncratic and not necessarily the best vehicles to illustrate the application of the principal at issue. It would be for the Committee to determine whether these be retained in the draft or replaced by more appropriate examples.

With regard to the nature and purpose of the General Comment, the rapporteur/present writer indicated, in line with previous practice of the Human Rights Committee, that it should serve as a legal interpretation of Article 19 rather than a recommendatory or policy-level instrument, except to the extent that the text indicates to the contrary.[129] The language of the draft made clear which of its elements were considered to be of the nature of legally binding obligations. Where the application of the law was unclear or it was otherwise appropriate to avoid language of formal obligation that, also, was clearly indicated.

127 Human Rights Committee, Draft General Comment No 34, supra n 124.
128 Human Rights Committee, Summary Record of the 2674th meeting, supra n 121 at para 2.
129 Ibid.

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With regard to the structure of the draft, the rapporteur/present writer explained that it had not proved possible to develop a text that would simply be comprised of opening general remarks and then a detailed exegesis of the words of Article 19 as had previously been the case with comments of the Committee.[130] This was because it was impossible to locate all of the relevant guidance of the Committee with reference to specific elements of the Article. This was especially the case with regard to the Committee's views on the application of paragraph 3. That paragraph identifies a number of grounds on which restrictions may be imposed. However, as a matter of practice, in the context of the individual communications procedure, States often fail to indicate which of the grounds is being relied on, instead either referring to them all or just making reference in general terms to the application of the overall paragraph. In many such cases the Committee, in its Views, follows suit. In order for the general comment to adequately capture the Committee's guidance in these situations, it was necessary to add a lengthy section that is arranged thematically around the principal contexts for such restrictions rather than by specific grounds as found in paragraph 3.

Finally, the rapporteur/present writer explained the inclusion of text regarding the relationship with Article 20.[131] He acknowledged that he had not been mandated to develop general comment guidance on that article. Nevertheless, he argued that some analysis should be included in the General Comment because of the intimate nexus between the two provisions and the extent to which Article 20 may serve to restrict Article 19 rights.

7. Passage of the Draft in the Committee: The First Reading

Very many elements of the text that were debated in the first reading were then agreed without significant discussion in the second reading. Attention will be drawn here to some of the more notable of these. Comment on other elements that experienced significant adjustment in the second reading will be dealt with in the next section of this article. Reference is made only to the preponderance of the text that relates to freedom of expression. This article does not consider the manner in which freedom of opinion was addressed.

Scope of the right: the Committee retained the broad language to the effect that freedom of expression embraces every form of idea and opinion capable of transmission to others, including views that may be deeply offensive.[132] In the view of the present writer it thus, implicitly, rejected the approach it had

130 Ibid. at para 16.
131 Ibid. at para 2.
132 Human Rights Committee, General Comment No 34: Article 19: Freedom of opinion and expression, 12 September 2011, CCPR/C/GC/34, at para 11.

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taken in *Zündel*, discussed above. However, following debate, and in the interest of consensus, it did delete text to the effect that forms of expression may, 'depending on the particular circumstances, include such forms as the choice of clothing or the wearing or carrying of a religious or other symbol, and a hunger strike'. This deletion was accepted by many committee members on the understanding that the list of forms of expression must always be an open one that does not a priori exclude the deleted or any other forms.[133] Thus, for example, and taking just one example put to the Committee by non-governmental organisations (NGOs), it could embrace such forms of expression as a person's external indication of gender choice.

Access to information: the Committee agreed to the retention of a section on this topic, taking account of its own experience in reviewing periodic reports, the evolving practice at the regional level and the interpretation of the ICCPR by the UN Special Rapporteur on Freedom of Expression. As the text was subject to significant strengthening on the second reading it is discussed further below.

The application of Article 19, paragraph 3: the draft presented a detailed extrapolation of each of the requirements of the paragraph, whereby any restriction must be provided by law, be necessary and proportionate and only be for the specific purposes recognised in that paragraph (respect for the rights and reputation of others, protection of national security, public order, public health or morals[134]). The draft drew in part from the manner in which limitation clauses were addressed in General Comment No 22 on freedom of movement,[135] and it offered the opportunity to set out in the most elaborated fashion yet undertaken, of the Committee's understanding of the operation of such provisions. In so doing it elaborated on the application of the restriction clause in a manner that also provides some guidance with regard to the similarly worded provisions of such other articles of the Covenant as those regarding the freedoms of movement, assembly and association.

The draft's *schema* was accepted by the Committee with a number of adjustments to detail. Among the more notable elements of the finalised text were the provisions whereby 'it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law';[136] the term 'rights' in Article 19(3) includes but is not restricted to 'human rights';[137] and 'when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the

133 Human Rights Committee, Summary Record of the 2699th meeting, 17 March 2010, CCPR/C/SR.2699, at para 101.

134 General Comment No 34, supra n 132 at paras 21–36.

135 Human Rights Committee, General Comment No 22: The right to freedom of thought, Conscience and Religion (art. 18), 20 July 1993, CCPR/C/21/Rev.1/Add.4; 1-2 IHRR 30 (1994), at para 8.

136 General Comment No 34, supra n 132 at para 24.

137 Ibid. at para 28.

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precise nature of the threat and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat'.[138] That last element regarding the nexus between the expression and the threat was not in the original draft and sets a high bar for restrictions—it will be of interest to see whether it will be accepted by commentators.

Margin of appreciation: the Committee accepted the proposal in the draft to the effect that the scope of the right is, 'not to be assessed by reference to a "margin of appreciation"'.[139] It thus definitively confirmed its repudiation of the findings in *Hertzberg*.

Freedom of the media: this topic is addressed in considerable detail, drawing in the main from Concluding Observations. Both public and private monopolistic tendencies are addressed. For instance, following lengthy discussion, the following formula was agreed, 'States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that maybe harmful to a diversity of sources and views'.[140] It was also decided to retain language of the draft that acknowledges the opening up of the journalistic function to, 'a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere'.[141]

Defamation: it was agreed to include language to the effect that, 'States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty'.[142]

The relationship of Articles 19 and 20: while it was agreed to keep a section on this issue, the Committee decided, in the interests of consensus, to remove language that addressed the specificities of Article 20 and instead just to address issues of relationship with Article 19. It retained the paragraph to the effect that, 'what distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19'.[143] By means of the retention of this language it was re-affirmed that any expression that would require to be prohibited pursuant to Article 20 would also be of so grave a nature that its restriction would be permitted under Article 19(3). In

138 Ibid. at para 35.
139 Ibid. at para 36.
140 Ibid. at para 40.
141 Ibid. at para 44.
142 Ibid. at para 47.
143 Ibid. at para 51.

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other words, Article 20 does not set any lower bar of protection for the specific forms of expression with which it deals.

8. Passage of the Draft in the Committee: The Second Reading

For the second reading, the Committee had to hand the observations and recommendations received from States and other such interested parties as NGOs and academics. No other treaty body submitted comments despite a request that had been made to them by the Committee.[144] Submissions were received from three of the special rapporteurs of the Human Rights Council. In total, some seventy-five submissions were received, containing more than three-hundred-and-fifty distinct comments and drafting suggestions.[145] In the view of the rapporteur/present writer, a great many of the comments were extremely useful and, if adopted, would render the text more rigorous and generally strengthen its provisions. Inevitably, there were also recommendations that were at odds with the *schema* that had already adopted for the comments, contradicted clear positions of the Committee or that, in some cases, were difficult to understand.

Seventeen States Parties made submissions, with the majority of them expressing support for the Committee's initiative and broadly welcoming the first draft—albeit with suggestions for its alteration. Notably, the United States made such a submission. As far as the present writer is aware, this is the first time that this State party has submitted textual proposals for a General Comment of the Committee. Previous submissions had been made following adoption of such texts, as was the case with its very critical comments regarding General Comment No 24 on the topic of reservations to the ICCPR.[146] The innovation suggests a new willingness by this State Party to accept the utility of general comments.

The management of the consideration of the large number of proposals proved to be a challenging task. While all Committee members had copies of the full file of materials, the rapporteur/present writer proposed to draw to the attention of the meeting all proposals of States Parties and of the Special Rapporteurs but only those of other actors where they constituted clear textual suggestions (as opposed to general observations).[147]

144 Orally confirmed to the present writer by the Secretary of the Committee.

145 Human Rights Committee, Summary Record of the 2815th meeting, 19 July 2011, CCPR/C/SR.2815, at para 2.

146 Observations on General Comment No 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, United States of America, 3 October 1995, 50/40, Annex VI.

147 Summary Record of the 2815th meeting, supra n 145 at paras 67–73.

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One of the first categories of recommendation that had to be considered by the Committee concerned the extent to which the draft general comment was thought to have disregarded the ways in which the internet has revolutionised communication. Numerous proposals were made to strengthen the text in this regard. Ultimately, the Committee opted for a framework paragraph: 'States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile-based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. State parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto'.[148] This text, drawing in part on specific submissions, marks an unusual willingness by the Committee to engage with the interaction of technological advancement and the enjoyment of ICCPR rights.

As has been mentioned earlier, the text on freedom of information was strengthened during the second reading, with account being taken of a number of NGO submissions. An explicit reference was added on the duty of the State to facilitate enjoyment of the right by, 'proactively put[ting] in the public domain Government information of public interest' and by providing that 'States parties should make every effort to ensure easy, prompt, effective and practical access to such information'.[149] Notably, the Committee avoided making reference in the body of the General Comment to the alleged nexus of freedom of information and the reference in Article 19(2) to a right to 'receive' information, as well as to any requirement that the right of access to public information may only reside in someone who demonstrates a distinct specific interest in accessing the information in question. It would thus appear that the Committee has distanced itself from the approach taken in *S.B.* and in *Toktakunov.*

Following extensive debate on a proposal by a national human rights institution,[150] the Committee made an addition to the text addressing restrictions to expression on the basis of morals. The draft already referred to General Comment No 22 to the effect that 'the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'.[151] Considering this guidance to be inadequate, the Committee agreed to add that, '[a]ny such limitations must be understood in the light of universality of human rights and the principle of

148 General Comment No 34, supra n 132 at para 15.
149 Ibid. at para 19.
150 Summary Record of the 2815th meeting, supra n 145 at paras 1–14.
151 General Comment No 34, supra n 132 at para 32; and Human Rights Committee, General Comment No 22, supra n 135 at para 8.

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non-discrimination'.[152] This is an important clarification that lessens the scope for abuse of ICCPR rights through invocation of the protection of morals.

With regard to the other grounds for the restriction of freedom of expression (respect for the rights and reputation of others, protection of national security, public order and public health), the Committee declined to elaborate definitions. In the first reading it had removed language to this effect from the draft submitted by the rapporteur/present writer. At the second reading it declined to accept the many submissions proposing that there be such language. Committee members were understandably reluctant to erect strict definitions that might hamper legitimate future application of Article 19, paragraph 3.[153] Nevertheless, in the view of the present writer the Committee may thus have missed an opportunity to impede abusive invocation by States of the various grounds. Commentators may also be disappointed that the Committee, in its guidance regarding the term, 'rights and reputation of others', failed to provide address to the complex and important issue of the relationship of Article 19 with such other Covenant provisions as Articles 7 (concerning privacy) and 18 (concerning freedom of religion or belief)—albeit elements of the relationship are touched on in the final sections of the text, as is noted below.

Two further adjustments to the text that occurred in the second reading may be mentioned—concerning blasphemy and 'memory' laws. The language of the first draft had addressed the topic of blasphemy in a manner that was consistent with Committee practice. It only countenanced criminal blasphemy laws in the context of the application of Article 20 and it set rigorous requirements for non-criminal laws, including respect for ICCPR Articles 2, 5, 18 and 26, and a prohibition on their use to penalise commentary on religious leaders or tenets of faith.[154] When read together with the prohibition of any restriction of freedom of expression by means of religious or traditional law, this draft, in effect, left little or no space for the operation of blasphemy laws. Notwithstanding this rigorous language, a number of NGOs made submissions very late in the day (during the Committee session) to the effect that this formula left open the possibility for grave violations of freedom of expression by States. It remains the view of the present writer that the NGOs considerably over-stated their case. Nevertheless, their concerted lobby afforded the Committee the occasion to revisit the language whereby it declared that blasphemy laws were only compatible with the Covenant when enacted pursuant to the requirements in Article 20.[155] In a similar fashion the Committee

152 General Comment No 34, supra n 132 at para 32.

153 Views of some individual members expressed informally to the present writer.

154 Human Rights Committee, Draft General Comment No 34, supra n 124 at para 49; and Human Rights Committee, Draft general Comment No 34 (Upon Completion of the First Reading), supra n 125 at para 50.

155 General Comment No 34, supra n 132 at para 48.

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adjusted the provision on 'memory' laws, or 'laws that penalise the expression of opinions about historical facts', to the effect that they are never compatible with the ICCPR (thus overruling *Faurisson*).[156]

Both of these adjustments to the draft represent strong affirmations of freedom of expression albeit they are at odds with much State practice worldwide. Also, it is not evident that they can be demonstrated to derive from Committee practice[157].

9. Conclusion

This article has sought to review the state of freedom of expression as found in the ICCPR taking due account of the adoption of General Comment No 34. The General Comment undoubtedly strengthens the framework for protection of the right by the Human Rights Committee, as well as all others at national and international levels who rely on the ICCPR. The General Comment also constitutes a significant contribution to the doctrine of the application of restriction clauses of the Covenant and other international human rights instruments. It has also to be acknowledged, as has been observed in this article, that the text is not beyond reproach: instances have been cited of what may have been missed opportunities to clarify the Committee's positions, as well as of a small number of excessive claims.

The impact of the General Comment will rely to a great extent on how it is invoked in practice and how it will be received by States Parties. It is now in use by the Human Rights Committee and has been relied on in a number of recent Concluding Observations on State Party periodic reports,[158] as well as in Views adopted under the Optional Protocol.[159] Early indications from beyond the practice of the Committee are encouraging. A number of civil society initiatives have cited it in advocacy and policy initiatives.[160] For instance, it is invoked to frame elements of a voluntary code of practice for the telecommunications industry.[161] Also, the present writer is aware of work being undertaken by the International Telecommunications Union to put references to the

156 Ibid. at para 49.

157 See supra n 125.

158 For example, Human Rights Committee, Concluding Observations regarding the Islamic Republic of Iran, 29 November 2011, CCPR/C/IRN/CO/3, at para 27; and Human Rights Committee, Concluding Observations regarding Yemen, 15 March 2012, CCPR/C/YEM/CO/5, at para 25.

159 For example, *Maria Tulzhenkova v Belarus* (1838/2008), CCPR/C/103/D/1838/2008 (2012), at para 9.2, n 3.

160 As reported orally by a representative of Open Society Justice Initiative to an informational event on General Comment No 34 at United Nations Headquarters New York, 27 March 2012.

161 ACCESS Telco Action Plan: Respecting Human Rights: Ten Steps and Implementation Objectives for Telecommunications Companies, at 4, available at: https://www.accessnow.org/page/-/docs/Telco_Action_Plan.pdf [last accessed 21 April 2012].

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General Comment before States that will participate in the World Conference on International Telecommunications in December 2012.[162] Within the UN context, the General Comment has come before States on at least two occasions: at the bi-annual meetings of the Human Rights Committee with ICCPR States Parties in Geneva in October 2011 and at an informal briefing event that took place in New York in March 2012.[163] On both occasions State commentary was generally complimentary and there was an absence of specific criticism. An important further opportunity to test its reception will occur with the consideration by the United Nations General Assembly, in late 2012, of the Committee's Annual Report. It will also be of interest to consider any commentary that States and others may make before them in the form of formal communications with the Committee.

It is by taking account of reactions such as these that it will become possible to determine whether the Human Rights Committee by means of the General Comment has indeed re-fortified Article 19—whether it has rendered the provision equal to the panoply of contemporary threats and challenges to freedom of expression. Or to return to the broader context with which this article began, the test will be that of the extent to which it will contribute to the fulfilment of the vision of Liu Xiabo of (a country) 'being a land of free expression, where all citizen's speeches are treated the same; here, different values, ideas, beliefs, political views . . . here compete with each other and coexist peacefully; here majority and minority opinions will be given equal guarantees.'[164]

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162 Correspondence on file with the present writer.

163 United Nations Webcast, The freedom of expression and the Human Rights Committee's General Comment No 34 (CCPR/C/GC/34), event co-organised by the Permanent Missions of Kenya, the Netherlands and Uruguay, 27 March 2012, available at: http://www.unmultimedia.org/tv/webcast/2012/03/panel-discussion-the-freedom-of-expression-english.html [last accessed 22 April 2012].

164 Coonan, supra n 1. It will be recalled that China (other than Hong Kong and Macau) is not a State Party to the ICCPR.