

The Human Rights Committee and Freedom of Expression

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1. Introduction

This paper ¹examines the approach of the Human Rights Committee (HRC) to the right to freedom of expression as defined in the International Covenant on Civil and Political Rights (ICCPR).² The substantive right to freedom of expression in article 19 is considered alongside the additional qualifications in article 20(2). The prohibition of propaganda for war contained in article 20(1) is not within the scope of this paper.

Article 19 ICCPR

- 1. Everyone shall have the right to hold opinions without interference*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

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² International Covenant on Civil and Political Rights, GA res. 2200 A (XXI), adopted 16 December 1966. For text, see S. Ghandhi, *Blackstone's International Human Rights Documents* (Oxford, Oxford University Press, 6th edition, 2008), pp. 39-62.

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

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

Article 20(2) ICCPR

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

We consider the HRC's Views on individual complaints, its General Comments (in particular numbers 10, 11 and 25) and its concluding observations on states reports. All concluding observations from 1997 to date were examined: a total of 105. Other factors considered are the *travaux préparatoires* of the ICCPR and the content of reservations and interpretative declarations made by States Parties. On this basis an analysis is made of the significance and weight of the right, its relationship to other key rights and goals and any permissible restrictions upon it. The relationship between the article 19 and article 20(2) is also examined. The work of the HRC is contrasted with the work of the Human Rights Council (HR Council), in particular the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (hereafter shortened to 'Special Rapporteur on freedom of expression'). Priority issues are noted for the HRC to address.

It should be noted that as this paper was being finalised the process of drafting a new General Comment on the right to freedom of expression had already begun. The first draft produced by Rapporteur Michael O'Flaherty had been discussed once by the HRC, at its 97th session of October 2009.³ As such certain recommendations to the HRC contained herein might already have been acted upon to a greater or lesser extent. Nonetheless, it is hoped that the paper will make a contribution to further development of the right to freedom of expression, the climate for which will likely continue to change in coming years as it has done in recent decades.

2. The significance and weight of the right to freedom of expression

Jurisprudence by HRC on article 19 as a whole is not extensive, accounting for only 58 cases of more than 1200 examined by the committee – less than five percent.

In the HRC's concluding observations on States reports, just over half those analysed made some reference to article 19. Of these, the majority concerned the operation of a free media. Annex A gives a full breakdown of the subjects of HRC's concerns.

General Comment 10 notes that many States had, up until that point, confined themselves to a reference to constitutional guarantees of freedom of speech in their reports.⁴ Both India and the United States submitted interpretative declarations to the ICCPR to the effect that article 19 would be interpreted in the light of relevant provisions of their respective constitutions. Neither has signed the optional protocol. In

³ No official document record available. The press release of the HRC regarding its consideration of the draft may be found at http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/2ED8C1E659CAB33EC125765C004840DD?OpenDocument (accessed 31 December 2009)

⁴ UN Human Rights Committee, *CCPR General Comment No. 10: Article 19 (Freedom of Expression)*, 29 June 1983, para. 3.

practice such constitutional protections are no guarantee that individuals may practically enjoy the right to freedom of expression.⁵

HRC General Comment 10 on article 19 provides only rudimentary guidance on the significance and weight of the right to freedom of expression as a whole. Having been drafted in 1983, the General Comment was also unable to take account of the technology that would change the way communication takes place so profoundly in the next quarter century. By this we may note not only the rise of email and the internet, but also mobile telephony, desktop publishing and other phenomena, all of which have had significant implications for freedom of expression.

2.1 Article 19(1)

Article 19 (1) notes that the freedom to hold opinions is absolute – the phrase ‘without interference’ is not bound by any qualifiers. This is borne out by the jurisprudence of the HRC, although Nowak⁶ notes the difference between two key cases, *Kang v Republic of Korea*⁷ and *Mika Miha v Equatorial Guinea*.⁸ In the former a violation of article 19(1) was found due to the Korean policy of ‘ideology conversion’ – a clear attempt to change the personal opinions of Mr. Kang. In the latter, however, a violation of article 19(1) was found despite the lack of any apparent attempt to change the complainant’s opinions, rather, he had been arrested on the basis of those opinions. Nowak suggests that this does not seem to be justified.⁹ The question, then, is whether article 19(1) protects only one’s right to hold internal, private opinions, or the right to be free from interference with one’s life for holding them.

The *travaux préparatoires* note the development of article 19(1) as initially including both opinion and expression. As discussions continued the difference in character between opinion and expression was highlighted, leading to the separation of opinion in article 19(1) as a right without qualifiers.¹⁰

2.2. Article 19(2)

Article 19 (2) hints at the wide scope of the freedom protected by article 19. It alludes to regulation of forms of mass media that were perhaps not envisaged by the drafters of the article, and notes the potential for States to impose restrictions which go beyond the scope of article 19(3).

The *travaux préparatoires* reveal much discussion of article 19(2). In particular, the possible inclusion of the phrase ‘[to seek and receive information] *without governmental interference*’ was discussed, but rejected on the grounds that private interests were also capable of hindering the operation of a free media.¹¹ The United States proposed the removal of the phrase ‘regardless of frontiers’, but later withdrew this proposal.¹² States parties have not made any reservations in respect of article 19(2).

General Comment 10 reasserts article 19(2) but gives little further detail as to its significance.¹³ The only specific additional issue raised is the potential for government excessively to control the operation of the

⁵ See, for example, *Viktor Korneenko et al. v. Belarus*, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006) at paras.5.1, 5.2 and 8.3, in which a violation of article 19 was found despite constitutional guarantees of freedom of expression.

⁶ Nowak, M., *U.N. Covenant on Civil and Political Rights : CCPR commentary*, 2nd rev. ed, Kehl: N.P. Engel, 2005, page 442 at para.9.

⁷ *Yong-Joo Kang v. Republic of Korea*, Communication No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999 (2003).

⁸ *Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

⁹ Nowak, M., *U.N. Covenant on Civil and Political Rights : CCPR commentary*, 2nd rev. ed, Kehl: N.P. Engel, 2005, page 442 at para.9..

¹⁰ Bossuyt, M.J., *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, 1987, page 378

¹¹ See note 10 above, page 385.

¹² See note 10 above, page 382

¹³ UN Human Rights Committee, *CCPR General Comment No. 10: Article 19 (Freedom of Expression)*, 29 June 1983, para. 2.

media. In this context it is worth noting that the potential for other interests, for example private financial interests or monopolies, which might affect the operation of a free media, are not mentioned.

The Views of the HRC show that the most frequently occurring subjects of complaint with respect to article 19 are the operation of a free media, and issues surrounding democracy and the expression of political opinions. General Comment 25 shows that the HRC has clarified the relationship between the right to participate and the right to freedom of expression in some detail, noting for example that “the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential” to the rights guaranteed in article 25.¹⁴ Political participation and democracy are relevant themes in 21 cases of a total of 57 examined by the HRC involving article 19.¹⁵ Despite this prevalence, it appears the HRC is reluctant to overstate the relationship with article 19. In only four of those cases has the HRC specifically asserted the importance of freedom of expression to democracy.¹⁶ Nonetheless it is clear that the HRC considers this a key relationship.

The majority of Concluding Observations in which article 19(2) is mentioned concern impediments to the right to freedom of expression of journalists, ranging from threats and harassment to imprisonment and physical violence.¹⁷ It is in this context that the HRC’s only mentions of new media technologies have occurred, in concluding observations on State reports of Armenia¹⁸ and Syria.¹⁹ In both cases this was in respect of excessive government control over the internet.

Certain provisions of article 19(2) have gained more significance in recent years, both through decisions of the HRC and world events. The right to receive information was recently confirmed by the HRC to include an active right to be informed, and not only to consist of a passive right to whatever information happens to be available. In *Mavlonov and Sa’di v Uzbekistan* a newspaper was repeatedly denied legal registration and eventually closed. The HRC found a violation of article 19 in respect of both the publisher and of one of his readers:

“The Committee notes that the public has a right to receive information as a corollary of the specific function of a journalist and/or editor to impart information. It considers that Mr. Sa’di’s right to receive information as an “Oina” reader was violated by its non-registration.”²⁰

The related issue of access to publicly held information has also recently come before the HRC. In *S.B. v Kyrgyzstan* the applicant had requested information from the government on the number of death sentences passed since amendment of the constitution of Kyrgyzstan to prohibit the death penalty. The HRC found that, since the applicant had requested the information ‘in the public interest’, and not explicitly on behalf of himself, the application was inadmissible under article 1 of the optional protocol as an *actio popularis*.²¹ This raises important questions about freedom of information and the right to seek publicly held information. Can public interests also be personal? Would the decision have been different if S.B. were

¹⁴ UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in public affairs, voting rights and the right of equal access to public life), 12 July 1996, para 25.

¹⁵ See annex B.

¹⁶ *Aduayom et al. v. Togo*, Communications Nos. 422/1990, 423/1990 and 424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990(1996), para. 7.4; *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para 9.7. *Korneenko and Milinkevich v. Belarus*, CCPR/C/95/D/1553/2007 (2009), para 8.3; *Shchetko v. Belarus*, CCPR/C/87/D/1009/2001 (2006), para. 7.3.

¹⁷ See annex A.

¹⁸ *Concluding observations of the Human Rights Committee : Armenia*, CCPR/C/79/Add.100 (Concluding Observations/Comments)(1998), para. 21.

¹⁹ *Concluding observations of the Human Rights Committee: Syrian Arab Republic*, CCPR/CO/84/SYR (2005), para. 13.

²⁰ *Mavlonov and Sa’di v. Uzbekistan*, Communication no. 1334/2004, CCPR/C/95/D/1334/2004, (2009), para. 8.4.

²¹ *S. B. v Kyrgyzstan*, Communication no. 1877/2009, CCPR/C/96/D/1877/2009, (2009), para 4.2.

a journalist? In particular, it seems difficult to reconcile this View with that given in Mavlonov and Sa'di. In that case the newspaper in question in that case was not produced solely for the applicant's benefit, but for that of a large public of potential readers.

Most dramatically, the phrase 'regardless of frontiers' included in article 19 now implies rather more than it did in 1966, as evidenced by the outrage surrounding cartoons on the theme of Islam published by a Danish newspaper in 2005. As the Special Rapporteur on freedom of expression noted in his 2007 annual report:

*"In the following wave of protests that spread throughout the Muslim world, around 200 people lost their lives. In addition, Danish embassies and other Western offices were attacked by the mob, Danish goods and products banned in Muslim countries' markets, and some Westerners briefly kidnapped by extremist organizations. Reportedly, several death threats were issued against the cartoon illustrators and the newspaper."*²²

It is not the aim of this paper to analyse this case in detail, but the key issue raised is clear – that rapid, technologically driven cross-border and cross-cultural expression has potentially huge and possibly unknowable consequences.

2.3 Article 19(3) and article 20(2)

Both articles concern restrictions on the right to freedom of expression. Article 19 is certainly the most heavily restricted right in the ICCPR, containing as it does a reference to 'duties and responsibilities'. It is a mark of the significance of the right to freedom of expression that article 19 is the only right in ICCPR which includes such a qualifying phrase within itself. While article 19(3) establishes limitations in fairly clear language, it does not make clearer the meaning of 'duties and responsibilities', in particular whether in practice this might encompass a need further to restrict or modify expression in situations not described in article 19(3).

The *travaux préparatoires* reveal that the notion of duties and responsibilities was introduced as a specific way to give States Parties a tool to combat any abuse of power by the mass media, and to manage freedom of expression as a 'dangerous instrument'.²³ In practice the HRC has dealt with a large number of individual complaints concerning governmental interference in journalistic activity.²⁴ Similarly, the Committee's concluding observations raise issues of media freedom frequently.²⁵ We must conclude that it remains the case that in many States parties it is the media which must be protected from government, and not the other way round.

General Comment 10, Paragraphs 3 and 4 both hint at the special role that limitations on the right to freedom of expression play in establishing its scope. Paragraph 4 sets out the HRC's three-part test for any restriction upon freedom of expression – that it must be "provided by law"; be imposed for a purpose set out in article 19(3) or 19(3)(b); and be "necessary" to the State Party for that purpose.²⁶ The HRC has applied this test consistently, and it must be seen as the key aspect of judging any questions of limitation

²² UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/4/27, 2 January 2007, para 26

²³ See Nowak, M., *U.N. Covenant on Civil and Political Rights : CCPR commentary*, 2nd rev. ed, Kehl: N.P. Engel, 2005, page 457 at para 40, and Bossuyt, M.J., Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, Martinus Nijhoff, 1987, page 386.

²⁴ See annex B.

²⁵ See annex A.

²⁶ UN Human Rights Committee, *CCPR General Comment No. 10: Article 19 (Freedom of Expression)*, 29 June 1983, para 4.

on freedom of expression. Some limitations relate to the relationship of article 19 to other rights and goals. Such limitations are discussed below in section 3.

Some limitations, however, relate specifically to article 19. The HRC has found, for example, that the place in which expression is made may be limited by law, even if the expression itself is not.²⁷ It has also dealt with the compatibility with article 19(3) of various licensing measures, for example, press accreditations.²⁸

Reservations made by States Parties to the ICCPR in respect of articles 19(3) and 20(2) fall into three broad categories. The first group of reservations concern article 20, and consist of assertions that no additional legislation is needed to guarantee the prohibition of speech outlined in article 20(2).²⁹ The second group of reservations assert that article 20 will be interpreted by those States Parties in the light of article 19.³⁰ Finally, certain European countries³¹ assert that article 19 will be interpreted in line with the provisions of article 10(3) and article 16 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), concerning respectively the licensing of broadcast enterprises and monopolies and the political activity of aliens.

One issue of particular concern has been article 19(3)(a), which has arisen mainly in cases of alleged defamation. Nowak notes that restrictions under article 19(3) may be implemented through criminal, civil or administrative law.³² For many years the Concluding Observations of the HRC highlighted disproportionate penalties in criminal defamation cases but stopped short of calling for defamation to be decriminalised altogether. In 2007, however, the HRC made its first recommendation to decriminalise defamation altogether.³³ The HRC should strengthen this position and restate that defamation should never be a criminal offence, and that penalties should be proportional to any harm caused, not punitive in nature.

In this context, the HRC has noted the problem of so-called ‘libel tourism’ in the United Kingdom, that is, the practice of foreign nationals taking advantage of the UK’s comparatively restrictive libel laws to increase their chances of gaining either a favourable judgement, or increased damages in cases of alleged defamation.³⁴ The HRC has also raised further issues which have caused undue limitation on the free expression of the media. The potential for anti-terrorism legislation introduced following the events of 11 September 2001 to unduly restrict freedom of expression has been noted in six Concluding Observations to date.³⁵ Concern has also been addressed in Concluding Observations on the issue of media

²⁷ See, for example, *Zündel v. Canada*, Communication No. 953/2000, CCPR/C/78/D/953/2000, 27 July 2003 and *Delgado Páez v. Colombia*, Communication No. 195/1985, U.N. Doc. CCPR/C/39/D/195/1985 (1990).

²⁸ *Gauthier v. Canada*, Communication No. 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (1999).

²⁹ Such reservations are made by Australia, Belgium, Malta, New Zealand and the United States of America.

³⁰ Such reservations are made by Luxembourg, Malta and the United Kingdom.

³¹ Such reservations are made by Austria, Belgium, France, Germany, Ireland, Italy, Malta, Monaco and the Netherlands.

³² Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd rev. ed, Kehl: N.P. Engel, 2005, page 464 at para 53

³³ *Concluding observations of the Human Rights Committee: Algeria*, CCPR/C/DZA/CO/3 (2007), para 24.

³⁴ *Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/6, (2008), para. 25.

³⁵ *Concluding observations of the Human Rights Committee : Germany*. 04/05/2004. CCPR/CO/80/DEU. (Concluding Observations/Comments), para 20;

Concluding observations of the Human Rights Committee : Russian Federation. 06/11/2003. CCPR/CO/79/RUS. (Concluding Observations/Comments), para. 19-22;

Concluding observations of the Human Rights Committee : India. 04/08/97. CCPR/C/79/Add.81. (Concluding Observations/Comments), para 19;

Concluding observations of the Human Rights Committee: Spain, CCPR/C/ESP/CO/5, 5 January 2009, para 19;

Concluding observations of the Human Rights Committee: United States of America, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 11.

concentration and ownership.³⁶ It is worth noting in this regard that the State also has a duty to supervise the role of non-State actors in restricting freedom of expression.³⁷

Article 20(2) contains further provisions which serve in practice as permissible limitations on the right to freedom of expression. In General Comment 11 the HRC confirms that the prohibitions contained in article 20(2) are compatible with article 19.³⁸ In doing so, however, it references the ‘special duties and responsibilities’, and not the permissible limitations in article 19 (3) and (b). The question thus arises – are the restrictions in article 20 a delineation of a permissible limitation under article 19 (3) or (b), or are they additional to those limitations? Nowak suggests that article 20 is inextricably linked with article 19, although the restrictions it imposes do not only affect article 19 but also freedom of religion and freedom of association as found in article 18 and article 21 of ICCPR respectively.³⁹ He suggests that article 20 serves as a means of prioritising the rights guaranteed in article 2(1) and article 26, plus indirectly article 6, over the liberties such as article 18, article 19, article 21 etc, found elsewhere in ICCPR.

In its Views the HRC has been somewhat inconsistent, in that any case coming before it which reveals advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence as defined in article 20(2) on the part of the complainant is deemed inadmissible. In such cases the complaint is considered on the merits only as it pertains to article 19, or it is not considered on the merits at all. This approach has not been without its detractors. In *Vassilari v. Greece*, a case concerning alleged dissemination of hate speech against a group of Roma, the HRC deemed the facts to have been insufficiently substantiated for the purposes of admissibility.⁴⁰ In doing so it avoided a major issue at stake – whether or not article 20 may be invoked under the Optional Protocol. As Mr. Abdelfattah Anor, dissenting, noted:

“Was it advocacy of racial hatred or just words? Was a racist offence committed or not? Was there the intention to offend, and who must prove this? These are questions that should be discussed, analysed and assessed on the merits.”⁴¹

If indeed article 20(2) is a clarification of the duties and responsibilities of article 19(3), then the dissent is persuasive, and such questions ought to be considered on the merits, as part of article 19.

3. The relationship between freedom of expression and other rights and goals

Notwithstanding the oft-quoted assertion of the United Nations General Assembly in 1945 that “freedom of information is... the touchstone of all the freedoms to which the United Nations is consecrated”⁴², the work of the HRC is remarkably scant on the relationship between freedom of expression and other human rights or goals of the United Nations, with the exception of the right to participate found at article 25 ICCPR.

³⁶ *Concluding observations of the Human Rights Committee : Russian Federation*. 06/11/2003. CCPR/CO/79/RUS. (Concluding Observations/Comments), para. 18;

Concluding observations of the Human Rights Committee: Italy, CCPR/C/ITA/CO/5, 24 April 2006, para. 20.

³⁷ Nowak, M., *U.N. Covenant on Civil and Political Rights : CCPR commentary*, 2nd rev. ed, Kehl: N.P. Engel, 2005, page 458 at para 42.

³⁸ UN Human Rights Committee, *CCPR General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, 29 July 1983, para 2.

³⁹ Nowak, M., *U.N. Covenant on Civil and Political Rights : CCPR commentary*, 2nd rev. ed, Kehl: N.P. Engel, 2005, page 471 at para 8.

⁴⁰ *Vassilari et al. V. Greece*, Communication No. 1570/2007, CCPR/C/95/D/1570/2007 (2009), para 6.5

⁴¹ *Vassilari et al. V. Greece*, Communication No. 1570/2007, CCPR/C/95/D/1570/2007 (2009), View of Mr Abdelfattah Anor (dissenting), at para 4.

⁴² UN GA Res. 59(I), adopted 14 December 1946, recital 1.

The General Comments 10 and 11, and the *travaux préparatoires* make no mention of what specific rights or goals might be affected by freedom of expression. Nor have any reservations been made by States Parties which might imply such a relationship.

It is clear, however, from its General Comment 25, its Views on individual complaints and certain Concluding Observations on State reports that the HRC does perceive certain key relationships between the right to freedom of expression and other rights in ICCPR. The HRC has also made links between freedom of expression and other goals and issues of concern, for example the rights of human rights defenders. There remain key issues, however, which HRC has not addressed, in particular the right to development. Full tables of Concluding Observations and cases are found in Annexes A and B respectively.

The relationship between article 19 and article 2 has only arisen directly on one occasion. In *Hertzberg at al. v Finland*, the HRC found no violation in the Finnish law prohibiting discussion of homosexuality on television, citing a margin of discretion for states parties in moral issues.⁴³ This View was adopted in 1982. It would seem that in the light of the persistent discrimination suffered by homosexuals in media portrayals, and indeed in light of the HRC's own subsequent jurisprudence⁴⁴, that the HRC should revise this view and state clearly that it cannot be in the spirit of the ICCPR to permit discussion of, for example, heterosexual sexuality, but to forbid a similar discussion of homosexual sexuality on moral grounds.

The relationship between article 19 and article 18, although dramatically underlined in the Danish cartoons affair, has arisen relatively infrequently in the HRC's work. In *Delgado Paez v Colombia* the HRC found that established churches have the right to enforce the particular doctrines taught in state schools.⁴⁵ In its Concluding Observations on Egypt's 2002 State report the HRC raised concerns about pressure on religious minorities through the actions of extremists claiming to represent Islam.⁴⁶ In 2009, the HRC's Concluding Observations on the Netherlands' report encouraged that country to ensure compatibility with article 19 of the proposed abolition of the offence of blasphemy, and revision of anti-discrimination law.⁴⁷ Since blasphemy laws have never been found to be compatible with article 19 it seems odd that the HRC would make such a recommendation.

The relationship between article 21 and article 19 has also arisen on several occasions. In the cases of *Kivenmaa v Finland*⁴⁸ and *Velichkin v Belarus*⁴⁹, the complainants were censured by authorities for unauthorised demonstrations of one and four people respectively. In the former case the HRC found that a single person holding a banner could not be construed as a 'demonstration'. In the latter case, the authorities had authorised leaflet distribution in a remote suburb, and the complainant persisted in distributing leaflets in the town centre. The HRC found no justification for the refusal to allow leaflet distribution in the town centre. In total, in seven cases involving article 21, a violation of article 19 has also been found.⁵⁰

⁴³ Hertzberg et al. v. Finland, Communication No. R.14/61, 2 April 1982, para 10.3

⁴⁴ See in particular Toonen v Australia, Communication No. 488/1992, 31 March 1994, CCPR/C/50/D/488/1992 at para 8.7, in which HRC confirms sexual orientation as being included within the scope of article 2(1).

⁴⁵ *Delgado Páez v. Colombia*, Communication No. 195/1985, U.N. Doc. CCPR/C/39/D/195/1985 (1990), para 5.8

⁴⁶ Concluding observations of the Human Rights Committee : Egypt. 28/11/2002. CCPR/CO/76/EGY. (Concluding Observations/Comments), para 17b.

⁴⁷ Concluding observations of the Human Rights Committee: Netherlands, CCPR/C/NLD/CO/4, 11 August 2009, para 16.

⁴⁸ *Kivenmaa v. Finland* Communication No. 412/1990, 31 March 1994, CCPR/C/50/D/412/1990, paras. 9.2 and 9.3

⁴⁹ *Velichkin v. Belarus*, Communication No. 1022/2001, CCPR/C/85/D/1022/2001, 23 November 2005, paras. 7.2 and 7.3.

⁵⁰ See annex B.

The relationship between freedom of expression and article 25 was examined in detail in the HRC's General Comment 25. The HRC clarified the importance of the institutions which are necessary to give meaning in practice to freedom of expression in this context – in particular a free media and meaningful elections. Similarly the need for the freedom to express oneself politically, either individually or through political parties, is highlighted.⁵¹ The specific link between the right to vote and the freedom to form one's own opinion in that matter is confirmed.⁵²

Other issues featuring prominently in the HRC's work are the rights of human rights defenders, and the issue of democracy. In the case of human rights defenders, such issues have been raised on 12 occasions since 1997.⁵³ Such issues, however, are absent from the jurisprudence.

There are certain links between freedom of expression and other rights and goals which have been made by other human rights bodies, but on which the HRC has remained silent. It has made no mention of the link between the right to freedom of expression and the right to development, nor to any economic, social or cultural rights beyond those afforded by article 27 ICCPR regarding the protection of minorities. In the case of the former, UNESCO in particular has promoted freedom of expression as a key part of the right to development, moreover it has been active in developing programming based on the indispensability of freedom of expression for the achievement of development goals.⁵⁴

4. Promotion and engagement

Article 19 sets out no particular promotional measures. General Comment 10 is likewise silent on the matter and nor does the jurisprudence reveal any particular promotional measures. In the case of a violation of article 19, the HRC tends to requests that the violating State cease or refrain from further activity in violation of the covenant, and compensate the victim to an appropriate level.

The committee's Concluding Observations also tend to emphasise activity from which states should refrain, rather than recommending particular actions that states should undertake, although the aforementioned example of Algeria's 2007 report regarding criminal defamation might represent a welcome change in course.⁵⁵

Promotional measures in respect of freedom of expression may be found in the work of other treaty bodies, for example in General Recommendation 24 of the CEDAW Committee regarding the health of women, that committee notes that women should have the right to access information regarding sexual health.⁵⁶

We may also examine the work of the Special Rapporteur on freedom of expression by way of comparison.⁵⁷ The mandate holders have, since 1994, made more, and much more extensive commentary

⁵¹ UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in public affairs, voting rights and the right of equal access to public life), 12 July 1996, para 25.

⁵² UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in public affairs, voting rights and the right of equal access to public life), 12 July 1996, para 19.

⁵³ See annex A.

⁵⁴ See, for example, Novel, A.-S. (ed.), *Press Freedom and Development: An analysis of correlations between freedom of the press and the different dimensions of development, poverty, governance and peace*, UNESCO Paris, 2008.

⁵⁵ Concluding observations of the Human Rights Committee: Algeria, CCPR/C/DZA/CO/3 (2007), para 24.

⁵⁶ UN Committee on the Elimination of Discrimination against Women, CEDAW General Recommendation No. 24: Women and Health (Article 12), 2 February 1999, para 18.

⁵⁷ Other mandates and instruments of the HR Council have also addressed issues of freedom of expression. A complete survey of the work of all special procedures mandate holders is, however, beyond the scope of this paper. The Universal Periodic Review, having been in operation only briefly at the time of writing, has not yet given sufficient results to show clear conclusions.

on the right to freedom of expression than the HRC, noting new issues as they arose including, inter alia, new media technology and the role of freedom of expression in prevention of HIV. Equally, the Special Rapporteur on freedom of expression has been able to add insight to long standing freedom of expression issues such as the role of the media in transitions to democracy. Clearly, the differences in mandate between the two instruments should not be forgotten. The HRC is a treaty body with a mandate to oversee the implementation of the ICCPR alone, while the Special Rapporteur on freedom of expression has a great deal more freedom in deciding which issues to raise and pursue, and which States to investigate. Nonetheless, the extent to which the Special Rapporteur has engaged with new and pressing issues is striking when compared to the HRC's almost total lack of engagement. A telling example is that the Special Rapporteur on freedom of expression first explicitly recommended in 2001 that defamation should not be a criminal offence,⁵⁸ but it took until 2007 for the HRC to do the same.⁵⁹ A full list of issues mentioned in the Special Rapporteur's reports since the institution of the mandate is included in Annex C.

5. Conclusions

In conclusion, we may note certain positive aspects of the HRC's work on freedom of expression, but also several significant areas with which it has not engaged. Of most concern are certain issues which the HRC appears actively to have avoided dealing with. In this context we may offer some tentative recommendations for avenues of further investigation and clarification for the HRC in the near future.

The HRC has perhaps focussed most in its work on article 19 on the operation of a free media. From its inception it has underlined the problems faced by journalists in their work and the tendency of governments to restrict the media unnecessarily. New aspects of the right have been underlined – in particular the right actively to receive information through the media has been affirmed, and it has been clarified that defamation should not be considered a criminal offence. Similarly, the right to freedom of expression of human rights defenders has received a good deal of attention from the HRC. Related to this is the necessity of freedom of expression for participation in society and the broader functioning of democracy – again underlined by the HRC. All of this must be commended.

By contrast, recent technological advances in the media seem to have rather left the HRC behind. Equally, the potential for article 2 to be engaged in the management of broadcast enterprises has been briefly discussed in jurisprudence, but has not been further developed or explored. The relationship between article 19 and article 18 has been touched upon, but not explored in any great detail despite its major significance to the world today. The relationship between article 19 and article 21 has, however, been explored a little more deeply and the importance and interdependence of the two rights underlined.

Of most concern is the lack of investigation of certain major issues. The decision in *S.B. v Kyrgyzstan* points to an apparent reluctance to engage in detail with the issue of freedom of information and the right to seek and receive information in that context. Given the recent proliferation of Freedom of Information laws globally, this is a serious omission.⁶⁰ The right to development has never been touched upon by the HRC. Likewise the links between freedom of expression and economic, social and cultural rights, which have already begun to be addressed by other treaty bodies, have been bypassed by the HRC. A final matter of concern is the approach of the HRC to article 20(2). While its decision in *Vassilari v Greece* does not

⁵⁸ UN Commission on Human Rights: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2001/64, 13 February 2001, para 47.

⁵⁹ Concluding observations of the Human Rights Committee: Algeria, CCPR/C/DZA/CO/3 (2007), para 24.

⁶⁰ See, for further details of recent developments, Banisar, D., *Freedom of Information around the world 2006*, Privacy International, London 2006.

preclude the possibility of its later examining a case involving article 20 under the Optional Protocol, the fact remains that the HRC chose to pass by this important issue, rather than engaging it.

Certain of these issues deserve urgent attention by the HRC. In particular, we suggest that the relationship between article 19 and other key rights in ICCPR should be clarified, to include article 2, article 18, article 21 and other rights relevant to freedom of expression. Issues of current concern – the ‘defamation of religions’ discourse, the question of media concentration, the rise of new technologies in the media and the resulting cross-border and cross-cultural expression, access to information and the relevance of freedom of expression to development – should be addressed as a matter of priority.

Annex A

Issues arising related to freedom of expression in the concluding observations on State reports. 105 Concluding observations were analysed, all from 1997 to date. Of those, 63 contained some reference to article 19.

No. of references	Matter of concern	ICCPR article(s)
28	Physical violence, harassment or imprisonment of journalists	19(2)
19	Defamation suits, libel or related harassment of journalists	19(2), 19(3)
12	Harassment, violence or other interference with human rights defenders work	19(2)
11	Problematic government monopoly or control of media	19(2)
9	Overly restrictive state security laws	19(3)
6	Excessive provisions on terrorism	19(3)
6	Problems related to freedom of association in connection with freedom of expression	21
4	Problems related to participation in connection with freedom of expression	25
2	Misuse of states of emergency	19(3)
2	Interference with internet or electronic media	19(2)
2	Problems related to freedom of religion in connection with freedom of expression	18
2	Media ownership and concentration issues	19(2)
2	Licensing issues	19(3)

Annex B

The table shows rights and themes additional to freedom of expression which have been raised in selected Views of the HRC on individual complaints.

Right/issue	cases	Article ICCPR
Freedom from discrimination	Hertzberg et al. v. Finland	2
Independence of the judiciary	Lovell v. Australia	14
Right to freedom of thought, conscience and religion	Delgado Páez v. Colombia	18
Prohibition of hate speech	Vassilari et al. v. Greece J.R.T. and the W.G. Party v. Canada Faurisson v. France Ross v. Canada	20
Freedom of association inc. Trades unions	Coleman v. Australia Burgos v. Uruguay Kivenmaa v. Finland Laptsevich v. Belarus Pietraroia v. Uruguay Sohn v. Republic of Korea Velichkin v. Belarus	21
Participation in public life	Nam v. Republic of Korea	25a
The right to participate in free and fair elections	Korneenko and Milinkevich v. Belarus Shchetko v. Belarus	25b

	Svetik v. Belarus Jong-Cheol v. Republic of Korea	
Minority protections	Ballantyne, Davidson and MacIntyre v. Canada Singer v. Canada R.T. v. France	27
Democracy	Aduayom et al. v. Togo AK and AR v. Uzbekistan Bandajevsky v. Belarus Bwalya v. Zambia Dergachev v. Belarus Dissanayake v. Sri Lanka Jaona v. Madagascar Kang v. Republic of Korea Kim v. Republic of Korea Mbenge v. Zaire Mika Miha v. Equatorial Guinea Motta et al. v. Uruguay Mpaka-Nsusu v. Zaire Mpandanjila et al. v. Zaire Mukong v. Cameroon Muteba v. Zaire Weinberger v. Uruguay	-
The exercise of a free media	Bodrozic v. Serbia and Montenegro Gauthier v. Canada Kankanamge v. Sri Lanka Marques v. Angola Mavlonov and Sa'di v. Uzbekistan Njaru v. Cameroon Paraga v. Croatia Park v. Republic of Korea Zündel v. Canada	-
Hunger strike	Baban v Australia	-
Military service	L.T.K. v. Finland	-
State security	Shin v. Republic of Korea	-

Annex C

Issues raised by the Special Rapporteur on freedom of expression in annual reports since the inception of the mandate.

Issues	UN Document No.
<ul style="list-style-type: none"> • Limitations of the right to freedom of opinion and expression • Safety and protection of journalists and media professionals in conflict zones • Implementing the right of access to information in situations of extreme poverty 	A/HRC/11/4
<ul style="list-style-type: none"> • Implementing the right of access to information • Safety and protection of journalists and media professionals • Legal restrictions on freedom of opinion and expression • Freedom of opinion and expression and the realization of other human rights 	A/HRC/7/14
<ul style="list-style-type: none"> • The Special Rapporteur's visit to Denmark (paras 22-37) • Internet governance and digital democracy • Decriminalization of defamation offences 	A/HRC/4/27

<ul style="list-style-type: none"> • Security and protection of media professionals 	
<ul style="list-style-type: none"> • Internet governance and human rights • Freedom of expression and defamation • Security and protection of media professionals 	E/CN.4/2006/55
<ul style="list-style-type: none"> • Implementing the right of access to information • Protection and security of media professionals 	E/CN.4/2005/64
<ul style="list-style-type: none"> • Access to information for the purposes of education on, and prevention of, HIV • The right to freedom of opinion and expression and counter-terrorism measures 	E/CN.4/2004/62 E/CN.4/2003/67
<ul style="list-style-type: none"> • World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance • The events of 11 September • Broadcasting • The Internet 	E/CN.4/2002/75
<ul style="list-style-type: none"> • Non-State actors • New technologies • Women and freedom of expression 	E/CN.4/2001/64
<ul style="list-style-type: none"> • Access to information • Criminal libel and defamation • The police and the criminal justice system • The new technologies 	E/CN.4/2000/63
<ul style="list-style-type: none"> • The right to seek and receive information • The media in countries of transition and in elections • The impact of new information technologies • National security • Women and freedom of expression 	E/CN.4/1997/31 E/CN.4/1998/40 E/CN.4/1999/64
<ul style="list-style-type: none"> • General principles • Restrictions on freedom of expression • Restrictions on freedom of information • Rule of law and other matters 	E/CN.4/1996/39
<ul style="list-style-type: none"> • The nature and scope of the right to freedom of opinion and expression • Restrictions and limitations to the right to freedom of expression 	E/CN.4/1994/33 E/CN.4/1995/32

Annex D

A complete list of individual complaints heard by the HRC relating to article 19 and/or article 20(2). Note that the 'Outcome' column refers ONLY to the outcome in respect of the freedom of expression issues under consideration. Violations of other articles may or may not have been found in each case.

Name of case	Relates to article:					Communication No.	Date of Decision	Outcome
	19	19(1)	19(2)	19(3)	20(2)			
Abbassi Madani v. Algeria	19					1172/2003	28-Mar-07	No violation
Aduayom et al. v. Togo	19					422, 423, & 424/1990	12-Jul-96	Violation
AK and AR v. Uzbekistan				19(3)		1233/2003	31-Mar-09	No violation
Baban et al. v. Australia				19(3)		1014/2001	06-Aug-03	No violation
Ballantyne, Davidson and MacIntyre v. Canada	19					359 & 385/1989	31-Mar-93	Violation
Bandajevsky v. Belarus	19					1100/2002	28-Mar-06	No violation
Bodrozic v. Serbia and Montenegro			19(2)			1180/2003	31-Oct-05	Violation
Burgos v. Uruguay		19(1)	19(2)			52/1979	29-Jul-81	Violation
Bwalya v. Zambia	19					314/1988	14-Jul-93	Violation
Coleman v. Australia			19(2)	19(3)		1157/2003	17-Jul-06	Violation
Delgado Páez v. Colombia	19					195/1985	12-Jul-90	No violation
Dergachev v. Belarus	19					921/2000	02-Apr-02	Violation
Dissanayake v. Sri Lanka	19					1373/2005	22-Jul-08	Violation
Faurisson v. France				19(3)		550/1993	08-Nov-96	No violation
Gauthier v. Canada			19(2)			633/1995	07-Apr-99	Violation
Hertzberg et al. v. Finland			19(2)	19(3)		61/1979 (R.14/61)	02-Apr-82	No violation
Howell v. Jamaica			19(2)			798/1998	21-Oct-03	No violation
J.R.T. and the W .G. Party v. Canada	19				20(2)	104/1981	06-Apr-83	Inadmissible
Jaona v. Madagascar			19(2)			132/1982	01-Apr-85	Violation
Jong-Cheol v. Republic of Korea			19(2)	19(3)		968/2001	27-Jul-05	No violation
Kalenga v. Zambia	19					326/1988	27-Jul-93	No violation
Kang v. Republic of Korea		19(1)				878/1999	15-Jul-03	Violation
Kankanamge v. Sri Lanka	19					909/2000	27-Jul-04	Violation
Kim v. Republic of Korea				19(3)		574/1994	02-Nov-98	Violation
Kivenmaa v. Finland			19(2)			412/1990	31-Mar-94	Violation

Koné v. Senegal	19					386/1989	21-Oct-94	No violation
Korneenko and Milinkevich v. Belarus			19(2)	19(3)		1553/2007	20-Mar-09	Violation
L.T.K. v. Finland	19					185/1984	09-Jul-85	Inadmissible
Laptsevich v. Belarus			19(2)			780/1997	20-Mar-00	Violation
Lovell v. Australia			19(2)	19(3)		920/2000	24-Mar-04	No violation
Marques v. Angola			19(2)	19(3)		1128/2002	29-Mar-05	Violation
Mavlonov and Sa'di v. Uzbekistan	19					1334/2004	19-Mar-09	Violation
Mbenge v. Zaire		19(1)	19(2)			16/1977	25-Mar-83	No violation
Mika Miha v. Equatorial Guinea		19(1)	19(2)			414/1990	08-Jul-94	Violation
Motta et al. v. Uruguay			19(2)	19(3)		11/1977	29-Jul-80	Violation
Mpaka-Nsusu v. Zaire	19					157/1983	26-Mar-86	Violation
Mpandanjila et al. v. Zaire	19					138/1983	26-Mar-86	Violation
Mukong v. Cameroon				19(3)		458/1991	21-Jul-94	Violation
Muteba v. Zaire	19					124/1982	24-Jul-84	Violation
Nam v. Republic of Korea	19					693/1996	28-Jul-03	Inadmissible
Njaru v. Cameroon			19(2)			1353/2005	19-Mar-07	Violation
Paraga v. Croatia	19					727/1996	04-Apr-01	No violation
Park v. Republic of Korea	19					628/1995	20-Oct-98	Violation
Pietraroia v. Uruguay			19(2)			44/1979	27-Mar-81	Violation
R.T. v. France			19(2)			262/1987	30-Mar-89	Inadmissible
Ross v. Canada	19					736/1997	18-Oct-00	No violation
S.B. v Kyrgyzstan	19					1877/2009	30-Jul-09	Inadmissible
Shchetko v. Belarus			19(2)	19(3)		1009/2001	11-Jul-06	Violation
Shin v. Republic of Korea			19(2)			926/2000	16-Mar-04	Violation
Singer v. Canada			19(2)			455/1991	26-Jul-94	Violation
Sohn v. Republic of Korea			19(2)	19(3)		518/1992	19-Jul-95	Violation
Svetik v. Belarus	19		19(2)	19(3)		927/2000	08-Jul-04	Violation
Thomas v. Jamaica		19(1)	19(2)			614/1995	31-Mar-99	Violation
V.M.R.B. v. Canada	19					236/1987	18-Jul-88	Inadmissible
Vassilari et al. v. Greece					20(2)	1570/2007	19-Mar-09	Inadmissible
Velichkin v. Belarus			19(2)			1022/2001	20-Oct-05	Violation
Weinberger v. Uruguay			19(2)			28/1978	29-Oct-80	Violation
Zündel v. Canada			19(2)			953/2000	27-Jul-03	Inadmissible