FREEDOM OF OPINION AND FREEDOM OF EXPRESSION: SOME REFLECTIONS ON GENERAL COMMENT NO. 34 OF THE UN HUMAN RIGHTS COMMITTEE

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Abstract

The United Nations Human Rights Committee is a body of 18 independent experts (including a member from the Netherlands, Professor Cees Flinterman) who are tasked with monitoring compliance with the provisions of the 1966 International Covenant on Civil and Political Rights (in force 23 March 1976). The Committee deploys four principal activities – periodic examination of State Party reports, interpretation and progressive development of the provisions of the Covenant in the form of General Comments, and adjudication of individual complaints under the Optional Protocol, as well as follow-up procedures. This article analyzes the Committee's second General Comment on Article 19 of the Covenant, which stipulates freedom of opinion and freedom of expression. In 52 paragraphs the General Comment systematically examines, defines and delimits the concepts contained in the three subparagraphs of Article 19, basing itself primarily on the Committee's concluding observations upon examination of State Party reports and on the case-law in response to petitions under the Optional Protocol. The Committee highlights the primacy of freedom of opinion, recognizing that it is crucial for a democratic society that persons have access to truthful, reliable and pluralistic information, including through the internet, in order to develop a personal opinion whose expression must then be protected by law. The Committee notes, however, that whereas it is inadmissible to impose any restrictions on freedom of opinion, there are certain responsibilities that attach to the exercise of freedom of expression, namely the respect of the reputation of others as well as considerations of health, morals and national security. The Committee holds that so-called 'memory laws' as well as blasphemy laws are incompatible with Article 19 and that defamation laws must strike a balance between competing rights and interests. Paragraph 49 of the General Comment clearly affirms the right to hold non-conformist historical views and the right to be wrong. While it is not the function of lawyers or judges to establish what historical truth is, Article 20 of the Covenant imposes an obligation on governments to prohibit incitement to racial hatred or violence, the criminalization of which requires narrow definition of the elements of the crime.

1. INTRODUCTION

On 21 July 2011 the Human Rights Committee (the Committee) adopted General Comment No. 34 (GC 34) relating to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which lays down the guarantees of freedom of opinion, expression, freedom of access to information, and freedom of the media.[1]

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1. UN Doc. CCPR/C/GC/34 (12 September 2011), available at <www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>.

Originally General Comments were framed as a part of the reporting procedure[2] established by Article 40 ICCPR.[3] Yet with the passing of time they have evolved[4] into an autonomous and distinct juridical instrument, issuing authoritative interpretations[5] of the Articles of the ICCPR. Through them the Committee restates opinions previously set forth in Concluding Observations (following the examination of state reports under Art. 40 ICCPR) or in its Views under Article 5(4) of the Optional Protocol regarding individual communications, and frequently goes beyond mere reflecting prior jurisprudence in order to resolve remaining ambiguities. In any case General Comments constitute today a valuable guidance to States Parties to facilitate the proper implementation of the ICCPR. Recent GC 34 is a notable exponent of all these purposes.

An earlier, very short General Comment on Article 19 (GC No. 10)[6] was adopted by the Committee during its nineteenth session in 1983. The drafting of the new General Comment No. 34 to replace the earlier one was undertaken by the Committee at the request of many stakeholders, national human rights institutions and non-governmental organizations including PEN International, and responded to the encouragement by an expert consultation hosted by the Office of the High Commissioner for Human Rights on 2-3 October 2008[7] in Geneva. With the adoption of its new General Comment the Committee comprehensively elucidates the scope and meaning of Article 19. The differences between the two General Comments are evident. While GC 10 was mainly intended to signal what information was required from states in order to conduct the examination of reports, the new General Comment thoroughly parses the provisions laid down in Article 19 in

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2. See I. Boerefijn, *The Reporting Procedure under the Covenant on Civil and Political Rights* (Antwerp, Intersentia 1999) especially chapter XIV, General Comments, pp. 285-302.

3. In fact, the only mention to General Comments is contained in Art. 40 ICCPR, though it leaves their meaning wide open. Pursuant to Art. 40(4), 'the Committee shall study the reports submitted by the States parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States parties.'

4. C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd edn. (Oxford, Oxford University Press 2008) p. 189. This author opines that General Comments emerged as 'the constructive outcome of a confrontation that took place in the Human Rights Committee over the correct interpretation of Article 40(4) ICCPR. Seen originally as some kind of second-rate *ersatz* for the absent assessment of State reports, general comments soon showed their usefulness in that the Human Rights Committee could explain to States parties how certain problems arising in the implementation of the ICCPR should be dealt with.'

5. J.T. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law 1977-2008: A Handbook* (Kehl am Rhein, Engel 2009) p. 49.

6. General Comment No. 10: Freedom of expression (Art. 19), 29 June 1983.

7. The expert seminar was chaired by Professor Bertrand Ramcharan and attended by over 200 representatives of governments, intergovernmental organizations and nongovernmental organizations. Alfred de Zayas spoke both on 2 and 3 October on behalf of the International Society for Human Rights and PEN Centre Suisse romand. The Report of the High Commissioner is contained in UN Doc. A/HRC/10/31/Add3 (16 January 2009), available at <www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-HRC-10-31-Add3.pdf>. See also <www.ohchr.org/EN/NEWSEVENTS/Pages/WorldexpertsdiscussFreedomExpression.aspx>. Follow-up expert seminars were hosted by OHCHR in 2011, <www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>.

order to clarify their content. In contrast to the brevity of GC 10 (one page, four paragraphs), GC 34 consists of 15 pages and 52 paragraphs.

Undoubtedly several reasons justify a more substantive contribution of the Committee in the field of freedom of opinion and expression. First, the freedoms of opinion, expression and of the media form part of the core of the Covenant, not only because of their intrinsic value but also as enablers for the enjoyment of other fundamental rights such as the right to privacy (Art. 17), freedom of assembly (Art. 21) and association (Art. 22), and the exercise of political rights (Art. 25). Paragraph 2 of GC 34 affirms that the freedoms recognized in Article 19 are 'indispensable conditions for the full development of the person', 'essential for any society', and 'constitute the foundation stone for every free and democratic society'.[8] These categorical statements acknowledge that they transcend basic personal freedoms and indeed represent indispensable tenets for shaping a free and all-embracing coexistence, respectful of human dignity. Freedom of expression is an essential litmus-test right, which goes well beyond its own scope and serves to assess the degree of enjoyment of other human rights as well. Second, there was a pressing need to update the implications of Article 19 in the context of the new information and communication technologies era.[9] The outburst of the 'Arab Spring' and its unprecedented use of social networks were amply discussed by Committee members who underscored the timeliness of the new General Comment. Third, the contemporary proliferation of various types of laws promoted by states in order to restrict freedom of opinion, access to information and freedom of expression under ostensibly legitimate grounds has been of growing concern to the Committee and explains perhaps the relative speed in the adoption of the new text of the General Comment.

GC 34 identifies the importance of enabling the individual first to develop an opinion, whose expression should then be protected by law. The Genral Comment rests heavily on previous case law, the jurisprudence on Article 19 being abundant

8. In the same vein, the European Court of Human Rights (ECHR) early affirmed in *Sunday Times* v. *The United Kingdom* (26 April 1979) that freedom of expression is guaranteed as a fundamental principle in a democratic society. In *Handyside* v. *The United Kingdom* (7 December 1976) and *Lingens* v. *Austria* (8 July 1986) the ECHR laid down that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. It is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

9. Although the Committee has not yet adopted 'Views' concerning new technologies of the information and communication society, the Special Rapporteurs on freedom of expression of the UN, the OSCE and the Inter-American Commission on Human Rights have repeatedly stated that the relevant international instruments, including the ICCPR, provide a sound basis for the adoption of conclusions concerning Internet-based communication. See the 2011 report of UN Special Rapporteur Frank La Rue, UN Doc. A/HRC/17/27 (16 May 2011): 'The Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.'

and wide-ranging.[10] The fact that numerous governments, inter-governmental organizations and non-governmental organizations submitted their observations[11] in the drafting process confirms the importance attached to the panoply of rights affected and the general interest in their conceptualization and further elaboration. Moreover, this General Comment is intended to identify obstacles to the implementation of Article 19 and thus to assist States Parties in adapting their legislation and practice, so as to avoid violations that would give rise to state responsibility.[12]

2. THE ARCHITECTURE OF GC 34: A BRIEF SUMMARY

The configuration of the new General Comment basically conforms to the systematic structure of Article 19, which deals in its three paragraphs with freedom of opinion, freedom of expression and legitimate restrictions. GC 34 is structured in nine sections, focusing on certain aspects of the three main issues.

The Committee begins by emphasizing the central position of the freedom of opinion and expression for the promotion and protection of human rights, and their role as a necessary condition for the realization of the principles of transparency and accountability. The recognition of limitations to the possibility of formulating reservations to or derogating from certain elements of Article 19 is a crucial contribution of GC 34, precisely because the conditions and modalities of these possibilities are not spelled out in the Covenant.

The second section of GC 34 is devoted to the analysis of freedom of opinion (paras. 9-10), which emcompasses the right to change one's opinion and necessarily includes freedom not to express any opinion. All forms of opinion are protected, including those of political, scientific, historical, moral or religious nature. Furthermore, the Committee pronounces an absolute prohibition of limitation or criminalization of opinions. The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of his/her opinions necessarily constitutes a violation of Article 19. The Committee further recognizes that opinion is prior to and indispensable to the meaningful exercise of the right of expression. Indeed, what is crucial to ensure is that the human being have the right to inform himself and to develop a personal opinion. This requires access to all sources of information and freedom from manipulation and indoctrination. Article 19 intends to protect not simply the right to echo 'politically correct' views, but the right to arrive at a genuinely independent opinion, which may or may not correspond to popular notions.

10. Some forty cases are cited in the footnotes of GC 34. See also Möller and de Zayas, *supra* n. 5, pp. 354-370.

11. For the last session of discussions on Draft GC 34 held in Geneva, 19-21 July 2011, the Committee received around 75 submissions with some 350 textual suggestions from States Parties and NGOs.

12. See I. Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties', 56 *NILR* (2009) pp 167-205.

In its third section the General Comment focuses on various aspects of the exercise of freedom of expression. Article 19(2) protects all forms of expression and all the means for their dissemination. In line with technological evolution the Committee has now added to the language of the Covenant that they include all forms of audio-visual as well as electronic and internet-based modes of expression. In relation with the three dimensions of freedom of expression enunciated in the Covenant – the right to seek, receive and impart information and ideas of all kinds –, GC 34 further elaborates on these dimensions through two separate sections on the role of the media and the right of access to information.

Paragraph 20 of GC 34 deals with the interplay between freedom of expression and political rights. It mainly reinforces GC 25[13] on Article 25 (political participation), which focuses on access to public service, the right to run for office and to vote at genuine periodic elections by universal suffrage.

The following section deals with the restrictions envisaged under Article 19(3). It is obvious that rights are seldom absolute, that the exercise of all human rights also entails responsibilities and that sometimes human rights enter into competition. In such cases, it is important to ensure that human dignity is served by striking the proper balance and ensuring that one right does not undermine another. Restrictions, however, must be based on reasonable, objective, and proportional grounds. Only two categories of restrictions on this right are permitted, which may relate either to respect the rights or reputations of others or to the protection of national security, public order (*ordre public*) or of public health or morals. The Committee insists on the proper understanding that the relation between right and restriction and between norm and exception must not be reversed. Restrictions must be provided by law and may include laws of parliamentary privilege and laws of contempt of court, notwithstanding that the latter should not in any way be used to restrict the legitimate exercise of defense rights. It is decisive for the universality of human rights that restrictions not be justified simply by reference to traditional, religious or other such customary law. As for the requisites, in order to be characterized as a law, a norm must be formulated with sufficient precision and must be accessible to the public. 'Rubber' paragraphs are not legitimate. The Committee has taken a firm stand in harnessing any eventual undue expansion of the restraints to freedom of expression by carefully coining the admissible limitations under the Covenant. Restrictions must not be overbroad nor can they be permanent. They must be subject to periodic review, and to strict tests of necessity and proportionality.

A section under the rubric 'limitative scope of restrictions on freedom of expression in certain areas' comprises of 13 paragraphs (37-49). It has a miscellaneous content that ranges from political discourse to mass media and journalists. Special attention must be paid to the whole array of different types of laws that are examined (on such matters as *lèse majesté, desacato*, counter-terrorism measures, defamation, blasphemy, the so-called 'memory-laws', etc.), which are scrutinized

13. CCPR/C/21/Rev.1/Add.7 (1996).

under a 'containment' perspective. The Committee has made the boldest and most significant statements in this part of GC 34.

Finally the last section of GC 34 addresses the relationship of Articles 19 and 20 ICCPR. There are some other places in the General Comment where connections with other provisions of the Covenant are made. However, the Committee has wanted to underscore specifically the compatibility and complementarity of the two mentioned provisions. It is important to retain that the prohibition of acts addressed in Article 20 (propaganda for war and incitement to discrimination, hostility or violence) must not go beyond the restrictions mentioned in Article 19(3); in other words, Article 20 does not expand the State Party's possibility to impose restrictions to freedom of expression.

This article focuses on the 'added value' of GC 34, i.e., those issues that merit greater attention, either because of their reach or novelty; because of the audacious statements made by the Committee, or in certain cases because of the criticism that they may engender.

3. SOME EXPANSIVE DEVELOPMENTS IN GC 34 WITH REGARD TO ARTICLE 19 ICCPR SAFEGUARDS REGIME

The close interrelation of the freedoms of opinion and expression with other fundamental rights and freedoms stipulated in Articles 17, 18, 25 and 27 ICCPR is likely the reason why the Committee has developed for them a special regime of guarantees that goes beyond the literal wording of the Covenant.

Although Article 19 is not included in the Covenant among those provisions not subject to derogation during a state of emergency pursuant to Article 4(2) ICPPR, the Committee declared already in GC 10 that the right to hold opinions without interference 'is a right to which the Covenant permits no exception or restriction'. Some authors[14] have interpreted more explicitly that, 'in this sense, it is analogous to Art. 18, which is one of the non-derogable rights listed in Art. 4 of the Covenant'. The Committee now has formalized this idea in GC 34 (para. 5), and with reference to the doctrine established in GC 29 on derogation and states of emergency, adds expressly for the first time the freedom of opinion to the list of rights that must be integrated under Article 4(2) and cannot be suspended. Moreover, the justification for this stance is taken from paragraph 11 of GC 29,[15] according to which the category of peremptory norms extends beyond the list of non-derogable provisions found in Article 4(2). Thus it 'can never become necessary to derogate from it' during a state of emergency and 'cannot be made subject to lawful derogation'.

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14. Möller and de Zayas, *supra* n. 5, p. 354.

15. CCPR/C/21/Rev.1/Add.11 (31 August 2001). Its para. 13 states that '[i]n those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4'. Immediately after, it enunciates some examples among which the freedom of opinion is not referred to.

The Committee does not extend the same reinforced status to freedom of expression, which is seen as a 'vehicle' – that is to say, instrumental – for the exchange and development of opinions and whose exercise may collide with other rights or values. This is why it can be justifiable that in time of public emergency the common good of society takes precedence over an individual's freedom of expression.

As for eventual reservations from States Parties, the difference between both freedoms is also made clear by the Committee. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. But in GC 24[16] the Committee elaborated on the (in)admissibility of reservations to its provisions, particularly on the grounds of their (in)compatibility with the object and purpose of the Covenant. A specific application of its conclusions to Article 19 is carried out by the new General Comment. 'A reservation to paragraph 1 [Art. 19] would be incompatible with the object and purpose of the Covenant'. By contrast, 'while reservations to particular elements of article 19, paragraph 2, may be acceptable, a general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant'. In this second case, it falls on the Committee to determine on a case by case basis whether a reservation is acceptable or not. A judgment on the permissibility of a reservation can be made not only at the moment of its formulation but also whenever it is invoked by the reserving state, in order to assess the real scope and meaning that it confers to it in a concrete situation. It is to be noted as well that the reservations already entered by some States Parties regarding Article 19 ICCPR greatly differ in their respective purposes and scope;[17] therefore their appraisal may likely result in dissimilar appreciations.

In sum, the Committee in GC 34 takes the view that there are essential differences between the two freedoms, and consequently provides for distinctive regimes with respect to their guarantees. Admitting the importance of the new developments, it must be said that the Committee has not invented from scratch but elucidated by drawing concrete conclusions with regard to Article 19 out of more general conceptions contained in previous General Comments. Perhaps because of this fact but also owing to the reasonableness and the nuanced approach of the proposed interpretation by the Committee, there was no objection from States

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16. GC 24: 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, 4 November 1994, CCPR/C/21/Rev.1/Add.6.

17. For instance, Ireland, Italy, Luxemburg, Monaco and The Netherlands have entered reservations in order to preserve their respective licensing systems for broadcasting, television and film companies. In a different sense, Malta declared that its Constitution allows restrictions to be imposed upon public officers in regard to their freedom of expression as are reasonably justifiable in a democratic society, and also reserved the right not to apply Art. 19 to the extent that this may be fully compatible with Act 1 of 1987 entitled 'An act to regulate the limitations on the political activities of aliens'. In different fashion, the Islamic Republic of Pakistan made a reservation upon ratification 23 June 2010, by virtue of which it declared that the provisions of Arts. 3, 6, 7, 18 and 19 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Sharia laws.

Parties during the discussions for this expansive reading of Article 19(1) in connection with Article 4(2) ICCPR.[18]

4. POSITIVE DELIMITATION OF THE SCOPE OF ARTICLE 19 ICCPR: PARAGRAPHS 1 AND 2

4.1 **Freedom of opinion**

In the section devoted to Article 19(1) ICCPR in GC 34 the Committee has construed 'the right to hold opinions without interference' in several dimensions. In some cases, however, the borders between freedom of opinion and freedom of expression (to manifest one's opinion) are unclear. In many constitutional texts freedom of opinion is affirmed as the right to freely express and disseminate thoughts, ideas and opinions. The European Convention on Human Rights includes the right to hold an opinion as a part of the right to freedom of expression (Art. 10). But it is a fact that the ICCPR has formulated them as separate and distinct rights.[19] Seemingly freedom of opinion, as freedom of thought,[20] would be a 'passive' right, which is enjoyed in an inner sphere, while freedom of expression requires an activity with external projection. In many ways, freedom of opinion overlaps with freedom of conscience or conviction, which is protected by Article 18, a non-derogable article. A strongly held opinion is often a matter of personal conscience or ethics and as such is untouchable.

In any case GC 34 has merged aspects of freedom of opinion and freedom of expression at some points. Its last assertion in this section says that 'freedom to express one's opinion necessarily includes freedom not to express one's opinions', somehow providing a bridge to the next section on freedom of expression (where it would have probably found a better systematic placement *ratione materiae*). On the other hand, the case law upon which the Committee supports the comment on freedom of opinion is represented by the Views adopted in several cases (*Mpaka-Nusu* v. *Zaire*, No. 157/1983; *Mika Miha* v. *Equatorial Guinea*, No. 414/1990; *Kang* v. *Republic of Korea*, No. 878/1999, etc.). These and other cases concerned situations where there was both a restriction on the right to hold an opinion accompanied by punishment for having voiced such an opinion.

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18. A different reception had the identification of Art. 20 as a non-derogable right, which raised controversy and the opposition of numerous states and could not obtain general consensus.

19. For further clarifications on the distinction between the (private) freedom to hold an opinion and also to form one (Art. 19, para. 1) and the (public) freedom to express an opinion and to procure information (Art. 19, para. 2), and also on the differences between Art. 19 ICCPR and Art. 10 ECHR, see M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd rev. edn. (Kehl, Engel 2005) pp. 438-466.

20. GC No. 22: The right to freedom of thought, conscience and religion (Art. 18), 30 July 1993, CCPR/C/21/Rev.1/Add.4. Para. 1 refers to freedom of thoughts on all matters and personal convictions.

In fact, opinion as a pure inner conception that is not manifested can hardly be suppressed. Ideas and opinions without expression are unknown to others and therefore it is impossible to react to them. But even if not expressed, freedom of opinion requires the acknowledgement and respect of a personal intellectual sphere immune to any interference, which would also enjoy the protection of Article 17 ICCPR. It may also have a certain degree of external projection that not even attaining the stage of 'expression', entails an *agere licere* or the liberty of self-determination to behave according to one's opinions (and thoughts) without repression, sanction or demerit. In other words, no one can be penalized on the basis of an inference of an opinion which has not been publicly articulated. If the guarantees to ensure the integrity of freedom of opinion have been upgraded and set formally (non-derogability and interdiction of reservations), GC 34 perhaps could have gone further and identified curtailments of the exercise of this right and their causes. In the asseveration that 'any form of coercion for holding or not holding of any opinion is prohibited' there is great potential for further development such as a right to be free from indoctrination and from manipulation. Among the main perils that haunt freedom of opinion are the various – subtle, and not so subtle – actions intended to manipulate, which in the end influence and warp minds through brainwashing. Mass media present a Janus potential in this regard and guarantees for ensuring that at least publicly owned broadcasting services report and comment objectively and independently are crucial (as it will be commented on later).

Education is another domain of extreme importance. Although relevant for human beings of all ages, children in the process of developing their own thinking and opinions are in a particularly vulnerable situation. This is the reason why public education must be objective and respectful of different points of view, and also promote critical thinking. In this sense the opinion of the Committee regarding Article 18(4) of the Covenant can be recalled:

> 'The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. … The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.'

4.2 **Freedom of expression**

Under Article 19(2) everyone shall have the right to freedom of expression. Highlighting the reverse side of the coin, GC 34 begins its considerations in this respect by emphasizing the obligation of States Parties to guarantee it. The Committee has enumerated many different fields and forms of expression embraced in this freedom.

As the Covenant provides for, freedom of expression must be affirmed both in an inward (to seek and to receive information and ideas) and an outward direction

(to impart). Certainly the second perspective is the most usual object of violations,[21] but the aspect of seeking and receiving – having access to – information and ideas – must not be underrated. As observed before, it is essential for citizens to have the opportunity to form their own opinion freely – to arrive at an informed opinion – which necessitates the real possibility to obtain information and pluralistic views and perspectives. Moreover, censorship or the denial of freedom of expression of one person automatically violates the right of many other persons to have the opportunity to hear the censored views and perspectives. Totalitarian states can effectively increase their hold on their subjects by restricting access to information.

One of the most important fields where both dimensions of the right are deeply intertwined is academic freedom, which embraces the right to conduct research freely and to publish the outcome of the research. Academic freedom can be understood as freedom to manifest one's conviction or belief in teaching, and as such should enjoy protection under Article 18(1) ICCPR; yet, this norm does not cover the whole content of such a freedom. In the absence of a provision that specifically provides for academic freedom under the human rights treaties of the United Nations,[22] some kind of elaboration by the Committee on this matter would have been desirable. It is clear that its protection must be integrated through Article 19(2). One of the most controversial cases that the Committee has faced to this regard was *Faurisson* v. *France*, No. 550/1993. This case is cited three times[23] in GC 34, within the framework of: a) freedom of opinion, b) restrictions of freedom of expression based on the protection of the honor and reputation of others, and c) so-called 'memory-laws'. The Views adopted by the Committee (in a not very convincing decision, as seven members appended separate opinions) – found no violation of freedom of expression by considering that the restriction of the author's freedom of expression was necessary 'to the interests of other persons or to those of the community as a whole'.[24] On the other hand, there seems to have been general consensus in the Committee that the legislation in question, the Gayssot Act, was fundamentally flawed.[25]

21. In fact all cases cited by GC 34 in its para. 10 are related to violations of freedom of speech or expression, regarding political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, cultural and artistic expression, teaching, religious discourse.

22. By contrast to some more modern international instruments (i.e., Art. 13 Charter of Fundamental Rights of the European Union) and several Constitutions.

23. See fnn. 9, 62 and 116 of GC 34.

24. The author of the communication was a Professor of literature at the Sorbonne University in Paris until 1973 and at the University of Lyon until 1991, when he was removed from his chair because of his nonconformist historical opinions. He was convicted under the 'Gayssot Act', Law No. 90-615 of 13 July 1990, which criminalizes challenging the conclusions and the verdict of the International Military Tribunal at Nuremberg or the existence of crimes against humanity as defined by Art. 6c of the statute of the Tribunal annexed to the London Agreement.

25. Möller and de Zayas, *supra* n. 5, pp. 366-370.

4.3 Freedom of expression and the media

Press and media play a key role in a democratic society. Although they must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, their duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[26]

In contrast to some constitutional systems that acknowledge separately freedom of expression and freedom of the press and media, the provision in Article 19(2) ICCPR does not establish any dividing line or distinctive characterization between them, and GC 34 has not elucidated the point. The first notion refers to personal and subjective opinions and certainly covers the right to be wrong or even to opine without foundation. Freedom of the press also pertains to the reality of facts and requires respect for veracity[27] and public interest. Certainly media provide both news (information) and opinion (editorials, articles by columnists, op-ed pieces), many times in a mixed way. Apart from the need to clearly identify them distinctively, while transmitting news to the public, truthfulness is essential.[28] To that purpose systems of self-regulation have proved to be more effective and less invasive on freedom of the media than governmental regulations and controls. While censorship of the press by governmental authorities is extremely problematic, it must be stressed that what Article 19 of the Covenant intended to protect is the right to obtain truthful information[29] so as to be able to develop opinions

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26. The ECHR has repeatedly highlighted in such terms the importance of press and media for democracy. See *Bladet Tromsø and Stensaas* v. *Norway* (20 May 1999), *Axel Springer AG* v. *Germany* (7 February 2012).

27. The only mention to the aspect of truth and veracity in GC 34 is made in a different context (defamation laws) and for different purposes. See para. 47.

28. The Spanish Constitutional Court has carefully distinguished between freedom of expression, aiming at the transmission of opinions, and freedom of information, directed to inform about facts (CCJ 223/1992; 61/1998; 47/2000), even within one and only radio show (STC 105/1990, *caso* José María García). For the second 'veracity', that is to say a basic and real correspondence of the object of communication with the facts, is required. There must be a reasonable and diligent contrast of the news that are delivered (which does not mean that finally the result cannot be wrong). The consequences of the lack of veracity is the loss of constitutional protection for the author of the communication. Thus, in case another constitutional right is affected – i.e., right to privacy or right to honor – this prevails over freedom of the press (or the media). It must be said that Art. 20 of the Spanish Constitution enshrines in a distinctive way (different paragraphs) the freedom of expression and 'the right to freely communicate or receive truthful information'.

In the US Supreme Court journalists and media are not protected if they act with 'actual malice', knowing the falseness of the facts or dismissing the truth with temerity. A reference to this point is made in para. 47, GC 34, but again in a different context.

29. The Human Rights Council has adopted several resolutions concerning the right to truth as a human right. This right has also been recognized by UN High Commissioner for Human Rights Navi Pillay in her report, UN Doc. A/HRC/15/33 (28 July 2010), available at <www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.33_en.pdf>. On 23 March 2012 the Human

and freely express them. In this context it bears repeating that manipulation of the news by the private sector may be as deleterious to a democratic society as censorship by government. Thus there is a delicate balance to be struck here in order to guarantee the essence of the right, which necessitates pluralism and requires access to all information and the possibility of open debate ('the marketplace of ideas').

Freedom of the press and of the media refer both to the content of the messages and to the ownership and functioning of the means of communication themselves. Apart from direct censorship, there are also indirect ways to censor or shut down media outlets that express independent voices, e.g., through the application of administrative regulations,[30] particularly as for licensing and taxation, in order to open, close or suspend media outlets; ultimately, the main impact of these policies is to create an uncertain environment for media owners and professionals, thus fostering self-censorship and shunning any meaningful criticism of public policies and authorities.[31]

A particular reflection is made in GC 34 regarding the new developments in communication technologies such as the internet and mobile based electronic information dissemination systems. Their decentralized nature and great reach provide an important outlet for the circulation of independent opinions. The attempts to control, monitor, block and censor the digital media are not unusual actions performed by many governments. Yet it must also be taken into account that such actions are even facilitated by private service providers, among them leading internet and telecommunications corporations based in democratic countries, which accept governments' imposition for strict controls (such as blocking 'politically sensitive terms' of search results presented to individuals or disclose personal information of their users to allow governments to identify and convict internet writers). This kind of cyber-censorship is practiced not only in China and Iran, but also in many countries in Europe. The concept of 'chilling effect' laws has recently emerged and is being widely discussed in academic *fora*.[32]

A recent Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression underscores the role of internet

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Rights Council Appointed Mr. Pablo De Greiff (Colombia) as Special Rapporteur on the Promotion of Truth, Justice and Reparation, <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12011&LangID=E>.

30. For a detailed argumentation on some of these issues see the ECHR judgment in *Informationsverein Lentia and Others* v. *Austria* (24 November 1993). After this judgment and other pronouncements of the Constitutional Court, the Austrian legislation on audiovisual media was amended.

31. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, UN Doc. A/HRC/7/14 (28 February 2008), para. 21.

32. What is termed 'chilling effect' laws are such laws or decrees intended to intimidate and neutralize dissent. See 'chilling effects' corresponding to many google pages on World War II history. <www.chillingeffects.org/>. See also http://cyber.law.harvard.edu/>. In Spain the term is '*leyes mordaza*' or gag laws, <www.nacionred.com/censura/ley-mordaza-o-como-el-gobierno-podria-censurar-la-red>.

access as an 'enabler'[33] of other human rights. Both access to content and access to the physical and technical infrastructure required to access the internet must be ensured.

At its 20th session (July 2012) the Human Rights Council adopted Resolution 20/8 on 'The promotion, protection and enjoyment of human rights on the Internet'. This resolution affirms that 'the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights'; recognizes 'the global and open nature of the Internet as a driving force in accelerating progress towards development in its various forms'; and 'calls upon all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries'.[34]

GC 34 repeatedly speaks of the independence of the media as an idea that States Parties should take particular care to foster. Undoubtedly, independence (in the sense of neutrality, impartiality) is a principle that must inspire public broadcasting services and it is a governmental duty to guarantee it. However, for the whole set of the public and private media operating in a certain country, the obligation of the government is to ensure not their independence (one by one considered) but the pluralism and the diversity of the global system, especially when distributing frequencies or granting funds. A whole array of guidelines envisaged to prevent undue limitations regarding such sensitive matters as regulatory systems, licensing regimes, monopolies and media concentrations, subsidies and restrictions on the operation of internet-based or electronic information dissemination systems are set out in paragraphs 39 to 43, GC 34.

The communication of information and ideas through the media is mainly carried out by journalists, who are also essential for researching and gathering the news. GC 34 refers in several paragraphs to journalists (23, 30, 44, 45 and 48). In most of the comments the Committee seeks to protect their integrity and freedom from external threats, many of them associated with interference by states. There is a mention to the obligation of States Parties 'to recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources'.[35] In order to fully guarantee the individual freedom of journalists within the media a further acknowledgement of the clause of conscience would have been important.

33. Not only in the context of political unrest, as demonstrated by the recent 'Arab Spring' uprisings in Tunisia and Egypt, among other countries, but also targeting France and the United Kingdom, which have passed laws to remove accused copyright scofflaws from the internet.

34. UN Doc. A/HRC/20/L.13 (29 June 2012).

35. In line with ECHR *Goodwin* v. *The United Kingdom* (27 March 1996).

4.4 Right of access to information

Aware of the significance of the right of access to information in current societies, the Committee elaborates on the two dimensions in which the 'right to know' is nowadays most commonly understood: a) data protection, which deals with the rights of each person to access and to correct personal information held about him/her by both public and private bodies and to have its confidentiality ensured; and b) freedom of information, which pertains to the right to access all other types of information.

Paragraph 18, GC No. 34 summarizes the principles on information legislation. Some connections with other rights of the Covenant in this regard are pointed out (Arts. 25, 17, 10, 2, 27 ICCPR). The comments of the Committee in this section are indeed in line with those principles affirmed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his 1999 Report.[36] However, the Committee, which is more focused on procedural issues, failed to proclaim the overarching principle of maximum disclosure, which establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances. Another aspect where GC 34 falls short is the omission of any explicit reference to the duty of states to provide their citizens with information to ensure that they are aware of the risks stemming from hazardous activities[37] which has been indirectly promoted by the progressive development of the precautionary principle, especially within the European Union.

5. NEGATIVE DELIMITATION OF THE SCOPE OF ARTICLE 19 ICCPR: THE APPLICATION OF PARAGRAPH 3

The exercise of the rights provided for in Article 19(2) of the Covenant is not absolute and, pursuant to paragraph 3 of the same Article, carries with it special duties and responsibilities. Therefore it may be subject to certain restrictions, which will only be admissible if they are provided by law and are necessary: (a) for respect of the rights or reputations of others, or (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

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36. E/CN.4/2000/63 (18 January 2000), Annex II: The public's right to know: Principles on freedom of information legislation.

37. In this regard the jurisprudence of the ECHR also offers some disappointing exponents. In *Guerra and others* v. *Italy* (19 February 1998) the Court said that the provision of Art. 10 of the Covenant merely guarantees freedom to receive information without hindrance by states but does not impose any positive obligation. Freedom to receive information, referred to in para. 2 of Art. 10 of the Convention, 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' (see the *Leander* v. *Sweden* judgment of 26 March 1987). That freedom cannot be construed as imposing on a state, in circumstances such as those of the case, positive obligations to collect and disseminate information *motu proprio*.

The language of Article 19(3) recalls Article 18(3) ICCPR. Both stipulate the only admissible restraints to the exercise of the rights that they refer to respectively (freedom of expression and freedom to manifest one's religion or belief), and they do so with similar but not identical wording. GC No. 22 (para. 8)[38] elucidated in 1993 the meaning of Article 18(3) and some concrete distinctive aspects can be deduced. If 'restrictions' in the name of 'national security' are permitted under Article 19(3)(b), 'limitations' on the same ground cannot be allowed as for the freedom to manifest one's religion or belief. Conversely, the exercise of freedom of expression would not tolerate restrictions based on 'public safety', even if it may be complicated sometimes to draw the line between both concepts.[39] On the other hand, Article 18(3) refers to the 'fundamental rights and freedoms of others' while Article 19(3) focuses on the 'rights and reputations of others'.

The Committee has elaborated abundantly in GC 34 on the restrictions admitted according to Article 19(3). Naturally, restrictions cannot be of such a character as to void the right itself; only its exercise may be limited if the required circumstances occur, and, as in the case of derogations, only for the period of time deemed necessary. Legitimate restrictions are not intended to be permanent and thus indefinitely bar the enjoyment of Covenant rights. Laws restricting Covenant rights must themselves be compatible with its provisions, aims and objectives. Furthermore, it is for the State Party that establishes a restriction to demonstrate its legal basis, providing details of the law and of the actions that fall within the scope of the law (para. 27) and that in the concrete situation where the restriction is applied there is a direct and immediate connection between the expression and the danger, and the specific restrictive measure is necessary in individualized fashion (paras. 35 and 36). Thus, in order to assess the conformity of the restrictive action taken by the State Party with the Covenant, the Committee avails itself of the competence to decide on the law itself and on its practical application 'both as a matter of law and of their application in specific circumstances', as very explicitly and directly affirmed in GC 22 with respect to Article 18(3).

GC 34 shows great caution *vis-à-vis* laws that confer 'unfettered discretion for the restriction of freedom of expression on those charged with its execution' (para. 25) or grant a 'margin of appreciation' in the hands of the authorities that decide on the restrictions to the exercise of freedom of expression (para. 36).[40] Certainly

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38. 'Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms or others. … In interpreting the scope of permissible limitation clauses, States Parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.'

39. It is arguable that nominal reasons can serve to judge the permissibility of a measure, or that the distinction between safety as protection against accidental events and security as protection against intentional damages would be justified to play some role in this particular context.

40. By contrast, the jurisprudence of the ECHR leaves more room for a margin of appreciation in hands of national authorities, i.e., *Otto-Preminger-Institut* v. *Austria* (20 September 1994) or

arbitrariness must be banished, but a margin of discretion – not the simple formal reference to it – is often inevitable to assess whether the circumstances in a given case justify a restriction and to which extent. However, 'discretion' cannot be equated automatically with arbitrariness. Many times it is a question of degree to determine whether a measure is necessary, reasonable, proportionate, appropriate, etc. The mere use of undetermined legal concepts (overbroad, excessive, the least intrusive, with care, normally…) in the language of the Committee gives room to its own discretional appreciation. And this margin of appreciation is inexorable and can only be clarified on a case by case basis. This can be observed in several cases where the Views have been adopted with individual opinions appended and the majority's assessment is on a razor's edge.

Regarding the first of the legitimate grounds for restriction envisaged in Article 19(3), that is to say the 'respect for the rights or reputations of others', the term 'rights' includes human rights as recognized in the Covenant and more generally in international human rights law.[41] 'Others' can refer to other persons individually or as members of a community, defined by its religious faith or ethnicity among others (in any case this does not create a group entitlement). However, the Committee has not touched specifically in GC 34 the sensitive issue of the eventual collision between freedom of expression and the right to honor and reputation (Art. 17 ICCPR). The latter relates to personal dignity as it is projected to the others and also how it is perceived by each person.[42] As for public projection, a person that accepts a public activity in all its dimensions – political, economic, social – exposes him or herself to a greater degree of scrutiny than a private person and, consequently, the protection of honor and image has a different intensity in both cases.[43] In the case of competing interests, the principle of balance of interests will determine which one prevails[44] (to this conclusion would lead the necessity test that must be applied, according to the chapeau of Art. 19(3)).

As for the second legitimate ground for restrictions – protection of national security or of public order, or of public health or morals – the Committee makes

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Jersild v. *Denmark* (23 September 1994) and more recently in *Axel Springer AG* v. *Germany* (7 February 2012).

41. However, this wording does not exclude human rights under domestic law or other rights.

42. The collision between freedom of information and the protection of the reputation of others has been analyzed by the ECHR in *Jersild* v. *Denmark* (23 September 1994), *News Verlags GmbH & Co. KG* v. *Austria* (11 January 2000), *Palomo Sánchez and Others* v. *Spain* (12 September 2011), among others.

43. Para. 34 *in fine*, GC 34 notes that 'the value placed by the Covenant upon inhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain'. The specific issue of freedom of expression *vis-à-vis* political representatives and candidates has been also abundantly touched upon by the ECHR, among others in *Lingens* v. *Austria*, *Oberschlick* v. *Austria*, *Lopes Gomes da Silva* v. *Portugal*, *Feldek* v. *Slovakia* or *Castells* v. *Spain*, *Ukrainian Media Group* v. *Ukraine*.

44. The Spanish Constitutional Court requires three elements in order to find that freedom of the press and the media prevail over the rights to privacy, honor and 'self-image': a) veracity of the information; b) public projection of the affected person; c) information must be of public or general interest (CCJ 104/1986; 159/1986; 105/1990; 172/1990).

remarks in GC 34 only on three of the four categories. Perhaps the greater objectiveness of the category of 'public health' or the absence of communications (with assessment of the merits in that respect) where it was invoked prevented further elaboration.[45] Indeed the most problematic cases relate to: national security,[46] where the worries concern treason laws, official secrets regulations and sedition laws; public order (*ordre public*), which is deemed as a potential circumstance to cover contempt of court proceedings as well as limitations for speech-making in a particular public space; and public morals. In any case the Committee has preferred not to introduce definitions for the aforementioned terms and just give some illustrative examples of them as there would be a vast array of possible interpretations among States Parties. Whilst in all the preliminary drafts,[47] concerning public morals, it was observed that the content of the expression may differ widely from society to society and even it was affirmed that 'there is no universally applicable common standard',[48] fortunately for the sake of human rights, the final version of GC 34 abandons previous relativism. Now it is clearly asserted in paragraph 32 that 'any such limitations must be understood in the light of the universality of human rights and the principle of non-discrimination'.[49]

Given the concurrence of the legitimate circumstances in a concrete case, still they must be evaluated under the test of necessity in the light of all provisions of the Covenant. Moreover, beyond the strict necessity of the restrictive measure for a legitimate purpose, the Committee has brought up – based on previous GC No. 27[50] – a broader concept so as to assess that it conforms to the Covenant: the

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45. By contrast, the Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights Resolution 1993/45 (E/CN.4/1995/32, 14 December 1994) has referred under this concept to sensitive issues such as traditional practices affecting the health of women and children. These practices include female genital mutilation, dowry debts and bride-burning. Publications on these matters that can be considered as misleading entail a positive obligation on the part of the Government to take steps to protect the interests of public health, if necessary by curtailing the right to freedom of expression.

46. Particularly illustrative on this concept and eventual restrictions based on it are the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted on 1 October 1995 by a group of experts in international law, national security and human rights convened by Art. 19, the International Centre against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, appended as an Annex to the Report of the Special Rapporteur, Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45.

47. Versions dated 16 September 2010, 4 October 2010, and 3 May 2011.

48. An expression that was taken from the Committee's jurisprudence in its View on case *Hertzberg et al.* v. *Finland*, which dated back to 1982, though it must be understood to have been superseded by the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, which affirms the universality of human rights.

49. Of course on the basis of recognizing universal standards as a common denominator according to what GC 22 stated ('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').

50. GC 27: Freedom of movement (Art. 12), 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9.

principle of proportionality.[51] It requires that the restrictive action be suitable for the desired aim, that it be necessary to reach this aim, and that it not be excessively burdensome (the least intrusive instrument amongst those which might achieve the protective function) on the holder of the right in relation to the objective that is intended to be reached.

6. CERTAIN SPECIFIC AREAS

GC 34 devotes a penultimate section to a number of thorny issues. We will focus on problems which derive from the proliferation of laws that, while ostensibly seeking to protect other rights, result in inacceptable limitations on freedom of opinion and expression. Through GC 34 the Committee has made valuable contributions in providing interpretative criteria which reveal the contradictions and dysfunctions in the manner in which states apply Article 19 and which necessitate legislative action.

6.1 Laws that pretend to crystallize history are deemed incompatible with the Covenant

So called 'memory-laws'[52] are the object of paragraph 49, GC 34. The Committee has considered that 'laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States Parties in relation to the respect for freedom of opinion and expression'. Furthermore, 'the Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events'. The final warning is that 'restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression they should not go beyond what is permitted in paragraph 3 or required under Article 20'.[53]

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51. The principle of proportionality has progressively extended to other spheres, mainly thanks to the jurisprudence of the European Court of Justice since the 1970s. In 1999, the principle of proportionality was formally incorporated in the EU Treaty of Amsterdam. Although the ICCPR does not expressly refer to it, probably due to its early date of adoption in 1966, it is also currently applied within the UN (i.e., UNHCR – a characterized field where it applies to is in the legislation concerning administrative detention and in detention practice; administration detention may be considered lawful only if it is appropriate, necessary and reasonable).

52. In previous drafts the expression 'memory-laws' was used in the main text of GC 34. In the final version which has been adopted it only appears in fn. 116. The main text contains now just a descriptive formulation of their object and purpose. It has been a savvy decision of the Committee to prescind from such rubric as it has different meanings depending on the countries and could cause confusion.

53. This compromise text was proposed by Mr. Rafael Rivas Posada. The Rapporteur Michael O'Flaherty noted that New Zealand and a large number of NGOs wished to have the paragraph strengthened. However, three other States Parties – Germany, Japan and Lithuania – wished to have the entire paragraph deleted. Germany also considered that States Parties should not be required to

The progression in the drafting of this comment from an initially lukewarm position[54] to the final categorical statements merits highlighting. Probably the most controversial case decided by the Committee was *Faurisson* v. *France*, No. 550/1993, which concerned the application of the so-called 'Gayssot Act', which amended the law on the Freedom of the Press of 1881 by adding an Article 24 *bis*, and made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-46. Although the Committee did not declare the Gayssot Act *in abstracto* incompatible with the Covenant, it did express the view that the application of the terms of the Act 'may lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant'.

Seven members of the Committee appended individual opinions that showed their concern over the overbroad nature of the Gayssot Act and formulated nuanced remarks on the interpretation of certain aspects which can be regarded as seminal asseverations for today's General Comment. Nisuke Ando was of the view that the term 'negation' ('contestation'), if loosely interpreted, could comprise various forms of expression and thus risked encroaching on the right to freedom of expression. In order to eliminate this risk, he proposed replacing the Act with a specific law prohibiting well-defined acts of anti-Semitism or with a provision of the criminal code protecting the rights or reputations of others in general. Elizabeth Evatt, David Kretzmer and Eckart Klein observed that the crime for which the author was convicted under the Gayssot Act does not expressly include the element of incitement, nor do the statements which served as the basis for the conviction fall clearly within the boundaries of incitement. Furthermore, they interpreted that the Gayssot Act, being phrased in the widest language, would seem to prohibit publications of *bona fide* research connected with matters decided by the Nuremberg Tribunal, and in this sense the restrictions imposed did not meet the proportionality test. Rajsoomer Lallah expressed the view that the assumption, in the provisions of the Act, that the denial is necessarily anti-Semitic or incites anti-Semitism is parliamentary or legislative judgment and is not a matter left to adjudication or judgment by the Court. It created an absolute liability in respect of which no defense appears to be possible. For this reason, the Act would appear, in principle, to put in jeopardy the right of any person accused of a breach of the Act to be tried by an independent Court. Prafullachandra Bhagwati observed that if a law were merely to prohibit any criticism of the functioning of the International Military Tribunal at Nuremberg or any denial of a historical event on pain of

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review their legislation. To address the concerns expressed by the three States Parties, the Committee deleted the reference to 'memory laws' while keeping the substance. See Summary Records of 21 July 2011, CCPR/C/SR.2820, para. 63.

54. The first sentence said that 'laws that penalize the promulgation of specific views about past events, so called "memory-laws", must be reviewed to ensure they violate neither freedom of opinion nor of expression'.

penalty, such law would not be justifiable under paragraph 3(a) of Article 19 and it would clearly be inconsistent under Article 19(2).

'Memory-laws' have proliferated in several countries of Europe, Russia, Turkey and the Arab world, laws that criminalize questioning certain aspects of the Holocaust, criticism of Kemal Atatürk or Joseph Stalin, or which prohibit affirming or denying the Armenian genocide.[55] The Committee is on solid ground when stating that laws that practically impose a historical dogma and protect it by penal law are incompatible with Article 19, because they can never be considered to be 'necessary' or 'proportional' to the goal ostensibly pursued.

An indiscriminate expansion of this type of laws, apart from potentially impairing an individual's freedom of expression, can also generate nefarious side effects for scientific research and academic freedom. 'Memory-laws' that carry penal consequences in case of violation necessarily put a damper on academic research, and can intimidate both amateurs and professionals. If there is only an 'official history' and deviation is deemed criminal, then most people with common sense will exercise self-censorship and avoid conducting any research on the subject. Indeed, who would waste time and effort researching a sensitive topic, if he/she is then incapable of publishing or even publicly discussing the results of his/her research for fear of having to face a criminal prosecution? Of course, in a democratic country with an independent and competent judiciary a researcher who can prove that he/she is in good faith, will most likely be acquitted. But in order to defend oneself from a Big-Brother-type criminal prosecution, the researcher must devote untold hours to prepare his/her defense, suffer defamation, ostracism, mobbing in the press, and anxiety, besides having to bear considerable legal costs. The result of penal laws in the field of history is therefore effectively to impose a ban on research in certain areas. One would be allowed only to rehash what already exists and is considered acceptable or 'orthodox' history. Such 'memory-laws' do a disservice to academic freedom and lead to ritualism and stagnation in historical debate.

Some reactions against such laws and their effects have emerged in the last years.[56] The movement *Liberté pour l'Histoire* has raised its voice in the *Appel*

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55. As Timothy Garton Ash pointed out in his article 'The Freedom of Historical Debate Is under Attack by Memory Police', published in *The Guardian*, 16 October 2008, 'The wrong answer depends on where you are. In Switzerland, you get prosecuted for saying that the terrible thing that happened to the Armenians in the last years of the Ottoman empire was not a genocide. In Turkey, you get prosecuted for saying it was. What is state-ordained truth in the Alps is state-ordained falsehood in Anatolia.'

56. Numerous non-governmental organizations have taken a keen interest in the adoption of GC 34, including PEN International and the Centre Suisse romand, based in Geneva. The paper presented by the President of PEN Suisse Romande, Alfred de Zayas, at the PEN annual congress in Dakar in 2007 was circulated to the Rapporteur of GC 34, Professor Michael O'Flaherty, and to the members of the Human Rights Committee. That statement concluded: 'When one considers penal legislation that may be applied to punish the views of researchers (academic and amateur), journalists and historians, caution is necessary, lest the medicine may turn out to be worse than the disease. Personally, as an American, I believe in a liberal view of freedom of expression as expressed in the

de Blois[57] (2008) defending the freedom of historians and warning against 'official truths', in particular when imposed by legal means. It meant a reaction against the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of the EU Justice and Home Affairs Council of Ministers, which promoted the criminalization in all member states of 'publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes' when it is carried out either 'in a manner likely to incite to violence or hatred' or 'in a manner likely to disturb public order or which is threatening, abusive or insulting'.[58] The potential for misuse of such penal laws is obvious. Its very existence constitutes a threat to academic freedom. Thus, the Committee's statement regarding 'memory-laws' in GC 34 is timely and unambiguous. The vexing question remains: what constitutes 'hate speech'[59] that

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First Amendment to the US Constitution (article 1 of the US Bill of Rights), and am very skeptical about the benefits of restricting the freedom of the press and of expression in general. This Enlightenment right, so much associated with Voltaire's philosophy, is also reflected in article 19 of the Universal Declaration of Human Rights and article 19 ICCPR. Thus, any restriction on the freedom "to seek and impart information" must be extremely well justified – indeed, in human rights there are frequently competing interests, and a careful balance must be undertaken. 14 States have legislation that prohibit "negationism" of the Holocaust. In human rights terms, such legislation is rather questionable and would be inconceivable in many democratic countries, including the United States. Obviously any clear incitement to racial hatred or to violence must be prohibited and punished, but the mere expression of opinions, even obnoxious opinions, and the posing of questions with regard to historical events, their evaluation, with regard to the number of victims must not be prohibited. I am persuaded that prohibitions of this kind are counterproductive. The rule of the "marketplace of ideas" should be allowed to operate. I have no fear about the abstruse ideas of an Arthur Butz or of a Robert Faurisson. Only a very marginal group of people take them seriously. Making them "criminals" in a way transforms them into "victims" or even "martyrs" in the eyes of some.'

57. In the context of the Historical Encounters of Blois in 2008 dedicated to 'The Europeans', *Liberté pour l'Histoire* adopted the following resolution: 'Concerned about the retrospective moralization of history and intellectual censure, we call for the mobilization of European historians and for the wisdom of politicians. History must not be a slave to contemporary politics nor can it be written on the command of competing memories. In a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions. We call on historians to marshal their forces within each of their countries and to create structures similar to our own, and, for the time being, to individually sign the present appeal, to put a stop to this movement toward laws aimed at controlling history memory. We ask government authorities to recognize that, while they are responsible for the maintenance of the collective memory, they must not establish, by law and for the past, an official truth whose legal application can carry serious consequences for the profession of history and for intellectual liberty in general. In a democracy, liberty for history is liberty for all.' Professor Pierre Nora (*Académie française*), chairman of *Liberté pour l'Histoire.*

58. In favour of this Framework Decision, see L. Pech, 'The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-wide Criminal Prohibition', Jean Monnet Working Paper 10/09, available at <www.JeanMonnetProgram.org>. A prior publication, however, disposes of these arguments: E. Fronza, 'The Punishment of Negationism: The Difficult Dialogue between Law and Memory', 30 *Vermont L Rev.* (2006) pp. 609-626.

59. Though this term appeared in preliminary versions of GC 34 it was finally suppressed for being unclear in legal terms.

leads to incitement to discrimination, hostility or violence? Where is the threshold? The lines should be carefully drawn, and laws, particularly penal laws, must be very narrow and specific and frame their scope predictably.

A fundamental distinction must be made. Holding and expressing an opinion that implies denial of the Armenian genocide, the Holocaust, the massacres of Halabja or Srebrenica, or any other construction even when it entails wrong interpretations of historic events, does not automatically constitute incitement to hatred against the person or group concerned. In this sense there is the need to clearly differentiate between activities contrary to the Covenant (Art. 20) and thus deprived of protection, and the mere dissemination of opinions and ideas, even if these ideas are factually wrong, unless the dissemination of such ideas necessarily and foreseeably threatens the coexistence of the community.[60] This last requirement has been interpreted according to reiterated case law of the European Court of Human Rights by considering, in order to invoke the exceptions to freedom of expression under Article 10 of the European Convention on Human Rights – equivalent to Article 19(3) ICCPR – that it is not enough to provide evidence of damage, but it is also essential to corroborate the express wish of those who attempt to use freedom of expression as a cover in order to use the rights conferred in that provision to destroy freedoms and pluralism.

Expressing a wrong historical view is not equivalent with 'incitement'. It is the function of penal legislation to carefully define the elements of the crime of 'incitement' and to ensure that the threshold is sufficiently high so as not to prevent or discourage non-conformist historical research. As the Committee has acknowledged in GC 34, there is a right to be wrong.

The Spanish Constitutional Court has also set in its Judgment No. 235/2007, of 7 November 2007 (case *Varela*) a dividing line between the 'mere denial' of the crime of genocide and the dissemination of ideas 'justifying' genocide.[61] Only the latter, insofar as it reveals a proactive element, may be deemed to imply some

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60. The ECHR stated that freedom of expression is valid not only for information or ideas which are favorably viewed or considered inoffensive or indifferent, but also for those which contravene, conflict or concern the state or any part of the population (*De Haes and Gijsels* v. *Belgium*, 24 February 1997). However, some years later, in *Garaudy* v. *France*, 24 June 2003, the ECHR understood that the denial of the Holocaust cannot be considered to be protected by freedom of expression in that it implied a proposal of racial defamation of Jews and incitement to hatred towards them.

61. Constitutional Court Judgment No. 235/2007, 7 November 2007, case *Varela*, available at <www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2352007en.aspx>. In this Sentence the Court nullified the part of the article of the Penal Code that criminalized the denial of genocide, while considered that the part related to its justification was consistent with the Constitution.

Applying this constitutional interpretation, the Supreme Court has recently acquitted (Judgment No. 259/2011, 12 April 2011) the owners of a bookshop – *Kalki* – dedicated to sell controversial World War II literature considering that the Constitution neither prohibits any ideology *per se* nor its dissemination, unless it constitutes a direct provocation or an incitement to racial hatred. See also P. Salvador Coderch and A. Rubí Puig, 'Genocide Denial and Freedom of Speech', 4 *InDret* (2008), available at <www.indret.com/pdf/591_en.pdf>.

kind of incitement to hatred towards specific groups and to put at risk coexistence, and thus can be penalized. 'Historical research is always … controversial and debatable, as it arises on the basis of statements and value judgments, the objective truth of which it is impossible to claim with absolute certainty…'[62]

Notwithstanding this Spanish precedent, political pressures still exist in some countries to criminalize various kinds of 'negationism'. Thus the French Parliament adopted on 23 January 2012 a law penalizing the denial of the Armenian genocide. A group of French lawyers and intellectuals, including the former Minister of Justice Robert Badinter, challenged the constitutionality of the Law, and on 28 February 2012 the *Conseil Constitutionnel* held in a short two-page decision that the law was unconstitutional because it conflicted with the right to freedom of expression (*Décision No. 2012-647 DC*), making reference to Article 11 of the *Déclaration des droits de l'homme et du citoyen* of 1789, which lays down the right to freedom of speech and dissemination of ideas. Interestingly enough, the *Conseil Constitutionnel* failed to address the implications of its decision to the continued validity of the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, or for that matter the consequential necessity to declare unconstitutional the Gayssot Act of 1990, which in its overbroad language constitutes a greater danger to the exercise of freedom of opinion and expression than the law criminalizing denial of the Armenian genocide. As highlighted by *The Economist*, quoting Jacques Chirac, Holocaust denial may be 'a perversion of the soul and a crime against truth. But that does not mean it should be a crime in law.'[63]

To conclude, it is not for lawyers to legislate on history. History-writing is the task of historians and should not be hijacked by legislators or parliaments. On the other hand, legislators do have the responsibility to define what constitutes 'incitement' to racial hatred, to discrimination, to violence. The elements of the crime of 'incitement' must be clearly laid down and judges must not infer hidden 'codes' or presume the 'intent' of the dissenter in the expression of his views. As in all areas of criminal law, the presumption of innocence (Art. 14(2) ICCPR) applies, and the court has the burden of proving, not inferring, the intent to commit incitement. The expression of a non-conformist view may be offensive, but it does not automatically go over the objective threshold to criminal incitement.

6.2 Blasphemy laws are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20(2)

The Committee has also taken in GC 34 (para. 48) a decided posture regarding prohibitions of displays of lack of respect for a religion or other belief system as contrary to freedom of expression. During the drafting process the text changed profoundly due to the sensitivity of the issue. In the preliminary versions[64] blas-

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62. Case *Varela*, *supra* n. 61.
63. Charlemagne, 'Slippery Slope', *The Economist*, 25 January 2007.
64. Dated 16 September and 4 October 2010

phemy (and other analogous acts) prohibitions were just subjected to certain requirements in order to be compatible with Article 19(3) ICCPR. Later on[65] it was stated that such prohibitions may not be applied in a manner that is incompatible with the mentioned provision or other provisions of the Covenant. Furthermore, 'States parties should repeal criminal law provisions on blasphemy and regarding displays of disrespect for religion or other belief system other than in the specific context of compliance with article 20.' The definitive text in GC 34 has evolved to a radical declaration of the incompatibility of blasphemy laws with the Covenant, unless they entail advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[66]

The position of the Committee is in line with the findings of the Special Rapporteur on Freedom of Religion or Belief.[67] According to his reports, criminalizing so-called defamation of religions as such can be counterproductive and may have adverse consequences for members of religious minorities, dissenting believers, atheists, artists and academics. Instead of trying to shield religions *per se* against criticism or ridicule, states should rather focus their attention on the protection of believers and non-believers against discrimination and violence. In addition, recent voting patterns in the Human Rights Council suggest that support for the concept of defamation of religions is on the decline at the international level.[68]

The rest of the considerations in paragraph 48 of GC 34 elucidate cases where prohibitions could be admissible – within the narrow limits of Article 20(2) – so that they are at any rate consistent with the requirements of other provisions of the Covenant, in particular those laid down in Articles 19(3), 2, 5, 17, 18 and 26. These exceptions are intended to prevent unequal treatment and discrimination. Thus, it would be impermissible for any such laws to discriminate in favor of or against one or certain religions or belief systems, or their adherents, or religious believers over non-believers.[69]

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65. Version of 3 May 2011

66. Mr. O'Flaherty (Rapporteur for the General Comment) said that Sweden and the United States had maintained in their submissions that the notion of blasphemy was basically incompatible with the Covenant. They considered that the General Comment should make that point and many NGOs had expressed similar views. Several other submissions called for a strengthening of the text. Many additional NGO comments proposed amendments. In the light of those contributions and taking due account of the Committee's jurisprudence, he had drafted a new paragraph and suggested that it should be considered in place of the paragraph contained in the existing draft. See para. 34 of Summary Records CCPR/C/SR.2820.

67. Rapporteur's Digest on Freedom of Religion or Belief Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications, <www.ohchr.org/Documents/Issues/Religion/RapporteursDigest FreedomReligionBelief.pdf>.

68. See Human Rights First, 'Blasphemy Laws Exposed: The Consequences of Criminalizing "Defamation of religions"', available at <www.humanrightsfirst.org/wp-content/uploads/Blasphemy_ Cases.pdf>.

69. The Committee also received much material substantiating the claim that blasphemy and apostasy laws have been used to persecute Christians in Muslim countries and that murder and

While blasphemy laws are not compatible with the Covenant, observers recognize that religions and religious persons are entitled to respect and protection from mobbing and ridicule. Bearing in mind that defamation of religions is a very sensitive issue,[70] since for religious persons the Holy Books constitute an essential part of their identities and an attack on religion is perceived as an attack on themselves, states must find ways to protect the human dignity of religious persons, who should not be subject to baiting or ridicule. In the years 1999-2005 the then UN Commission on Human Rights adopted numerous resolutions against the 'defamation of religions', and in the years 2006-2010 the UN Human Rights Council passed similar resolutions,[71] some of which were reflected in General Assembly resolutions.[72] More recently opposition to the concept of 'defamation of religions' has grown and in 2011 the Council adopted, by consensus, a resolution on combating intolerance based on religion, dropping altogether the Organization of the Islamic Conference (OIC)'s cherished concept of 'defamation' of religions.[73]

6.3 Satire and provocation: reasonable limits of the exercise of freedom of expression

Whereas freedom of opinion cannot be restricted, freedom of expression always carries special responsibilities with it, and is subject to reasonable restrictions under Article 19(3). If the Committee were adopting its General Comment in the

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violence against Christians and critics of blasphemy laws have made many victims. See, *inter alia*, Art. 295 of the Pakistani Penal Code provides in part: 'B – Whoever wilfully defiles, damages or desecrates a copy of the Holy Qur'an or an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life. C – Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.' See also 'Pope Urges Pakistan to Repeal Blasphemy Law', BBC News, 10 January 2011, available at <www.bbc.co.uk/news/world-south-asia-12156825>. In January 2011 the governor of the Punjab, Salman Taseer, was shot dead for merely suggesting the blasphemy laws should be changed. In January On 2 March 2011 Pakistani minorities Minister Shahbaz Bhatti who had said he was getting death threats because of his opposition to a controversial blasphemy law was shot to death. See 'UN Officials Condemn Assassination of Government Minister', <www.un.org/apps/news/story.asp?NewsID=37659&Cr=Pakistan&Cr1>. On 4 July 2012 a man was burned to death on a charge of blasphemy, S. Jillani, 'Pakistan Mob Burns Man to Death for "Blasphemy"', <www.bbc.co.uk/news/world-asia-18713545>. See also Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, UN Doc. A/HRC/20/19 (7 June 2012).

70. See Report of the UN High Commissioner for Human Rights, Navi Pillay, on the implementation of Council Resolution 10/22 entitled Combatting Defamation of Religions, UN Doc. A/HRC/13/57 (11 January 2010), available at <www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-57.pdf>.

71. See, e.g., A/HRC/RES/13/16 of 25 March 2010.

72. GA Res. 62/154, 'Combating defamation of religions', 18 December 2007.

73. P. Goodenough, 'U.N. Human Rights Council Moves Away from "Dangerous" Defamation of Religion Concept', 25 March 2011, available at <http://cnsnews.com/news/article/un-human-rights-council-moves-away-dangerous-defamation-religion-concept>.

fall of 2012, it would probably have to devote considerable space to the implications of the violence caused by the publication of cartoons and of an amateur video ridiculing Islam and its Prophet,[74] which unleashed a wave of anti-Western rioting in many Muslim countries. There is a debate going on in civil society as to the limits of satire when the consequences may be the death of many innocent persons. In such cases the question arises whether the exercise of freedom of expression can be given priority over social peace, and whether and what kind of restraint should be imposed. As in many other circumstances, there may be competing rights and colliding interests that must be taken into account and balanced out. Insistence on the exercise of any right, e.g., freedom of expression, notwithstanding the foreseeable consequences violates common sense and constitutes a dangerous form of impertinence. Shakespeare deals with the 'pound of flesh' obsession in the *Merchant of Venice*, where the money-lender Shylock undoubtedly had a right to reimbursement of his loan, but not at any cost. If he demanded and obtained, as the contract stipulated, a pound of flesh from the body of the borrower, the Merchant Antonio, this would have entailed Antonio's death and therefore constituted an attempt on the life of Antonio. In the play the competing rights were decided in favour of Antonio. Whereas in some Western media intransigence is justified and somehow ennobled by appealing to a 'positive' right to freedom of expression and the press, this flies in the face of the *spirit of the law* and human dignity. Moreover, one can cite other 'positive' obligations of states, such as the responsibility to prohibit incitement to racial or religious hatred, enshrined in Article 20 ICCPR, to ensure the 'security of person' pursuant to Article 9 ICCPR, and to respect freedom of religion and belief pursuant to Article 18 ICCPR. On the other hand, it must also be said that in the concrete case of violence following the publication of the anti-Muslim cartoons and videos, there was responsibility not only on the part of the individuals deliberately insulting and provoking, but also on the part of those persons who magnified and instrumentalized the provocations in order to cause greater havoc.[75]

6.4 Defamation laws: imprisonment is never an appropriate penalty and States Parties should consider the decriminalization of defamation

In paragraph 47, GC 34 the Committee, apart from advising that defamation laws must be crafted with care to ensure that they comply with Article 19(3) and they

74. The airing in Youtube of an amateur film entitled 'Innocence of Muslims' was followed by an outburst of violence in the Muslim world, including the sacking of the US Consulate in Benghazi, Libya, on 11 September – along with the murder of US Ambassador Chris Stevens and three of his staff.

75. On 14 September 2012 UN High Commissioner Navi Pillay said: 'The film is malicious and deliberately provocative and portrays a disgracefully distorted image of Muslims. I fully understand why people wish to protest strongly against it, and it is their right to do so peacefully. However, I utterly condemn the killings in Benghazi, and other violent and destructive reactions to the film and urge religious and political leaders to make a major effort to restore calm', <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12522&LangID=E>.

do not serve, in practice, to stifle freedom of expression, has made several important remarks in order to clearly define the boundaries of such provisions in correspondence with the letter and spirit of the Covenant.

According to the Committee, all defamation laws, in particular those of penal nature, should include such defenses as the defense of truth (*exceptio veritatis*) and should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with respect to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. At this point the Committee preferred to be cautious as for acknowledging the right to reply of public figures against whom false statements had been made probably on the grounds that, though some human rights instruments refer to the right of reply, the Covenant does not; it is also a controversial issue, not universally accepted in all countries. Previously in paragraph 38 the Committee had expressed that all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition (recalling to this regard case *Marques de Morais* v. *Angola*, No. 1128/2003). Accordingly, the Committee has manifested concern regarding laws on such matters as, *lèse majesté*, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection for the honor of public officials. Laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned.

Another defense to be acknowledged by States Parties should be the concurrence of public interest in the subject matter of the criticism. Moreover, the Committee has declared impermissible to indict a person for criminal defamation but then not proceeding to trial him/her expeditiously, as the chilling effect many result in undue restrictions of the exercise of freedom of expression of the person concerned and others. Eventually, reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party should be put in place.

Of utmost importance is the recommendation that States Parties should consider the decriminalization of defamation and, in any case, the application of criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. The decriminalization of defamation is a controversial issue and, precisely through the last nuance, the balance requisite achieved in the jurisprudence of the European Court of Human Rights[76] is sought to be reflected in the text.

In the above mentioned specific areas underlies a certain risk of a 'moralization of the law', by means of which moral attitudes and stances, albeit laudable and praiseworthy from an ethical standpoint, are transformed by the legal order into rules. In many cases overbroad or rubber legislation, particularly when it attains

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76. *Giniewski* v. *France* (31 January 2006), *July and SARL Liberation* v. *France* (14 February 2008).

the condition of penal law, constitutes a serious threat with regard to freedom of expression. The recommendations of the Committee for a minimal intervention principle (including decriminalization of such conducts) and regarding a careful and precise drafting of laws are crucial *vis-à-vis* the expansive trend observed in many cases.

7. CONCLUSION

As GC 34 demonstrates, the rights to freedom of opinion and freedom of expression enshrined in Article 19 ICCPR embrace a significant potential for interpretative construction, among other reasons because of the nature of the Covenant as a living instrument that has to keep pace with the cultural, social, economic and technological evolution of society. Although mainly based on – and consistent with – previous jurisprudence, Concluding Observations and General Comments, the new General Comment occasionally goes a step ahead in its conclusions,[77] e.g., when it expressly declares non-derogable the provision in Article 19(1) even if it is not included in the list of Article 4(2) ICCPR. Comments concerning internet-based communications and new technologies are also developments without prior Committee pronouncements or relevant case law. The Committee has performed indeed the role of a 'negative legislator' in some cases when laying down certain limits and prohibitions for national laws (in the cases of 'memory-laws', blasphemy laws and defamation laws). Thus, once more the Committee has displayed through GC 34 an important role in the 'lawmaking process' by exercising a welcome degree of quasi-judicial activism.

Naturally, there are omissions and not all issues related to the right of freedom of expression have been clarified by GC 34. The vastness of the subject, the innumerable forms in which the rights in question can be exercised and thwarted cannot be exhaustively tackled in a single document. However, more extensive reference to other treaties that contain peremptory provisions regarding freedom of expression or to the national legislation of several democracies could have been taken up[78] for a more integrated interpretation. Even if the practice of the Committee is to cite only itself, it would have been of great use to pay further attention to the parallel work of other UN bodies (namely the reports of the Special

77. In the discussions some members were against the introduction of new elements that are not present in the Covenant and so far have not been dealt with in the Committee's jurisprudence. Other members considered that a General Comment is not just a summary of previous jurisprudence but it is also intended to assist States Parties in complying with their obligations, so this should allow and advice formulating *ex novo* considerations.

78. I.e., child pornography is prohibited in absolute terms by the Convention on the Rights of the Child (Art. 34.c), by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and by the ILO Convention No. 182 on the Worst Forms of Child Labour.

Rapporteur appointed by the Human Rights Council)[79] and other international human rights protection systems[80] in order to highlight the complementary views or focus on some recent trends and challenges, and to harmonize and refine certain conclusions. Using the expression by Christian Tomuschat, an additional effort of 'cross-fertilization' would have been beneficial for the final output of GC 34.

While the comments made by the Committee cannot be regarded as the only possible interpretation of Covenant provisions – in the sense that they are not carried out by the 'legislator' itself, the assembly of States Parties –, they are certainly sound legal pronouncements made by a highly qualified and legitimate body. Despite the absence of an acknowledged binding character, the high juridical value – based on *auctoritas* rather than on *potestas* – of GC34 as adopted by the Human Rights Committee is undeniable. Hopefully, it will contribute to reaffirm the centrality of freedom of opinion and expression both as a civil right – freedom from state interference – and as a political right – freedom of access to information and freedom of political participation –; to increase awareness about threats and undue restrictions, and to provide states, individuals, and human rights defenders with effective tools for the strengthening of the respect, protection and fulfillment of these freedoms. It is to be hoped that States Parties to the ICCPR will review both their legislation and practice in the light of the clear guidelines given by the Committee in this important General Comment.

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79. Originally it was the former Commission on Human Rights that created the thematic Special Procedure on freedom of opinion and expression according to Resolution 1993/45. Subsequently the Human Rights Council has adopted new mandates through Resolutions 7/36 (2008) and 16/4 (2011). Of relevance are also the reports of the Special Rapporteurs on Freedom of Religion or Belief, on Freedom of Peaceful Assembly and Association, on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, on the Promotion of Truth, Justice, Reparation and Guarantee of Non-recurrence, and on the Independence of Judges and Lawyers.

80. For instance the 'Inter-American Legal Framework regarding the Right to Freedom of Expression' published by the Office of the Special Rapporteur for Freedom of Expression of the Inter American Commission on Human Rights, 2010.