

XIX

ARTICLE 19

16 April 2009

Durban Review Conference Analysis of the Draft Outcome Document as of 15 April 2009

I. Introduction

1. On the eve of the Durban Review Conference (“DRC”) to be held in Geneva on 20-24 April 2009, this paper analyses the latest version of draft outcome document of the DRC from the perspective of international human rights law on freedom of expression.¹
2. ARTICLE 19 understands that the latest draft of the DRC’s outcome document is a work in progress, to be finalised only at the DRC itself. ARTICLE 19 is strongly committed to engaging in the DRC process, supports the work of the Office of the High Commissioner for Human Rights (“OHCHR”) in this regard and urges states and other civil society groups to do likewise.
3. At the outset of the analysis, ARTICLE 19 reaffirms its view that the rights to freedom of expression and equality are universal, indivisible, interdependent and interrelated and essential to the international protection of human rights.² We believe that racism and discrimination constitute major impediments to the realisation of the right to freedom of expression. Racism has a chilling effect on freedom of expression. Along with discrimination, it inhibits and stifles the right of everyone to seek, receive and impart information and ideas through any media and regardless of frontiers. ARTICLE 19 is thus particularly concerned with the prevalence of racism and discrimination, as well as the existence in many countries and regions of the world of a climate of intolerance, and the threat these pose to equality and full enjoyment of human rights and freedoms. From its inception twenty years ago, ARTICLE 19 has stressed the positive contribution that the exercise of the right to freedom of expression, particularly by the media, and full respect for the right to freedom of information can make to the fight against racism, discrimination, xenophobia and intolerance. As such, a failure of the international community to genuinely assess the progresses, gaps and new challenges in the fight against racism will also constitute a failure to promote and defend diversity and pluralism of voices. The mutually reinforcing nature of the rights to freedom of expression and equality is further elaborated in *The Camden Principles on Freedom of Expression and Equality*, which have been drafted by ARTICLE 19 on the basis of discussions with international experts.³ The Camden Principles are reflected in this analysis of the draft outcome document and in the recommendations.

¹ Draft outcome document of the Durban Review Conference as of 15 April 2009 at 9.00am as amended by the Chair.

² Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

³ See ARTICLE 19, *Camden Principles on Freedom of Expression and Equality* (London, 2009).

4. In our view, the DRC will only achieve its overall ambitions – to fulfil “the promises of the Durban Declaration and Programme of Action agreed at the 2001 World Conference through reinvigorated actions, initiatives and practical solutions, illuminating the way toward equality for every individual and group in all regions and countries of the world”⁴ – if the essential, complementary nature of freedom of expression and equality is recognised in the final text.
5. ARTICLE 19 welcomes the latest version of the draft outcome document (“the draft outcome document”), particularly because it presents a significant improvement upon earlier versions. However, the draft has a number of serious shortcomings that should be addressed before the final text is adopted.
6. ARTICLE 19’s analysis of the latest version of the draft outcome document adopts the following structure: Part II will highlight the positive features of the draft outcome document; Part III will criticise the existing text from an international human rights perspective; Part IV will highlight features which ought to be incorporated in the text from such a perspective; Part V summarises ARTICLE 19’s recommendations.

II. Positive features of the draft outcome document

7. ARTICLE 19 believes that the following features of the current version of the draft outcome document are positive from the “mutually reinforcing paradigm”, that is from the perspective that the right to equality can best be protected and promoted only through respect and promotion of freedom of expression.
8. First, the **broad affirmations of the right to freedom of expression and the right to access information** in paragraphs 53 and 57 of the draft outcome document are obviously positive from “mutually reinforcing paradigm”. Paragraph 53 states that the text “[r]eaffirms the positive role that the exercise of the right to freedom of opinion and expression, as well as the full respect for the freedom to seek, receive and impart information can play in combating racism, racial discrimination, xenophobia and related intolerance”. The language of this provision is based on that of Article 19 of the Universal Declaration of Human Rights (“UDHR”),⁵ as well as Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”).⁶ Paragraph 57 then goes on to articulate the strong connection between freedom of expression and a genuine democracy. It “[s]tresses that the right to freedom of opinion and expression constitutes one of the essential foundations of a democratic, pluralistic society and stresses further the role these rights can play in the fight against racism, racial discrimination, xenophobia and related intolerance worldwide”. Such an assertion reflects the positions of international

⁴ See <http://www.un.org/durbanreview2009/>

⁵ Article 19 UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

⁶ Article 19 ICCPR states: “1. Everyone shall have the right to hold opinions without interference.

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

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

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

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

and regional human rights courts,⁷ authorities⁸ and NGOs working to promote freedom of expression internationally.⁹ Given that the links between freedom of expression and democracy are so widely accepted, ARTICLE 19 strongly believes that this paragraph should be adopted in the final outcome document.

9. Second, ARTICLE 19 welcomes the draft outcome document's **reference to existing international human rights law relevant to the right to freedom of expression**. In particular, on numerous occasions, the draft text directly relies upon the wording of Article 20(2) of the ICCPR, the key international standard on "hate speech" through its provisions. Article 20(2) states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".
10. In this regard, ARTICLE 19 observes that paragraph 12 of the draft outcome document "[r]eaffirms that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Paragraph 68 also "[r]esolves to, as stipulated in art. 20 of the ICCPR, fully and effectively prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility and violence and implement it through all necessary legislative, policy and judicial measures". Furthermore, paragraph 133 "[t]akes note of the proposal of the OHCHR, in cooperation with regional stakeholders in all parts of the world, to organize as a follow-up to the OHCHR Expert Seminar on the links between art. 19 and 20 of the ICCPR a series of expert workshops to attain a better understanding of the legislative patterns, judicial practices and national policies in the different regions of the world with regard to the concept of incitement to hatred, in order to assess the level of implementation of the prohibition of incitement, as stipulated in article 20 of the International Covenant on Civil and Political Rights".
11. Third, ARTICLE 19 welcomes the fact that the draft outcome document **omits any reference to "defamation of religions"**. The preparations to the DRC have been partly

⁷ The European Court of Human Rights famously stated that freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment"; *Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A no 24, 1 EHRR 737, paragraph 48. Meanwhile the Inter-American Court on Human Rights has stated: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free"; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No 5, paragraph 70.

⁸ The third preambular paragraph of the most recent Joint Declaration of international mechanisms on freedom of expression of the UN, Organisation of American States, Organisation for Security and Cooperation in Europe and the African Commission on Human and Peoples' Rights states: "Recognising the importance to democracy, as well as to holding social institutions accountable, of open debate about all ideas and social phenomena in society and the right of all to be able to manifest their culture, religion and beliefs in practice"; Joint Declaration of The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, December 2008.

⁹ ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, 1999) begins: "Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government. Bad government needs secrecy to survive. It allows inefficiency, wastefulness and corruption to thrive ... Information allows people to scrutinise the actions of a government and is the basis for proper, informed debate of those actions." The second paragraph of the Transparency Charter for International Financial Institutions states: "The right to information plays a crucial role in promoting a range of important social values ... It is a key underpinning of meaningful participation, an important tool in combating corruption and central to democratic accountability." See Global Transparency Initiative, *Transparency Charter for International Financial Institutions: Claiming Our Right to Know* 17 September 2006.

dominated by controversies concerning the inclusion of limitations on defamation of religions proposed by several Islamic states.¹⁰ A number of states – including the US, the UK, France, the Netherlands, Italy and Australia – have at various times threatened to withdraw from the DRC process if the text was not suitably amended. Whilst we welcome the omission of references to such a flawed and counterproductive concept,¹¹ we remain concerned that such language will be reintroduced at a later stage or during the conference itself.¹² Such an inclusion would be incompatible with international human rights law, in particular Articles 19 and 20 ICCPR which are drawn upon in other parts of the text, as indicated above.

12. Fourth, ARTICLE welcomes paragraph 66 which “[c]alls upon States to ensure that any measures taken in the fight against terrorism are implemented in full respect of all human rights, in particular the principle of non-discrimination”. This provision means that **counter-terrorism measures ought to comply with the right to freedom of expression**, a point that was recently emphasised by the international and regional mechanisms for the protection of freedom of expression.¹³
13. Fifth, on several occasions, the draft outcome document acknowledges **the importance of the promotion of “intercultural”** (paragraphs 22, 108, 126) and **“interreligious dialogue”** (paragraphs 108 and 126) to anti-racism efforts. The text also promotes human rights education that sensitises society to “cultural diversity” (paragraph 21) and “multicultural diversity” in their political and legal systems (paragraph 109). ARTICLE 19 views such references as positive in that they support promotional approaches towards achieving substantive equality in practice.¹⁴ Such approaches include the promotion of intercultural understanding through education, social dialogue and awareness-raising policies. In contrast to such measures supporting diverse forms of expression, *restrictions* on freedom of expression often have a disproportionately detrimental impact on disadvantaged groups, undermining rather than promoting equality.
14. Sixth, ARTICLE 19 notes that the draft outcome document recognises **the proactive role that the media can play towards combating racial discrimination** in a number of paragraphs on “preventive measures”,¹⁵ effective state campaigns¹⁶ and persisting

¹⁰ High Commissioner Makes Concrete Proposals to Combat Racism, 23 February 2009, http://www.un.org/durbanreview2009/pr_23-02-09.shtml

¹¹ For an analysis of the serious shortcomings of the concept of defamation of religions from an international human rights perspective, see ARTICLE 19, “Statement, Human Rights Council: Article 19 Calls on HRC Members to Vote Against Proposed Resolution on Defamation of Religions” 25 March 2009; ARTICLE 19, Cairo Institute for Human Rights Studies and the Egyptian Initiative for Personal Rights, “Joint Written Statement to the Human Rights Council Ninth Session” 11 September 2008.

¹² Reuters, “Diplomats amend UN text to draw in West” 17 March 2009

<http://www.reuters.com/article/worldNews/idUSTRE52G5NP20090317?feedType=RSS&feedName=worldNews>

¹³ The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on defamation of religions, and anti-terrorism and anti-extremism legislation, December 2008.

¹⁴ These may be viewed as being grounded in Article 7 ICERD which states: “States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.” Article 7 has been regarded as a somewhat neglected provision of the ICERD. See Patrick Thornberry, “Forms of Hate Speech and the ICERD”, Conference Room Paper 11, Expert seminar on the links between Articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, 2-3 October 2008 at 23.

¹⁵ Paragraph 20.

“xenophobic attitudes”.¹⁷ In addition, paragraph 120 commends “media organizations that have elaborated voluntary ethical codes of conduct”. Such references support the position of international authorities, in particular the UN Special Rapporteur on Freedom of Opinion and Expression and the parallel regional mechanisms, on the “moral and social obligation[s] to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance”.¹⁸

15. ARTICLE 19 recommends that the positive features of the text indicated above should be affirmed and not compromised in future negotiations on the final text. There should be no backsliding on the concept of “defamation of religions” which should remain excluded from the text.

III. Criticism of the draft outcome document

16. Notwithstanding its positive features, ARTICLE 19 believes that the draft outcome document contains some serious shortcomings which need to be addressed before it is finalised. The most important of these are indicated below.

Negative stereotyping of religions

17. ARTICLE 19 is particularly concerned about paragraph 11 of the draft outcome document which “[r]ecognises with deep concern the *negative stereotyping of religions resulting in denial or undermining the rights of persons associated with them* and the global rise in the number of incidents of racial or religious intolerance and violence, including Islamophobia, anti-Semitism, Christianophobia and anti-Arabism” (emphasis added). This provision, which clearly deals with anti-religious behaviour, is problematic for two reasons.

18. ARTICLE 19 recognises that this paragraph is an improvement on the previous draft outcome document as it relates the “negative stereotyping of religions” directly with “the denial or undermining of the rights of persons associated with them”. However, in ARTICLE 19’s opinion, it should be the *negative stereotyping of individuals and groups on the basis of their religion or ethnicity* that should be of concern. This is because the “negative stereotyping of religions” itself is a very broad term which may easily be interpreted to encompass the criticism, mockery or caricature of religious ideas, practices or figures.¹⁹ Moreover, the right to freedom of religion as protected by international law does not protect religions per se, as duly noted by the Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.²⁰

¹⁶ Paragraph 54.

¹⁷ Paragraph 75.

¹⁸ Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001.

¹⁹ It is noted that the concept of “negative stereotyping” does not appear in any international human rights treaty including ICERD or the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981.

²⁰ Report to the Second Session of the HRC A/HRC/2/3, 20 September 2006, paragraph 38.

- 19. ARTICLE 19 recommends that any reference to “negative stereotyping of religions” be excluded from the draft outcome document and replaced with the “negative stereotyping of individuals and groups on the basis of their religion or ethnicity”.**
- 20. ARTICLE 19 recommends that the text should make explicit provision for the positive right of individuals to exercise their freedom of expression to criticise religions, so long as that criticism does not constitute the incitement of discrimination, hostility or violence.**
- 21. ARTICLE 19 recommends that a provision be inserted into the draft outcome document urging states to repeal all blasphemy laws.**

A hierarchy of protection

22. In the opinion of ARTICLE 19, another problem with paragraph 11 of the draft outcome document is that intolerance and violence directed at Muslims, Jews, Christians and Arabs are deemed to deserve explicit reference. Although other groups are recognised elsewhere in the text (e.g. the need for protecting Roma/Sinti/Gypsies/Travellers is indicated in paragraph 83) and paragraph 11 may be interpreted to encompass other groups, the special mention of Islamophobia, anti-Semitism, Christianophobia and anti-Arabism appears to raise these phenomena above other forms of racial and religious discrimination, intolerance or violence. In doing so, the paragraph suggests a hierarchy of different grounds of protection whereas the right to non-discrimination applies equally to all believers (and non-believers) and ethnic groups. Such a hierarchy of protection should be avoided in the final text.²¹
- 23. ARTICLE 19 recommends that, in order to ensure that a hierarchy of protection of the right to non-discrimination is avoided, reference to “Islamophobia, anti-Semitism, Christianophobia and anti-Arabism” be excluded in the draft text.**

Article 20(2) ICCPR and Article 4 ICERD

24. ARTICLE 19 observes that the text of the draft outcome document goes beyond requiring states to proscribe incitement to “discrimination, hostility and violence” or “incitement to hatred” as reflected in Article 20(2) ICCPR. In several paragraphs, the draft outcome document requires states to also prohibit the *dissemination of ideas based on racial superiority*. This wording is based on in Article 4 the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).²²

²¹ It is noted that paragraph 16 of the draft outcome document “[a]cknowledges that there should be no hierarchy among potential victims of racism, racial discrimination, xenophobia and related intolerance and that all victims should receive the same attention, the necessary protection and accordingly appropriate treatment.”

²² Article 4 states: “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

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

25. More specifically, paragraph 12 indicates that “all dissemination of ideas based on racial superiority or hatred as well as acts of violence or incitement to such acts shall be declared offence[s] punishable by law, in accordance with the international obligations of States that these prohibitions are consistent with freedom of opinion and expression”. In this way, this paragraph recalls the wording of Article 20(2) ICCPR and Article 4(b) ICERD, as well as that of General Comment 15 of the Committee on the Elimination of Racial Discrimination.²³ Paragraph 98 also reflects Article 4 ICERD in calling “upon States, in accordance with their human rights obligations, to declare illegal and to prohibit by law all organizations based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote national, racial and religious hatred and discrimination in any form, and to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”.
26. ARTICLE 19 acknowledges the relevance of drawing from the ICERD in the draft outcome document. As the key international treaty against racial discrimination, ICERD is an important source of inspiration for the draft outcome document, the Committee the authoritative interpreter of its provisions.²⁴ At the same time, ARTICLE 19 draws attention to the obvious tension between Article 20(2) ICCPR, on the one hand, and Article 4 ICERD on the other, in relation to freedom of expression. In our opinion, any reliance upon Article 4 ICERD in the text should be avoided for it unnecessarily restricts the right to freedom of expression, as protected by Article 19 ICCPR and presents a lower threshold than Article 20(2) for determining what constitutes expression that ought to be prohibited in order to protect equality.²⁵
27. We also note that the obligations upon States parties under Article 4 ICERD are “with due regard to the principles embodied in [the UDHR] and the rights expressly set forth in article 5 of this Convention”, including freedom of opinion and expression. Yet the draft outcome document does not reflect this qualification made in Article 4 ICERD anywhere in the text.
28. Furthermore, ARTICLE 19 observes that paragraph 38 of the draft outcome document “[u]rges States parties to the [ICERD] to withdraw reservations contrary to the object and purpose of the Convention and to consider withdrawing other reservations”.²⁶
29. This call on states might be interpreted as encouraging states to withdraw reservations they have made to any provision of ICERD, including Article 4, on the basis that they are arguably “contrary to the object and purpose of the Convention”. It is noted that a significant number States parties have entered reservations or declarations to that provision. Indeed, as of 15 April 2009, there are twenty reservations or declarations entered by States parties of the ICERD to its Article 4, many of them essentially asserting

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

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

²³ General Comment No 15: Organised violence based on ethnic origin 23 March 1993, A/48/18 at paragraph 4.

²⁴ See paragraphs 32 and 34 of the draft outcome document.

²⁵ The Committee on the Elimination of Racial Discrimination has asserted that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression”, General Comment XV, A/48/18, 23 March 2003.

²⁶ It is interesting to note that the draft outcome document does not demand a specific withdrawal of reservations from Article 20 ICCPR.

that measures to implement Article 4 will only be adopted by them to the extent that they are compatible with principles of freedom of expression and freedom of assembly and association.²⁷

30. Given the possibility of such interpretation of paragraph 38 of the draft outcome document, ARTICLE 19 recommends its removal. At the same time, we outline the following arguments in support of those states that have entered reservations to Article 4 of the ICERD on the basis of the right to freedom of expression.
31. *First*, reservations or declarations entered to Article 4 ICERD on the basis of the right to freedom of expression should not be deemed to go against the object and purposes of the treaty itself. As stressed out above, it is our view that the right to equality and the right to freedom of expression are compatible with one another.²⁸ *Second*, the call on States parties to withdraw reservations contrary to the object and purpose of the Convention is somewhat tautological: under general international law, a reservation may only be entered to a treaty in the first place if it is compatible with the object and purpose of that treaty.²⁹ *Third*, paragraph 38 does not meet the standard contained in the ICERD for the circumstances in which reservations may be restricted. Article 20(2) ICERD itself prohibits reservations that are “incompatible” with the treaty’s provisions. Such incompatibility arises when two thirds or more of States parties object to the reservation in question.³⁰ Yet, as of 15 April 2009, no State party has entered such objections to any of the reservations to Article 4 of the ICERD.³¹ These reservations to the ICERD therefore remain legitimate and respected under the terms of the treaty itself. *Fourth*, there is no norm in the customary international law imposing a *specific* obligation upon states to prohibit the dissemination of ideas based on racial superiority or organisations with such goals.³² The existence of a vast number of reservations to Article 4 ICERD in itself

²⁷ See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en> For example, the reservation/interpretative declaration of Ireland states: “Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention. Ireland therefore considers that through such measures, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. These rights are laid down in Articles 19 and 20 of the Universal Declaration of Human Rights; they were reaffirmed by the General Assembly of the United Nations when it adopted Articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in Article 5 (d)(viii) and (ix) of the present Convention.” See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en>

²⁸ See ARTICLE 19, *Camden Principles on Freedom of Expression and Equality* (London, 2009).

²⁹ Under the Vienna Convention on the Law of Treaties 1969, reservations may be entered to a treaty unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

³⁰ Article 20(2) ICERD states: “A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.”

³¹ See <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=319&chapter=4&lang=en>

³² In paragraph 5 of his partly dissenting opinion in the ICTR Appeals Chamber in the *Nahimana et al* case, Judge Meron states that there is “profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of ... [ICERD] ... and Article 20 of the ICCPR do not reflect a settled principle. Since a consensus among States has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech.” See Patrick Thornberry, “Forms of Hate Speech and the Convention on the Elimination of All Forms of Racial Discrimination (ICERD)” Conference Room Paper 11 presented at OHCHR Expert seminar on the links between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR): Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, 2-3 October 2008, Geneva at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/experts_papers.htm. On the scope of customary international law, see *North Sea Continental Shelf cases*, 20 February 1969, ICJ Reports 1969, 4-54 at paragraph 74. On the fundamental elements constituting custom see Antonio Cassese, *International Law* (Oxford: OUP, 2005) at 157-158.

suggests the highly contentious nature of the provision and the absence of a customary norm.

32. ARTICLE 19 recommends that the draft outcome document omits paragraph 38 altogether.

Nationalist ideologies

33. Paragraph 59 “[u]rges States to punish violent, racist and xenophobic activities by groups based on neo-Nazi, neo-Fascist and other violent national ideologies”. From ARTICLE 19’s “mutually reinforcing paradigm” perspective, the key problem with this provision is that the term “activities” is too broad and might be used to restrict a wide spectrum of activities – such as holding meetings or demonstrations, or producing flyers – in violation of the rights to freedom of opinion and expression, as well as the freedom of association and assembly under international human rights law. The notion of “punish” lacks precision, and might be deemed to include both civil and criminal penalties. Furthermore, as currently drafted, this provision would apply to neo-Nazi and neo-Fascist groups but would not be applicable to other groups which are not based on nationalist ideologies, but which nonetheless promote violent, racist or xenophobic activities.

34. ARTICLE 19 argues that the discrepancies and vagueness of paragraph 59 need to be addressed and that the provision should seek to *prohibit*, in accordance with international human rights law, any acts of violence and other activities which constitute incitement to violence, discrimination or hostility, by *any* organisation.

35. ARTICLE 19 recommends that paragraph 59 should urge States to prohibit by law violence and incitement to incitement to violence, discrimination or hostility perpetrated by any group on the grounds of nationality, race or religion.

IV. What is missing from the draft outcome document

36. ARTICLE 19 argues that there are two fundamental deficiencies in the draft outcome document: first, the lack of a general non-discrimination provision and one that includes sexual orientation as a protected ground; and second, a paucity of consideration of the role of the media in relation to the promotion of intercultural understanding, which is crucial for combating racial discrimination and related manifestations of discrimination.

37. The inclusion of a general non-discrimination provision recognising a spectrum of grounds, including sexual orientation, and greater acknowledgement of the crucial role the media can play to promote equality are both important from a “mutually reinforcing paradigm” standpoint. Both lead to a greater awareness of the grounds of discrimination and the building of the participation and voice of members of diverse communities. Without recognition in law of a broad range of grounds of discrimination or the media taking their moral and social obligations to promote equality seriously, the issues, experiences and concerns of members of such communities are rendered invisible.

A general non-discrimination provision

38. Although the draft outcome document's focus is on "racism, racial discrimination, xenophobia and related intolerance", there are various more general references to manifestations of discrimination on other grounds, most notably *religious* discrimination, intolerance and violence and methods to combat them throughout.³³ The impact of some other, often overlapping, grounds of discrimination, such as gender,³⁴ age³⁵ and disability³⁶ is also recognised. At the same time, there is no acknowledgement of sexual orientation as a ground of discrimination anywhere in the text. This goes against recent legal and jurisprudential trends which further recognise sexual orientation as a legitimate grounds of discrimination,³⁷ but also because of paragraph 34 of the text itself which acknowledges "multiple or aggravated forms of discrimination".³⁸ ARTICLE 19 argues for the inclusion of a non-discrimination provision that requires states to guarantee the right to non-discrimination on a broad range of grounds.³⁹

39. ARTICLE 19 recommends that a general equality provision should be inserted in the text stating that "states are urged to ensure that the right of everyone to be free from discrimination based on grounds such as race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language, political or other opinion, national or social origin, nationality, property, birth or other status".

40. ARTICLE 19 recommends that there should also be another provision indicating that states are "urged to combat multiple or aggravated forms of discrimination on one or more" of such grounds.

Role of the media

41. ARTICLE 19 argues that the text should further expand upon the positive role that may be played by the media to promote intercultural understanding. In doing so, the draft outcome document should reflect the policy recommendations outlined in ARTICLE 19's *Camden Principles on Freedom of Expression and Equality*.⁴⁰

³³ Paragraphs 11-13, 67-69, 81, 98, 101, 105, 108, 109 and 126 of the draft outcome document.

³⁴ See *inter alia* paragraphs 86, 87 and 89 which call on states to incorporate a gender perspective into their anti-racism strategies, acknowledge that children may be vulnerable to violence because of their gender and call on states to integrate a gender and age perspective to combat anti-trafficking initiatives.

³⁵ Paragraph 90.

³⁶ Paragraph 94 welcomes the "entry into force of the Convention on the Rights of Persons with Disabilities and its Optional Protocol, and urges States to effectively address the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination".

³⁷ See Statement on "Human Rights, Sexual Orientation, and Gender Identity" presented to the UN General Assembly by 66 member states, 18 December 2008; see http://www.ilga.org/news_results.asp?FileID=1211; See also Resolution AG/RES 2435 (XXXVIII-O/08) on "Human Rights, Sexual Orientation, and Gender Identity" adopted by the General Assembly of the Organization of American States during its 38th session in 3 June 2008. In the case *Toonen vs. Australia*, the Human Rights Committee held that the references to "sex" in Articles 2, paragraph 1, (non-discrimination) and 26 (equality before the law) of the ICCPR should be taken to include sexual orientation. As a result of this case, Australia repealed the law criminalizing sexual acts between males in its state of Tasmania. With this case, the Human Rights Committee created a precedent within the UN human rights system in addressing discrimination against lesbian, gays and bisexuals. Communication, No 488/1992, adopted 31 March 1994.

³⁸ See also paragraph 84 which "[n]otes with concern the increased number of instances of discrimination on multiple grounds".

³⁹ See Principle 3, ARTICLE 19, *Camden Principles on Freedom of Expression and Equality* (London, 2009).

⁴⁰ Principle 8 deals with "State responsibilities", Principle 9 with "Media responsibilities", and Principle 10 with those of Other actors".

42. The text should encourage states to have in place a public policy and regulatory framework for the media, including new media, which promotes equality and pluralism. The moral and social responsibilities of the media in combating discrimination should also be specified in more detail.
43. **ARTICLE 19 recommends that the draft outcome document should be amended to include a provision which establishes that any bodies with regulatory powers over the media should be independent of government, publicly accountable and transparent; and promote the right of different communities to freely access and use media and information and communications technologies for the production and circulation of their own content, as well as for the reception of content produced by others, regardless of frontiers.**
44. **ARTICLE 19 recommends that the text should urge states to repeal any restrictions on the use of minority languages that have the effect of discouraging media addressed to particular communities; make diversity a condition for assessing broadcasting licence applications; and ensure that disadvantaged and excluded groups have equitable access to media resources.**
45. **ARTICLE 19 recommends that there should be a provision inserted into the text which addresses the moral and social responsibilities of the media in promoting intercultural understanding. The text should encourage the media to ensure that their workforces are diverse and representative of a society as a whole; address as far as possible issues of concern to all groups in society; seek a multiplicity of sources and voices within different communities; adhere to high standards of information provision.**
46. **ARTICLE 19 recommends that there should be a separate provision urging the media to take care to report in context and in a factual and sensitive manner, while ensuring that acts of discrimination are brought to public attention; be alert to discrimination or negative stereotypes of individuals or groups being furthered by media; avoid unnecessary references to race, religion, gender or other group characteristics that may promote intolerance; raise awareness of the harm caused by discrimination and negative stereotyping; report on different groups or communities and give their members an opportunity to speak and to be heard in a way that promotes better understanding of them. ARTICLE 19 also recommends that public service broadcasters should be under an obligation to avoid negative stereotypes of individuals and groups, and their mandate should require them to promote intercultural understanding.**

V. Conclusions and recommendations

47. ARTICLE 19 urges states to follow the recommendations indicated above in the final outcome document.
48. To sum up those recommendations in conclusion, ARTICLE 19 recommends:
 - (a) **The positive features of the text should be affirmed and not compromised in future negotiations on the final text. Most importantly, there should be no**

backsliding on the concept of “defamation of religions” which should remain excluded from the draft outcome document.

- (b) Any reference to “negative stereotyping of religions” should be excluded from the draft outcome document and replaced with the “negative stereotyping of individuals and groups on the basis of their religion or ethnicity”.
- (c) The draft outcome document should make explicit provision for the positive right of individuals to exercise their freedom of expression to criticise religions, so long as that criticism does not constitute the incitement of discrimination, hostility or violence.
- (d) There should be provision is inserted into the draft outcome document urging states to repeal all blasphemy laws.
- (e) References to “Islamophobia, anti-Semitism, Christianophobia and anti-Arabism” should be excluded in the draft text.
- (f) Paragraph 59 should urge States to prohibit by law violence and incitement to incitement to violence, discrimination or hostility perpetrated by any group on the grounds of nationality, race or religion.
- (g) The draft outcome document should include a provision encouraging states to have a public policy and regulatory framework for the media which promotes pluralism and diversity.
- (h) The draft outcome document should address comprehensively the moral and social responsibilities of the media in promoting intercultural understanding.

- END-

FURTHER INFORMATION:

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- ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.