



**CONSULTATION ON THE INTERRELATIONSHIP
BETWEEN ICCPR ARTICLES 19 AND 20 WITH RESPECT
TO FREEDOM OF EXPRESSION AND ADVOCACY OF
NATIONAL, RACIAL OR RELIGIOUS HATRED THAT
CONSTITUTES INCITEMENT TO DISCRIMINATION,
HOSTILITY OR VIOLENCE**

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D) Statement of the Issues and Summary of Conclusions

The Alliance Defense Fund (ADF), Christian Legal Fellowship (CLF), Jubilee Campaign (JC), World Evangelical Alliance (WEA) and Advocates International (AI, and together with ADF, CLF, JC and WEA, the “NGO Contributors”) make this submission following the call by the Office of the High Commissioner for Human Rights (OHCHR) for a series of expert workshops on the linkage between articles 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR). As part of this process, the United Nations (UN) High Commissioner for Human Rights has invited the submission of papers addressing the interplay between ICCPR article 20, which prohibits “advocacy of national, racial or religious hatred that calls for incitement to discrimination, hostility or violence,” and ICCPR article 19, which acknowledges the right of everyone “to hold opinions without interference” and the “right to freedom of expression.” In particular, the OHCHR seeks to better understand “what constitutes ‘incitement’ in the sense of article 20 of the ICCPR” and “how to effectively address it while ensuring full respect for freedom of expression as enshrined in article 19 of the ICCPR.”

As set forth below, the NGO Contributors call upon the OHCHR to:

- Clarify and, if necessary, reformulate the topic of inquiry so that it is properly focused upon “advocacy of national, racial or religious hatred that calls for incitement to discrimination, hostility or violence,” and *not* “incitement to national, racial or religious hatred,” which improperly alters the language used in the ICCPR and lowers protection for freedom of expression;
- Consider expanding the scope of inquiry to include the interplay between and among ICCPR articles 20, 19 and 18, which concerns “freedom of thought, conscience and religion;”

- Protect freedom of expression, even if it entails protecting certain odious speech, due to the important role free expression plays as a catalyst for reform and the search for truth;
- Interpret “incitement” as contained in ICCPR article 20 in a manner that protects religious minorities from actual, imminent harm;
- Reject the call for vague “hate speech” codes that penalize speech which makes the listener uncomfortable; and
- Urge States Parties to fulfill their obligations under the ICCPR by protecting groups such as national, racial and religious minorities that are the victims of violence directly attributable to the advocacy of hatred.

II) Who We Are

ADF is a not-for-profit international legal alliance of more than 1700 lawyers dedicated to the protection of fundamental human rights. ADF has argued cases before the United States Supreme Court and the European Court of Human Rights. It has also provided expert testimony to the European Parliament and United States Congress. ADF has full accreditation with the United Nations’ Economic and Social Council (ECOSOC), as well as the Organization for Security and Co-operation in Europe and the European Union (Fundamental Rights Agency and European Parliament). As a result, ADF is fully-versed in rights under the International Covenant on Civil and Political Rights and the international law issues that bear upon this submission.

CLF, founded in the mid-1970s, is a Canadian not-for-profit association of lawyers, law students, professors, and friends dedicated to exploring the complex interrelationships between the practice and theory of law and the Christian faith. While having no direct denominational affiliation, CLF has over 550 active members from over 40 denominations. CLF strives to help its members grow spiritually, do justice with

compassion, facilitate advocacy and promote Christian values and morality within Canada and around the world. CLF has special consultative status with ECOSOC.

JC promotes the human rights and religious liberty of ethnic and religious minorities; advocates the release of prisoners of conscience imprisoned on account of their faith; advocates for and assists refugees fleeing religion-based persecution; seeks to protect human dignity and the right to life for every human being from conception to natural death; and protects and promotes the freedom and safety of children from bodily harm and sexual exploitation. JC holds special consultative status with ECOSOC at the United Nations.

WEA is made up of 128 national evangelical alliances located in seven regions and 104 associate member organizations and global networks. The WEA is the world's largest association of evangelical Christians serving a constituency of 420 million people. The WEA is a voice to governments, media and other faith communities, and holds consultative status at the United Nations.

AI is an international organization of staff and volunteer attorneys in over 150 nations who seek to do justice with compassion, including through its Religious Freedom Global Task Force, working to assure, in the words of Article 18 of the Universal Declaration of Human Rights, that "everyone has the right to freedom of thought, conscience and religion, including the freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

As human rights organizations particularly concerned with incidents of persecution and violence visited upon minority religions, the NGO Contributors are

especially cognizant of the effects of incitement to violence motivated by religious hatred. As religious liberty depends on the ability to engage in freedom of expression – the ability to preach and teach – the NGO Contributors are also highly aware of the exalted position of such a freedom amid the constellation of fundamental human rights.

The NGO Contributors urge the OHCHR to safeguard the liberty right recognized in ICCPR article 19 and to interpret “incitement” as contained in ICCPR article 20 in a manner that protects religious minorities from actual, imminent harm while preserving freedom of expression. They strongly urge the OHCHR to reject the call for vague “hate speech” codes that would result in curtailment of freedom of expression.

In reaching this conclusion, the NGO Contributors summarize the generally successful approach adopted by the United States Supreme Court in balancing these interests, and in creating guidelines for understanding “incitement” that could help deepen understandings of the term as used in the ICCPR. It also addresses the danger posed to free expression by such “hate speech” codes by citing examples from Canada and elsewhere. Finally, the submission details real-life examples of incitement of violence directed at religious minorities as examples of the harm that the ICCPR was intended to address, and requests that OHCHR encourage states parties to fulfill their obligations to protect members of minority religious groups from such violence.

III) **Establishing Governing Interpretive Principles: Fidelity to Text, Context, and the Need to View Human Rights as “Interdependent and Indivisible”**

The Vienna Convention on the Law of Treaties sets forth interpretive principles that govern analysis of a treaty such as the ICCPR: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in

their context and in light of its object and purpose.”¹

It is a standard principle of interpretation that a treaty, like a contract, should not be interpreted in a manner that creates a contradiction between terms so as to render one or both of them a nullity, but rather in a manner that gives meaning to all terms of a treaty, the presumption being that the treaty was intended to be internally consistent.

This common-sense interpretive principle is implicit in a statement of principle that the OHCHR elsewhere highlights: “All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education, or collective rights, such as the rights to development and self-determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates the advancement of others. Likewise, the deprivation of one right adversely affects the others.”²

In the context of this call for submissions, it is important to address the interplay between ICCPR article 19 and article 20 in a holistic manner, and not to pit one provision against the other. Thus, the strictures referenced in article 20 therefore may not be expanded so as to swallow the negative rights acknowledged in article 19, namely “the right to hold opinions without interference” from states parties (or transnational entities, for that matter) and the “right to freedom of expression.”³ As the General Assembly

¹ Vienna Convention on the Law of Treaties, art. 31(1).

² Office for the High Commissioner for Human Rights, “What are Human Rights?,” *available at* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

³ Given the need for a holistic approach to interdependent and indivisible rights, it is perplexing why the discussion does not include ICCPR article 18 as well, as “freedom of thought, conscience and religion” is also implicated by an overbroad interpretation of article 20, no less than article 19. *Accordingly, the NGO*

noted in granting the OHCHR its mandate to address human rights, “all human rights are universal, indivisible, interdependent and interrelated and that as such *they should be given the same emphasis.*”⁴

This need for holistic interpretation that maintains the integrity of the ICCPR as an organic whole has also been acknowledged, at least by inference, by the Human Rights Committee (HRC) in General Comment 11, which reads article 20 to be “fully compatible with the right of freedom of expression as contained in article 19.”⁵

In view of this need for interpretive balance, it is extremely important that the OHCHR not adopt an overly-expansive interpretation of article 20 unwarranted by a holistic reading of the ICCPR. This is particularly true, since article 20 is *sui generis*, and one must therefore guard against any tendency to view it in isolation. Viewed as a whole, the ICCPR is by and large a statement of negative rights, protecting citizens from actions taken by government actors. Article 20, however, is different, insofar as it calls

Contributors call for the OHCHR to expand the scope of the workshops to include discussion of article 18.

⁴ General Assembly Resolution 48/141, “High Commissioner for the Promotion and Protection of All Human Rights,” preamble (Dec. 20, 1993), available at <http://www.un.org/documents/ga/res/48/a48r141.htm>; see also Vienna Declaration and Programme of Action, A/Conf. 157/23 at ¶ 5 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”) For a general discussion on the emergence of the “holistic” approach, see *International Law, Conflict and Development: The Emergence of a Holistic Approach in International Affairs* (Maurice D. Voyame et al., eds.) (Brill 2010).

⁵ HRC, “General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred” (July 29, 1983), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/60dcfa23f32d3feac12563ed00491355?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument). It should be noted that while the title of the General Comment shorthands the article as prohibition of “inciting national, racial or religious hatred,” the comment itself cites the text of article 19 fully.

upon states to prohibit certain conduct “by law.”⁶ This led to a significant number of countries stating reservations with respect to this article.⁷ Whether they did so out of an excess of caution or whether out of prescience remains to be seen, and depends in part on whether the workshops result in a recommendation that freedom of expression be unduly curtailed. Any interpretation of article 20 that reads it in isolation from the rest of the ICCPR – in particular, article 19, but also article 18 – would exacerbate fears concerning article 20 and concerns over incompatibility with freedom of expression protections in national constitutions and international documents. Moreover, such an interpretation would militate against OHCHR’s and HRC’s expressed desire for countries to remove reservations and implement the ICCPR in its entirety, as is routinely requested of states parties by the HRC in its concluding observations.⁸

IV) Defining the Issues Properly: Fidelity to the Text of the ICCPR

a) Article 20

Article 20 of the ICCPR, as drafted, states:

⁶ See Ivan Hare, “Extreme Speech Under International and Regional Human Rights Standards,” *in* *Extreme Speech and Democracy* at 70 (I. Hare and J. Weinstein eds.)(Oxford 2009) (“Article 20 is singular in that it is the only provision of the ICCPR which requires (rather than prohibits) action by the state parties.”); Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council: Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Doudou Diène, Further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, A/HRC/2/3 (Sept. 20, 2006) at ¶ 46 (“Compared to other provisions of the Covenant, this provision is unusual because it does not provide for a human right but establishes limitation on other rights and requires States parties to enact legislative restrictions.”).

⁷ Namely Australia, Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Sweden, Switzerland, Thailand (interpretive declaration), the United Kingdom, and the United States. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁸ See, e.g., Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations: Australia, 95th Session, at ¶ 9 (May 7, 2009) (calling upon Australia to consider withdrawing its reservations to the ICCPR, including to article 20).

1. Any propaganda for war⁹ shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred *that constitutes incitement to discrimination*,¹⁰ hostility or violence shall be prohibited by law.

It is vital to clarify what precisely article 20 prohibits, and what it does not, as the actual wording of the ICCPR is what constitutes the extent of obligation that sovereign states parties undertook when they ratified the convention. By extension, it also delineates what is the proper scope of review by the OHCHR. The OHCHR must remain within its mandate and not act *ultra vires*, as the General Assembly acknowledged when it directed the High Commissioner to: “Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law, including the obligations, within this framework, to respect the sovereignty, territorial integrity and domestic jurisdiction of States.”¹¹ The OHCHR therefore may not amend treaty language drafted by States Parties binding upon nations that have ratified it and thereby create new obligations.

⁹ Certain states parties have pointed out that use of the term “war” should properly be understood as “war in contravention of international law,” in other words, “war” that does not meet *ius ad bellum* principles. See e.g., Declarations and Reservations of France to the ICCPR, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (“The Government of the Republic declares that the term ‘war,’ appearing in article 20, paragraph 1, is understood to mean war in contravention of international law.”). Implicitly acknowledging this deficiency in draftsmanship, the HRC has sought to clarify that this provision does not “prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence.” HRC, General Comment 11.

¹⁰ As with the term “war” in the preceding clause, the bald word “discrimination” is inartful. “Discrimination,” *i.e.*, the ability to draw distinctions and to make judgments, is not in and of itself intrinsically problematic, but rather “unjust discrimination” – the treatment of like- or similarly-situated individuals or classes or people in a dissimilar matter – is what is problematic. Rather than untangling what the drafters may have meant with respect to “discrimination,” this submission addresses incitement to “hostility or violence,” which is a realtime phenomenon in much of the world, calling for a realtime and effective response.

¹¹ See GA Resol. 48/141 at ¶ (3)(a). The same holds true for the Human Rights Committee as the treaty compliance committee set up under the ICCPR. The HRC is empowered to receive reports from states parties, to study them and then to “transmit its reports, and such general comments as it may consider

Unfortunately, the OHCHR has introduced an ambiguity which *must* be addressed at the outset. While the Concept Paper properly defines the “scope” of the expert workshops as focusing on “legislative and judicial practices as well as policies conducive to effectively prohibit and prevent *advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,*” in its executive summary and elsewhere the Concept Paper states the issue as one concerning “*the prohibition of incitement to national, racial or religious hatred.*”¹² Likewise, the High Commissioner, in her Message to Civil Society, echoes this misstatement, incorrectly characterizing the issue as “prohibiting incitement to national, racial or religious hatred.” That is *not*, however, the language which appears in the ICCPR, and therefore, should not be the focus of the workshops.

As a threshold matter, therefore, it is important to clarify that what article 20 prohibits is *neither* “incitement to national, racial or religious hatred,” nor even “advocacy of national, racial or religious hatred” in the abstract without anything more. As odious as such advocacy may be, what is required is rather a two-step process whereby (1) “*advocacy of national, racial or religious hatred*” is coupled with (b) “*incitement to discrimination, hostility or violence,*” before state sanction is incurred.

appropriate, to the States Parties.” ICCPR art. 40(2), (4). The HRC may also receive and consider reports from a State Party concerning another State Party’s failure to fulfill its obligations, issue a report on such a complaint, and, where the parties consent, convoke a Conciliation Commission. ICCPR arts. 41-42. For those countries that have ratified the optional protocol, the HRC may receive petitions from individuals once domestic remedies have been exhausted, conduct a proceeding, and, upon conclusion, issue its non-binding “views” on the matter. ICCPR Optional Protocol art. 5.

¹² See Concept Paper on OHCHR’s Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred; Follow-up to the Expert Seminar on Articles 19 and 20 of the ICCPR with Regard to Freedom of Expression and Incitement to Hatred,” at 1. Indeed, even the very title of the Concept Paper misstates the issue.

