

SOFIA CASEIRO¹

I. **Freedom of Expression – the concept enshrined in the international treaties promoted by the United Nations**

Universal Declaration of Human Rights

The Universal Declaration of Human Rights, as the primary instrument of International Human Right Law, applicable universally, includes on article 19 the provision of the freedom of opinion and expression:

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.

In the preliminary discussions that foresaw the approval of this provision, the Soviet delegation worried that freedom of expression was permitted to propagate aggression. The negotiations, inserted in the after-war period (beginning of the cold war), rose accusations from the Soviet delegation stating that the United States of America and European countries were using freedom of expression to incite a policy of aggression. In fact, freedom of expression can be a weapon to totalitarian regimes and that way limitations were imposed in other international instruments.

In this concept, we can perceive the following elements:

- Freedom to hold opinions without interference
- Freedom to seek, receive and impart information and ideas

It is also important to refer that article 7 predicts a limitation to freedom of expression:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

By enshrining equal protection against any discrimination and any incitement to such discrimination – we can infer here the beginning of the protection against hate speech.

International Covenant on Civil and Political Rights

The first international binding instrument that included the protection of freedom of expression was the International Covenant on Civil and Political Rights.

In this convention, it was possible to consider freedom of expression as a binding right that the States should be obliged to respect. The provision maintains a clear distinction between: (1) the right to hold opinions – that should not be limited in any way, for that reason paragraph 3 does not apply to this right in particular; (2) the right to freedom of expression – that includes freedom to seek, receive and impart information and ideas of all kinds, by any means and regardless of frontiers, that can be limited when stated by law and when necessary.

Article 19

¹ Lecturer, Centre for Human Rights, University of Coimbra (Portugal), sofiafeliciocaseiro@gmail.com

“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.”

On this article we can find several elements of freedom of expression:

- (1) Freedom of opinion – the only element that cannot be restricted. It comprehends the right to change an opinion whenever, and for whatever reason a person so freely chooses. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.
- (2) Freedom of expression – includes the right to seek freely, receive and impart information and ideas of all kinds, regardless of frontiers. It also extends to all forms of expression and the means of their dissemination.
- (3) Free, uncensored and unhindered press – which is essential to ensure freedom of opinion and expression and the enjoyment of other rights provided by the Covenant. It also implies a free press and other media that can comment on public issues without censorship or restraint and to inform public opinion.²
- (4) Right to access to information – includes the right of access to information held by public bodies (records held by a public body, regardless of the form in which the information is stored)

In parallel with these elements, the text of the ICCPR introduces an innovation not found in the UDHR – it allows restrictions and limitations upon freedom of expression (paragraph 3). These limitations are connected to the duties and responsibilities that the enjoyment of freedom of expression implies. They shall only apply as provided by law and when necessary: (1) for the respect of the rights of reputations of others; (2) for the protection of national security or of public order; or (3) for public health or morals.

The rights laid down on article 19 are further restricted on article 20:

“1. Any propaganda for war shall be prohibited by law.

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

This provision restricts freedom of expression in the ways that its exercise could result in incitement to war, hatred, discrimination, hostility and violence.

It conducts the State Parties to adopt necessary legislative measures (which article 19 does not) prohibiting the actions referred in the article.³ General Comment No. 11 from the Human

² In General Comment No. 34 (that replaces General Comment No. 11) the HRC considers important that the States take into account the extent to which developments in information and communications technologies have substantially changed communication practices around the world.

³ General Comment No. 11 - <https://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf> 11 -

Rights Committee (monitoring organism of the ICCPR) clarifies that the prohibition in paragraph 1 extends to all forms of propaganda threatening or resulting in the act of aggression or breach of peace contrary to the UN Charter. Also, according to this interpretative document, the prohibition stated in paragraph 2 applies to advocacy and incitement on the grounds referred to when it is directed internally to that State or externally. The HRC also clarifies that article 20 does not prohibit advocacy of the sovereign right to self-defence or the right of peoples to self-determination.

Problem – when the sovereign speech confronts with a specific discriminatory speech against an ethnic minority, to migrants, to other religion believers – hate speech

II. Freedom of expression protection within the United Nations

Monitoring the ICCPR – Human Rights Committee

The ICCPR created the Human Rights Committee (article 28) to monitor the implementation of the Covenant by the States. Firstly, it obliged States to present reports about the measures and proceedings taken to apply the Covenant in their country.

With the Optional Protocol to the ICCPR, the Human Rights Committee was inducted to receive individual complaints from individuals who suffered a violation in the eyes of the Covenant.

“The Human Rights Committee performs the vital function of monitoring the enjoyment of the rights set out in the Covenant, a legally binding international treaty. Whether in its consideration of States parties’ reports, its adoption of general comments, or its examination of complaints by individuals or States alleging violations of the Covenant, the Committee is the pre-eminent interpreter of the meaning of the International Covenant on Civil and Political Rights.”⁴

Admissibility of complaints in the Human Rights Committee:

- Victim status – the individual that sends a communication to the HRC has to be a victim of a violation by a State Party of a right enshrined in the Covenant
- Exhaustion of domestic remedies
- Examination under another procedure of international investigation or settlement

What happens:

The Committee decides upon the communication received if it should take the matter to the attention of the State. When it does so, the States should respond within 6 months with explanations or clarifications on the matter and should indicate what measures were taken to remedy the situation.

Relevant complaints:

Case No. **2101/2011 (Evrezov v. Belarus)**, the Committee observed that the author’s application for a picket to protest against political persecution of former candidates for the posts of President of Belarus and members of their electoral teams, was rejected by the municipal authorities on the basis that the notion of ‘political persecution’ was not defined in the Criminal Code and because there was a sports event already scheduled to take place at the same location on the same date. The Committee noted that prohibiting a protest against political persecution because the terms of political persecution are not defined in law

⁴ <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>, p. 30

does not appear to meet the standards of necessity and proportionality under article 19 (3) and the second sentence of article 21 of the Covenant. The Committee further noted, that even though there was a second, potentially legitimate ground for refusal, i.e. a previously authorised sports event, there was no indication in the decision of the Executive Committee or the domestic courts, in light of the first objection raised by the Executive Committee, that the author would have been allowed to carry out a picket at an alternative time and/or date. The Committee, therefore, concluded that the State party violated the author's rights under articles 19 and 21 of the Covenant.⁵

Case no.2124/2011 (*Rabbae et al. v. Netherlands*) - the authors claimed that the acquittal of Mr Geert Wilders, member of parliament, on charges of insult of a group for reasons or race or religion and incitement to hatred and discrimination breached their rights under articles 2(3) (equality before law), 20(2) and 26 (equality against non-discrimination). The Committee noted that article 20(2) secures the right of people as individuals and as members of groups to be free from hatred and discrimination under article 26 by requiring States to prohibit certain conduct and expression by law. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. The Committee recalled in this regard that freedom of expression embraces even expressions that may be regarded as deeply offensive.

According to the Committee, a government prohibition on free speech pursuant to Article 20(2) against incitement to hatred or discrimination on the grounds of race, nationality or religion must comply with the strict requirements of Article 19(3). This means that the limitation must be provided by law and be necessary for the respect of the rights or reputations of others, or for the protection of national security, public order, public health or morals. The Committee further noted that Article 20(2) "does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be 'prohibited by law,' Such prohibitions may include civil and administrative as well as criminal penalties." [para. 10.4]

In this case, the Committee observed that the Netherlands' domestic laws not only afforded the Complainants with the opportunity to secure an order from the Amsterdam Court of Appeal, directing the public prosecutor to prosecute Wilders, but also the right to seek damages under Article 6(162) of the Civil Code for any tort Wilders had committed by his statements. Without addressing the Complainants' claims as to their inability to fully and independently participate in the criminal proceedings, the Committee noted the Netherlands' argument that the public prosecutor impartially presented the factual and legal issues in the case, and that the court independently examined the law and evidence and entered judgment after a careful assessment.

Result: The Committee concluded the acquittal did not violate Article 2(3), 20(2), and 26 because the government had undertaken "necessary and proportionate measures in order to 'prohibit' statements made in violation of article 20(2) and to guarantee the right of the [Complainants] to an effective remedy in order to protect them against the consequences of such statements." [para. 10.7]

Human Rights Council

⁵ Consideration by the Human Rights Committee at its 117th, 118th and 119th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 140

The Human Rights Council as created by the United Nations General Assembly on 15 March 2006 by Resolution 60/251. It is an inter-governmental body. The HRC is responsible for strengthening the promotion and protection of human rights around the globe and for addressing the situation of human rights violations and make recommendations on them. The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly. It replaced the former United Nations Commission on Human Rights.

Within the several procedures and mechanisms that constitute the HRC, we can find:

- (1) Universal Periodic Review - a mechanism which serves to assess the human rights situations in all United Nations Member States
- (2) Advisory Committee – serves as the Council’s “think tank” providing it with expertise and advice on thematic human rights issues (18 independent experts from different professional backgrounds, from the different regions of the world)
- (3) Complaint Procedure – allows individuals and organizations to bring human rights violations to the attention of the Council

The **Universal Periodic Review** is a unique process which involves a periodic review of the human rights records of all 193 UN Member States. The UPR is a significant innovation of the Human Rights Council, which is based on equal treatment for all countries. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe. Currently, no other mechanism of this kind exists. The UPR will assess the extent to which States respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party (human rights treaties ratified by the State concerned); (4) voluntary pledges and commitments made by the State (e.g. national human rights policies and/or programmes implemented); and, (5) applicable international humanitarian law.

Admissibility criteria to the Complaint Procedure:

A communication related to a violation of human rights and fundamental freedoms is admissible:

- When lodge by Individuals as well as NGOs with or without consultative status to the Human Rights Council;
- At any time;
- Domestic remedies must be exhausted unless such remedies would be ineffective or unreasonably prolonged;
- The pattern of human rights violations alleged cannot be being dealt with by one of the Special Procedures, a treaty body or other United Nations or similar regional complaints procedure.

National human rights institutions, established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.

What happens?

If a complaint is taken up after initial screening by the Working Group on Communications, the allegation of human rights violations will be transmitted to the State concerned. A Working Group of the Human Rights Council (the Working Group on Situations) will then consider the complaint and the reply received from the State, and make a recommendation to the Human Rights Council, which will consider the report of the Working Group in a confidential manner unless the Council decides otherwise.

The Human Rights Council can take one of the following measures:

- to discontinue considering the situation, if no further action is needed;
- to keep the situation under review, and request further information from the State concerned;
- to keep the situation under review and appoint an independent expert to monitor the situation and report back to the Council;
- to discontinue reviewing the situation under the confidential complaint procedure in order to take up a public consideration;
- to recommend to the OHCHR to assist the State concerned.

In 1993, the (then) Human Rights Commission (now Human Rights Council) established the mandate of the **Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression**⁶. The Special Rapporteur has the competency to gather all relevant information of discrimination against, threats or use of violence and harassment, including persecution and intimidation, directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression as affirmed in the UDHR and the ICCPR.

The Rabat Plan of Action⁷

In 2011, the OHCHR organised a series of expert workshops to ground the debate on incitement to hatred in international human rights law. The objectives were: to gain a better understanding of legislative patterns, judicial practices and policies regarding the concept of incitement to national, racial or religious hatred, while ensuring full respect for freedom of expression as outlined in articles 19 and 20 of the International Covenant on Civil and Political Rights; to arrive at a comprehensive assessment of the state of implementation of the prohibition of such incitement in conformity with international human rights law; and to identify possible actions at all levels.

The conclusions of the workshops were adopted in 2012, in Rabat.

Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence

- it suggests a high threshold for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the ICCPR
- It outlines a six-part threshold test that takes into account:
 - Context
 - Speaker
 - Intent
 - Extent
 - Likelihood

⁶ <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

⁷ <https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx>

The Rabat threshold test is being used by the national authorities for audio-visual communication in Tunisia, Côte d'Ivoire and Morocco. The Rabat threshold test is being used by the national authorities for audio-visual communication in Tunisia, Côte d'Ivoire and Morocco.

Other Considerations:

- The care about the spread of hate is also noted in several other Human Rights International Instruments such as in **Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination** (the monitoring of this Convention is made by the Committee on the Elimination of Racial Discrimination⁸).
- The importance of the prohibition of propaganda, incitement to discrimination, hostility and violence enshrined in article 20 is also present in the Rome Statute that regulates the International Criminal Court, as it criminalises the incitement to genocide. And it was yet clarified in the Rabat Plan of Action.

Final Notes:

- Freedom of expression cannot be limited in such a way that loses its core. The judiciary has the mission to balance the several fundamental rights without harming freedom of expression and therefore provoke a “chilling effect”.

⁸ <https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>