



# COMMENT

on

the draft text of the resolution on freedom of expression proposed by Egypt and the US at the twelfth session of the UN Human Rights Council

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**ARTICLE 19 welcomes the draft resolution on the right to freedom of expression proposed by Egypt and the United States at the twelfth session of the UN Human Rights Council. In our view, Member States of the UN Human Rights Council should adopt the draft resolution with the amendments which we suggest in this Comment.**

## **I. Introduction**

1. This Comment examines the draft text of the resolution on freedom of expression which has been proposed by Egypt and the US (“the draft resolution”) at the twelfth session of the UN Human Rights Council (the “HRC”) which is currently being held in Geneva.<sup>1</sup> ARTICLE 19 finds the draft resolution to be a marked improvement on an earlier draft text which was proposed by the Group of African States at the tenth session of the HRC in March 2009 (the “earlier draft resolution”).
2. At the outset of this Comment, ARTICLE 19 notes both *the positive and negative features of the draft resolution*. On the positive side, the draft text takes more account of international human rights law on freedom of expression than the earlier draft resolution, a welcome development. More specifically, a number of provisions of the draft resolution make reference to the “international obligations” of states on freedom of expression and several provisions recall the specific wording of Articles 19 and 20 of the International Covenant on Civil and Political Rights (the “ICCPR”). Furthermore, the draft resolution encompasses a progressive understanding of both Articles 19 and 20 of the ICCPR by recognising the importance of freedom of expression and the role of the media in combating racism, xenophobia and related intolerance. In doing so, some of the provisions of the draft resolution reflect *The Camden Principles on Freedom of Expression and Equality* (“*The Camden Principles*”).<sup>2</sup> Finally, the draft resolution acknowledges the importance of media access to situations of armed conflict.
3. On the negative side, ARTICLE 19 highlights two aspects of the draft resolution which are of particular concern. These concerns relate to: *first*, the reference to the “negative stereotyping of religions”, a concept that is not protected by international human rights law; and *second*, several references to HRC Resolution 7/36 which was adopted in March 2008 and controversially expanded the mandate of the Special Rapporteur on Freedom of Opinion and Expression by requesting the mandate-holder to “report on instances in which the abuse of the right to freedom of expression constitutes an act of racial or religious discrimination”. We also recommend that the draft resolution should be enhanced through a proper reflection of the relevant parts of *The Camden Principles*, including those principles on “promoting of intercultural understanding” and on “legal protection for equality and freedom of expression.”

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<sup>1</sup> This Comment analyses the text of draft resolution as of 9 September 2009. Any amendments introduced to the text of the draft resolution after its circulation could not have been addressed here.

<sup>2</sup> See <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>

4. At the beginning of this Comment, ARTICLE 19 also notes *the context* within which this UN HRC draft resolution emerges. In particular, we note that the protection of the right to freedom of expression under international human rights law has been undermined and threatened over recent years through HRC Resolution 7/36, which dilutes and distorts the focus of the mandate of the Special Rapporteur on Freedom of Opinion and Expression, as well as successive resolutions adopted by the HRC, its predecessor, the Commission on Human Rights and the General Assembly on the concept of the “combating of defamation of religions.”<sup>3</sup> These resolutions have been highly contested and the debates that have led to their adoption have been highly divisive for the international community within UN human rights bodies. Moreover, the progressive interpretation of international human rights law on freedom of expression by these bodies has not only been stalled but has been set back as a result of such resolutions.
5. In ARTICLE 19’s view, however, the Final Outcome Document of the Durban Review Conference (“Final Outcome Document”) which was adopted on 21 April 2009 signalled a shift in the approach of states at the UN on the issue of freedom of expression.<sup>4</sup> Importantly, the Final Outcome Document omitted any reference to “defamation of religions”, but instead focussed on the protection of the rights of individuals. The Final Outcome Document also contained provisions positively reaffirming the importance of freedom of expression in the fight against racism, racial discrimination, xenophobia and related intolerance.
6. In ARTICLE 19’s opinion, the positive features of the draft resolution should be seen in the light of and build upon the progress achieved on the protection of freedom of expression within the Final Outcome Document. ARTICLE 19 commends the efforts of the co-sponsors in presenting this draft resolution which, even in its current form, should be firmly viewed as the first positive development on freedom of expression at the UN HRC for some years. Yet we urge UN HRC Member States to make the changes we propose to ensure that the protection of freedom of expression is not compromised in any way. **ARTICLE 19 therefore recommends that the draft resolution should be adopted with the amendments indicated below.**

## II. The Preamble

7. The Preamble of the draft resolution remains much the same as that of the earlier draft resolution and contains a number of positive aspects from ARTICLE 19’s perspective – references to freedom of expression as “an

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<sup>3</sup> ARTICLE 19 and other human rights organisations have campaigned against such resolutions on “combating defamation of religions”. See ARTICLE 19 Comment of 25 March 2009 at <http://www.article19.org/pdfs/press/human-rights-council-article-19-calls-on-hrc-members-to-vote-against-propose.pdf> See also Sejal Parmar, “The Challenge of ‘Defamation of Religions’ to Freedom of Expression and the International Human Rights System” (2009) 3 *European Human Rights Law Review* 353-375.

<sup>4</sup> See the press release of ARTICLE 19 and the Cairo Institute for Human Rights Studies of 23 April 2009 at <http://www.article19.org/pdfs/press/geneva-article-19-and-cihrs-welcome-agreement-on-the-final-outcome-document-.pdf>

important indicator of the level of protection of other human rights and freedoms” (PP3), “increased attacks directed against, and killings of, journalists and media workers” (PP4), “the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right” (PP5); “the importance ... of access to information” (PP6). ARTICLE 19 welcomes the Preamble’s highlighting of different manifestations of violations of freedom of expression.

8. Unlike the earlier draft resolution, however, the first paragraph of the Preamble of the draft resolution recalls HRC Resolution 7/36 as well as all previous resolutions of the Commission on Human Rights. This recognition of previously adopted resolutions by the HRC and its predecessor the Commission on Human Rights is reflected in later provisions of the draft resolution. ARTICLE 19 recommends however that specific reference to HRC Resolution 7/36 in the Preamble – or in any other part of the draft resolution for that matter – should be omitted for reasons indicated in Part VII below.

**(i) ARTICLE 19 welcomes the draft resolution’s references to other UN human rights sources.**

**(ii) ARTICLE 19 recommends that specific reference to HRC Resolution 7/36 in the Preamble or in the substantive provisions of the draft resolution should be omitted.**

**(ii) ARTICLE 19 recommends that the Preamble of the draft resolution should be made consistent with the subsequent provisions by recalling all relevant Human Rights Commission and HRC resolutions and decisions.**

### **III. States Parties’ Obligations under International Law**

9. ARTICLE 19 welcomes the fact that the draft resolution places particular emphasis on states’ actual obligations relating to freedom of expression across its provisions, in particular: Paragraph 1 “[r]eaffirms the rights of individuals and *obligations of States Parties under the ICCPR*”; Paragraph 3 bis “urges states to take effective measures, *consistent with their international human rights obligations*”; Paragraph 4 calls on States to “respect the rights of individuals and *obligations undertaken by States Parties referred to in paragraph 1*” (a), “review their procedures, practices and legislation, with a view to *ensure the full and effective implementation of all their obligations under international human rights law* related to the exercise of the right to freedom of opinion and expression” (OP4(n)) and “stresses that *condemning and addressing, in accordance with international human rights obligations ... any advocacy of national, racial or religious hatred that constitutes incitement to discrimination is an important safeguard to ensure the enjoyment of human rights and fundamental freedoms of all, particularly minorities*” (OP4 bis) (emphasis added).

**(i) In ARTICLE 19’s view, the draft resolution’s references to the international obligations of states in relation to freedom of expression add to and arguably amplify those contained in paragraphs 4(b), (o) and 5, which were included in the earlier draft resolution. The cumulative effect of these references to international obligations is a strong sense that the draft resolution is soundly based on existing states’ obligations on freedom of expression, under both Articles 19 and 20 of the ICCPR. These provisions are therefore welcomed by ARTICLE 19.**

#### **IV. The Language of Articles 19 and 20 of the ICCPR**

10. ARTICLE 19 appreciates that in a number of the paragraphs the draft resolution uses the precise language of international human rights law on freedom of expression. An additional paragraph to the Preamble recalls that the “exercise of the right of freedom of expression carries with it special responsibilities” (PP7) echoing Article 19(2) of the ICCPR.

11. ARTICLE 19 observes that a number of subsequent provisions properly balance freedom of expression and equality principles through a precise recollection of international law on the issue, namely Article 20 of the ICCPR. Notably, Paragraph 3(bis) “[e]xpresses further concern that incidents of racial and religious intolerance, discrimination, and related violence, as well as of negative stereotyping of religions and racial groups around the world, continue to rise, and *condemns, in this context, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, and urges States to take effective measures, consistent with their international human rights obligations, to address and combat such incidents”. Similarly, as indicated above, paragraph OP4 bis “[s]tresses that condemning and addressing, in accordance with international human rights obligations, including those regarding equal protection of the law, *any advocacy of national, racial or religious hatred that constitutes incitement to discrimination* is an important safeguard to ensure the enjoyment of human rights and fundamental freedoms of all, particularly minorities”. However, on the basis of Principle 3 of *The Camden Principles*, ARTICLE 19 argues that paragraph OP4 should refer to “equality” rather than the narrower concept of “equal protection of the law”.

**(i) ARTICLE 19 welcomes the provisions of the draft resolution which rely upon the specific wording of Articles 19 and 20 of the ICCPR.**

**(ii) ARTICLE 19 recommends that paragraph OP4 bis should refer to “equality” instead of “equal protection of the law”.**

12. ARTICLE 19 notes that paragraph 3(bis) of the draft resolution states that the HRC “[e]xpresses further concern that incidents of racial and religious intolerance, discrimination, and related violence, *as well as negative stereotyping of religions and racial groups around the world*, continue to rise, and *condemns, in this context, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...*”

(emphasis added). ARTICLE 19 has a number of concerns about the reference to the “negative stereotyping of religions” and the associated text. *First*, we note that the reference recalls the vague language contained within the highly problematic HRC resolutions on “combating defamation of religions” – a concept that falls far short of the threshold of incitement put forward in Article 20(2) of the ICCPR. *Second*, and more specifically, the reference to “negative stereotyping of religions” here might suggest the international human rights system protects the religions. Yet international human rights law actually protects individuals and groups but not ideas or beliefs, whether religious or not. *Third*, the words “in this context” might indicate that there is an underlying presumption in paragraph 3(bis) that, in certain circumstances, the “negative stereotyping of religions” may be so severe as to constitute a violation of Article 20(2) of the ICCPR. As already indicated, international human rights law, including Article 20 of the ICCPR, only protects individuals and groups, and not religious, religious ideas or beliefs. The presumption underlying the reference to “negative stereotyping of religions” would be a false one and therefore serves to undermine the framework of international human rights law.

13. We therefore argue that the reference to “as well as negative stereotyping of religions and racial groups” should be entirely omitted. In the alternative, we argue that paragraph 3(bis) should be amended and that the reference to “negative stereotyping of religions and racial groups” should be replaced with the following: “negative stereotyping of individuals or groups on the basis of their religion or race”.

**(iii) ARTICLE recommends that the words “as well as negative stereotyping of religions and racial groups” are omitted from paragraph 3(bis) of the draft resolution. In the alternative, ARTICLE 19 recommends that the words “negative stereotyping of religions and racial groups” in paragraph 3(bis) are replaced by “negative stereotyping of individuals or groups on the basis of their religion or race”.**

## **V. Media Responsibilities and Best Practices**

14. ARTICLE 19 welcomes the fact that paragraph OP5 bis “[r]ecognises the relevant moral and social responsibilities of the media, and the importance that voluntary codes of conduct can play in combating racism, xenophobia and related intolerance”. This provision essentially reflects Principle 9 of *The Camden Principles* on media responsibilities in promoting intercultural understanding, and Principle 9.3 in particular. Paragraph OP5 ter then “[e]ncourages consultations among media professionals through relevant associations and organizations at the national, regional and international levels, with the assistance of the OHCHR, with a view to exchanging views on this subject and sharing best practices, taking into account the independence of the media and international human rights law”.

15. In ARTICLE 19's opinion, the draft resolution may be strengthened through the inclusion of further provisions on the role of the media in the promotion of intercultural understanding in accordance with *The Camden Principles*. In relation to the media, the draft resolution should provide that all media organisations have a moral and social responsibility to combat discrimination and promote "intercultural understanding" as such by *inter alia*: taking care to report in context and in a factual and sensitive manner, being alert to the danger of discrimination being furthered in the media, avoiding unnecessary references to race, religion, gender and other characteristics that may promote intolerance, raising awareness of the harm caused by discrimination and reporting on different groups and communities and giving their members an opportunity to speak and to be heard (Principle 9). Moreover, media organisations should ensure diversity within their workforces, address issues that concern all groups of society and seek a multiplicity of sources from different communities (Principle 6).
16. The draft resolution should also recognise the role of the state in the promotion of intercultural understanding in accordance with *The Camden Principles*. The draft resolution should provide that states should: impose obligations on public officials to avoid as far as possible making statements that promote discrimination or undermine equality and intercultural understanding and also engage in broad efforts to combat discrimination against and negative stereotypes of individuals and groups and to promote intercultural understanding including through teacher training and the school curriculum (Principle 8).

**(i) ARTICLE 19 welcomes Paragraphs OP5 bis and OP5 ter which recognise the importance of the media in realising freedom of expression and equality.**

**(ii) ARTICLE 19 recommends the enhancement of the draft resolution through the incorporation of further provisions on the respective roles of the media and the state in the promotion of intercultural understanding, as indicated above.**

## **VI. Dialogue and Debate**

17. The draft resolution contains several new paragraphs absent from the earlier draft resolution which refer to the importance of the exercise of expression through dialogue and debate in combating racism. The additional paragraph to the Preamble states that "[s]tates should encourage free, responsible and mutually respectful dialogue" (PP7). Paragraph OP6 bis later "[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, in line with relevant provisions of international human rights law". Paragraph OP6 ter then "[r]ecognizes that the open public debate of ideas can be among the best protections against

racism, racial discrimination, xenophobia, and related intolerance, and can play a positive role in combating national, racial, or religious hatred”.

18. While ARTICLE 19 welcomes these provisions, in our view the draft resolution should go further by providing that states should ensure basic legal protections for freedom of expression and equality according to Principles 1 to 4 of *The Camden Principles*. In particular, the draft resolution should state that states should ratify and implement domestically international and regional human rights treaties guaranteeing freedom of expression and equality and also ensure that the right to freedom of expression, including the right to information, is enshrined in domestic constitutional provisions or their equivalent and protected in domestic legislation, in accordance with international human rights law.

**(i) ARTICLE 19 welcomes the draft resolution’s provisions on the importance of dialogue and debate in combating racism.**

**(ii) ARTICLE 19 recommends that the draft resolution should further highlight the responsibilities of states to ensure legal protection for freedom of expression and equality, as indicated above.**

## **VII. The Role of the Special Rapporteur on Freedom of Opinion and Expression**

19. ARTICLE 19 appreciates that Paragraph 2 of the draft resolution takes note of the Special Rapporteur’s “report ... (A/HRC/11/4), as well as his presentation and the interactive dialogue thereon at the 11<sup>th</sup> session of the UN Human Rights Council”. In this context, we recall that the Special Rapporteur was attacked by some states under the Special Procedures Code of Conduct and that, together with 34 other civil society organisations, ARTICLE 19 expressed concern about the issue in an open letter to member states of the HRC.<sup>5</sup>

20. In relation to the role of the Special Rapporteur, ARTICLE 19 welcomes paragraph 7 of the draft resolution insofar as it invites the mandate-holder to continue his/her mandate in accordance with “all relevant Human Rights Council resolutions and decisions”. Paragraph 7 is clearly an improvement to the earlier draft resolution which had only referenced HRC Resolution 7/36 that controversially requests the Special Rapporteur to “report on instances in which the abuse of the right to freedom of expression constitutes an act of racial or religious discrimination”, but without mentioning any other relevant HRC resolutions. We note, however, that paragraphs 7 and 8, but also 12 and PP1 (as already indicated) of the current draft resolution make special reference to HRC Resolution 7/36, which is the only HRC resolution to which the draft resolution specifically refers. In this context, ARTICLE 19 recalls its own and other civil society organisations’ strong opposition to the extension

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<sup>5</sup> See Joint Letter of 11 June 2009 available at <http://www.article19.org/pdfs/letters/hrc-open-letter-on-mandate-holders.pdf>

of the mandate of the Special Rapporteur required by HRC Resolution 7/36.<sup>6</sup> We have not wavered in our opposition to HRC Resolution 7/36 and consequently we do not believe that that this draft resolution should make special reference to that resolution. On this basis, we recommend that references to HRC Resolution 7/36 in paragraphs 7, 8 and 12 as well as PP1 should be omitted.

**(i) ARTICLE 19 welcomes paragraph 7 insofar as it calls on the Special Rapporteur to continue his activities in accordance “with all relevant HRC resolutions and decisions”.**

**(ii) ARTICLE 19 recommends that all references to HRC Resolution 7/36 in the draft resolution should be omitted.**

21. Paragraph 14, another new provision, “[r]equests the Special Rapporteur to submit an annual report to the Human Rights Council and to the United Nations General Assembly covering activities relating to his/her mandate”. Paragraph 14(bis) also states that the HRC “[d]ecides to continue its consideration of the issue of the right to freedom of opinion and expression in accordance with its programme of work”.

**(ii) ARTICLE 19 views paragraphs 14 and 14(bis) as positively setting out the reporting responsibilities of the Special Rapporteur as well as consolidating the HRC’s work on the right of freedom of expression.**

## **VIII. Media in Situations of Armed Conflict**

22. Notably, paragraph 5 of the draft resolution contains an expanded provision concerning the access of media to situations of armed conflict, whether international or non-international. Whereas the earlier draft resolution simply called “all parties to an armed conflict to respect international humanitarian law, including their obligations under the Geneva Conventions of 12 August 1949 ... and the two Additional Protocols thereto of 8 June 1977, whose provisions extend protection to journalists in situations of armed conflict”, the draft resolution also calls on parties to an armed conflict “to allow, within the framework of applicable rules and procedures, media access and coverage, as appropriate, in situations of international and non-international armed conflict”. It is speculated that this additional clause to paragraph 5 is inspired by recent examples of restrictions on media access to situations of armed conflict (eg during Israel’s offensive against Gaza in late 2008/early 2009).

**(i) ARTICLE 19 welcomes the reinforcement of international humanitarian law in paragraph 5 coupled with its emphasis on media access to situations of armed conflict.**

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<sup>6</sup> See petition of ARTICLE 19 and other human rights organisations of 28 March 2008 at <http://www.article19.org/pdfs/press/petition-hrc.pdf>

## **IX. Summary of Comments and Recommendations**

**23. ARTICLE 19 welcomes the following positive features of the draft resolution:**

- (i) ARTICLE 19 welcomes the draft resolution’s references to other UN human rights sources.**
- (ii) In ARTICLE 19’s view, the draft resolution’s references to the international obligations of states in relation to freedom of expression add to and arguably amplify those contained in paragraphs 4(b), (o) and 5, which were included in the earlier draft resolution. The cumulative effect of these references to international obligations is a strong sense that the draft resolution is soundly based on existing states’ obligations on freedom of expression, under both Articles 19 and 20 of the ICCPR. These provisions are therefore welcomed by ARTICLE 19.**
- (iii) ARTICLE 19 welcomes the provisions of the draft resolution which rely upon the specific wording of Articles 19 and 20 of the ICCPR.**
- (iv) ARTICLE 19 welcomes Paragraphs OP5 bis and OP5 ter which recognise the importance of the media in realising freedom of expression and equality.**
- (v) ARTICLE 19 welcomes the draft resolution’s provisions on the importance of dialogue and debate in combating racism.**
- (vi) ARTICLE 19 welcomes paragraph 7 insofar as it calls on the Special Rapporteur to continue his activities in accordance “with all relevant HRC resolutions and decisions”.**
- (vii) ARTICLE 19 views paragraphs 14 and 14(bis) as positively setting out the reporting responsibilities of the Special Rapporteur as well as consolidating the HRC’s work on the right of freedom of expression.**
- (viii) ARTICLE 19 welcomes the reinforcement of international humanitarian law in paragraph 5 coupled with its emphasis on media access to situations of armed conflict.**

**24. ARTICLE 19 makes the following recommendations to UN HRC Member States in relation to draft resolution:**

- (i) ARTICLE 19 recommends that the draft resolution should be adopted with the amendments indicated below.**

- (ii) **ARTICLE 19 recommends that specific references to HRC Resolution 7/36 in the draft resolution – in particular those in PP1 and paragraphs 7, 8 and 12 – should be omitted.**
- (iii) **ARTICLE 19 recommends that the Preamble of the draft resolution should be made consistent with the subsequent provisions by recalling all relevant Human Rights Commission and HRC resolutions and decisions.**
- (iv) **ARTICLE 19 recommends that paragraph OP4 bis should refer to “equality” instead of “equal protection of the law”.**
- (v) **ARTICLE recommends that the words “as well as negative stereotyping of religions and racial groups” are omitted from paragraph 3(bis) of the draft resolution. In the alternative, ARTICLE 19 recommends that the words “negative stereotyping of religions and racial groups” in paragraph 3(bis) are replaced by “negative stereotyping of individuals or groups on the basis of their religion or race”.**
- (vi) **ARTICLE 19 recommends the enhancement of the draft resolution through the incorporation of further provisions on the respective roles of the media and the state in the promotion of intercultural understanding.**
- (vii) **ARTICLE 19 recommends that the draft resolution should further highlight the responsibilities of states to ensure legal protection for freedom of expression and equality.**

**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.