NOTE

on

the draft Declaration on the Right To Communicate

Prepared by C. Hamelink

by
ARTICLE 19
Global Campaign for Free Expression

January 2003

1. Introduction

A draft Declaration on the Right to Communicate has been prepared by C. Hamelink (Hamelink Declaration)[1] and endorsements of this Declaration are being sought. This Note by ARTICLE 19 assesses the Hamelink Declaration both for compliance with international human rights standards, in particular relating to freedom of expression, and for the contribution it makes to further developing the right to communicate.

ARTICLE 19 endorses, in principle, the idea of an authoritative elaboration of a right to communicate. Numerous claims are made in the name of the right to communicate, and it would be useful to promote consensus as to its content. Authoritative clarification of the right to communicate would, in addition, help promote its acceptance by decision-makers, courts and other influential bodies, leading to greater respect for human rights.[2]

[1] The version being commenting on here is dated 15 December 2002 and done at Amsterdam/Geneva.
[2] ARTICLE 19 will be releasing shortly a comment on the right to communicate, analysing its content and setting out our views on what could usefully be included.

One concern we have about the right to communicate, however, relates precisely to the wide range of claims made in its name. It remains very unclear what it includes, and some of the claims made represent clear breaches of other rights. We are strongly of the view that any elaboration of the right to communicate must respect the framework of existing rights.

We believe, furthermore, that the elaboration of the right to communicate should take place within the framework of existing rights rather than seeking to create new rights. There already exists under international law broad consensus on the basic content of fundamental human rights and, although this normative framework is certainly not complete, we are of the view that the various legitimate claims made for the right to communicate can be accommodated within it. We note, in particular, that the right to freedom of expression is recognised to include a positive element, placing an obligation on States to take positive measures to ensure respect for this important right. Interpretation by courts and other authoritative bodies has started to elaborate on the nature of these positive rights and, collectively, this interpretation broadly encompasses the legitimate content of the right to communicate.

We have two main concerns with the Hamelink Declaration. First, very unfortunately, it fails in important ways to respect established rights, particularly the right to freedom of expression. Indeed, if accepted, it would provide a broad licence to governments to repress critical or oppositional viewpoints. Second, equally important, it does little to elaborate, in a constructive and clear manner, the content of the right to communication. It thus fails to promote the goals, noted above, that elaboration of the right to communicate could further.

ARTICLE 19 does not endorse the Hamelink Declaration, which we consider to retard rather than promote further realisation of human rights. We also urge other NGOs and interested bodies and persons not to endorse it. Our concerns with the Hamelink Declaration are elaborated in greater detail below.

2. General Concerns

ARTICLE 19 has two primary concerns with the Hamelink Declaration. First, despite a statement in the preamble that it does not seek to "substitute" rights already recognised, many of the provisions of the Hamelink Declaration are clearly contrary to the right to freedom of expression. Second, it fails to provide any useful elaboration of concepts which are clearly central to the right to communicate, such as equitable access to the public media and the means of communication. Instead, to the extent that it deals with matters legitimately covered by the right to communicate, it repeats rights already set out elsewhere, adding vague statements of principle.

Restricting Rights

The Hamelink Declaration contains a number of restrictions on fundamental rights. Part III, for example, sets out a number of restrictions on expression, either generally or in relation to the mass media, which go far beyond the legitimate scope of restrictions as recognised under international law, including the *Universal*

Declaration on Human Rights (UDHR)[3] and the *International Covenant on Civil and Political Rights* (ICCPR).[4] Not only are these restrictions contrary to international law, but they have no place in a declaration on the right to communicate (see below, in relation to our second main concern).

Under international law, restrictions on freedom of expression are permitted, but only where these meet a strict three-part test which requires that they a) be provided by law; b) protect a legitimate interest recognised under international law; and c) are necessary to protect that interest. These standards are designed to promote a balance between the recognised need for certain restrictions on freedom of expression and the potential abuse by governments of their power with a view to limiting legitimate speech. This is a difficult balancing act, and international standards, as authoritatively elaborated, for example by international courts, have started to clarify the balance in relation to a wide range of issues.

The first part of this test implies that any restriction must be set out in a law that is both accessible and sufficiently clear to enable individuals to "foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[5] Vague or unclear provisions fail to meet this standard and open up the possibility of abuse of restrictions for purposes not originally intended. Many of the restrictions in the Hamelink Declaration are extremely unclear.[6] For example, Clause 3 of Part III provides that the media must "respect standards of due process in the coverage of trials". Due process, while relatively clear in relation to courts, lacks any concrete meaning in relation to the media. At a minimum, an international declaration should provide inadequate guidance as to the content of the right to communicate. There is a very real risk that these provisions will be abused by repressive governments as a basis for unduly restricting freedom of expression.

The third part of the test, that restrictions be necessary to protect legitimate interests, implies, among other things, that a restriction not be overbroad or go beyond what is required to protect the legitimate interest. Standards relating to legitimate restrictions have been developed carefully over years by international bodies and courts. Many of the provisions in Part III of the Hamelink Declaration go far beyond the scope of legitimate restrictions on freedom of expression. For example, Clause 2 of Part III provides that everyone has a right to be protected against "misleading" information in the media. It is, however, well established that rules prohibiting false information are illegitimate.

The Hamelink Declaration also breaches human rights guarantees by placing broad, undefined obligations on private actors. For example, it recognises an obligation to "respect thoughts and ideas of all other people". It is quite unclear what this means and, on any reasonable interpretation, it is illegitimate. Does it mean, for example, that no one is allowed to criticise other people's ideas?

---

[3] UN General Assembly Resolution 217A (III), 10 December 1948.
[4] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[5] *Sunday Times v. the United Kingdom*, 26 April 1979, para. 49 (European Court of Human Rights).
[6] The specific problems with various provisions in the Hamelink Declaration issues will be discussed in greater detail below.

Failing to Elaborate the Right to Communicate

The Hamelink Declaration, despite its numerous provisions, provides very little useful elaboration of the right to communicate. Many of its provisions deal with restrictions on rights. ARTICLE 19 is of the view that this fundamentally misconstrues the real essence of the right to communicate. A number of elements of the right to communicate have been advocated, including equitable access to the media, access to the means of communication, the right of communities to have their stories told and views heard and the right to information. None of these are about restricting the content of what may be expressed. Even if the restrictions in the Hamelink Declaration did not breach the right to freedom of expression which, as noted above, is unfortunately not the case, we are of the view that they have no place in a declaration on the right to communicate.

At least as importantly, the Hamelink Declaration fails to provide adequate positive guidance as to the content of the right to communicate, even where it does address the right topics. For example, ARTICLE 19 considers that the issue of equitable access to the media and the means of communication is central to any legitimate conception of the right to communicate. The Hamelink Declaration deals with this issue briefly, in only one provision, Clause 4 of Part I, and in very general terms. Any declaration on the right to communicate needs to address this in far more detail, providing useful guidance as to what the concept of equitable access means and what States and other international actors should do to promote such access.

This is a general problem with the Hamelink Declaration which, to the extent that it deals with matters legitimately covered by the right to communicate, tends to provide general statements, many simply reiterating standards set out in other international documents, but little specific policy or standard-setting guidance. ARTICLE 19 considers that there is absolutely no need for an international statement on the right to communicate which ultimately fails to provide useful clarification of its meaning.

3. Specific Concerns

The Preamble

The very first clause of the preamble is seriously misleading. This clause refers to a number of authoritative, official statements on human rights, all formally adopted by UN bodies, including the UDHR, ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (IESCR).[7] However, it also refers to one other international statement, the Universal Declaration of Human Responsibilities, a document which has no formal international status and is certainly not a UN standard-setting document. This is highly misleading. Furthermore, the Universal Declaration of Human Responsibilities has been roundly rejected as illegitimate by leading human rights organisations.[8] It undermines the rights set out in the UDHR and contains a

[7] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 3 January 1976.
[8] See Amnesty International, *Muddying the waters The Draft 'Universal Declaration of Human Responsibilities': No complement to human rights*, AI Doc. IOR 40/002/1998, 1 April 1998.

number of statements which breach these rights. There is no warrant for citing this document in any statement seeking to promote human rights.

The sixth clause of the preamble states that all individuals should have "equal opportunities" to participate in "all means of communication" while preserving "the right to protection against their abuses". As noted above, in our view, protection against abuse of freedom of expression is not part of the right to communicate.

The seventh clause of the preamble refers to the "critical necessity" of dialogue to establish a "new system of international relations based on inclusion, cooperation, and solidarity". It is well beyond the scope of the right to communicate to talk about a new system of international relations, and this is certain to alienate many people. Furthermore, it is totally unclear what the concepts of inclusion, cooperation, and solidarity, as nice as they sound, might mean in this context. Finally, on any interpretation, these are surely unrealistic bases for a system of international relations.

The tenth clause of the preamble claims that the purpose of the Declaration is "not to substitute the notion of the right to communicate for any rights already recognized by the international community, but to increase their scope with new elements in the context of the right to communicate". Unfortunately, as already noted, this is not the case with the Hamelink Declaration, which does indeed trench on established human rights. Indeed, it is hard to avoid the suspicion that this clause was included precisely because the Declaration does purport to restrict fundamental rights.

Part I – Information Rights

Clause 1 of Part I reiterates the guarantee of freedom of expression found at Article 19 of the UDHR with one important difference: it extends the prohibition on interference to private parties. Clause 2 does the same in relation to the rights to freedom of thought, conscience and religion. It is unclear why the Hamelink Declaration seeks to amend these well-established rights but these changes are potentially very harmful. For example, the proposed right to freedom of religion could be seen as prohibiting individuals from criticising religions, a legitimate exercise of the right to freedom of expression.

Clause 3 of Part I states that everyone has the right to be "properly informed about matters of public interest" and further that this "includes access to information on matters of public interest held by public or private sources". There are a number of problems with this. First, the notion of public interest is exceedingly vague and thus a totally inappropriate basis for any positive right, such as the right to information. Second, ARTICLE 19, in common with a number of international bodies and other NGOs, are of the view that the right to freedom of expression includes a right to access **all** information held by public bodies, subject to narrowly defined exceptions. To provide for this right only in relation to information on **matters of public interest** seriously and unnecessarily limits it.

Finally, there are potentially serious problems with requiring private bodies to disclose all information of public interest. Very few countries around the world include private bodies within the ambit of their freedom of information laws. South

Africa, on of the few exceptions, requires private bodies to disclose only information which is required to exercise or protect a right. ARTICLE 19 does believe that broader obligations in this area may be warranted for private bodies. At the same time, there are serious potential problems with this, for example in the area of protection of journalists' sources or of official harassment. The implications of any extension of the obligation to disclose information to private parties need to be carefully considered. In particular, basing this extended obligation on the idea of public interest is problematical.

Clause 5 of Part I states that "the resources needed for public communication … remain the common heritage of humankind". It might be reasonable to posit that the **public** resources needed for communications should remain in **public** hands, but this statement goes much further in two respects. First, it is not restricted to public resources, so could be considered to include resources currently held in private hands. Given that what is "needed" for communication is not defined, this is problematical and could be abused by governments to justify the seizure of private media outlets. Second, many public resources needed for public communication cannot be considered to be the common heritage of humankind. For example, public service broadcasters are clearly needed for public communication but it is hardly proper to describe them as the common heritage of humankind.

Part II – Cultural Rights

As with Part II, the first two clauses of this Part repeat international guarantees, with additions which are unclear and unnecessary. Clause 1 repeats, word-for-word, the right to participate in cultural life, as guaranteed by Article 27(1) of the UDHR, but adds the phrase, "this includes the right to artistic, literacy and academic creativity and independence". It is unclear why the established UDHR guarantee was considered insufficient, but the additions are clearly already covered by the UDHR guarantee.

Clause 2 repeats the guarantee in Article 27(2) of the UDHR in relation to the right of authors to protect their interests in their work, adding, "in particular the moral rights of individual creative artists need strong protection". Once again, it is unclear why the established UDHR guarantee was considered insufficient. This is more problematical than Clause 1 for a number of reasons. First, it simply repeats the guarantee for artists, adding nothing to the original statement. Second, it appears to create a hierarchy among those protected, which is unfortunate. Why should artists need protection more than scientists or writers? Third, by stipulating that artists need "strong" protection, it actually undermines the guarantee. Rights should simply be protected and to suggest that some should benefit from strong protection implies that others should not.

Part III – Protection Rights

This whole Part is highly problematical, as noted above. Apart from a couple of provisions, all of the clauses in this Part impose restrictions on freedom of expression which, in our view, have no place in a declaration on the right to communicate. Furthermore, most of these restrictions go beyond what is recognised as legitimate under international law.

Clause 1 provides: "Everyone has the right be protected against forms of communication that are discriminatory in terms of [a variety of grounds such as gender, race and religion]". This largely overlaps with Clause 10, which prohibits "incitement to hate, prejudice, violence, war, and genocide". Clause 1 is thus repetitive. It is also excessively broad, prohibiting anything that could be considered to be discriminatory. It is far broader even than Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[9] considered problematical by many human rights authorities. Article 4 prohibits, "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".

Clause 2 provides: "Everyone has the right to be protected against the deliberate dissemination of misleading and distorted information by national as well as international information enterprises". It is well established that prohibitions of this sort on 'false news' are illegitimate. This is highlighted by a case from Zimbabwe where two journalists were illegally detained and then tortured by the army before being charged with publishing false news for alleging that there had been a coup attempt. The false news provision was ultimately struck down by the Zimbabwean Supreme Court.[10]

Clause 3 provides that the mass media should, "respect standards of due process in the coverage of trials". The concept of due process, as noted above, has evolved in relation to courts and serves to protect the rights of parties to a case. It is unclear what it means in relation to the media and the idea of placing an obligation on the media to protect litigants' rights is totally inappropriate. Even the second part of Cause 3, that the media should, "not presume guilt of defendants before a verdict of guilt by a court of law has been established" is increasingly being questioned as an illegitimate restriction on freedom of expression.

Clause 4 provides for protection of privacy and autonomy against interference by public or private bodies, specifically including the mass media. It is unclear why the mass media have been singled out for special reference here as invasions of privacy by public bodies, such as security bodies, are a widespread and serious problem which appears to have escalated since the events of 11 September 2001. In any case, any protection for privacy must recognise certain exceptions if it is not to be abused to prevent investigative journalists from exposing corruption and wrongdoing by public officials and others. A general exception in favour of the overall public interest is, at a minimum, required.

Clause 7 protects children against, "harmful media products and commercial and other exploitation". Some protections for children are legitimate and in place in most countries. This provision, however, is excessively broad and also extremely vague. Some people claim, for example, that violence on television is harmful to children. Would this provision, on that basis, prohibit Bugs Bunny from being shown to children?

---

[9] UN General Assembly Resolution 2106A(XX), 21 December 1965, in force 4 January 1969.
[10] *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgment No. S.C. 36/2000, Civil Application No. 156/99. ARTICLE 19 worked closely with the applicants' lawyers in this case, providing an in-depth brief which can be found on our website, http://www.article19.org.

Clause 9 provides: "Everyone has the right to be protected from all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression". Once again, the phrasing of this prohibition is unduly broad. It could be used, for example, to repress criticism of a controversial government policy on the basis that this is likely to encourage 'illegal' demonstrations against it, breaching the peace. Provisions of this sort have been widely abused by repressive governments in the past. A much closer nexus between the impugned expression and the risk of a breach of the peace should be required. The Indian Supreme Court, dealing with this issue, stated: "the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'."[11]

Part IV – Participation Rights

Clause 2 of Part IV states, among other things, that everyone has the right to participate in decision-making about, "the structure and policies of media industries". This is totally illegitimate and could potentially lead to serious abuse of the right to freedom of expression. The authorities have the right to set general public policy including, for example, in relation to allocation of broadcast licences. They have no right, however, to interfere with matters relating to the internal structure or policies of media bodies, which could well constitute an infringement of the right to editorial independence.

Clause 3 of Part IV provides that everyone has the right to acquire certain skills, including facility in storytelling and critical media analysis. It is, perhaps, a nice idea to think that everyone in the world should be equipped to undertake critical media analyses but this is totally unrealistic. Indeed, promoting universal literacy, far more basic and important, has so far proved elusive.

Part VI – Implementation and Monitoring Methods

Clause 2 of Part VI provides for restrictions on the rights set out, as long as they are, among other things, of "temporary duration". It is perhaps ironic that the Hamelink Declaration itself provides for restrictions on the very rights it sets out that appear to be permanent in nature. In any case, it is obvious that at least some restrictions on the right to freedom of expression, for example, may legitimately be permanent. Permanent restrictions apply, for example, to defamatory statements in almost every country in the world.

Most of Part VI relates to the Hamelink Declaration's proposal to set up a "Communication Rights Ombudsman" to protect the right to communicate. A plethora of international mechanisms exist to promote and protect guaranteed human rights. While there are serious problems with these mechanisms, an enormous amount of international attention has been devoted to improving them and it is facile to assume that a "Communication Rights Ombudsman" would be a more effective mechanism. Rather than setting up new mechanisms, ARTICLE 19 would advocate in favour of improving the systems that already exist.

[11] [1989](2) SCR 204, p. 226.

Part V – Duties and Responsibilities

Clause 1 of Part V provides: "Everyone has a responsibility to promote and defend the right to communicate, to treat all people in accordance with this right, and to create the conditions for all people to enjoy the right to communicate". This fundamentally misconstrues the way human rights and obligations work. Under international law, States bear the primary responsibility for protecting rights, a reflection of their power and status as primary abusers of human rights. Although it might be argued that everyone has a moral or social responsibility to respect rights, this cannot be compared with the legal obligation States have to do so. A declaration on the right to communicate should avoid vague, unenforceable and ultimately ineffective general statements about morality and focus on the obligations of States and public bodies to protect rights.

Clause 2 of Part V sets out a number of obligations on everyone as a "necessary complement to the right to communicate", including to respect the ideas of other people, to respect the creative work of other people and to share our knowledge and experience with others. Even if cast as social responsibilities, these obligations are unreasonable and oppressive. Open public debate depends on criticism of other people's ideas and creative work, even unreasonable or excessively harsh criticism. They become totally unacceptable when cast, as in the Hamelink Declaration, as obligations, which implies a legal requirement.