ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

STATEMENT

on

the Right to Communicate

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

An important debate is taking place over whether the World Summit on the Information Society should adopt a declaration on 'the right to communicate'. Different rationales have been expressed in support of such a declaration but, in a broad sense, its advocates tend to act out of a concern that the media are becoming increasingly homogenised and that minority, dissenting or even local voices and issues are not being heard. Globalisation and commercialisation of the media is one of the concerns, along with the exclusion of the poor from decision-making processes due to a lack of information and access to the means of communication. Governments are part of the problem, for example where they impose restrictive rules and regulations on the media or telecommunications or where they seek to impose political control over these sectors. It is, however, also argued that developments in the private sector, particularly the increasing dominance of large media corporations, are now posing a parallel threat to freedom of expression, along with these 'traditional' State threats.

ARTICLE 19 has described the right to communicate, in its widest sense, as "the right of every individual or community to have its stories and views heard."[1] In principle, an authoritative elaboration of a right to communicate could serve a useful purpose.

[1] Andrew Puddephatt, Executive Director, ARTICLE 19, keynote speech at Community Media Festival, 27 November 2001, London.

Numerous claims are made in the name of the right to communicate and it would be useful to promote consensus as to its content. Furthermore, authoritative clarification of the right to communicate would help promote its acceptance by decision-makers, courts and other influential bodies, leading to greater respect for human rights. At the same time, however, some of the claims made for this right undermine or directly breach established rights and it is important that these are not reflected in any authoritative statement.[2]

The right to communicate should not be conceived as a new and independent right but rather as an umbrella term, encompassing within it a group of related, existing rights. This means that any elaboration of the right to communicate must take place within the framework of existing rights. There already exists under international law broad consensus on the basic content of fundamental human rights and we are of the view that the various legitimate claims made for the right to communicate can be accommodated within this framework. 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.

Full implementation of the right to freedom of opinion and expression is central to the realisation of the right to communicate. Communication is not a one-way process and the right to communicate therefore also presupposes a right to receive information, from both State and private sources. Key elements of the right, elaborated below, include the right to a diverse, pluralistic media; equitable access to the means of communication, as well as to the media; the right to practise and express one's culture, including the right to use the language of one's choice; the right to participate in public decision-making processes; the right to access information, including from public bodies; the right to be free of undue restrictions on content; and privacy rights, including the right to communicate anonymously.

This position paper will elaborate on the various constituent elements of the right to communicate, providing evidence of support for these ideas in existing or emerging international law.

II. The Right to Communicate

It is common ground that the right to communicate is deeply rooted in the established right to freedom of expression, a fundamental human right on its own, key to the fulfilment of other rights, and an essential underpinning of democracy. The importance of freedom of expression cannot be overstated; international law is replete with statements underlining its essential nature.[3] Article 19 of the *Universal*

[2] See the ARTICLE 19 *Note on the draft Declaration on the Right To Communicate Prepared by C. Hamelink*, available on our website at: http://www.article19.org/docimages/1502.doc, highlighting our concerns with that particular draft.

[3] See, for example, UN General Assembly Resolution 59(I), 14 December 1946; *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3 (UN Human Rights Committee); *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63 (European

Declaration on Human Rights (UDHR),[4] binding on all States as a matter of customary international law, guarantees the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This provision does more than simply to state that every individual has the right to say what they want. Article 19 of the Universal Declaration, and its twin Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[5] were carefully drafted to guarantee explicitly:

- an unfettered right to hold opinions;
- a right to express and disseminate 'any information or ideas';
- a right to have access to media;
- a right to seek and receive information and ideas.[6]

Not only does Article 19 prohibit States from interfering with the enjoyment of these rights, international law requires them to take such steps as are necessary to make freedom of expression a reality for everyone.[7] This includes legislative or other regulatory steps, as well as 'practical' positive measures, for example through the establishment of public communication centres.

II.1 Pluralism

A key positive element of the right to freedom of expression and a crucial foundation of the right to communicate is the obligation on governments to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to receive information from a variety of different sources.[8] As the European Court of Human Rights has stated:

Court of Human Rights); *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52 (African Commission on Human and Peoples' Rights); *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34 (Inter-American Court of Human Rights); *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6 (Transvaal Provincial Division).

[4] UN General Assembly Resolution 217A(III), 10 December 1948.

[5] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. As of December 2002, it had been ratified by 149 States.

[6] See, for example, the UN Human Rights Committee's General Comment No. 10, 29 June 1983, on the implementation of the similarly worded Article 19 of the International Covenant on Civil and Political Rights.

[7] Article 2 of the ICCPR, places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." A similar obligation can be found in the pre-amble of the UDHR. See also various European Court of Human Rights' judgments, including *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98, para. 38 and *Young, James and Webster v. United Kingdom*, 13 August 1981, Application Nos. 7601/76, 7806/77, para. 55.

[8] See, for example, *Athukorale v. Attorney-General of Sri Lanka* (1997) 2 BHRC 610 (Supreme Court of Sri Lanka), p. 624.

> [Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism.[9]

One aspect of pluralism is that all groups in society have access to the media. The Inter-American Court has held that freedom of expression requires that,

> The communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.[10]

Similarly, it has been observed that:

> Today, television is the most powerful medium for communications, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium.[11]

States are under various obligations to promote pluralism, both in terms of media outlets and in terms of content available through the media. It requires States to take practical positive measures to create an environment in which the media, and diverse content, can flourish. Specific measures required will depend on the circumstances but examples include setting up non-discriminatory media subsidy schemes, adopting rules on local content, encouraging community broadcasting, providing tax-breaks for new media outlets and promoting local content production.[12] Indirect measures include ensuring a constant supply of the goods necessary for different media, such as electricity or newsprint, promoting modern communications technologies and providing adequate training opportunities.

A key instrument through which States are required to contribute to plurality in the media is public service broadcasting. This is only possible if public broadcasters are sufficiently protected against government control and where State and government broadcasters are transformed into true public service broadcasters.[13] Furthermore, these broadcasters should be required to promote a diversity of information and views through broadcasting. Such broadcasters can play a crucial role in supplementing the material provided by commercial broadcasters and by ensuring strong local and minority voices. The German Federal Constitutional Court, for example, has held that promoting pluralism is a constitutional obligation for public service broadcasters.[14] As early as 1981, it held:

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[9] *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88 and 15041/89, 17 EHRR 93, para. 38.

[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 3, *F*para. 34.

[11] *Belize Broadcasting Authority v. Courtenay and Hoare* [1988] LRC (Const) 276, p. 284 (the Belize High Court and Court of Appeal), quoted with approval in *Retrofit (Pvt) Ltd v. Posts and Telecommunications Corporation*,[1996] 4 LRC 489, p. 503 (Supreme Court of Zimbabwe).

[12] See, for example, Council of Europe Recommendation R(99)1 on measures to promote media pluralism, adopted by the Committee of Ministers on 19 January 1999. See also *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (London: ARTICLE 19, 2002), Principles 3 and 6-8.

[13] This has been stressed in numerous statements and court decisions. For an overview of the relevant principles, see *Access to the Airwaves*, note 12, Section 10.

[14] See *Fourth Television* case, 87 BverfGE 181 (1992).

> Free individual and public formation of opinion by broadcasting initially requires that broadcasting be free of State dominance and influence…[But mere] freedom from the State does not mean that free, comprehensive formation of opinion by broadcasting is made possible; this mandate cannot be fulfilled by a mere negative duty…a positive order is necessary, which ensures that the variety of existing opinion is expressed in broadcasting…In order to achieve this, substantive, organizational and procedural rules are necessary that are oriented to the mandate of freedom of broadcasting.[15]

Similarly, a *Resolution of the Council and of the Representatives of the Governments of the Member States*, passed by the European Union, recognises the important role played by public service broadcasters in ensuring a flow of information from a variety of sources to the public. It notes that public service broadcasters are of direct relevance to democracy, and social and cultural needs, and the need to preserve media pluralism.[16] The 1992 *Declaration of Alma Ata*, adopted under the auspices of UNESCO, calls on States to encourage the development of public service broadcasters for the same reasons.[17]

Community broadcasting can also enhance pluralism by providing a cheap, accessible form of communication for communities which would otherwise have no independent voice and it should, as a result, be recognised and promoted. Recent human rights declarations have begun to recognise this. For example, the *Declaration of Principles on Freedom of Expression in Africa*, adopted in October 2002, states:

> The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:
> - there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community; … and
> - community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.[18]

In addition, the capacity of community broadcasters or publishers to disseminate their products over the Internet should be enhanced, including through the provision of the necessary hardware and software, as well as training.[19]

It is now obvious that, "enjoyment of the right to communicate is intrinsically linked to the society's level of socio-economic development."[20] As a result, communities that have fallen behind in the global race for financial and economical development normally find it more difficult to make their voices heard. Specific measures to redress global inequities in relation to media development, as well as access to information and the means of communication, should be prioritised by development bodies and national governments.

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[15] *3. Rundfunkurteil ("Third Broadcasting Case")*, 57 BverfGE 295 (1981).
[16] Official Journal C 030, 5 February 1999.
[17] Clause 5. See also *Resolution No. 1: Future of Public Service Broadcasting* of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994.
[18] Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, Principle V.
[19] See Principle 3, Part III of the African Charter on Broadcasting 2001, adopted by a representative conference of experts in Windhoek, Namibia, under the auspices of UNESCO and the Media Institute of Southern Africa (MISA).
[20] 'The Right to Communicate: A Fundamental Human Right', F. Jagne, Kubatana.net, 17 December 2002.

II.2 Equitable Access

Under international law, States are under a duty to ensure equitable access to the means of communication. This implies both a 'negative' duty not to restrict access to the media and a positive duty to ensure plurality and diversity. States should not impose unreasonable regulatory obligations such as licensing or registration requirements for journalists, licensing of small publications or registration of Internet service providers.[21]

Licensing of broadcasters is permitted under international law,[22] as long as it meets certain conditions of independence and respect for freedom of expression. The principle of plurality requires a diversity of communicators and legitimate regulation should promote diversity on the airwaves. For example, promoting diversity should be one of the criteria for deciding between competing licence applications.[23] This does not, however, imply an individual right of access to the media or, in particular, to privately owned means of communication. Such a right would constitute a serious infringement of editorial independence, as well as of respect for freedom of expression.

Both public and private broadcast monopolies have been held to constitute illegitimate restrictions on freedom of expression and effective measures must be taken to ensure that they do not emerge, including through the regulatory system.[24] As long ago as 1983, the UN Human Rights Committee recommended that Sates should implement "effective measures … necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression."[25] This reasoning extends to monopolies over all forms of communications, not just television and radio. In an application to strike down legislation providing for a monopoly by a State company over telephone services, the Zimbabwean Supreme Court observed:

> [R]estriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression. A fortiori any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right.[26]

Effective State action to ensure equitable access to the means of communication must also incorporate a positive element. In the field of telecommunications, so-called 'universal service' commitments are now well-established, requiring service providers to ensure that their products, such as access to telephone lines, are universally

[21] See, for example, *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997 (UN Human Rights Committee) and the *Compulsory Membership* case, note 10.
[22] See, for example, the last sentence of Article 10(1) of the *European Convention on Human Rights* (ECHR), Adopted 4 November 1950, entered into force 3 September 1953.
[23] See *Access to the Airwaves*, note 12, Principle 21.
[24] See, for example, *Radio ABC v. Austria*, 20 October 1997, Application No. 19736/92 (European Court of Human Rights) and *United States v. American Telephone and Telegraph Co* (1982) 552 F Supp 131 (District Court of Columbia).
[25] UN Human Rights Committee, General Comment, note 6.
[26] *Retrofit (Pvt) Ltd v. Posts and Telecommunications Corporation*, note 11, p. 503.

available. In the United States, this goal was written into federal law as early as 1934.[27] The EU Voice Telephony Directive requires that all persons reasonably requesting it should be able to obtain a connection to the fixed public telephone network at an affordable price; the connection provided should be capable of national and international calls, supporting speech, facsimile and/or data communications.[28] Similarly, the Zimbabwean Supreme Court stated, in the second *Retrofit* judgment:

> A government committed to the grant of affordable telephonic communication for its people in the rural areas must be prepared to bear a portion of the expense required to promote such a commendable endeavour. The remedy lies in subsidising this social need, not in impacting upon a fundamental human right.[29]

Similar reasoning is currently being extended to the Internet, as well as to reception of broadcasting services.[30] The Internet provides an unparalleled opportunity for low-cost but effective dissemination of information and ideas, and is hence central to the right to communicate. Numerous statements have been made about the capacity of the Internet to give practical effect to freedom of expression. The Genoa Plan of Action, adopted by the G8 countries, for example, provides that "local content on the Internet should be strengthened and encouraged, including by encouraging governments to provide freely-available access to State-owned information and local content, except where it is genuinely private or classified."[31] UN bodies have stressed that governments should take action to make the Internet more accessible, including by bringing down the price of access. In his report to the UN Millennium Assembly, UN Secretary General Kofi Annan urged Member States to pursue a development agenda which includes a "review [of] policies in order to remove regulatory and pricing impediments to Internet access".[32] Responding to this, ECOSOC adopted a Ministerial Declaration recommending that national programmes be established which "promote access to information and communications technology for all by supporting the provision of public access points." This was endorsed by the UN Heads of State at the Millennium Assembly.[33]

II.3 Freedom to Practice One's Culture

The freedom to practice and express one's culture is key to diversity in society generally and is therefore inextricably linked to freedom of expression and the right to communicate. Article 27 of the UDHR states:

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[27] 47 USC 254.
[28] Directive 98/10/EC, 26 February 1998, OJ L101/24, 1 April 1998.
[29] *Retrofit (Pvt) Ltd. v. Minister of Information, Posts and Telecommunications* [1996] 4 LRC 512, p. 516.
[30] See *Access to the Airwaves*, note 12, Principle 6.
[31] Genoa Plan of Action, proposed by the Digital Opportunity Task Force and adopted by the G8 Heads of State in Genoa, 2 July 2001. See http://www.dotforce.org/.
[32] *United Nations, We the Peoples: The Role of the United Nations in the 21st Century*, Millennium Report of the Secretary General of the United Nations (New York: United Nations, 2000), Key Proposals, http://www.un.org/millennium/sg/report/key.htm.
[33] United Nations Millennium Declaration, 18 September 2000, Doc. A/RES/55/2, Article 20. See also Recommendation R(99)14 on Universal Community Service concerning New Communication and Information Services, adopted by the Committee of Ministers of the Council of Europe on 9 September 1999.

> 1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This is mirrored in Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[34] Moreover, States parties to the ICESCR are explicitly required to take active steps to promote and diffuse culture. Article 15(2) of the ICESCR states:

> The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

As the UN Human Rights Committee has observed, culture presents itself in many forms, including a particular way of life associated with the use of land resources or such traditional activities as fishing or hunting. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[35]

A crucial aspect of one's culture is the right to use the language of one's choice. This is a right that is well-established in international law, both as an aspect of the right to freedom of expression and explicitly under Article 27 of the ICCPR. The UN Human Rights Committee has observed that although the right to use one's own language is in essence an individual right, it nevertheless is inextricably linked to the culture of the group to which the individual belongs. As with other aspects of the right to communicate, positive measures by States are required to protect the right to use one's own language.[36] Particular steps include the teaching of minority languages in primary and secondary education[37] and the right of language groups to set up their own educational and training institutions.[38]

Measures should also be taken to encourage access to the media by different minority or language groups, for example through funding for minority broadcasting or for programme productions dealing with minority issues and/or offering a dialogue between groups, and by ensuring that minority and language groups are properly represented in both the staff and though the programme content of public service broadcasters.[39]

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[34] Adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976. As of December 2002, it had been ratified by 146 States.
[35] UN Human Rights Committee, General Comment 23, 8 April 1994, para. 7.
[36] *Ibid.*, para. 6.2.
[37] *European Framework Convention for the Protection of National Minorities*, E.T.S. No. 157, signed 1 February 1995, entry into force 1 February 1998, Article 14. As of February 2003, 12 States had ratified the Convention.
[38] *Ibid.*, Article 13
[39] *Ibid.*, Article 9 and Explanatory Memorandum.

II.4 Right to Information

The right to communication depends on a free flow of information, both to and from the communicant. In particular, the exercise of democratic rights requires that everyone should have access, subject only to narrowly defined exceptions, to information held by public bodies, often referred to as the right to freedom of information. Freedom of information is an important component of the international guarantee of freedom of expression, which includes the right to seek and receive, as well as to impart, information and ideas.

There can be little doubt as to the importance of freedom of information and numerous authoritative statements have been made by official bodies to this effect. During its first session in 1946, the United Nations General Assembly adopted Resolution 59(I) which stated:

> Freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the UN is consecrated.[40]

All three regional human rights systems have adopted authoritative statements on freedom of information.[41] These international developments find their parallel in the passage or preparation of freedom of information legislation in countries in every region of the world. In the past seven years, in particular, a large number of countries from all regions of the world have adopted freedom of information legislation, including Bulgaria, Fiji, India, Israel, Japan, Mexico, Pakistan, Peru, Poland, South Africa, Thailand, Trinidad and Tobago, the United Kingdom and Uzbekistan.

Global governance actors, as well as individual States, hold public information and should have to provide access to it. This is increasingly being recognised as various international actors adopt disclosure policies, including, for example, the United Nations Development Programme (UNDP),[42] as well as the World Bank and all four regional development banks.[43]

With the shift of power from the State to private corporations, and in particular multilateral corporations, it is important that these actors should also recognise at least a limited right to access information. The South African Constitution provides for an enforceable right to information vis-à-vis private actors where this is necessary for the exercise or protection of a right. The ARTICLE 19 publication, *A Model Freedom of Information Law* states:

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[40] 14 December 1946.

[41] See Recommendation Rec(2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, 21 February 2002; the *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000; and the *Declaration of Principles on Freedom of Expression in Africa*, note 18.

[42] Public Information Disclosure Policy, UNDP, 1997.

[43] See The World Bank Policy on the Disclosure of Information (Washington, D.C.: World Bank, 1994); OP-102 Disclosure of Information, Inter-American Development Bank, December 1994; Disclosure of Information Policy, African Development Bank Group; and Confidentiality and Disclosure of Information, Asian Development Bank, August 1994.

> Any person making a request for information to a private body which holds information necessary for the exercise or protection of any right shall, subject only to the relevant provisions of … this Act, be entitled to have that information communicated to him or her.[44]

At the same time, a worrying trend is emerging whereby the development of intellectual property and related rights seriously limits the amount of material that is available in the public domain. Increasingly, intellectual property rights are being granted over ideas or even sets of factual data – such as the human genome – which limit their availability and use to others. The impact of this on scientific and academic freedom of expression should not be underestimated and the 'public domain' should be protected from being fenced off and turned into private property.[45] Similar developments are taking place in copyright law, potentially limiting the right to freedom of expression.[46]

II.5 Right to Participate in Public Affairs

The right to participate in public decision-making processes is protected under the ICCPR. Article 25 states:

> Every citizen shall have the right and the opportunity … without unreasonable restrictions:
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> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
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> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

The right to be able to influence and actively to participate in political processes is necessary to enable effective input by everyone into political processes and a vital element of the right to communicate. The political shape of the society an individual lives in is a determining factor in the enjoyment of all other human rights. The right to communicate must therefore extend not only to the opportunity to comment on public affairs, but to be enabled to vote and take part in public affairs.

In turn, the role of freedom of expression in realising the right to vote and take part in public affairs is also well-established. The Human Rights Committee has emphasised that freedom of expression is "essential … for the effective exercise of the right … and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty … Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice."[47] The media in particular play a vital role in all democratic processes by acting as 'public watchdog' of government

[44] (London: ARTICLE 19, 2001), section 4(2).
[45] For a thorough analysis, see J. Boyle, "The Second Enclosure Movement and the Construction of the Public Domain", paper for Duke Conference on the Public Domain, 9 November 2001.
[46] See, for example, B. Pfaffenberger, "Why Open Content Matters", at http://www.linuxjournal.com/.
[47] UN Human Rights Committee, General Comment 25, 12 July 1996, para. 12.

and by reporting on matters of public interest.[48] This includes the right of the media to publish widely on all matters of public interest without fear of restriction. It also implies, as a matter of principle, that the media should have access to sessions of public decision making bodies, such as Parliament, so that they may report to the public generally on the activities of these bodies.[49]

II.6 Restrictions on Freedom of Expression

The right to communicate cannot be exercised in a hostile environment. Individuals should be allowed to collect, receive and disseminate information without undue hindrance and any restrictions on this right must remain within strictly defined parameters. Article 19(3) of the International Covenant on Civil and Political Rights lays down the conditions which any restriction on freedom of expression must meet. It states:

> 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.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly and this is especially true of the right to freedom of expression in light of its importance in democratic society. Any restriction on the right to freedom of expression must, in accordance with the provision above, meet a strict three-part test, as recognised by the Human Rights Committee.[50] This test requires that any restriction must a) be provided by law, b) be for the purpose of safeguarding one of the legitimate interests listed, and c) be necessary to achieve this goal.

The first condition, that any restrictions should be 'provided by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.[51] This implies that it is sufficiently precise that individuals may know in advance what is prohibited. The second condition requires that legislative measures restricting free expression must truly pursue one of the aims listed, namely the rights or reputations of others or the protection of national security, public order ('ordre public') or of public health or morals. The third condition means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessary". The European Court of Human Rights has established that this is a very strict test:

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[48] E.g. Bladet Tromsø and Stensaas v. Norway, 20 May 1999, Application No. 21980/93 (European Court of Human Rights), para. 59.
[49] See *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995 (UN Human Rights Committee).
[50] See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991.
[51] See *Faurisson v. France*, 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).

> [The adjective necessary] is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable". [It] implies the existence of a "pressing social need".[52]

Furthermore, any restriction must restrict freedom of expression as little as possible.[53] The measures adopted must be carefully designed to achieve the objective in question, and they should not be arbitrary, unfair or based on irrational considerations.[54] Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

II.7 Anonymity and freedom from unwarranted surveillance

The right to speak anonymously, the right to use encryption tools and the right to be free from unwarranted monitoring and surveillance are all part and parcel of the right to communicate.

If an Internet user suspects that his or her on-line movements are monitored, he or she will exercise caution with regard to statements made or sites visited. The same goes for telephone, fax or any other kind of communications. Although it may be necessary to monitor or intercept communications in certain narrowly prescribed cases, for example for the prevention of serious crime, guarantees are necessary in order to safeguard against abuse of such powers. There exists a wealth of case law and national practice, from international courts as well as from national jurisdictions, on the kind of safeguards that are needed. International courts have stressed that clear legislative rules are needed to regulate the use of monitoring and surveillance powers, particularly now that technology allows ever-increasing intrusion on the privacy of communications.[55] Such legislation should require that all surveillance operations are authorised by an independent authority – for example, a judge[56] – and that they are instituted only where there are real indications that they are necessary to prevent or detect serious crime, or to protect national security. There also need to be more general mechanisms to monitor the use of surveillance powers, for example through a parliamentary committee or through a specially established 'surveillance commissioner',[57] including a reporting requirement on the number of operations and results obtained.[58]

Similar guarantees should safeguard against interference by private actors as well. The European Court of Human Rights, for example, has long held that workplace monitoring constitutes an interference with the right to respect for private life.[59]

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[52] *The Sunday Times v. The United Kingdom*, 26 April 1979, Application No. 6538/74, para. 59 (European Court of Human Rights)

[53] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights).

[54] See *R. v. Oakes* (1986), 26 DLR (4th) 200, pp. 227-8, (Canadian Supreme Court).

[55] *Kruslin v. France*, 24 April 1990, Application No. 11801/85, para. 33 (European Court of Human Rights); *Klass and others v. Federal Republic of Germany*, 6 September 1978, Application No. 5029/71 (European Court of Human Rights).

[56] E.g. Article 184.2, Canadian Criminal Code.

[57] E.g. the UK's Surveillance Commissioner, established in Part IV of the Regulation of Investigative Powers Act 2000.

[58] This is practised in the US, for example: see Section 18 USC 2518.

[59] See *Halford v. the United Kingdom*, 25 June 1997, Application No. 20605/92.

In addition to freedom from unwarranted monitoring, protection of anonymity is another key element of the right to communicate. Various courts have recognised anonymity as an important pre-condition for the exercise of the right to freedom of expression, as well as of other rights. The US Supreme Court, for example, has held:

> …anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech…[60]

Finally, there should be no restrictions on the use of technology to enhance on-line privacy, such as encryption or anonymising software. Particularly in those countries where there is heavy State monitoring, anonymity tools can allow users to communicate with the outside world without fear of identification and reprisals. Any restrictions on the use of anonymity tools will therefore impact on the right to freedom of expression.

III. Conclusion

ARTICLE 19 considers that the right to communicate is to be understood as "the right of every individual or community to have its stories and views heard." This means that full implementation of the right to freedom of opinion and expression, including the right of equitable access to the media and the means of communication, is central to its realisation.

Understood in the way outlined in this Statement, the right to communicate is not a new, independent right, but rather as an umbrella right, encompassing within it a group of related rights including the right to seek, receive and impart information and ideas, the right to pluralism within and equitable access to the media, the right to practice and express one's culture, the right to participate in public decision-making processes, the right to access information from public bodies and supporting rights including the right to communicate anonymously and the right to respect for private life. A Declaration on the Right to Communicate along these lines will contribute to the ongoing process of implementation of the International Bill of Rights.

[60] *McIntyre v. Ohio* (1995) 115 S. Ct. 1511.