

**DRAFT GENERAL COMMENT No. 34 ON ARTICLE 19 OF THE INTERNATIONAL COVENANT ON  
CIVIL AND POLITICAL RIGHTS**

**SUBMISSION OF COMMENTS<sup>1</sup>**

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## I. Introduction

The Center for Studies on Freedom of Expression and Access to Information (CELE), based out of the University Of Palermo School Of Law in Buenos Aires, appreciates the opportunity to analyze the recently released draft of General Comment No. 34 (D.G.C.34) for Article 19 of the International Covenant of Civil and Political Rights, and provide meaningful input.

Our input is derived from our extensive experience analyzing legislation, jurisprudence, and public policies relating to freedom of expression and access to information throughout the Americas. We believe that the problems faced, and the lessons learned, within the Americas can provide the Human Rights Committee of the ICCPR with meaningful and relevant recommendations for the D.G.C.34. Below, we detail our Center’s interpretation of D.G.C.34, as well as our recommendations.

## II. The explicit guarantee of expression relating to sexual and gender orientation.

Paragraphs 11 and 13 of D.G.C.34 detail explicit guarantees under the right to freedom of expression:

*This right (freedom of expression) extends to the guarantee of the expression of every form of subjective idea and opinion capable of transmission to others (...). It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, religious discourse.<sup>2</sup>*

*A State party may choose one or more national or official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s own choice.<sup>3</sup>*

CELE wholeheartedly agrees with the protections and guarantees afforded under Paragraphs 11 and 13 of D.G.C.34. In particular, we commend the explicit inclusion of the guarantees to religious discourse and the right to express one’s self in the language of one’s own choice. The explicit inclusion of these two guarantees is important because of the nature of the aforementioned speech to express ‘integral elements of personal integrity and dignity’.<sup>4</sup>

However, due to their importance in the formulation of personal integrity and dignity, we believe that D.G.C.34 should explicitly include guarantees to expressions on one’s own gender and sexual orientation. For example, according to the “Inter-American Legal Framework Regarding the Right to Freedom of Expression”, sexual and gender

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<sup>2</sup> Human Rights Committee. General Comment No. 34, Para. 11

<sup>3</sup> HRC. General Comment No. 34, Para. 13

<sup>4</sup> See, Office of the Special Rapporteur for Freedom of Expression. “Inter American Legal Framework Regarding the Right to Freedom of Expression”. Para. 56. Inter American Commission on Human Rights, 2009.

orientation is an integral part of the formulation of self integrity and dignity and, as such, merits the same explicit guarantees as religious discourse and the right to express one's self in the language of one's own choosing.<sup>5</sup>

Although we recognize that the guarantee of expressions on one's own gender and sexual orientation is implicitly included in D.G.C.34, we advise that any expressions on one's own orientation in these matters be expressly included. As stated above, this is because of the fundamental role that gender and sexual orientation play in the formulation of personal integrity and dignity, as well as the discrimination that is often experienced by individuals who express certain gender or sexual orientations.

### **III. Attacks on journalists**

In reference to attacks on journalists, D.G.C.34 states:

*All allegations of attacks on or other forms of intimidation or harassment of journalists, human rights defenders and others should be vigorously investigated, the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of the appropriate forms of redress.*<sup>6</sup>

Paragraph 24 of D.G.C.34, quoted above, rightly calls for the vigorous investigation and prosecution of crimes against journalists, as well as redress to the victims of said crimes.

Yet, we believe that solely implying the role of the State in the investigation of crimes against journalists is insufficient. Rather, the responsibility of the State in these matters needs to be clear, precise, and overt. In effect, the current situation in the Americas leads us to believe that an explicit mention of the State's duty to protect journalists, as well as to prevent any crimes against them, is warranted.

### **IV. General duties of the exercise of freedom of expression by public officials**

Paragraph 21 of the D.G.C.34 says:

*The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*<sup>7</sup>

The role that the free press and media have in transmitting information about public and political issues between citizens, candidates, and public officials is critical to the functioning of democracy. Yet, also fundamental, is the *responsible* and *measured* dissemination of official information by part of public officials in order to maintain a balanced and informed citizenry.

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<sup>5</sup> *Ibid.*

<sup>6</sup> HRC. General Comment No. 34, Para. 24

<sup>7</sup> HRC. General Comment No. 34, Para. 21

As such, outside of the guarantees to free communication of information and ideas about public and political issues, we believe that D.G.C.34 should include certain duties of the exercise of freedom of expression by public officials. It is important to note that the inclusion of these duties could not only facilitate the dissemination of information relevant to the public and political arena, but it could also ensure that public officials be held responsible for the *way* in which they deliver their messages. In effect, due to public officials' positions of influence, these duties should include provisions for providing information in an honest and responsible manner.

Some of the duties that we feel are relevant are:

- Duty to make statements in certain cases, in the performance of their legal and constitutional duties, regarding matters of public interest;
- Special duty to reasonably verify facts on which their statements are based;
- Duty to ensure that their statements do not amount to human rights violations;
- Duty to ensure that their statements do not constitute arbitrary interference- direct or indirect- with the rights of those who contribute to the public discourse through the expression and distribution of their thoughts;
- Duty to ensure that their statements do not interfere with the independence and autonomy of judicial authorities.<sup>8</sup>

As stated above, while the guarantee of a free press and media certainly promotes a public's right to receive information on public issues, the recognition of the duties of public officials could further facilitate this exchange of information, and even strengthen the guarantee of a free press. Yet, aside from the duty to inform the public, it should also be mentioned that public officials, due to their positions of authority, hold great power and responsibility. As such, the imposition of any of the aforementioned duties must include the provision that, outside of having the duty to inform the public, public officials must express information in a manner that is honest, responsible and does not create animosity or conflict.

## V. Freedom of Expression vs. Freedom of Opinion

Paragraphs 1 and 2 of Article 19 read as follows:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

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<sup>8</sup> See, Office of the Special Rapporteur for Freedom of Expression. "Inter American Legal Framework Regarding the Right to Freedom of Expression". Para 201-205. [Inter American Commission on Human Rights](#).

The division of freedom of opinion and freedom of expression into two distinct paragraphs indicates that said freedoms encapsulate two different ideas, and thus require differing norms and regulations. In effect, D.G.C.34 defines the freedom of opinion as “the right to hold opinions without interference...the right to change an opinion whenever and for whatever reason a person so freely chooses...and the freedom to express one’s opinion”.<sup>9</sup> Furthermore, there are no exceptions or restrictions that can be placed on this right.<sup>10</sup> Meanwhile, freedom of expression:

*...requires guarantees of the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right extends to the guarantee of the expression of every form of subjective idea and opinion capable of transmission to others...<sup>11</sup>*

While there can be no exceptions or restrictions placed on freedom of opinion, freedom of expression allows for restrictions and limitations under particular circumstances.

CELE recognizes both rights, and agrees with the protections outlined in the General Comment. However, we feel that D.G.C.34 leaves unclear the distinction between what constitutes an opinion and what constitutes an expression. For example, what differentiates a political opinion, which is completely protected, from a political expression, which can be restricted if it meets certain criterion?

There is a well documented discussion in defining how opinion and expression differ from each other in practice. Removing ourselves from endorsing a particular theory on the matter, we present one particular form of addressing the issue. This example differentiates between an opinion and an expression by employing a four part test which includes: analysis of the common usage or meaning of the words used in the statement; the statement’s objective verifiability; the full context of the statement, that is, for example, an analysis of the entire column in which the statement is found; and the broader social context in which the statement is made.

We recommend that D.G.C.34 should, if not expressly elucidate the conditions under which something can be considered an opinion or an expression, at least make reference to the debate on the matter in order to make it clear that the difference between the two is not well defined, and thus subject to interpretation. Doing so would ensure that States would recognize the differences between the two, and be wary of misconstruing, and thus wrongly restricting, certain statements.

## **VI. “Internet based media”**

Paragraph 12 of D.G.C.34 expressly delineates the protection of all forms of expression and the means of their publication. Certain means of expression that are protected are explicitly mentioned:

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<sup>9</sup> HRC. General Comment No. 34, Para 9.

<sup>10</sup> *Ibid.*

<sup>11</sup> HRC. General Comment No. 34, Para 11

*Means of expression [protected] include books, newspapers, pamphlets, poster, banners, and legal submissions. They include all forms of audio-visual as well as electronic and internet-based media<sup>12</sup>*

Certainly, the protection of all forms of expression and their means of publications is correct. Furthermore, including specific means of expression that require protection, such as books, newspapers, and technological means, is both important and relevant.

However, the wording used in the above quote lends itself to ambiguity. Specifically, the phrase “internet-based media” could be subject to misinterpretation due to the multiple definitions of the word “media”. Traditionally defined, “media” refers to the plethora of companies, organizations, and individuals that transmit information on public affairs, private affairs, or entertainment through newspapers, television, radios, blogs, and other forms of expression<sup>13</sup>. Yet, “media” can also be defined as the plural of “medium”, which is quite simply a method, or way, of expressing something.<sup>14</sup>

Depending on the definition intended, the protection of all “audio-visual...electronic...and internet-based media” could either be limiting or inclusive. If D.G.C.34 intends to use “media” as a plural of “medium”, then the protection of all forms of audio-visual, electronic, and internet-based expression is assured, whether it is blogs, newspapers, television, or personal websites. If, instead, the traditional definition of “media” is intended, then only expressions transmitted in what is considered traditional media (i.e. news blogs, online newspaper, radio, or television) are protected under D.G.C.34, which thus limits many forms of personal expression through technological means.

CELE believes that the intent of D.G.C.34 is to protect all forms of expression, which implies that, in the sentence in question, the word “media” is being utilized as the plural of “medium”. However, due to the ambiguous terminology, and the possibilities of misconstruing the intent of D.G.C.34, we recommend that a different, more precise, phrasing of the protections to electronic, audio-visual, and Internet based expressions be used.

## **VII. Exceptions to the right to Access to Information**

Paragraph 20 of the D.G.C.34 affords some detail on provisions and guarantees to the right to Access to Information:

*To give effect to the right of access to information, States parties should enact the necessary procedures, such as by means of freedom of information legislation. The procedures should provide for the rapid processing of requests for information according to clear rules that are compatible with the Covenant.*

<sup>12</sup> Human Rights Committee. General comment No. 34, para. 12

<sup>13</sup> “Media”. Cambridge Dictionary Online, 2010

<sup>14</sup> “Medium”. Cambridge Dictionary Online, 2010

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*Arrangements should be put in place for appeals from refusals to provide access to information. Fees for the processing of requests for information should not be such as to constitute an unreasonable impediment to access to information. States parties should make every effort to ensure easy, effective and practical access to state-controlled information in the public domain.<sup>15</sup>*

Paragraph 20, quoted above, gives a good summary of the obligations that any state should comply with in order to follow the mandates of the Covenant. It correctly states the relevance of enacting legislation to guarantee the full exercise of the right to access to information, and establishes some norms that should be considered when elaborating said legislation.

However, it should be noted that access to information is not an unlimited right. As such, we recommend that D.G.C.34 include a concrete and detailed list of exceptions, that is, a list of situations in which information cannot be divulged in order to protect other rights.

Lastly, it may be advisable to go beyond the scope of the current Paragraph 20, and include a short paragraph on the need to address access to information relating to content of public policies. In effect, rather than rely on a system of access to information that depends on requests submitted by the citizenry, D.G.C.34 should advocate the implementation of a proactive policy of disclosure of information. Said policy would continuously release information relevant to public discourse without waiting for requests from the citizenry.

### **VIII. “ Defense of truth”**

In regards to defamation laws, D.G.C.34 outlines the following:

*Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws should include the defence of truth and they should not be applied with regard to the expression of opinions that are not, of their nature, subject to verification.<sup>16</sup>*

In CELE’s opinion, the provisions provided in respect to defamation laws in D.G.C.34 are strong, though a bit ambiguous. Of particular concern is the lack of clarity inherent in the idea that defamation laws should include the “defense of truth”. Certainly, truth should play a significant role when analyzing defamation cases, but only when the burden of proof is explicitly placed on the accuser.

When the burden of proof lies on the accused, then conditions arise that could affect an individuals’ freedom of expression. For example, a journalist is accused of defamation of a politician, and has the burden of proof placed upon him. What this implies is that,

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<sup>15</sup> HRC. General Comment No. 34, Para 20

<sup>16</sup> HRC. General Comment No. 34, Para 49

under those circumstances, the journalist, under pressure to verify his story, will be forced to reveal his sources under questionable circumstances. This situation becomes particularly dangerous if the journalist had previously revealed very sensitive public information.

In effect, we advise that D.G.C.34 maintain its clause on “defense of truth”, but qualifies it with the assurance that the burden of proof lays with the accuser, not the accused. This can help assure that the freedom of expression of the accused is not violated.

### **IX. Limits on the journalistic privilege not to disclose sources**

Paragraph 47 expressly claims that journalists have limited privileges to not disclose information sources:

*State parties should recognize and respect the limited journalistic privileges not to disclose information sources.<sup>17</sup>*

CELE recognizes that conceptions on the right of journalists to withhold disclosure of their sources vary by jurisdiction. We are aware that, for example, the Inter-American Commission on Human Rights advocates for no limits on the journalistic privilege to not disclose sources<sup>18</sup>, while the European Court for Human Rights imposes certain limits on said privilege<sup>19</sup>.

The issue of whether or not to impose limitations on this journalistic privilege is far too complicated for inclusion into this report and, as such, we will not make reference to it here. However, given the danger inherent in revealing confidential sources, it would be advisable for D.G.C.34 to elucidate the norms regulating the limits on this journalistic privilege. For example, under what conditions can journalists be forced to reveal their sources? Who can force journalists to reveal their sources? And what protection is afforded to the sources that are revealed?

### **X. Use of public funds for State advertising**

In Paragraph 43, the D.G.C.34 warns about government subsidies to media outlets through the means of advertising:

*Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisements are not employed to the effect of impeding freedom of expression.<sup>20</sup>*

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<sup>17</sup> HRC. General Comment No. 34, Para 47

<sup>18</sup> IACHR. *Declaration of Principles on Freedom of Expression*. Principle 8.

<sup>19</sup> *Sanoma Uitgevers BV vs. The Netherlands (ECHR, Sept 2010)*.

<sup>20</sup> HRC. General Comment No. 34, Para. 43



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CELE concurs with D.G.C.34 in that extreme care should be taken when allocating public funds for government advertisements in the media. However, we believe that beyond promoting “care” in these regards, D.G.C.34 should make explicit the requirement that States should have legislation that establishes clear and transparent procedures for allocating public funds for advertising.

In effect, given the fact that the allocation of public funds towards selected media can constitute a violation to freedom of expression, the exercise of “care” in these matters is insufficient. Instead, we advise a more stringent approach towards assuring the exercise of freedom of expression by delineating clear, transparent, non-arbitrary, and non-discriminatory norms for regulating the allocation of public funds for State advertising.

## **XI. Conclusions**

In conclusion, CELE finds that General Comment No. 34 is strong, inclusive, and adherent to the traditional norms on protection of the right to freedom of expression and access to information. Due to the strength of the document, our recommendations don’t address fundamental theoretical issues within the document. Rather, our recommendations are focused on instances where we believe more transparent and detailed provisions and guarantees could help afford a greater amount of protection to the rights to freedom of expression and access to information of individuals worldwide.

The **Center for Studies on Freedom of Expression and Access to Information (CELE)** was founded in 2009 at the Palermo University Law School. Our objective is to provide rigorous research and investigations for sectors of civil society, journalists, government institutions and the academic community that are dedicated to the promotion of those rights, primarily in Latin America. CELE was created in response to a need to construct spaces for debate and study dedicated to reflecting on the importance and the limits of freedom of expression and access to public information in the region. In order to accomplish this, the Center proposes to create dialogue and collaborate with other academic entities in Argentina and in Latin America.

In this framework, CELE's specific objectives are:

- To develop studies and guides of recommendations that can have an impact on public policies related to access to information and freedom of expression.
- To initiate, together with other academic entities, the improvement of studies and questions relating to these rights.
- To raise awareness of the importance of these rights in democratic societies, especially in the younger generations.

Some of our recent work includes:

- Hosting the "Latin American Experts Meeting on Freedom of Expression in the Internet"; organized by Mr. Frank La Rue, UN Special Rapporteur on Freedom of Expression and Freedom of Opinion.
- Publication of our book "¿Es legítima la criminalización de la protesta social? Derecho Penal y Libertad de Expresión en América Latina". The book was a compilation of results obtained from a comparative investigation carried out with collaborators throughout the region