

**HUMAN RIGHTS COMMITTEE**  
**DISCUSSIONS ON DRAFT GENERAL COMMENT NO. 34**  
**MEETING NOTES (18 MARCH – 24 MARCH 2011)**

Notes by Open Society Justice Initiative  
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**DAY 1 (18 MARCH 2011)**

Mr. O’Flaherty noted that the Committee received more than 300 drafting suggestions on the draft General Comment, submitted by a range of state party governments, national human rights institutions, academics, and NGOs. He explained that he would make a brief introduction to each paragraph, drawing attention to salient points made by commentators and skipping suggestions that belong elsewhere.

**Paragraph 1**

No discussion.

**Paragraph 2**

Sir Nigel proposed a new paragraph 2b.

Mr. Fathalla suggested language “essential for any society and its stability”.

Mme. Chanet was against introducing political and philosophical concepts that do not tie into Article 19. These can lead to circular arguments or might be interpreted differently. Thus, she supported the paragraph as drafted.

Mr. Rivas Posada was also not in favor of the addition because it was a political concept and could be interpreted to mean that the Committee was opposed to reform efforts in light of societies’ impression. This could be dangerous and was not the intent of proposal. It could be seen as prejudicial to any reform movement, which was not the Committee’s territory to enter into.

Mr. Iwasawa was sympathetic to the idea of the amendment in spirit, but agreed that the paragraph should remain as drafted.

Mr. O’Flaherty personally agreed with Mr. Iwasawa, but it was not for him to accept or reject.

***Consensus: Leave paragraph as is, save Sir Nigel’s additional language as 2bis.***

**Paragraph 3**

Mr. O’Flaherty introduced the proposal that sentence two should include economic and social rights as rights that depend on freedom of expression/freedom of opinion; many commentators asked to include “a wide range of civil political economic social and cultural rights” instead of the language “wide range of other human rights”.

There was also a proposal to add new language.

Mr. Bouzid suggested reverting to proposal from outset—the addition of 24 general comment 17 indicates that rights stipulated in article 24 are not only rights recognized by the ICCPR with respect to children, as they are also individuals who enjoy all rights form covenant. Thus, provisions of 24 must be set aside with 26, 27 and other articles.

Mr. Flinterman supported the changes to include and explicitly state the rights.

Mr. Thelin felt that the text would not gain from expanding on rights; it was enough as it is, referring to the rights that are in there now, but if his colleagues feel the enumeration of articles could be expanded, it establishes a limit and raises the question of why other articles aren't mentioned. He would not oppose also referencing 24, but would not be overly happy with it.

Mme. Chanet did not entirely oppose the suggestion to add economic, social and cultural rights but felt that this could implicate the right to freedom of expression/opinion in a number of other articles that are not currently listed in paragraph 3 (e.g., Article 24 on the rights of children refers to social and cultural rights, but these have not been considered in the context of a child's right to freedom of expression). Accordingly, the Committee should not include such language at this point without closer consideration. She supported the proposal to include language simply referring "other human rights."

Sir Nigel wondered what exactly the Committee was trying to convey, noting that this may help address the proposal. He felt that Article 19 was particularly important for other rights, but we are actually saying that these rights inherently include Article 19. He noted that although it could be valuable to spell out the human rights in question, he agreed with the proposal of Mme. Chanet that "other human rights" resonates better, but would also agree to then put a comma and then list civil political and other rights after, rather than before.

Mr. Iwasawa felt that Article 27 on religion might be the link to Article 19, but not a very strong one. For the second sentence, he noted that the civil and political rights dimension is very important, but economic and social rights—while equally important—are not as rooted in freedom of expression. For political rights, you do not need to have expression; if you have a right to vote you can have a democratic society. In that sense, freedom of expression forms a basis for the enjoyment of mainly civil and political rights, but maybe also economic and social rights. He wanted to maintain that they are a basis for democratic society through Articles 25, 18, 19, and so forth.

Mr. Fathalla agreed that Article 17 certainly was related, as well as 18 and 25. But upon further discussion, he was more convinced to leave what was in the current version of the draft.

Mr. Neuman agreed about Article 17. He had the impression from the summary record with comments from NGOs that there are contrary pressures to make the draft more specific and concise but also more general. In order to get the work done, the Committee may have to avoid too much specificity. From that perspective, he was supportive of any solution as long as it was accurate and inclusively-worded.

Mr. Salvioli agreed with Mr. Neuman's statement and thought it would be useful to refer to economic and social rights, which would go hand-in-hand with the very clear trends for freedom of expression that use this right as a basis for the further enjoyment of other human rights. The need for a reference to economic and social rights was in no way beyond provisions of the Covenant.

Mr. O'Flaherty saw that absolute nature of civil and political rights as a foundation for freedom of expression. He asked if it would solve the issue for freedom of expression and opinion to form a basis for a "wide range of civil and political rights, as well as of economic and social rights".

Mr. Rivas Posada was fully satisfied with Mr. O'Flaherty's proposal. It should satisfy viewpoints expressed even if it was not complete. He believed the disagreement was with regard to Article 17, as there was no justification for including Article 17—having looked at the text, it was not in the same category. All of the Articles do have some relation to expression, but Article 17 should be taken out; the Committee should use minimalist language rather than stating everything that could be included.

Mr. Fathalla found Mr. O’Flaherty’s proposal to be very limited because it was taking out the more general aspect of “human rights” and restricting the text to just two rights civil/political and economic/social. Accordingly, he opposed the proposal.

Sir Nigel could go along with Mr. O’Flaherty’s suggestions but also had a problem with “as well as,” which can seem subsidiary or prior. As someone brought up with the dialectic between civil/political and economic/social rights, he liked the idea of having all together. He liked the existing text best, but was sympathetic to inclusion of a phrase to make that point. But if it was included, he agreed with Mme. Chanet’s suggestion.

Ms. Waterval liked the text as it was: “other human rights”.

Ms. Keller was in favor of including social and economic rights and could accept deleting Article 17.

Mme. Chair Majodina summed up that the issue was one of adding Article 24 and also of cutting other articles.

Mr. O’Flaherty suggested keeping the text as it was in the draft due to lack of consensus. There was a general agreement to remove 17 and not strong support to add 24.

Mme. Chanet opined that Article 17 is everything that relates to cell phones and computers; she was against deleting Article 17 because it relates to modern forms of expression.

Sir Nigel agreed that there is a connection between Articles 17 and 19, but the difference was that for the other rights, freedom of expression was inherent to the other right. Article 17 was a counterweight to Article 19 rather than a possessor. Articles 18 and 25 were the more obvious ones to include, but if Article 17 was the only obstacle, he would go with the group.

Mr. O’Flaherty pointed out that because it is an open list, there is no harm in deleting Article 17 because it does not exclude it from the list.

*Consensus: remove reference to Article 17.*

Mr. Iwasawa suggested for the third sentence to add “association and the exercise of the right to vote” to the end.

Mr. O’Flaherty noted that he will propose a new paragraph (12bis) about new media.

*Consensus: paragraph 3 adopted with Mr. Iwasawa’s addition, but without reference to Article 17.*

#### **Paragraph 4**

Mr. O’Flaherty noted that Japan, Canada and Australia asked for deletion of the entire paragraph. Personally, he opposed deletion.

Mr. Neuman was somewhat uncomfortable with paragraph four, because it commits to saying that Article 19, paragraph 1 is non-derogable when in fact there are aspects of the rights involved that may be necessary to derogate from in certain circumstances, and it is important not to read content into paragraph 1 that expands into—but does not properly apply to—other fields.

Mr. Iwasawa recalled that the original text was that a “reservation is not permitted” and the Committee intentionally chose that language to be compatible with Article 19.

Mr. Thelin believed the paragraph should remain as it was drafted.

Mme. Chair Majodina confirmed that if there was no further input, paragraph 4 would stand with the amendment by Mr. Flinterman.

Mr. Iwasawa preferred to leave the paragraph as it was, without the amendment.

Mr. O’Flaherty could accept the language as it was drafted, because he believed it already reflected what Mr. Flinterman wanted to add.

*Consensus: paragraph 4 adopted in original form.*

### **Paragraph 5**

Mr. O’Flaherty noted that Japan wanted the paragraph deleted, and a Jordanian human rights institute wanted it retained and strengthened by adding “and states should review any such reservations with a view to their withdrawal”.

Sir Nigel wanted it to remain as it was.

Mme. Chanet asked Mr. O’Flaherty to clarify why Freedom of Expression was expressed with regard to other rights. Why talk about other rights in the Covenant and then say that a general reservation would be incompatible? She didn’t understand the compulsory nature of the relationship.

Mr. O’Flaherty clarified that it followed from the General Comment on a State of Emergency and the idea of Freedom of Expression as a “meta-right”.

Sir Nigel agreed with Mr. O’Flaherty that the Committee could make the declaration but including reasoning would be useful, and that the Committee had already decided that freedom of expression gives infrastructure to other rights.

Mr. Iwasawa noted that Footnote 5 was the same as Footnote 2.

Mme. Chair Majodina asked where it was more relevant.

Mr. O’Flaherty recommended retaining both footnotes because they were making different points, even though they related back to the same General Comment.

*Consensus: paragraph 5 adopted as written.*

### **Paragraph 6**

Mr. O’Flaherty introduced two points from the commentary. In the last sentence, Japan asked that “must” should become “should” because of the role of the Committee in interpreting the ICCPR. Also, Canada wanted to add after “ensure” “...in a manner consistent with the covenant”. Mr. O’Flaherty did not disagree with the changes; he saw no harm to the draft.

Mr. Iwasawa supported both amendments.

Sir Nigel was not prepared to have “should” rather than “must” because paragraph 6 is about an obligation. The text could say that the “obligation involves state parties ensuring that persons...” or something similar. But it is describing the nature of an obligation, and in his opinion “must” was appropriate.

Mr. Thelin felt that “must” and “should” needed consistency. He wondered why the change was necessary, and was happier to keep “must” because it was still an obligation. Also, he felt that Canada’s proposal didn’t add anything and thus preferred keeping it as it was.

Mr. Neuman queried whether “insofar as” meant the same as “to the extent that” rather than “because.”

Mme. Chair Majodina noted consensus that the inputs from Japan and Canada would not be accepted.

Sir Nigel suggested the following phrase would read better: “the obligation also requires states parties to ensure,” as it conveyed the same message but related back rather than adding a thought. This could prevent it seeming added-on and avoid Japan’s problem. It still means “must”, but must isn’t always the best way of saying must.

Mr. O’Flaherty clarified that “insofar as” means “to the extent that” but would be happy to substitute “to the extent that” for clarity.

Mme. Chair Majodina checked that the meaning was the same in the other languages.

***Consensus: paragraph 6 adopted with the new language.***

### **Paragraph 7**

Mr. O’Flaherty introduced Australia’s comment that “enshrined” might cause confusion for dualist states; Mr. O’ Flaherty saw no problem with the term “enshrined”.

Mr. Iwasawa understood the dualist concern and suggested “given effect in domestic law” rather than “enshrined.”

Mme. Chanet noted that if additional paragraphs were to be added, paragraphs 7 and 8 could be merged.

Mr. O’Flaherty agreed for paragraphs 7 and 8 to be merged and suggested incorporating the phrase “given effect to” in first sentence.

***Consensus: amend paragraph 7 with “given effect to” language.***

### **Paragraph 8**

Mr. O’Flaherty noted that Australia had a useful suggestion to change the text to reflect the Committee’s new reporting system. He asked Ms. Keller for drafting input.

Another suggestion from Japan was that in the last sentence “must” should be replaced with “should” and here Mr. O’Flaherty found that appropriate.

Mr. Iwasawa suggested the language: “It is recalled that state parties should provide the committee in their initial report and where applicable subsequent periodic reports”.

Mme. Chanet understood that Australia wanted to refer to the period when reports are no longer being submitted, so she preferred text such as “reports, where applicable” or “where necessary the committee may request reports”.

Ms. Keller agreed with both speakers. Mr. Iwasawa’s suggestion made sense if you know there is a “list of issues” procedure; Mme. Chanet pointed out that with this formula we don’t refer to that, but the text cannot refer to list of issues in the first phrase because of the auto-mechanism.

Mr. Rivas Posada felt there was a need for compliance and consistency with new procedures, but that the text should still refer to reports so as to comply with Article 40.

Mr. Fathalla suggested to simply refer to reporting “in accordance with its procedure” which would be inclusive.

Mr. Thelin suggested “reports within the obligation under Article 40”.

Mr. O’Flaherty accepted the suggestion of “reports pursuant to article 40 of the covenant”.

Mme. Chair Majodina agreed.

*Consensus: adopt paragraph 8 as amended, and merge with paragraph 7.*

### **Paragraph 9**

Mr. O’Flaherty introduced the suggestion from a Norwegian center for human rights that where the text says “including,” it should instead say “including but not limited to”. Mr. O’Flaherty agreed to implement that suggestion throughout the draft.

Mr. Neuman pointed out that it is not necessary to derogate from “discrimination” because the right against discrimination is a relative right; it is not absolute. If something more absolute was being asserted, he was doubly uncomfortable if it was said to be non-derogable.

Mme. Chair Majodina asked whether Mr. Neuman suggested different language.

Mr. Neuman was not suggesting new language regarding discrimination so long as it was understood as describing discrimination where not justified; otherwise he would prefer to clarify that it is relative.

Mr. O’Flaherty also found the issue interesting and proposed that a solution was to have a sentence “no person may be subject to impairment of any rights under the covenant on the basis of their opinion”—even if one can occasionally be required to disclose your opinion, that would be a legitimate action (not impairment). Impairment of a right is clear because the right would not be impaired if the action to impair were justified.

Mr. Rivas Posada entirely agreed with Mr. O’Flaherty’s proposal; the mention of discrimination could give rise to problems—in Spanish the text said “no one can be subject to any form of discrimination or the impairment of any rights” which were two different things. Discrimination is another article of the covenant, which doesn’t have anything to do with this, so Mr. O’Flaherty’s proposal is good.

Mr. Iwasawa agreed with Mr. O’Flaherty’s proposal for the third sentence. With regard to “including but not limited to” he didn’t want to be picky, but the text had one sometimes and the other sometimes. “Including” seems to imply not limited, so why not just use “including” and let the summary notes make clear that it isn’t limited to anything?

Mr. O’Flaherty agreed there was a consensus to drop discrimination but would like to keep “but not limited to”. The Norwegian arguments were about having to show clearly that it is not a closed list. It may be a little tautological, but doesn’t do any harm.

Mr. Thelin expressed fondness for the Norwegians, but not to the degree of following the proposal. The Committee had been using both terms and he didn’t want to make life problematic.

Mme. Chair Majodina agreed to drop “but not limited to”.

*Consensus: paragraph 9 adopted with the discrimination reference deleted.*

### **Paragraph 10**

Mr. O’Flaherty introduced concerns from Australia and Poland regarding the paragraph, because at times it may be necessary to compel disclosure of opinion, offering the examples of collecting statistics (which Mr. O’Flaherty found less convincing) or where a person in professional position has well-founded fears of danger to a child, or when a doctor objects to certain treatment of a patient. Another example would be policing conscientious objection to military service.

Mr. O’Flaherty was not in favor of a change, because with regard to professional issues from Australia he distinguished professional judgment as different from *forum internum*.

Mme. Chair Majodina was also not convinced by the Australian argument because that example seemed not to be about opinion, but about disclosing facts.

Mr. Neuman disliked the sentence because he could imagine times when compulsion could be appropriate, for example where an expert witness testifying as to opinion doesn’t want to testify on a related subject. In that case, compelling the witness to give his related opinion would be an example. He was concerned that in this sentence the Committee had religion and politics in mind, but opinion was a very broad word. Also, he didn’t find the sentence logical, because it wasn’t non-derogable in the way that the right to hold opinions in.

Mr. Iwasawa shared Mr. Neuman’s concern, but didn’t have a proposal for change except that the last phrase seemed to be going too far and the Committee could nuance it a bit.

Sir Nigel found “coerced effort to shape opinion” to not make sense, and suggested “effort to coerce opinion”, because the Committee frequently asks States to shape opinion, like where racism is a problem, and then it’s ok. Presumably the problem is the coercive element.

Regarding sentence two, he suggested that “since freedom to hold an opinion necessarily includes freedom not to express ones opinion” would solve it. He did not find the example of an expert witness convincing because no one compelled the expert to be there. A better example might be where a juror who is compelled to be a juror is compelled otherwise when asked to give his opinion about death penalty.

Mr. O’Flaherty explained that the first sentence was based on a South Korean case of brainwashing in prison. He agreed that Sir Nigel’s correction solved the logic of the sentence, but the substance remained to be seen.

Mme. Chanet felt it would be beneficial to maintain the wording as it was for any coerced repressive or punitive action geared to shaping someone’s opinion. The second sentence refers more to paragraph two than paragraph one, but like Freedom of Expression, the intent was to show facets, that both not to be prosecuted for opinion and not to be forced to give it were protected. She felt the Committee was going further than the ICCPR here.

Mr. Rivas Posada agreed that to some extent the Committee was confusing paragraph one and paragraph two of Article 19. The first paragraph is on opinion, not expression of opinion, which was what helped the Committee decide something about brainwashing, because the paragraph refers to opinion, not expression of opinion. Therefore the second sentence regarding expression shows why there were difficulties in finding complete agreement on paragraph ten of the General Comment because of the two aspects, both of having an opinion without the need to express it, and of having the opinion itself. It is sometimes acceptable to limit expression of opinion, but not having the opinion.

Mme. Chair Majodina found the second sentence ambiguous.

Mr. O’Flaherty proposed that this is the best place for this statement, even if it is not perfect. He suggested that the Committee keep the first sentence and keep the first part of the second sentence but drop the end part. Therefore the sentence would end after “includes freedom not to express one’s opinion” (full stop) making it clear that the Committee was referring to Article 19(2).

Mr. Iwasawa stated that he could not accept the proposed second sentence, and instead proposed using “freedom of opinion necessarily includes freedom not to express opinion”.

Mme. Chanet said that what is said can be read both positively and negatively. She suggested leaving the text as it stood.

Mr. Neuman didn’t agree with Iwasawa; he would accept Mr. O’Flaherty’s proposal or accept moving the concept into Freedom of Expression.

Mr. Fathalla agreed that the simplest option was Mr. O’Flaherty’s wording, and supported it.

Mr. Thelin also supported Mr. O’Flaherty’s proposal.

Mme. Chanet still felt that something was missing; some may not have opinions, aside from not expressing an opinion—these concepts shouldn’t be confused.

Mr. O’Flaherty revised his proposal to “any effort to coerce the holding, the not holding, or the shaping of an opinion is prohibited.”

Mr. O’Flaherty also brought up that an NGO had been worried that the phrase only seemed to cover coercive action by the state, so the first sentence could include that the State has to ensure that non-state actors also do not coerce.

Mr. Thelin was hesitant to include mention of non-state actors, because this was a concern throughout the document and he didn’t want it to be misinterpreted where non-state actors were not specifically mentioned.

***Consensus: paragraph 10 adopted as amended.***

### **Paragraph 11**

Mr. O’Flaherty raised New Zealand’s proposal to remove brackets around the phrase “commercial advertising” citing a concern that brackets might be interpreted as reducing the level of protection provided to commercial advertising beyond the current level.

Mr. Iwasawa agreed with New Zealand’s suggested deletion, noting that although commercial advertising receives a lower level of protection than its counterparts in paragraph 11, commercial advertising is still an important form of expression and thus should not be bracketed.

Sir Nigel shared the above concerns and suggested ending the sentence at “teaching and religious discourse,” followed by a separate sentence stating: “It may also include commercial advertising” with the intention that this phrase be vague. Agreed; brackets removed and sentences amended according to Sir Nigel’s suggested language.

Mr. Neuman agreed that commercial advertising is judged by a lower standard than other forms of expression but pointed out that corresponding footnote 22—which cites *Ballantyne v. Canada*—does not support this type of lower standard (in fact, *Ballantyne* establishes the opposite position). So unless the



Committee supports an equal level of protection for commercial advertising, the reference to *Ballantyne* in footnote 22 should be omitted.

*Consensus to delete footnote 22.*

Mr. O’Flaherty raised Japan’s suggestion to remove “canvassing” from the listed forms of expression (O’Flaherty disagreed as he felt Japan was misunderstanding the logic of this reference). Committee’s silence on this point indicated agreement with O’Flaherty’s suggestion to retain, and thus “canvassing” remains on the list.

Mr. O’Flaherty also advanced the suggestion of several legal scholars that the final sentence in paragraph 11—which refers to the scope of paragraph 2—should use the word “expression” instead of “views” so as not to limit the interpretation of this sentence. Committee’s silence on this point indicated agreement.

Mr. O’Flaherty then brought up the suggestion of a confidential commentator to insert the word “only” in the phrase “such expression may be restricted in accordance with the provisions of...” within the final sentence, so as to provide additional safeguards against restriction of the right to freedom of expression. Mr. O’Flaherty and the Committee agreed on this addition.

***Consensus: paragraph 11 amended as indicated above; discussion of additional points to continue at the following meeting.***

## **DAY 2 (23 MARCH 2011)**

### **Paragraph 11 (continued)**

Mr. O’Flaherty introduced proposals from several organizations to include a reference to “expression related to sexual orientation and gender identity” in the list in second sentence.

Sir Nigel was ambivalent on this point. He had no doubt that freedom of expression covers that area of speech, but wasn’t sure whether it had the same kind of generic quality as other broader items listed; with inclusion of this, the list could get a lot longer. Sir Nigel did not wish to demean the importance of this issue, but he wasn’t sure it fell within same broad generic genus of expression.

Mr. Flinterman asked if this issue had come up in Committee discussions before.

Mr. O’Flaherty was not aware of concluding observations on these terms. Gender identity was not an issue the Committee had engaged with to any great extent. They had discussed sexual orientation with regard to freedom of association and assembly, but not directly associated with freedom of expression. Following on Sir Nigel, Mr. O’Flaherty agreed it might fit into paragraph 12 where “forms and means” are noted.

Mr. Flinterman said he might have misunderstood. He had more points on paragraph 11; a query on the first line of “guarantee to seek”, etc. why was it not another formulation, because this seemed restricted to three rights.

Mr. Thelin also wanted to expand on paragraph 11 and shared the reluctance of Sir Nigel. Also, as Mr. Flinterman said, he finds the first line to follow from the headline for interpretation, but with clarification he could accept it.

Mr. O’Flaherty noted that it may save time to quote properly in the first line.

Sir Nigel suggested that instead of “requires guarantees,” “requires states parties to guarantee”.

*There was consensus on this point.*

Mr. Neuman suggested adding language and adjusting the second sentence to give more attention to the right to receive voluntary communications, which was an important right hidden in the general comment. He proposed the language “this right extends to the expression and to the receipt of voluntary communication of every form of subjective idea”. This language was chosen because “the right extends to” is inclusive, while “extends to the guarantee of the expression” was redundant. He wanted to ensure the “right to receive communication of ideas” was equal to “right to express ideas”. There was a later reference to this regarding journalists, and he thinks it shouldn’t be limited to journalists. It might also extend to certain books, separate from the right to write the book.

Mme. Chanet felt this amendment was asking for the right to receive information as desired by persons delivering information as restriction, not a guarantee of a right; this was not the location for it; one should be able to receive all information and no restrictions. She felt that introducing this in the guarantee of a right seemed strange, and proposed revisiting the issue in the context of restrictions.

Mr. Iwasawa, referring to the same sentence, wanted to drop “subjective” and just say every form of idea or opinion.

Ms. Motoc understood Mr. Neuman’s point, but wondered—since he alluded to freedom to receive information (regarding the Uzbekistan case)—where are we with this general comment and in our practice have we really had instances of access to information? If not, then in this draft General Comment Mr. O’Flaherty reflects our practice. Should we have something not from our practice? She agreed in principle and maybe in the future there would be a case where we can take a stance on the issue.

Mr. O’Flaherty agreed it was important to distinguish access of information from right to freely receive information – they were quite different issues. He didn’t see harm in Mr. Neuman’s addition, which just made it more evident to the reader, but didn’t compromise the access to public information discussion. When the Committee says access to information (in paragraphs 18 and following) they should not link that or freely for that proposition on the language of seeking and receiving. The right of information is much stronger from paragraph 2 bis saying freedom of expression about the context of accountability and transparency, which legitimizes the right to public information.

Mr. Neuman said that with regard to whether we’ve dealt with this, the Uzbekistan case involved the question of banning of a newspaper in Tajik as violation of the producers’ and the readers’ rights. With regard to Mme. Chanet’s concern that language might have unintended restrictive effect, the language says voluntary but that could come out if viewed as restrictive. Maybe “to receive communication” would be vague, but it would cover the Uzbek case and not preclude anything if the word voluntary were removed.

Mr. Neuman’s proposed language was “this right includes the expression and the receipt of communication of every form of idea”.

If there were concerns that this was restrictive, “extends to” could be “includes”.

Sir Nigel consented to the suggestion, but would remind colleagues that some had a separate opinion in *Mavlonov* (the Uzbek case) and he didn’t consider that every person who might have read a suppressed organ of communication would therefore automatically have been subject to a violation of Article 19, but this language didn’t foreclose a discussion of the issue.

***Consensus: paragraph 11 adopted as amended.***

## **Paragraph 12**

Mr. O’Flaherty suggested addressing the issues in order of the text, rather than dealing with the sexual orientation issue first.

Accordingly, the first suggestion was a sensible proposal from disability organization that pointed out the exclusion of sign language. This could be dealt with in the second sentence, where “spoken and written word” could be “spoken written and signed language” which seemed to him to be a good addition.

Another proposal was what to do with sexual orientation and gender identity.

In the original draft, “form of dress” was included, but then in the first reading that language was removed. Many made clear that this was an open list and that dress could be a form of expression, so some had then suggested re-introducing the word “dress” and other related forms of expression had been suggested as forms of sexual orientation and gender identity, but not connected to dress. The ultimate suggestion was a distillation “dress, as well as forms of expression of sexual orientation and gender identity.”

Mr. Iwasawa asked if he could propose a different issue before discussing the gender question.

Mr. O’Flaherty didn’t mind, but he was following the order of the text and had other proposals.

Mr. Iwasawa said that the first sentence “publication” could be replaced with “dissemination” to allow for new media. He also confirmed that “but are not limited to” had been deleted.

Mr. Fathalla agreed that publication should be replaced with dissemination. He didn’t see what sexual orientation had to do with paragraph 12, which dealt with forms of expression, not content of expression.

Mr. Thelin said he understood the dress and gender proposals, and would be happy to include dress, which relates to both religious and sexual orientation, but agreed that it would be illogical to include substance of expression in this context.

Mme. Chanet agreed with Thelin, limiting sexual orientation to form of expression would not help defend sexual orientation. With regard to General Observation 28 on clothing for women, the covenant didn’t speak to it. If the Committee wanted to include “dress” as expression, they needed to make it gender neutral.

Mr. O’Flaherty was sympathetic for just “dress” but didn’t object as much as Mr. Fathalla. The phrase could say “forms of expression of gender identity” but if there was not agreement, than just “dress” would be acceptable, as he would rather not deal with it at all than do so inadequately.

*Consensus to just include the word “dress.”*

Mr. O’Flaherty presented a minor matter in second to last sentence, that “media” was misleading because it referred to not just mass media, but the concept of the plural of medium of communication, so it could be replaced with “modes of expression” which helped avoid confusion.

*Consensus on this point.*

Mr. O’Flaherty noted that the information in the last sentence had originated in the *Zundel* case in Canada. So that explained why it looked odd, because it was a faithful representation of jurisprudence. From the comments, some didn’t understand what it meant; some said *Zundel* was wrong, others said it was a hostage to fortune and that taking the point out of context encouraged location-specific limitations, while others suggested changes that made clear they were confused. The Committee found that it was the wrong *Zundel* in the footnote, so Mr. O’Flaherty would just delete the sentence.

Sir Nigel agreed to delete but noted for the record that in *Zundel* they got it right in denying the right to hold a racist meeting in the state legislature; so statement is right, but the *a contrario* limitation is the problem. Accordingly, Sir Nigel accepted deleting the sentence, but noted that that he thought *Zundel* was right for the facts of that case and the location in question.

*Consensus on paragraph 12.*

Mr. O’Flaherty suggested discussing the addition of a paragraph 12bis regarding new media.

Mr. Thelin was sympathetic to the idea, but it introduced new definitions, which they hadn’t had elsewhere in the draft (e.g. paragraph 45 where the text covers blogs, websites, etc.). He would choose to be true to what they had already introduced elsewhere and maybe to realign the language in paragraph 45 if that changed. He suggested for the second sentence “mobile phone and social media” should be replaced with “modern information dissemination systems, such as websites, blogs, or any other internet based electronic media, are driving the development of a global network for the sharing of ideas and information”. The third sentence would remain as drafted.

Sir Nigel was not sure of the function of this paragraph. It was descriptive of the technological evolution, but was not normative and maybe something was missing.

Mr. Iwasawa found it important because of the situation in North Africa, the Comment should be up to date. The Committee made efforts in paragraphs 12 and 45, so the second to last sentence of paragraph 12 could be expanded instead of adding a new paragraph 12 bis.

Mr. Fathalla agreed with Mr. Iwasawa. He liked the idea of a new formulation that was in paragraph 12.

Mr. O’Flaherty replied to Sir Nigel’s point that the original phrase would have given content to the right, but O’Flaherty took it out because went too far. He asked if they could capture the same essence in 12.

Mr. Thelin didn’t want to draft a sentence because he wasn’t against a stand-alone paragraph, because both the general development of the technology would be lost and also the essence. He was reluctant to lose the idea of a stand-alone paragraph.

Mr. Neuman asked whether moving the thought to the end of the section on the media might solve the problem by both putting it in the right place and postponing the drafting task.

Mr. O’Flaherty agreed that it would make sense in the media section.

*Consensus: wait for media section – paragraph 12 would stand as is.*

### **Paragraph 13**

Mr. O’Flaherty noted a suggestion to include a reference to sign language in first sentence. He had no strong view for or against it, but felt that “language of one’s own choice” already included sign language.

Sir Nigel was not opposed but also didn’t see the problem; if there aren’t restrictions already, why include it at all? If there had been problems, he was happy to include it, but wasn’t not sure if it was necessary.

*Consensus: leave out the suggestion of adding “sign language” in paragraph 13.*

### **Paragraph 14**

Mr. O’Flaherty noted the suggestion that in the first sentence “other media” would be replaced with “other media including new media”.

Mr. Fathalla found this suggestion to be redundant; the term “media” included now and the future.

*Consensus, the suggestion would not be adopted.*

Mr. O’Flaherty noted that for the third sentence there was a problem because “media” as such didn’t have rights, so they could say “media actors”.

*Consensus to accept this suggestion.*

Ms. Motoc noted that Article 27 of the ICCPR provides for people not to be deprived of employment with a group of people of their own language, including not only national but ethnic minorities, so she suggested taking out “right to express oneself in their own language”. She further stated that we don’t have only the right to use language in common with other members of group, they can use it outside, the sentence didn’t show how 27 is interpreted in contemporary practice.

Mr. Fathalla didn’t agree with Motoc’s suggestion.

Mr. O’Flaherty said that if paragraph 13 would create problems, it was not necessary to the general comment and could be removed.

*Consensus: delete paragraph 13.*

Sir Nigel asked whether “media actors” was a good formulation.

Mr. O’Flaherty explained that it couldn’t be “members of the media” because media as mass media had a new individualized sense without “joining”.

Sir Nigel felt that may be going too far. What about the “right to have the media receive information as a basis on which...”

*Consensus on this language.*

Mr. O’Flaherty posed the suggestion that in reference to “this implies a free press...” there had been a suggestion from Zurich to say “this implies a free press and other media as well as the free and unrestricted access by individuals to the internet which enables information intermediaries and members of civil societies to comment on public issues...”

Sir Nigel found that didn’t work, it was getting mixed up between media through which people have the right to receive information and the people having the right – unless civil society means something other than the right of us all to receive information. He also suggested it be two sentences.

Mr. Iwasawa felt the fourth and fifth sentences came from General Comment 25, paragraph 25 so it should be cited as such. He was also reluctant to add new ideas here.

Mr. Thelin said that here it was better off to reinforce that states parties shall not restrict access to new media. That would better fit in paragraph 15 and substance could be added. Also, paragraph 15 should be preceded by the discarded 12 bis, which would underscore modern communication.

Mr. O’Flaherty said that wherever it goes, they must address it; the media section was from 1955 and didn’t show how world had changed. He agreed with Mr. Thelin not to attach it to article 15, but would bring a proposal for a paragraph in this section prior to 15 with Mr. Thelin’s help.

*Consensus on this point.*

Mr. O’Flaherty shared a proposal suggested by Amnesty International [although he clarified later it was Greenpeace] and others, to add at the end of the paragraph 14 “where the activities of NGOs contribute to informed public debate on matters of public interest, the protections they and their members enjoy should be analogous to those of the media and journalists”.

Mr. Thelin understood the sentiment, but these rights should not be restricted for anyone, so he was uncomfortable with idea of a privilege given to journalists, because everyone should have them.

Mr. Neuman agreed with Mr. Thelin; NGOs are already covered. But regarding the privilege of journalist not to disclose sources, we may not have good idea of what defines an NGO such that these organizations would claim privileges because they were equated to journalists. He saw no clear boundary-line, so he was uncomfortable with the suggestion.

Mr. Fathalla agreed and also felt the proposal focused on protection while this section addressed freedom.

*Consensus not to accept the proposed sentence.*

Mr. Neuman noted that in the last sentence, the reference to receiving information was a corollary to journalism, so he proposed the alternative language “pursuant to Article 19” could be cut, and then “the public also had a corresponding right to receive information imparted by the media” could be added.

*Consensus on this point; delete paragraph 13 and adopt paragraph 14 as amended.*

### **Paragraph 15**

Mr. O’Flaherty presented that some commenters preferred “guarantee” to “encourage”. Also, Germany would like second sentence deleted because there was no basis in the ICCPR. Japan likes the sentence but would change “must” to “should”. Another commentator said that “since this is a means to protect the rights of media consumers to receive a range of information and ideas” should be included with “rights”.

Ms. Motoc agreed with keeping in the terms “encourage an independent and diverse media” because of country reports. She would rather the second part specify ethnic minorities.

Sir Nigel asked Mr. O’Flaherty to invert the sentence so that the punch line flows from the covenant rather than the explanation. He was against the German proposal, willing to discuss the Japanese proposal, and liked Ms. Motoc’s proposal.

Mr. Fathalla would add “guarantee” rather than replace “encourage” with it.

Mr. Iwasawa preferred “encourage” to “guarantee” noted that in concluding observations the language is “should” so here it should be the same.

Mr. Bouzid agreed with “encourage” and agreed with Motoc’s idea to mention Article 27 with reference to minority groups

Mr. Neuman was not sure of the meaning of sentence two or the impact of “the media”.

Mr. O’Flaherty proposed a new phrase: “as a means to protect the rights of media consumers”.

Mr. Neuman noted that the meaning might depend on encourage/guarantee as it related to signaling an obligation.

Ms. Keller said there is no legal basis in Article 19 for protection of minorities—they couldn’t say that the state had to guarantee the diversity of media.

Ms. Motoc made a point that the translation didn't match the meaning. The French translation of "media consumers" meant purchasers of media, but that wasn't the meaning here.

Mr. O'Flaherty agreed that the language came from lawyers, and it could be solved by saying "media users".

Mr. O'Flaherty summed up that Sir Nigel's proposal to adjust the first sentence was fine, and that he was also fine with saying "should" here. It seemed that most felt that "encourage" was good. They could use "including linguistic and religious minorities".

Mr. Fathalla didn't agree with cutting "guarantee".

Ms. Keller respectfully disagreed because "to guarantee the diversity of media" was not stated in Article 19, despite a wish that it was.

Mr. Thelin said that it would go too far to impose "guarantee"; to "encourage" was enough.

Mr. Iwasawa was more inclined to just delete second sentence.

Sir Nigel suggested that regarding "guarantee" vs. "encourage", he would prefer "should encourage and guarantee" or "must encourage" but "should encourage" was too weak.

### **Paragraph 16**

This paragraph was drafted by the Special Rapporteur.

Mr. O'Flaherty began by raising two points:

- (1) Ireland asked to retain paragraph 16 as drafted.
- (2) A confidential source suggested adding a sentence in the paragraph stating: "Bodies established to implement such laws must be independent from political, commercial, or unwarranted interferences in a manner that is neither arbitrary nor discriminatory and includes adequate safeguards for abuse".

Mr. Rivas Posada was not comfortable with the limited scope of the paragraph given its reference to "public broadcasting services" rather than information media in general, which he viewed as uncharacteristically restrictive.

Ms. Motoc agreed with Ireland's suggestion to keep the paragraph as drafted, considering the critical importance of media independence in state parties. Ms. Motoc cited the problem of media control by the Hungarian government as an example of this issue.

Mr. Thelin was not in favor of retaining the paragraph and feared that the notion of "independent media" had "darker streaks to it," that could encourage state control under the guise of independence, especially considering the diversity of the media market to which such guidance would apply. As an alternative to complete deletion, Mr. Thelin suggested retaining the first sentence and changing the "should" to a "must" to strengthen state party obligations.

Mr. Neuman pointed out that while paragraph 15 addresses the issue of an independent and diverse media in general, paragraph 16 describes a particular subset of the media (public broadcasting services) without discussing the distinctions between state-owned broadcasting services and their privately-owned

counterparts. Mr. Neuman expressed concern that more detail could raise the risk of treating complex issues in a somewhat rigid manner.

Sir Nigel opposed deleting paragraph 16 entirely because of the hortatory language in paragraph 15, noting that a decision to exclude 16 would result in state-monopolization of the media without any accompanying guarantees of independence.

Mr. O’Flaherty clarified that paragraph 16, as drafted, intended to address the issue of government control of the media, as the Committee has repeatedly encountered examples of the media being “used in an abusive fashion as a government mouthpiece”. The second sentence uses language that is suggestive and flexible—rather than hortatory—so that state parties with varying needs could tailor their domestic implementation of the guideline. In an effort to respond to the Committee’s concerns, however, Mr. O’Flaherty suggested removing the second sentence in paragraph 16.

Sir Nigel then reiterated Mr. Thelin’s earlier suggestion to delete the second sentence and change the “should” to a “must” in sentence one.

Mr. Rivas Posada and Mme. Chair Majodina both proposed combining paragraphs 15 and 16, as long as the new formulation referred to public broadcasting services and maintained guarantees of independence.

Based on the above discussion, Mr. O’Flaherty suggested deleting paragraph 16 and adding the following sentences to paragraph 15: *State parties must ensure that public broadcasting services operate in an independent manner. In this regard, they must guarantee the independence and editorial freedom of these services, and the provision of funding to them in a manner that does not undermine independence.*

***Consensus: delete paragraph 16 as initially drafted and add proposed language to the end of paragraph 15.***

### **New Paragraph 16**

The next day, O’Flaherty proposed a new version of paragraph 16 to address the Committee’s concerns regarding freedom of expression and the media: *State parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile phone-based electronic information dissemination systems,<sup>1</sup> have substantially changed communication practices around the world. There is now a global network to exchange ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. State parties should take all necessary steps to foster independence of these new media and to ensure access of individuals thereto.*

***Consensus: adopt new paragraph 16 as drafted above.***

### **Paragraph 17**

No discussion.

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<sup>1</sup> The suggestion to include the phrase “such as internet and mobile phone-based electronic information dissemination systems” was made by Mr. Thelin and adopted by the Committee after an initial reading of the paragraph by Mr. O’Flaherty.



## **DAY 3 (24 MARCH 2011)**

### **Access to Information**

#### **Paragraph 18**

Mr. O'Flaherty presented two preliminary suggestions:

- (1) Germany and Norway requested deletion of the entire section on access to information (paragraphs 18-20 in the current draft).
- (2) Article 19 as well as several other NGOs proposed changing the title to "Right to Information" as this would be a more helpful label.

Mr. Fathallah opposed deletion of this entire section and proposed the label "right of access to information" for consistency with language in the first sentence of paragraph 18.

Sir Nigel emphasized the importance of paragraphs 18-20, stating that it was "absolutely critical" to keep this section, particularly with regard to freedom of opinion, as "one needs information to form opinions."

*Consensus: keep this entire section and change title to "Right of Access to Information".*

Mr. O'Flaherty then advanced Canada's request to add "subject to the provisions of Article 19(3)" at the end of the first sentence in paragraph 18.

Mr. Thelin noted that there are references to Article 19(3) in other areas of the GC, such as paragraph 11, so this addition would make the document consistent.

Sir Nigel pointed out that the 19(3) restrictions serve as a reminder that certain bodies of government may want to be advised confidentially and may not want to disclose every aspect of their decision-making process save 19(3) restrictions; thus, governments may have a right to retain the confidentiality of internal information for areas that fall outside of the scope of 19(3) clawback clauses. Sir Nigel worried that a reference to 19(3) may not be sufficiently flexible to address this concern.

Mr. Fathallah and Mme. Chanet expressed similar concerns regarding the reference to 19(3), and favored leaving this language out.

*Consensus: reject Canada's suggestion and leave out reference to Article 19(3).*

Mr. O'Flaherty raised several commentators' objections to the explicit reference to "judiciary" in the final sentence without including other types of public bodies. He also mentioned a suggestion to remove the language referring to "all levels of State bodies" and replace it with "all state institutions including parliamentary bodies", as one commentator felt that such bodies may be overlooked.

Mr. Thelin felt that removing the reference to "all levels" of State bodies would drop the nuance and potentially lead to restricted access from local administrators. He disagreed with the suggestion to add the parliamentary bodies and urged the Committee to retain the existing language, including the reference to the judiciary. Alternatively, Mr. Thelin suggested using language to the effect of "public bodies include all levels and branches of government", to make this provision all-inclusive and address others' concerns about singling out the judiciary.

Mr. Neuman raised a related point about whether the reference to "all records" held by a public body in the first sentence created a universal right of public access that might be inconsistent with the reference to Article 19(3) restrictions in other paragraphs of the General Comment.

Mr. Thelin disagreed with this concern and discussed the Swedish understanding of the word “records” as documents with some level of finality (rather than “working materials” for example); thus records by their definition have obtained some level of finality and confidential or ongoing deliberations do not necessarily fall in this category.

Sir Nigel reiterated the public’s strong interest in accessing information and documents and questioned the meaning of the word “general” in “general right of access” because it could mean either a general right of access, or, alternatively and more broadly that the right itself is general and all-encompassing.

Mr. O’Flaherty summed up the points above and proposed to:

- (1) Retain the third sentence in its original form; (2) remove the reference to “general” before the right of access to information as the ambiguity (raised by Sir Nigel) could be taken to limit the right, and that is not the Committee’s intention.
- (2) To counter-balance this deletion, the Rapporteur also suggested dropping the word “all” before records, as retaining one without the other would weaken this paragraph.
- (3) Include a sentence clarifying that “public bodies are as indicated in paragraph 6 of this general comment” to ensure this provision is defined precisely and in an all-inclusive manner that is consistent with language in other provisions of the general comment. Considering the limited practice of the Committee in this area, Mr. O’Flaherty was hesitant to include further detail.

*Consensus on the above points.*

[Mr. Bouzid responded by suggesting that the last sentence should refer to “public bodies” that carry out public functions, but Mr. O’Flaherty replied that there cannot be a private/public distinction because the right applies to private bodies that undertake public functions, such as adoption agencies. Accordingly, the Committee rejected this suggestion].

***Consensus: accept paragraph 18 as amended.***

### **Paragraph 19**

Mr. O’Flaherty began by (1) observing that paragraph 19 has an important role to play because it draws upon a host of other rights (e.g., Article 17, 20, etc.) which should be listed; (2) raising several NGOs’ comments that paragraph 19 is misplaced and should instead follow paragraph 20 so that it does not break the flow of content on access to information and (3) voicing NGO concerns that the paragraph confuses the right to access public records with the right to access one’s own private records.

Mr. Thelin emphasized that paragraph 20 discusses modality of the right of access to information and reinforces that this right flows from a variety of sources, thus it should not be deleted or moved.

Mr. Neuman was also comfortable with keeping the paragraph in its current location, as long as there is adequate emphasis on the fact that the right of access to information stems from a variety of sources.

*Consensus: keep paragraph 19 in its current location.*

Mr. O’Flaherty then summarized several substantive suggestions by third parties, including:

- (1) the third sentence should specify that the right applies to “mass media actors” rather than just “right of media”.
- (2) “request rectification” should be changed to the stronger phrase “right to insist on rectification”.
- (3) Japan’s request to replace “must” in the last sentence with “should” as this is a recommendation rather than a requirement.

Mr. Iwasawa added as a minor point that footnote 38 should be deleted as it includes a weak, “see also” reference, and he suggested using “request and obtain rectification” instead of language in suggestion (2).

Mr. Neuman was unsure about the “right of general public . . . output” phrase at the end of the first sentence as he does not think that this is necessarily an access to information issue (implies that the mass media has an obligation to disclose information, which is not consistent with the Committee’s intent and gives the wrong impression); suggested changing language to “and thereafter the general public has the right to receive mass media output” or “what the mass media disseminates.”

Mme. Chanet pointed out in response to Mr. Neuman that the first part of paragraph 19 relates to *Gauthier v. Canada* while the second addresses an issue raised in *Mavlonov et al v. Uzbekistan*. Accordingly, although the terminology may appear strange it is there for reasons grounded in the Committee’s practice.

Mr. O’Flaherty summarized the amendments as follows:

- (1) The first sentence will state “Elements of the right of access to information may be identified in various articles of the Covenant, for instance: [list, including Article 17 which he suggests re-inserting in paragraph 3 of the general comment]”;
- (2) change “right to request information” to “right to have records rectified” and delete reference to elimination, as this is included in the new language;
- (3) delete footnote 38; and (4) adjust sentence on mass media output to state “the right of the general public to receive what the mass media disseminates”.

***Consensus: keep paragraph 19 in current location and accept language as amended above.***

## **Paragraph 20**

Mr. O’Flaherty provided an overview of proposals related to this paragraph:

- (1) Several commentators noted that the paragraph should not begin with procedures but instead reinforce a “general culture” of providing information, with the following suggestion for sentence one: “state parties should proactively put in the public domain information about government functions as well as other information of public interest,” which Mr. O’Flaherty supported.
- (2) Commentators suggested taking out “such as by means of legislation” because it provides too much instruction on how to implement the Committee’s guidance and one state asked to replace the phrase with “preferably” (Mr. O’Flaherty disagreed with these proposals because he felt the “such as” language made it clear that states were not required to pass legislation on the topic).
- (3) Canada and Australia requested to replace “rapid” with “timely” vis-à-vis the processing of information requests in second sentence.
- (4) An NGO pointed out that there should be an ability to appeal not only government refusals to provide access to information, but also in cases where the government fails to respond to information requests. Accordingly, sentence three should include the phrase “. . . as well as in cases of failure to respond to the request”.
- (5) Other commentators noted that the reference to fees for processing information requests should instead state “fees for the receipt of information” to avoid governments charging such fees without actually providing the information to requesters.
- (6) A number of commentators asked the Committee to provide protection for whistleblowers who leak information; although Mr. O’Flaherty was sympathetic to this problem from an ethical perspective, he felt that the Committee had very limited exposure to this topic in knowledge and practice and thus had no adequate basis for addressing whistleblower protection.

Mr. Iwasawa expressed support for the change to “timely” in proposal (3) and also raised an additional suggestion by an NGO—which he supported—to add “prompt” to the phrase “easy, effective and practical access” in the last sentence.

Mr. Thelin felt that the phrase “fees for requests” would cover not only processing but also receipt, and thus suggested adding this instead of the language in proposal (4). Addressing the issue of whistleblowers, Mr. Thelin agreed that this was an extremely important topic, but he reiterated that the Committee had limited experience with the issue/no basis in its jurisprudence, and could not responsibly provide guidelines regarding protection for whistleblowers.

Ms. Motoc inquired about the original reason for including a provision on fees, to which Mr. O’Flaherty responded that fees are an important issue because many states charge them, and in a number of unfortunate cases citizens have not been able to afford the fees, hence the reasonableness requirement.

Mr. Neuman added that the sentence on appeals should be inverted with the subsequent sentence on processing of requests so that the paragraph addresses—in order—the reasons for information requests, followed by the process for such requests, and finally the issue of appeals.

Mr. O’Flaherty then summed up by stating that the Committee agreed to accept all the suggestions as proposed except for proposal (2) (thus, the paragraph will keep the “such as by means of legislation” language), and proposal 6 (whistleblower protections). The Committee also decided to invert the sentences on appeals and processing of information requests based on the additional comment above.

***Consensus: accept paragraph 20 as amended.***

### **Paragraph 21**

Mr. O’Flaherty advanced the suggestion of several organizations to elaborate on the reference to media in sentence three by adding the phrase: “including new media, whereby journalists, other intermediaries, and members of civil society would be allowed to comment on issues of public interest”. Mr. O’Flaherty felt this suggestion was unnecessary in light of the recently-adopted amendments to paragraph 16, which addresses new media.

Mr. Iwasawa pointed out that the second and third sentences in this paragraph repeat language that is already in paragraph 14 and suggested removing reference to ‘state parties’ in the last sentence as the reader’s attention is directly drawn to this and may limit the scope of the guidance.

Mr. O’Flaherty responded that although there is indeed repetition, it is important in the context of paragraph 21, particularly because the paragraph would be very short without those two sentences. Further, because the general comment is intended to apply to state parties pursuant to Article 40, the Rapporteur did not find a reference to state parties in the final sentence problematic.

Mme. Chanet agreed that the reference to state parties must stay in the paragraph, emphasizing that the very purpose of general comments is to provide guidelines for state parties. She also suggested an inversion of the language in the second to last sentence so that the prohibition of censorship/restraint applies uniformly. The proposed change would read: “*This implies a free press and other media able to comment on public issues and inform public opinion without censorship or restraint.*”

Mr. O’Flaherty closed the discussion on this paragraph by stating that—in the absence of any other responses to the first proposal, it would be rejected—and thus the only change to this paragraph is the inversion of the language in the penultimate sentence.

***Consensus: agree to keep original language of paragraph 21, except for amendment to sentence three.***

## **Paragraph 22**

Mr. O’Flaherty raised two brief comments:

- (1) Canada suggested adding language indicating: “when a state party imposes restrictions, they must be in conformity with Article 19(3)” but Mr. O’Flaherty opposed this change, based on the Committee’s previous decision regarding 19(3) (see paragraph 18);
- (2) There was also a request to move the last sentence (“The Committee . . .reversed.”) to follow the first sentence, as this sentence elaborates on the right described in sentence one.

***Consensus: agree to keep language in paragraph 22 as is and change placement of final sentence.***

## **Paragraph 23**

Mr. O’Flaherty noted at the outset that paragraph 23 received little feedback from outside parties. He then raised two points made by Canada:

- (1) The reference to public safety in the second to last sentence may be confused with the public order (ordre public) exception in paragraph 22. Mr. O’Flaherty indicated that there was no such confusion and thus he saw little merit in this suggestion.
- (2) The paragraph should explicitly refer to the proportionality principle, which Mr. O’Flaherty suggested adding after the second sentence on justification, using the following language: “Restrictions must also conform to the principle of proportionality”.

Mr. Neuman worried that the existing reference to a “strict test of justification” in the paragraph followed by the proposed addition on proportionality above gives the appearance of two separate tests, which may be unnecessarily restrictive. He expressed concerns regarding the application of these tests in the commercial speech context and also feared that the tests might result in an intensified standard being applied uniformly to all categories under the freedom of expression heading.

Mr. O’Flaherty responded to Mr. Neuman’s initial concern by revising the language to state: “Restrictions must conform to the principle of proportionality” (thus removing the “also”). He deferred a discussion of the political speech concern to the Committee’s deliberations on paragraph 35.

Mr. Iwasawa and Mme. Chanut both approved a strict test for proportionality, with Mme. Chanut further stating that paragraph 35 also refers to this test.

Sir Nigel emphasized the importance of a strict test for proportionality, stating that this interpretation is required to ensure that the exception does not swallow the rule, an outcome prohibited by paragraph 22 (“the relation between the right and restriction and between the norm and exception must not be reversed”). Sir Nigel noted that the Committee has consistently applied this test in its jurisprudence.

Mr. O’Flaherty considered the responses and proposed the following change: *exclude “must meet a strict test of justification” and replace it with the language “must conform to the strict tests of necessity and proportionality.” (Consensus on this point)*

Mr. Iwasawa added that one NGO submitted the following revision to the language in the penultimate sentence of paragraph 23: “. . .even if such grounds would justify restrictions of other rights protected in the Covenant.” *(Consensus on this point)*

***Consensus: accept paragraph 23 as amended.***

## **Paragraph 24**

Mr. O’Flaherty provided an overview of comments to this paragraph in order of importance:

- (1) An NGO suggested including a reference to preventive strategies by the state and proposed the following sentence: “State parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression.”
- (2) The International Commission of Jurists (ICJ) asked for an explicit reference to judges and lawyers when discussing the heightened vulnerability of certain parties. Accordingly, they propose adding “as well as judges and lawyers” after the reference to persons who publish human rights reports in sentence five.
- (3) Canada suggested adding the phrase “crimes should be vigorously investigated, and, where appropriate, prosecuted” to the third sentence (which addresses acts of intimidation and attacks directed at journalists).
- (4) One commentator requested a reference to “other information intermediaries” in the third sentence (which currently refers only to journalists).

Mr. Thelin supported both the ICJ’s comment and the NGO suggestion regarding preventive measures, adding that the proposed language should be moved up, as prevention precedes the other issues discussed in this paragraph.

Mr. O’Flaherty responded by suggesting that paragraph 24 begin with the following sentence: “*States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression.*”

Mr. Salvioli supported the language discussing preventive action but opposed Canada’s proposal, as he felt that the “if appropriate” language was *not* appropriate in this context (as it weakened the sentence).

Mme. Chanet supported the ICJ’s proposal to include “lawyers and judges” to the list of protected persons, citing the example of the Committee’s Italian and Spanish colleagues who have paid a high price for releasing human rights information.

Sir Nigel agreed with the Canadian government’s basic point regarding prosecution, but felt that the scope of this element needed refining, since not every type of attack will trigger the obligation to investigate/prosecute/bring to justice under criminal law.

Mr. O’Flaherty summed up the Committee’s discussion on the proposed changes as follows:

- (1) Include NGO suggestion with language proposed by Mr. O’Flaherty as the opening sentence.
- (2) Add reference to judges and lawyers in fifth sentence.
- (3) Reject proposed addition of “information intermediaries” to third sentence.
- (4) Exclude language proposed by Canada regarding prosecution, and instead replace reference to “all allegations of attacks” in the final sentence with “all such attacks” for consistency with description of attacks earlier in paragraph 24. The Committee agreed to continue discussion of this point at the next meeting.

***Consensus: accept paragraph 24 as amended, and continue discussion of “such attacks” language at next meeting.***