24. Art and human rights law

Sarah Joseph

1. INTRODUCTION

There are key synergies between the fields of human rights law and art.¹ Human rights focus on maximising human flourishing, and the opportunities for people to reach their potential to live a life worthy of a human being. Art enlightens and questions aspects of humanity, identity and dignity. Art invites us to ponder, to consider, to reflect and to respond, often engendering empathy, hence inspiring greater recognition and respect of the humanity and rights of others.² In any case, art ‘broadens our perspectives’; it ‘can shake us up, leading to enlightenment or disillusionment, but we are wiser for the experience’.³ Art is also a uniquely powerful medium for conveying human rights messages: there are for example few indictments of war as evocative as Picasso’s *Guernica*.

This chapter focuses on how international human rights law engages with art, in particular the rights of artists and their audiences with regard to freedom of expression. The fulfilment by a State of its obligations regarding freedom of expression creates spaces for artists to flourish through recognition of their rights to create works, whether they are beautiful or ugly or unpredictable or provocative or boring or conformist or subversive.

However, there are limits to the right of artistic expression. The nature and extent of these limits, including the ways they have been applied in relevant international cases, are explored in this chapter. First, the human right to freedom of expression under two international treaties, the International Covenant on Civil and Political Rights (‘ICCPR’)⁴ and the European Convention on Human Rights (‘ECHR’), is introduced. The application of what could be termed the ‘right to freedom of artistic expression’ is then discussed with regard to the following themes: national security, morality and religious sensibilities, political art, hate art, and restrictions on art related to public order. Finally, restrictions on art arising from non-state actors are discussed, namely ‘the heckler’s veto’ and ‘market censorship’.

The chapter concludes with final comments on the support for art, as well as the disappointing limits to that support, provided under the international law relating to

¹ This opening paragraph is adapted from European Union Agency for Fundamental Rights (FRA), *Exploring Connections between Arts and Human Rights*, Report of a High-level Expert Meeting on 29–30 May 2017 (compiled by this author).

² See e.g. Lynn Hunt, *Inventing Human Rights* (Norton, 2008), in which Hunt argues that a human rights ethos emerged in the 18th century partly due to a growth in empathy prompted by general access to portraiture and novels.

³ Edward J Eberle, ‘Art as Speech’, (2007–8) 11 *University of Pennsylvania Journal of Law and Social Change* <<https://scholarship.law.upenn.edu/jlasc/vol11/iss1/2>> accessed 28 February 2019, 11.

⁴ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171.

freedom of expression. It is recommended that the unique anarchic ‘rule-less’ nature of art be acknowledged and embraced more, and that the human right to create and access art, whether one enjoys or is confronted by it, be accorded greater protection and prioritisation.

2. FREEDOM OF EXPRESSION UNDER THE ICCPR AND THE ECHR

The right of freedom of expression is recognised in numerous international human rights instruments, both universal and regional. Article 19 of the ICCPR is probably the most important such guarantee in the world, as it applies globally and binds the greatest number of States, with 172 States parties to that treaty.⁵ Article 19 reads:

19(1) Everyone shall have the right to hold opinions without interference.

19(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.

19(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 19 specifies that expression ‘in the form of art’ is protected. The United Nations (UN) Human Rights Committee (HRC), the international body which monitors and supervises implementation of the ICCPR,⁶ has clarified in its General Comment 34 that ‘non-verbal expression’ includes ‘images and objects of art’.⁷

Rights to freedom of expression, and therefore rights of artistic expression, are not absolute. The right can be subjected to reasonable and proportionate limitations designed to achieve the ends specified in Article 19(3). Unfortunately, the HRC has addressed only two cases under the First Optional Protocol to the ICCPR concerning artistic works,⁸ so it has offered little guidance on the permissible limits of artistic expression.

⁵ Numbers of treaty parties are available via the United Nations Treaty Collection database at < treaties.un.org > (accessed 27 February 2019).

⁶ The statements and decisions of the HRC are not of themselves binding in international law. However, they represent authoritative interpretations of the ICCPR, which is itself legally binding.

⁷ UN Human Rights Committee, ‘General Comment 34’, UN doc CCPR/C/GC/34, 12 September 2011. General Comments are consensus comment issued by the HRC which expand upon issues arising under the ICCPR. Most General Comments, such as General Comment 34, constitute detailed explanations of particular ICCPR rights.

⁸ The Optional Protocol is a separate treaty to the ICCPR with 116 States parties. Upon ratification, States parties consent to the consideration by the HRC of individual communications regarding alleged violations by that State of its ICCPR obligations. See Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171.

The European Court of Human Rights has addressed far more cases regarding art than any other international human rights body.⁹ The relevant right in the ECHR is Article 10, which reads:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

It is generally understood that Article 10 protects artistic expression, even though it is not explicitly mentioned in the provision. The restrictions on freedom of expression permitted under Article 10 are similar to those in Article 19 of the ICCPR.

It is clear that certain official constraints that have been placed on art would not be allowed under the contemporary right to freedom of expression. For example, the Nazi regime and the Soviet regime both imposed aesthetic restrictions on art. The Nazis banned and persecuted the creators of ‘degenerate art’,¹⁰ encompassing most modern styles of art. Socialist Realism was the officially sanctioned art form behind the Iron Curtain to the exclusion of other styles.¹¹ Clearly, such restrictions are not contemplated under either Article 19 or Article 10.

In *Singer v Canada*, a case concerning commercial speech, the HRC stated, after explaining that Article 19 protects political, cultural, artistic and commercial expression:

The Committee does not agree . . . that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.¹²

In contrast, the European Court does distinguish between different types of expression in terms of the protection conferred. Daňková concludes that art comes relatively low in the Court’s hierarchy, above commercial speech but below political speech, speech in the public interest, and probably academic speech.¹³ Polymenopoulou agrees that art lacks a privileged status among forms of expression in the European Court.¹⁴

⁹ Eleni Polymenopoulou, ‘Does one Swallow make a Spring? Artistic and Literary Freedom at the European Court of Human Rights’ (2016) 16 Human Rights Law Review 511, 515.

¹⁰ See e.g. Olaf Peters, *Degenerate Art: The Attack on Modern Art in Nazi Germany 1937* (Neue Galerie 2014).

¹¹ See e.g. C Vaughan James, *Soviet Socialist Realism: Origins and Theory* (Palgrave Macmillan 1973).

¹² *Singer v Canada*, UN doc CCPR/C/51/D/455/199, 15 August 1994, para 11.3.

¹³ Michaela Daňková, ‘Art Speech in the Case Law of the European Court of Human Rights’ Diploma Thesis, Masaryk University, Faculty of Law, Brno 2018, available at <<https://is.muni.cz/th/b36bd/?lang=en>> (accessed 28 February 2019), 30–31, see also 65.

¹⁴ Polymenopoulou (n 9) 516.

A privileged status for art might prompt a decision-maker to decide on whether an impugned work is in fact ‘art’. In *Vereinigung Bildender Künstler v Austria*, Judge Loucaides in dissent suggested that the impugned work was not art:

we must exclude from the legitimate expression of artists insulting pictures that undermine the reputation or dignity of others, especially if they are devoid of any meaningful message and contain nothing more than senseless, repugnant and disgusting images, as in the present case.¹⁵

Judge Loucaides’ instrumentalist approach suggests that works of art must have a purpose, in particular the conveyance of a ‘meaningful message’. Yet meaning is in the eye of the beholder: a work’s message and purpose will vary between the artist and the various people who encounter the work. As explained by Eberle:

each of us is empowered to experience [art] as we see fit. No person or government can channel our free play of imagination.¹⁶

Art may need more protection than many other forms of expression. Art will often push societal boundaries, challenge taboos, and seek to provoke, shock, and disgust. Art can elicit intense emotional responses.¹⁷ Art is therefore often threatened by measures regarding obscenity, morality, blasphemy, defamation and moral rights, public order and even national security. Widespread censorship on such grounds threatens to reduce art to a homogenous bland rump.

In General Comment 34, the HRC confirms that Article 19(2) ‘embraces even expression that may be regarded as deeply offensive’.¹⁸ Similarly, in its early decision in *Handyside v UK*, the European Court of Human Rights confirmed in an oft-quoted paragraph that Article 10 extended:

not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.¹⁹

The HRC has had little chance to prove that it will robustly defend this principle in considering individual complaints with regard to art.²⁰ However, it is arguable that the European Court has failed to stand by these admirable sentiments in its art cases, as discussed below.

¹⁵ *Vereinigung Bildender Künstler v Austria*, Judgment, 25 January 2007, No 68354/01, dissenting opinion of Judge Loucaides, 13–14.

¹⁶ Eberle (n 3) 16.

¹⁷ Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: ‘The right to freedom of artistic expression and creativity’ (Special Rapporteur), UN doc A/HRC/23/34, para 35.

¹⁸ General Comment 34 (n 7), para 11.

¹⁹ *Handyside v UK*, 7 December 1976, Series A No 24, para 49.

²⁰ Another source of HRC jurisprudence are its Concluding Observations pursuant to State reports. A search of the Universal Human Rights Index database (<uhri.ohchr.org> (accessed 27 February 2019)) indicates that there have been very few comments about artistic expression by the UN treaty bodies (including the HRC) pursuant to the reporting process. Most comments about art have not concerned freedom of expression, but other rights, such as the right of the child to play and to participate freely in cultural life and the arts in Article 31 of the Convention on the

I now move on to discuss the various permissible restrictions to rights of freedom of expression, and how they relate to artistic expression. However, I note at the outset that international law in this respect is underdeveloped due to a lack of cases. The dearth of international cases on artistic expression does not reflect a lack of restrictions on art, and rights violations in regard to art. Indeed, the non-government organisation 'Freemuse' details a depressing catalogue of human rights abuses involving art across the world on its excellent website.²¹ The relative lack of international cases may instead reflect the way concerns over freedom of expression have been dominated by matters regarding the media, freedom of the press, and political speech. Research on artistic freedom under human rights law is lacking, as is awareness amongst artists of their human rights.²²

3. NATIONAL SECURITY RESTRICTIONS

National security relates to the protection of the territorial integrity and political independence of a State, and the people within it.²³ It relates to extreme public order threats such as war or, in the present day, terrorism.

*Shin v Republic of Korea*²⁴ is a case taken to the HRC concerning the conviction of an artist of a national security offence, entailed in his display of a painting which arguably portrayed North Korea as an agrarian paradise, and South Korea as a State dominated by US, Japanese and corporate interests. The painting itself was confiscated and damaged. An expert witness had argued that the artist 'sought to incite overthrow' of the South Korean regime by forces friendly to North Korea. The artist claimed instead that it represented his utopian view of a unified Korea, influenced by his childhood memory of rural life.

The case may demonstrate how an artwork can convey different meanings to different people, and how those meanings can diverge from that intended by the artist.²⁵ Hence, the UN Special Rapporteur in the Field of Cultural Rights has warned, in a statement of relevance to rights limitations beyond national security:

Artistic expressions and creations do not always carry, and should not be reduced to carrying, a specific message or information.²⁶

Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3. The comments about artistic expression have been quite general, such that one cannot extrapolate much more than the obvious fact that censorship of art raises issues regarding freedom of expression. See e.g. UN Committee on Economic Social and Cultural Rights, Concluding Observations on Vietnam, UN doc E/C.12/VNM/CO/2-4, para 35, 15 December 2014. These comments concerned Article 15 of the International Covenant on Economic Social and Cultural Rights (16 December 1966, 993 UNTS 3), which encompasses rights to artistic expression.

²¹ See <freemuse.org> accessed 28 February 2019.

²² FRA (n 1) 7.

²³ See *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles), UN doc E/CN.4/1984/4 (1984), Principle 29.

²⁴ *Shin v Republic of Korea*, UN doc CCPR/C/80/D/926/2000, 16 March 2004.

²⁵ FRA (n 1) 8. The meaning of an artwork may also change over time.

²⁶ Special Rapporteur (n 17), para 37. UN Special Rapporteurs are human rights experts appointed by the UN to investigate particular human rights issues.

4. MORALITY AND RELIGIOUS SENSIBILITIES

M4835-McCUTCHEON_9781788971461_t.indd 394

A current controversy concerns Balthus's *Therese dream*,³⁵ a 1938 painting of a carefree 12-year-old in a provocative stance with her legs apart and underwear visible, on display at New York's Metropolitan Museum. Critics claim that the painting promotes paedophilia, and have petitioned the museum, thus far unsuccessfully, for its removal.³⁵

In *Müller and others v Switzerland*³⁶ before the European Court, the relevant artwork consisted of three paintings by Josef Felix Müller, which depicted sexual intercourse, including between a person and an animal. Despite the lack of any apparent public outcry, the paintings were confiscated and Müller was fined 300 Swiss Francs for breaching Article 204 of the Swiss Criminal Code on obscenity. Müller complained of a breach of Article 10.

The European Court found that the Swiss government's actions did not breach Article 10. The Court agreed with Swiss authorities that the works were 'morally offensive to a person of normal sensitivity'.³⁷ It was also influenced by the fact that the relevant exhibition was open to the public free of charge, without any age restriction.³⁸ It is legitimate to demand that precautions be taken to protect children from confronting artworks that are inappropriate for their age.³⁹ That should not however entail disproportionate prohibitions which shield adults from the work as well.⁴⁰

The European Court has addressed a number of cases regarding clashes between art and religious sensitivities. *Otto-Preminger Institut v Austria*⁴¹ and *Wingrove v UK*⁴² both concerned complaints about the censorship of films which were deemed to breach the respondent State's blasphemy laws. The relevant movie in *Otto-Preminger Institute* portrayed God as senile, Mary as promiscuous, and Jesus as idiotic. *Wingrove* involved a short video which depicted a sexually aroused nun, supposedly 'St Teresa', dreaming of sex with Jesus Christ.⁴³ *I.A. v Turkey* concerned passages in a book which attacked the character of Mohammad.⁴⁴

In all of those cases, no violation of Article 10 was found. This was despite the fact that considerable effort had to be made in order to access the artworks: in no case was an unsuspecting member of the public likely to confront the work, as might have happened in *Müller*.

The relevant limit in these religious morality cases was not the protection of public morals, but rather the countervailing 'rights of others' under Article 9 of the ECHR, concerning freedom of religion. In *Otto-Preminger Institute*, the Court stated:

³⁵ Harriet Alexander, 'New York's Met Museum refuses to remove Balthus painting despite petition against promoting paedophilia', (*The Telegraph (UK)*, 6 December 2017) <<https://www.telegraph.co.uk/news/2017/12/06/new-yorks-met-museum-refuses-remove-balthus-painting-despite/>> 28 February 2019.

³⁶ *Müller and Others v Switzerland* judgement, 24 May 1988, No 10737/84.

³⁷ Ibid paras 18, 36.

³⁸ Ibid para 36.

³⁹ See Polymenopoulou (n 9) 529–30.

⁴⁰ Special Rapporteur (n 17) paras 62–63.

⁴¹ *Otto-Preminger-Institute v Austria*, Judgment, 20 September 1994, No 13470/87.

⁴² *Wingrove v UK*, Judgment, 25 November 1996, No 17419/90.

⁴³ The video was finally given classification, and therefore permission for release, in 2012: Daňková (n 13) 71.

⁴⁴ *I.A. v Turkey*, Judgment, 13 September 2005, No 42571/98.

Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.⁴⁵

The Court went on to say that the religious feelings of Christians in *Otto-Preminger* were ‘violated by provocative portrayals of objects of religious veneration’.⁴⁶ Similar reasoning was applied in *Wingrove* and *I.A.*

Freedom of religion is clearly an important human right, but it should not include a right to protection of one’s religious feelings,⁴⁷ unless the assault on those feelings is so extreme as to constitute hate speech (discussed below). Indeed, there is no human right not to be offended per se. Therefore, such ‘rights’ should not be able to outweigh an important human right such as that of freedom of expression.⁴⁸

A substantial minority in *I.A.*, which was decided 4:3, called for the *Otto-Preminger* precedent to be revisited on this matter, as they cogently argued:

[It] seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.⁴⁹

In *Müller*, *Otto-Preminger*, *Wingrove* and *I.A.*, the majority findings (of no violation of Article 10) were all influenced by the doctrine of ‘the margin of appreciation’. The margin of appreciation in the European Court’s case law is a zone where the actions of the State are given the benefit of the doubt, so no violation is found if a situation falls within that zone. Hence, a broader margin of appreciation gives States greater leeway to interfere with ECHR rights, including freedom of expression. One factor which influences the Court on the size of the margin is whether a common European practise exists in an area. Less consensus will lead to a larger margin of appreciation.⁵⁰ Matters of morality including religious morality lack consensus, especially in Europe’s modern multicultural societies, so a broad margin is generally conferred.⁵¹ This increases the vulnerability of art to restrictions on moral grounds, including those based on religious sensibilities, under the ECHR.⁵² Yet it is vitally important for art to be able to challenge prevailing moral

⁴⁵ *Otto-Preminger-Institute v Austria* (n 41) para 47.

⁴⁶ *Ibid.*

⁴⁷ See also *Otto-Preminger-Institute v Austria* (n 41), dissenting opinion of Judges Palm, Pekkanen and Makarczyk, para 6.

⁴⁸ See also General Comment 34 (n 7) para 28.

⁴⁹ *I.A. v Turkey* (n 44), Joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, para 8.

⁵⁰ See e.g. Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *International Law and Politics* 843, 851–53.

⁵¹ See e.g. *Wingrove v UK* (n 42), para 58 and the concurring opinion of Judge Bernhardt.

⁵² *Polymenopoulou* (n 9) 516.

codes: one only has to consider the wealth of brilliant art available today which challenged contemporaneous moral climates.⁵³

The margin of appreciation is not a blank cheque. The European Court upheld a claim for a breach of Article 10 in *Akdaş v Turkey* over the censorship, and punishment of the publisher, of a Turkish translation of Guillaume Apollinaire's erotic 1907 novel, *The Eleven Thousand Rods*. The Court was explicitly influenced by Apollinaire being a 'classic author', and the novel being 'a work contained in the European literary heritage'.⁵⁴ Indeed, the widespread veneration of this novel formed a continental consensus which accordingly shrank Turkey's margin of appreciation.⁵⁵ A similar argument about a piece's place within a global artistic heritage could perhaps be applied to Balthus's *Therese Dreaming*.

Soon after the decision in *I.A. v Turkey*, a political schism opened up between Western and Islamic States over so-called defamation of religions, prompted by the Danish cartoons controversy of 2006⁵⁶ and subsequent like episodes. Broadly, European States lined up in favour of freedom of expression against the need to protect religions from offensive publications. In such a political environment, Polymenopoulou cogently argued that the Court would likely pull back from its *Otto-Preminger* precedent.⁵⁷

However, the *Otto-Preminger* precedent was recently supported, as was the broad margin of appreciation in such cases, by the unanimous judgment of the European Court in *E.S. v Austria*.⁵⁸ The case did not concern art, but rather a public statement by the applicant about the alleged paedophilic tendencies of Mohammad. She was duly convicted in Austria of the crime of disparaging a religion. Despite citing numerous international and regional instruments which cautioned against the criminalisation of blasphemous speech, the European Court found no breach of Article 10.

The 'margin of appreciation' doctrine does not apply under the ICCPR, which should hopefully lead to greater protection for artists arising under that treaty.⁵⁹ Indeed, a more robust protection of freedom of expression compared to the European Court is evident in General Comment 34:

⁵³ Examples include Donatello's nude statue of David (1440s) and Edouard Manet's *Le Dejeuner sur l'herbe* (1862–1863).

⁵⁴ *Akdaş v Turkey*, Judgment, 16 February 2010, No 41056/04; see English language press release at <[https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:\[%22akdas%22\],%22itemid%22:\[%22003-3030159-3344927%22\]}](https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22akdas%22],%22itemid%22:[%22003-3030159-3344927%22]}>)> accessed 28 February 2019.

⁵⁵ Polymenopoulou (n 9) 535.

⁵⁶ This controversy concerned the publication of several cartoons by Danish newspaper *Jyllands-Posten* in September 2005, some of which depicted Mohammad, and all of which linked Islam to terrorism. In early 2006, riots erupted in several Muslim States over the cartoons, resulting in deaths and attacks on European embassies.

⁵⁷ Polymenopoulou (n 9) 526. See also *Alekhina and Others v Russia*, Judgment of 17 July 2018, No 38004/12, concerning the infamous Pussy Riot minute-long impromptu performance inside a major Russian cathedral. While the Court found that sanctions might have been justified to protect the rights of others (see paras 214, 228), the severe sanctions in the form of criminal convictions and prison sentences were disproportionate, so it found a breach of Article 10.

⁵⁸ *E.S. v Austria*, Judgment, 25 October 2018, No 38450/12. The court quotes *Otto-Preminger Institute* (n 41) with approval at paras 43 and 46.

⁵⁹ See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases Materials and Commentary* (3rd edn, OUP 2013) para 18.69.

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant [which prohibits hate speech].⁶⁰

5. POLITICAL ART AND SATIRE

Art can convey a political message. Much art that supports human rights can be classified as political art, such as *Guernica* or John Heartfield's anti-Nazi photo-montages, or as social commentary such as Goya's 19th century depictions of poverty, prisons and asylums. Art has also long played a role in aid of protests, including Joseph Turner's *Slave Ship* (1840) in support of the abolitionist movement, and the arts vanguard which brought AIDS into the spotlight during the 1980s in the face of official indifference.

Vereinigung Bildender Künstler v Austria was an ECHR case which concerned a mock religious painting/collage which contained 33 contemporary identifiable figures, including the artist himself, engaged in various sexual acts with each other. One of those people was a former politician, who subsequently won a legal claim in Austria based on harm to his reputation and moral rights. The European Court found that the consequent restriction on artistic freedom, which prevented the display of the work, breached Article 10.

It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate.⁶¹

Similar support for political satire is found in its decisions in *Alves de Silva v Portugal* (concerning satirical puppetry)⁶² and *Kuliš and Rożycki v Poland* (concerning a cartoon).⁶³ On the other hand, a satirical attack in a novel on right-wing French politician Jean Marie Le Pen was not protected in *Lindon, Otchakovsky-Laurens and July v France*,⁶⁴ partly due to the murky mix of fictional and non-fictional events in the relevant book,⁶⁵ and the harshness of the imputation linking Le Pen to racist murders. Furthermore, as explained above, the Court did not tolerate the satirical '9/11' cartoon in *Leroy*.

The European Court has commonly indicated that political speech is accorded the highest protection amongst types of expression,⁶⁶ which might help to explain its more 'art friendly' approach in the cases involving satire, compared to the cases involving

⁶⁰ General Comment 34 (n 7) para 48. See also *Fedotova v Russian Federation*, UN doc CCPR/C/106/D/1932/2010, 19 November 2012, where the HRC found a breach of Article 19 entailed in Russia's suppression of 'homosexual propaganda' entailed in posters put up near a school.

⁶¹ *Vereinigung Bildender Künstler v Austria* (n 15) para 33.

⁶² *Alves da Silva v Portugal*, Merits and Just Satisfaction, 20 October 2009, No 41665/07.

⁶³ *Kuliš and Rożycki v Poland* judgment, 6 October 2009, No 27209/03. See also *Ziemiński v Poland* (No 2) (concerning a satirical article), judgment, 5 July 2016, No 1799/07.

⁶⁴ *Lindon, Otchakovsky-Laurens and July v France* Grand Chamber judgement, 22 October 2007, Nos 21279/02 and 36448/02.

⁶⁵ *Polymenopoulou* (n 9) 533.

⁶⁶ See e.g. *Lingens v Austria* Application No 9815/82, Merits and Just Satisfaction, 8 July 1986.

religious offence. This was the case even in *Vereinigung Bildender Künstler*, which satirised religious iconography, but was censored by Austrian authorities on the basis of its political rather than its religious content.⁶⁷

6. HATE ART

Hate speech is prohibited under Article 20 of the ICCPR, which reads:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

There is no equivalent ECHR provision. However, the European Court has confirmed that hate speech is not protected under Article 10. Only one such case has concerned art, *M'bala v France*.⁶⁸ The complaint, regarding the complainant's conviction for a comedy show, was ruled inadmissible as the relevant expression was deemed to be anti-Semitic hate speech. Other examples of 'hate art' are the anti-Semitic cartoons that flourished under the Nazis, such as those in the notorious newspaper *Der Stürmer*.

'Hate speech', as well as war propaganda, becomes murky beyond obvious examples. There are many artworks which fall short of hate, but which may still be, or be perceived to be, antagonistic to certain groups. For example, older art can reflect contemporaneous attitudes which are now seen as abhorrent.

In 2012, the Brussels Court of First Instance ruled against one Bienvenu Mbuto Mondondo, who had alleged that the continued sale of the comic *Tintin in the Congo*, part of Hergé's iconic Tintin series, amounted to hate speech and discrimination. *Tintin in the Congo* celebrates Belgian colonialism in the Congo, and depicts its white protagonist and his dog as superior to Africans, who are portrayed as stupid and lazy. The Belgian court found that the publication lacked the requisite intent to be classified as hate speech. It would have been helpful had the court clarified whether the book's content, aside from questions of intent, could ever constitute hate speech. If it could, vast swathes of the world's art could contravene hate speech and anti-discrimination legislation.⁶⁹

'Discriminatory art', including art which may or may not cross the line into hate speech, is not confined to the past. For example, sectarian murals continue to be painted in Northern Ireland.⁷⁰ Cartoons can be particularly problematic in conveying racist or sexist messages. As explained by Fredrik Strömberg:

[R]acism pops up quite often in comics, especially in the older ones . . . I would argue, racism seems to pop up more frequently in comics than many other art forms. One reason why this

⁶⁷ Polymenopoulou (n 9) 524.

⁶⁸ *M'Bala M'Bala v France* decision, 20 October 2015, No 25239/13.

⁶⁹ See Jogchum Vrieling, 'Judging the Past: Discrimination Law, Hate Speech Legislation and the Colonial Imagination' (2012) 12 *International Journal of Discrimination and the Law* 99.

⁷⁰ Fiona McGaughey, 'A law unto themselves: murals in the Northern Ireland conflict' chapter 21 of this book.

might be so is that the creators working in comics often use visual simplifications in order to tell their stories. Comics are, in essence, a narrative art form, and to get that readable flow the images are often reduced almost to iconic simplicity. When an artist working with comics designs a character, he or she may use easily recognizable traits to get the general idea of that character across to the reader. But in doing so, it is very easy to resort to characteristics based on biased or even racist grounds.⁷¹

Art that crosses the line into hate speech should be prohibited. However, art that falls short of hate, which is nevertheless divisive or reinforcing of stereotypes, is largely entitled to protection as artistic expression. The line between instances of hate speech and that which falls short is not always easy to delineate. As explained in a General Comment from the UN Committee on the Elimination of All Forms of Racial Discrimination, the classification of speech as hate depends a lot on the context in which the instance of speech arises.⁷²

Different people will interpret images in different ways. For example, many read a notorious 2016 Bill Leak cartoon in Australia, which depicted a lazy drunk Indigenous father, as a racist attack on Australia's Indigenous people. Leak defended the impugned cartoon as a comment on parental responsibility in light of reports regarding Indigenous juvenile crime.⁷³

As noted above, there is no human right to be free from offence. Divisive art, or that which might perpetuate stereotypes but which falls short of hate, should not be banned unless harm beyond offence or insult is likely to result, such as a public order threat or the real likelihood that the art will increase discriminatory attitudes. In some cases, the opposite may happen as the relevant artwork might generate an anti-discriminatory backlash.⁷⁴ The law, including law based on human rights principles, cannot capture everything that might be distasteful. As explained by the UN Special Rapporteur in the Field of Cultural Rights:

. . . what may be morally objectionable (from one point of view) may not necessarily be legally admissible or condemnable.⁷⁵

⁷¹ Fredrik Strömberg, *Comic Art Propaganda* (ILEX, 2010) 13.

⁷² See generally on racist hate speech, Committee on the Elimination of Racial Discrimination, General Comment 35, 'Combating racist hate speech', UN doc CERD/C/GC/35, 26 September 2013 (at para 15 on context). That Committee supervises and monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, open for signature on 21 December 1965, 660 UNTS 195. Article 4 addresses racist hate speech.

⁷³ Janna Thompson, 'What is racism – and is Bill Leak a 'controversialist' or a racist?' (*The Conversation*, 2 November 2016) <<https://theconversation.com/what-is-racism-and-is-bill-leak-a-controversialist-or-a-racist-67993>> accessed 28 February 2019. It may be noted that Leak's cartoon ignored the crux of the relevant debate, which had arisen in the context of revelations of mistreatment of juvenile prisoners, largely Indigenous children, in the Northern Territory.

⁷⁴ For example, Leak's cartoon prompted a social media campaign, #indigenousandads, celebrating Aboriginal fatherhood.

⁷⁵ Special Rapporteur (n 17) para 31.

7. PUBLIC ORDER

Public order is a broad limitation relating to the maintenance of the orderly functioning of society.⁷⁶ It is a common ground used, and abused, by governments in imposing restrictions on art.

Marchant Reyes et al v Chile was a case before the HRC which concerned a work of art entitled *Bridges of Memory*.

The work consisted of 17 banners painted by national artists on the subject of the coup d'état of 1973 and the defence of human rights in a democracy. The aim of the work was to draw the attention of passers-by to the serious human rights violations of the past and show how these were connected to current violations.⁷⁷

The artists had obtained the requisite administrative permission to hang the banners. Nevertheless, Chilean police removed 15 banners. Four were later restored, but 11 banners were lost.

The artists claimed a breach of Article 19, entailed in the removal and loss of most of the work. Chile explained that its police were unaware that the display of the work was authorised, and had acted to prevent a threat to public order, as it was possible that the works would provoke a violent response. The HRC summarised Chile's explanation:

... the State party has argued that the removal of the work of art had the legitimate objective of preventing potential disruption to public order arising out of the burning of the banners and that it is the duty of the Carabineros to safeguard public order.⁷⁸

However, the HRC went on to dismiss the State's justification:

The Committee observes, however, that a disruption of public order due to the burning of the work of art is merely speculative, inasmuch as the State party has provided no evidence of what specific information it had that gave rise to fears that the work might be burned because it contained human rights messages.⁷⁹

The HRC went on to find that Chile had failed to explain 'the precise nature of the threat' to public order posed by the artwork.⁸⁰ The HRC added that the police actions could not be justified by their own ignorance of the fact that the artists had obtained the requisite permits. Ultimately, the HRC found that the removal of the 15 banners, along with the subsequent loss of 11 of them, breached Article 19(2).⁸¹

Many public order measures, generally, are aimed at preventing public disturbances, such as breaches of the peace. Some such disturbances can arise from an antagonistic outraged response by a crowd to some perceived provocation. This issue arose in *Marchant Reyes*, and is discussed in further detail directly below.

⁷⁶ Siracusa Principles (n 23) Principle 22.

⁷⁷ *Marchant Reyes et al v Chile*, UN doc CCPR/C/121/D/2627/2015, 7 November 2017, para 2.2.

⁷⁸ Ibid para 7.5.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid para 7.8.

8. RESTRICTIONS ON ART FROM NON-STATE ACTORS 1: THE HECKLERS' VETO

Sometimes art will provoke an antagonistic reaction from those who disapprove. It was the fear of such a reaction which apparently prompted the Chilean police to remove the artworks in *Marchant Reyes*. Interestingly, the HRC stated:

the State party has the positive obligation to facilitate the exercise of the right to freedom of expression. Thus, given that it is the function of the Carabineros to safeguard public order, it was their duty to ensure that the artistic work was not burned.⁸²

The alleged public order threat arose from the Carabineros' anticipation of a hostile reaction by some of 'the audience' to the artwork. However, States have obligations to protect the exercise of artistic expression against extreme and disproportionate reactions by an audience, such as the actions of those who seek to destroy a work of art. This phenomenon is known, evocatively, in the US as 'the hecklers' veto'.⁸³ In *Marchant Reyes*, the human rights compliant response to such an anticipated threat was for the police to protect the artworks, rather than remove them and pre-emptively reward the anticipated poor behaviour of 'hecklers'.

An extreme example of a 'heckler's veto' was the murder of the *Charlie Hebdo* cartoonists by Al Qaeda-linked gunmen due to the magazine's frequent publication of cartoons which depicted, often in very unflattering and offensive ways, the prophet Mohammed. A less extreme example concerns Andres Serrano's controversial *Piss Christ*, a ten-edition photograph of a crucifix in a glass of the artist's urine. *Piss Christ* was attacked with a hammer in Melbourne in 1997, and slashed by Catholic protesters in Avignon in 2011.⁸⁴ The French gallery continued to exhibit the slashed work, while the National Gallery of Victoria (NGV) closed the relevant exhibition of Serrano's work. The NGV arguably succumbed to the hecklers' veto in breach of the rights of the artist and his Melbourne audience.⁸⁵

Beyond violent or destructive responses, people can certainly criticise an artwork. Indeed, criticism is itself an exercise of freedom of expression. For example, a campaign was waged against a painting in the 2017 Whitney Biennial in New York by Dana Schutz entitled *Open Casket*. The painting is an abstract representation of a famous 1955 photograph of the open funeral casket of a lynched African American teenager, Emmett Till. Critics complained that Schutz, a white Jewish artist, had 'appropriated' and exploited African American culture and trauma. On one day during the Biennial, a black artist stood in front of the work all day, in a form of performance art, wearing a T shirt emblazoned with the words 'Black Death Spectacle'. A petition was circulated by another black artist Hannah Black calling for the removal and even the destruction of

⁸² Ibid para 7.5.

⁸³ See e.g. *Bible Believers et al v Wayne County, Michigan*, US Court of Appeals for the Sixth Circuit, No 13-1635, 28 October 2015. See also Special Rapporteur (n 17) para 54.

⁸⁴ Angelique Chrisafis, 'Serrano Piss Christ slashed', *Sydney Morning Herald*, 20 April 2011.

⁸⁵ The episode is discussed at the beginning of D Casey, 'Sacrifice, Piss Christ, and Liberal Excess' (2000) 5 *Law Text Culture* <ro.uow.edu.au/ltc/vol5/iss1/2> accessed 28 February 2019.

the painting. All of these attacks on Schutz and her work fall within the bounds of the freedom of expression of her critics.⁸⁶

What is less clear, however, is the appropriate reaction to such a protest. How would one characterise the actual removal of the painting by the Whitney if Black's urgings had been heeded, leaving aside the more problematic call for the painting's destruction?⁸⁷ Even though Black's actions were peaceful, unlike the hammer attack in Melbourne on *Piss Christ*, would such an action by the Whitney be an instance of a gallery succumbing to a hecklers' veto, as was arguably the case with the NGV in 1997 with Serrano? Such action would deprive audiences of access to art, and perhaps their rights to 'receive information' under international articulations of the right to freedom of expression. Certainly, the Special Rapporteur in the Field of Cultural Rights cautions against censorship in such circumstances:

The fear that some communities may protest should not be sufficient to lead to the conclusion that some artworks should not be displayed or performed; a certain level of contest and dispute is often inherent to contemporary art.⁸⁸

The NGV is a government body, for which the State is accountable under international human rights law. It is less clear how the actions of the Whitney, a private gallery, give rise to relevant international human rights obligations. As a private actor, it has a certain freedom to pursue courses of action in its self-interest.⁸⁹ It may not wish to bear the backlash from a protest. It might also be swayed by the power of the arguments against display of the work.

This circumstance may be problematic in an age where protesters against artworks can massively amplify their voices and impact on social media, placing unprecedented pressure for the withdrawal of an artwork. Beauchamp notes that today's cultural climate may mean that exhibitors 'tend to bend, often to break' in response to such protests.⁹⁰ It can also lead to self-censorship by artists, and a consequent diminution in the creation and display of controversial art.⁹¹

Attacks on controversial art have historically come from conservative forces in society, as in the cases involving religious offence. Conservatives may be more opposed to the occasional radical nature of art, and its capacity to challenge the status quo. Contemporary attacks also come from progressive forces dedicated for example to the greater empowerment of vulnerable minorities. This latter instance arose with regard to

⁸⁶ See generally, on the 'Open Casket' episode, Gorman Beauchamp, 'Open Casket and Cultural Appropriation' (2017) 75 *The Antioch Review* 455.

⁸⁷ The Whitney did not remove the painting from the Biennial, but it changed the caption attached to it.

⁸⁸ Special Rapporteur (n 17) para 49.

⁸⁹ This is not to say that it lacks any relevant ethical or moral responsibilities. As a business, the Whitney has responsibilities to respect human rights according to the UN Guiding Principles on Business and Human Rights, UN doc A/HRC/17/31, 21 March 2011, Pillar 2, though such responsibilities are not binding under international law (in any case, the UN Guiding Principles are not hard law).

⁹⁰ Beauchamp (n 86) 465.

⁹¹ FRA (n 1) 10.

Open Casket. Similarly, the campaign against Balthus's *Therese Dreaming* emanates from feminists galvanised by the #metoo movement, rather than from traditional conservative morals campaigners.

Certainly, the US government has human rights obligations to protect Schutz's rights of artistic expression, but it is very doubtful that those obligations extend to any duty to direct the Whitney to display her works. Such 'coerced speech' would in fact breach the rights of individuals associated with the Whitney.⁹² The situation involves multiple exercises of freedoms of expression in the private sphere, coupled with the necessary freedoms of private entities to respond to arguments and debates as they see fit. Human rights principles do not seem to dictate how the Whitney should respond in this scenario.

Finally, any duty of protection for Schutz requires one to assume that her work should not be vulnerable to banning under international human rights principles. Her painting does not seem to come within any of the limits in either the ICCPR or the ECHR. In contrast, Serrano's *Piss Christ* might have been and may still be vulnerable to being legitimately censored, at least under the ECHR's conservative approach to clashes between artistic expression and religious morality. Nevertheless, the NGV's reaction in cancelling the entire Serrano exhibition seems disproportionate and therefore a possible breach of human rights law by a public body attributable to the State.⁹³

9. RESTRICTIONS ON ART FROM NON-STATE ACTORS 2: MARKET CENSORSHIP

Another area where pressures in the private sector suppress the creation or display of certain art, is 'market censorship'. For example, corporate sponsors may wield power behind the scenes, and therefore without transparency and accountability, placing pressure on exhibitors to withdraw or not display certain artworks. Modern market censorship can lead to the suppression of experimental and provocative art.⁹⁴ As explained by the Special Rapporteur:

Corporations tend to show little interest in funding alternative cultural spaces or institutions and prioritise funding high-profile programmes such as blockbuster exhibitions.⁹⁵

Sponsor interference is not new. For example, the famed Medici family of Florence had an immense influence on Renaissance art.⁹⁶

Market censorship is very difficult to address under international human rights law compared to State censorship. States have direct human rights duties under international law whereas the private sponsors of art and art exhibitions do not. Even though modern

⁹² I will not here discuss whether non-state entities like the Whitney itself have human rights.

⁹³ Australia is of course not a party to the ECHR. While the NGV is a Victorian statutory authority, the actions of all public bodies within a federation are attributable to the State party, in this case Australia, under international human rights treaties. See, e.g. ICCPR Article 50.

⁹⁴ Special Rapporteur (n 17), para 76.

⁹⁵ Ibid para 77.

⁹⁶ See e.g. Paul Strathern, *The Medici: Godfathers of the Renaissance* (Vintage, 2003).

day developments indicate that businesses, including sponsors and art galleries, have responsibilities to respect rights such as freedom of expression, such responsibilities have not crystallised as binding obligations under international law.⁹⁷

The most effective response from the government is to ensure that the arts are properly funded by the State to guard against over-reliance on the corporate dollar. Such an obligation may be located within the right to freedom of expression. However, the emphases on positive obligations regarding freedom of expression have been on the provision of independent government-funded public broadcasting services,⁹⁸ rather than on the provision of government funding for arts projects. Such a positive obligation regarding the arts might be more easily located within the right to take part in cultural life, protected in Article 15 of the ICCPR's sister treaty, the International Covenant on Economic Social and Cultural Rights.⁹⁹ Discussion of that right is beyond the scope of the present chapter.¹⁰⁰

10. CONCLUSION

The right to freedom of expression provides important protections for art, both for creators and those who appreciate and experience art. However, there have been few international human rights cases about restrictions on art. Unfortunately, the dearth of cases is not mirrored by a dearth of actual threats to artistic expression. It may instead reflect a dearth of knowledge about international human rights law by bodies involved in the arts. This may have led to a related underdevelopment of the freedom of artistic expression compared to other forms of expression, such as journalism.

The European Court of Human Rights has dealt with the lion's share of international human rights cases about art. Its record in that regard is disappointing. While confirming the *Handyside* principle that ECHR norms protect art that is shocking, offensive and disturbing, it has tended not to find in favour of such art. Instead it has deferred too much to the State's margin of appreciation, and the misguided idea of countervailing human rights to freedom from offence on a religious basis. As cautioned by the minority in *I.A. v Turkey* with regard to the *Handyside* principle:

We consider that these words should not become an incantatory or ritual phrase but should be taken seriously and should inspire the solutions reached by our Court.¹⁰¹

The European Court, as well as other international human rights bodies like the HRC, must take seriously the important role of provocation and subversion in art. As explained by the Special Rapporteur in the Field of Cultural Rights:

⁹⁷ See UN Guiding Principles on Business and Human Rights, UN doc A/HRC/17/31, 21 March 2011, Pillar 2.

⁹⁸ See General Comment 34 (n 7) para 16.

⁹⁹ International Covenant on Economic, Social, and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3, Article 15. See generally, Special Rapporteur (n 17).

¹⁰⁰ See also Convention on the Rights of the Child, opened for signature on 20 November 1989, 1577 UNTS 3, Article 31, and Convention on the Rights of Persons with Disabilities, open for signature on 24 January 2007, 2515 UNTS 3, Article 30.

¹⁰¹ *I.A. v Turkey* (n 44), dissent, para 1.

Artists may entertain people, but they also contribute to social debates, sometimes bringing counter-discourses and potential counterweights to existing power centres. The vitality of artistic creativity is necessary for the development of vibrant cultures and the functioning of democratic societies. Artistic expressions and creations are an integral part of cultural life, which entails contesting meanings and revisiting culturally inherited ideas and concepts. The crucial task of implementation of universal human rights norms is to prevent the arbitrary privileging of certain perspectives on account of their traditional authority, institutional or economic power, or demographic supremacy in society. This principle lies at the heart of every issue raised in the debate over the right to freedom of artistic expression and creativity and possible limitations on that right.¹⁰²

Eberle emphasises art's link to our imagination and our inner selves, as creator but also as viewer or participant: 'Art . . . is the imagination made manifest'.¹⁰³ In that sense, art is possibly the form of expression that is closest to its passive internal analogue, that is freedom of opinion. Interestingly, freedom of opinion is an absolute right under Article 19(1) of the ICCPR, precisely because of its wholly internal dimension.

As stated above, the international law on freedom of expression as it relates to art is underdeveloped. That underdevelopment may have led international bodies, particularly the European Court of Human Rights, to misunderstand or overlook certain unique characteristics of art, such as its 'nonrational, non-cognitive or non-discursive' nature.¹⁰⁴

Art involves the free use of imagination and intuition. This free use of judgment is unencumbered by rules. Art must not conform to accepted standards. . . . Art is exercise of our fancy, inspiration or whim.¹⁰⁵ . . .

art speech is . . . outside the control of government and the majoritarian forces that form conventions and the normal rules of society.¹⁰⁶

The European Court has perhaps failed to provide appropriate protection to art by applying 'normal' rules to an area where 'rules' are anathema.

Of course, there are some legitimate limits to artistic freedom. But such limits, such as prohibitions on hate art, or art that seriously undermines one of the interests outlined in Article 19(3) of the ICCPR or Article 10(2) of the ECHR, must be strictly proportionate and strictly scrutinised. In that respect, broad margins of appreciation for States in the context of art are inappropriate. Explicit recognition of the high value of artistic expression, perhaps on a par with political expression as arose in *Vereinigung Bildender Künstler v Austria*, may be appropriate, notwithstanding difficulties that may arise in defining 'art'.

Artistic freedom can be constrained by the actual or even potential reactions of audiences. Human rights norms are less effective in combating 'private' threats to artistic freedom, especially when those threats themselves involve the exercise of freedom of expression. While human rights norms clearly demand that States combat threats such as

¹⁰² Special Rapporteur (n 17) para 3.

¹⁰³ Eberle (n 3), 11.

¹⁰⁴ Ibid 9.

¹⁰⁵ Ibid 15.

¹⁰⁶ Ibid 16.

the destruction of art works (or of artists), there is little the State can or should do about a vigorous social media campaign against an exhibition, apart from robustly support principles of pluralism and tolerance. International human rights law does not generally demand that the State dictate responses in and by the private sector in the contested marketplace of ideas.

It is therefore incumbent on all of us to take seriously the rights of artists to create art. And we must take seriously the rights of all of us to engage with art so as to be, inter alia, entranced, confronted, comforted, inspired, provoked, bored, confused, or enlightened by it.