

## CHAPTER IV FREEDOM OF EXPRESSION AND THE INTERNET

### A. Introduction

1. Freedom of thought and expression is the cornerstone of any democratic society.<sup>1</sup> The inter-American human rights system in particular gives it a very broad scope<sup>2</sup>: Article 13 of the American Convention guarantees the right of all persons to freedom of expression and establishes that this right includes "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

2. Article 13 applies fully to communications, ideas and information distributed through the Internet.<sup>3</sup> The Internet has not only made it easier for citizens to express themselves freely and openly, but has also provided ideal conditions for innovation and the exercise of other fundamental rights such as the right to education and free association.<sup>4</sup> As the OAS General Assembly has stated, information and communications technologies (ICT) are crucial for political, economic, social and cultural development, as well as essential factors in the reduction of poverty, job creation, environmental protection, and prevention and mitigation of natural disasters.<sup>5</sup>

3. In this document the Office of the Special Rapporteur endeavors to make available to all States in the region, general principles for the protection of the right to freedom of thought and expression online. These principles are intended to provide guidance to governments, legislative and regulatory bodies, the courts and civil society in order to clear the way for this conceptually and technically new territory, and stimulate the revision and adoption of legislation and practices in view to achieving the full realization of the right to freedom of thought and expression through the Internet.

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<sup>1</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 8; I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 70; I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. Para. 85; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 112; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 82; I/A Court H.R. *Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 194. Para. 105; I/A Court H.R. *Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 195. Para. 116.

<sup>2</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 3.

<sup>3</sup> United Nations. Human Rights Council. The promotion, protection and enjoyment of human rights on the Internet. A/HRC/20/L.13. June 29, 2012. Para. 1. Available for consultation at: [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=20280](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=20280)

<sup>4</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Para. 61. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>5</sup> OAS. General Assembly. [Use of Telecommunications/Information and Communication Technologies to Build an Inclusive Information Society](#). AG/RES. 2702 (XLII-O/12). June 4, 2012.

4. In preparing this report, the Office of the Special Rapporteur looked at the progress that has taken place in international<sup>6</sup> and domestic law and specialized scholarship on the subject, as well as those important documents suggested by multi-sectorial forums such as the UN's Internet Governance Foru.<sup>7</sup> Similarly, the legislative, administrative and legal progress that has been made in the region on the issue has been fundamental, usually as a result of multi-stakeholder and democratic processes of deliberation around Internet governance issues.

5. As explained in detail later on, some countries in the region have begun to adapt their domestic legislation to international human rights principles that extend to the right to freedom of expression on the Internet. For example, Mexico recently approved a bill to amend its Political Constitution in the area of telecommunications. The amendment states in its Article 7 that protections of the right to disseminate opinions, information and ideas through any media includes a prohibition on restricting this right using indirect measures “such as the abuse of government or private controls over [...] equipment used in the dissemination of information, or by any other means and information and communications technologies tending to impede the communication and circulation of ideas and opinions.”<sup>8</sup>

6. Important laws have been passed in Chile to protect freedom of expression on the Internet, including changes to the Law on Intellectual Property that limit intermediary liability for the content produced by third parties, and establish a legal standard for eliminating content that violates

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<sup>6</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and Organization of American States (OAS) Special Rapporteur on Freedom of Expression. November 20, 2001. [Joint Declaration about Countering Terror, Broadcasting and The Internet](#); UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 10, 2002. [Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialisation and Freedom of Expression, and Criminal Defamation](#); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and Organization of American States (OAS) Special Rapporteur on Freedom of Expression. December 18, 2003. [Joint Declaration on the regulation of the Media, On the Restrictions on Journalists, and On Investigating Corruption](#); UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist Measures](#); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. February 2, 2010. [Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade](#); UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. [Joint Statement On Wikileaks](#); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#); UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#); United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#).

<sup>7</sup> United Nations. Internet Governance Forum. [About the Internet Governance Forum](#).

<sup>8</sup> Cámara de Diputados. [Constitución Política de los Estados Unidos Mexicanos](#). February 5, 1917. Last reforms published on December 27, 2013. Art. 7.

the Law. It also creates new exceptions to the need for consent of rights holders.<sup>9</sup> In addition, in exemplary fashion, Law 20,453, also from Chile, enshrining the principle of net neutrality for Internet consumers and users, by prohibiting blocking, interference, discrimination, throttling, and the restriction of the right of any user to “use, send, receive or offer any lawful content, application or service through the Internet, as well as any other type of lawful activity on or use of the web.”<sup>10</sup>

7. Elsewhere, Argentina enshrined Law 26,032 on Internet Services, which explicitly enshrines the guarantees of the protection of freedom of expression in the searching, receiving and circulation of information and ideas of all kinds through Internet services.<sup>11</sup>

8. Other more recent legislative initiatives in the region that seek to apply human rights standards to the Internet include a civil law Internet bill in Brazil. This bill, which at the time of this report was before Congress, contains, in its original version, a number of provisions that would be highly effective in protecting the right to freedom of expression on the Internet, such as a provision to limit intermediary liability for content produced by third parties.<sup>12</sup>

9. Finally, without attempting to be exhaustive, it should be mentioned that Canada passed Bill C-11: The Copyright Modernization Act of 2012, which establishes safeguards for Internet providers and implements a private system for issuing complaints notifications over for illegal content, but without requiring Internet providers to remove that content without a court order.<sup>13</sup>

## **B. Freedom of expression on the Internet: guiding principles**

10. Currently, the right to freedom of expression has found in the Internet a unique tool for incrementally extending its enormous potential to broad sectors of the population. According to the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Internet, like no other means of communication before, has allowed individuals to communicate instantly and at a low cost, and has had a dramatic impact on journalism and the way in which we share and access information and ideas.<sup>14</sup>

11. The configuration and architecture of the Internet are relevant insofar as the Internet offers space for strengthening the exchange of information and opinions. The Internet has been developed using design principles which have fostered and allowed an online environment that is

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<sup>9</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.435](#). Modifica la [Ley N° 17.336](#) sobre Propiedad Intelectual of August 28, 1970. May 4, 2010. Art. 85L to 85U and 71A to 71S.

<sup>10</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.453](#). Consagra el principio de neutralidad en la red para los consumidores y usuarios de Internet. August 26, 2010. Art. 24 H a).

<sup>11</sup> Congreso de la Nación Argentina. [Ley 26.032](#). Servicio de Internet. Establécese que la búsqueda, recepción y difusión de información e ideas por medio del servicio de Internet se considera comprendida dentro de la garantía constitucional que ampara la libertad de expresión. June 16, 2005. Art. 1.

<sup>12</sup> Câmara de Deputados. Proyecto de ley N° 2126/2011. [Marco Civil da Internet](#). August 24, 2011. Available for consultation at: [http://www.camara.gov.br/sileg/Prop\\_Detalhe.asp?id=517255&st=1](http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=517255&st=1).

<sup>13</sup> Parliament of Canada. [Copyright Modernization Act](#). June 29, 2012. Articles 35 (31.1), 47 (41.25 and 41.27).

<sup>14</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Para. 10. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

decentralized, open and neutral. It is important for all regulation to be based on dialog among all actors and to maintain the basic characteristics of the original environment, strengthening the Internet's democratizing capacity and fostering universal and nondiscriminatory access.

12. This means that on one hand, that the original and special characteristics of the Internet should be taken into account before making any regulation that would affect its architecture or interaction with society. In this respect, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have recognized that "[a]pproaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it."<sup>15</sup> In other words, the special characteristics that have made the Internet a perfect medium for growing the democratic, open, plural and expansive exercise of freedom of expression should be taken into account when establishing any measure that could impact upon it.

13. In this regard, the Office of the Special Rapporteur deems of particular importance that public policy and regulations seek to preserve the original architecture of the Internet, not only directly but also through the private parties that influence and develop it. Regarding this, the Council of the Organisation for Economic Co-operation and Development recommends that States promote "the open, distributed and interconnected nature of the Internet."<sup>16</sup>

14. This means that not just any type of interconnected network would serve the same goals of freedom of expression in the broad terms of Article 13 of the American Convention. The digital environment should develop according to certain guiding principles that inform the State's work, the development of public policies, and the actions of private parties. These principles, which will be laid out further on, include equal conditions of access, pluralism, nondiscrimination and privacy. Any measures which could, in one way or another, affect the access to and use of the Internet must be interpreted according to the primacy of the right to freedom of expression, at all times, especially in regard to speech that is protected pursuant to the terms of Article 13 of the American Convention.

## **1. Access**

15. Principle 2 of the Declaration of Principles on Freedom of Expression states that, "[a]ll people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition." The Office of the Special Rapporteur considers that this principle should be interpreted so as to derive the following consequences: steps should be taken to progressively promote universal access not only to

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<sup>15</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (c).

<sup>16</sup> Organisation for Economic Co-Operation and Development (OECD). [OECD Council Recommendation on Principles for Internet Policy Making](#). December 13, 2011. Recommendation 2.

infrastructure but also the technology necessary for its use and to the greatest possible amount of information available on the Internet; to eliminate arbitrary barriers to access to infrastructure, technology and information online, and to adopt measures of positive differentiation to allow for the effective enjoyment of this right for individuals or communities who face marginalization and discrimination.

16. The principle of universal access refers to the need to guarantee connectivity and access to the Internet infrastructure and other ICT services that is universal, ubiquitous, equitable, truly affordable, and of adequate quality, all throughout the State's territory, as it has been recognized by the heads of State in the Summits of the Americas.<sup>17</sup> It is up to the State to decide which means are the most appropriate under the circumstances to ensure implementation of this principle.<sup>18</sup> However, as will be addressed later on, this Office attaches particular importance to measures that ensure that price structures are inclusive in order to facilitate access; that connectivity extends throughout the States territory, in order to effectively promote access for rural users and marginal communities; that communities have access to information technology and communications centers and other options for public access; and that efforts for training and education are reinforced, especially for poor, rural and older segments of the population.<sup>19</sup> Universal access also places a priority on ensuring equitable access when it comes to gender, as well as inclusive access for disabled individuals and/or individuals belonging to marginalized communities.<sup>20</sup>

17. Closing the "digital divide" goes hand-in-hand with the need for States to ensure that private parties do not erect disproportionate or arbitrary barriers to Internet access or use of its principal services. In other words, the Internet must maintain its intrinsically accessible character.

## 2. Pluralism

18. Maximizing the number and diversity of voices that are able to participate in the public debate is both a means and an end of the democratic process. In this sense, robust guarantees of the

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<sup>17</sup> Organization of American States. Sixth Summit of the Americas. April 14 and 15, 2012. Cartagena de Indias, Colombia. [Mandates Arising from the Sixth Summit of the Americas](#). May 23, 2012. OEA/Ser.E CA-VI/doc.6/12 Rev.2. Access to and Use of Information and Communication Technologies. Para. 1-4; Organization of American States. Fifth Summit of the Americas. April 17 to 19, 2009. Port of Spain, Trinidad and Tobago. [Declaration of Commitment of Port of Spain Securing Our Citizens' Future by Promoting Human Prosperity, Energy Security and Environmental Sustainability](#). OEA/Ser.E CA-V/DEC.1/09. April 19, 2009. Para. 43.

<sup>18</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Para. 66. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>19</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. February 2, 2010. [Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade](#). Point 10.

<sup>20</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 60-61. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

exercise of freedom of expression through the Internet are currently a condition for opening up the public sphere.<sup>21</sup>

19. It is up to the State to preserve the Internet's ideal conditions for promoting and maintaining informational pluralism. This means ensuring that changes are not made to the Internet that result in a reduction in the number of voices and amount of content available. Public policies on these subjects should protect the multidirectional nature of the Internet and promote platforms that allow for the search for and circulation of information and ideas of all kinds, without regard to borders, pursuant to the terms of Article 13 of the American Convention.

### **3. Non-discrimination**

20. Pursuant to articles 1.1 and 24 of the American Convention, States are required to "adopt affirmative measures (legislative, administrative, or in any other nature), in a condition of equality and non-discrimination, to reverse or change existing discriminatory situations that may compromise certain groups' effective enjoyment and exercise of the right to freedom of expression."<sup>22</sup> This obligation of nondiscrimination means that, among other things, the State must remove obstacles that prevent individuals – or a particular sector – from disseminating their opinions and information.

21. When it comes to the Internet, the obligation of nondiscrimination means that in addition to the duties of access and pluralism mentioned above, steps need to be taken by all appropriate means to guarantee that all persons – especially those belonging to vulnerable groups or who express criticism with regard to matters of public interest – are able to disseminate content and information under equal conditions.<sup>23</sup> In these terms, it is necessary to guarantee that there is no discriminatory treatment of certain content over the Internet that is favored over those distributed by certain sector of society. One development of this principle is the principle of net neutrality, which will be examined later on in this report (*infra*, para. 25 *et seq.*).

### **4. Privacy**

22. Article 11 of the American Convention on Human Rights states that, "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation," and that, "[e]veryone has the right to the protection of the law against such interference or attacks." Thus, the State must respect the privacy of individuals and ensure that third parties do not act in a way that could arbitrarily affect it.

23. As the United Nations General Assembly has observed in the resolution "The Right to Privacy in the Digital Age," adopted without a vote, States have the duty to respect and protect the right

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<sup>21</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 199.

<sup>22</sup> IACHR. [Annual Report 2008. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February 25, 2009. Para. 230.

<sup>23</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 87. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

to privacy according to international human rights law, including in the context of digital communication.<sup>24</sup> In effect, as will be developed further on the authorities should on one hand refrain from interfering arbitrarily with individuals, their personal information and their communications, and on the other hand, should guarantee that other actors refrain from such abusive conduct as well. For example, online spaces where people's activities and identities are not observed or documented should be promoted. This includes, for instance, the preservation of anonymous platforms for the exchange of content and use of proportionate authentication services.<sup>25</sup> This point is closely linked to the State's obligation to create a safe environment for the exercise of freedom of expression, as violation of communication privacy has a chilling effect and hampers the full exercise of the right to communicate.<sup>26</sup> In this sense, the aforementioned Resolution adopted without a vote by the General Assembly of the United Nations states that practices of surveillance and the interception and unlawful or arbitrary collection of personal data not only affect the right to privacy and freedom of expression but also may contradict the tenets of a democratic society.<sup>27</sup>

24. Finally, the defense of individual privacy should be carried out pursuant to reasonable and proportional standards that do not end up arbitrarily restricting the right to freedom of expression. In this sense, it is important to recall that as Principle 10 of the Declaration of Principles on Freedom of Expression states, “[p]rivacy laws should not inhibit or restrict investigation and dissemination of information of public interest.”

### C. Net neutrality

25. In their Joint Declaration on Freedom of Expression and the Internet, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information stated

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<sup>24</sup> According to the resolution, the General Assembly calls upon States to, among others, “respect and protect the right to privacy, including in the context of digital communication; to take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law; to review their procedures, practices and legislation regarding the surveillance of communications, their interception and collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law; to establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and collection of personal data”. United Nations. General Assembly. Resolution adopted by the General Assembly on 18 December 2013. 68/167. The right to privacy in the digital age. A/RES/68/167. January 21, 2014. Para. 4. Available for consultation at: [http://www.un.org/Depts/dhl/resguide/r68\\_en.shtml](http://www.un.org/Depts/dhl/resguide/r68_en.shtml); General Assembly. Department of Public Information. *General Assembly Adopts 68 Resolutions, 7 Decisions as It Takes Action on Reports of Its Third Committee*.

<sup>25</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 47. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 53, 82 and 84. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>26</sup> IACHR. Report No. 82/10. Case No. 12.524. Fontevecchia y D'Amico. Argentina. July 13, 2010. Para. 91 *et seq.*

<sup>27</sup> United Nations. General Assembly. Resolution adopted by the General Assembly on December 18, 2013. 68/167. The right to privacy in the digital age. A/RES/68/167. January 21, 2014. Para. 4. Available for consultation at: [http://www.un.org/Depts/dhl/resguide/r68\\_en.shtml](http://www.un.org/Depts/dhl/resguide/r68_en.shtml); General Assembly. Department of Public Information. *General Assembly Adopts 68 Resolutions, 7 Decisions as It Takes Action on Reports of Its Third Committee*.

that net neutrality is a principle according to which there “[s]hould be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.”<sup>28</sup> The purpose of this principle is to ensure that free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference.<sup>29</sup> This is a necessary condition for exercising freedom of expression on the Internet pursuant to the terms of Article 13 of the American Convention. At the same time, it is a transversal component of the guiding principles outlined above.

26. The Office of the Special Rapporteur deems it important that authorities guarantee the validity of this principle through adequate legislation. For example, Law 20,453 from Chile enshrines the principle of net neutrality by prohibiting the blocking, interference, discrimination, throttling and restriction of the right of “any Internet user to use, send, receive or offer any lawful content, application or service through the Internet, as well as any other type of lawful activity on or use of the web.”<sup>30</sup>

27. Net neutrality is part of the original design of the Internet. It facilitates access to and circulation of content, applications and services freely and without any distinction. At the same time, the lack of disproportionate barriers to entry for offering new services and applications over the Internet constitutes a clear incentive for creativity, innovation and competition.<sup>31</sup>

28. The protection of net neutrality is fundamental for guaranteeing the plurality and diversity of the flow of information. The Inter-American Court has indicated that “the State must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism. Consequently, equity must regulate the flow of information.”<sup>32</sup> For its part, Principle 5 of the Declaration of Principles establishes that, “[r]estrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.” By the same token, steps should be taken to prevent the establishment of private sector controls from resulting in a violation of freedom

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<sup>28</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 5 (a).

<sup>29</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 5 (a).

<sup>30</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.453](#). Consagra el principio de neutralidad en la red para los consumidores y usuarios de Internet. August 26, 2010. Article 24 H a).

<sup>31</sup> Council of Europe. Committee of Ministers. [Declaration of the Committee of Ministers on network neutrality](#). September 29, 2010. Point 3; Belli, Luca. [Council of Europe Multi-Stakeholder Dialogue on Network Neutrality and Human Rights. Outcome Paper](#). CDMSI(2013)Misc 18. December 3 to 6, 2013. Para. 16-17

<sup>32</sup> I/A Court H.R. *Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008. Series C No. 177. Para. 57; I/A Court H.R. *Case of Fontevecchia y D’Amico v. Argentina. Merits, Reparations and Costs*. Judgment of November 29, 2011. Series C No. 238. Para. 45.



of expression.<sup>33</sup> As established in Article 13(3), the actions of private parties can also result in the violation of this right. States should take on the role of ensuring the right in response against these abuses.<sup>34</sup>

29. Neutrality rules should apply without distinction to all ways of accessing the Internet, regardless of the technology or platform used to transmit the data.<sup>35</sup> Users have the right to connect to or use the Internet, according to their choice, with any type of compatible device, as long as the devices do not adversely affect the network or the quality of service.<sup>36</sup>

30. Traffic over the Internet should not be discriminated against, restricted, blocked or interfered with unless strictly necessary and proportional in order to preserve the integrity and security of the network; to prevent the transmission of online content at the express request - free and not incentivized - of the user; and to temporarily and exceptionally manage network congestion. In this latter case, the measures employed should not discriminate between types of applications or services. Similarly, some norms have established that traffic management measures must be necessary for the efficient and safe use of the Internet and cannot discriminate arbitrarily against a particular content provider or service provider, or a group thereof, in favor of other providers.<sup>37</sup> Also, the European Commission proposal for the regulation of the European single market for electronic communications recognizes that “[r]easonable traffic management encompasses prevention or impediment of serious crimes, including voluntary actions of providers to prevent access to and distribution of child pornography.”<sup>38</sup>

31. Net neutrality rules should require Internet service providers to be transparent in the practices they use for managing traffic or information. Any relevant information on these practices should be made available to the public and to the agency in charge of monitoring compliance with the principle of net neutrality in a format that is accessible to all interested parties.<sup>39</sup>

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<sup>33</sup> I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 48.

<sup>34</sup> I/A Court H.R. *Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 195. Para. 367; I/A Court H.R. *Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 194. Para. 340.

<sup>35</sup> Council of Europe. Committee of Ministers. [Declaration of the Committee of Ministers on network neutrality](#). September 29, 2010. Point 4; Access. September, 2011. *The importance of net neutrality in the emerging and developing world*. P. 8 Available for consultation at: [https://s3.amazonaws.com/access.3cdn.net/6d698a85cebaff26c1\\_szm6ibxc7.pdf](https://s3.amazonaws.com/access.3cdn.net/6d698a85cebaff26c1_szm6ibxc7.pdf); Center for Democracy and Technology. May, 2013. [CDT Recommendations for EU Net Neutrality Policy](#). Pp. 6-9; Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE). [La neutralidad de la red, la tensión entre la no discriminación y la gestión](#). P. 21.

<sup>36</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.453](#). Consagra el principio de neutralidad en la red para los consumidores y usuarios de Internet. August 26, 2010. Article 24 H a).

<sup>37</sup> Biblioteca del Congreso Nacional de Chile. [Decreto 368](#). Reglamento que regula las características y condiciones de la neutralidad de la red en el servicio de acceso a Internet. March 18, 2011. Articles 8, 10 and *considerando* d).

<sup>38</sup> European Commission. Proposal for a regulation of the European Parliament and of the Council for laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012. COM(2013) 627 final 2013/0309 (COD). September 11, 2013. Available for consultation at: <https://ec.europa.eu/digital-agenda/en/news/regulation-european-parliament-and-council-laying-down-measures-concerning-european-single>

<sup>39</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special

32. It is the responsibility of States, through laws passed by the Legislative and through the oversight of the competent agencies, to make the principle of net neutrality valid pursuant to the terms expressed heretofore. The agencies in charge of supervising and applying these rules should be independent of political and economic powers and should proceed in a manner that is transparent and respects due process.<sup>40</sup>

33. The importance of net neutrality is increasingly recognized throughout the world. Chile<sup>41</sup> and The Netherlands,<sup>42</sup> among other countries, have passed laws specifically to protect it. Likewise, the Council of Europe and telecommunications regulatory agencies have declared their commitment to the principle.<sup>43</sup> The principle has also been recognized by some domestic courts.<sup>44</sup>

#### D. Access to the Internet

34. Article 13 of the American Convention establishes that the right to freedom of expression includes the “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.” At the same time, Principle 2 of the Declaration of Principles states that, “[a]ll people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”

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Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 5 (b).

<sup>40</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter VI (Freedom of Expression and Broadcasting). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 50 *et seq.*

<sup>41</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.453](#). Consagra el principio de neutralidad en la red para los consumidores y usuarios de Internet. August 26, 2010; Biblioteca del Congreso Nacional de Chile. [Decreto 368](#). Reglamento que regula las características y condiciones de la neutralidad de la red en el servicio de acceso a Internet. March 18, 2011. Articles 8, 10 and *considerando* d). In its pertinent part, the cited law states: “[c]oncessionaires of public telecommunications services that provide services to internet services providers and internet service providers themselves [...] [c]annot arbitrarily block, interfere with, discriminate, throttle or restrict the right of any internet user to use, send, receive or offer any legal content, application or service over the Internet, nor any other type of legal activity or use via the Internet. In this sense, they must offer each user Internet access service or access to the Internet access provider, as appropriate, that does not arbitrarily distinguish between content, applications or services based on source or ownership, taking into account the different configurations of Internet connections according to the contract with users in force.”

<sup>42</sup> Bits of Freedom. [Translations of Key Dutch Internet Freedom Provisions](#); IRIS Merlin. Netherlands. [Amendment of the Telecommunications Act](#).

<sup>43</sup> Post-og teletilsynet. Norwegian Post and Telecommunications Authority. February 24, 2009. [Network neutrality: Guidelines for Internet neutrality](#); Council of Europe. Committee of Ministers. [Declaration of the Committee of Ministers on network neutrality](#). September 29, 2010.

<sup>44</sup> Republica de Chile. Tribunal de Defensa de la Libre Competencia. C 60-05 - Demanda de Voissnet S.A. y requerimiento de la FNE en contra de CTC. [Sentencia No 45/2006](#). October 26, 2006. In this case, the Chilean Court protected net neutrality by prohibiting a telecommunications and Internet service provider of adopting measures to restrict or hinder the use of network bandwidth in providing Internet telephony services. *See also*, Corte Suprema de Chile. Tercera Sala. No. 6236-2006. VOISNETT S.A. Y REQUERIMIENTO DE LA FNE CONTRA CTC. Judgment of July 4, 2007 Available for consultation at: [http://suprema.poderjudicial.cl/SITSUPPORWEB/?opc\\_menu=7](http://suprema.poderjudicial.cl/SITSUPPORWEB/?opc_menu=7)

35. As has been developed by inter-American case law, freedom of expression is characterized as a right with two dimensions: an individual dimension and a collective or social dimension.<sup>45</sup> Taking this dual dimension into account, freedom of expression is a means of exchanging information and ideas among people and for mass communication among human beings. This means both the right to communicate to others one's point of view and any information or opinion desired, as well as the right of everyone to receive and hear those points of view, information, opinions, stories and news, freely and without interference that would distort or block it.<sup>46</sup>

36. Given the Internet's multidirectional and interactive nature, its speed, and its global scope at a relatively low cost, as well as its decentralized and open design,<sup>47</sup> access to it presents an unprecedented potential for effective realization of the right to seek, receive, and disseminate information in both its individual and collective dimensions.<sup>48</sup> The Internet also serves as a platform for fulfilling other human rights, such as the right to participate in cultural life and enjoy the benefits of scientific and technological progress (article 14 of the Protocol of San Salvador), the right to education (article 13 of the Protocol of San Salvador), the right to assembly and association (articles 15 and 16 of the American Convention), political rights (article 23 of the American Convention), and the right to health (article 10 of the Protocol of San Salvador), among other rights.<sup>49</sup>

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<sup>45</sup> I/A Court H.R. *Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008 Series C No. 177. Para. 53; I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. Para. 75; I/A Court H.R. *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. Para. 163; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 101.1 a); I/A Court H.R. *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. Para. 146; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 77; I/A Court H.R. *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. Para. 64; I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 30; IACHR. [Annual Report 1994](#). Chapter V (Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights). Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. Report No. 130/99. Case No. 11.740. Víctor Manuel Oropeza. Mexico. November 19, 1999. Para. 51; IACHR. Report No. 11/96. Case No. 11.230. Francisco Martorell. Chile. May 3, 1996. Para. 53.

<sup>46</sup> I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 110; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 79; I/A Court H.R. *Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. Para. 66; I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 32; IACHR. [Annual Report 1994](#). Chapter V (Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights). Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 14.

<sup>47</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 19, 23 and 27. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>48</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>49</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on

37. Thus to ensure the effective and universal enjoyment of the right to freedom of expression, steps should be taken to progressively guarantee access to the Internet for all persons.<sup>50</sup> This includes at least three types of measures: positive measures to ensure inclusion or closing the digital divide; efforts to develop plans to ensure that infrastructure and services tend to progressively pursue universal access; as well as measures to prohibit blocking or limiting access to the Internet or any part of it, pursuant to the conditions indicated below.

38. The first of these measures is intended, among other things, to close the so-called “digital divide,” that being “the gap between people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access at all.”<sup>51</sup>

39. The Office of the Special Rapporteur deems it important that authorities make efforts to progressively close the digital divide, broadly recognized by States<sup>52</sup>, whether it is the result of wealth, gender, geography or social group, between States and within them.<sup>53</sup> Likewise, the “digital divide” is

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Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 6 (a).

<sup>50</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 6 (a). Some States in the region have enshrined access to the Internet and other information and communication technologies as a fundamental right in their domestic legal systems. Ecuador’s Constitution recognizes in Article 16 that “[a]ll persons, individually or collectively, have the right to: [...] universal access to information and communication technologies.” Asamblea Constituyente. [Constitución del Ecuador](#). October 20, 2008. The Constitution of Mexico, for its part, establishes in Article 6 that “the State will guarantee the right to access to information and communication technologies, as well as radio broadcasting and telecommunications services, including broadband and Internet.” Cámara de Diputados del H. Congreso de la Unión. [Constitución Política de los Estados Unidos Mexicanos](#). February 5, 1917. Likewise, the Constitutional Chamber of the Corte Suprema de Justicia of Costa Rica found in a judgment issued in 2010 that access to the Internet and information technologies constitutes a fundamental right. Sistema Costarricense de Información Jurídica. Sala Constitucional de la Corte Suprema de Justicia. Exp: 09-013141-0007-CO. Res. N° 2010012790. [Sentencia: 12790](#). June 30, 2010; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 65 and 66. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

The Office of the Special Rapporteur agrees with UNESCO on this issue. It has argued for a comprehensive concept of the universality of the Internet. In this sense, the term “accessible to all” is part of a more general concept of the universality of the Internet referring to both issues of infrastructure and connectivity (including technical issues and the digital divide) and “accessibility” (in the sense of social exclusion based on issues of language, gender or disability). “Accessibility” also presupposes the critical empowerment of all sectors, including consumers and producers of content and services. United Nations Educational, Scientific and Cultural Organization (UNESCO). [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). September 2, 2013.

<sup>51</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 60-61. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>52</sup> Organization of American States. General Assembly. AG/RES.2440 (XXXIX-O/09). [Telecommunication Development in the Region to Reduce the Digital Divide](#). Adopted at the fourth plenary session, held on June 4, 2009; Inter-American Telecommunications Commission. [Agenda for Connectivity in the Americas. Plan of Action of Quito](#). November 25, 2003; World Summit on the Information Society. [Declaration of Principles](#). December 12, 2003. C.66.

<sup>53</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 61 and 62. Available for consultation at:

not only related to the availability of Internet access, but also to the quality, information, and technical knowledge necessary in order for access to the Internet to be useful and beneficial for users.<sup>54</sup> In order to reach this goal, the Office considers important that States adopt effective and specific policies and strategies, prepared in consultation with persons and organizations from all sectors of society.<sup>55</sup>

40. The commitment to close the "digital divide", recognized by States<sup>56</sup>, has inspired the adoption of measures intended to increase the availability of information and communication technologies, such as programs to distribute affordable portable computers.<sup>57</sup> Additionally, some States have established public access points, which are important for facilitating access for the most vulnerable groups, which often do not have personal computers in their homes.<sup>58</sup>

41. In addition, there is also a gender divide separating women and men in the access to and use of information and communication technology.<sup>59</sup> States should take measures to promote the participation of women in the information society in order to contribute to their empowerment and gender equality.<sup>60</sup>

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[http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Organisation for Economic Co-Operation and Development (OECD). *Understanding the Digital Divide*. 2001. P. 5.

<sup>54</sup> United Nations. General Assembly. [Information and communications technologies for development](#). A/RES/66/184. February 6, 2012.

<sup>55</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 66. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Organization of American States. General Assembly. [Declaration of Santo Domingo: Good Governance and Development in the Knowledge-Based Society](#). AG/DEC. 46 (XXXVI-O/06). Adopted at the fourth plenary session, held on June 6, 2006. Para. 21.

<sup>56</sup> Organization of American States. General Assembly. AG/RES.2440 (XXXIX-O/09). [Telecommunication Development in the Region to Reduce the Digital Divide](#). Adopted at the fourth plenary session, held on June 4, 2009; Inter-American Telecommunications Commission. [Agenda for Connectivity in the Americas. Plan of Action of Quito](#). November 25, 2003; World Summit on the Information Society. [Declaration of Principles](#). December 12, 2003. C.66.

<sup>57</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 63. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>58</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 64. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Regional Preparatory Ministerial Conference of Latin America and the Caribbean for the World Summit on the Information Society. [Bávaro Declaration](#). Bávaro, Punta Cana, Dominican Republic, January 29-31, 2003. Section 2, b.

<sup>59</sup> United Nations. UN Women. [Gender equality and empowerment of women through ICT](#). September, 2005. P. 3; INTEL Corporation/ Dalberg Global Development Advisors/ GlobeScan. [Women and the Web](#). P. 10; United Nations. General Assembly. [Information and communications technologies for development](#). A/RES/66/184. February 6, 2012. Para. 3.

<sup>60</sup> Organization of American States. General Assembly. [Declaration of Santo Domingo: Good Governance and Development in the Knowledge-Based Society](#). AG/DEC. 46 (XXXVI-O/06). Adopted at the fourth plenary session, held on June 6, 2006. Para. 13; United Nations. General Assembly. [Information and communications technologies for development](#). A/RES/66/184. February 6, 2012. Para. 3; The Association for Progressive Communications. 2009. [The APC ICT Policy Handbook. ICTs and Gender. Chapter 30](#).

42. Universal access to the Internet also means an obligation to design policies that grant equal opportunity of access and efficient use for all sectors, and in particular for people with disabilities.<sup>61</sup>

43. In this regard, it is pertinent to recall that Article III, 1 c) of the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities establishes a State commitment to implement “[m]easures to eliminate, to the extent possible, architectural, transportation, and communication obstacles to facilitate access and use by persons with disabilities.” Likewise, Articles 9 and 21 of the United Nations Convention on the Rights of Persons with Disabilities establishes specific obligations for States to: “[p]romote access for persons with disabilities to new information and communications technologies and systems, including the Internet;” “[p]romote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost;” and ensure that “persons with disabilities can exercise the right to freedom of expression.” Based on this, universal access to the Internet and other information and communication technologies for people with disabilities should be promoted.<sup>62</sup>

44. In order for Internet access to constitute an authentic instrument to increase informational pluralism and cultural diversity, it is necessary to guarantee the participation of linguistic minorities, as well as the availability of local content on the Internet.<sup>63</sup> As the Inter-American Court has indicated, the right to freedom of expression necessarily includes the right of individuals to use the language of their choosing to express themselves.<sup>64</sup> Based on this, measures should be adopted to reduce linguistic obstacles to guaranteeing that different cultures are able to express themselves on and access the Internet. At the same time, the production of original local and indigenous content on the Internet needs to be promoted.<sup>65</sup>

45. Now, a second kind of measure derived from the right to universal access involves the need to adopt multi-year, detailed action plans to make the Internet broadly available, accessible and

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<sup>61</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Para. 51-53 and 85. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>62</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 6 (e); Organization of American States. General Assembly. [Declaration of Santo Domingo: Good Governance and Development in the Knowledge-Based Society](#). AG/DEC. 46 (XXXVI-O/06). Adopted at the fourth plenary session, held on June 6, 2006. Para. 21; International Telecommunication Union. [e-Accessibility Policy Toolkit for Persons with Disabilities A Joint ITU/G3ict Toolkit for Policy Makers Implementing the Convention on the Rights of Persons with Disabilities](#).

<sup>63</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 87. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations Educational, Scientific and Cultural Organization. [Recommendation Concerning Promotion and Use of Multilingualism and Universal Access to Cyberspace](#); World Summit on the Information Society. [Declaration of Principles](#). December 12, 2003. B8, para. 52.

<sup>64</sup> I/A Court H.R. *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. Para. 164.

<sup>65</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) [Recommendation Concerning Promotion and Use of Multilingualism and Universal Access to Cyberspace](#).

affordable.<sup>66</sup> In this sense, States should adopt and promote the necessary public policies to establish infrastructure for universal access that allows for the construction of a society of knowledge, preventing, as mentioned before, arbitrary situations of social exclusion.<sup>67</sup> As has been noted during a number of multilateral forums, this includes the preparation of national broadband plans and promotion of the expansion of physical infrastructure, as well as adopting measures to develop mobile Internet.<sup>68</sup>

46. In this same sense and in order to comply with the mandate established in Article 13 of the Convention, according to which the right to freedom of expression is the right to express oneself and receive information regardless of borders, regulations and public policies that promote Internet interoperability and interconnection on a global scale needs to be adopted. In this way, the free flow of information, ideas and expression is fomented, thus preventing the erection of territorial or technological barriers or barriers of any other kind that would result in the fragmentation of the Internet on a national or regional level and the subsequent limitation of freedom of expression and access to information.

47. Similarly, according to the principle of universal access, that is, the rights to equality and nondiscrimination, regulatory mechanisms need to be established - including pricing regimens, universal service requirements and licensing agreements - to foment broad access to the Internet, including for vulnerable sectors of society and the most isolated rural areas.<sup>69</sup> For these purposes, all necessary efforts should be made to provide direct support to facilitate access, for example, as mentioned before, through programs to distribute affordable computers<sup>70</sup> and the creation of community information technology centers and other points of public access.<sup>71</sup>

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<sup>66</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 66. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>67</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 85 and 87. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Para. 88. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>68</sup> Organization of American States. General Assembly. AG/RES.2440 (XXXIX-O/09). [Telecommunication Development in the Region to Reduce the Digital Divide](#). Adopted at the fourth plenary session, held on June 4, 2009. Resolution 4; Third Ministerial Conference on the Information Society in Latin America and the Caribbean. Lima, November 21-23, 2010. [Plan of Action for the Information and Knowledge Society in Latin America And The Caribbean \(eLAC2015\)](#). November 23, 2010; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Para. 75 and 91. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>69</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 6 (e).

<sup>70</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 63. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85). See also, Uruguay. Plan Ceibal. [Acerca del Plan](#).

<sup>71</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 6 (e).

48. In addition, authorities should foment educational measures intended to promote the training of all individuals in the autonomous, independent and responsible use of the Internet and digital technologies ("digital literacy").<sup>72</sup> This is because full access to information and communications technologies, particularly the Internet, is closely related to the capacity to make effective use of these tools.<sup>73</sup>

49. Finally, the right to access does not only involve the adoption of positive measures. This right also includes the right of all persons to not have their ability to access the network or any part of it blocked or interrupted arbitrarily.<sup>74</sup> In this sense, as has been recognized, the interruption of access to the Internet or any part of it is prohibited whether applied to all populations or specific segments of the public. Also prohibited are the denial of the right to access the Internet as a form of punishment and measures to reduce the speed of the Internet or parts of it for reasons other than the reasonable administration of traffic. All of these things would radically violate the right to freedom of expression on the Internet.<sup>75</sup>

50. In this sense for example, the Office of the Special Rapporteur has expressed concern with regard to information on the suspension of mobile telephone and Internet services in areas where protests are being held against major infrastructure projects, thus affecting the ability of demonstrators and journalists to communicate regarding events that are in the public interest.<sup>76</sup>

51. In addition, with regard to their obligation to guarantee the right to freedom of expression, States should adopt measures to prevent or remove the illegitimate restrictions to Internet access put in place by private parties and corporations, such as policies that threaten net neutrality or foster anticompetitive practices.<sup>77</sup>

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<sup>72</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (f).

<sup>73</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/66/290. August 10, 2011. Summary and para. 84. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>74</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 29 and 78. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>75</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 6 (b), (c).

<sup>76</sup> IACHR. [Annual Report 2012. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II.147. Doc. 1. March 5, 2013. Para. 403.

<sup>77</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 76. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations. Office of the United Nations High Commissioner for Human Rights. [Guiding Principles on Business and Human Rights](#). HR/PUB/11/04. Principle 1.



**E. Legislative limitations and subsequent liability: Standards of legitimacy and deliberative factors for resolving online rights conflicts**

52. Freedom of expression is a fundamental right in a democratic society<sup>78</sup> and an invaluable instrument for protecting and guaranteeing other human rights. For these reasons, the right to freedom of expression in all its manifestations plays a central role in the American Convention. Nevertheless, the right to freedom of expression is not an absolute right.<sup>79</sup> This right can be subjected to certain restrictions that - in order to be legitimate - must meet a series of requirements that have been clearly developed by the bodies of the inter-American human rights protection system.<sup>80</sup>

53. That said, as previously mentioned, the Internet has special characteristics that make it a "unique transformational tool,"<sup>81</sup> given its unprecedented potential for the effective fulfillment of the right to seek, receive and disseminate information, and its enormous capacity to serve as an effective platform for the fulfillment of other human rights.<sup>82</sup> Consequently, when it comes to the Internet, it is crucial to evaluate all legitimacy conditions of the limitations of the right to freedom of expression based on these unique and special characteristics. Thus for example, when establishing the proportionality of a

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<sup>78</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 8; *See also*, I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 70; I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. Para. 85; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 112; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 82; I/A Court H.R. *Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 194. Para. 105; I/A Court H.R. *Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 195. Para. 116.

<sup>79</sup> I/A Court H.R. *Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008. Series C No. 177. Para. 54; I/A Court H.R. *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. Para. 79; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 120; I/A Court H.R. *Case of Tristán-Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. Para. 110; I/A Court H.R. *Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 194. Para. 106; I/A Court H.R. *Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of January 28, 2009. Series C No. 195. Para. 117; IACHR. [Annual Report 1994](#). Chapter V (Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights). Title IV. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>80</sup> I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 120; I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 35; IACHR. Report No. 11/96. Case No. 11.230. Francisco Martorell. Chile. May 3, 1996. Para. 55; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 68 *et seq.*

<sup>81</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#)

<sup>82</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

particular restriction, it is crucial to assess the impact (or cost) of that restriction not only from the point of view of the private parties directly affected by the measure, but also from the perspective of the impact on the functioning of the Internet. In effect, as explained hereinafter, a particular restrictive measure may seem minor if it is examined only from the perspective of the individual affected. However, the same measure may have a seriously devastating impact on the general operation of the Internet and, as a consequence, on the right to freedom of expression of all users. In this sense, it is crucial to evaluate each measure in a specialized way, from what one could call a systemic digital perspective.

54. On evaluating the proportionality of a restriction to freedom of expression on the Internet, one must weigh the impact that the restriction could have on the Internet's capacity to guarantee and promote freedom of expression against the benefits that the restriction would have in protecting other interests.<sup>83</sup>

55. The essential requirements that must be met by any restriction of the right to freedom of expression are contained in Articles 13, 8 and 25 of the American Convention. As noted, when applied to measures that could compromise the Internet, the requirements should be evaluated from a systematic digital perspective. This is explained briefly in the following paragraphs, but can be summarized as (1) legal enshrinement; (2) seeking a crucial goal; (3) necessity, suitability and proportionality of the measure for achieving the aim sought; (4) judicial guarantees; and (5) satisfaction of due process, including user notifications.

56. In all cases, restrictive measures should be transparent and subjected to rigorous oversight by autonomous and specialized agencies with the technical capacity and sufficient guarantees to protect from possible structural threats to the Internet or the integrity of communications.

57. The following paragraphs develop in a little more detail each of these guarantees and explain how they can be applied to specific conflicts between rights, principles and values protected under international law, such as privacy, the higher interest of the child, and public order, among other things.

58. As previously noted, the first condition of the legitimacy of any restriction of freedom of expression - on the Internet or in any other area - is the need for the restrictions to be established by law, formerly and in practice, and that the laws in question be clear and precise.<sup>84</sup> Substantive restrictions set forth in administrative orders or broad or ambiguous regulations that create uncertainty with regard to the scope of the right protected and whose interpretation could lead to arbitrary rulings that could arbitrarily compromise the right to freedom of expression would be incompatible with the American Convention. The latter regulations, for example, could have a particular chilling effect on individual users who participate in public debate without support of any kind other than the force of

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<sup>83</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 b).

<sup>84</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 70 *et seq.*

their arguments.<sup>85</sup> Vague and ambiguous laws can particularly impact the growing universe of individuals whose inclusion in the public debate is one of the principle advantages offered by the Internet as a space for global communication.

59. Second, it is crucial for the restrictions to be oriented toward achieving urgent objectives authorized under the American Convention, such as the protection of the rights of others, national security, public order, or public health or morals.<sup>86</sup> On this point, it is important to clarify that States are not free to interpret the content of these objectives in any way they please when justifying limitation on freedom of expression. At all times, these concepts must be interpreted pursuant to the principles of a democratic society.<sup>87</sup>

60. Thus for example, protection of national security can be invoked to place restrictions on the right to freedom of expression. Nevertheless, a restriction of freedom of expression that seeks to justify itself on grounds of national security cannot be based on an idea of national security that is not compatible with democratic society. In that case, it would not have a legitimate goal if by invoking defense of national security it intercepts, captures or uses private information of dissidents, journalists and defenders of human rights for political purposes, or to prevent or compromising their investigations or complaints.

61. Third, the limitation must be necessary in a democratic society for achieving the urgent goal it seeks, strictly proportional to the end sought and suitable to achieve its objective.<sup>88</sup> This requirement is called the standard of "necessity" and requires that any restriction be adequate and sufficiently justified.

62. Thus for example, invoking public order so as to place restrictions on an individual (subsequent liability) based on the person's exercise of the right to distribute information over the Internet requires proving the existence of real and objectively verifiable causes that present at the very least a sure and credible threat of a potentially serious disturbance of the basic conditions for the operation of democratic institutions. In this sense, in order to impose subsequent liability for the exercise of the fundamental right to freedom of expression on the Internet - or in any other area - it is not sufficient to invoke mere conjecture of eventual violations of order, nor hypothetical circumstances derived from interpretations of the authorities regarding facts that are not clearly defined - for example, a clear and objective risk of grave disturbances ("anarchic violence") pursuant to the terms of Article 13(5) of the Convention.

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<sup>85</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 26. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>86</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 75 *et seq.*

<sup>87</sup> IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Access to Information on Human Rights Violations). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 12 *et seq.*

<sup>88</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 84 *et seq.*

63. At all times, on evaluating the necessity and proportionality of any restrictive measure, a systemic digital perspective must be applied that takes into account the impact the measure would have on the operation of the Internet as a decentralized and open network. In this regard, the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information have recognized that "[a]pproaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it."<sup>89</sup> This includes the need to formulate alternative and specific focuses for imposing restrictions to freedom of expression on the Internet that have been adapted to its singular characteristics, while at the same time recognizing that special restrictions should not be made to the content of the material distributed over the Internet.<sup>90</sup>

64. At the same time, it is necessary to take into account the availability of measures that are less restrictive to freedom of thought and expression that can be more easily available on the Internet than in analog environments. Thus for example, as indicated by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, it is extremely important to address the possibility of more effective and rapid exercise of the right to correction or response established in Article 14 of the American Convention.<sup>91</sup>

65. A fourth condition of the legitimacy of restrictive measures in the context imposing subsequent liability for the exercise of freedom of expression on the Internet has to do with respect for guarantees of due process and judicial remedy (articles 8 and 25 of the American Convention).

66. Finally, the global nature of the Internet represents a fifth general safeguard. Effectively, in order to prevent the existence of indirect barriers that disproportionately discourage or directly limit the right to freedom of expression on the Internet, jurisdiction over cases connected to Internet expression should correspond exclusively to States to which the cases are most closely associated, normally because the perpetrator resides there, the expression was published from there, or the expression is aimed directly at a public located in the State in question. Private parties may only launch

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<sup>89</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (c).

<sup>90</sup> IACHR. [Annual Report 2012. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II.147. Doc. 1. March 5, 2013. Para. 263; UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (d).

<sup>91</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 27. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

court action in the jurisdiction in which they can demonstrate having suffered substantial damages, thereby preventing what is known as “forum shopping.”<sup>92</sup>

67. In this sense, it is important to warn that States’ right to jurisdiction or the prosecution of crimes should not become an indirect limitation that threatens the free circulation of information due to the threat of multiple layers of litigation and punishments in different jurisdiction. The Office of the Special Rapporteur deems it important that authorities adopt jurisdictional rules that are compatible with the notion of single publication that prevents both the undesirable effects of forum shopping and redundant trials over a single case (*non bis in idem*).<sup>93</sup>

68. As stated in the Joint Declaration of the Rapporteurs on Freedom of Expression and the Internet, in the case of similar content, published in the same form and at the same place, the time limits for bringing legal action should start to run from the first time of its initial publication. Similarly, only one action for damages should be allowed to be brought in respect of that content and, where appropriate, damages suffered in all jurisdictions should be allowed to be recovered at one time (“single publication” rule).<sup>94</sup>

69. Recent years have raised significant challenges in applying the international standards just mentioned (*supra*, paras. 55 and *et seq*) to cyberspace when dealing with conflicts between the right to freedom of expression and other rights, such as the rights to honor, privacy, copyright, and higher interest of children and adolescents. The following paragraphs give some examples for how the standards can be adopted to the special conditions of the Internet.

70. When it is alleged that a violation of honor or reputation has been committed through the use of the Internet, protection of these rights must respond in general to similar grounds as used in other areas of communication. Specifically, as the IACHR has held repeatedly, the application of criminal law is disproportionate when dealing with speech that is especially protected, that being information or expression regarding matters of public interest and public officials or individuals voluntarily involved in matters of public interest.<sup>95</sup>

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<sup>92</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 4 (a).

<sup>93</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 4 (a) and (c).

<sup>94</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 4 (c).

<sup>95</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 101 *et seq*.

71. When it comes to information that has been circulated using any of the Internet's multiple platforms, and in order to define whether damage has taken place that should be redressed, it is fundamental to take into account the circumstances of a particular case without making assumptions that cannot be technically supported and that make unjustified distinctions based exclusively on the nature of the media used to disseminate a particular expression. Similarly, when defining the remedy to be handed down, it is necessary to identify the features of the Internet that could allow an individual to exercise his or her right to rectification and response immediately and effectively. Effectively, the imposition of subsequent liability that that could be legitimate in a traditional context may not actually be so in an online environment, as noted by the United Nations Special Rapporteur.<sup>96</sup>

72. For a freedom of expression perspective, the correction of erroneous information is the least costly measure for redressing damage related to it. In this sense, this Office of the Special Rapporteur has said that when the rectification "insufficient to repair the harm that has been inflicted may recourse be made to the imposition of legal liabilities more costly for those who have abused their right to freedom of expression, and –while doing so- have produced an actual and serious damage to the rights of others or to juridical assets specially protected by the American Convention."<sup>97</sup> From this point of view, the rectification should exclude other types of liability, especially when the speech is specially protected. In these cases, there can only be liability if it can be demonstrated that the speaker acted with "actual malice" at the time of publishing the false information that produced the damage.<sup>98</sup> It should also be recalled that IACHR standards discourage the use of criminal law as a response to damage caused by the exercise of freedom of expression<sup>99</sup> and recommend that in the event that the rectification is not sufficient, proportional civil liability should apply.<sup>100</sup>

73. As stated in the Joint Declaration of the Rapporteurs on Freedom of Expression and the Internet, self-regulation is a very effective tool for addressing harmful speech.<sup>101</sup>

74. On this issue, it should be noted that a law that specifically penalizes crimes against honor online and imposes harsher punishments than for off-line perpetrators would not be

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<sup>96</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 27. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>97</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 109.

<sup>98</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 110.

<sup>99</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 112.

<sup>100</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 111.

<sup>101</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (e).

acceptable.<sup>102</sup> This would represent a disproportionate restriction of Internet expression under a paradigm that considers it more risky than other media. These types of measures would effectively restrict and limit the Internet as a space for the free exchange of ideas, information and opinions.<sup>103</sup>

75. Copyright protection is without a doubt a legitimate end that can lead to the imposition of limits to the right to freedom of expression.<sup>104</sup> Nevertheless, this protection needs to be provided while respecting all of the safeguards mentioned in earlier paragraphs and while taking into account the unique nature of the Internet. Specifically, this protection cannot be pursued in a way that chills creativity or the free exchange of information on the Internet.<sup>105</sup> The Internet has established unprecedented conditions for the exercise of freedom of thought and expression and other human rights, including economic, social and cultural rights, including the right to education and the right to participate in cultural life and enjoy the benefits of scientific progress and its applications. The Internet has become a transformative instrument that allows billions of people to access, share, exchange and enjoy cultural production on a global scale, instantly and at a relatively low cost.<sup>106</sup> In this way, the Internet empowers the right to participate in cultural life,<sup>107</sup> which includes a State obligation to facilitate and provide access to cultural production.<sup>108</sup>

76. In this sense, it should be recalled that the public has an interest in defending copyright, but also in maintaining the Internet as a free and open space and in the promotion of the right to culture, education and information. These public interests also form part of the social dimension of the right to freedom of thought and expression. It is consequently necessary that restrictions to the right to freedom of expression on the Internet that have to do with copyright violations comply with the requirements established in the American Convention and be designed so as to not affect the unique

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<sup>102</sup> Article 19. 2013. [The Right to Blog](#). Pp. 31-32.

<sup>103</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 72. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>104</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#); European Court of Human Rights. *Affaire Ashby Donald et autres c. France*. Requête no 36769/08. Arrêt. 10 janvier 2013. Para. 36.

<sup>105</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (b); UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist Measures](#).

<sup>106</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 19 and 22. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>107</sup> The concept of cultural life is developed in: United Nations. Committee on Economic, Social and Cultural Rights. [General comment No. 21. E/C.12/GC/21](#). December 21, 2009. Para. 15 (a) and 32.

<sup>108</sup> United Nations. Committee on Economic, Social and Cultural Rights. [General comment No. 21. E/C.12/GC/21](#). December 21, 2009. Para. 6.

capacity of the Internet to promote freedom of expression and access to knowledge and cultural production.<sup>109</sup>

77. On previous occasions, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights of the OAS have had the opportunity to address some issues related to the protection of copyrights on the Internet.<sup>110</sup> They have noted that the laws against Internet-based piracy have the legitimate aim of seeking to protect copyrights. Nevertheless, when such laws are drafted broadly or ambiguously, they raise serious concerns with respect to their potential impact on the right to freedom of expression. In this regard, ambiguous prohibitions can lead to the silencing of speech that is absolutely lawful and deserving of protection because it is not covered by copyrights.<sup>111</sup>

78. The Rapporteurs have maintained that in considering domestic laws and international treaties—such as the Anti-Counterfeiting Trade Agreement—“the States must bear in mind that although freedom of expression can be restricted to meet legitimate aims, such as the prevention of crimes or the protection of the rights of others, those limitations must be drafted clearly and precisely, and infringe upon the right to freedom of expression to the least extent possible. Any measure that affects speech that circulates on the Internet must be designed with the specific aim of preserving the singular capacity of this medium to promote freedom of expression through the free exchange of information and ideas instantaneously and at a low cost, without regard to borders.”<sup>112</sup>

79. The Rapporteurs have also expressed their concern over the establishment of a non-judicial process of “notification and termination,” which does not meet the requirements of Articles 8 and 25 of the Convention.<sup>113</sup>

80. Also of concern are laws that require intermediaries to control user-generated content in order to identify copyright violations.<sup>114</sup> The four Rapporteurs on Freedom of Expression indicated

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<sup>109</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>110</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#); United States House of Representatives. [H.R. 3261. Stop Online Piracy Act \(SOPA\)](#). October 26, 2011; United States Senate. [S. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 \(PROTECT IP Act\)](#).

<sup>111</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>112</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>113</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>114</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 39 and 40. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)



that intermediaries should not be required to monitor user-generated content, and they emphasized the need to protect intermediaries from any liability, provided that they do not intervene specifically in the content or refuse to comply with a court order for its removal.<sup>115</sup>

81. Finally, it is worrying that these types of laws can affect different forms of protected speech involving an entire website even if only a small portion of its contents are considered unlawful.<sup>116</sup>

82. In particular, disconnecting Internet users as a punishment for a copyright violation, including through mechanisms of "graduated response," constitutes a radical measure that disproportionately restricts the right to freedom of expression, as noted by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.<sup>117</sup> Similar warnings should be made in the case of civil liability: Awards need to be strictly related to the actual damage suffered by the holder of the copyright and shall not be so large as to have a chilling effect.<sup>118</sup> This analysis should be taken into account in the context of specific cases in order to establish whether such damage has effectively taken place or not, and, where applicable, its magnitude.

83. The prohibition of the use of circumvention tools to legitimately protect the right to anonymous communication or for the legitimate use of a person's property shall not be considered a legitimate copyright protection measure.<sup>119</sup>

#### **F. Filters and blocking**

84. As has been observed in the Joint Declaration on Freedom of Expression and the Internet, forcing the blocking or suspension of entire websites, platforms, channels, IP addresses, domain name extensions, ports, network protocols, or any other kind of application, as well as measures intended to eliminate links, information and websites from the servers on which they are stored, all constitute restrictions that are prohibited and exceptionally admissible only strictly pursuant to the terms of Article 13 of the American Convention.<sup>120</sup>

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<sup>115</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 2.

<sup>116</sup> UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>117</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 49 and 78. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>118</sup> I/A Court H.R. *Case of Tristán-Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. Para. 129.

<sup>119</sup> Article 19. 2013. [The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age](#). Principle 12.3; EFF. March, 2013. [Unintended Consequences: Fifteen Years under the DMCA](#).

<sup>120</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#).

85. In exceptional cases of clearly illegal content or speech that is not covered by the right to freedom of expression (such as war propaganda and hate speech inciting violence, direct and public incitement to genocide, and child pornography)<sup>121</sup> the adoption of mandatory measures to block and filter specific content is admissible. In these cases, the measure must be subjected to a strict balance of proportionality and be carefully designed and clearly limited so as to not affect legitimate speech that deserves protection. In other words, filtration or blocking should be designed and applied so as to exclusively impact the illegal content without affecting other content.<sup>122</sup>

86. The Special Rapporteur considers that in the aforementioned exceptional cases, the measures must be authorized or put in place pursuant to the appropriate procedural guarantees, in the terms of articles 8 and 25 of the American Convention. In this regard, the measures should only be adopted after the illegal content to be blocked has been fully and clearly identified, and when necessary to achieve a pressing aim. In any case, these measures must not be applied to legal content.

87. Restrictive measures should at all times include safeguards to prevent abuse, such as transparency with regard to the content whose removal has been ordered, as well as detailed information regarding the measures' necessity and justification. At the same time, a measure of this kind should be adopted only when it is the only measure available for achieving an imperative end and is strictly tailored to achieve it.<sup>123</sup>

88. At no time can an *ex ante* measure be put in place to block the circulation of any content that can be assumed to be protected. Content filtering systems put in place by governments or commercial service providers that are not controlled by the end-user constitute a form of prior censorship and do not represent a justifiable restriction on freedom of expression.<sup>124</sup>

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Point 3 (a); IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 149; IACHR. [Annual Report 2010](#). Volume I. Chapter IV (Human Rights Developments in the Region). OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. Para. 822.

<sup>121</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 58 *et seq.*

<sup>122</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 25, 26 and 32. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>123</sup> IACHR. [Annual Report 2010](#). Volume I. Chapter IV (Human Rights Developments in the Region). OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. Para. 822; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (a) (b) and 3 (a); UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

<sup>124</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 3 (b); UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist](#)

89. Products intended to facilitate filtration by end users should be required to be accompanied by clear information intended to inform those users on how the filters work and the possible disadvantages should filtering turn out to be excessive.<sup>125</sup>

90. Measures to block content cannot be used to control or limit the circulation of speech that is specially protected or is assumed to be protected when that assumption has not been contradicted by a competent authority that provides sufficient guarantees of independence, autonomy and impartiality, pursuant to the above-mentioned terms.<sup>126</sup> In this regard, it should be noted that systems for blocking and filtering Internet content frequently block legitimate websites and content. Some governments have used them to prevent their populations from accessing information that is fundamentally in the public's interest but that governments are interested in hiding.<sup>127</sup>

## G. Intermediaries

91. The exercise of the right to freedom of expression on the Internet depends, to a large extent, on a broad range of actors—mainly private ones—who act as intermediaries by providing a range of services such as access and interconnection; transmission, processing and routing of Internet traffic; hosting and providing access to material posted by others, searching or referencing materials on the Internet; financial transactions; and connecting users through social networks, among other things.<sup>128</sup> There are many intermediaries and different ways to classify them; the most relevant include Internet service providers (ISP), website hosting providers, social networking platforms, and search engines.<sup>129</sup>

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*Measures*; UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. [Joint Statement On Wikileaks](#). Point 5.

<sup>125</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 3 (c).

<sup>126</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 70. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>127</sup> United Nations. Human Rights Committee. [Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee](#). CCPR/C/IRN/CO/3. November 29, 2011. Para. 27; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 32. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); The Sydney Morning Herald. June 5, 2013. [How ASIC's attempt to block one website took down 250,000](#); IT- Politisk Forening. [Google and Facebook blocked by Danish child porn filter on March 1, 2012](#); Eupean Digital Rights (EDRI). [Internet Blocking. Crimes should be punished, not hidden](#).

<sup>128</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 38. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>129</sup> The Organisation for Economic Co-Operation and Development (OECD) defines Internet Intermediaries as those entities that “give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.” Organisation for Economic Co-Operation and Development (OECD). April, 2010. [The Economic and Social Role of Internet Intermediaries](#). P. 9.

92. The circulation of information and ideas on the Internet would be impossible without these actors, who play an essential role in the exercise of the right to search for and receive information online, fostering the social dimension of freedom of expression in the terms of the Inter-American Court.<sup>130</sup> At the same time, as explained further below, because of their position and the role they play, intermediaries have become points through which it is technically possible to exercise control over Internet content.<sup>131</sup>

93. Indeed, with the objective of controlling different types of expression, both the State and private actors have sought to take advantage of the position held by intermediaries as points of control over access to and use of the Internet.<sup>132</sup> The interest in using intermediaries as points of control is motivated, among other things, by the fact that it is easier for States and private actors to identify and coerce intermediaries than those directly responsible for the expression they seek to inhibit or control. This is due to the number of users, and the fact that they are frequently unidentified or may be located in multiple jurisdictions. There is also greater financial incentive in seeking to impose liability on an intermediary rather than on an individual user.<sup>133</sup> Accordingly, some States have adopted frameworks that impose liability on intermediaries for the expression generated by the users of their services.<sup>134</sup>

94. As held repeatedly not only in the Joint Declaration on Freedom of Expression and the Internet but also in national legal decisions,<sup>135</sup> “[n]o one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so (‘mere conduit principle’).”<sup>136</sup>

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<sup>130</sup> I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 32; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 38. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>131</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 74. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>132</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 74. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>133</sup> Center for Democracy and Technology. December, 2012. [Shielding the Messengers: Protecting Platforms for Expression and Innovation](#). P. 4.

<sup>134</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 39 and 40. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>135</sup> Supreme Court of Canada. [Crookes v. Newton, 2011 SCC 47, \[2011\] 3 S.C.R. 269](#). October 19, 2011; Corte Suprema de Justicia de la Nación. [S. 755.-XLVI. Sujarchuk, Ariel Bernardo c/ Warley, Jorge Alberto s/ daños y perjuicios](#). Judgment of August 1, 2013.

<sup>136</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 2 (a). This rule is taken up in its greatest extension by the United States Communications Decency Act (CDA). US Government Printing Office. United States Code. Section 47, §230 (c)(1).

95. The above rule assumes the exclusion of a model of strict liability according to which intermediaries are held liable for unlawful content generated by third parties. Indeed, a system of strict liability in the sphere of electronic or digital communications is incompatible with minimum standards of freedom of expression, at least for the reasons discussed below.

96. First, the application of strict liability criteria is exceptional in contemporary law, and is only justified in narrowly defined cases in which it can be assumed that the person found to be liable failed to perform a legal duty or was able to exercise control over the risk factor that caused the harm. In cases involving Internet intermediaries, it is conceptually and practically impossible, without distorting the entire architecture of the Web, to assert that intermediaries have the legal duty to review all of the content that flows through their conduits or to reasonably assume, in all cases, that it is within their control to prevent the potential harm a third party could cause by using their services. In this respect, it is clear that intermediaries must not be required to supervise user-generated content in order to detect and filter unlawful expression.<sup>137</sup>

97. In this respect, applying strict liability to this issue would be to radically discourage the existence of the intermediaries necessary for the Internet to retain its features of data flow circulation. To hold an intermediary liable in the context of an open, plural, universally accessible, and expansive Web would be like holding the telephone companies liable for the threats one person makes to another over the phone, thus causing uncertainty and extreme distress. Accordingly, no democratic legal system today extends strict liability to Internet intermediaries. On the contrary, as discussed below, most States have established systems of liability conditioned on notice of the existence of unlawful content and the intermediary's ability to remove it. Such systems, as discussed below need to have certain requirements to be legitimate from the point of view of protection of freedom of expression.

98. In addition, a system of strict liability like the one mentioned would run against the State's duty to favor an institutional framework that protects and guarantees the right to seek, receive, and disseminate information and opinions freely, as stipulated by Article 13 of the Inter-American Convention. Indeed, as the IACHR has stated, the right of every person to be afforded equal opportunities to receive, seek and impart information by any means of communication without discrimination for reasons of religion, language, political opinions, or any other reason is derived from Article 13.<sup>138</sup> For the reasons briefly explained below, the application of strict liability to the activities of Internet intermediaries creates strong incentives for the private censorship of a wide range of legitimate expression.<sup>139</sup>

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<sup>137</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 2 (b); Court of Justice of the European Union. *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*. C-70/10. Judgment of November 24, 2011. Para. 49-53; Court of Justice of the European Union. *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*. C-360/10. Judgment of February 16, 2012. Para. 47-51.

<sup>138</sup> IACHR. [Declaration of Principles on Freedom of Expression](#). Principle 2.

<sup>139</sup> For example, in Thailand, Turkey or China. United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 39-40. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Center for Democracy and Technology. December, 2012. [Shielding the Messengers: Protecting Platforms For Expression and Innovation](#). Pp. 14-15.

99. As just mentioned, in most cases, intermediaries do not have—and are not required to have—the operational/technical capacity to review content for which they are not responsible. Nor do they have—and nor are they required to have—the legal knowledge necessary to identify the cases in which specific content could effectively produce an unlawful harm that must be prevented. Even if they had the requisite number of operators and attorneys to perform such an undertaking, as private actors, intermediaries are not necessarily going to consider the value of freedom of expression when making decisions about third-party produced content for which they might be held liable.<sup>140</sup> In view of the uncertainty about potential liability, intermediaries can be expected to end up suppressing all of the information that they think, from any point of view, could potentially result in a judgment against them. A system of this kind would seriously affect small and medium-sized intermediaries, as well as those who operate under authoritarian or repressive regimes. It would also jeopardize the right of all persons to use the media they deem appropriate for the transmission of ideas and opinions.

100. It is precisely for this reason that the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated that “[h]olding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship, often without transparency and the due process of the law.”<sup>141</sup>

101. It bears recalling that the Inter-American Court has emphasized that freedom of expression is not limited to the abstract right to speak or write; rather, it inseparably encompasses the right to disseminate thoughts, information, ideas, and opinions through any appropriate media chosen for such purpose, and it includes the right to reach the greatest number of recipients.<sup>142</sup> In order to safeguard this freedom effectively, the State must not restrict dissemination by disproportionately or unreasonably prohibiting or regulating media. Disproportionate limitations that distort the workings of the Internet and limit its democratizing potential as a medium within the reach of a wide world of individuals constitutes directly, and to the same extent, a violation of freedom of expression.<sup>143</sup>

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<sup>140</sup> MELÉNDEZ JUARBE, H. *Intermediarios y libertad de expresión: apuntes para una conversación. En: Hacia una Internet libre de censura. Propuestas para América Latina*. Eduardo Bertoni, compiler. Editorial Universidad de Palermo, 2012. P. 111. On the roles and incentives to intermediaries: Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE). *Las llaves del ama de llaves: la estrategia de los intermediarios en Internet y el impacto en el entorno digital*; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 42. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>141</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 40. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>142</sup> I/A Court H.R. *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. Para. 73; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 109; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 78; I/A Court H.R. *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. Para. 147; I/A Court H.R. *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. Para. 65; I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 31.

<sup>143</sup> I/A Court H.R. *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. Para. 164. I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 109; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits,*

102. For all of the above reasons, this Office of the Special Rapporteur has indicated that subsequent liability should be imposed only on the authors of the online expression—that is, those directly responsible for the offensive expression.<sup>144</sup>

103. This principle was taken into account, for example, by the Supreme Court of Canada in the case of *Crookes v. Newton*, which examined whether a person can be found liable for defamation when his website contains links to another site that contains allegedly defamatory content about third parties.<sup>145</sup> The Court held that a link or hyperlink, by itself, should never be viewed as the publication of the content to which it refers, and therefore the person who creates the link cannot, in principle, be sued for defamation, as the creator of a hyperlink has no control over the referenced content. The Court assessed the potential chilling effect that could arise, given that the authors of articles would not risk liability by linking to other articles over which they have no content control.<sup>146</sup> Similarly, the Argentine Supreme Court of Justice of the Nation recently ruled that liability could not be imposed for third party-produced content that was hosted and reproduced on a blog that indicated the websites from which the information had been taken.<sup>147</sup> Similarly, a court in Peru found no liability in the case of a blogger who reproduced the links to several articles in which the actions of a public servant were called into question, clearly indicating the author of that content.<sup>148</sup>

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*Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 78; I/A Court H.R. *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. Para. 147; I/A Court H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and Costs*. Judgment of February 5, 2001. Series C No. 73. Para. 65; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (c).

<sup>144</sup> IACHR. [Annual Report 2010](#). Volume I. Chapter IV (Human Rights Developments in the Region). OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. Para. 822; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist Measures](#); United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 2 (a).

<sup>145</sup> Supreme Court of Canada: [Crookes v. Newton, 2011 SCC 47, \[2011\] 3 S.C.R. 269](#). October 19, 2011.

<sup>146</sup> Supreme Court of Canada. [Crookes v. Newton, 2011 SCC 47, \[2011\] 3 S.C.R. 269](#). October 19, 2011; IACHR. [Annual Report 2012. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Domestic Case Law on Freedom of Expression). OEA/Ser.L/V/II.147. Doc. 1. March 5, 2013. Para. 121-122.

<sup>147</sup> Corte Suprema de Justicia de la Nación. [S. 755.-XLVI. Sujarchuk, Ariel Bernardo c/ Warley, Jorge Alberto s/ daños y perjuicios](#). Judgment of August 1, 2013. For a study of cases on Argentine jurisprudence and the challenges on intermediaries liability, see: UGARTE, R. y RABINOVICH, E., [Los intermediarios y los desafíos para la libertad de expresión en Internet](#). Revista Cuestión de Derechos N°4, first semester of 2013.

<sup>148</sup> 33º Juzgado Penal – Reos Libres. Expediente 24304-2009-0-1801-JR-PE-33. Resolución Nro. 38 of June 18, 2012. Available for consultation at: Archives of the Office of the Special Rapporteur for Freedom of Expression. Corte Superior de Justicia de Lima. Sexta Sala de lo Penal. Expediente 24304-2009-0-1801-JR-PE-33. Judgment of January 31, 2013. Available for consultation at: <http://www.scribd.com/doc/134562556/Sentencia-Segunda-Instancia-Caso-Mufarech>; Instituto Prensa y Sociedad (IPYS). July 10, 2012. [Absuelven en primera instancia a blogger denunciado por ex ministro](#).

104. Another model for the imposition of liability is that of the fault-based liability regimes, in which liability is based on compliance with extra-judicial mechanisms such as “notice and takedown.”<sup>149</sup> Under these provisions (called “safe harbor”), in exchange for protection from liability, intermediaries are required to take down content that a third party (more or less qualified according to the respective judicial system), alleges to be unlawful.<sup>150</sup>

105. In general, save for in extraordinarily exceptional cases, this type of mechanism puts private intermediaries in the position of having to make decisions about the lawfulness or unlawfulness of the content, and for the reasons explained above, create incentives for private censorship. Indeed, extrajudicial notice and takedown mechanisms have frequently been cause for the removal of legitimate

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<sup>149</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 2 (b).

<sup>150</sup> In some cases, the imposition of liability on intermediaries requires that the “notice” or notification come from specially qualified subjects (such as the alleged owner of a copyright) or that it contain certain substantive elements other than the simple assertion of the legality of the content, such as actual knowledge of the unlawful nature of the material or activity for which the material is used. Section 512 of the Digital Millennium Copyright Act (DMCA) of the United States, enacted in 1998, stipulates that in order for liability to be imposed against an intermediary the notice or notification must be sent in writing to the intermediary by the copyright holder or his or her duly identified representative, who must provide sufficient contact information; it must identify the material allegedly protected by copyright as well as information reasonably sufficient to locate the material; and it must contain a good faith statement making clear that the use of the material has not been authorized by the copyright holder or by law, among other things. According to the law, the intermediary cannot be held liable if the content is removed or blocked upon receiving the notification. According to Section 512, the author of the original content can reply to the notice and initiate proceedings to reinstate the material. Nevertheless, the requirements to successfully pursue such a claim are not easily accessible for most Internet users. House of Representatives. [H.R. 2281 The Digital Millennium Copyright Act](#). October 8, 1998; United States Copyright Office. December, 1998. [The Digital Millennium Copyright Act](#). On this matter, see: Center for Democracy and Technology. Diciembre de 2012. [Shielding the Messengers: Protecting Platforms For Expression and Innovation](#). P. 6-13; Center for Democracy and Technology. October 12, 2010. [Report on Meritless DMCA Takedowns of Political Ads](#); Berkman Center Research Publication No. 2010-3; URBAN, J. & QUILTER, L. [Efficient Process or “Chilling Effects”? Takedown notices under Section 512 of the Digital Millennium Copyright Act](#). 22 Santa Clara Comp. & High Tech. L. J. 621, 677 (2006). In addition, Article 14 of the European Directive on Electronic Commerce of the European Parliament and of the Council of the European Union adopted in 2000, establishes that intermediaries shall not be liable for illegal activity or information unless they have actual knowledge of such illegality. European Parliament and Council of the European Union. [Directiva 2000/31/CE](#). July 17, 2000. This Directive has been interpreted in various ways, and some States have required as a condition of actual knowledge that the notice come from a judge or similar authority, except in the case of grave and imminent danger. Regarding the concept of actual knowledge, the Court of Justice of the European Union has said that not every private notice or complaint will be sufficient to establish actual knowledge: “a [private] notification admittedly cannot automatically preclude the exemption from [host] liability [...] given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated.” The Court went on to note that “such notification represents, as a general rule, a factor of which the national court must take account when determining [...] whether the [operator] was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality”. Court of Justice of the European Union. *L’Oréal SA v. eBay*, Case C-324/09. July 12, 2011. Para. 122.

Advocate General Jääskinen presented similar arguments in the same case: “[f]irst it is evident that the service provider must have actual knowledge of, and not a mere suspicion or assumption regarding, the illegal activity or information. It also seems to me that legally ‘knowledge’ may refer only to past and/or present but not to the future. [...] Secondly the requirement of actual knowledge seems to exclude construed knowledge. It is not enough that the service provider ought to have known or has good reasons to suspect illegal activity. This is also in line with Article 15(1) of [the ECD] which forbids the Member States to impose on service providers general obligations to monitor the information they transmit or store or to actively seek facts or circumstances indicating illegal activity.” Court of Justice of the European Union. *L’Oréal SA v. eBay*, Case C-324/09. Opinion of Advocate General Jääskinen. December 9, 2010. Para. 162-163.



content, including specially protected content.<sup>151</sup> As noted above, leaving the removal decisions to the discretion of private actors who lack the ability to weigh rights and to interpret the law in accordance with freedom of speech and other human rights standards can seriously endanger the right to freedom of expression guaranteed by the Convention. For this reason, provisions for the imposition of liability on intermediaries should have sufficient judicial safeguards so as not to cause or encourage private censorship mechanisms.<sup>152</sup>

106. Indeed, provisions for *conditional immunity* are compatible with the framework of the Convention to the extent that they establish sufficient safeguards for the protection of the users' freedom of expression and due process, and do not impose vague or disproportionate obligations on intermediaries. Specifically, the requirement that intermediaries remove content, as a condition of exemption from liability for an unlawful expression, could be imposed only when ordered by a court or similar authority that operates with sufficient safeguards for independence, autonomy, and impartiality, and that has the capacity to evaluate the rights at stake and offer the necessary assurances to the user.<sup>153</sup> The Rapporteurs for Freedom of Expression have already addressed this topic in their Joint Declaration on Freedom of Expression and the Internet.<sup>154</sup>

107. In these cases, the orders or notices need to state precisely which content must be removed, thus keeping legitimate expression from being affected, and they should be preceded by a determination on the illegality of the content in accordance with due process of law.<sup>155</sup> Finally, States ought to establish the necessary safeguards, such as obligations of transparency and access to an effective remedy, so as to limit the risk of abuse in the adoption of these types of measures.<sup>156</sup>

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<sup>151</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 42. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Eupean Digital Rights (EDRi). January, 2011. *The slide from "self-regulation" to corporate censorship: The scale and significance of moves to entrust internet intermediaries with a cornerstone of democracy –open electronic communications networks*. Pp. 32-34; Electronic Frontier Foundation (EFF). *Takedown Hall of Shame*. Center for Democracy and Technology. October 12, 2010. *Report on Meritless DMCA Takedowns of Political Ads*; SELTZER, W. *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*. Harvard Journal of Law & Technology, Vol. 24. P. 171, 2010; Berkman Center Research Publication No. 2010-3; URBAN, J. & QUILTER, L. *Efficient Process or "Chilling Effects"? Takedown notices under Section 512 of the Digital Millenium Copyright Act*. 22 Santa Clara Comp. & High Tech. L. J. 621, 677 (2006); Open Business. Latin America & Caribbean. April 3, 2013. *La DMCA como forma de censura. El caso del documental del Presidente Correa*.

<sup>152</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 42, 43 and 75. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>153</sup> Biblioteca del Congreso Nacional de Chile. *Ley núm. 20.435*. Modifica la *Ley No 17.336* sobre Propiedad Intelectual of August 28, 1970. May 4, 2010. Articles 85L *et seq*; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 75 and 76. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>154</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. *Joint Declaration on Freedom of Expression and the Internet*. Point 2.

<sup>155</sup> IACHR. *Annual Report 2010*. Volume I. Chapter IV (Human Rights Developments in the Region). OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. Para. 822.

<sup>156</sup> IACHR. *Annual Report 2010*. Volume I. Chapter IV (Human Rights Developments in the Region). OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. Para. 822; United Nations. General Assembly. Report of the Special Rapporteur on the promotion

108. The system of immunity subject to court notice has been used, among others, in Chilean law, which regulates disputes involving alleged copyright infringements on the Internet.<sup>157</sup>

109. In addition, for some specific cases, some regulatory systems establish “notice and notice” mechanisms through which intermediaries have the obligation to convey to the user notices of the alleged unlawfulness of a particular expression.<sup>158</sup> In order for these mechanisms to really make it possible to exercise the right of defense with respect to the challenged expressions and to prevent abuses, it is essential that they meet certain conditions. In particular, they have to include a detailed notice about the location of the material considered unlawful and the legal basis for the unlawfulness, as well as an adequate option for counter-notice to the user who produced the content, with judicial oversight guarantees. In all cases, users have the right to remain anonymous and any dispute on this point need to be resolved exclusively in court.<sup>159</sup>

110. Given the importance of private actors as intermediaries for access to and use of the Internet,<sup>160</sup> authorities need to give them the safeguards to operate transparently before the rest of the system’s actors (especially the end users), and they should create the conditions to be able to effectively serve as a vehicle for the exercise of the universal right to freedom of expression. In this respect, it is relevant to mention the Guiding Principles on Business and Human Rights,<sup>161</sup> endorsed by the UN Human Rights Council, which recognize the complementary, yet different, roles of States and companies in relation to the validity of human rights.<sup>162</sup>

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and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 75 and 76. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>157</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.435](#). Modifica la [Ley No 17.336](#) sobre Propiedad Intelectual of August 28, 1970. May 4, 2010. Articles 85L *et seq* For a greater explanation of Chilean Law, see, among others: International Centre for Trade and Sustainable Development. December, 2011. [En Busca de Equilibrios Regulatorios: Chile y las Recientes Reformas al Derecho de Autor](#). Pp. 3-4; Derechos Digitales. [Responsabilidad de los prestadores de servicios de Internet](#). Pp. 20-23.

<sup>158</sup> Biblioteca del Congreso Nacional de Chile. [Ley núm. 20.435](#). Modifica la [Ley No 17.336](#) sobre Propiedad Intelectual of August 28, 1970. May 4, 2010. Article 85U; Parliament of Canada. [Copyright Modernization Act](#). June 29, 2012. Article 41.26.

<sup>159</sup> Article 19. 2013. [Internet intermediaries: Dilemma of Liability](#). P. 19.

<sup>160</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 44. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 73-75. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85). For more examples of the different scenarios in which the conduct of private actors may impact the right to freedom of expression, see also, European Digital Rights (EDRI). January, 2011. [The slide from “self-regulation” to corporate censorship: The scale and significance of moves to entrust internet intermediaries with a cornerstone of democracy –open electronic communications networks](#); BSR. February, 2011. [Protecting Human Rights in the Digital Age: Understanding Evolving Freedom of Expression and Privacy Risks in the Information and Communications Technology Industry](#); Access. March, 2012. [Telco Action Plan. Respecting human rights: Ten steps and implementation objectives for telecommunications companies](#). Available for consultation at: [https://s3.amazonaws.com/access.3cdn.net/1f9ab2891a86f3f081\\_uom6iil1w.pdf](https://s3.amazonaws.com/access.3cdn.net/1f9ab2891a86f3f081_uom6iil1w.pdf); European Commission. [ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights](#).

<sup>161</sup> United Nations. Office of the United Nations High Commissioner for Human Rights. [Guiding Principles on Business and Human Rights](#). HR/PUB/11/04.

<sup>162</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 45. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

111. Intermediaries must thus keep their activities from provoking or helping to provoke negative consequences on the right to freedom of expression.<sup>163</sup> So, for example, the adoption of voluntary measures by intermediaries that restrict the freedom of expression of the users of their services—for example, by moderating user-generated content—can only be considered legitimate when those restrictions do not arbitrarily hinder or impede a person’s opportunity for expression on the Internet.

112. Private actors must also establish and implement service conditions that are transparent, clear, accessible, and consistent with international human rights standards and principles, including the conditions that might give rise to infringements of users’ rights to freedom of expression or privacy.<sup>164</sup> Companies must seek to ensure that any restriction derived from the application of the terms of service does not unlawfully or disproportionately restrict the right to freedom of expression.<sup>165</sup>

113. With respect to the duty of transparency, intermediaries should have sufficient protection to disclose the requests received from government agencies or other legally authorized actors who infringe upon users’ rights to freedom of expression or privacy. It is good practice, in this respect, for companies to regularly publish transparency reports in which they disclose at least the number and type of the requests that could lead to the restrictions to users’ rights to freedom of expression or privacy.<sup>166</sup>

114. Intermediaries should be able to evaluate the legality of the requests that could compromise the freedom of expression and privacy of users, and consider making use of proceedings to challenge them when they find that they are being made in violation of the law or internationally recognized human rights. In this respect, the joint initiatives taken by different companies seeking to resist attempts to improperly restrict or control the use of the Internet or to compromise the privacy of their users are a positive development.<sup>167</sup>

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<sup>163</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 48 and 76. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>164</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 48. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>165</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist Measures](#); UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. [Joint Statement On Wikileaks](#). Point 5; United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 11.

<sup>166</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 46. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Global Network Initiative. [A Call for Transparency from Governments and Telecommunications Companies](#); Global Information Society Watch. [Don’t censor censorship: Why transparency is essential to democratic discourse](#). For example, see also, Google. [Informe de transparencia](#); Twitter. [Transparency Report. Communicate fearlessly to build trust](#); Microsoft. [Law Enforcement Requests Report](#).

<sup>167</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist Measures](#); United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and

115. In principle, persons affected by restrictive measures or interference (and, when appropriate, the general public) should be given advance notice of those measures, save when in properly justified exceptional cases. Users affected by any measure that restricts freedom of expression as a result of the decisions of intermediaries should have, depending on the specific domestic regulations, legal remedies to contest such decision and mechanisms for reparations in the event of the violation of their rights.<sup>168</sup> It is good practice to have non-judicial domestic remedies for the expedited resolution of conflicts that may arise between users and intermediaries.

116. Finally, companies whose activities impact the exercise of the right to freedom of expression or the right to privacy on the Internet should take proactive protective measures such as—for example—taking part in multi-stakeholder initiatives, which can be useful for learning and developing good business practices consistent with respect for human rights.<sup>169</sup>

## H. Cybersecurity, privacy, and freedom of expression

117. The Office of the Special Rapporteur has recognized on various occasions that the right to freedom of expression is favored when States protect the privacy of digital communications, as well

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Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 11.

The companies AOL, Apple, Microsoft, Yahoo!, Facebook, LinkedIn, Twitter and Google publicly urged the US government and members of Congress “to take the lead and make reforms that ensure that government surveillance efforts are clearly restricted by law, proportionate to the risks, transparent and subject to independent oversight.” AOL, Microsoft, Yahoo, Facebook, LinkedIn, Twitter and Google called on States to endorse a set of five principles and enact reforms accordingly. The principles endorsed by the companies are: “1. Limiting Governments’ Authority to Collect Users’ Information. Governments should codify sensible limitations on their ability to compel service providers to disclose user data that balance their need for the data in limited circumstances, users’ reasonable privacy interests, and the impact on trust in the Internet. In addition, governments should limit surveillance to specific, known users for lawful purposes, and should not undertake bulk data collection of Internet communications. 2. Oversight and Accountability. Intelligence agencies seeking to collect or compel the production of information should do so under a clear legal framework in which executive powers are subject to strong checks and balances. Reviewing courts should be independent and include an adversarial process, and governments should allow important rulings of law to be made public in a timely manner so that the courts are accountable to an informed citizenry. 3. Transparency About Government Demands: Transparency is essential to a debate over governments’ surveillance powers and the scope of programs that are administered under those powers. Governments should allow companies to publish the number and nature of government demands for user information. In addition, governments should also promptly disclose this data publicly. 4. Respecting the Free Flow of Information. The ability of data to flow or be accessed across borders is essential to a robust 21st century global economy. Governments should permit the transfer of data and should not inhibit access by companies or individuals to lawfully available information that is stored outside of the country. Governments should not require service providers to locate infrastructure within a country’s borders or operate locally. 5. Avoiding Conflicts Among Governments: In order to avoid conflicting laws, there should be a robust, principled, and transparent framework to govern lawful requests for data across jurisdictions, such as improved mutual legal assistance treaty — or “MLAT” — processes. Where the laws of one jurisdiction conflict with the laws of another, it is incumbent upon governments to work together to resolve the conflict”. AOL, Facebook, Google, LinkedIn, Microsoft, Twitter, Yahoo!. [Global Surveillance Reform](#).

<sup>168</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 76. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>169</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 46. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85). See also, Global Network Initiative. [About Us](#).

as the confidentiality, integrity, and availability of data and computer systems.<sup>170</sup> As explained in the paragraphs below, public policies to promote *cybersecurity* and ensure the privacy of information are important measures for reaching those objectives.

## 1. Cybersecurity

118. “Cybersecurity” is usually used as a broad term to refer to various issues, ranging from the security of the national infrastructure and networks through which Internet services are provided, to the security or safety of users. Nevertheless, subsequent developments suggest the need to limit the concept exclusively to the safeguarding of computer data and systems. As explained below, this narrow focus allows for a better understanding of the problem as well as a proper identification of the solutions needed to protect interdependent networks and the information infrastructure.<sup>171</sup>

119. Indeed, this limited focus makes it possible, among other things, to prevent a broad view of the concept of “cybersecurity” from leading to the creation of new “computer crimes,” or to an increase in the penalties of criminal conducts that are not aimed at attacking the integrity of the web and the infrastructure of the Internet, or the integrity and confidentiality of the information they contain. In this respect, the aim is to prevent acts such as defamation or fraud from being considered computer crimes, or the punishment of those offenses from being aggravated in exclusive consideration of the technological medium used to carry them out. In other words, to prevent a broad concept that could lead to the criminalization of the use of the Internet, the concept of cybersecurity is reduced to the protection of a set of legally protected interests, such as infrastructure and information that is stored or in any way administered through the Internet, but not of the technological medium used to commit any kind of crime.

120. Understood properly, the response of States in regard to security in cyberspace need to be limited and proportionate, and designed to meet specific legal aims that do not jeopardize the democratic virtues that characterize the Web. In this respect, governments ought to abstain from favoring the concentrated and centralized use of the criminal law as a fundamental instrument for dealing with all possible threats to online security. As explained in the final section of this report, by virtue of the open and decentralized configuration of the Internet, governments should seek a security model in which there are shared responsibilities among the different actors as well as a diversity of media, from the training of users and the implementation of technical security devices to the sanctioning of acts that in fact threaten or attack the legal interests protected by “cybersecurity.”

121. In any case, when adopting a sanctions policy on this issue, the States should seek a dual outcome. First, as explained below, authorities must be aware of the possible impact of any measure of this kind on the exercise of freedom of expression through the Internet. Second, they ought to aim to have that policy ensure the integrity of the infrastructure and the information online, so that it protects

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<sup>170</sup> See, for example: United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#).

<sup>171</sup> European Commission. High Representative of the European Union for Foreign Affairs and Security Policy. Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. [Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace](#). Join (2013) 1 final. February 7, 2013. P. 3.

users from cyber-attacks that infringe upon their rights to privacy or freedom of expression and related rights.

122. In the face of any measure that could affect the exercise of freedom of expression through the Internet, States must ensure compliance with the international standards that provide, among other things, that any restriction that can affect this right must be provided for by law in the clearest and most precise terms possible, pursue a legitimate aim recognized by international law, and be necessary to accomplish that objective (“three-part test”). When dealing with limitations imposed by criminal provisions, the Inter-American Court has held that the demands inherent in the principle of strict legality must be additionally satisfied: “If such restriction or limitations are under criminal law, it is important to observe the strict requirements characteristic of the criminal codification to satisfy the principle of legality.”<sup>172</sup> This entails the need to “use strict and unequivocal terms, clearly restricting any punishable behaviors,”<sup>173</sup> which involves “a clear definition of the incriminatory behavior, setting its elements, and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures.”<sup>174</sup>

123. In terms of the abovementioned principle of necessity, in taking initiatives to protect security in cyberspace, States ought to include explicit safeguards in the law to prevent the criminalization of regular acts or acts inherent in the use of the Internet. They also need to require that the defined acts involve an effective harm and that the harmful acts are carried out with the intent to commit a crime. In addition, periodic updates of the legal regulations are needed to adapt them to the current technological reality, so as not to impose measures that, because they are out-of-date, restrict fundamental rights of Internet users and intermediaries.

124. The public policies on cybersecurity should be proportionate to the risk they address and, in any case, the security objective must be weighed against the protection of fundamental rights.<sup>175</sup> Indeed, computer threats are distinct in nature and have diverse impacts. A cyber-attack against a system to interrupt a critical service such as a city’s electrical power is not the same as one aiming to obtain the passwords of a group of social network users.

125. Although it is desirable, in the interest of preventing and combating Internet crime, for States to establish security standards for public entities, they should not, in principle, do the same thing with private networks and services. To broadly require a particular security standard—whether for networks, applications, or private services—can inhibit innovation on the Internet and especially affect those who cannot assume these changes. To require specific standards would adversely affect the open and decentralized platforms and could lead to a restriction of online freedom of expression, unless, for example, they deal with critical infrastructure services or essential public services, such as electrical power and the banking system.

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<sup>172</sup> I/A Court H.R. *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. Para. 55.

<sup>173</sup> I/A Court H.R. *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. Para. 55.

<sup>174</sup> I/A Court H.R. *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. Para. 55.

<sup>175</sup> Organisation for Economic Co-Operation and Development (OECD). 2012. [Cybersecurity policy making at a turning point: Analysing a new generation of national cybersecurity strategies for the Internet economy](#).

126. Additionally, authorities need to report and be accountable for measures taken with regard to cybersecurity—both those directly implemented and those taken by private intermediaries hired by the State. Civil society learns of many the cyber-attacks after the fact and, little is ever known of their real impact and of the response to prevent similar events in the future. Fearing a negative business impact, private companies are especially reluctant to provide explanations.

127. This duty of transparency and accountability does not in any way mean that it is necessary to reveal information that poses a risk to the success of those programs. States should make known, among other things, the general guidelines of the policies, the agencies are in charge, and what their responsibilities are. In the face of imminent risks or attacks, States should provide detailed information or order investigations to determine the magnitude of the events. Accountability with respect to security matters should operate jointly at the legal, institutional, technological, and social levels.

128. In this respect, official programs and public policies on cybersecurity need to have oversight and control mechanisms where the final authority is a judge. There must also be follow-up procedures with some degree of participation by civil society. The supervision and oversight procedures apply to all actors engaged in cybersecurity activities. The duty of supervision and oversight also means that no State agent, or private individual acting on the State's behalf, may have excessive powers over the operation of the Internet in the country.

129. The above principles cannot be interpreted to diminish the inherent right of the State to investigate when a website is the object of attacks such as, for example, so-called Denial of Service Attacks (DoS); those carried out through computer viruses or worms aimed at the transmitter's equipment, among others. These types of computer attacks can be aimed at particular individuals or media outlets and can be enormously disruptive to the exercise of the right to freedom of expression. Accordingly, the State is obligated to investigate and properly redress such attacks.

## 2. Privacy

130. Respect for online freedom of expression assumes that there is privacy for people's communications. Indeed, without a private sphere, free from the arbitrary interference of the State or private individuals, the right to freedom of thought and expression cannot be exercised fully.<sup>176</sup> The American Convention on Human Rights protects the right to privacy, enshrined in Article 11, that, "[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence," and that "[e]veryone has the right to the protection of the law against such interference or attacks." The inter-American case law has recognized that the purpose of this right is to ensure that individuals enjoy a private sphere in their lives, protected from the intervention, knowledge, or disclosure of the State or third parties.<sup>177</sup>

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<sup>176</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. A/HRC/13/37. December 28, 2009. Para. 33. Available for consultation at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 24. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>177</sup> I/A Court H.R. *Case of Fontevecchia y D'Amico v. Argentina. Merits, Reparations and Costs*. Judgment of November 29, 2011. Series C No. 238. Para. 48.

131. The Inter-American Commission has observed that the right to privacy encompasses at least four legally protected interests that are closely related to the exercise of other fundamental rights such as freedom of thought and expression. First, the right to have an individual sphere impervious to the arbitrary interference of the State or third parties. Second, the right to govern oneself, in that solitary space, by one's own rules defined autonomously according to one's individual life plan. Third, the right to private life protects the confidentiality of all the data produced in that private space—in other words, it prohibits the disclosure or circulation of information captured, without the consent of their owner, in that space of private protection reserved to the individual. And finally, the protection of private life protects the right to one's own image, meaning the right to not have one's image used without consent.<sup>178</sup>

132. In view of this close relationship between freedom of expression and privacy, States should avoid the implementation of any measure that restricts, in an arbitrary or abusive manner, the privacy of individuals (Article 11 of the American Convention). This privacy is understood in a broad sense as every personal and anonymous space that is free from intimidation or retaliation, and necessary for an individual to be able to freely form an opinion and express his or her ideas as well as to seek and receive information, without being forced to identify him or herself or reveal his or her beliefs and convictions or the sources he or she consults.<sup>179</sup> Nevertheless, the defense of individual privacy must be based on reasonable and proportionate criteria that do not end up arbitrarily restricting the right to freedom of expression. It is thus important to recall, as stated in principle 10 of the Declaration of Principles, that privacy laws should not inhibit or restrict investigation and dissemination of information of public interest.

133. The protection of the right to private life involves at least two specific policies related to the exercise of the right to freedom of thought and expression: the protection of anonymous speech and the protection of personal data. Some basic principles pertaining to this issue are discussed in the paragraphs below.

134. Both the right to freedom of thought and expression and the right to private life protect anonymous speech from government restrictions. Participation in public debate without revealing one's identity is a normal practice in modern democracies. The protection of anonymous speech is conducive to the participation of individuals in public debate since—by not revealing their identity—they can avoid being subject to unfair retaliation for the exercise of a fundamental right. Indeed, those who exercise the right to freedom of thought and expression take part in public debate and the political life of a community. It does not solely entail writing opinion articles or participating in debate forums—it also involves the ability to call for social mobilizations, to call upon other citizens to protest, to organize politically, or to challenge the authorities even in risky situation.

135. It does not, however, mean that anonymity safeguards all types of information. For example, the anonymity of the sender would in no way protect those who disseminate child

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<sup>178</sup> IACHR. Report No. 82/10. Case No. 12.524. *Fontevicchia y D'Amico*. Argentina. July 13, 2010. Par. 91 *et seq.*

<sup>179</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 47. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 53, 82 and 84. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)



pornography, engage in pro-war propaganda or the advocacy of hatred that constitutes the incitement of violence, or the direct and public incitement of genocide.<sup>180</sup> This kind of speech is not protected by the American Convention, and anonymity cannot protect its issuers from the legal consequences established—in accordance with international human rights law—in each domestic legal system with respect to each one of those cases. The same thing would occur if the exercise of the right to freedom of thought and expression were subject to the subsequent imposition of liability of the kind authorized by the American Convention. In all of those cases, judicial authorities would be authorized to take reasonable measures to determine the identity of the sender engaged in prohibited acts, in order to take proportionate action in response, as provided by law.<sup>181</sup>

136. Online identification and authentication requirements need to be used exclusively in sensitive and risky transactions and interactions, and not broadly for all services and applications.<sup>182</sup> Authentication requirements must follow the principle of proportionality, which in this case indicate that if the risk is high, the collection of additional information from the user is justified. However, if the risk is low, there is no reason to do so. Among other things, this balance encourages anonymous platforms and services on the Internet, which enable freedom of expression in contexts of repression or self-censorship. Also, the principle of diversity indicates that multiple identification schemes must be encouraged for online users, in order to avoid single or concentrated identifiers that can lead to security abuses and privacy intrusions.

137. The protection of anonymous speech on the Internet is, nevertheless, insufficient to guarantee a private space conducive to the exercise of the right to freedom of expression. To achieve this purpose, the confidentiality of personal data online needs to be guaranteed. Nowadays most online communications between individuals create privacy risks, since everything that happens on the Internet leaves a “digital footprint.” This means that enormous quantities of information about individuals can be intercepted, cached, and analyzed by third parties.<sup>183</sup>

138. Given the impact on the private life of individuals, States should establish systems for the protection of personal data, to regulate their storage, processing, use, and transfer.<sup>184</sup> Principle 3 of

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<sup>180</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 58 *et seq.*

<sup>181</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 80.

<sup>182</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 84. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>183</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 4-6; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 56. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>184</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 4; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,

the IACHR's Declaration of Principles on Freedom of Expression establishes that "[e]very person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it."

139. In this respect, States are required to prohibit the use of personal data for purposes inconsistent with the human rights treaties and to establish rights to information, correction and - if necessary and proportioned - deletion of data, as well as to create of effective supervision mechanisms.<sup>185</sup>

140. The right of access to personal data, or *habeas data*, has been recognized and developed in some States of the region. *Habeas data*, in effect, is the common heritage of inter-American constitutional law, insofar as most of the constitutions of the States in the region recognize it, whether in its substantive<sup>186</sup> or its procedural form.<sup>187</sup> In addition, the recognition of this right in the national legal systems has seen diverse moments and paths, depending on the particularities of the Member States. In some cases, the States have regulated *habeas data* as necessary complement and an integral part of the laws on access to public information. Other States have enacted general or special laws on the protection of personal data. Others have regulated *habeas data* within regulations on due process guarantees and codes of constitutional procedure.<sup>188</sup> On the date of writing of this report, at least 12 States that have enacted general laws on the protection of personal data.<sup>189</sup> In this context, the

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Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 56. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>185</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 58. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>186</sup> Senado de la Nación Argentina. [Constitución Nacional](#). 1994 Reform. Art. 43; Gaceta Oficial del Estado Plurinacional de Bolivia. [Constitución Política del Estado](#). February, 2009. Art 130, para. I; Presidência da República Casa Civil Subchefia para Assuntos Jurídicos. [Constituição da República Federativa do Brasil de 1988](#). Art. 5, section LXXII; Colombia. Presidencia de la República. [Constitución Política de Colombia](#). 1991. Art. 15; Asamblea Constituyente. [Constitución del Ecuador](#). October 20, 2008. Art. 66, para. 19 and Art. 92; Corte de Constitucionalidad. República de Guatemala. [Constitución Política de República de Guatemala](#). 1985. Art. 31 and Art. 92; Honduras. [Constitución Política](#). 1982. Article 182; Cámara de Diputados. [Constitución Política de los Estados Unidos Mexicanos](#). February 5, 1917. Art. 6, A, II and III and Art. 16; República de Nicaragua. [Constitución Política de la República de Nicaragua](#). February, 2007. Art. 26, 4; Panamá. [Constitución Política de la República de Panamá](#). 1972. Art. 42 and 44; Convención Nacional Constituyente. [Constitución de la República del Paraguay](#). 1992. Artículo 135; Perú. [Constitución Política de Perú](#). 1993. Art. 2, 5 and 6 and Art. 200, 3; República Dominicana. [Constitución de la República Dominicana](#). 2010. Art. 44, 2 and Art. 70; Asamblea Nacional Constituyente de Venezuela. [Constitución](#). 1999. Art. 28.

<sup>187</sup> Senado de la Nación Argentina. [Constitución Nacional](#). Art. 43; Gaceta Oficial del Estado Plurinacional de Bolivia. [Constitución Política del Estado](#). February, 2009. Art 130, párr. I; Presidência da República Casa Civil Subchefia para Assuntos Jurídicos. [Constituição da República Federativa do Brasil de 1988](#). Art. 5, section LXXII.; Asamblea Constituyente. [Constitución del Ecuador](#). October 20, 2008. Art. 92; Honduras. [Constitución Política](#). 1982. Article 182; Panamá. [Constitución Política de la República de Panamá](#). 1972. Art. 44; Convención Nacional Constituyente. [Constitución de la República del Paraguay](#). 1992. Art. 135; Perú. [Constitución Política de Perú](#). 1993. Art. 200, 3; República Dominicana. [Constitución de la República Dominicana](#). 2010. Art. 70.

<sup>188</sup> Organization of American States. Permanent Council. [Comparative Study: Data Protection in the Americas](#). CP/CAJP-3063/12. April 3, 2012.

<sup>189</sup> Congreso de la República Argentina. [Ley 25.326](#). Protección de Datos Personales. October 4, 2000; Bahamas. [Data Protection \(Privacy of Personal Information Act\)](#). April 11, 2003; Canadá. [Personal Information Protection and Electronic Documents Act](#). April 13, 2000; Biblioteca del Congreso Nacional de Chile. [Ley 19.628](#). Protección de Datos de carácter personal. August 18, 1999. Biblioteca del Congreso Nacional de Chile. [Decreto 779](#) Aprueba reglamento de registro de banco de datos

OAS General Assembly has underscored “the growing importance of privacy and the protection of personal data”.<sup>190</sup>

141. With regard to this matter, the United Nations Human Rights Committee maintained that, “[i]n order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public [authorities] or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every

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personales a cargo de organismos públicos. August 24, 2000; Congreso de Colombia. [Ley 1581](#). Por la cual se dictan disposiciones generales para la protección de datos personales. October 17, 2012; Asamblea Legislativa de la República de Costa Rica. [Ley no. 8968](#). Protección de la Persona frente al Tratamiento de sus Datos Personales. September 5, 2011; Presidenta de la República de Costa Rica. [Decreto Ejecutivo No. 37554-JP](#). Reglamento a la ley de protección de la persona frente al tratamiento de sus datos personales. March 5, 2013; Estados Unidos Mexicanos - Presidencia de la República. [Ley federal de protección de datos personales en posesión de los particulares](#). July 5, 2010; Asamblea Nacional. [Ley No. 787](#). Ley de protección de datos personales. March 29, 2012; Presidencia de la República de Nicaragua. [Decreto No. 36-2012](#). Reglamento de la Ley No. 787 “Ley de protección de datos personales.” October 17, 2012; Poder Legislativo. [Ley No. 1682](#). Que reglamenta la información de carácter privado. January 16, 2001; Congreso de la Nación Paraguaya. [Ley No 1969](#). Que modifica, amplía y deroga varios artículos de la ley N 1682/2001 “Que reglamenta la información de carácter privado.” September 3, 2002; Congreso de la República. [Ley No 29733](#). Ley de protección de datos personales. July 3, 2011. República del Perú. [Decreto Supremo N° 003-2013-JUS](#). March 21, 2013; Republic of Trinidad and Tobago. [Act No. 13 of 2011](#). Data Protection Act. July 22, 2011; República Oriental del Uruguay. Poder Legislativo. [Ley 18.331](#). Protección de datos personales y acción de “habeas data.” August 11, 2008.

<sup>190</sup> Organization of American States. General Assembly. [Access to Public Information and Protection of Personal Data](#). AG/RES. 2811 (XLIII-O/13). June 6, 2013. Given the importance of this issue, the OAS General Assembly has issued several statements on the right to access to personal data or *habeas data*. In 1996, in its resolution 1395 (XXVI-O/96) the General Assembly requested the Inter-American Juridical Committee to give special attention to matters concerning access to information and the protection of personal data. Organization of American States. General Assembly. [Annual Report of the Inter-American Juridical Committee](#). AG/RES. 1395 (XXVI-O/96). June 7, 1996. Ten years later, through resolution 2252 (XXXVI-O/06) the Assembly instructed the Department of International Legal Affairs to prepare “a study with recommendations on the subject of access to information and protection of personal data,” and the Inter-American Juridical Committee to continue to carry out studies “on the protection of personal data.” Organization of American States. General Assembly. [Access to Public Information: Strengthening Democracy](#). AG/RES. 2252 (XXXVI-O/06). June 6, 2006. In 2011, through resolution 2661 (XLI-O/11) instructed the Department of International Law, to “prepare a comparative study of different existing legal regimes, polices, and enforcement mechanisms for the protection of personal data [...] with a view to exploring the possibility of a regional framework in the area” and to the Inter-American Juridical Committee to present “a document of principles for privacy and personal data protection in the Americas,” Organization of American States. General Assembly. [Access to Public Information and Protection of Personal Data](#). AG/RES. 2661 (XLI-O/11). June 7, 2011. In other highlighted documents, the Inter-American Juridical Committee, as instructed by the OAS General Assembly, according to resolution 1395 (XXVI-O/96), prepared the document CJI/doc.25/00 rev.1, on the international and local regulation “of the processing of personal data by the private sector.” Years later, the Inter-American Juridical Committee, through document CJI/doc. 25/00 rev. 2, updated the previous document, as instructed by the General Assembly in resolution 2252 (XXXVI-O/06). Organization of American States. Inter-American Juridical Committee. [Right to Information: Access to and Protection of Information and Personal Data in Electronic Form](#). OEA/Ser.Q CJI/doc.25/00 rev. 2. February 7, 2007. For its part, the OAS Department of International Law, as instructed by the OAS General Assembly in its resolutions 2514 (XXXIX-O/09) and 2661 (XLI-O/11), prepared a document titled Preliminary Principles and Recommendations on Data Protection (the Protection of Personal Data). Organization of American States. Committee on Juridical and Political Affairs. [Preliminary Principles and Recommendations on Data Protection \(the Protection of Personal Data\)](#). OEA/Ser.G CP/CAJP-2921/10 rev.1 corr. 1. October 17, 2011. In 2012, resolution AG/RES.2727 (XLII-O/12) on Access to Public Information and Protection of Personal Data was approved, and in June, 2013 the same was done through resolution AG/RES.2811 (XLIII-O/13). Organization of American States. General Assembly. [Access to Public Information and Protection of Personal Data](#). AG/RES.2727 (XLII-O/12). June 4, 2012; Organization of American States. General Assembly. [Access to Public Information and Protection of Personal Data](#). AG/RES. 2811 (XLIII-O/13). June 6, 2013.

individual should have the right to request rectification or elimination.”<sup>191</sup> The European Parliament has similarly created rules and guidelines for the protection of personal data, paying special attention to the right to privacy enshrined in Article 8 of the European Convention on Human Rights.<sup>192</sup>

142. Regarding the type of obligations the States have in relation to *habeas data* insofar as it is—as previously stated—an indispensable condition for the full enjoyment of the right to freedom of thought and expression on the Internet. The European Directive 95/46/EC establishes, for example, that processing of personal data must be lawful and fair to the individuals concerned; that it is only possible to collect information for legitimate, specific, and explicit purposes; that the data collected must be adequate, relevant and not excessive in relation to the purposes for which they are processed; that the information must be accurate and, where necessary, kept up to date; that inaccurate information must be corrected or eliminated; and that information that allows for the identification of individuals must not be maintained for any longer than is necessary for the purposes for which the data were collected.<sup>193</sup> The Directive also establishes that the processing of data is only allowed if the person who provides personal data give their consent or if it is necessary for the performance of a contract, for compliance with a legal obligation, to protect the vital interests of the data subject, for the performance of a task carried out in the public interest, or for the purposes of the legitimate interests pursued by the controller or third parties.<sup>194</sup>

### 3. Internet communications surveillance and freedom of expression

143. The Special Rapporteurs have acknowledged that the exceptional use of legally established programs or systems for the surveillance of private communications is occasionally legitimate, when necessary to meet compelling objectives such as crime prevention. They have also recalled that such restrictions must be strictly proportionate and consistent with the international standards the right to freedom of expression.<sup>195</sup>

144. Thus, for example, in his recent report on communications surveillance and its implications for the exercise of the rights of privacy and freedom of expression (A/HRC/23/40), the United Nations (UN) Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression recognizes that “concerns about national security [...] may justify the

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<sup>191</sup> United Nations. Office of the High Commissioner for Human Rights. [General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation \(Art. 17\)](#). April 8, 1988. Para. 10.

<sup>192</sup> European Parliament and Council of the European Union. Directive 95/46/EC. [On the protection of individuals with regard to the processing of personal data and on the free movement of such data](#). October 24, 1995.

<sup>193</sup> European Parliament and Council of the European Union. Directive 95/46/EC. [On the protection of individuals with regard to the processing of personal data and on the free movement of such data](#). October 24, 1995. Article 6.

<sup>194</sup> European Parliament and Council of the European Union. Directive 95/46/EC. [On the protection of individuals with regard to the processing of personal data and on the free movement of such data](#). October 24, 1995. Article 7.

<sup>195</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 1-3 and 9; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (a) and (b).

exceptional use of communications surveillance technology”.<sup>196</sup> This position was reiterated in his joint declaration with the IACHR’s Office of the Special Rapporteur on Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression.<sup>197</sup>

145. Additionally, in their various reports and declarations the Special Rapporteurs have indicated, reflecting the assessments of other international human rights bodies, that terrorism is a real and significant threat against the protection of human rights, democracy, peace, and regional and international security. Given their obligation to guarantee the right of individuals to freely exercise their rights, the States have taken different types of measures to prevent and counteract terrorism, including the implementation of communications surveillance programs.<sup>198</sup>

146. Nevertheless, the Special Rapporteurs have also reiterated in their reports and declarations that it is essential to establish the conditions under which the implementation of such surveillance programs is lawful. Given the dynamic nature of the advances of the Internet and communications technology in general, these kinds of programs can be particularly invasive and can seriously affect the right to privacy and freedom of thought and expression, among others.<sup>199</sup>

147. The Special Rapporteurs have already confirmed that the technology available to capture and monitor private communications has changed in recent years at a dizzying pace. The Internet has created unprecedented opportunities for the free expression, communication, search, possession, and exchange of information. This has also facilitated the capture, storage, and administration of enormous quantities of data that can be highly revealing of even the most intimate aspects of the private lives of individuals. In this respect, as the Special Rapporteurs have noted, it is troublesome that the legal frameworks regulating communications surveillance programs have not been brought into line with the developments of the new technologies in the digital era, and that they have transferred analogous surveillance criteria that are obsolete when applied to the digital sphere.<sup>200</sup>

148. The interception and retention of data on private communications entails both a direct limitation on the right to privacy and an infringement of the right to freedom of thought and

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<sup>196</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 3. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>197</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 3.

<sup>198</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 1.

<sup>199</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 2 and 3.

<sup>200</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 4 and 5; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 17. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

expression.<sup>201</sup> The rights to privacy and the free flow of thought and information are protected by international human rights law. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the American Declaration of the Rights and Duties of Man expressly recognize the right of all persons, without discrimination, to freely express their thoughts and to seek and receive information of all kinds. They also prohibit arbitrary or abusive interference in private life, including communications, and recognize the right to obtain protection from the State from such interference.

149. With respect to the right to privacy, the resolution “The Right to Privacy in the Digital Age.” adopted on December 18, 2013 by the General Assembly of the United Nations.<sup>202</sup> This document underscores the value of the right to privacy in communications and expresses concern at the negative impact the surveillance of communications may have on the exercise of human rights. In particular, it reaffirms the right to privacy as a right to which individuals are entitled both offline and when they are connected to the Internet. It also calls for measures to put a stop to arbitrary interference in the privacy of individuals and to prevent future abuses in that respect.<sup>203</sup>

150. As far as freedom of expression is concerned, the violation of the privacy of communications can give rise to a *direct* restriction when—for example—the right cannot be exercised anonymously as a consequence of the surveillance activity. In addition, the mere existence of these types of programs leads to an *indirect* limitation that has a chilling effect on the exercise of freedom of expression.<sup>204</sup> Indeed, the violation of the privacy of communications makes people cautious of what they say and—therefore—of what they do; it instills fear and inhibition as part of the political culture, and it forces individuals to take precautions in communicating with others. Moreover, the people most affected are those who take unpopular positions, or the members of political, racial, or religious minorities who are often unjustifiably classified as “terrorists,” which makes them the object of surveillance and monitoring without proper oversight.<sup>205</sup> A democratic society requires that individuals

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<sup>201</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 81. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>202</sup> United Nations. General Assembly. Resolution adopted by the General Assembly on December 18, 2013. 68/167. The right to privacy in the digital age. A/RES/68/167. January 21, 2014. Available for consultation at: [http://www.un.org/Depts/dhl/resguide/r68\\_en.shtml](http://www.un.org/Depts/dhl/resguide/r68_en.shtml); General Assembly. Department of Public Information. [General Assembly Adopts 68 Resolutions, 7 Decisions as It Takes Action on Reports of Its Third Committee](#).

<sup>203</sup> United Nations. General Assembly. Resolution adopted by the General Assembly on December 18, 2013. 68/167. The right to privacy in the digital age. A/RES/68/167. January 21, 2014. Available for consultation at: [http://www.un.org/Depts/dhl/resguide/r68\\_en.shtml](http://www.un.org/Depts/dhl/resguide/r68_en.shtml); General Assembly. Department of Public Information. [General Assembly Adopts 68 Resolutions, 7 Decisions as It Takes Action on Reports of Its Third Committee](#).

<sup>204</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 53 and 55. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. A/HRC/13/37. December 28, 2009. Para. 33. Available for consultation at: <http://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>

<sup>205</sup> IACHR. [Report on Terrorism and Human Rights](#). Chapter III (Norms and Principles of International Human Rights and Humanitarian Law Applicable in Terrorist Situations). OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. October 22, 2002. Para. 371; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 54, 79 and 89. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

be able to communicate without undue interference, which means that their communications must be private and secure.<sup>206</sup>

151. These programs can have a serious negative impact on rights such as privacy and freedom of expression, and on the entire architecture of the Web. Accordingly, there is an urgent need for States to revise their laws to set limits on the authority to monitor online communications, as well as its necessity and proportionality, in accordance with individual rights and the principles of international law reflected in, *inter alia*, the Report on Terrorism and Human Rights of the Inter-American Commission on Human Rights (OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr);<sup>207</sup> the Report on the Implications of States' Surveillance of Communications on the Exercise of the Human Rights to Privacy and to Freedom of Opinion and Expression (A/HRC/23/40) of the United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression;<sup>208</sup> and the joint declarations on freedom of expression and the Internet,<sup>209</sup> Wikileaks,<sup>210</sup> and surveillance programs and their impact on freedom of expression.<sup>211</sup>

152. The paragraphs below systematize the most important recommendations that have been made with regard to this issue in the international case law and doctrine, so that communications surveillance programs can be designed and implemented bearing in mind the set of fundamental rights involved.

153. First, the limitations on those rights must be established beforehand in a law, and set forth expressly, exhaustively, precisely, and clearly,<sup>212</sup> both substantively and procedurally.<sup>213</sup> This

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<sup>206</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 23. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>207</sup> IACHR. [Report on Terrorism and Human Rights](#). Chapter III (Norms and Principles of International Human Rights and Humanitarian Law Applicable in Terrorist Situations). OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. October 22, 2002.

<sup>208</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>209</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#).

<sup>210</sup> UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. [Joint Statement On Wikileaks](#).

<sup>211</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#).

<sup>212</sup> I/A Court H.R. *Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008 Series C No. 177. Para. 63; I/A Court H.R. *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207. Para. 55; I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 39-40; I/A Court H.R. *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. Para. 79; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 120; I/A Court H.R. *Case of Tristán-Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193. Para. 117; IACHR. [Annual Report 1994](#). Chapter V (Report on the Compatibility of "Desacato" Laws with the American

means that it must be a law that results from the deliberation of a legislative body, which precisely defines the causes and conditions that would enable the State to intercept the communications of individuals, collect communications data or “metadata,” or to subject them to surveillance or monitoring that invades spheres in which they have reasonable expectations of privacy.<sup>214</sup>

154. As this Office of the Special Rapporteur has already indicated, clandestine espionage conducted unlawfully or without legal support is an act that is highly offensive to fundamental rights and seriously compromises the actions of the State, its international responsibility, and even the very basis of democracy.<sup>215</sup>

155. Nevertheless, the existence of a law is not enough for a program to be legitimate. As previously mentioned, vague or ambiguous legal provisions that grant very broad discretionary powers are incompatible with the American Convention, because they can serve as the basis for potential arbitrary acts that translate into violations of the right to privacy or the right to freedom of thought and expression guaranteed by the Convention.<sup>216</sup>

156. The laws that authorize the interception of communications must establish clearly and precisely the reasons the State can invoke to request that interception, which can only be authorized by a judge.<sup>217</sup> Additionally, must be established by law safeguards pertaining to the nature, scope, and duration of the surveillance measures; the facts that could justify these measures, and the authorities

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Convention on Human Rights). Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995; IACHR. Report No. 11/96. Case No. 11.230. Francisco Martorell. Chile. May 3, 1996. Para. 55; I/A Court H.R. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. Para. 72. a).

<sup>213</sup> The definition of the Inter-American Court in Advisory Opinion OC-6/86, according to which the word “laws” does not mean any rule of law, but general normative acts adopted by the legislature provided for constitutionally and democratically-elected, according to the procedures established in the Constitution, tight to the common good is applicable. I/A Court H.R. *The Word “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 6, 1986. Series A No. 6. Para. 34 *et seq.*

<sup>214</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 83.a. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Necessary and Proportionate. July 10, 2013. [International Principles on the Application of Human Rights to Communications Surveillance](#).

<sup>215</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 10; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 135 *et seq.*; IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 140 *et seq.*; IACHR. [Democracy and Human Rights in Venezuela](#). Chapter VI (The Right to Life, to Humane Treatment, and to Personal Liberty and Security). OEA/Ser. L/V/II. Doc. 54. December 30, 2009. Para. 703.

<sup>216</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 71.

<sup>217</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 81. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)



competent to authorize them, carry them out, and supervise them.<sup>218</sup> The law must be clear with regard to the possible remedies for abuses committed in the exercise of those powers.<sup>219</sup>

157. Second, limitations to the rights guaranteed by the American Convention must pursue compelling objectives agreed to by the States through their signature of international human rights law instruments. In the case of State surveillance activities—on the Internet or in any other sphere—reasons of national security and the fight against crime or organized crime tend to be invoked. The Office of the Special Rapporteur has maintained that when national security is invoked as a reason for monitoring personal data and correspondence, in order to prevent discretionary interpretations the law must clearly specify the criteria to be applied in determining the cases in which these types of limitations are legitimate, and it must be careful to define that concept precisely. In particular, the Office of the Special Rapporteur has asserted that the concept of national security cannot be interpreted haphazardly and must be defined from a democratic perspective.<sup>220</sup>

158. The inter-American system for the protection of human rights has ruled, for example, on inadmissible interpretations of the concept of national security. In the case of *Molina-Theissen v. Guatemala*, the Inter-American Court of Human Rights held that the so-called “national security doctrine” makes it possible to characterize a person as ‘subversive’ or as an ‘internal enemy,’ for the sole fact that they genuinely or allegedly supported the fight to change the established order.<sup>221</sup> Similarly, in the case of *Goiburú et al. v. Paraguay* the Court found that “[m]ost of the Southern Cone’s dictatorial governments assumed power or were in power during the 1970s [...]. The ideological basis of all these regimes was the ‘National Security Doctrine,’ which regarded leftist movements and other groups as ‘common enemies’.”<sup>222</sup> Even today, it has been reported that national security reasons tend to be invoked to place human rights defenders, journalists, members of the media, and activists under surveillance, or to justify excessive secrecy in the decision-making processes and investigations tied to surveillance issues.<sup>223</sup> Clearly, this kind of interpretation of the “national security” objective cannot be

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<sup>218</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 8.

<sup>219</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 81. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>220</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 76 *et seq*; IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Access to Information on Human Rights Violations). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 4, 12 *et seq*.; United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 9.

<sup>221</sup> I/A Court H. R. *Case of Molina-Theissen v. Guatemala. Merits*. Judgment of May 4, 2004. Series C No. 106. Para. 40.2.

<sup>222</sup> I/A Court H. R. *Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs*. Judgment of September 22, 2006. Series C No. 153. Para. 61.5.

<sup>223</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 60. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 10 and 12; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of](#)

the basis for the establishment of surveillance programs of any kind, including, naturally, online communications surveillance programs.

159. In any event, in order for an online communications surveillance program to be appropriate, States must demonstrate that the limitations to the rights to privacy and freedom of expression arising from those programs are strictly necessary in a democratic society to accomplish the objectives they pursue.

160. The opinion of strict necessity with respect to communications surveillance assumes that it is insufficient for the measure to be “useful,” “reasonable,” or “opportune.”<sup>224</sup> In order for the restriction to be legitimate, the true and compelling need to impose the limitation must be clearly established; that is, said legitimate and compelling aim cannot be reasonably accomplished by any other means less restrictive of human rights.<sup>225</sup>

161. In any case, as has been mentioned, in order to define if a measure is proportioned, its impact on the capacity of the Internet to guarantee and promote freedom of expression should be evaluated.<sup>226</sup>

162. Given the importance of the exercise of these rights in a democratic system, the law must authorize access to personal data and communications only under the most exceptional circumstances defined in the law. When fairly open-ended grounds such as national security are invoked as the reason to monitor personal data and correspondence, the law must clearly specify the criteria to be applied in determining those cases in which such limitations are legitimate.<sup>227</sup> Their application should be authorized solely when there is a definite risk to the protected interests, and when that harm

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[Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 135 *et seq.*; IACHR. [Annual Report 2010. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere). OEA/Ser.L/V/II. Doc. 5. March 7, 2011. Para. 140 *et seq.*; IACHR. [Democracy and Human Rights in Venezuela](#). Chapter VI (The Right to Life, to Humane Treatment, and to Personal Liberty and Security). OEA/Ser. L/V/II. Doc. 54. December 30, 2009. Para. 703.

<sup>224</sup> I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 46; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. Para. 122; IACHR. [Annual Report 1994](#). Chapter V (Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights). Title III. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>225</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 86.

<sup>226</sup> United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). Point 1 (b); United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 6.

<sup>227</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 81. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

is greater than society's general interest in maintaining the rights to privacy and the free expression of thought and the circulation of information.<sup>228</sup>

163. When establishing such limitations, States must abstain from perpetuating prejudice and discrimination. Accordingly, limitations to the exercise of fundamental rights cannot be discriminatory or have discriminatory effects, as this would also be inconsistent with Articles 1.1 and 24 of the American Convention. It bears recalling that, under Article 13 of the American Convention, freedom of expression is a right that belongs to "everyone," and by virtue of Principle 2 of the Declaration of Principles, "[a]ll people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition."

164. Furthermore, any restriction to freedom of expression or privacy on the Internet as a result of a State security measure should respect the procedural requirements imposed by inter-American law. Indeed, Article 8 of the American Convention is not limited to judicial remedies, but rather must be understood as "the set of requirements that must be observed in proceedings so that individuals can defend themselves properly from any type of State act that might affect their rights."<sup>229</sup> As discussed below, the Special Rapporteurs have already underscored the need for effective controls to ensure that online surveillance programs are designed and implemented taking account of all of the rights at stake, including the procedural guarantees.<sup>230</sup>

165. In light of the above, decisions to undertake surveillance activities that invade the privacy of individuals must be authorized by independent judicial authorities, who must state why the measure is appropriate for the accomplishment of the objectives pursued in the specific case; whether it is sufficiently restricted so as not to infringe upon the right in question more than necessary; and whether it is proportionate in relation to the interests pursued. In this respect, the European Court of Human Rights has held that "in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge."<sup>231</sup> States must ensure that the judicial authority is specialized and competent to make decisions on the legality of the communications surveillance, the technologies used, and its impact on the sphere of rights that could be involved.<sup>232</sup>

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<sup>228</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 9.

<sup>229</sup> I/A Court H.R. *Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs*. Judgment of February 6, 2001. Series C No. 74. Para. 102; I/A Court H.R. *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 55. Para. 69; I/A Court H.R. *Case of Baena-Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72. Para. 124.

<sup>230</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 9.

<sup>231</sup> European Court of Human Rights. *Affaire Ashby Donald et autres c. France*. Requête no 36769/08. Arrêt. 10 janvier 2013. Para. 36; European Court of Human Rights. *Case of Klass and others v. Germany*. Application no. 5029/71. Judgment 6 September 1978. Para. 56.

<sup>232</sup> Necessary and Proportionate. July 10, 2013. [International Principles on the Application of Human Rights to Communications Surveillance](#)

166. The State must be transparent with respect to the laws regulating communications surveillance and the criteria used for their application.<sup>233</sup> The principle of “maximum disclosure” is applicable to this issue, and indeed governs all State acts: they are public and can only be kept secret from the public under the strictest circumstances, provided that this confidentiality is established by law, seeks to fulfill a legitimate aim under the American Convention, and is necessary in a democratic society.<sup>234</sup>

167. As the European Court of Human Rights has held, a secret surveillance system can “undermine or even destroy democracy under the cloak of defending it.”<sup>235</sup> The Court therefore demands that there be “adequate and effective guarantees against abuse.”<sup>236</sup> To determine whether this is being done in a particular case, the Court indicated that it is necessary to examine “nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorize, carry out and supervise them, and the kind of remedy provided by the national law.”<sup>237</sup>

168. States should disclose general information on the number of requests for interception and surveillance that have been approved and rejected, and should include as much information as possible, such as—for example—a breakdown of requests by service provider, type of investigation, time period covered by the investigations, etc.<sup>238</sup>

169. The service providers should be able to publicly disclose the procedures they use when they receive requests for information from government authorities, as well as information on at least the types of requests they receive and the number of requests.<sup>239</sup> On this point, it bears noting that

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<sup>233</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 12; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 91 and 92. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>234</sup> IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter IV (The Right of Access to Information). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. 9 and 45.

<sup>235</sup> European Court of Human Rights. *Case of Weber and Saravia v. Germany*. Application no. 54934/00. Decision as to the admissibility of 29 June 2006. Para. 106.

<sup>236</sup> European Court of Human Rights. *Case of Weber and Saravia v. Germany*. Application no. 54934/00. Decision as to the admissibility of 29 June 2006. Para. 106.

<sup>237</sup> European Court of Human Rights. *Case of Weber and Saravia v. Germany*. Application no. 54934/00. Decision as to the admissibility of 29 June 2006. Para. 106.

<sup>238</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 12 and 14; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 91. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>239</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 13; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,

various Internet companies have adopted the practice of issuing transparency reports that disclose some aspects of the government requests for access to user information they receive.<sup>240</sup>

170. Finally, States should establish independent supervisory mechanisms over the authorities in charge of conducting surveillance. Along these lines, the resolution “The Right to Privacy in the Digital Age” adopted without a vote by the General Assembly of the United Nations on December 18, 2013. This resolution recommends that States establish or maintain “independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data.”<sup>241</sup>

171. As previously stated, under no circumstances can journalists, members of the media, or members of civil society who have access to and disseminate confidential information about these types of surveillance programs because they are of the opinion that it is in the public interest be subjected to the subsequent imposition of liability for this sole fact. Similarly, confidential sources and materials related to the disclosure of confidential information must be protected by law. The journalistic mechanisms of self-regulation have contributed significantly to the development of good practices on how to approach and communicate complex and sensitive issues. Journalistic responsibility is especially necessary when reporting information on matters of terrorism and national security. The journalistic codes of ethics are useful for the accomplishment of this aim.<sup>242</sup>

172. As the Special Rapporteurs have stated on repeated occasions, persons connected to the State who, having the legal obligation to maintain the confidentiality of certain information, limit themselves to publicly disclosing, in good faith, what they reasonably consider to be evidence of the commission of human rights violations (“whistleblowers”), must not be subject to legal, administrative, or employment sanctions for the disclosure.<sup>243</sup>

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Frank La Rue. A/HRC/23/40. April 17, 2013. Para. 92. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85)

<sup>240</sup> United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 46. Available for consultation at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=85](http://ap.ohchr.org/documents/dpage_e.aspx?m=85); Global Network Initiative. *A Call for Transparency from Governments and Telecommunications Companies*; Global Information Society Watch. *Don't censor censorship: Why transparency is essential to democratic discourse*. See, for example: Google. *Informe de transparencia*; Twitter. *Transparency Report. Communicate fearlessly to build trust*; Microsoft. *Law Enforcement Requests Report*.

<sup>241</sup> United Nations. General Assembly. Resolution adopted by the General Assembly on 18 December 2013. 68/167. The right to privacy in the digital age. A/RES/68/167. January 21, 2014. Para. 4 d). Available for consultation at: [http://www.un.org/Depts/dhl/resguide/r68\\_en.shtml](http://www.un.org/Depts/dhl/resguide/r68_en.shtml); General Assembly. Department of Public Information. *General Assembly Adopts 68 Resolutions, 7 Decisions as It Takes Action on Reports of Its Third Committee*.

<sup>242</sup> UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. *Joint Statement On Wikileaks*. Point 3; United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. *Joint Declaration on surveillance programs and their impact on freedom of expression*. Point 15.

<sup>243</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. *Joint Declaration on surveillance programs and their impact on freedom of expression*. Point 16; UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. *Joint Statement On Wikileaks*. Point 3.

173. In the interest of controlling foreign surveillance of personal data, some States have proposed establishing a legal obligation of forced localization with respect to some intermediaries. Forced localization is understood as the legal obligation of the owners of Internet sites, platforms, and services to store the data or information on national users locally (in-country) if they provide their services in that country. The forced localization of data may be a mechanism for the restriction of freedom of expression for various reasons. First, the forced localization of Internet intermediaries substantially reduces the supply of services and platforms that users can freely access. It is important to note that the freedom to choose which services and platforms to access is a prerogative of users in the exercise of their freedom of expression and cannot be restricted by governments without violating the unique nature of the Internet as a free, open, and decentralized medium.<sup>244</sup> This opportunity to choose is essential in many States in which individuals are subjected to arbitrary interference in their privacy by the States. In such cases, the opportunity to choose the intermediaries that offer better security becomes a necessary condition for the uninhibited exercise of freedom of expression. In other words, the absence of adequate local laws or public policies for the protection of data could cause greater insecurity in the access to data if they are located in a specific country, as opposed to being stored in multiple locations or in places that offer better safeguards.

174. In addition, requiring Internet service providers to store data locally can create a barrier to entry into the market for new platforms and services. This would negatively affect the freedom of expression of users, who will see their access to resources for research, education, and communication reduced. Indeed, meeting the requirement of data localization is complex and costly, and harms individual users or new initiatives by potentially depriving them of the conditions of interoperability necessary to connect globally. Freedom of expression and democracy assume the free flow of information and require the prevention of measures that create fragmentation in the Internet.

175. In this respect, the exercise of freedom of expression requires conditions that encourage—rather than discourage—user access to a plurality and diversity of media.

176. It is therefore advisable for those issues to arise from political agreements between countries with the participation of all interested actors (see *infra*), so that any regulation goes beyond local regulatory activities that may have detrimental effects on the basic and democratizing characteristics of the Internet. The solution lies in improving the systems of international cooperation, establishing proper safeguards to ensure the protection of all of the fundamental rights at stake.

#### **I. Principles for the protection of freedom of expression through multi-sector participation in Internet governance**

177. Because the Internet is a special and unique communications medium that enables the free, plural, and democratic exercise of the right to freedom of expression, its governance is a particularly relevant matter. In its statements concerning freedom of expression on the Internet, the Office of the Special Rapporteur has considered the importance of the multi-stakeholder and democratic processes in Internet governance, in which the principle of strengthened cooperation ensures that all

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<sup>244</sup> European Parliament and Council of the European Union. [Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services\(Framework Directive\)](#). March 7, 2002. Article 8, section 4, letter g.

relevant points of view can be taken into account and no actor can assume its regulation exclusively.<sup>245</sup> This issue will be addressed in the final section of this report.

178. In order to make sure that all relevant points of view can be properly considered, the States must ensure the equal participation of all actors relevant to the governance of the Internet, fostering strengthened cooperation among authorities, academia, civil society, the tech community, the private sector, and others, both nationally and internationally.

179. A pioneer experience in this area is the creation and operation of the Internet Management Committee in Brazil (CGI). This committee is responsible for the promotion of technical quality, innovation, and the dissemination of services offered online. It follows the “multi-stakeholder” model, in that it is comprised by members of the government, the business sector, the third sector, and the academic community. Based on the principles of multilateralism, transparency, and democracy, the CGI coordinates and integrates the country’s Internet services. It is thus an innovative experience with respect to society’s participation in decisions involving the implementation, administration, and use of the Web. Since July 2004, the representatives of civil society have been democratically elected and participate directly in the deliberations.<sup>246</sup>

180. In this respect, Principle 20 of the Declaration of Principles of the World Summit on the Information Society stated: “[G]overnments, as well as private sector, civil society and the United Nations and other international organizations have an important role and responsibility in the development of the Information Society and, as appropriate, in decision-making processes. Building a people-centered Information Society is a joint effort which requires cooperation and partnership among all stakeholders.”<sup>247</sup>

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<sup>245</sup> United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights. June 21, 2013. [Joint Declaration on surveillance programs and their impact on freedom of expression](#). Point 1-3 and 9; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#).

<sup>246</sup> Comitê Gestor de Internet no Brasil. [Comitê Gestor de Internet en Brasil](#).

<sup>247</sup> World Summit on the Information Society. [Declaration of Principles](#). December 12, 2003. Principle 20.