



Research article

# Bridge over troubled water: An emerging right to access to the internet

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## Abstract

This article is about the internet and its place in the current international legal order. The more precise inquiry concerns identifying the probable emergence of a legal entitlement, as opposed to the predominant focus on legal limitations or consequences of abuse of the right, to access to the internet. It seeks to identify the sources and shape of any such entitlement, along with investigating pertinent trends in political, legal, and judicial decision-making. It proposes the contents and contours of a right to access to the internet, which this article advances and expresses in terms of four As (availability, accessibility, affordability, and adequacy). These four concepts are tested against the real-world backdrop of existing tensions between free and unimpeded access, on one side, and claims and demands for protection of copyrighted material, on the other. The ultimate analysis is framed in terms of the existence or emergence of a “positive” or a “negative” universal right to access to the internet. Whereas the former appears to be rather limited (though emerging) and dictated by a variety of factors, a negative obligation, one that entails the absence of interference with, or impediment of, an individual’s existing or future access to the internet, has been established.

*Keywords:* human rights, international law, information and communications technology, internet, right to information

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## I. Delimitation of the problem

Most scholarship about access to the internet has focused on what states can (or cannot) do to deter cyberthreats, control cyberspace, or limit individual human rights by imposing limitations on access to the internet; other scholarship has looked at access to the internet within the exclusive parameters of the right to freedom of expression.<sup>1</sup> This article goes beyond those approaches. It seeks to ascertain whether there is any specific “positive” or “negative” human right to access to the internet. A more elaborate inquiry, defined in terms of the three-fold contemporary concepts of states’ duty to respect, protect, and fulfil, will also be offered. In its analysis, this article emphasizes the individual; converts limitations into legal exceptions; seeks to illuminate the role of such exceptions in the global online order; and defines and discusses the common interests, consequences, contents, and contours of an international human right to universal access to the internet. These aims may best be understood by starting with just two examples of recent events that have brought attention to the significant role that internet access now plays in our social order and changes to our social order.

When Mohamed Bouazizi, a twenty-six-year-old fruit vendor in Tunisia, set himself on fire in front of the governor’s office to protest the harassment he was suffering at the hands of brutal police and local officials, the widespread use of cell phones and digital media made it possible to spread the news rapidly throughout the country. Bouazizi’s self-immolation in the small city of Sidi Bouzid was followed by protests that were, in turn, met by deadly force authorized by President Zine al-Abidine Ben Ali, Tunisia’s dictator of twenty-three years. But this response happened in Tunisia at a time when an average of one out of three people was an internet user, and the horrifying events were recorded and disseminated online by activists and family members. Consequently, the digital images of Bouazizi in the burn unit at a hospital outside Tunis, as well as the violence inflicted upon the protestors, were recorded and posted on the internet, shared and discussed on Facebook and Twitter, and eventually transmitted by international news outlets. The result: protests spread and intensified. Ultimately, the sequence of events came to be known as “the first Facebook revolution.”<sup>2</sup>

Likewise, what mobilized Egyptian anger against Hosni Mubarak—Egypt’s dictator of nearly three decades—into civil disobedience was an internet campaign to keep alive the memory of Khaled Said, a twenty-eight-year-old blogger who was beaten to death by police in Alexandria in June 2010 for exposing their corruption. Just like the images of Bouazizi, a digital image of Said’s corpse in the morgue, taken by his brother, became a protest icon as it made its way to thousands of cell phones and was posted in the internet; hence, his

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<sup>1</sup>See, e.g., Duncan B. Hollis, *An e-SOS for Cyberspace*, 52 HARV. INTL L. J. 374 (2011); Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INTL L. 421 (2011); Alisdair A. Gillespie, *Restricting access to the internet by sex offenders*, 19 INTL J. L. & INFO. TECH. 165 (2011); Katharine C. Hinkle, *Countermeasures in the Cyber Context: One More Thing to Worry About*, 37 YALE J. INTL L. ONLINE 11 (2011); JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006). Those limited publications that do examine the internet from the perspective of a human right either do it from the exclusive angle of the right to freedom of expression or in relation to some other considerations. See, e.g., Patrick Ford, *Freedom of Expression through Technological Networks: Accessing the Internet as a Fundamental Human Right*’ 32 WISCONSIN INTL L. J. 142, 162 (2014) (stating that access to the internet is included within the right to freedom of expression); Madeline Carr, *Internet Freedom, Human Rights and Power*, 67 AUSTRALIAN J. INTL AFFAIRS 621 (2013) (approaching internet freedom more from a perspective of power than from seeking to establish the existence and/or content of an international human right to access to the internet).

<sup>2</sup>See, e.g., Roger Cohen, *Facebook and Arab Dignity*, N.Y. TIMES, 24 Jan. 2011, <http://www.nytimes.com/2011/01/25/opinion/25iht-edcohen25.html>.

image was later described as “the face that launched a revolution.”<sup>3</sup> A Facebook group named “We are All Khaled Said” was created by Wael Ghonim, a computer engineer and local Google Executive, who became Egypt’s leading voice in the revolt that ousted Hosni Mubarak. The Facebook group was the first to call Egyptians to protest on a day of anger on 25 January 2011. The date was purposefully chosen because it coincided with, or was officially celebrated as, “National Police Day” in Egypt.

Both Tunisia and Egypt have active and large populations that have access to the internet. A March 2011 survey conducted in Tunisia showed that ninety-one percent of university students were visiting Facebook at least once a day, Facebook was the primary source of information about protests taking place between December 2010 and January 2011 for sixty-four percent of student respondents, and thirty-two percent of all students learned of Bouazizi’s self-immolation through Facebook. Facebook itself confirmed that by 8 January 2011 it had several hundred thousand more users than it had ever had before in Tunisia.<sup>4</sup> Just as striking, Egypt ranks second in the region (only after Iran) in terms of internet-using population. And almost every Egyptian, the same as almost every Tunisian, is thought to have access to a mobile phone.

The governments of both Egypt and Tunisia attempted to cut off their citizens’ access to the internet during the revolutionary events described here, evidence of a rising power that is truly civic, decentralized, uncontrolled by government, and owned by communal needs and aspirations. Indeed, based on a variety of critical indicators, ranging from socioeconomic conditions to political and security indicators, both countries were ripe for change when these events occurred. Though all these indicators remain subject to further scrutiny, one can hardly deny the dominant narrative that “digital media were singularly powerful in spreading protest messages, driving coverage by mainstream broadcasters, connecting frustrated citizens with one another, and helping them to realize that they could take shared action regarding shared grievances.”<sup>5</sup> In other words, digital media helped mobilize and express the will of the people in a way or, indeed, on a scale and with a speed, that were previously unseen, a phenomenon that testifies to a radical increase of individuals’ access to power through information and communication beyond state control.

The ever-growing occurrence of technology-enhanced or -enabled events outside the realm or control of government may be the most prominent feature of today’s global information age, doctrinally described as “power diffusion.”<sup>6</sup> In this setting of power diffusion, although states still remain the central or dominant global actors, they operate on a stage that is “far more crowded and difficult to control.” Power resources are dispersed among different actors, ultimately narrowing the gap between state and non-state actors in many instances.<sup>7</sup>

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<sup>3</sup>Brian Ross and Matthew Cole, *Egypt: The Face that Launched a Revolution*, ABC NEWS, 4 Feb. 2011, <http://abcnews.go.com/Blotter/egypt-face-launched-revolution/story?id=12841488>.

<sup>4</sup>See Alexis C. Madrigal, *The Inside Story of How Facebook Responded to Tunisian Hacks*, THE ATLANTIC, 24 Jan. 2011, <http://www.theatlantic.com/technology/archive/2011/01/the-inside-story-of-how-facebook-responded-to-tunisian-hacks/70044>.

<sup>5</sup>Philip N. Howard and Muzammil M. Hussain, *The Role of Digital Media*, 22 J. DEMOCRACY 35, 41 (2011).

<sup>6</sup>JOSEPH S. NYE, JR., THE FUTURE OF POWER 113 (2011) [hereinafter NYE, JR., POWER].

<sup>7</sup>See *id.* at 114–32; see also Anne-Marie Slaughter, *America’s Edge: Power in the Networked Century*, 88 FOREIGN AFF. 94, 95 (2009) (“[t]he emerging networked world of the twenty-first century . . . exists above the state, below the state, and through the state.”); Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT’L LEGAL STUD. 155, 162 (1997) (“[t]he internet . . . is not just a technology, but a way of organizing and connecting human activity, which emphasizes decentralization, specialization, and global cooperation. It is . . . inherently global and indifferent to geographic political boundaries.”).

History indicates that every new communication technology has had its socially transformative effects or brought about some revolutionary change. From Johannes Gutenberg's printing press and its impact on the Protestant Reformation;<sup>8</sup> to the role of radio during the People Power Revolution in the Philippines, which ousted the Ferdinand Marcos regime in 1986 and restored the country's democracy;<sup>9</sup> to the mobile-phone-enabled "Text-Messaging Revolution"—the People Power II Revolution in the Philippines—which allowed information on former President Joseph Estrada's corruption to be shared widely and, ultimately, deposed him in 2001,<sup>10</sup> the role of information and communication technology has been critical.

Yet the internet remains distinct from many other means of information and communication:

Compared with radio, television, and newspapers controlled by editors and broadcasters, the internet creates unlimited communication one to one (via e-mail), one to many (via a personal homepage, blog, or Twitter), many to one (such as Wikipedia), and, perhaps most importantly, many to many (as in online chat rooms or social networking sites such as Facebook or LinkedIn).<sup>11</sup>

This statement points to a number of key differences from earlier technologies: the internet has "the capacity to flow farther, faster, and with fewer intermediaries";<sup>12</sup> allows "more people [to] have access to more information than ever before,"<sup>13</sup> thus dramatically reducing the cost of creating, finding, processing, transmitting, and accessing information;<sup>14</sup> and dramatically intensifies and increases the worldwide invention and adoption of digital technologies.<sup>15</sup>

Increased access to the modern digital universe has, however, not always led to positive results or productive consequences. Rather, widespread, significant abuse has occurred, including but not limited to, child pornography, defamation, fraud, identity theft, hate speech, human trafficking, and terrorism, as well as unjustified or illegitimate government censorship or restriction, including cyberwarfare. How to protect the internet from abuse is beyond the scope of this article, but reference to it is necessary to help delimit the scope of the human right to access to the internet.

In this article, the focus is on identifying the probable emergence of a legal entitlement to access to the internet, delineating the sources and shape of such an entitlement, and investigating related trends in decisions. The spotlight on this single feature of the larger global online order is demanded, in part, by

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<sup>8</sup>See, e.g., Joseph S. Nye, Jr., *New World Order, The New Republic*, 18 February 2011, <http://www.tnr.com/article/world/83707/information-technology-egypt-revolution> [hereinafter Nye, Jr., *New World*].

<sup>9</sup>See DUNCAN J. MCCARGO, *MEDIA AND POLITICS IN PACIFIC ASIA* 20 (2003) (referring to former President of the University of Philippines Francisco Nemenzo: "Without Radio Veritas, it would have been difficult, if not impossible, to mobilize millions of people in a matter of hours."); see also PETER ACKERMAN & JACK DUVAL, *A FORCE MORE POWERFUL: A CENTURY OF NONVIOLENT CONFLICT* 370 (2000).

<sup>10</sup>See Ned Potter, *Text Messaging More Popular than Ever*, ABC NEWS, 12 July 2001, <http://abcnews.go.com/WNT/story?id=130826&page=1#.TtOrhmOBrqE>; see also Julius Court, *People Power II in the Philippines: The First E-Revolution?* (Overseas Dev. Inst., Jan. 2001), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4114.pdf>.

<sup>11</sup>See NYE, JR., *POWER*, *supra* note 6, at 116.

<sup>12</sup>PIPPA NORRIS, *THE DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE* 232 (2001).

<sup>13</sup>NYE, JR., *POWER*, *supra* note 6, at 116.

<sup>14</sup>See, e.g., Nye, Jr., *New World*, *supra* note 8.

<sup>15</sup>See JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 3 (2008) ("The Chinese invented the printing press several centuries before Johannes Gutenberg developed the European printing press in the mid-1400s and churned out his first Bibles. Few people could afford the printed books made possible by presses for another several centuries. By contrast, the invention and adoption of digital technologies by more than a billion people worldwide has occurred over the span of a few decades.").

global developments that consistently show the internet to be an incredibly promising, practical, and powerful tool for individual or collective empowerment.

The focus is also demanded, even more urgently, by another area this article will address: the “digital divide.” This term of art refers to the gap between people (both within and among countries) with effective access to the internet and those with very limited or no access at all, a divide described elsewhere as “technological apartheid.”<sup>16</sup> This article will address, within practical limits, how to bridge the digital divide, as well as how to protect existing or future access to the internet from states’ arbitrary interference.

To address these issues, this article will examine pertinent international legal instruments (Part II), explore key trends in present decision-making processes on the international plane (Part III), and appraise them against the demand for greater equality and wider access to the internet (Part IV). Intertwined with discussion of the international legal status of the right to access to the internet will be an analysis of the classic human rights framework for the freedom of opinion and expression, as well as other human rights and fundamental freedoms.

## II. Pertinent Past Decisions: International Legal Instruments

### A. *The Charter of the United Nations*

The Charter of the United Nations provides useful guideposts for a wide range of questions pertaining to legal aspects of world public order. Fundamentally, it seeks to establish an institutional structure for the world community and secure the absence of unauthorized coercion or violence in that community; in other words, it seeks to embody a minimum world public order. Despite the breadth of this goal, the Charter nonetheless incorporates a number of provisions that aim specifically to further the world’s economic and social aspirations. For example, the Preamble of the U.N. Charter provides that the United Nations is formed, *inter alia*, to “promote social progress and better standards of life in larger freedom,”<sup>17</sup> and “to employ international machinery for the promotion of the economic and social advancement of all peoples.”<sup>18</sup>

These aspirations are further articulated and clarified in Articles 1(3), 13(1b), 62, and, perhaps most importantly, Article 55(a, b). Article 1(3) provides that it is a purpose of the United Nations “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>19</sup> Article 13(1b), addressing the functions of the U.N. General Assembly, requires that the Assembly initiate studies and make recommendations for the purpose of “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>20</sup> The Economic and Social

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<sup>16</sup>Manuel Castells, *Information Technology, Globalization and Social Development* 3 (U.N. Res. Inst. for Soc. Dev., Discussion Paper No. 114, Sept. 1999). To provide some context, all of Africa’s internet users make up only 5.7 percent of the world’s internet users. In Africa, there are 9.6 users per 100 inhabitants. Overall, there are 71.6 internet users per 100 inhabitants in developed states compared with 21.1 internet users per 100 inhabitants in developing states. See International Telecommunication Union, *The World in 2011: ICT Facts and Figures*, <http://www.itu.int/ITU-D/ict/facts/2011/material/ICTFactsFigures2011.pdf> (last visited 14 Nov. 2014); International Telecommunication Union, *The World in 2010: ICT Facts and Figures*, <http://www.itu.int/ITU-D/ict/facts/2011/material/ICTFactsFigures2010.pdf> (last visited 14 Nov. 2014).

<sup>17</sup>U.N. Charter, 26 June 1945, 1 UNTS XVI, <http://www.un.org/en/charter-united-nations/index.html>.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* art. 1, ¶ 3.

<sup>20</sup>*Id.* art. 13, ¶ 1(b).

Council is also assigned, in Article 62, the duty to make or initiate studies and reports with “respect to international economic, social, cultural, educational, health, and related matters and [it] may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.”<sup>21</sup>

Another key provision of the Charter that addresses economic and social questions is Article 55:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation.<sup>22</sup>

Given the time of its adoption (1945) and its primary concerns, dictated by the disasters of World War II, the Charter contains no explicit reference to information and communication technologies. Yet, it leaves the door open for such technologies by way of broad language placing no limit on the instruments or “international machinery” to be employed by the U.N. or its organs in furthering economic and social progress and development. This is not to say that a right to access to the internet derives its legal basis in the express content of the Charter. But the internet’s impact on the world so far has established that it has the potential to mobilize and consolidate “international machinery” for economic and social progress.

## **B. The Universal Declaration of Human Rights**

The Universal Declaration of Human Rights<sup>23</sup> (UDHR), although not by itself legally binding, is indisputably one of the landmark achievements of the post-World War II era. A self-proclaimed “common standard of achievement for all peoples and all nations” that reflected, in many parts, the customary international law of its time, the Declaration’s major contribution is its thrust towards a unified code of universal human rights and fundamental freedoms.

Article 19 of the UDHR, on the right to freedom of opinion and expression, bears special relevance to understanding the form and substance of any legal right to access to the internet. It provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>24</sup> The internet readily fits within the references to “any media” and “regardless of frontiers” as an instrument or a means for the realization of the right to freedom of opinion and expression.

This interpretation should not, however, be construed as denying the more comprehensive and autonomous features of a right to access to the internet. A right to access to the internet can exist as a standalone right, much as freedom of the press can under the First Amendment to the U.S. Constitution.

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<sup>21</sup>*Id.* art. 62, ¶ 1.

<sup>22</sup>*Id.* art. 55.

<sup>23</sup>GA Res 217A, Universal Declaration of Human Rights, U.N. Doc. A/810 (III) (10 Dec. 1948), <http://www.un.org/en/universal-declaration-human-rights/index.html>.

<sup>24</sup>*Id.* art. 19.

It can equally be an instrument of realizing other basic human rights and fundamental freedoms, as well as furthering the broader goals of an abundant and dignified world public order. And sometimes—the present case of the internet being a cardinal example—an instrument is so essential that its absence would invalidate the proper meaning of the right itself.

### **C. *The International Covenant on Civil and Political Rights***

As with Article 19 of the UDHR, Article 19 of the International Covenant on Civil and Political Rights<sup>25</sup> (ICCPR), on the right to hold opinions without interference and to freedom of expression, is a fundamental provision. One should, however, note the differences between the two articles, not so much on substance as on detail. The first paragraph of ICCPR Article 19 states: “Everyone shall have the right to hold opinions without interference.”<sup>26</sup> Paragraph 2 of the same Article reads: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>27</sup>

The essential difference between Article 19 of the UDHR and Article 19 of the ICCPR is found in paragraph 3 of the ICCPR version, which allows for exceptions and prescribes specific restrictions on the protected right to freedom of expression that could be extended to the digital context:

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

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.<sup>28</sup>

### **D. *Relevant regional human rights instruments and practice***

Given the ever-growing roles, and recognition of these roles, for different types of communication technology and their potential for furthering knowledge and development, a series of other, more specific international measures have been adopted over the years.

#### *1. Human rights instruments*

Several regional human rights instruments contain provisions protecting the freedom of expression or opinion. In order of their year of adoption, the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in 1948, provides for the every person’s “right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”<sup>29</sup>

<sup>25</sup>G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, 999 UNTS 171 (16 Dec. 1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

<sup>26</sup>*Id.* art. 19, ¶ 1.

<sup>27</sup>*Id.* art. 19, ¶ 2.

<sup>28</sup>*Id.* art. 19, ¶ 3.

<sup>29</sup>Ninth International Conference of American States, American Declaration of the Rights and Duties of Man, Apr. 1948, O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82 doc.6 rev.1 at 17 (1992), [https://www.aaas.org/sites/default/files/American\\_Declaration\\_Rights\\_and\\_Duties\\_Man\\_Eng.pdf](https://www.aaas.org/sites/default/files/American_Declaration_Rights_and_Duties_Man_Eng.pdf).

In 1950, the Member States of the Council of Europe signed the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 3 September 1953.<sup>30</sup> It was subsequently amended and supplemented by a number of Protocols, the latest one being Protocol No. 14, which entered into force on 1 June 2010.<sup>31</sup>

Article 10 is the relevant provision of the European Convention. Its first paragraph provides, along the lines of Articles 19 of the UDHR and the ICCPR, that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>32</sup> Unlike the UDHR and the ICCPR provisions, however, Article 10’s first paragraph also specifies that it does not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.<sup>33</sup>

Paragraph 2 of Article 10 lays down the conditions under which the rights it recognizes may be subject to certain restrictions and limitations. It reads:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>34</sup>

The American Convention on Human Rights, which entered into force in 1978, also addresses the freedom of expression and thought.<sup>35</sup> Article 13 of the American Convention is the relevant provision. The first two paragraphs largely follow the content and structure of Article 19 of the ICCPR:

1. Everyone has the right to freedom of thought and expression. 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. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.<sup>36</sup>

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<sup>30</sup>Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (also known as European Convention on Human Rights), 11 Apr. 1950, 213 U.N.T.S. 221, *entered into force* Sept. 3, 1953, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>31</sup>See European Convention on Human Rights, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>32</sup>*Id.* art. 10, ¶ 1.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* art. 10, ¶ 2.

<sup>35</sup>Organization of American States, American Convention on Human Rights, 22 Nov. 1969, O.A.S.T.S. No. 36, 1144 U.N. T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>36</sup>*Id.* art. 13, ¶¶ 1 & 2.



The following paragraphs of Article 13 add detail. Paragraph 3 specifies that the freedom of expression cannot be restricted by such indirect methods or means as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means or methods seeking to impede the communication and circulation of ideas and opinions.<sup>37</sup> Paragraph 4 specifies further that, notwithstanding paragraph 2 of Article 13, quoted above, public entertainments may be subject by law to prior censorship only for the purpose of regulating access to them for the moral protection of children and adolescents.<sup>38</sup> The last paragraph (5) of Article 13 provides that:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.<sup>39</sup>

Moving to another continent, the African [Banjul] Charter on Human and Peoples' Rights also addresses the freedom of expression.<sup>40</sup> The Charter, which was adopted in 1981, entered into force on 21 October 1986. Article 9, the relevant provision, reads:

1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.<sup>41</sup>

Moving yet again, the Arab Charter on Human Rights of the League of Arab States, which entered into force on 15 March 2008, contains provisions similar to, or that build on, the international and regional instruments explored above.<sup>42</sup> Article 32 stipulates that the Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive, and impart information and ideas through any medium, regardless of geographical boundaries.<sup>43</sup> Such rights and freedom are to be exercised "in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals."<sup>44</sup>

The foregoing demonstrates that for the majority of regional instruments, the language addressing freedom of expression or dissemination of ideas and information through any medium, regardless of frontiers, would certainly include the internet.

## 2. *Judicial practice*

Judicial practice has complemented regional legal instruments. The European Court of Human Rights (sometimes referred to as the Strasbourg Court due to its location in France) applies and interprets the

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<sup>37</sup>*Id.* art. 13, ¶ 3.

<sup>38</sup>*Id.* art. 13, ¶ 4.

<sup>39</sup>*Id.* art. 13, ¶ 5.

<sup>40</sup>African States Members of the Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, <http://www.refworld.org/docid/3ae6b363o.html>.

<sup>41</sup>*Id.* art. 9.

<sup>42</sup>Council of the League of Arab States, Arab Charter on Human Rights, 22 May 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005).

<sup>43</sup>*Id.* art. 32, ¶ 1.

<sup>44</sup>*Id.* art. 32, ¶ 2.

European Convention on Human Rights. It has dealt with a variety of cases pertaining to information and communication technologies, examining them in the context of either the right to freedom of expression (Article 10 of the Convention) or the right to respect for private and family life (Article 8).<sup>45</sup>

The specific question of an individual's access to the internet came before the European Court in the 2012 case of *Ahmet Yildirim v. Turkey*.<sup>46</sup> The case concerned a criminal court decision to block access to one site out of a number of sites hosted by Google sites. The owner of the site in question was facing criminal proceedings for insulting the memory of Mustafa Kemal Atatürk, the founder of the Republic of Turkey.<sup>47</sup> As a result of the decision by the Denizli Criminal Court, access to all other sites hosted by Google sites were blocked as well.<sup>48</sup> The blocking order was executed by the Turkish Telecommunications and Information Technology Directorate ("the TİB").<sup>49</sup> The applicant, Mr. Ahmet Yildirim, was thus barred from all access to his own website, which he used to publish his academic work and his opinions on various topics, even though his website had no connection with the site that had been blocked because of its illegal content.<sup>50</sup>

Relying on Article 10 of the European Convention on Human Rights (freedom of expression), Mr. Yildirim complained that the measure barring access to his own internet site infringed his freedoms under the article to receive and impart information and ideas.<sup>51</sup> The Court observed that, at the heart of the problem, was the blocking of all access to Google sites and its effect on the Applicant, who owned another website hosted on the same domain.<sup>52</sup> While in the Court's view the measure did not, strictly speaking, constitute a wholesale ban but rather a restriction on internet access, the limited effects of the restriction did not diminish its significance.<sup>53</sup> In particular, as noted by the Court, "the internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest."<sup>54</sup>

The Court, therefore, decided that the circumstances of the case were sufficient to conclude that the ban amounted to interference by a public authority with the Applicant's right to freedom of expression, by way of preventing him from accessing his own website.<sup>55</sup> The Court noted in this context that the measure

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<sup>45</sup>See, e.g., *Ashby Donald v. France* (Jan. 10, 2013), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-115845"\]}](http://hudoc.echr.coe.int/eng#{); *Editorial Bd. Pravoye Delo & Shtekel v. Ukraine* (May 5, 2011), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-104685&filename=001-104685.pdf>; *Renaud v. France* (Feb. 25, 2010), [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["863450"\],"itemid":\["001-97515"\]}](http://hudoc.echr.coe.int/eng#{); *Times Newspaper, Ltd v. United Kingdom* (Mar. 10, 2009), <http://www.5rb.com/wp-content/uploads/2013/10/Times-Newspapers-Ltd-v-UK-ECHR-10-Mar-2009.pdf>; *Willem v. France* (Jul. 16, 2009), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-93612"\]}](http://hudoc.echr.coe.int/eng#{); *K.U. v. Finland* (Dec. 2, 2008), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168067d215>; *Copland v. United Kingdom* (Apr. 3, 2007), <https://www.juridice.ro/wp-content/uploads/2016/07/1531450.pdf>.

<sup>46</sup>*Ahmet Yildirim v. Turkey* (Application no. 3111/10; Dec. 18, 2012), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-115401"\]}](http://hudoc.echr.coe.int/eng#{).

<sup>47</sup>*Id.* ¶¶ 8–14.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* ¶¶ 9–11.

<sup>50</sup>*Id.* ¶ 12.

<sup>51</sup>*Id.* ¶ 38.

<sup>52</sup>*Id.* ¶ 54.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* ¶ 55.

in question produced arbitrary effects that could not be said to have been aimed solely at blocking access to the offending website, since the measure in fact acted to block all the sites hosted by Google sites.<sup>56</sup> Further, the judicial review procedures concerning the blocking of internet sites were insufficient to meet the criteria for avoiding abuse, as the relevant domestic law did not provide for any safeguards to ensure that a blocking order concerning a specific site was not used as a means of blocking access to the internet in general.<sup>57</sup> It is relevant in this light to note that the Human Rights Committee, in its General Comment 34, states, “Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3 [of Article 19 of the ICCPR].”<sup>58</sup>

All in all, the internet was viewed by the Court in *Ahmet Yıldırım* as “one of the principal means” for the exercise by individuals of their right to freedom of expression and information, and as “an essential tool” for individuals’ participation in activities and discussions concerning issues of political and other interest.<sup>59</sup> This view is consistent with the Court’s statement in one of its earlier cases, *Times Newspapers, Ltd v. the United Kingdom*:

In light of its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.<sup>60</sup>

### **E. The United Nations Millennium Declaration and its successor**

Beyond international or regional legal instruments and court decisions concerning human rights, a number of other international measures bear particular relevance. Although they are not *sensu stricto* legally binding, they still exert considerable policy influence and enable a fuller examination of the developing trends concerning access to the internet.

One of the most prominent international measures aiming to enhance universal access to information and communication technology can be found in the Millennium Development Goals (MDGs). The MDGs were officially established by the United Nations Millennium Declaration, which set out an agenda for improving the human condition by 2015.<sup>61</sup> The Millennium Declaration was adopted by 189 heads of state and government at the largest-ever gathering of world leaders at the U.N. Millennium Summit in 2000.<sup>62</sup>

Quantifiable targets and indicators were set to operationalise the MDGs and implement the commitments made at the Millennium Summit. Relevant to this article, the world’s leaders resolved

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<sup>56</sup>*Id.* ¶ 68.

<sup>57</sup>*Id.*

<sup>58</sup>Human Rights Committee, General Comment 34, U.N. Doc. CCPR/C/GC/34, (12 Sept. 2011), ¶ 30 [hereinafter General Comment 34]. The Human Rights Committee has also noted that is inconsistent with paragraph 3 of Article 19 of the ICCPR “to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.” *Id.*

<sup>59</sup>*Ahmet Yıldırım*, *supra* note 46, ¶ 54.

<sup>60</sup>*Times Newspaper, Ltd.*, *supra* note 45.

<sup>61</sup>The eight goals are aimed to: (1) eradicate extreme hunger and poverty; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV/AIDS, malaria, and other diseases; (7) ensure environmental sustainability; and (8) develop a global partnership for development.

<sup>62</sup>G.A. Res. 55/2, United Nations Millennium Declaration, U.N. Doc. A/RES/55/2 (18 Sept. 2000), <http://www.un.org/millennium/declaration/ares552e.htm>.

to ensure that the benefits of new technologies, especially information and communication technologies, would be made available to all.<sup>63</sup> This commitment was embodied in Goal 8, Target 8F, which calls upon states, “[i]n cooperation with the private sector, [to] make available the benefits of new technologies, especially information and communications.”<sup>64</sup> Ensuring the freedom of the media and “the right of the public to have access to information” was another commitment of the world’s leaders.<sup>65</sup>

Five years after the adoption of the Millennium Declaration, the U.N. General Assembly, at a meeting of heads of state and government, adopted the 2005 World Summit Outcome. In it, the leaders committed to promoting and facilitating access to, and the development, transfer, and diffusion of, technologies to developing countries, including the corresponding know-how.<sup>66</sup> The world’s leaders further committed themselves to building a people-centred and inclusive information society so as to enhance digital opportunities for all people and to help bridge the digital divide.<sup>67</sup> The establishment of a Digital Solidarity Fund was welcomed and voluntary contributions to its financing were encouraged.<sup>68</sup>

In 2010, the U.N. General Assembly adopted another outcome document at the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals, entitled “Keeping the promise: united to achieve the Millennium Development Goals.”<sup>69</sup> Addressing information and communication technology in the context of MDG Goal 8, the heads of state and government committed themselves to accelerating progress on achieving the goal. Strategies included promoting the strategic role of science and technology, including information about technology and innovation, in areas relevant for the achievement of the MDGs. These areas included, in particular, agricultural productivity, water management and sanitation, energy security, and public health. Other strategies included strengthening public-private partnerships to close the large gaps that remain in access to, and affordability of, information and communications technology across countries and income groups. In this regard, the outcome encouraged further operationalisation of the voluntary Digital Solidarity Fund.<sup>70</sup>

In late September 2015, the U.N. General Assembly, meeting again at the level of the heads of state and government, adopted a successor document, entitled “Transforming our world: the 2030 Agenda for Sustainable Development.”<sup>71</sup> Although not a distinct goal in itself, access to information and communications technology was defined as one of the targets under Goal 17.<sup>72</sup>

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<sup>63</sup>*Id.* art. 20.

<sup>64</sup>See Millennium Development Goals and Beyond 2015, Goal 8: Develop a Global Partnership for Development, <http://www.un.org/millenniumgoals/global.shtml>.

<sup>65</sup>Millennium Declaration, *supra* note 62, art. 25.

<sup>66</sup>See GA Res 60/1, 2005 World Summit Outcome, U.N. Doc. A/RES/60/1, art. 60(b) (16 Sept. 2005), <http://www.ifrc.org/docs/idrl/1520EN.pdf>.

<sup>67</sup>*Id.* art. 60(g).

<sup>68</sup>*Id.*

<sup>69</sup>See GA Res 65/1, U.N. Doc. A/RES/65/1 (22 Sept. 2010), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/65/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/1).

<sup>70</sup>*Id.* ¶ 78.

<sup>71</sup>See GA Res 70/1, U.N. Doc. A/RES/70/1 (25 September 2015), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1).

<sup>72</sup>*Id.* ¶¶ 17.6 – 17.8 of the Sustainable Development Goals. Goal 17 is “Strengthen the means of implementation and revitalize the global partnership for sustainable development.”

## **F. The World Summit on the Information Society**

Recognizing the urgent need to harness the potential of knowledge and technology to promote the goals of the U.N. Millennium Declaration and to find effective and innovative ways to make this potential available to all, the U.N. General Assembly (GA) adopted a resolution in January 2002 through which it welcomed the organization of a World Summit on the Information Society (WSIS).<sup>73</sup> The Summit was scheduled to take place in two phases: the first in Geneva in 2003, and the second in Tunis in 2005.

During its first phase, which took place in Geneva from 10 to 12 December 2003, the Summit adopted a Declaration of Principles and a Plan of Action designed to operationalise the vision and principles of the Millennium Declaration. The ultimate objectives were to develop and foster a statement of political will, and to take concrete steps to establish the foundation of an all-inclusive information society. Both the Declaration of Principles and the Plan of Action were subsequently endorsed by the U.N. General Assembly.<sup>74</sup>

The second phase of the WSIS, which took place in Tunis from 16 to 18 November 2005, resulted in the adoption of the Tunis Commitment and the Tunis Agenda for the Information Society. This phase, aiming to put the Geneva Plan of Action into motion, focused on financial mechanisms for bridging the digital divide, on internet governance, and on follow-up and implementation of the Geneva and Tunis decisions. The Tunis Commitment recognized that freedom of expression, as well as the free flow of information, ideas, and knowledge, are essential for the information society. The U.N. General Assembly endorsed both the Tunis Commitment and the Tunis Agenda for the information society.<sup>75</sup>

In accordance with the decision made at the Tunis phase of the WSIS, the U.N. General Assembly invited the U.N. Secretary-General to convene a new forum for multi-stakeholder policy dialogue called the Internet Governance Forum.<sup>76</sup> It further decided to proclaim 17 May annual World Information Society Day to help raise awareness of the possibilities that use of the internet can bring to societies and economies, as well as encourage development of ways to bridge the digital divide.<sup>77</sup>

## **III. Key Trends in Present Decision-Making**

The present trends in decision-making at the global level concerning the right to access the internet are far from uniform. This should, however, not be construed as a denial of the encouraging and leading examples being set at regional levels, most prominently by the EU. Indeed, the most consolidated legal measure at the international level thus far remains Directive 2002/22 of the European Parliament and of the Council, known as the Universal Service Directive. "Universal service" is conceived by this Directive as providing electronic telecommunications networks and defining a minimum set of good quality, publicly-available services to all end-users at an affordable price.<sup>78</sup>

<sup>73</sup>See GA Res 56/183, U.N. Doc. A/RES/56/183 (31 Jan. 2002), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/56/183](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/183).

<sup>74</sup>See GA Res 59/220, U.N. Doc. A/RES/59/220 (11 Feb. 2005), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/59/220](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/220).

<sup>75</sup>See GA Res 60/252, U.N. Doc. A/RES/60/252 (27 Apr. 2006), <http://www.itu.int/en/wtisid/Pages/res60-252.aspx>.

<sup>76</sup>*Id.* art. 9.

<sup>77</sup>*Id.* art. 13.

<sup>78</sup>Council Directive 2002/21/EC, arts. 1 & 2, O.J. (L 108) 51 [hereinafter Directive 2002/22 or Universal Service Directive].

The Universal Service Directive was amended in 2009 by Directive 2009/136. Relevant Article 4 of the Directive, as amended, reads:

1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.
2. *The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional internet access*, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.<sup>79</sup>

The EU Member States were obligated to transpose Directive 2009/136 to national law by 25 May 2011.<sup>80</sup> Framed in terms of a legal right to access the internet, the Directive's content, as defined by the key substance of the EU's Universal Service Directive (as amended), refers to the right to access, at an affordable price (in the light of specific national conditions), good-quality, publicly-available internet services.<sup>81</sup>

This trend of imposing legal obligations to provide for universal access to internet service had been present in the legislation of a number of individual EU Member States even before these measures were laid down by the governing EU institutions. As early as in February 2000, Estonia adopted a Telecommunications Act that provided for internet service that would be "universally available to all subscribers regardless of their geographic location, at a uniform price."<sup>82</sup> A number of other countries, such as Finland and Spain, have taken a further step, requiring that broadband connection at a speed of 1 Mbit per second be provided by universal service providers.<sup>83</sup> Beyond the EU theatre, the Supreme Court of Costa Rica ruled in 2010 that access to the new technologies (including the internet) is nowadays a basic or necessary instrument for the exercise of various fundamental rights, and that delay in opening up the telecommunications market constitutes a breach of freedom of speech and other fundamental rights.<sup>84</sup>

To date, such legal steps forward remain absent in other countries or regions of the world. In any event, however, the common quest for universal access to the internet may not be satisfactorily addressed merely by legal provisions. A further exploration of their operational consequences and difficulties, especially in terms of fair balancing with other conflicting claims or rights, may be inescapable for a more complete conceptualization of the contents and contours of access to the internet.

<sup>79</sup>Council Directive 2009/136/EC, art. 4, O.J. (L 337) 11 (emphasis added) [hereinafter Directive 2009/136].

<sup>80</sup>*Id.*

<sup>81</sup>Directive 2009/136 defines the minimum set of services of specified quality to which all end-users have the right to have access to. The "affordable price" remains to be determined by "specific national conditions, without distorting competition." See *id.*, art. 1.

<sup>82</sup>Telecommunication Act of Estonian Republic, ¶ 5 (2000), published in Estonia Riikogu Daatu, # 56 (2000), <https://www.riigiteataja.ee/akt/71844>.

<sup>83</sup>*Finland Makes Broadband a "Legal Right"*, BBC NEWS, 1 July 2010, <http://news.bbc.co.uk/2/hi/technology/10461048.stm>; Press Release, Ministry of Transport and Communications, 1 Mbit Internet access a universal service in Finland from the beginning of July (29 June 2010), <https://www.lvm.fi/en/-/1-mbit-internet-access-a-universal-service-in-finland-from-the-beginning-of-july-782612>. In Spain, the decision for broadband connection at a speed of 1 Mbit per second is reflected in the Law on Sustainable Economy. See Ley de Economía Sostenible 2/2011, art. 52 (4 de marzo de 2011), 55 BOLETÍN OFICIAL DEL ESTADO (5 de marzo de 2011).

<sup>84</sup>See Sala Constitucional de la Corte Suprema de Justicia [Constitutional Chamber of the Supreme Court of Justice], Judgment No. 09-013141-0007-CO 30/07/2010 ¶V (30 July 2010), [http://200.91.68.20/scij/busqueda/jurisprudencia/jur\\_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=483874&strTipM=T&Resultado=1](http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=483874&strTipM=T&Resultado=1).

Recent developments in France help to illustrate some of the complexities. In France, in a 10 June 2009 decision, the *Conseil Constitutionnel*, France's highest constitutional authority, reasoned that "freedom to access" the internet was implied by Article 11 of the French Declaration of the Rights of Man and the Citizen of 1789, which proclaimed that "[t]he free communication of ideas and opinions is one of the most precious rights of man."<sup>85</sup> The *Conseil Constitutionnel* thus concluded: "In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services."<sup>86</sup>

In reaching its decision, the *Conseil Constitutionnel*, exercising its constitutional power of *a priori* and abstract control over the constitutionality of laws before they enter into force, declared partly unconstitutional the French Online Copyright Infringement Law (known as HADOPI 1).<sup>87</sup> The most controversial provision of the law was the creation of an independent administrative authority, the "Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet" [High Authority for the diffusion of works and the protection of copyright on the internet], which was vested with sanctioning powers that extended to restricting or denying internet access to specified subscribers.<sup>88</sup> Its powers were not limited to any specific category of persons, but included the entire population.<sup>89</sup> The Court recognized that such broad powers, vested in an authority entrusted with the protection of copyright, as opposed to a court of law, can lead to a restriction of the right to freedom of expression and communication, particularly the ability to exercise the right to one's home.<sup>90</sup>

In an effort to reconcile the objective of fighting infringement of copyright on the internet with promoting the freedom of expression and communication, the *Conseil Constitutionnel* concluded that the latter "are all the more precious since they are one of the cornerstones of a democratic society and one of the guarantees of respect for other rights and freedoms."<sup>91</sup> In such circumstances, and referring to Article 11 of the 1789 Declaration, it ruled that the legislative branch "was not at liberty ... to vest an administrative authority with such powers for the purpose of protecting holders of copyright."<sup>92</sup> The consequence of this decision was the adoption by the French Government of HADOPI 2,<sup>93</sup> which was subsequently approved by the *Conseil Constitutionnel*.<sup>94</sup>

The new law transferred the sanctioning power to a judicial authority and instituted the notion of "graduated power." It established a three-phase system of control, the so-called "three-strikes law": the

<sup>85</sup>See Conseil constitutionnel [Constitutional Court] decision No. 2009-580 DC, art. 12, 10 June 2009, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf> (in French), [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/2009\\_580dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf) (in English) [hereinafter Decision No. 2009-580].

<sup>86</sup>*Id.*

<sup>87</sup>Loi 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, 135 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], 13 June 2009, p. 9666 [hereinafter HADOPI 1].

<sup>88</sup>Decision No. 2009-580, *supra* note 85, ¶ 16.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Id.* ¶ 15.

<sup>92</sup>*Id.* ¶ 16.

<sup>93</sup>Loi 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet, 251 JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], 29 Oct. 2009, p. 18290 [hereinafter HADOPI 2].

<sup>94</sup>See Conseil constitutionnel [Constitutional Court] decision No. 2009-59 DC, 22 Oct. 2009, [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en2009\\_59odc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2009_59odc.pdf) [hereinafter Decision No. 2009-59].

first warning to a user suspected of downloading copyright-protected content is sent via e-mail;<sup>95</sup> the second warning is sent via registered letter delivered in person;<sup>96</sup> and lastly, upon receipt of a third warning, the suspected user is invited to appear before a judge, who is empowered to impose penalties that may include complete suspension of access to the internet for a maximum period of one year, together with a prohibition against contracting with any other internet service provider for the same period.<sup>97</sup> A similar, three-phase procedure that allows for suspending internet access was adopted by the United Kingdom in 2010.<sup>98</sup>

But the debate on finding the right balance persists. In its decision about HADOPI I, the *Conseil Constitutionnel* reasoned that the processing of data of a personal nature “does not [itself] fail to comply with the constitutional requirements.”<sup>99</sup> This position was justified on grounds that the processing of personal data is not to be allowed to serve purposes other than “to enable copyright holders to institute legal proceedings” or to allow the Committee for the Protection of Copyright “to carry out its mission,” otherwise constituting “preliminaries to referring cases to the courts,” and that the “sworn agents” are not entrusted “to monitor or intercept private exchanges or correspondence.”<sup>100</sup> The controversy remains because the processing of data makes it possible to identify persons having a right to access to the internet.

The European Court of Justice (ECJ) has not taken the same approach, although it has not addressed the same situation faced by the French court. The ECJ determined in a 2011 judgment that internet users’ IP addresses are “protected personal data,” and that the installation of a “filtering system would involve systematic analysis of all content and the collection and identification of users’ IP addresses.”<sup>101</sup> It further held that requiring installation of the contested filtering system could undermine freedom of information “since that system might not distinguish adequately between unlawful content and lawful content,” and could therefore “lead to the blocking of lawful communications.”<sup>102</sup> In addition, such a system would not respect the requirement that a fair balance be struck between copyright protection and the freedom to conduct business since it would require the internet service provider “to install a complicated, costly, permanent computer system at its own expense.”<sup>103</sup>

Consistent with an earlier 2008 ECJ judgment requiring a fair balance to be struck between the various fundamental rights,<sup>104</sup> the ECJ concluded in the 2011 case that requiring the internet service provider to

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<sup>95</sup>HADOPI 2, *supra* note 93, art. 5.

<sup>96</sup>*Id.* art. 8.

<sup>97</sup>*Id.* art. 9; *see also* Decision No. 2009-59, *supra* note 94, ¶ 21 (stating that this penalty “does not fail to comply with the principle of the necessity of punishments.”).

<sup>98</sup>Digital Economy Act 2010, c. 24, [http://www.legislation.gov.uk/ukpga/2010/24/pdfs/ukpga\\_20100024\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/24/pdfs/ukpga_20100024_en.pdf).

It prescribes the following measures that an internet service provider is obliged to take for the purpose of preventing or reducing infringement of digital content protected by copyright: (a) limiting the speed or other capacity of the service provided; (b) preventing a subscriber from using the service to gain access to particular material, or limiting such use; (c) suspending the service provided; or (d) limiting the service provided in another way. *Id.* ¶ 124(G).

<sup>99</sup>Decision No. 2009-580, *supra* note 85, ¶ 31.

<sup>100</sup>*Id.* ¶¶ 27–30.

<sup>101</sup>*See* Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, ¶ 51 (24 Nov. 2011), <http://curia.europa.eu/juris/p/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-70/10> [hereinafter Case C-70/10].

<sup>102</sup>*Id.* ¶ 52.

<sup>103</sup>*Id.* ¶¶ 48–49.

<sup>104</sup>*See* Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, ¶ 71, 2008 E.C.R. I-00271 (29 Jan. 2008) (ruling that the relevant Directives “do not require the Member States to lay down . . . an



install the contested filtering system “would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.”<sup>105</sup>

#### IV. Appraisal

The foregoing discussion has revealed that, with the exception of the EU’s Universal Service Directive, there is no legally-binding international instrument that obligates states to provide for universal access to the internet. This situation certainly does not, however, close the door for an analysis of other international instruments that could be of relevance, not only for the probable creation of an obligation to ensure that an individual has access to the internet (the so-called “positive obligation”),<sup>106</sup> but also for obligations that require refraining from acting or interfering with an individual’s right (the so-called “negative obligation”).<sup>107</sup>

##### A. Evaluation of legal measures: International legal instruments

Although neither Article 19 nor any other provision of either the UDHR or the ICCPR contains any explicit reference to access to the internet or information and communication technology, the language of Article 19 is sufficiently broad to encompass the internet.

The Human Rights Council’s (HRC’s) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reported in 2011 that the internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by Article 19.<sup>108</sup> Given that Article 19 of the UDHR and the ICCPR explicitly provide that everyone has the right to express him or herself through any medium, regardless of frontiers, the Special Rapporteur emphasized that Article 19 was drafted with the foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression. Therefore, the framework of international human rights law remains relevant and is applicable to the internet.<sup>109</sup>

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##### Footnote continued

obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights.”)

<sup>105</sup>Case C-70/10, *supra* note 101, ¶ 53.

<sup>106</sup>The so-called “positive obligations” or “positive rights” entail that the state is obligated to take some action to provide the rights to which the individuals are entitled to. The nature of these rights is fundamentally social, economic and cultural. These rights are codified in Articles 22 to 27 of the UDHR, and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>107</sup>The so-called “negative rights” are essentially civil and political in nature. They are codified in Articles 3 to 21 of the UDHR, and in the ICCPR. The principal aim of civil and political rights is to protect the individual from the arbitrary exercise of state power. This may, however, not exclude entirely the duty of the state to intervene in certain specific cases, such as those demanded by human rights abuses by third parties that may require taking action to investigate such abuses, holding to account those responsible, and/or preventing their reoccurrence in the future.

<sup>108</sup>Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, ¶ 20 U.N. HRC, 17th Sess., U.N. Doc. A/HRC/17/27 (16 May 2011) [hereinafter Report of the Special Rapporteur].

<sup>109</sup>*Id.* ¶ 22.

Concerning the existence of a right to access to the internet, though, while the report observed, *inter alia*, that the internet is a “key means,”<sup>110</sup> a “catalyst,”<sup>111</sup> and an “important tool”<sup>112</sup> for the enjoyment of the right to freedom of opinion and expression, as well as a “facilitator”<sup>113</sup> for the realization of a range of other human rights (including economic, social and cultural rights), he did not consider internet access as a right of its own accord.

A similar conception had been adopted by the European Parliament in 2009, but with a different outcome.<sup>114</sup> It conceived of the internet a “key instrument” for exercising freedom of expression, one that gives “full meaning” to this freedom, particularly in light of its “regardless of frontiers” dimension.<sup>115</sup> In addition, a host of other fundamental rights are affected by the internet, including but not limited to, respect for private life, data protection, freedom of association, freedom of the press, political expression and participation, non-discrimination, and education.<sup>116</sup> More specifically, considering e-illiteracy to be the illiteracy of the twenty-first century, the European Parliament declared that ensuring access to the internet for all citizens is “equivalent” to ensuring access to education, and therefore “such access should not be punitively denied by governments or private companies.”<sup>117</sup>

The pronouncement that access to the internet represents the equivalent of the right to access to schooling is of radical importance, though the subsequent qualification that such access should not be *denied* would appear to contemplate a negative obligation rather than a positive duty to provide for it. A more positively-oriented result may be offered by a 2011 interpretation of Article 19 of the ICCPR by the HRC, the treaty body that monitors its implementation. According to the HRC, states that are parties to the ICCPR “should take all necessary steps . . . to ensure access of individuals” to the internet.<sup>118</sup> By emphasizing the undertaking of “all necessary steps . . . to ensure access,” the HRC implied a positive obligation for the realization of the human right to access to the internet. Indeed, it not only assumed the obligation to respect and protect access of individuals to the internet, but also to fulfil that obligation by taking all necessary steps or positive actions to facilitate such access.

As to the exceptional types of expression that may be legitimately restricted under Article 19(3) of the ICCPR and that arise specifically in the online sphere, the HRC’s 2011 Special Rapporteur report referenced above provided a list, which included: child pornography (to protect the rights of children); hate speech (to protect the rights of affected communities); defamation (to protect the rights and reputation of others against unwarranted attacks); direct and public incitement to commit genocide (to protect the rights of others); and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination,

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<sup>110</sup>*Id.* ¶ 20.

<sup>111</sup>*Id.* ¶ 22.

<sup>112</sup>*Id.* ¶ 62.

<sup>113</sup>*Id.* ¶ 22.

<sup>114</sup>Eur. Parl., Recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet, 2010 O.J. (C. 117) E/206, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0194+o+DOC+XML+Vo//EN>.

<sup>115</sup>*Id.* ¶¶ A & C.

<sup>116</sup>*Id.* ¶ O.

<sup>117</sup>*Id.* ¶ Q.

<sup>118</sup>*General Comment 34, supra* note 58, ¶15.

hostility or violence (to protect the rights of others).<sup>119</sup> It was, therefore, suggested that any restriction to access to the internet must conform to international human rights standards.<sup>120</sup>

In this connection, the Special Rapporteur noted many instances when “States restrict, control, manipulate and censor content disseminated via the internet without any legal basis, or on the basis of broad and ambiguous laws, without justifying the purpose of such actions; and/or in a manner that is clearly unnecessary and/or disproportionate to achieving the intended aim.”<sup>121</sup> This practice is considered “clearly incompatible with States’ obligations under international human rights law,”<sup>122</sup> often creating “a broader ‘chilling effect’ on the right to freedom of opinion and expression.”<sup>123</sup> The Special Rapporteur was also “alarmed by proposals to disconnect users from internet access if they violate intellectual property rights,” including the French and UK legislation that allows the suspension of internet service.<sup>124</sup>

In the context of the connection between the rights to privacy and to freedom of expression, the Special Rapporteur recalled that, throughout history, debating controversial issues in the public sphere—in *offline* platforms—has always implied the possibility to do so anonymously,<sup>125</sup> a practice approved by the judiciary.<sup>126</sup> Therefore, the Special Rapporteur called upon states to ensure that individuals are also able to express themselves anonymously on the internet and to refrain from adopting real-name registration systems.<sup>127</sup> Although there may be legal exceptions that warrant limiting the right to privacy, such as for the purposes of administering criminal justice or preventing crime, he stated that these measures must comply with the international human rights framework.<sup>128</sup> This framework, aimed at providing adequate safeguards against abuse, includes ensuring that any exceptional legal limitation of the right to privacy is effected strictly on the basis of a decision by a state authority expressly empowered by law to do so; further, such a decision must be subject to the requirements of necessity and proportionality as well.<sup>129</sup>

Ultimately, under existing practice, there is no conclusive argument for the existence—as opposed to the emergence—of a universal human right to access to the internet. But states do have a recognized duty to guarantee free and unimpeded access to the internet on the basis of the human rights regime, most notably, though not exclusively, through the right to freedom of opinion and expression. The practice of disconnecting users from access to the internet or processing personal data for purposes of protecting

<sup>119</sup>Report of the Special Rapporteur, *supra* note 108, ¶ 25.

<sup>120</sup>*Id.* ¶ 28; *see also* General Comment 34, *supra* note 58, ¶ 43:

[a]ny restrictions . . . are only permissible to the extent that they are compatible with paragraph 3” of Article 19; “[p]ermissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.

<sup>121</sup>Report of the Special Rapporteur, *supra* note 108, ¶ 26.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*

<sup>124</sup>*Id.* ¶ 49.

<sup>125</sup>*Id.* ¶ 53.

<sup>126</sup>*See, e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 2000 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 362 U.S. 60, 65 (1960).

<sup>127</sup>Report of the Special Rapporteur, *supra* note 108, ¶ 84.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

digital copyright is hardly defensible and clearly unable to survive the predominant legal trends, as demonstrated by the recent decision of the ECJ and the Report of the U.N.'s Special Rapporteur.

The pressing practical challenge now is striking a fair balance between free access to the internet and other competing claims or concerns. In this context, empowering a court of law instead of an administrative body to exercise essentially judicial functions, such as making determinations about an offence or its punishment, is only logical and warranted by the principle of separation of powers. However, the existence of legally permissible restrictions cannot, itself, deprive the internet of its character as a legal right. Exceptions are not necessarily exceptional in the domain of the international human rights regime, provided they conform to existing international legal standards.

### **B. Evaluation of policy responses: The effects of the Millennium Development Goals**

Beyond the legal sphere, other approaches could potentially be as effective as legally-binding instruments. Indeed, law-based and alternative approaches should be viewed as complementary and not mutually exclusive. The most authoritative current articulation of the non-law-based approach is to be found in the Millennium Development Goals adopted at the U.N. Millennium Summit.

Measuring progress in achieving Target 8F, discussed above, the U.N.'s *Millennium Development Goals Report 2010* noted that internet access continues to expand, albeit at a slower pace relative to 2009, and that by the end of 2008, twenty-three percent of the world's population were using the internet.<sup>130</sup> The Report noted that, "in the developed regions, the percentage remains much higher than in the developing world, where only 1 in 6 people are online,"<sup>131</sup> and that, by the end of 2008, "fixed broadband penetration in the developing world averaged less than 3 percent and was heavily concentrated in a few countries."<sup>132</sup> When it comes to the "least developed countries," in most of them, "the number of fixed broadband subscriptions is still negligible; service remains prohibitively expensive and inaccessible to most people."<sup>133</sup>

On the more encouraging side of the story, the U.N. Report observed that the introduction of high-speed wireless broadband networks is expected to increase the number of internet users in developing countries in the near future.<sup>134</sup> The limited availability of such broadband networks, however, was identified as a challenge in bringing more people online in developing countries.<sup>135</sup>

The Report's overall conclusion was that, despite world leaders' commitments and a notable expansion of worldwide access to the internet, there still remains a significant divide between those who enjoy access to the internet and those who do not, and that "a significant divide [also] exists between those who enjoy fast access to an online world increasingly rich in multimedia content and those still struggling with slow, shared dial-up links."<sup>136</sup> On the broader global scale, this "divide" also continues with regard to varying degrees of respect for, or enjoyment of, a range of basic human rights and fundamental freedoms for individuals or groups of individuals around the globe.

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<sup>130</sup>See United Nations, *The Millennium Development Goals Report 2010*, 72 (15 June 2010), <http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%2015%20-low%20res%2020100615%20-.pdf>.

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*

<sup>136</sup>*Id.*

## V. Conclusion

Access to the internet has become indispensable not only to enable individuals to exercise a range of fundamental rights, but also to maximize their access to the universe of human aspirations. In short, it enables individuals or groups of individuals “to report news, expose wrongdoing, express opinions, mobilize protests, monitor elections, scrutinize government, deepen participation, and expand the horizons of freedom.”<sup>137</sup> These features of the internet have so far been exposed most prominently to the world during the Arab Spring, as discussed in the introductory part of this article.

Whilst the ever-increasing role of the internet as a knowledge and empowerment tool is widely recognized, also imperative is the recognition that access to the internet must be extended to those lacking it, and that the rights and liberties of those who already enjoy or will enjoy access must be safeguarded. As with many other critical and multifaceted social processes, full involvement and shared responsibility of all relevant actors remains incomparably important. These actors include the government, the private sector, civil society, the U.N., and other international and regional organizations. In this particular context, governments have a leading role and responsibility for the development and implementation of national e-strategies. Experience has revealed that the rapid diffusion of the internet in a country is often closely correlated with the level of government support.<sup>138</sup>

On the legal side, other than the rather limited national or predominantly EU-centred practices, there is no international legal instrument that provides for, or contemplates, a right to universal access to the internet. The dominant legal conception is that of the internet as a “key means,” “key instrument,” “catalyst,” or “tool” for the realization of the right to freedom of opinion and expression, and/or a key “facilitator” of a range of human rights.

Although the positive obligation to create this right is not yet acknowledged, the recognition that illegal restriction or unjustified denial of access to the internet is capable of effecting or constituting a breach of other protected rights is leading to change. The consequence is creating an obligation on the part of states to refrain from arbitrarily interfering with internet access; hence, the recognition of a state’s negative obligation not to interfere with, or impede, an individual’s access to the internet.<sup>139</sup> For instance, when a cyber-attack that aims to deny access to legal content on the internet is attributed to a state, “it clearly constitutes . . . a violation of its obligation to respect the right to freedom of opinion and expression.”<sup>140</sup>

Applying a legal analysis based on civil and political rights, there is a strong case to be made for a positive obligation to provide access to the internet. Such a case rests on the long-recognized rights to freedom of opinion and expression, and is further supported on the bases that the internet is already accessible and that there is recognition that denying or unjustifiably restricting such access is wrong. Beyond mere non-interference, a positive obligation would arguably involve some affirmative action by government (e.g., to open up the telecommunications market or the provision of internet at non-discriminatory rates).

<sup>137</sup>Larry Diamond, *Liberation Technology*, 21 J. DEMOCRACY 69, 70 (2010).

<sup>138</sup>See, e.g., International Telecommunication Union, *Internet from the Horn of Africa: Ethiopia Case Study*, 34 (July 2002), [http://www.itu.int/osg/spu/casestudies/ETH\\_CS1.pdf](http://www.itu.int/osg/spu/casestudies/ETH_CS1.pdf) (last visited 9 Jan. 2015).

<sup>139</sup>This conclusion finds ample support in the interpretation of the ICCPR’s treaty body, the Human Rights Committee. See General Comment 34, *supra* note 58.

<sup>140</sup>Report of the Special Rapporteur, *supra* note 108, ¶ 52.

Unlike the increasingly-recognized negative obligation, a positive obligation to provide for access to the internet would so far appear to be limited to a few cases or countries where access is explicitly provided for by law. Even in such scenarios—as far as the existing practice is concerned—a human right to access to the internet does not mean that it has to be free, but does mean that it has to be available, accessible, affordable, and adequate, complying, therefore, with the suggested contours of a right to access to the internet suggested at the start of this article. Should any one of the four As be absent, the positive obligation to provide genuine internet access cannot be met.

Although currently limited, one cannot fail to observe the signs of the continuing emergence of the positive right. The most authoritative global testimony is offered by the HRC, stating that states parties to the ICCPR “should take all necessary steps . . . to ensure access of individuals” to the internet. Another authoritative indication of this emerging decision-making process is the HRC’s call upon all states “to . . . facilitate access to the internet.”<sup>141</sup> Regional bodies, such as the OSCE (Organization for Security and Co-operation in Europe), have also indicated the human rights character of access to the internet.<sup>142</sup>

Furthermore, the absence of any international legal instrument that imposes positive obligations to provide access cannot be construed as absolving states of all their responsibility. Quite the contrary, and as also interpreted by the ICCPR’s treaty body, states have a responsibility to take all necessary steps, individually and through international assistance and cooperation, to achieve the full realization of universal access to the internet. This responsibility is also demanded by the undertaking of the world’s leaders at the U.N. Millennium Summit, through the adoption of the 2030 Sustainable Development Goals to ensure that the internet is available to all, and by the declaration of the HRC to that effect. As ruled by a German Federal Court in 2013, access to the internet is an “essential” part of life and its lack can significantly disrupt the material basis of life.<sup>143</sup>

It is accepted worldwide that the internet is the singularly most indispensable instrument of the twenty-first century for effecting and ensuring a whole host of human rights and fundamental freedoms—in the words of Simon and Garfunkel, it is a global “bridge over troubled water.” Building this bridge will not be easy. Utilizing the implementation framework adopted in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the steps taken will need to be “deliberate, concrete and targeted as clearly as possible”<sup>144</sup> in order to secure the widest possible distribution of access to this key planetary resource, and to align the world online order on a scale that would benefit everyone socially and economically. Successful achievement of these goals is represented by the four As: availability, accessibility, affordability, and adequacy of the internet. Those persons and entities implementing future internet-related decision-making processes must recognize the urgency of the situation and look to providing the four As as a way of achieving internet access for all.

<sup>141</sup>Human Rights Council Res. L. 13, A/HRC/20/L.30 (29 June 2012). It also affirmed that the same rights that people have offline must also be protected online.

<sup>142</sup>See Press Release, OSCE, Internet blocking practices a concern, access is a human right, says OSCE media freedom representative at launch of OSCE-wide study (8 July 2011), <http://www.osce.org/fom/80735> (“The internet should remain free and access should be considered a human right” and “Some governments already recognize access to the internet as a human right.”)

<sup>143</sup>Bundesgerichtshof [BGH] [German Federal Court of Justice] Urteil vom 24 Jan. 2013, Ausfall des Internetzugangs, Az. III ZR 98/12, <https://openjur.de/u/597186.html> (in German).

<sup>144</sup>Comm. on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States’ parties obligations*, ¶ 2, U.N. Doc. E/1991/23, annex III at 86 (1991), <http://hrlibrary.umn.edu/gencomm/epcomm3.htm>.