



Internet Rights & Principles Coalition

**COMMENTARY ON THE CHARTER OF HUMAN
RIGHTS AND PRINCIPLES FOR THE INTERNET**

PREPARED BY THE CENTRE FOR LAW AND
DEMOCRACY

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Introduction¹

In the decades since its inception, the Internet has revolutionised virtually every facet of human life. People use the Internet to express their thoughts and opinions, to educate themselves, to find information on practically any subject, to maintain relationships with their family and culture, to conduct business, to work and to seek healthcare.

The online world has also become a vehicle for the actualisation of basic human rights. One need look no further than at the throngs of people that packed Cairo's Tahrir Square – assembled and organised through online social networking services – to see that the Internet has become a global force for democratisation, enfranchisement and positive social progress.

At the same time, and sometimes for these very reasons, governments in some countries have sought to control the Internet. Once again, Egypt provides a clear example of this as the government dramatically shut down virtually the whole Internet in the country in an ultimately failed attempt to stop the protests. In other cases, governments have sought to impose restrictions on the Internet to achieve legitimate aims – such as combating crime – but often with unfortunate consequences.

The *Charter of Human Rights and Principles for the Internet* (Charter)² is being developed by the Internet Rights and Principles Coalition, a body that arose out of the Internet Governance Forum (IGF). The IGF is a tri-partite gathering bringing together civil society, governments and the commercial sector with the goal of discussing regulatory issues relating to the Internet. The Charter seeks to set out clear standards regarding governance of the Internet, based in international human rights but, at least in some cases, representing a forward-looking vision of the application of these rights to the Internet.

The Charter recognises that, because so many people around the world now depend on the Internet, including as an expressive medium and as a means of protecting their human rights, the right to access and use the Internet must itself be considered a human right. Governments or private bodies which obstruct the ability of people to access and/or use the Internet do not merely deny them a convenience; they strip them of something far more fundamental. The Internet belongs to all of humanity, and it is the right of every person to have a place within it.

This Commentary elaborates upon the human rights standards and principles in

¹ This Commentary was prepared by the Centre for Law and Democracy, info@law-democracy.org, www.law-democracy.org. Michael Karanicolas, Legal Officer, Centre for Law and Democracy, led on the drafting process, with support and editing by Toby Mendel, Executive Director. CLD would like to thank all of those who provided comments on draft versions of the Commentary.

² Available at: <http://Internetrightsandprinciples.org/node/367>.

international law which underpin the statements expressed in the *Charter of Human Rights and Principles for the Internet*. In many cases, the rights expressed here are natural extensions of widely recognised and legally binding standards. In other cases, the rights described by the Charter are better understood as emerging rights, the result of shifting social paradigms brought about by a continuously evolving online culture. A key foundation for the rights described in the Charter is the idea of the Internet as a neutral, inclusive and multicultural space, which is quickly becoming the world's shared cultural legacy.

A Note on International Law

In demonstrating how the concepts expressed in this Commentary are grounded in international law, it is helpful first to examine the sources of international law that it relies upon. It may be noted that, frequently, this Commentary refers to regional law and standards. Formally, these are only binding upon States which are located in the relevant region, or which are party to the relevant regional instruments. At the same time, these regional standards often provide an authoritative elaboration of global standards relating to the rights to which they relate. As such, they are relevant to countries in all regions of the world.

Covenants and Conventions

International treaties are legally binding agreements which function like multiparty contracts. Countries which ratify treaties are legally bound to live up to their pledges. Key general human rights treaties include the *International Covenant on Civil and Political Rights* (ICCPR)³ and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁴

Running in parallel to these general, global human rights treaties are a number of regional treaties, including the *African Charter on Human and Peoples' Rights* (African Charter),⁵ the *American Convention on Human Rights* (American Convention)⁶ and the *European Convention on Human Rights* (European Convention).⁷

Most of the human rights treaties cited here do not merely prohibit States from engaging in conduct that breaches rights. They also place a positive obligation on States to ensure respect for and protection of the rights they proclaim. Thus, Article 2(1) of the ICCPR states, in part:

³ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁴ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

⁵ Adopted 26 June 1981, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁶ Adopted 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.

⁷ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.

Often, human rights treaties establish a specialised court or other oversight body, such as a committee or commission, before which persons who believe their rights have been violated can lodge appeals. Thus, the ICCPR establishes the UN Human Rights Committee, a body of 18 independent experts before which complaints about breaches of rights may be lodged. The Committee, however, can only entertain complaints from individuals where the State Party concerned has ratified the (first) *Optional Protocol* to the ICCPR.⁸ The African Charter, American Convention and European Convention all set up specialised courts to hear appeals about violations of the rights set out in those treaties.

The enforceability of international treaties within a legal framework of an individual State (i.e. within the domestic legal framework) varies from country to country. There are two main systems around the world for implementing international law domestically. Some States follow a monist model, according to which international law is part of the domestic legal order (and this is usually reflected in the constitution). In many such States, international law is formally superior to national statutory law, but inferior to the constitution.

Other States follow the dualist approach, according to which national and international law are separate systems. In these countries, international law applies domestically only to the extent that it has specifically been incorporated into domestic law by statute. In this case, it only has the status of the statute that incorporates it.

Declarations and Recommendations

This Commentary also cites authoritative statements adopted by international human rights bodies and mechanisms, such as declarations and recommendations. A leading such statement is the *Universal Declaration of Human Rights* (UDHR),⁹ adopted as a resolution by the UN General Assembly in 1948 as its flagship statement of international human rights. Another statement cited widely in this Commentary is the 2011 *Joint Declaration on Freedom of Expression and the Internet* (2011 Joint Declaration),¹⁰ adopted by the special international mechanisms for freedom of expression at the UN, OAS, OSCE and African Commission.¹¹ Although

⁸ UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

⁹ UN General Assembly Resolution 217A(III), 10 December 1948.

¹⁰ 1 June 2011. Available at: <http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf>.

¹¹ 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. Since 1999, these mechanisms have adopted a Joint Declaration annually focusing

this certainly does not have the overriding status of the UDHR, it is still a very important statement of the human rights standards applicable to the Internet.

As a general rule, these statements are not legally binding. However, they provide strong and persuasive evidence of the content of rights and, as a result, carry considerable weight. In some cases, non-binding declarations can become legally enforceable if they are widely recognised enough to become accepted as customary international law (see below).

Customary International Law

Customary international law is a legal concept, framework or idea which has become binding due to the fact that it has become so widely accepted as such. An example of this is many of the laws which apply to the use of the sea, such as territorial waters, the exclusive economic zone, passage on the high seas, pursuit into the high seas and so on. These rules, which had been evolving for centuries, were eventually codified into the UN *Convention on the Law of the Sea*.¹²

There is no easy yardstick for determining what does or does not qualify as customary international law. However, much of the UDHR has arguably attained this status. As a resolution of the UN General Assembly, the UDHR is not a legally binding document. However, since its passage, much of it has been widely treated as the pre-eminent definition of (binding) fundamental human rights, and its formulations have served as the basis of many of the binding human rights conventions that followed it (such as the ICCPR). This is particularly true of certain articles of especial relevance to the Internet, such as Article 19, guaranteeing freedom of expression.

The Charter

Right to Access to the Internet

The right to access the Internet lies at the heart of this Charter, and of Internet rights in general. This right flows, first and foremost, from the right to freedom of expression, which, as guaranteed in Article 19 of both the UDHR and the ICCPR, protects the right to seek, receive and impart information and ideas through any media. It is amply clear that this right applies to the Internet (see Section 5, below).

Just as everyone has the right to found a newspaper¹³ or publish a book, everyone has the right to access the Internet. The right to access the Internet is arguably stronger than the analogous right for newspapers, given the signal power of this medium not only in terms of fostering the ability of individuals to impart

on a different freedom of expression theme.

¹² Adopted 10 December 1982, entered into force 16 November 1994.

¹³ See, for example, *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95 (European Court of Human Rights).

information and ideas, but also to seek and receive them, both of which are protected under international law.

As an included element in the right to freedom of expression, the right to access the Internet applies regardless of the use to which that access is put. It thus applies not only to more ‘salutary’ uses of the Internet, such as for educational or political purposes, but also to use of the Internet for entertainment, social networking and so on.

Access to the Internet is also central to the protection of other rights. It is thus instrumentally protected as an aspect of these rights. For example, the Internet has become a key educational tool and, in this guise, access is protected as part of the right to education. Similarly, access to the Internet is now essential in many countries for the practical exercise of the right to be elected to public office (see Article 25 of the ICCPR). Given their instrumental nature, the scope of these protections for the right of access to the Internet are more limited than the general protection afforded under the right to freedom of expression.

It is increasingly accepted that the right of access goes beyond prohibiting States from preventing individuals from accessing the Internet and places a positive obligation on them to foster access, with a view to ensuring universal access over time. Thus, the 2011 Joint Declaration states:

Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet.¹⁴

The precise modalities by which this should be achieved will necessarily vary from country-to-country based on numerous factors such as wealth, population density and geography. However, the 2011 Joint Declaration provides important guidance on this issue:

- (e) States are under a positive obligation to facilitate universal access to the Internet. At a minimum, States should:
 - i. Put in place regulatory mechanisms – which could include pricing regimes, universal service requirements and licensing agreements – that foster greater access to the Internet, including for the poor and in ‘last mile’ rural areas.
 - ii. Provide direct support to facilitate access, including by establishing community-based ICT centres and other public access points.
 - iii. Promote adequate awareness about both how to use the Internet and the benefits it can bring, especially among the poor, children and the elderly, and isolated rural populations.
 - iv. Put in place special measures to ensure equitable access to the Internet for the disabled and for disadvantaged persons.

- (f) To implement the above, States should adopt detailed multi-year action plans for increasing access to the Internet which include clear and specific targets, as well as standards of transparency, public reporting and monitoring systems.¹⁵

¹⁴ See para. 6(a).

It is implicit in the statement above, as well as the fact that access to the Internet is part of the right to freedom of expression, that the quality of access – including in terms of speed, efficiency and reliability – should be increased over time, as capacity allows.

States are also under an obligation to ensure net neutrality, defined in the 2011 Joint Declaration as follows:

There should 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.¹⁶

This is essential to ensure that the Internet remains a common and egalitarian space, so that its potential to give effect to freedom of expression for all will be maximised.

These principles arguably form the basis for an assertion that Internet users should be able to exercise choice regarding the types of systems they wish to use on the Internet, with all that this implies in terms of interoperability and open standards.

Right to Non-Discrimination in Use, Access and Governance

The right to non-discrimination is one of the key developments in the evolution of international human rights law, since it underpins the very notion of universal rights. It even finds expression in Article 56(c) of the UN Charter, which obliges member States to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Many human rights instruments begin with a basic statement of their universal applicability. The Preamble to the UDHR contains a statement that human rights apply equally and inalienably to “all members of the human family.” Article 1 of the UDHR reinforces this idea by stating: “All human beings are born free and equal in their dignity and human rights.” A similar prohibition on discrimination in the provision of rights is found in Article 2(1) of the ICCPR, which requires States to protect rights,

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Since access to the Internet is a human right, these provisions therefore guarantee that such access be provided in a non-discriminatory manner.

All three regional agreements also prohibit discrimination in the protection of

¹⁵ Para. 6.

¹⁶ Para. 5(a).

rights, at Article 14 of the European Convention, Article 1 of the American Convention and Article 2 of the African Charter. It may be noted that each of these treaties provides a slightly different list of the grounds upon which discrimination is prohibited. Ultimately, however, all of these treaties use inclusive language – namely ‘such as’ – with the result that these differences are generally unimportant, and prohibitions on discrimination should be read in widely. For example, although none of the regional agreements explicitly mentions sexual orientation as a prohibited ground of discrimination, all three should be read as prohibiting discrimination based on sexual orientation due to the fact that it is a condition analogous to those enumerated.

In addition to guarantees of non-discrimination in relation to the enjoyment of rights, some human rights instruments also guarantee equality before the law. Thus, Article 7 of the UDHR states:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.¹⁷

The African Charter is noteworthy for containing a requirement that private individuals not discriminate (Article 28).

Specific types of discrimination have also been the subject of specific treaties, including the *Convention on the Rights of People with Disabilities*,¹⁸ the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁹ and the *Convention on the Elimination of All Forms of Discrimination against Women*.²⁰

It is generally accepted in international law that prohibitions on discrimination do not apply to positive action taken to empower disenfranchised groups, or otherwise correct existing or historical inequality, since these measures work towards promoting substantive equality. For example, Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

¹⁷ See also Article 26 of the ICCPR.

¹⁸ UN General Assembly Resolution A/RES/61/106, 13 December 2006, entered into force 3 May 2008.

¹⁹ UN General Assembly Resolution 2106 (XX), 21 December 1965, entered into force 4 January 1969.

²⁰ UN General Assembly Resolution 62/218, 18 December 1979, entered into force 3 December 1981.

Right to Liberty and Security on the Internet

International human rights law provides protection for the rights to life, liberty and security of the person. Thus, Article 3 of the UDHR states: “Everyone has the right to life, liberty and security of person.” Article 9 of the ICCPR similarly protects the rights to liberty and security. The main focus of international commentary on these provisions concerns the right to liberty, and protections against arbitrary State actions that deprive individuals of liberty, although deprivations of liberty in accordance with due process guarantees may, of course, be justified in the context of sufficiently serious criminal acts.

However, it is implicit both in these human rights provisions and in the very nature of the State that countries are bound to provide a degree of security to their citizens. Given the growing centrality of the Internet to all forms of human endeavour, true security of the person is becoming increasingly dependent on security of the Internet.

The right to secure use of the Internet also flows from the right to freedom of expression, since it is not possible to realise the full potential of the Internet to give effect to freedom of expression if one’s use of this medium is not secure. Viruses, theft of one’s digital identity and other forms of interference with one’s ability to use the Internet all undermine freedom of expression and action should, as a result, be taken to limit them.

It is important to note that these principles cover not only behaviour that harms individuals, but also harmful acts which undermine the functioning of the Internet as a whole. An example is spamming, which threatens the systematic efficacy of the Internet.

At the same time, any State measures to curtail criminal activities should be consistent with international human rights standards and should not unduly undermine other internationally protected human rights. Thus, to the extent that an activity which may threaten the Internet usage of others involves an expressive activity – which is arguably the case with spamming – any restriction on it must meet the test for such restrictions under international law.

Right to Development Through the Internet

The idea of a general human right to development is controversial. It finds its clearest expression in the 1986 *Declaration on the Right to Development*,²¹ Article 1 of which recognises development as an “inalienable human right”. The Declaration also obliges States to act, collectively and individually, to promote this right worldwide (see Articles 2(3), 3, 4 and 8). However, the Declaration has not been actively followed up and enthusiasm for the general idea of a human right to development has waned.

²¹ UN General Assembly Resolution 41/128, 4 December 1986.

Despite this, a number of development issues are quite clearly established as human rights under international law. Thus, the UDHR guarantees rights to those economic and social rights where are necessary for dignity and development of individuals' personality (Article 22, as well as specific rights to work and an adequate standard of living, as follows:

Article 22:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23:

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

...

Article 25:

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Beyond this, it is recognised that international cooperation is, at least in practice, a necessary precondition for social progress. Thus, pursuant to Articles 55 and 56 of the UN Charter, Member States pledge to "take joint and separate action" in order to promote economic development.

The Internet's power as a tool for economic progress is virtually unparalleled. Access to the Internet can dramatically improve the availability of education and health services, it promotes gender equality and the empowerment of women, and it provides boundless economic opportunities for the entrepreneurially minded. Through its educational, commercial and social power, the Internet has helped lift some nations out of poverty. As the global economy is increasingly dependent on the Internet, access to the Internet may now be seen as an integral component of economic development.

The need for international cooperation in the area of the Internet was addressed in the 2005 *Tunis Agenda for the Information Society*,²² which culminated in a list of specific recommendations of avenues where development funds should be channelled (Article 23), as well as a set of policy changes that are prerequisite to universal Internet accessibility (Articles 26 and 27).

²² Available at: <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>.

At the same time, development initiatives should be predicated on the notion of environmental sustainability. This has been recognised through the *United Nations Framework Convention on Climate Change*²³ and the *Rio Declaration on Environment and Development*.²⁴ As a result, development actions should be undertaken in a manner that limits the adverse impact upon the environment. In the context of the Internet, this suggests that development programmes should be developed hand-in-hand with effective policies to regulate the disposal of e-waste and to provide for the sustainable construction of the necessary communications and energy infrastructure.

Freedom of Expression and Information on the Internet

Freedom of expression is a fundamental human right, vital not only in its own right, but also to all other human rights and to meaningful participation in the public sphere. The right to freedom of expression is guaranteed in Article 19 of the UDHR, as follows:

Everyone 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.

Article 19 of the ICCPR guarantees this right in very similar terms, and it also finds protection in all three regional human rights treaties, at Article 13 of the American Convention, Article 9 of the African Charter, and Article 10 of the European Convention. Protections for freedom of speech are also enshrined in almost all of the bills of rights found in national constitutions.

The Internet is primarily a means of communication and it has had a transformative impact on the ability in practice of individuals to realise the right to free speech. It is amply clear that the right to freedom of expression applies to the Internet. This flows directly from the language of Article 19, which refers to “any other media”, and it is also reflected in authoritative statements. Thus, the seminal 2011 Joint Declaration, which focuses on freedom of expression and the Internet, states:

Freedom of expression applies to the Internet, as it does to all means of communication.²⁵

The right to freedom of expression protects a wide range of speech, both popular statements and those which some people may find offensive. As the European Court of Human Rights has often stated:

[F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ...

²³ Adopted 16 March 1998, entered into force 16 February 2005.

²⁴ *Report of the United Nations Conference on Environment and Development*, 1992, A/CONF.151/26, vol. I. Available at: <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

²⁵ Para. 1(a). See also the draft General Comment No. 34 of the UN Human Rights Committee of 3 May 2011, para. 11. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

it is applicable not only to “information” or “ideas” that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”.²⁶

Freedom of expression protects the right to protest and media freedom, both mentioned in the text of the Charter. In terms of the media, the right to freedom of expression goes beyond simply requiring States not to intervene; it places a positive obligation on States to promote pluralism. As the European Court of Human Rights has stated:

[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.²⁷

Similarly, the Inter-American Court of Human Rights has stated:

Freedom of expression requires that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.”²⁸

The special international mechanisms on freedom of expression devoted an entire statement to this issue, namely their 2007 Joint Declaration on Diversity in Broadcasting.²⁹

The power of the Internet to promote diversity – both formally in the sense of media diversity and in the wider sense of fostering the circulation of a wide range of information and ideas – is manifest.

Prior censorship, whereby official bodies preview or block material before it is allowed to be released to the public, has always been regarded with great suspicion by courts because of the enormous potential for abuse. It is prohibited altogether under the American Convention, except as necessary for the protection of children.³⁰ Even where international instruments have not gone so far as to forbid prior censorship outright, it is clear that it may be legitimate only in extremely limited circumstances, where an overwhelming public interest is at stake. The European Court of Human Rights, for example, has held that prior restraints “call for the most careful scrutiny on the part of the Court.”³¹

²⁶ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49 (European Court of Human Rights).

²⁷ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17202/90, 17 EHRR 93, para. 38.

²⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

²⁹ Adopted 12 December 2007. Available at: <http://www.cidh.org/relatoria/docListCat.asp?catID=16&IID=1>.

³⁰ See Article 13(2).

³¹ *The Observer and Guardian v. United Kingdom*, (Spycatcher case), 26 November 1991, Application No. 13585/88, para. 60.

In relation to censorship, the 2011 Joint Declaration by the special international mechanisms on the Internet states:

Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.

Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.³²

It also makes it clear that shutting down the Internet is not legitimate:

Cutting off access to the Internet, or parts of the Internet, for whole populations or segments of the public (shutting down the Internet) can never be justified, including on public order or national security grounds. The same applies to slow-downs imposed on the Internet or parts of the Internet.³³

While many observers tend to think of freedom of expression as mainly protecting the right to impart information and ideas, in fact international guarantees of this right also protect the rights to seek and receive information. This is now widely accepted as guaranteeing a right to access information held by public authorities (government). A number of international standard-setting statements have been made regarding this right, including to the effect that responses to requests for information should be timely and of low cost.³⁴

The right to freedom of expression is not absolute. Rather, international law does allow some restrictions on this right, but places strict conditions on those restrictions, as provided for in Article 19(3) of the ICCPR:

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.

One specific area of restriction is set out in Article 20(2) of the ICCPR, which states:

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

³² Clauses 3(a) and (b).

³³ Clause 6(b).

³⁴ See the chapter on International Standards in Mendel, Toby, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO). Available in various languages at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

This is one of the very few provisions in the ICCPR which actually mandates a restriction on freedom of expression, given the importance attached to equality. However, a careful balance has been struck here with the right to freedom of expression, which involves the twin requirements of advocacy (i.e. intention) and incitement (i.e. a close link between the expression and the risk of the prohibited harms).

Freedom of Religion and Belief on the Internet

Freedom of religion is a recognised human right, protected under UDHR Article 18, which states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

This formulation is repeated in Article 18 of the ICCPR, with added provisions protecting individuals from religious coercion and protecting the right of parents and guardians to raise their children within their own religious beliefs. This article does, however, allow for restrictions on religious freedom as necessary “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Most regional agreements protect religion using a similar format (see Article 9 of the European Convention, Article 12 of the American Convention and Article 8 of the African Charter).

The right to freedom of religion naturally extends to the Internet. All persons and communities have the right to use online resources to practice, research, or proselytise, and have the right to do so without fear of recrimination or discrimination.

It is important to note that most of these human rights instruments explicitly protect the right to change religions. When read in the context of Article 18(2) of the ICCPR, which protects individuals against religious coercion of any kind, this means that while the State has an obligation to take a relatively hands-off approach to the practise of religion, it must actively protect individuals and communities from hostility at the hands of religious rivals.

The right to freedom of religion and belief also protect individuals and groups who are not religious, or whose personal beliefs are antithetical to religion. The right to freedom of religion does not mean that believers can claim protection against open debate, or against expression which might legitimately challenge their religious beliefs. Article 20(2) of the ICCPR prohibits advocacy of religious hatred, but the dissemination of ideas about religion that some may find offensive is not covered by

this. Freedom to choose one's religion includes the freedom to spread beliefs that are antithetical to one, or all religions. As a result, religiously offensive speech should be considered protected under freedom of expression as well as an expression of freedom of belief, so long as the debate is not framed in a way that promotes hatred or discrimination. Thus, the new draft General Comment on Article 19 of the ICCPR that is currently being prepared by the UN Human Rights Committee states:

Thus, for instance, they may not discriminate in a manner that prefers one or certain religions or belief systems or their adherents over another, or religious believers over non-believers. Blasphemy laws should not be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.³⁵

The question of what qualifies as a religion is difficult to resolve, but jurisprudence suggests an inclusive definition is appropriate.³⁶

Freedom of Online Assembly and Association

The right to freedom of association is protected in Article 20 of the UDHR as follows:

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

This right is also protected in the ICCPR under Article 22, though the wording in that document focuses particularly on organised labour and the formation of trade unions. Nonetheless, the use of the word "including" in ICCPR Article 22(1) confirms that the right to form trade unions is only one aspect of a more generalised right to form associations of any kind. The ICCPR also allows for limited restrictions on this right as long as they are "necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

This right also finds protection in Article 10 of the African Charter, Articles 15 and 16 of American Convention, and Article 11 of the European Convention. Both the ICCPR (Article 22(2)) and the American Convention (Article 16(3)) specifically allow for restrictions on the right to association for members of the military and armed forces, presumably insofar as is necessary to preserve national security and public safety.

As the Internet has grown as a social hub, it has naturally become a central forum for political activism as well as for other types of association. Indeed, virtual personalities have become an increasingly important part of peoples' social and political being.

³⁵ Draft general comment No. 34 (Upon completion of the first reading by the Human Rights Committee), 3 May 2011, para. 51.

³⁶ See *Church of Scientology Moscow v. Russia*, 5 April 2007, Application no. 18147/02 (European Court of Human Rights). Available online: <http://strasbourgconsortium.org/document.php?DocumentID=3578>

In the online context, the rights to freedom of assembly and association enfranchise all persons with the freedom to use the Internet as both a political and a social hub. It encompasses both purely online activities, such as online petitions and campaigns, and real-world actions which are organised, monitored or broadcast online. These freedoms should be able to be exercised without fear of recrimination, which means that users should be free to engage in political action without fear of surveillance, or of repercussions either online or in the real-world as a result of their membership in or association with any individual or group.

Right to Privacy on the Internet

The right to privacy is recognised in international human rights law, although different approaches are taken in different instruments. Rather than enumerating a direct right to privacy, Article 12 of the UDHR provides indirect protection, stating:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.³⁷

This clearly places an obligation on States to adopt laws which protect privacy. This formulation would appear to provide greater flexibility for national governments to craft their own privacy regimes. However, the UN Human Rights Committee has made it clear that the inclusion of the term 'arbitrary' in this article imposes certain minimum standards on such legislation, stating:

The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.³⁸

Furthermore, the Committee has made it clear that the right is to be protected against invasion from all sources, both private and public:

In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.³⁹

Both the American Convention (Article 11) and the European Convention (Article 8) have recognised the right to privacy as a free standing right.

The Internet allows for an unprecedented spread of information, which at the same time may come into conflict with the right to privacy. Use of the Internet also raises

³⁷ See also Article 17 of the ICCPR.

³⁸ General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), adopted 4 August 1988, para. 4.

³⁹ *Ibid.*, para. 1.

certain special concerns regarding privacy issues.

The 2011 Joint Declaration by the specialised international mechanisms on freedom of expression does not address directly the issue of privacy settings on Internet services. However, it does require any filtering products to be “accompanied by clear information to end-users about how they work”.⁴⁰ The same principle of openness should, *a fortiori*, be applied to privacy settings.

The Council of Europe’s leading statement on Internet freedom, its *Declaration on Freedom of Communication on the Internet*, recognises the crucial importance of anonymity to on-line expression:

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas (...) States should respect the will of users of the Internet not to disclose their identity.⁴¹

The European Court of Human Rights has, through its caselaw, developed a sophisticated body of principles on surveillance of communications generally, which would apply equally to the Internet.

First, to satisfy the requirement that surveillance operations be ‘in accordance with law’, they require a clear basis in law, and the laws concerned must be readily accessible and sufficiently precise so that citizens will be aware of the circumstances in which they apply:

[T]he requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. Nevertheless, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which the [authorities] are empowered to resort to this secret and potentially dangerous [measure].⁴²

The Court has stressed: “It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.”⁴³

Second, surveillance operations have to be ‘necessary’ – “[an] adjective [that is] not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘reasonable’, or ‘desirable’”⁴⁴ – and proportionate, allowing

⁴⁰ Clause 3(c).

⁴¹ Council of Europe Declaration on Freedom of Communication on the Internet, adopted 28 May 2003, Principle 7. Available at: [http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Dec\(2003\)FreedomCommInt_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Dec(2003)FreedomCommInt_en.asp#TopOfPage)

⁴² *Malone v. the United Kingdom*, 2 August 1984, Application No. 8691/79 (European Court of Human Rights), para. 67.

⁴³ *Kruslin v. France*, 24 April 1990, Application No. 11801/85 (European Court of Human Rights), para. 33.

⁴⁴ *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72 (European Court of Human Rights), at para. 48.

the State to take only such measures as are strictly required to achieve the required objective. Finally, there must be safeguards built-in to the legislative framework to prevent abuse of surveillance capabilities:

This assessment ... depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law.⁴⁵

The right to privacy is closely associated with the right to reputation. The UDHR (Article 12), the ICCPR (Article 17) and the American Convention (Article 11) all protect individuals from attacks on their honour, and in all three cases this protection is located within the same article that protects privacy. At the same time, the right to one's reputation may well come into conflict with the right to freedom of expression. There are clear international rules on how to balance these two rights, a complex matter. This was, for example, the subject of the 2000 Joint Declaration by the specialised international mechanisms on freedom of expression.⁴⁶

Right to Digital Data Protection

Concomitant to the right to privacy is the right to a system of security for the protection of individual's private data. A number of international principles have emerged in relation to the general protection of personal data, which also apply to data collected over the Internet or in relation to Internet usage.

The UN Human Rights Committee has set out a number of principles concerning the collection and use of personal data, as follows:

The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In 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 individual should have the right to request rectification or elimination.⁴⁷

These principles are roughly similar to those found in the OECD's *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.⁴⁸ These include the

⁴⁵ *Klass and others v. Federal Republic of Germany*, 6 September 1978, Application No. 5029/71 (European Court of Human Rights), para. 50.

⁴⁶ Adopted 30 November 2000.

⁴⁷ General Comment No. 16, note 38, para. 10.

⁴⁸ OECD, *Recommendation of the Council Concerning Guidelines Covering the Protection of Privacy and Transborder Flows of Personal Data*, 23 September 1980. Available at:

following:

- data collection should be limited to that information which is necessary for a legitimate purpose (Article 7);
- data should be kept accurate and up to date (Article 8);
- data should be collected for a specific purpose and used only for that purpose (Articles 9 and 10);
- data should be adequately safeguarded (Article 11);
- user consent is required for the collection and use of data (Articles 7 and 10);
- organisations should be forthcoming in their policies surrounding user data (Article 12); and
- users should have the right to access and correct any data stored about them (Article 13).

These principles again roughly correspond to the standards spelled out in the European Union's *Directive 95/46/EC* (the Data Protection Directive).⁴⁹ However, the Data Protection Directive also requires that data be anonymised where this would not defeat the purpose of the data collection (Articles 6(e)), and it gives users the right to request erasure of their personal information (Article 12(b)). The Data Protection Directive also provides special protection for data that reveals a person's racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sexual life, or criminal convictions (Article 8). A particularly interesting feature of the Data Protection Directive is that it purports to bind any website that makes use of equipment inside the EU in order to process data (Article 4). In principle, this means that any website that is accessed from a computer that is located within the EU is subject to the directive.⁵⁰

Many individual States have passed data protection laws and some, such as that of Canada, purport to have some kind of extraterritorial effect (in that case, any handling of data from Canadians).⁵¹ Many nations, particularly in the developing world, lack data protection regimes entirely. Others, such as the USA and Australia, regulate data protection at the sub-State level, leading to a patchwork of differing regimes even within these nations.

This state of affairs is problematic for several reasons. While Canadian and EU law purports to apply to any website that handles data from their citizens (which,

http://www.oecd.org/document/18/0,3746,en_2649_34255_1815186_1_1_1_1,00&&en-USS_01DBC.html.

⁴⁹ EC, *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, [1995] O.J. L 281.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

⁵⁰ EU Directives are technically only binding upon Member States, rather than on individuals. Nonetheless, the *Data Protection Directive* places an onus on Member States to regulate to this effect, so it is functionally the same thing.

⁵¹ See the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5. Available online: <http://laws-lois.justice.gc.ca/eng/acts/P-8.6/FullText.html>.

practically speaking, means they apply to the entire Internet), it is obviously unworkable for them to apply their jurisdiction so broadly. As a matter of practicality and efficiency, it is also completely impractical to expect every website operator to ensure that their standards are in line with dozens of different national codes, even if the standards therein are roughly similar. One obvious solution to this would be to adopt global standards on data protection, something that has so far remained elusive.

Right to Education on and About the Internet

The right to education is also enshrined in Article 26 of the UDHR which states:

- (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.⁵²

The right also finds expression in Article 13 of the ICESCR, and in Article 28 of the *Convention on the Rights of the Child* (CRC),⁵³ which states:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge

⁵² See also Article 13 of the ICESCR and Article 17 of the African Charter.

⁵³ UN General Assembly Resolution 44/25, 20 November 1989, entered into force 2 September 1990.

and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.⁵⁴

Of particular interest is the obligation, under Article 28(3) of CRC, to cooperate internationally in order to provide access to modern teaching methods.

By providing near instant access to resources and perspectives from all over the world, the Internet has unparalleled usefulness as an educational tool. The Internet is thus an increasingly important educational tool. At the same time, this right has not yet developed to the point where it can be said to override traditional copyright regimes, although fair use exceptions to copyright do exist for some educational and research purposes.

Basic functional Internet literacy is a pre-requisite to meaningful use of this essential tool. As the Internet world becomes more complex, along with the skills needed to navigate it safely and without harm, the need for evermore sophisticated forms of Internet literacy has grown. As the 2011 Joint Declaration notes:

Awareness raising and educational efforts to promote the ability of everyone to engage in autonomous, self-driven and responsible use of the Internet should be fostered ('Internet literacy').⁵⁵

Right to Culture and Access to Knowledge on the Internet

Article 27(1) of the UDHR provides protection for the right to culture and knowledge, stating:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

This is spelt out in much greater detail in Article 15 of the ICESCR, as follows:

- (1) The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
- (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
- (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
- (4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific

⁵⁴ See also Article 17.

⁵⁵ Clause 1(f).

and cultural fields.⁵⁶

The importance of culture as a human right is further illustrated in the importance that it is ascribed within the United Nations framework. The UN Charter lists promoting international cultural cooperation a key duty of the General Assembly (see Article 13(1)(b)). The importance of cultural development and protection is also evident through the mission of UNESCO, the UN body responsible for education, science and culture. The recent *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,⁵⁷ which aims to protect cultural diversity and to promote cultural dialogue. The treaty sets out universal principles regarding cultural diversity and commits States to various actions to promote this common good.

In an increasingly interconnected world, the Internet has emerged as a vital conduit for cultural participation and communication. This is particularly valuable in the context of marginalised or minority cultures that make use of the Internet in order to protect threatened traditions. It is also invaluable for diffuse ethnic or cultural groups, an increasingly important part of the population of many countries in an age of migration, as a way of maintaining traditional ways of life. Social networking also allows members of diverse ethnic groups to forge new bonds with one another, thereby helping to break down divisions stemming from various social and geographic factors. As a result, for many people the Internet has become vital to establishing and maintaining their cultural identity.

The importance of the Internet as a cultural phenomenon means that States are under a positive obligation to make an effort to maintain and extend the multicultural quality of the Internet. This includes ensuring that the Internet evolves in a manner that does not represent the domination of a single culture or language.

It might be argued that there is a certain conflict between Article 27(1) of the ICCPR, which protects the right to enjoy the arts and to share in scientific advancement, and Article 27(2), which states:

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁵⁸

In practice, a complex regime of intellectual property rights, with interlocking international and national elements, attempts to resolve this tension. Different rules apply to different forms of intellectual property, such as trade marks, copyright, patents and so on.

⁵⁶ See also Article 17(2) of the African Charter.

⁵⁷ Adopted on 20 October 2005 at the 33rd Session of the General Conference of UNESCO. Entered into force 18 March 2007. Available at: http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵⁸ The same tension may be observed in Article 15(1)(a) and (b) of the ICESCR, on the one hand, and Article 15(1)(c) of the same treaty, on the other.

At the centre of the international intellectual property regime is the *Berne Convention for the Protection of Literary and Artistic Works* (Bern Copyright Convention), originally promulgated in 1886 and substantially revised in 1971.⁵⁹ The basic thrust of the Convention is that States Parties, of which there are some 164, agree to recognise the same package of copyright rights for citizens of other States Parties as they do for their own. To this extent, the Convention does not establish a uniform set of rules for States Parties. However, it also establishes some minimum copyright law standards, such as that copyright shall persist for a minimum duration of the author's life plus 50 years.⁶⁰

Another important part of the international copyright regime is the *WIPO Copyright Treaty*.⁶¹ This essentially defines the copyright rules for the online world, extending copyright to computer programmes and the arrangement and selection of databases.

The Berne Copyright Convention sets up a three-step test for national limitations to copyright as follows: (1) these limitations are confined to special cases; (2) they do not conflict with the normal exploitation of the work; and (3) they do not unreasonably prejudice the legitimate interests of the rights holder (see Article 9). In many countries, a doctrine of 'fair use' or 'fair dealing' has evolved which permits certain uses of copyrighted material without the need to obtain permission from the author, such as for purposes of teaching or research. The scope of these rules must conform, for States Parties, to the Berne Copyright Convention, but otherwise these rules are set nationally.

The online world is challenging traditional copyright rules in at least two main ways. First, the ease of sharing information over the Internet has made it difficult at a practical level to maintain control over copyrighted works. Second, a new set of values around information and the sharing of information is emerging, which is at least to some extent at odds with traditional rules on protection of intellectual property.

In parallel to this, the growth of recognition of the right to information (see Section 5, above) is impacting on copyright in works which are created by public authorities or funded by public funds. The right to information clearly protects the right to access these works, but it is increasingly being recognised, not only by activists but also by governments, that the right should also cover a right to reuse these works, essentially free of copyright limitations.

⁵⁹ In Paris on 24 July 1971.

⁶⁰ With some exceptions, for example for cinematographic and photographic works.

⁶¹ Adopted 20 December 2006, entered into force 6 March 2002. Available at: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

Rights of Children and the Internet

International law has long recognised that children deserve special legal protection. This is best expressed through the *Convention on the Rights of the Child*, which guarantees several of the rights expressed in this Charter, including the rights to be free from discrimination (Article 2(2)), to free expression (Article 13), to freedom of conscience (Article 14), to freedom of association and assembly (Article 15) and to privacy (Article 16). The basic structure and framing of these rights is similar in form to the parallel provisions in the UDHR, ICCPR, ICESCR and regional human rights treaties. The Internet can play a role in ensuring these rights for children in an analogous fashion as it does for adults.

The main way in which the rights of children differ from those of adults is that the CRC places a paramount importance on the best interests of the child (see Article 3). This grants States a freer hand in regulating the extent to which rights, such as freedom of association, are applied to children. In other words, a measure of paternalism can be appropriate when dealing with individuals who are under 18 years of age that would not be acceptable for the adult population.

Article 18 of the CRC places the primary responsibility for children's wellbeing with their parents (see also Article 5). This philosophy, which is in line with most national legal frameworks, acts as a break on the power of the State to directly regulate the affairs of children. As a sort of corollary of this, children have the right to maintain regular contact with their families (see Article 9 of the CRC, and also Article 10). The Internet has the potential to substantially facilitate the realisation of this right.

Article 19 of the CRC requires States to take appropriate measures to protect children from harm, including the threat of abduction or abuse. In the context of the Internet, this means preserving its power to as a source of education and cultural enlightenment, while also preventing dangers, especially of sexual abuse of various forms.

Rights of People with Disabilities and the Internet

The right to freedom from discrimination applies to individuals with disabilities. It is now recognised that the right to equal treatment, as is mandated by the rules on non-discrimination, means more than just the right not to be treated differently (including in a less than equal fashion). Substantive equality sometimes requires a degree of special accommodation in order to ensure real equality in terms of access to rights and other social benefits. One example of this type of necessary accommodation is through exceptions to the international copyright regime to enable works to be presented in impaired-accessible formats.

Various international human rights treaties specially address the issue of equality for those with disabilities. Article 25(1) of the UDHR states that individuals with disabilities have the right to a reasonable standard of living. And Article 18(4) of the

African Charter states: “The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”

The most comprehensive treatment to the rights of the disabled is found in the *Convention on the Rights of Persons with Disabilities*,⁶² Article 1 of which mandates that all States Parties “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities”. Within the context of the Internet, it is particularly relevant that the Convention includes a specific obligation to pursue technologies aimed at improving the lives of persons with impairments, and to ensure that these technologies are available and affordable for those who need them (Article 4(1)(g)). States Parties are also obliged to ensure that individuals with impairments can work and participate meaningfully in the economy (Articles 27 and 4(2)), can receive a proper and equal education (Article 24), and can participate in public and cultural life (Articles 29 and 30). The Convention also calls on States to urge private players, including the media, to provide accessible information to people with disabilities, specifically through the Internet (Article 21).

The Internet has the potential to serve as an excellent tool of enfranchisement for the disabled. But there remain significant obstacles to be overcome in order to ensure that the disabled are able to take full advantage of the opportunities the Internet affords. Governments, in order to fulfil their obligation to provide substantive equality to their people, should therefore work to remove these impediments.

Right to Work and the Internet

The right to work is protected in Article 23 of the UDHR, which states:

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

This right also finds expression in Articles 6-8 of the ICESCR,⁶³ which extend the protections of the UDHR, in particular by stipulating that States should take steps to ensure that their populations have the technical and vocational opportunities to meaningfully fulfil this right and that all workers should have equal opportunity for promotion and advancement. Article 8 of the ICESCR also includes detailed

⁶² UN General Assembly Resolution A/RES/61/106, 13 December 2006, entered into force 3 May 2008.

⁶³ See also Article 15 of the African Charter.

provisions on trade union rights.

It goes without saying that everyone has the right to use the Internet to achieve these rights.

The European Court of Human Rights has long held that workplace monitoring constitutes an interference with the right to respect for private life, which is protected under Article 8 of the European Convention in terms which are roughly similar to the protection of privacy under Article 17 of the ICCPR:

[I]t is clear ... that telephone calls made from business premises as well as from the home may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 para. 1.⁶⁴

Although this case concerned telephone monitoring, similar principles would apply to monitoring of Internet usage.

Right to Online Participation in Public Affairs

International law protects the right to take part in public affairs either directly or through representatives chosen at genuine and periodic elections. Thus, Article 21 of the UDHR states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Similar guarantees are found at Article 25 of the ICCPR, Article 23 of the American Convention and Article 13 of the African Charter, although it may be noted that these rights are limited to citizens in these legally binding treaties.

The Internet presents unparalleled opportunities to foster direct citizen participation in public affairs, as well as new modalities for involvement in the electoral process. As such, States arguably have an obligation to make use of these new modalities to foster greater direct public participation.

The Internet is also becoming a key means for accessing public services, to which all citizens should have access "on general terms of equality" (Article 25 of the ICCPR). Given the vast benefits of accessing public services via the Internet, this right has various implications in terms of government obligations, including to promote universal access to the Internet.

⁶⁴ *Halford v. the United Kingdom*, 25 June 1997, Application No. 20605/92.

Rights to Consumer Protection on the Internet

As electronic commerce becomes an increasingly important aspect of the global economy, governments have a responsibility to ensure that the Internet is a safe and reliable place to do business. Unfortunately, there is little in the way of binding international law on the subject. The United Nations Commission on International Trade Law developed the *United Nations Convention on the Use of Electronic Communications in International Contracts* as a way of harmonising some forms of electronic commerce, but this agreement specifically excludes private consumer transactions.

For consumer protection, the clearest statement of best practices can be found in the 1999 *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*.⁶⁵ The main thrust of the OECD guidelines are the need for transparency and proper advertising in electronic commerce, in order to ensure that consumer protections are not undermined by the fact that the seller may be situated halfway around the world. This includes honest information about the product, the business and the transaction (Articles III and V), as well as adequate privacy and security protections (Articles V and VII). Because purchasing online can often happen at the mere click of a mouse, the OECD guidelines also recommend confirmation procedures in order to prevent unintentional purchases or mistakes in ordering (Article IV). The OECD guidelines also address the conflicting jurisdictions inherent in online commerce, and call for a standardised process of dispute resolution to be implemented (Article VI). However, the guidelines recognise that, while global cooperation is necessary in order to ensure that consumer protections for electronic commerce are effective, the main implementation of these principles has to happen at the State level (Parts 3 and 4).

Although the OECD guidelines are somewhat vague around implementation, one strategy that has been successfully adopted in some countries has been to place the main onus for ensuring consumer protection on the credit card companies that facilitate online transactions. Thus, the Canadian *Internet Sales Contract Harmonization Template*⁶⁶ allows unsatisfied consumers to demand refunds directly from credit card agencies, who in turn should take the issue up with vendors. Although this may be seen by some as placing an unfair burden on credit card agencies, these companies have not expressed opposition to the plan, likely due to the vested interest that they have in ensuring that online transactions are viewed as secure and trustworthy. This strategy could serve as a good model for safeguarding all electronic transactions.

⁶⁵ OECD, *Guidelines for Consumer Protection in the Context of Electronic Commerce*, 9 December 1999. Available at: <http://www.oecd.org/dataoecd/18/13/34023235.pdf>.

⁶⁶ Industry Canada, *Internet Sales Contract Harmonization Template* (Ottawa: Office of Consumer Affairs, 2001). Available at: <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca01642.html>.

Right to Health and Social Services on the Internet

The right to health care and to social services receive some recognition under international law. Article 25 of the UDHR recognises a right to a standard of living which is adequate to sustain his or her health, as well as the necessary social services. Article 12 of the ICESCR recognises a right to the “highest attainable standard” of health, and calls for certain specific health measures to this end.

Unfortunately, medical care is a scarce and expensive resource, which can be especially difficult to provide in isolated regions. The Internet can serve as an important tool for the provision of health and social services. Although there is no substitute for a real, live doctor, online services are a good way of ensuring that some level of medical services remains available in remote and poor areas. However, the provision of medical services, in particular, is highly regulated in most countries, and for good reason. Use of the Internet to supplement more traditional provision of health care services needs to be done in a manner that does not compromise regulatory standards.

Right to Legal Remedy and Fair Trial for actions involving the Internet

The concept of due process is foundational to nearly all of the world’s legal systems, with the idea that everyone is equal and deserves fair treatment before the law going back as far as Hammurabi’s Code. This concept is enshrined in the UDHR, with Article 8 providing for a right to an effective legal remedy for actions that infringe on one’s rights. The UDHR also guarantees certain due process rights, including the right to the presumption of innocence (Article 11(1)), the right to a fair and public hearing by an independent tribunal (Article 10), and a prohibition on arbitrary detention (Article 19). These protections in the UDHR are spelled out in greater detail in Articles 9-11 and 14-15 of the ICCPR. Of particular interest in an online context is ICCPR Article 15, which states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

In the online context, the Council of Europe’s *Convention on Cybercrime*⁶⁷ establishes standards regarding the collection and interception of online data by law enforcement officials. Although the enumerated safeguards are somewhat vague, the *Convention on Cybercrime* requires that adequate legal procedures be spelled out in each signatory’s domestic legal system (Article 14) and that these legal frameworks,

shall provide for the adequate protection of human rights and liberties, including rights

⁶⁷ Adopted 23 November 2001, entered into force 1 July 2004. Available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>

arising pursuant to obligations it has undertaken under the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, and other applicable international human rights instruments, and which shall incorporate the principle of proportionality. (Article 15(1))

The *Convention on Cybercrime* also suggests that these safeguards should “include judicial or other independent supervision, grounds justifying application, and limitation of the scope and the duration of such power or procedure” (Article 15(2)).

A particular problem which has emerged in the online world is attempts by some governments to transfer responsibility for the imposition of rules on intermediaries, either by making them liable for legal breaches involving their customers or by imposing direct obligations on them to monitor and take action in relation to potentially illegal content or other activities. Imposing restrictions via intermediaries can effectively get around some of the legal remedies that would be available if States tried to impose these same restrictions directly through law.

The 2011 Joint Declaration by the specialised international mechanisms on freedom of expression adverts to this issue, expressing concern about “attempts by some States to deputise responsibility for harmful or illegal content to [Internet intermediaries]”. The Joint Declaration also sets out important standards in this regard, stating:

At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the ‘notice and takedown’ rules currently being applied).⁶⁸

Right to Appropriate Social and International Order for the Internet

The Internet is effectively a borderless place, and should be regulated in a way that respects its international character. While this does not mean that the online world should be treated as a place without jurisdiction, no nation should seek to inappropriate assert control over what has become a shared global asset. Furthermore, although the rules on participation in public affairs articulated in the UDHR are directed mainly at the national level (see section 15, above), the same principles underpin a right to participate at the global governance level, including in respect of the Internet.

The need to maintain the Internet’s international and shared character is well expressed in the Council of Europe’s *Internet Governance Principles*:

2. Multi-stakeholder governance

The development and implementation of Internet governance arrangements should ensure, in an open, transparent and accountable manner, the full participation of governments, the private sector, civil society and the technical community, taking into account their specific

⁶⁸ Clause 2(b).

roles and responsibilities. The development of international Internet-related public policies and Internet governance arrangements should enable full and equal participation of all countries.

...

4. Empowerment of Internet users

Users should be fully empowered to exercise their fundamental rights and freedoms, make informed decisions and participate in the information society, in particular in governance mechanisms and in the development of Internet-related public policy, in full confidence and freedom.

5. Global nature of the Internet

Internet-related policies should recognise the global nature of the Internet and the objective of universal access. They should not adversely affect the global, unimpeded flow of cross-border Internet traffic.⁶⁹

At the moment, global governance of the Internet has been conducted relatively free of State interference. In particular, the United States, whose authority over the Internet Corporation for Assigned Names and Numbers (ICANN) puts them in the best position to potentially exercise inappropriate control over the Internet, has largely refrained from exercising this control. Specifically, the United States Department of Commerce has generally respected the autonomy of ICANN, which is run by an international board with a strong emphasis on consensus and regional diversity.

As we go forward, it is essential that the principle of ultimate accountability to the people of the world, rather than to governments or to political blocs, should be respected. Unfortunately, the often highly politicised environment which dictates the manner in which the UN functions, render that forum less than optimum for governance of the Internet. Until a solution can be found which is able to ensure direct and global public accountability, the best solution is probably to maintain the current arrangements which have functioned satisfactorily, albeit imperfectly.

Duties and Responsibilities on the Internet

Article 29(1) of the UDHR states:

Everyone has duties to the community in which alone the free and full development of his personality is possible.

The rest of this article provides for certain limitations on the rights and freedoms proclaimed in the UDHR. The ICCPR does not follow this approach and, instead, authorises States to impose limited restrictions on only certain rights. The rules regarding restrictions on freedom of expression, for example, are outlined in Section 5 above. This approach is widely considered to be more consistent with the idea that it is States that bear primary responsibility for the implementation of human rights,

⁶⁹ Council of Europe, 2011 Internet Freedom Conference, *From Principles to Global Treaty Law?* (2011). Available at: <http://www.coe.int/t/dghl/standardsetting/media-dataprotection/conf-internet-freedom/Internet%20Governance%20Principles.pdf>.

even if this sometimes involves an obligation to put in place systems and rules that prevent individuals from abusing the rights of others (for example, in the form of rules banning hate speech).⁷⁰

The 2011 Joint Declaration takes a clear position on at least one aspect of this issue in respect of Internet intermediaries, calling for clear limitations on the liability of such intermediaries. Imposing liability is problematical because it effectively incentivises undue control by intermediaries over content on the Internet, to the detriment of freedom of expression. In practice, where intermediaries bear liability, they are likely to remove even potentially offending content, rather than take the risk of suffering legal consequences. The Joint Declaration therefore calls on States to protect intermediaries from liability for Internet content which they merely host or transmit, stating:

No 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').

⁷⁰ The African Charter, however, goes even further than the UDHR, including Chapter 11, on 'Duties', which outlines extensive duties for individuals.