

Standards for a Free, Open, and Inclusive Internet



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Standards for a Free, Open and Inclusive Internet

Office of the Special Rapporteur for Freedom of
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Edison Lanza
Special Rapporteur for Freedom of Expression



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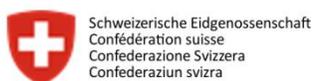
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INTRODUCTION

INTRODUCTION

1. The Office of the Special Rapporteur for Freedom of Expression of the IACHR has acknowledged that the Internet is a unique instrument with which to extend the enormous potential of human rights and, in particular, the right to freedom of expression, to broad sectors of the public.¹
2. The growing expansion of the web throughout the world, and especially in the Americas, makes it an indispensable instrument for the full exercise of human rights and contributes to the achievement of increasing levels of social benefits and inclusion.² In order for the benefits of the Internet and other communications technology to be distributed inclusively and sustainably among the population, the relevant policies and practices must be based on respecting and guaranteeing human rights—especially the right to freedom of expression, which facilitates and enables the exercise of other rights on the Internet. In the words of the United Nations General Assembly, “progress towards the vision of the World Summit on the Information Society should be considered not only as a function of economic development and the spreading of information and communications technologies but also as a function of progress with respect to the realization of human rights and fundamental freedoms.”³
3. In its report on *Freedom of Expression and the Internet (2013)*, the Office of the Special Rapporteur noted that the Internet’s unprecedented potential for the right to freedom of expression is mainly due to its “multidirectional and interactive nature, its speed, and its global scope at a relatively low cost, as well as its decentralized and open design.”⁴ The Office of the Special Rapporteur also affirmed that “the Internet also

¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013.

² United Nations. Human Rights Council. Resolution about the promotion, protection and enjoyment of human rights on the Internet. UN Doc. A/HRC/32/L.20. 1 July 2016. Available at: [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A.HRC.32.2_AUV.doc&action=default&DefaultItemOpen=1](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A.HRC.32.2_AUV.doc&action=default&DefaultItemOpen=1); United Nations. General Assembly. Resolution 70/125. Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society. UN Doc. A/RES/70/125. 1 February 2016. Para. 9. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/125.

³ United Nations. General Assembly. Resolution 70/125. Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society. UN Doc. A/RES/70/125. 1 February 2016. Para. 9. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/125.

⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 36.

serves as a platform for fulfilling other human rights, such as the right to participate in cultural life and enjoy the benefits of scientific and technological progress (article 14 of the Protocol of San Salvador), the right to education (article 13 of the Protocol of San Salvador), the right to assembly and association (articles 15 and 16 of the American Convention), political rights (article 23 of the American Convention), and the right to health (article 10 of the Protocol of San Salvador), among other rights.”⁵

4. The Office of the Special Rapporteur has underscored that the right to freedom of expression, in particular, is fully applicable to communications, ideas, and information that is disseminated and accessed through the Internet.⁶ Along the same lines, the UN Human Rights Council reaffirmed that “the same rights that people have offline must also be protected online.”⁷
5. This report draws from the standards developed on the 2013 *Report on Freedom of Expression and the Internet*, broadening its analysis to the new challenges faced in the exercise of human rights online, particularly freedom of expression. The document reviews current principles and summarizes the Inter-American case law and the advances made throughout the world, with the understanding that the right to freedom of expression is instrumental to the exercise of human rights on the Internet. Because of this, the standards on this subject shed light on the analysis of other, interrelated rights. The aim of this report is to assist the member States in their efforts to incorporate a human rights-based focus in the design, development, and implementation of policies affecting the Internet.

⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 36.

⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 2.

⁷ United Nations. Human Rights Council. Resolution about the promotion, protection and enjoyment of human rights on the Internet. UN Doc. A/HRC/32/L.20. 1 July 2016. Available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A.HRC.32.2_AUV.doc&action=default&DefaultItemOpen=1

CHAPTER I
GUIDING PRINCIPLES

GUIDING PRINCIPLES

6. The relevance of the Internet as a platform for the enjoyment and exercise of human rights is directly tied to the architecture of the web and its governing principles, including the principles of openness, decentralization, and neutrality.⁸ On the thematic report on *Freedom of Expression and Internet*, the Office of the Special Rapporteur recognized that the original and special characteristics of the Internet should be taken into account before making any regulation that would affect its architecture or interaction with society. Accordingly, the Office of the Special Rapporteur emphasized that the digital environment should develop according to certain guiding principles that inform the State's work, the development of public policies, and the actions of private parties, which include equal conditions of access, pluralism, nondiscrimination and privacy.⁹ Net neutrality and multi-stakeholder governance were also recognized as transversal components of these guiding principles.

7. The principle of universal access “refers to the need to guarantee connectivity and access to the Internet infrastructure and other ICT services that is universal, ubiquitous, equitable, truly affordable, and of adequate quality, all throughout the State's territory”.¹⁰ In other words, the Internet must maintain its intrinsically accessible character. This principle should be interpreted so as to derive the following consequences: steps should be taken to progressively promote universal access not only to infrastructure but also the technology necessary for its use and to the greatest possible amount of information available on the Internet; to eliminate arbitrary barriers to access to infrastructure, technology and information online, and to adopt measures of positive differentiation to allow for the effective enjoyment of this right for individuals or communities who face marginalization and discrimination.¹¹ Likewise, the Office of the Special Rapporteur has recognized that, according to this principle, closing the "digital divide" goes hand-in-hand with the need for States to

⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 11.

⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 14.

¹⁰ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 16.

¹¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 16.

- ensure that private parties do not erect disproportionate or arbitrary barriers to Internet access or use of its principal services.¹²
8. Pluralism and diversity, as essential conditions for public debate and the exercise of freedom of expression, must be preserved in the digital era. The Office of the Special Rapporteur has emphasized that this means ensuring that changes are not made to the Internet that result in a reduction in the number of voices and amount of content available. Public policies on these subjects should protect the multidirectional nature of the Internet and promote platforms that allow for the search for and circulation of information and ideas of all kinds, without regard to borders, pursuant to the terms of article 13 of the American Convention.¹³
 9. Likewise, the Office of the Special Rapporteur recognized that in the digital era, the principle of nondiscrimination requires States to guarantee that all persons – especially those belonging to vulnerable groups or who express criticism with regard to matters of public interest – are able to disseminate content and information under equal conditions.¹⁴
 10. The Office of the Special Rapporteur stressed that privacy should also be a guiding principle in the digital era. The right to privacy, according to which “no one may be object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence”, is a condition for the exercise of freedom of expression on line that must be protected by law and rigorously promoted in public policy.¹⁵ This is closely linked to the State’s obligation to create a safe environment for the exercise of freedom of expression, as violation of communication privacy has a chilling effect and hampers the full exercise of the right to communication.¹⁶
 11. In addition to the principles of universal access, pluralism, nondiscrimination and privacy, the principle of net neutrality was recognized by the Office of the Special Rapporteur as “a necessary condition for exercising freedom of expression on the Internet pursuant to the terms of article 13 of the American Convention”.¹⁷ The purpose of this principle is to ensure that free access and user choice to use, send,

¹² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 16.

¹³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 18 and 19.

¹⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 20 and 21.

¹⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 130.

¹⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 23.

¹⁷ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 25.

receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference.

12. Internet’s multi-stakeholder governance was also recognized as an important principle. The Office of the Special Rapporteur considered the importance of the multi-stakeholder and democratic processes in Internet governance, in which the principle of strengthened cooperation ensures that all relevant points of view can be taken into account and no actor can assume its regulation exclusively.¹⁸
13. Similarly, the United Nations Organization for Education, Science and Culture (UNESCO) endorsed the concept of “Internet universality” as an integrative model for the development of the Internet in the service of the public interest and proposes four guiding principles for promoting the regulation and development of the Internet in order to continue building the knowledge society: (i) human rights-based (and therefore, free); (ii) openness; (iii) accessibility; and (iv) multi-stakeholder participatory. The four principles can be summarized by the mnemonic R – O – A – M (Rights-based, Open, Accessible, Multi-stakeholder driven).¹⁹
14. According to this characterization of the Internet, the first dimension of “Internet universality” is to respect international norms on the protection and promotion of human rights and guarantee the three-part test of legality, necessity, and proportionality in the implementation of permissible limitations on human rights online. UNESCO emphasized that “an Internet that failed to uphold human rights would be far from being a case of ‘Internet Universality,’ and would also be incompatible with the Post-2015 Sustainable Development Agenda.”²⁰
15. The general principle of openness highlights the technical standards, such as interoperability and open application interfaces, “and the absence of closure that might otherwise be imposed through exclusionary licensing regimes or protectionist limitation on the provision of services that artificially favor monopolies or archaic technological platforms.”²¹ Political and social support for open systems, not only in technical knowledge, are part of this principle—and it is through this principle that innovation is encouraged and decentralization is maintained online. UNESCO affirmed that “openness also points to the importance of open source software, open data, and open educational resources, as part of the positive make-up of the Internet.”²²
16. Accessibility means that Internet access is ubiquitous, attainable, nondiscriminatory, high-quality, and low-cost. UNESCO underscored the dual dimension of Internet users as recipients or beneficiaries of information and content but also as producers of

¹⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#), Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 177-180.

¹⁹ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013.

²⁰ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 7.

²¹ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 7.

²² UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 7.

content, services and applications. Emphasis is therefore placed not only on the available infrastructure but also on the promotion of capacity, multilingualism, and digital literacy. Finally, UNESCO recognized two other dimensions of access: one linked to the development of “sustainable and reliable business models are able to finance universal access and further ensure accessibility through the sustenance of a diverse range of content and services,” and the other linked to confidence in the Internet with respect to such issues as the security and authenticity of data.²³

17. UNESCO also recognized that the multi-stakeholder governance of the Internet ensures the active participation of the representatives of the different interests converging around the development and regulation of the Internet, including States, the private sector, the tech sector, civil society, and the academic sector, as well as—essentially—Internet users.²⁴ The multi-stakeholder driven aspect helps to build shared norms that ensure the global nature of the Internet and mitigate violations or abuses of this important resource.²⁵
18. There is an international consensus and a commitment to the need to promote universal access to the Internet as an essential means for the effective exercise of human rights online, particularly freedom of expression; and the multi-stakeholder governance of the Internet as a guarantee for the development of technologies respectful of human rights. The right to equality and nondiscrimination intersects with the abovementioned principles, as well as the analysis of all of the rights that are exercised on or through the Internet. The Office of the Special Rapporteur will develop some of the essential aspects of these guiding principles.

A. Free and Open Internet

19. The concept of openness and internet freedom is based on the development of technical standards such as inter-operability, open application interfaces, open documents, text and data, as well as on the absence of limitations or obstacles that artificially favor monopolies or archaic platforms.²⁶ One of the pillars that guarantees Internet freedom and openness is the principle of net neutrality.
20. The 2011 Joint Declaration on Freedom of Expression and the Internet holds that “There should be no discrimination in the treatment of Internet data and traffic, based

²³ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 8.

²⁴ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 9.

²⁵ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 9. September 2013. Also see, [NETmundial’s Multistakeholder Statement](#). The Statement highlights the importance of a permissionless innovation environment for the future of the Internet. According to the text: “The ability to innovate and create has been at the heart of the remarkable growth of the Internet and it has brought great value to the global society. For the preservation of its dynamism, Internet governance must continue to allow permissionless innovation through an enabling Internet environment, consistent with other principles in this document.” April 24th, 2014.

²⁶ UNESCO. [Internet Universality: A Means Towards Building Knowledge Societies and the Post-2015 Sustainable Development Agenda](#). 2 September 2013. Page 7.

on the device, content, author, origin and/or destination of the content, service or application.”²⁷

21. The principle of neutrality is an Internet design principle, whereby the use of networks is maximized and all “data packets” are treated equally, without distinction of any kind. It follows that we can refer to a “dumb network” online that is specialized at both ends—the content or the application is created on one end, is transferred through the network in different packets, without discrimination, and the content or application is reassembled at the destination point.
22. As the Office of the Special Rapporteur for Freedom of Expression has maintained, net neutrality is a necessary condition for the exercise of freedom of expression, and intersects with the guiding principles.²⁸ The purpose of this principle is to ensure that free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference.²⁹
23. The States must guarantee the operation of this principle through appropriate laws.³⁰ Several countries in the region have already enacted laws establishing the principle of net neutrality: Argentina³¹, Brazil³², Chile³³ and Mexico.³⁴ The Federal Communications Commission (FCC) of the United States also recently endorsed the principle of net neutrality,³⁵ and the National Telecommunications Commission of Paraguay has done the same.³⁶

²⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

²⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 25.

²⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 25.

³⁰ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 26.

³¹ República de Argentina. Ley 25.078 Argentina Digital. Boletín Oficial No. 33.034. December 19, 2014. Articles 1, 56 and 57. Available at: https://www.enacom.gob.ar/ley-27-078_p2707

³² República Federativa de Brasil. Ley No. 12.965. Marco Civil de Internet. April 23, 2014. Article 9. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/12965.htm

³³ República de Chile. Ley 20.453 que consagra el principio de neutralidad en la red para los consumidores y usuarios de internet. August 20, 2010. Articles 1 and 24H. Available at: <https://www.leychile.cl/Navegar?idNorma=1016570>

³⁴ Estados Unidos Mexicanos. Ley Federal de Telecomunicaciones y Radiodifusión. Diario Oficial de la federación. July 14, 2014. Article 145. Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5352323&fecha=14/07/2014

³⁵ United States of America. Federal Communications Commission. Protecting and Promoting the Open Internet. 80 FR 19737. July 14, 2014. Article 145. Available at: <https://www.federalregister.gov/articles/2015/04/13/2015-07841/protecting-and-promoting-the-open-internet>

³⁶ República de Paraguay. Comisión Nacional de Telecomunicaciones. Resolución 190/2009. March 11, 2009. Article 26.

24. The FCC’s policy on net neutrality bans three specific practices that “invariably harm the open internet.” The order prevents internet service providers (ISPs) from blocking or restricting what people can do or see online; it prevents throttling, specifically prohibiting the degrading of traffic based on source, destination, or content; finally, it precludes paid prioritization.³⁷ The decision to protect net-neutrality, or the equal treatment of all internet traffic, also classifies broadband internet as a public utility. This allows the FCC to regulate broadband internet similarly to telephone services and other utilities and in turn, allows the FCC greater authority to enforce net neutrality. The United Nations Special Rapporteur on freedom of opinion and expression said that “this decision marks a real victory for freedom of expression and access to information in the United States”.³⁸
25. The principle of net neutrality, however, may be subject to exceptions. The Office of the Special Rapporteur for Freedom of Expression maintained in 2013 that there should be no discrimination, restriction, blocking, or interference in the transmission of Internet traffic, “unless strictly necessary and proportional in order to preserve the integrity and security of the network; to prevent the transmission of online content at the express request - free and not incentivized - of the user; and to temporarily and exceptionally manage network congestion.”³⁹ The European Commission’s proposal for the regulation of the European single market for electronic communications recognizes that “Reasonable traffic management encompasses prevention or impediment of serious crimes, including voluntary actions of providers to prevent access to and distribution of child pornography.”⁴⁰
26. The Committee of Ministers of the Council of Europe, for its part, has stated that the rules on neutrality “should apply irrespective of the infrastructure or the network used for Internet connectivity.”⁴¹ The Charter of Human Rights and Principles for the Internet establishes that “Access includes freedom of choice of system, application and software use. To facilitate this and to maintain interconnectivity and innovation, communication infrastructures and protocols should be interoperable, and standards should be open.”⁴² This gives all people the ability to innovate on the Internet, creating content, applications, and services in a decentralized manner, without the

³⁷ United States of America. Federal Communications Commission. Protecting and Promoting the Open Internet. 80 FR 19737. April 13, 2015. Available at: <https://www.federalregister.gov/articles/2015/04/13/2015-07841/protecting-and-promoting-the-open-internet>

³⁸ United Nations Office of the High Commissioner for Human Rights. *“A real victory for freedom of expression” – UN rights expert hails US move to keep Internet open.* February 27, 2015.

³⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 30.

⁴⁰ European Commission. [Regulation Framework of the electronic communications.](#) Regulation of the European Parliament and the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012. 11 September 2013. Page 27.

⁴¹ European Commission. [Committee of Ministers. Declaration of the Committee of Ministers on network neutrality.](#) 29 September 2010. Point 4.

⁴² Internet Rights and Principles Coalition. [The Charter of Human Rights and Principles for the Internet.](#) 2015. Point 1.b.

need for authorizations, bureaucracies, or permits.⁴³ It adds that, “Open standards and open formats must be made available. Free and Open Source Software (FOSS) must be used, promoted and implemented in public and educational institutions and services. When a free solution or open standards do not exist, the development of the needed software shall be promoted.”⁴⁴

27. The Office of the Special Rapporteur has echoed the above, stating that “Users have the right to connect to or use the Internet, according to their choice, with any type of compatible device, as long as the devices do not adversely affect the network or the quality of service.”⁴⁵
28. Transparency in the terms of network management is fundamental to ensuring the principle of net neutrality.⁴⁶ The 2011 Joint Declaration on Freedom of Expression and the Internet establishes that “Internet intermediaries should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.”⁴⁷
29. As part of the discussion on net neutrality, a new and controversial debate arose in 2015 regarding zero-rating plans. Zero-rating plans allow Internet service providers to provide access to specific applications without that access being charged as an expenditure in the end-user’s data plan. Zero-rating plans exist in different countries of the region, including Chile, Colombia, Brazil, Ecuador, Panama, and Paraguay.⁴⁸ Scholarly opinion is divided with respect to the impact of zero-rating plans on net neutrality. Without prejudice to the policy that each State adopts with regard to this issue, it bears noting that in no case will States be able to replace their policies of universal access to the Internet with zero-rating plans or policies.
30. The stated objective of some zero-rating plans is to bridge the digital divide and promote Internet access among persons not currently connected, temporarily providing them with restricted access to the Internet without any additional charges to their telephone service plan. Although zero-rating plans or policies may be considered acceptable in some States as part of a wider strategy to increase access, simply replacing access policies with zero-rating policies is incompatible with the

⁴³ Internet Rights and Principles Coalition. [The Charter of Human Rights and Principles for the Internet](#) 2015. Point 1.b.

⁴⁴ Internet Rights and Principles Coalition. [The Charter of Human Rights and Principles for the Internet](#) 2015. Point 11.f.

⁴⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 29.

⁴⁶ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

⁴⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

⁴⁸ See, for example, Derechos Digitales, Coding Rights y APC. [Latin America in a Glimpse](#). 2015. Page 3.

development goals of the United Nations, and with the obligation of States to promote and protect individual human rights on the Internet.

31. In all cases, zero-rating policies must be evaluated in light of the legal regulations of each State, assessing the compatibility of those policies with the terms of the rules that govern and regulate net neutrality, and are incompatible in those jurisdictions where net neutrality establishes the express prohibition against discriminating among applications or content based on price. The compatibility of such measures or plans with human rights will have to be measured in light of the legality, necessity, and proportionality test. States that allow for zero-rating plans to be offered should monitor their functionality and periodically evaluate their compatibility with human rights. In addition, those States should pay special attention to the data and privacy protection systems of those plans, addressing the risks that those plans create as a result of the centralization of user data and information.

B. Access

32. Access to the Internet is a condition *sine qua non* for the effective exercise of human rights today, especially including the rights to freedom of expression and opinion, association and assembly, education, health, and culture discussed in this report.⁴⁹ Given its nature as a crucial means for the full exercise of specific rights, Internet access must be universally guaranteed by taking measures to bridge the digital divide, promoting infrastructure development policies, and protecting the quality and integrity of service at all times, establishing explicit prohibitions against arbitrary blocks (partial or total), and slow-downs.
33. Currently, and in spite of the commitment and efforts undertaken by the States of the region to bridge the digital divide,⁵⁰ one-third of the population of the Americas is still not connected to the Internet.⁵¹ The lack of Internet access increases vulnerability and exacerbates inequality, perpetuating exclusion, one danger is that States switch all of the broadcast services to digital without ensuring that all citizens have access to digital services. This is most likely to impact upon poor, isolated and remote communities who can therefore be doubly disadvantaged by losing access to all communication services, not just digital ones.
34. In the words of the United Nations Rapporteur on Freedom of Opinion and Expression, the digital divide “refers to the gap between people with effective access

⁴⁹ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011. (The Declaration maintains that the States must promote Internet access as a means to guarantee rights, particularly freedom of expression).

⁵⁰ OAS. General Assembly. Declaration of Santo Domingo. Governability and Development in the Knowledge Society . OEA Doc. AG/DEC. 46 (XXXVI-O/06). July 6, 2006. Para. 21. See also: United Nations. General Assembly. Resolution 70/125. Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society. UN Doc. A/RES/70/125. 1 February, 2016. Para. 9.

⁵¹ International Telecommunications Union. [ICT Facts and Figures 2016](#). June 2016.

to digital and information technologies, in particular the Internet, and those with very limited or no access at all.”⁵²

35. The States should take actions to progressively promote universal access to the Internet – understood as access not only to the infrastructure but also to the technology needed for its use – and to the largest possible amount of information available on the web; eliminate arbitrary barriers to access to infrastructure, technology, and information online; and take positive differentiation measures to allow for the effective enjoyment of this right for individuals or communities who face marginalization and discrimination.⁵³ The Office of the Special Rapporteur for Freedom of Expression has stated that the States should guarantee connectivity and access to the Internet infrastructure and other ICT services that is universal, ubiquitous, equitable, truly affordable, and of adequate quality, all throughout the State’s territory.”⁵⁴ The 2011 Joint Declaration on Freedom of Expression and the Internet stressed that the regulations to be adopted should seek to ensure that pricing structures are inclusive, so as not to hinder access; that connectivity be extended throughout the country to effectively promote access for rural users and excluded communities; that communities have access to community-based information technology centers and other publicly accessible options; and that training and education be reinforced, especially for the poor, rural populations, and the elderly.⁵⁵
36. The Tunis Declaration of Principles from the World Summit on the Information Society, developed within the framework of the United Nations in 2003 and subsequently reaffirmed in various international instruments,⁵⁶ concluded that it is desirable to have “a well-developed information and communication network infrastructure and applications, adapted to regional, national and local conditions, easily-accessible and affordable, and making greater use of broadband and other innovative technologies where possible.”⁵⁷
37. The Office of the Special Rapporteur for Freedom of Expression has underscored that States should devise long-term plans and policies to develop the necessary physical

⁵² United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 61.

⁵³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 15.

⁵⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 15.

⁵⁵ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011. See also: IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 11.

⁵⁶ See, for example: United Nations. General Assembly. Resolution 70/125. [Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society](#). UN Doc. A/RES/70/125. 1 February, 2016. Para. 9

⁵⁷ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. 12 December 2003. Para. 22.

- infrastructure to prevent the arbitrary exclusion of certain sectors and create broadband plans and measures that enable the development of mobile Internet.⁵⁸This should include the development of more internet exchange points. These allow internet service providers and content delivery networks to exchange traffic locally rather than through upstream (and often remotely located points). This reduces costs, provides greater flexibility and quicker speeds (reducing latency considerably).
38. Finally, universal access to the Internet requires States to guarantee the quality and integrity of Internet service, protecting it in all cases from arbitrary blocking, interference, or slowdowns. Interrupting the Internet access of entire populations or segments of the population is never justified, even for national security reasons.⁵⁹ Temporary or partial blocks affect the exercise of human rights online, constituting restrictions to those rights. In examining each right included in this report, we discuss the effect of Internet blocks on the exercise of that right, and the permissible limitations thereto.
39. The application of penalties denying access to the Internet can only be justified when there are no less restrictive means, and provided that such penalties meet the requirements of legality, proportionality, and necessity in a democratic society, and have been ordered by a competent judicial authority.⁶⁰ Along the same lines, the State has the obligation to take measures to ensure that private companies and entities involved in the management and administration of the Internet do not erect disproportionate or arbitrary barriers to that access and that they are governed by transparent rules that allow for the exercise of citizen oversight over their access policies.⁶¹
40. Speed, stability, affordability, language, local content, and accessibility for persons with disabilities are core elements of access, recognized as such by the United Nations General Assembly in its resolution on the review of the implementation of the outcomes of the World Summit on the Information Society.⁶²

⁵⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 45.

⁵⁹ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

⁶⁰ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

⁶¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 17.

⁶² United Nations. General Assembly. [Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society](#). UN Doc. A/70/L.33. 13 December 2015. Para. 28.

a. Digital Literacy

41. The benefits of technological media in the exercise of human rights may materialize to the extent that individuals have access to the Internet. And this Internet access is not satisfied by mere connection to the web; rather, people must have the quality, information, and knowledge needed to be able to make use of this tool and benefit from it.⁶³
42. “Digital literacy” is defined as the “the set of skills, knowledge, and attitudes required by an individual to functionally develop within the information society,”⁶⁴ and its objective is for people to acquire the knowledge and the skills “to use technology efficiently, developing new social and financial opportunities within their social framework.”⁶⁵
43. Differences in individuals’ capabilities to both use and create information and communications technologies represent a knowledge divide that perpetuates inequality.⁶⁶ Digital literacy is an essential process in the guarantee of human rights, and a particularly necessary measure to protect and guarantee the rights to equality and nondiscrimination.
44. The States should make “educational efforts to promote the ability of everyone to engage in autonomous, self-driven and responsible use of the Internet.”⁶⁷ Such measures have a direct impact on the ability of individuals to fully exercise specific rights and to critically evaluate information obtained online. A 2013 UNESCO report indicates that 63 per cent of the region’s countries state that they have public policies designed to offer training courses on computing and information technology.⁶⁸
45. The States must promote and ensure the participation of all sectors of society, including all of the subjects of such measures, in the design and implementation of

⁶³ United Nations. General Assembly. Resolution 66/184. Information and communications technologies for development. UN Doc. A/RES/66/184. 6 February 2012. Available at: <http://www.un.org/en/ga/66/resolutions.shtml>

⁶⁴ Pan American Health Organization. eHealth Conversations. Information Management, Dialogue, and Knowledge towards Universal Access to Health. Washington DC, 2014. Pág. 255. Disponible para consulta en: http://www.paho.org/ict4health/index.php?option=com_content&view=category&layout=blog&id=40&Itemid=272&lang=en. See also, UNESCO. [Digital Literacy in Education](#). Policy Brief. May 2011.

⁶⁵ Pan American Health Organization. eHealth Conversations. Information Management, Dialogue, and Knowledge Exchange towards Universal Access to Health. Washington DC, 2014. Page. 255. Available at: http://www.paho.org/ict4health/index.php?option=com_content&view=category&layout=blog&id=40&Itemid=272&lang=en. See also, UNESCO. [Digital Literacy in Education](#). Policy Brief. May 2011.

⁶⁶ United Nations. General Assembly. [Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society](#). UN Doc. A/70/L.33. 13 December 2015. Para. 23.

⁶⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

⁶⁸ UNESCO. [ICT in Education in Latin America and the Caribbean. A regional analysis of ICT integration and e-readiness](#). 2013. Page. 9.

specific and effective policies on the issue.⁶⁹ In addition, digital literacy must be aimed at all persons without discrimination. The States should take account of the particular characteristics of the persons at whom such policies are directed, adopting a dual focus: 1) it should respond to the characteristics and needs of those who seek and receive information, goods, and services—for instance, a student in a rural area who receives educational material electronically, or a patient who requests an appointment for a medical exam or is notified of the results of an exam by electronic means; 2) it should take account of who offers, produces, administers, or makes use of the information, goods, and/or services—i.e., the teachers, doctors, or laboratories that create new ways of interacting with their students, patients, or the general public through the Internet.⁷⁰ This dual focus on digital literacy encourages the circulation of content, openness, and the decentralization that characterize the Internet and are fundamental to the full exercise of human rights in this sphere.

b. Linguistic Plurality

46. Linguistic plurality is a condition *sine qua non* for the achievement of full access to the Internet under conditions of equality and nondiscrimination. Moreover, plurilingualism is intrinsically linked to the creation of the local content that is so necessary for Internet universality.
47. On this point, the United Nations Special Rapporteur in the field of cultural rights has underscored that “the vastly unequal distribution of published literary works across languages poses a significant barrier to the right to take part in cultural life for linguistic communities not offering a major publishing market.”⁷¹ Although there are online translation services that have been improved in recent years,⁷² they do not provide effective solutions to the problem in question.
48. The Office of the Special Rapporteur for Freedom of Expression has emphasized that “In order for Internet access to constitute an authentic instrument to increase informational pluralism and cultural diversity, it is necessary to guarantee the participation of linguistic minorities, as well as the availability of local content on the Internet. As the Inter-American Court has indicated, the right to freedom of expression necessarily includes the right of individuals to use the language of their choosing to express themselves.”⁷³ States should take measures designed to reduce

⁶⁹ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 66; OAS. General Assembly. Declaración de Santo Domingo. Gobernabilidad y Desarrollo en la Sociedad del Conocimiento. OEA Doc. AG/DEC. 46 (XXXVI-O/06). June 6, 2006. Para. 21.

⁷⁰ See for example, Pan American Health Organization. eHealth Conversations. Information Management, Dialogue, and Knowledge Exchange to Approach Universal Access to Health. Washington DC, 2014. Pág. 255. Disponible para consulta en: http://www.paho.org/ict4health/index.php?option=com_content&view=category&layout=blog&id=40&Itemid=272&lang=en. And, UNESCO. [Digital Literacy in Education](#). Policy Brief. May 2011.

⁷¹ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. 24 December 2014. Para. 68.

⁷² United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/66/290. 10 August 2011. Para. 54.

⁷³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para.

linguistic obstacles in order to make literacy viable and ensure access for all people under equal conditions.⁷⁴ They should also “promote original local and indigenous content on the Internet.”⁷⁵

49. In the development of the knowledge society, the creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority, including all types of content—educational, scientific, cultural or recreational—and they should be accessible.⁷⁶ Accordingly, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has advocated for “the translation of websites into multiple languages, including languages spoken by minorities and indigenous peoples, and their accessibility to persons with disabilities. Allowing people speaking different languages or with disabilities to participate in the same communication platform facilitates a truly global society.”⁷⁷ This is the only way in which the States can ensure that information will be effectively accessible to all persons.

C. Multi-stakeholder Governance

50. The Internet has evolved into a global resource available to the public, and its management must respect that nature.⁷⁸ Indeed, the internet has been and is developed and operated by a series of private companies performing different functions. However its’ character as a communication medium is that of a public space and hence its governance should be guided according to the principles of a public resource rather than simply be a matter for private contracts.
51. The Tunis Agenda defined Internet governance as “the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet,”⁷⁹ and affirmed that such governance should be multilateral, transparent and democratic.⁸⁰ The United Nations General

44, citing, I/A Court H.R., Case of López-Álvarez s. Honduras. Judgment of February 1, 2006. Merits, Reparations and Costs. Series C No. 141. Para. 164.

⁷⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 44, citing, I/A Court H.R., Case of López-Álvarez s. Honduras. Judgment of February 1, 2006. Merits, Reparations and Costs. Series C No. 141. Para. 164.

⁷⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 44, citing, I/A Court H.R., Case of López-Álvarez s. Honduras. Judgment of February 1, 2006. Merits, Reparations and Costs. Series C No. 141. Para. 164.

⁷⁶ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. 12 December 2003. Para. 53.

⁷⁷ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/66/290. 10 August 2011. Para. 85.

⁷⁸ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. 12 December 2003. Para. 48.

⁷⁹ World Summit on the Information Society. [Tunis Agenda for the Information Society](#). Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E. 18 November 2005. Para. 34.

⁸⁰ World Summit on the Information Society. [Tunis Agenda for the Information Society](#). Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E. 18 November 2005. Para. 29.

Assembly has stressed the importance of multi-stakeholder governance at the international level, placing particular emphasis on the balanced participation of developing States and the cooperation of the multiple stakeholders—governments, civil society, international organizations, tech community, academic community—that have characterized the proceedings of the World Summit on the Information Society from its inception.⁸¹

52. The Office of the Special Rapporteur has stated that “in order to make sure that all relevant points of view can be properly considered, the States must ensure the equal participation of all actors relevant to the governance of the Internet, fostering strengthened cooperation among authorities, academia, civil society, the tech community, the private sector, and others, both nationally and internationally.”⁸²
53. The open debate and democratic participation that must characterize the enactment of laws in democratic States take on fundamental importance on the Internet where very diverse interests, opportunities, and capacities converge. Private actors and the tech community play a critical role as developers, administrators, and owners of the infrastructure, platforms, and applications through which people use and develop the Internet.⁸³
54. Technical bodies such as *Internet Corporation for Assigned Names and Numbers* – ICANN- or the *Internet Engineering Task Force* –IETF- have long practiced a multi-stakeholder form of governance with stakeholder groups able to develop policy and submit it to the wider community for agreement. These bodies are essentially concerned with technical problems where achieving rough consensus is possible as it involves identifying the best technical solution to the problem. Global policy issues, which require a balancing of competing interests are more difficult to achieve in a multi-stakeholder setting. Notwithstanding, the development of these public policies should be strengthened to enable the full and balanced participation of all stakeholders, and made by consensus, to the extent possible.
55. Also, the strengthening of local governance forums is essential to the promotion of a reliable and trustworthy Internet. It is particularly important for there to be rich, robust, and plural debates within States on the regulation of human rights, ensuring the participation of particularly affected or vulnerable sectors.
56. Finally, in order to measure the impact of the multi-stakeholder governance of the Internet, and to guarantee that its processes are being observed and its goals are

⁸¹ United Nations. General Assembly. Resolution 70/125. [Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society](#), UN Doc. A/RES/70/125. February 1, 2016. Para. 9.

⁸² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 178.

⁸³ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011.

being fulfilled, it is recommended to assess critical success factors such as inclusiveness, transparency, accountability, legitimacy and effectiveness.⁸⁴

D. Equality and Nondiscrimination

57. Articles 1.1 and 24 of the American Convention establish the rights to equality and nondiscrimination. Article 1.1 of the Convention requires the States to respect and guarantee the free and full exercise of the human rights contained in the Convention “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” Article 24 establishes that “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” Interpreting these provisions, the Inter-American Court has held that article 1.1 establishes the obligation of nondiscrimination with respect to the application and guarantee of the Convention rights and article 24 extends that guarantee of equality and nondiscrimination to the local laws that the States may enact.⁸⁵
58. In accordance with these rights, the States are required to abstain from discriminating in the exercise and guarantee of rights and to take positive measures that enable all persons under their jurisdiction to effectively enjoy and exercise their rights under equal conditions.⁸⁶ This entails the obligation to take administrative, legislative, or any other measures that may be necessary to reverse existing situations of discrimination that keep people from exercising their rights effectively.⁸⁷
59. Access to the Internet—both to the infrastructure and the content circulating on the web—is a key element in combating inequality and guaranteeing the full enjoyment and exercise of the rights to equality and nondiscrimination online.⁸⁸
60. The guarantee of nondiscrimination includes the State’s obligation to address the specific Internet access needs that some particularly vulnerable groups may have. The Office of the Special Rapporteur for Freedom of Expression has stated that “regulatory mechanisms need to be established - including pricing regimens, universal service requirements and licensing agreements - to foment broad access to the Internet, including for vulnerable sectors of society and the most isolated rural areas. For these purposes, all necessary efforts should be made to provide direct support to facilitate access, for example, as mentioned before, through programs to distribute affordable

⁸⁴ For a development on those critical success factors, see Gasser, Urs and Budish, Ryan and West, Sarah Myers, *Multistakeholder as Governance Groups: Observations from Case Studies* (January 14, 2015). Berkman Center Research Publication No. 2015-1. Available at SSRN: <https://ssrn.com/abstract=2549270>.

⁸⁵ I/A Court. *Case Apitz Barbera et al (“Corte Primera de lo Contencioso Administrativo”) v. Venezuela*. Judgment of August 5, 2008. Preliminary Objections, Merits, Reparations and Costs. Serie C No. 182. Para. 209.

⁸⁶ I/A Court. *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005. Preliminary Objections, Merits, Reparations and Costs. Series C No. 127.

⁸⁷ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 230.

⁸⁸ United Nations. General Assembly. Resolution 70/125. [Outcome document of the high-level meeting of the General Assembly on the overall review of the implementation of the outcomes of the World Summit on the Information Society](#), UN Doc. A/RES/70/125. February 1, 2016. Para. 9.

computers and the creation of community information technology centers and other points of public access.”⁸⁹

61. The States must promote and guarantee, for instance, the full participation of women in the knowledge society in order to be able to ensure integration and respect for human rights on the Internet. The States should ensure the participation of women in decision-making processes, and encourage their input in shaping all of the spheres of the information society at the international, regional, and local levels.⁹⁰ Statistics from Internet Governance Forum show that in 2015 only 38 per cent of the participants in the forum were women and in 2016 that percentage rose to 39.6 per cent.⁹¹ The States should take proactive measures to close the gender gap on the Internet and in all aspects of its governance.
62. Similarly, and as established in the Convention on the Rights of Persons with Disabilities (CRPD)⁹² “States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems⁹³ [...]including through the Internet. [And] promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.”⁹⁴
63. The States therefore must consider the promotion of auxiliary technologies for persons with disabilities, with a view to ensuring a more uniform distribution of the benefits of ICT services, and to narrow the digital divide and provide digital opportunities for all.⁹⁵ They should also enact policies to encourage those who provide services on the Internet to adopt formats accessible to persons with disabilities.⁹⁶
64. Internet access is particularly important for persons in vulnerable situations, including the poorest sectors of the population. Without Internet access, persons living in extreme poverty run the risk of remaining excluded, thus perpetuating their marginalization and vulnerability.⁹⁷ The dissemination of information about the

⁸⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 43.

⁹⁰ World Summit on the Information Society. [Tunis Agenda for the Information Society](#). Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E. 18 November 2005. Para. 23.

⁹¹ IGF 2015 Attendance Statistics, available at: <http://www.intgovforum.org/cms/igf-2015-attendance-statistics> and, IGF 2016 Attendance & Programme Statistics, available at: <https://www.intgovforum.org/multilingual/content/igf-2016-attendance-programme-statistics>

⁹² [United Nations Convention on the Rights of Persons with Disabilities](#). Article 21.

⁹³ [United Nations Convention on the Rights of Persons with Disabilities](#). Article 9.1.

⁹⁴ [United Nations Convention on the Rights of Persons with Disabilities](#). Article 9.

⁹⁵ World Summit on the Information Society. [Tunis Agenda for the Information Society](#). Doc. WSIS-05/TUNIS/DOC/6(Rev.1)-E. 18 November 2005. Para. 18.

⁹⁶ [United Nations Convention on the Rights of Persons with Disabilities](#). Article 21, subparagraphs c) and d).

⁹⁷ United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/11/4. 30 April 2009. Para. 53.

needs and issues of the poorest populations “improves understanding and actions aimed at addressing poverty, injustice and inequality and can inform and influence public agendas locally, nationally and internationally.”⁹⁸ Internet access is essential to guarantee the full exercise of these rights, and the States should adopt measures designed to guarantee that access under equal conditions. The Geneva Declaration states with regard to this point that “In disadvantaged areas, the establishment of ICT public access points in places such as post offices, schools, libraries and archives, can provide effective means for ensuring universal access to the infrastructure and services of the Information Society.”⁹⁹ The exercise of these persons’ rights has been facilitated with the emergence of the Internet as a means for disseminating their opinions and problems, thus preventing their exclusion from public debate and enabling them to fully enjoy their y human rights.¹⁰⁰

65. The obligation of equality and nondiscrimination also entails the State’s obligation to guarantee the exercise of individual human rights on the Internet under equal conditions. articles 1.1 and 24 govern both “online” and “offline,” and individuals have the right to exercise their rights to assembly, association, freedom of expression, access to information, freedom of religion, and so on, without discrimination. The Internet is an essential tool for vulnerable communities and communities historically subjected to discrimination to obtain information, assert grievances, make their voices heard, participate actively in public debate, and help shape public policies designed to redress their situation.¹⁰¹
66. Nevertheless, instances of online discrimination against particularly vulnerable groups, including women,¹⁰² children, the LGBTI community, migrants, disabled persons, and others have also been documented. The States must take measures to foster equality and nondiscrimination both “online” and “offline,” prohibiting hate speech that incites violence, documenting instances of discrimination, and promoting tolerance through social programs, training, and education.¹⁰³

⁹⁸ United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/11/4. 30 April 2009. Para. 54.

⁹⁹ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. 12 December 2003. Para. 23.

¹⁰⁰ United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/11/4. 30 April 2009. Para. 55.

¹⁰¹ United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/11/4. 30 April 2009. Para. 62.

¹⁰² United Nations. General Assembly. Resolution 68/181. [Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders](#). UN Doc. A/RES/68/181. 30 January 2014, available at: <http://www.un.org/es/ga/68/resolutions.shtml>; IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015.

¹⁰³ IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015.

67. The rights to equality and nondiscrimination inform the guiding principles that must shape public policy on matters concerning the Internet, as well as each one of the human rights discussed in this report. The obligation to guarantee those rights will require, where appropriate, the adoption of specific positive measures in light of the demands of each right.

CHAPTER II
THE RIGHT TO FREEDOM OF
THOUGHT AND EXPRESSION

THE RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION

A. *The Right to Freedom of Thought and Expression in the Inter-American System*

68. Article 13 of the American Convention on Human Rights¹⁰⁴ defines the right to freedom of thought and expression as the right 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. Clauses 2 to 5 of article 13 provide the applicable limitations and exceptions. Freedom of expression must not be subject to prior censorship or the subsequent imposition of liability.
69. The Inter-American System is the international system that gives the widest scope and breadth to freedom of thought and expression,¹⁰⁵ and is designed to lessen restrictions to the free circulation of information, opinions, and ideas, based on a broad concept of individual autonomy and dignity.¹⁰⁶ According to the Inter-American case law this right is the “cornerstone” of a democratic society, a core element for

¹⁰⁴ American Convention on Human Rights (Pact of San José). Article 13 provides that:

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.

3. The right of expression may not be restricted by indirect methods or means, such 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 tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. 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.

¹⁰⁵ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February 25, 2009. Para. 223.

¹⁰⁶ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February, 25 2009. Para. 224.

advancing development goals,¹⁰⁷ and an indispensable tool for the exercise of other fundamental human rights.¹⁰⁸

70. The Inter-American Commission has underscored the triple function of the right to freedom of expression in a democratic system: a) as an individual right that reflects the human capacity to think about the world from our own perspective and communicate with one another; b) as a means of open and uninhibited deliberation about matters of public interest; c) as an essential instrument for the guarantee of other human rights, including political participation, religious freedom, education, culture, equality, and others.¹⁰⁹
71. The Inter-American Commission and the Court recognize two dimensions of freedom of opinion and expression—individual and societal—¹¹⁰ which are interrelated and must be fully and simultaneously guaranteed.¹¹¹ The States cannot rely on one aspect of the right in order to diminish the other; they must guarantee their exercise comprehensively. Prohibiting or hindering the dissemination of expression is a violation of the right to freedom of expression in both its individual and collective dimensions.¹¹²
72. Article 13 of the American Convention protects not only inoffensive or innocuous expressions but also those that “offend, shock or disturb the State or any other sector of the population,” in the understanding that they are necessary in a democratic, open, plural, and tolerant society.¹¹³ According to the inter-American legal framework, the right to freedom of expression also encompasses and protects

¹⁰⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011.

¹⁰⁸ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 22.

¹⁰⁹ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 224-226.

¹¹⁰ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue. UN Doc. A/HRC/14/23. 20 April 2010. Para. 29.

¹¹¹ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 228, and Inter-American Court of Human Rights. *Case of Palamara-Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135.

¹¹² I/A Court. *Case of Palamara-Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135. Para. 107.

¹¹³ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 232. See also, Inter-American Court of Human Rights, *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107. Para. 113; Inter-American Court of Human Rights. *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*. Judgment of February 5, 2001. Series C No. 73. Para. 69; Inter-American Court of Human Rights. *Case Rios et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194. Para.105; Inter-American Court of Human Rights. *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195. Para. 116; IACHR. Annual Report 1994. Chapter V (Report on the Compatibility of “Desacato” (Contempt) Laws with the American Convention on Human Rights) Title III, OEA/Ser. L/V/II.88. doc. 9 rev. 17 February 1995.

erroneous, mistaken, and false speech, without prejudice to the subsequent liability that may arise as a result.¹¹⁴ The States have the primary obligation to remain neutral with respect to the content of speech, ensuring that there are no people, groups, ideas, or means of expression that are excluded *a priori* from public discourse.¹¹⁵

73. The Inter-American case law underscores three types of speech that are specially protected due to their importance in the exercise of all other human rights or for the consolidation, operation, and preservation of democracy: (a) political speech and speech involving matters of public interest; (b) speech regarding public officials in the performance of their duties and candidates for public office; and (c) speech that is an element of the identity or personal dignity of the person expressing him or herself.¹¹⁶
74. Article 13 of the American Convention provides the general framework of the permissible limitations on freedom of expression.¹¹⁷ Based on this provision, the case law of the Inter-American System has developed a “three-part test”¹¹⁸ which requires that the limitation must be: 1) clearly and precisely defined in a law, both substantively and procedurally, and must serve compelling objectives authorized by the Convention; 2) necessary and appropriate in a democratic society to accomplish the compelling objectives pursued; and 3) strictly proportionate to the objective pursued.¹¹⁹ In addition, the subsequent liability arising from the abuse of freedom of expression must always be ordered by an independent and impartial judge or court authority, respecting due process guarantees. These measures must in all cases be proportionate;¹²⁰ they must not be discriminatory or have discriminatory effects, and they cannot constitute censorship by indirect means, which is specifically prohibited by article 13.3 of the American Convention.¹²¹
75. The IACHR discourage the use of the criminal law to criminalize speech, and promotes the implementation of alternative measures such as the right of reply, and the

¹¹⁴ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 228.

¹¹⁵ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 231.

¹¹⁶ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 232.

¹¹⁷ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 242.

¹¹⁸ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 244.

¹¹⁹ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 245.

¹²⁰ Inter-American Court of Human Rights. *Case Kimel V. Argentina*. Judgment of May 2, 2008. Series C No. 177; Inter-American Court of Human Rights. *Case Palamara-Iribarne V. Chile*. Judgment of November 22, 2005. Series C No. 135; and Inter-American Court of Human Rights, *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004, Series C No. 107.

¹²¹ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 251.

- imposition of subsequent liability in the form of proportionate civil penalties, especially cases involving public servants and specially protected speech. In those cases, “actual malice,” understood as the publication of erroneous or defamatory content with knowledge that it was false or inaccurate, must also be proven.¹²²
76. Principle 10 of the Declaration of Principles of Freedom of Expression, adopted by the Inter-American Commission on 2000, states that “[p]rivacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news”.
77. In all cases, the imposition of subsequent civil liability must be proportionate in order to prevent a chilling effect on freedom of expression, and must be designed to redress the harm actually caused, rather than as a punitive mechanism.¹²³ Disproportionate civil penalties have the potential to affect the speaker’s personal and family life as much as or even more than criminal penalties, creating an intimidating and chilling effect that has repercussions not only on the speaker but also on the entire community.¹²⁴
78. There are certain types of speech that are excluded from the scope of protection of the right to freedom of expression: 1) war propaganda and the advocacy of hatred that constitutes the incitement of violence; 2) the direct and public incitement of genocide; and 3) child pornography.¹²⁵
79. In its report on *Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, the Office of the Special Rapporteur underscored that article 13(5) requires the States to enact laws punishing the advocacy of hatred that constitutes the incitement of violence or any other similar action.¹²⁶ It clearly distinguishes this type of speech from other expressions that do not strictly amount to the “incitement of violence” and therefore would fall not within the scope of that clause but rather under 13(2), which protects the reputation and

¹²² IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 261.

¹²³ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. [Joint Declaration about Censorship by Killing and Defamation](#). 2000.

¹²⁴ I/A Court. *Case Tristán Donoso v. Panamá*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193. Para. 129.

¹²⁵ IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. 25 February 2009. Para. 261.

¹²⁶ IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 18.

rights of others.¹²⁷ According to the consistent case law of the Inter-American Court and the Commission, the States may impose pecuniary and non-pecuniary reparations or other alternative measures in cases involving expressions that do not constitute the incitement of violence, but the criminalization of this type of speech is not considered advisable.¹²⁸

B. Internet and Freedom of Expression

80. Internet exponentially facilitates the exercise of freedom of expression in all of its dimensions, diversifying and multiplying the media and the audience (potentially global), decreasing costs and time,¹²⁹ and offering unparalleled conditions for the innovation and exercise of other fundamental rights.¹³⁰
81. The main impact of the internet on freedom of expression is the way in which it increases the ability to receive, seek and impart information. It enables the collaborative creation and sharing of content – it is world where anyone can be an author and anyone can publish and it helps them communicate, collaborate and exchange views and information. This represents, the ‘democratization’ of freedom of expression as public speech is no longer moderated by professional journalists or gatekeepers. In this way the internet has become a powerful democratizing force, transforming freedom of expression by creating: new capacities to create and edit content (across physical boundaries), often bypassing censorship controls, which creates new possibilities for realizing human potential; new abilities to organize and mobilize (strongly underpinning other rights such as the right to freedom of association); and new possibilities to innovate and generate economic development (underpinning social and economic rights).
82. The Inter-American Commission has maintained for more than a decade that “the right to freedom of expression in the terms established by article 13 of the American Convention equally protects both traditional media and the widespread expression via Internet.”¹³¹
83. The Joint Declaration on Freedom of Expression and the Internet contains the general principle that “Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that

¹²⁷ IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 18.

¹²⁸ IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 14 to 19.

¹²⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 36.

¹³⁰ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 2.

¹³¹ IACHR. [Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, “la Nación” Mauricio Herrera Ulloa and Fernan Vargas Rohrmoser](#). 28 January 2002. Para. 97.

they are provided for by law, and that they are necessary to protect an interest which is recognized under international law (the ‘three-part’ test).¹³²

84. Given the particular characteristics of the Internet in terms of its multidirectional and interactive nature, its speed and global reach at a relatively low cost, and its decentralized and open design principles, Internet access has acquired an unprecedented potential for the effective realization of the right to seek, receive, and disseminate information.¹³³ In order to be able to ensure the effective and universal enjoyment of the right to freedom of expression, the States should take measures to progressively ensure that all persons have access to the Internet,¹³⁴ in addition to taking measures to prevent the total or partial blocking or limitation of Internet access.¹³⁵ The Internet has a significant impact on the social dimension of freedom of expression.
85. Any restrictions on the operation of websites, blogs, applications or any other Internet-based electronic or other such information dissemination system, including support systems, such as ISPs or search engines, are permissible only to the extent that they are compatible with the conditions provided for the curtailment of freedom of expression.¹³⁶
86. The Office of the Special Rapporteur has observed with concern how some countries in the region have been resorting to the blocking of specific websites or applications for different reasons – and even with a judicial order–, with little or no regard to the implications of such measures on the right to freedom of expression online.¹³⁷
87. The Joint Declaration on Freedom of Expression and the Internet, states that forcing the blocking or suspension of entire websites, platforms, channels, IP addresses, domain name extensions, ports, network protocols, or any other kind of application,

¹³² 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

¹³³ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

¹³⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 37.

¹³⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 37.

¹³⁶ United Nations. Human Rights Committee. [General Comment No. 34 – Article 19: Freedom of opinion and expression](#). UN Doc. CCPR/C/GC/34. 12 September 2011. Para. 43.

¹³⁷ Brazilian courts, for example, have ordered the blocking of Whatsapp due to claims that the company has failed to comply with judicial orders requesting access to communication between users and user’s data. See, IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter II (Evaluation of the Situation of Freedom of Expression in the Hemisphere) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 264.

as well as measures intended to eliminate links, information and websites from the servers on which they are stored, all constitute restrictions that are prohibited and exceptionally admissible only strictly pursuant to the terms of article 13 of the American Convention.¹³⁸ The Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda indicates that these measures "can only be justified where it is provided by law and is necessary to protect a human right or other legitimate public interest, including in the sense of that it is proportionate, there are no less intrusive alternative measures which would protect the interest and it respects minimum due process guarantees."¹³⁹

88. The Office of the Special Rapporteur has indicated that "[i]n exceptional cases of clearly illegal content or speech that is not covered by the right to freedom of expression (such as war propaganda and hate speech inciting violence, direct and public incitement to genocide, and child pornography) the adoption of mandatory measures to block and filter specific content is admissible. In these cases, the measure must be subjected to a strict balance of proportionality and be carefully designed and clearly limited so as to not affect legitimate speech that deserves protection. In other words, filtration or blocking should be designed and applied so as to exclusively impact the illegal content without affecting other content. The measures must be authorized or put in place pursuant to the appropriate procedural guarantees, in the terms of articles 8 and 25 of the American Convention. In this regard, the measures should only be adopted after the illegal content to be blocked has been fully and clearly identified, and when necessary to achieve a pressing aim. In any case, these measures must not be applied to legal content."¹⁴⁰
89. Restrictive measures should at all times include safeguards to prevent abuse, such as transparency with regard to the content whose removal has been ordered, as well as detailed information regarding the measures' necessity and justification. At the same time, a measure of this kind should be adopted only when it is the only measure available for achieving an imperative end and is strictly tailored to achieve it.¹⁴¹

¹³⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 84; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#). ^{Point 3 (a)}; IACHR. [Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II. Doc. 51. December 30, 2009. Para. ¹⁴⁹; IACHR. [Annual Report 2010](#) ^{Volume I. Chapter IV (Human Rights Developments in the Region)}. OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. ^{Para. 822}.

¹³⁹ 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. [Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda](#). March 2017.

¹⁴⁰ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 85 and 86.

¹⁴¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 87; ^{IACHR.} [Annual Report 2010](#) ^{Volume I. Chapter IV (Human Rights Developments in the Region)}. OEA/Ser.L/V/II. Doc. 5, rev. 1. March 7, 2011. ^{Para. 822}; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights

90. In the case of *Cengiz et al. v. Turkey*,¹⁴² the European Court of Human Rights held that the blocking of a You Tube page for a lengthy period of time was a violation of the rights of users, in this case university professors and academics, to receive and impart information and ideas. The Court took account of the violation of the social dimension of freedom of expression, highlighting that the blocked platform allowed for the transmission of information of specific interest, particularly on political and social issues. It further held that there was no law that would allow local Turkish courts to impose general blocks on access to the Internet (in this case, to You Tube).
91. The Office of the Special Rapporteur has emphasized that at no time can an *ex ante* measure be put in place to block the circulation of any content that can be assumed to be protected. Content filtering systems put in place by governments or commercial service providers that are not controlled by the end-user constitute a form of prior censorship and do not represent a justifiable restriction on freedom of expression.¹⁴³
92. Measures to block content cannot be used to control or limit the circulation of speech that is specially protected or is assumed to be protected when that assumption has not been contradicted by a competent authority that provides sufficient guarantees of independence, autonomy and impartiality, pursuant to the above-mentioned terms.¹⁴⁴ In this regard, it should be noted that systems for blocking and filtering Internet content frequently block legitimate websites and content. Some governments have used them to prevent their populations from accessing information that is fundamentally in the public's interest but that governments are interested in hiding.¹⁴⁵

(ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#).^{Point 1 (a) (b) and 3 (a)} UN Special Rapporteur for Freedom of Opinion and Expression and IACHR-OAS Special Rapporteur on Freedom of Expression. January 20, 2012. [UN and IACHR Special Rapporteurs for Freedom of Expression Joint Declaration about Free Speech on the Internet](#).

¹⁴² European Court of Human Rights. [Case Cengiz et Autres v.Turquie](#). Petitions no. 48226/10 and 14027/11. 1 December, 2015.

¹⁴³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 88; United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. June 1, 2011. [Joint Declaration on Freedom of Expression and the Internet](#).^{Point 3 (b)} UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and OAS Special Rapporteur on Freedom of Expression. December 21, 2005. [Joint Declaration on the Internet and on Anti-Terrorist Measures](#); UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. December 21, 2010. [Joint Statement On Wikileaks](#). Point 5.

¹⁴⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 88; United Nations. General Assembly.^{Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,} Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 70. Available for consultation at: http://ap.ohchr.org/documents/dpage_e.aspx?m=85

¹⁴⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 89; United Nations. Human Rights Committee. [Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee](#). CCPR/C/IRN/CO/3. November 29,

93. With regard to subsequent liability for speech disseminated on the Internet, the Office of the Special Rapporteur for Freedom of Expression has maintained that the criminalization or aggravation of penalties merely because the speech in question was disseminated through the Internet would be unacceptable.¹⁴⁶ The Joint Declaration on Freedom of Expression and the Internet additionally states that, with respect to civil liability, “Standards of liability, including defenses in civil cases, should take into account the overall public interest in protecting both the expression and the forum in which it is made (i.e. the need to preserve the ‘public square’ aspect of the Internet).”¹⁴⁷ Following the decisions of the Inter-American System in these cases, the Office of the Special Rapporteur has stated that damages must not be proven rather than assumed, and that the States must not make presumptions that cannot be technically supported and that are based exclusively on the nature of the medium of dissemination or its comparison to others.¹⁴⁸
94. Now that the framework for the protection of the right to freedom of expression has been established, there are certain issues that represent important challenges and warrant particular attention: the role of the private sector, the liability of intermediaries, hate speech on the Internet, and the removal and de-indexing of content.

a. The Role of Private Sector

95. The Internet depends in large measure on private entities that enable connection; design and maintain the hardware and operating systems that facilitate information processing; allocate web domains; host information; facilitate aggregating, sharing and searching for information; produce and regulate access to one’s own content; connect users and communities; sell goods and services and facilitate transactions; and collect and sell data, among other things.¹⁴⁹ In view of their extremely broad spectrum of influence, private entities have come to play an unprecedented role as facilitators of the right to freedom of expression and access to information.¹⁵⁰ In effect, it is a public sphere that sits on a series of private platforms. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that “While States are the duty-bearers for

2011. Para. 27; United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/23/40 April 17, 2013. Para. 32. Available for consultation at:

http://ap.ohchr.org/documents/dpage_e.aspx?m=85.

¹⁴⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 63.

¹⁴⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

¹⁴⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 71.

¹⁴⁹ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 16 a 25.

¹⁵⁰ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 44.

human rights, private actors and business enterprises also have a responsibility to respect human rights.”¹⁵¹

96. While States are the primary duty-bearers when it comes to respect for human rights, different international bodies have addressed the issue of the responsibility of corporations—particularly transnational corporations—to respect human rights.¹⁵² In 2011, the United Nations Human Rights Council adopted the *Guiding Principles on Business and Human Rights*, which establishes that business enterprises should abstain from violating the human rights of third parties and redress violations in which they have participated directly or indirectly.¹⁵³ In complying with these principles, corporations should seek to prevent violations linked directly or indirectly to their operations, products, or services and mitigate the impacts, even if they have not contributed to those impacts.¹⁵⁴
97. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression highlighted that the Guiding Principles are part of the international framework applicable to intermediaries and other necessary actors for the functioning of the Internet.¹⁵⁵ The Rapporteur noted, as a preliminary assumption, that corporations should undertake to respect and promote freedom of expression in their internal policies, product engineering, business development, staff training, and other relevant internal processes.¹⁵⁶ He further recommended that private actors develop and implement transparent human rights assessment procedures, taking account of the potential impact of their policies.¹⁵⁷
98. As highlighted in the Guiding Principles, private actors have a responsibility to respect human rights online, and this includes both a responsibility not to restrict rights and a positive responsibility to create an environment in which rights are respected. As part of the above, private actors should make a formal and high-level commitment to respect human rights, including freedom of expression and privacy, and back this commitment up with concrete internal measures and systems designed to prevent activities which lead to negative human rights impacts. In particular, they must seek to ensure that any restriction derived from the application of the terms of service does not unlawfully or disproportionately restrict the right to freedom of

¹⁵¹ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 45.

¹⁵² United Nations, Human Rights Office of the High Commissioner. [Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework](#). 2011. Principle No 11. Page. 13.

¹⁵³ United Nations, Human Rights Office of the High Commissioner. [Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework](#). 2011. Principle No 11. Page. 13.

¹⁵⁴ United Nations, Human Rights Office of the High Commissioner. [Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework](#). 2011. Principle No 13 b), Page. 14.

¹⁵⁵ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 87.

¹⁵⁶ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 90.

¹⁵⁷ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 88.

expression.¹⁵⁸ Intermediaries, in particular, should put in place effective systems of monitoring, impact assessments, and accessible, effective complaints systems in order to identify actual or potential human rights harms caused by their services or activities.

99. Where negative human rights impacts or potential impacts are identified, private actors should have in place effective systems for providing appropriate remedies for those affected; and adjust their activities and systems as necessary to prevent future abuse. In keeping with the Guiding Principles, private actors should adopt robust approaches towards transparency in relation to their terms of service, policies and any operating procedures or practices which directly affect the public.
100. On the other hand, the States are called upon to foster the development of the private sector and of technical measures, products, and services that protect freedom of expression, and to enact the respective laws.¹⁵⁹ The public policies and laws governing this matter should be enacted and implemented in a transparent manner, allowing for citizen oversight of both the government administration and private management of matters concerning the guarantee of human rights.¹⁶⁰
101. States bear a primary responsibility to protect and respect the right to exercise freedom of opinion and expression. This means that States must not require or otherwise pressure the private sector to violate human rights or unnecessarily or disproportionately interfere with the right to freedom of expression.¹⁶¹ Any requests that the States make of the private sector, to intercept, block, remove, or monitor content, must meet the requirements established in international human rights treaties, particularly on freedom of expression.¹⁶²

b. Intermediary Liability

102. The transmission of content on the Internet depends upon intermediaries.¹⁶³ Intermediaries are generally defined as “any entity that enables the communication of information from one party to another.”¹⁶⁴ However, the legal definition of “intermediary” may differ among jurisdictions or countries.¹⁶⁵ As the United Nations

¹⁵⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 112.

¹⁵⁹ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 86.

¹⁶⁰ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 85.

¹⁶¹ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/32/38. 11 May 2016. Para. 85.

¹⁶² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013.

¹⁶³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 92.

¹⁶⁴ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page. 19.

¹⁶⁵ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 7.

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has underscored, intermediaries range from Internet service providers (ISPs) to search engines, and from blogging services to online community platforms,¹⁶⁶ e-commerce platforms, web servers, social networks, and others.¹⁶⁷

103. There is a large number of intermediaries, and there are different ways to classify them.¹⁶⁸ As noted in the previous section, depending on what kind they are and what service they offer, intermediaries exercise control over how and with whom their users communicate. They have become key actors in the protection of the rights to freedom of expression and privacy.¹⁶⁹
104. One of the measures that most directly affects the actions of Internet intermediaries is the intermediary liability regime legally imposed upon them for third-party content.¹⁷⁰ The liability regime is fundamental for creating the appropriate incentives for the protection and guarantee of human rights.¹⁷¹ In all cases, the liability regime must follow the three-part test of legality, necessity, and proportionality.
105. The 2011 Joint Declaration on Freedom of Expression and the Internet establishes that “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’).”¹⁷² In the same regard, the Office of the Special Rapporteur for Freedom of Expression maintains that subsequent liability should be imposed upon the authors of the speech in question rather than on the intermediaries.¹⁷³
106. Different laws and initiatives at the regional level reflect the different frameworks regulating intermediary liability, including personal data and privacy protection laws, copyrights, and the right to reputation and one’s good name. In other cases there are

¹⁶⁶ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011. Para.38.

¹⁶⁷ A Global Society Initiative. [Manila Principles on Intermediary Liability](#). Version 1.0, March 24, 2015. Page 6.

¹⁶⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 91.

¹⁶⁹ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page. 23.

¹⁷⁰ A Global Society Initiative. [Manila Principles on Intermediary Liability](#). Version 1.0, March 24, 2015. Page 6.

¹⁷¹ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page. 3.

¹⁷² 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

¹⁷³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 102. See also, United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 43.

general intermediary liability laws and specific regimes for particular instances such as copyright protection. Intermediaries may be exempt from liability for third-party content; subject to strict liability; subject to some conditional liability regime, or subject to the general regime of liability based on a breach of duty.

107. Strict liability, which holds the intermediary liable for any content on its platform that is considered unlawful,¹⁷⁴ is incompatible with the American Convention because it is disproportionate and unnecessary in a democratic society.¹⁷⁵ These types of regimes encourage intermediaries to monitor and censor their own users.¹⁷⁶
108. In the context of conditional liability, the intermediary is offered “safe harbor” from any legal liability to the extent that it complies with certain specific duties.¹⁷⁷ These regimes include the “notice and takedown” procedure, whereby the intermediary must remove the content once notified of its existence; the system of “notice and notice,” where the intermediary must notify the author of any complaint received with respect to content; and the system of “notice and disconnection,” where the intermediary will disconnect the user when he or she fails to remove the offending content after having been notified.
109. This model of intermediary liability does not impose a duty to monitor or filter content proactively.¹⁷⁸ However, these systems do not always respect the right to due process and minimum guarantees, insofar as they shift the responsibility to examine and decide on the lawfulness or unlawfulness of the content subject to removal from the State to the intermediary.¹⁷⁹ The Joint Declaration on Freedom of Expression and the Internet establishes that “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).”¹⁸⁰ Along these lines, the Office of the Special Rapporteur cautions that this model will be compatible with the American Convention “to the extent that they

¹⁷⁴ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page. 40.

¹⁷⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013.

¹⁷⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 98. Also, see for example, the decision by the Argentinian Supreme Court in the María Belén Rodríguez v. Google Inc. case. In its decision the Court held that: “establishing a strict liability regime in this activity would ultimately discourage the existence of ‘search engines’, which fulfill an essential role in the right to seek, receive and impart information and opinions freely on the Internet”. Corte Suprema de Justicia de la Nación. [Rodríguez, María Belén c/ Google Inc. s/ daños y perjuicios](#). October 28, 2014.

¹⁷⁷ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 41.

¹⁷⁸ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 40.

¹⁷⁹ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 30.

¹⁸⁰ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

- establish sufficient safeguards for the protection of the users' freedom of expression and due process, and do not impose vague or disproportionate obligations on intermediaries."¹⁸¹
110. Notice regimes must include a detailed notification procedure that states the location of the allegedly unlawful material, the legal basis for the unlawfulness, and an adequate option for counter-notice to the user who produced the content, with judicial oversight guarantees.¹⁸²
 111. For example, Brazil's Law no. 12.965/2014, (the so-called "Brazilian Internet Bill of Rights") provides that Internet application providers should only be held liable if they fail to comply with a judicial order. Article 19 of said law provides that "[i]n order to ensure freedom of expression and to prevent censorship, internet application providers may only be held civilly liable for damage resulting from content generated by third parties if after specific judicial order the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary."¹⁸³
 112. Intermediaries are still private entities with financial, social, and individual interests that differ from those of the State. Requiring them to function as a court that balances the rights of its users goes beyond the scope of their competence and may lead to and provide incentives for abuses, to the detriment of freedom of expression and access to information.
 113. The Manila Principles on Intermediary Liability, put forward by civil society organizations from around the world, propose a reference framework of baseline safeguards and best practices for States with regard to intermediary liability based on international human rights instruments.¹⁸⁴ The Principles recommend that the States limit the liability of intermediaries for third-party content (Principle 1), not require the restriction or removal of content without a court order issued in accordance with due process rights and guarantees (Principles 2 and 3), ensure that the laws meet the

¹⁸¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 106.

¹⁸² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 109.

¹⁸³ Presidência da República. [Lei No. 12.965](#), April 23, 2014. Article 19 also establishes that "1- The judicial order mentioned in the heading must contain, under the penalty of nullification, clear and specific identification of the content claimed to be a violation, which allows for the unequivocal identification of the content. § 2- In cases where there is an infringement on copyright laws and other related rights, this Article shall be applicable when specific legal precaution has been utilized, with full respect for freedom of expression and other guarantees provided for in Art. 5 of the Federal Constitution." Article 21 of the law also establishes that intermediaries have subsidiary responsibility when divulging content created by a third party; said content may be images, videos or other material containing nudity or sexual acts that are private in nature as long as, upon notification by the participant or legal representative, sponsorship diligently ceases; within the context and technical limitations of the service, the withdrawal of said content.

¹⁸⁴ A Global Society Initiative. [Manila Principles on Intermediary Liability](#). Version 1.0, March 24, 2015.

three-part test on freedom of expression and include the principles of transparency and accountability (Principles 5 and 6).¹⁸⁵

114. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression recommended that intermediaries only implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved.¹⁸⁶ He further recommended that there be effective remedies for affected users, including the possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority.¹⁸⁷
115. The Office of the Special Rapporteur underscores that the States should encourage the adoption of systems that allow intermediaries to function as true promoters of freedom of expression and to operate with transparency toward their users.¹⁸⁸ Online content can be restricted both by the laws of a State and by the private policies of a company acting as an intermediary, and the liability regimes can have a significant impact on the latter, functioning as incentives for censorship or for the protection of human rights (for instance, providing incentives for intermediaries to remove lawful and legitimate content for fear of incurring liability for third-party content).¹⁸⁹
116. The Joint Declaration on Freedom of Expression and the Internet points to self-regulation as a potentially effective tool in redressing harmful speech.¹⁹⁰ “Self-regulation” refers to policies unilaterally set by intermediaries for the optimal functioning of their platforms or services. These policies range from measures taken by the company to block or remove spam and viruses, to the setting and enforcement of “terms of service” or “community rules”¹⁹¹ whereby companies limit the type of desirable and undesirable content according to criteria that are financial, social, cultural, and so on.¹⁹² Co-regulation is a regulatory regime involving private regulation that is actively encouraged or even supported by the state through

¹⁸⁵ A Global Society Initiative. [Manila Principles on Intermediary Liability](#). Version 1.0, March 24, 2015. Page

¹⁸⁶ Naciones Unidas. Asamblea General. Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 47.

¹⁸⁷ Naciones Unidas. Asamblea General. Informe del Relator Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión, Frank La Rue. A/HRC/17/27. 16 May 2011. Para. 47.

¹⁸⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 110.

¹⁸⁹ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Pages 54-55

¹⁹⁰ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011.

¹⁹¹ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 55.

¹⁹² UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 55.

- legislation, funding, or other means of state support or institutional participation.¹⁹³ In order for self-regulation to function effectively, intermediaries must be committed to respecting and promoting freedom of expression and conducting with transparency.
117. Transparency in the intermediaries' content removal policies is fundamentally important. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that "Lack of transparency in the intermediaries' decision-making process also often obscures discriminatory practices or political pressure affecting the companies' decisions."¹⁹⁴
118. In this regard, the Office of the Special Rapporteur considers it is of utmost importance that intermediaries provide clear information about the type of content that might be removed from the platform on its terms of service or community guidelines, as well as how the removal could take place and if there is any form of appeal by the user who feel that his or her content have been incorrectly removed.
119. Bearing in mind that many States are currently promoting legislation on the liability of intermediaries, the global and transnational reach of the Internet means that States must aspire to consistency in the standards that govern such liability in order to maintain a free, open, and global Internet.¹⁹⁵ Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State.¹⁹⁶ Judges are responsible for preventing what is known as "libel tourism" or "forum-shopping," recusing themselves when no substantial harm can be demonstrated in their jurisdiction.¹⁹⁷
120. This issue has been consistently raised in judicial decisions regarding the so-called "right to be forgotten" (see below), in which a judge from one country might order the delisting of a specific search result not only from the platform that is linked to the competent jurisdiction, but also from other countries (or even globally). This could result in an extra-territorial application of a national court order and rises complex

¹⁹³ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 56.

¹⁹⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#). Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 42.

¹⁹⁵ UNESCO. [Fostering Freedom Online: The role of Internet Intermediaries](#). Unesco Series on Internet Freedom. Internet Society (2014). Page 3.

¹⁹⁶ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011. Para. 4.

¹⁹⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). 1 June 2011. Para. 4.

questions regarding the future of jurisdiction on the Internet and its interplay with national sovereignty.

c. Hate Speech on the Internet

121. The Office of the Special Rapporteur is of the opinion that only through a sustained and comprehensive policy that goes beyond legal measures and includes preventive and educational measures will it be possible to effectively combat hate speech and ensure the right of individuals to equality and nondiscrimination both on the Internet and offline.¹⁹⁸ Measures like these “strike at the cultural root of systematic discrimination. As such, they can be valuable instruments in identifying and refuting hate speech and encouraging the development of a society based on the principles of diversity, pluralism, and tolerance.”¹⁹⁹
122. The Office of the Special Rapporteur has underscored on numerous occasions that the States should not take measures that are especially restrictive of freedom of expression on the Internet. The 2001 Joint Declaration on Countering Terror, Broadcasting and The Internet had already asserted that freedom of expression governs the Internet just like any other communication medium, and that “States should not adopt separate rules limiting Internet content.”²⁰⁰ On the contrary, the UNESCO Report on hate speech, for instance, highlights digital literacy, universal access, and the promotion of techniques such as “counter-speech,” teaching people to detect hate speech and counteract it with tolerant and anti-discriminatory speech, as viable and sustainable mechanisms to combat hate speech.²⁰¹
123. The blocking or filtering of content to combat hate speech are measures of last resort, and should only be used when necessary and proportionate to the compelling aim they pursue.²⁰² The States that take such measures should also design them in such a way that they do not affect legitimate speech that warrants protection.²⁰³

¹⁹⁸ IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 38; Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. [Conclusions and Recommendations](#). October 5, 2012. Para. 11; United Nations. General Assembly. Report of the United Nations Special Rapporteur for the promotion and protection of freedom of opinion and expression. UN Doc. A/67/357. September 7, 2012. Para. 33.

¹⁹⁹ IACHR. [Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2015](#). Chapter IV (Hate Speech and Incitement to Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas) OEA/Ser.L/V/II. Doc. 48/15. 31 December 2015. Para. 36.

²⁰⁰ UN Special Rapporteur on Freedom of Opinion and Expression, Abid Hussain; OSCE Representative on Freedom of the Media, Freimut Duve and OAS Special Rapporteur on Freedom of Expression, Santiago Canton. [Joint Declaration on Freedom of Expression and New Century Challenges](#). 2001.

²⁰¹ UNESCO, *Combatiendo el Discurso de Odio en Línea (Countering Online Hate Speech)*, 2015, p. 48. Disponible únicamente en inglés.

²⁰² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 85.

²⁰³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 85.

124. The transparency of the measures adopted—with respect to both the content removed and the detailed information about the necessity and proportionality of the blocking, removal, or filtering of content—is essential in order to properly control the legality of these measures.²⁰⁴ In addition, and bearing in mind the issues examined in the section on intermediary liability, the States should not exert unlawful pressure on intermediaries to restrict the circulation of content through private blocking or filtering, or indirectly use the terms of service or community rules to expand the legally established grounds for restriction.²⁰⁵
125. Combating hate speech requires empowering users to identify and condemn it in public discourse without blocking legitimate speech, thus creating more inclusive forums of expression.

d. De-indexation and the “Right to Be Forgotten”

126. Internet’s platforms, applications and search engines are central components of the one’s ability to seek, receive and impart information in the digital era, particularly to access information and opinions generated or disseminated by media outlets. The Office of the Special Rapporteur has highlighted the impact on the exercise of the right to freedom of expression in its dual dimension (individual and collective) of measures to remove and de-index Internet content adopted by the private companies that administer and manage specific web pages, platforms, or apps, as well as those requested by States.
127. As has been indicated in previous sections of this report, government limitations on internet content must be ordered by a competent, independent, and impartial judge or court with due process guarantees as established in Article 8 of the American Convention. It further emphasized the need to create appropriate incentives for companies to commit to freedom of expression, limiting their grounds, wherever possible, for the removal or de-indexing of content to those legally required.
128. In 2014, following the decision of the Court of Justice of the European Union (CJEU) in the case of “*Google Spain S.L., Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*,” a new debate arose with regard to the legitimacy of different means of online content removal and deindexing and the appropriate weighing of the right to privacy against the right to freedom of expression and information on the Internet. The CJEU interpreted that the activity of search engines—intermediaries that index content hosted by other platforms (Google, Yahoo, Bing, etc.) should be classified as data controllers “processing personal data”. Under that classification and according to European Directive No. 95/46/CE, individuals may exercise the right to object to that data processing on compelling legitimate grounds relating to their

²⁰⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 85.

²⁰⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 111-113.

particular situation.²⁰⁶ In its judgment, the CJEU interpreted that, under Directive No. 95/46/CE, individuals can request to have their personal data de-indexed from Internet browsers or search engines, based on the protection of personal data on the Internet.²⁰⁷

129. The decision, known for having established a so-called right to be forgotten, recognizes a de-indexing authority limited to information that has been indexed under an individual's name, maintaining that said indexing provides "a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him."²⁰⁸ According to this reasoning, the decision would not affect the deindexing of the same content under other search formats, such as thematic or contextual searches, or through other people's names—for instance, the author of a news article or the name of a newspaper. The CJEU made clear that the data processing of a search engine is different from that done by the publishers of websites (such as newspapers), and recognizes that the content may be legally protected and therefore not subject to a removal order with respect to the site that

²⁰⁶ CJUE. *Google Spain, S.L., Google Inc. / Agencia Española de Protección de Datos, Mario Costeja González*. Judgment of May 13, 2014. The Office of the Special Rapporteur for Freedom of Expression observes that on April 27, 2016 the European Parliament and the Council of the European Union issued new regulations on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealed Directive 95/46/EC. See, the European Parliament and the Council of the European Union Regulation (EU) 2016/67 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)/ 27 April 2016. Paras 65 and 66. The regulation provides that: "A data subject should have the right to have personal data concerning him or her rectified and a 'right to be forgotten' where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, a data subject should have the right to have his or her personal data erased and no longer processed where the personal data are no longer necessary in relation to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation. That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet. The data subject should be able to exercise that right notwithstanding the fact that he or she is no longer a child. However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defence of legal claims. To strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. In doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request". Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=ES>

²⁰⁷ CJUE. *Google Spain, S.L., Google Inc. / Agencia Española de Protección de Datos, Mario Costeja González*. Judgment of May 13, 2014.

²⁰⁸ CJUE. *Google Spain, S.L., Google Inc. / Agencia Española de Protección de Datos, Mario Costeja González*. Judgment of May 13, 2014. Para. 80.

hosts or created it.²⁰⁹ The CJEU held that de-indexing may only be authorized if the personal information included on the website in question is “inadequate, irrelevant or excessive,” and only if the information does not pertain to the public interest. However, the Court did not develop in detail these concepts, which are key for weighing the interests at issue, generating a series of vague and ambiguous interpretations of these concepts in different jurisdictions²¹⁰ Also, the CJEU decision delegated to the private sector the duty of receiving, analyzing and deciding over de-indexation requests, which has generated other concerns regarding its implementation.

130. Based on the doctrine arising both from the *Costeja* case and the data protection laws in Latin America, search engine companies in the region began to receive content removal and de-listing requests. Also, requests have been filed using the concept of the “right to be forgotten” to demand that newspapers, blogs and newspapers to remove or delete content rather than deindexing it from web search results. Civil society organizations have also reported that public servants from different countries are using the right to be forgotten in order to delete information that is in the public interest, in many cases establishing the practice of filing challenges before the personal data protection authority rather than bringing criminal defamation lawsuits.²¹¹
131. Without a doubt, the advent of the Internet has brought new challenges to protecting the right to privacy, both for the State in its role of guarantor and for private parties in their roles as users. The Office of the Special Rapporteurship has recognized that the right to privacy on internet requires the protection of treatment of personal data online. States have an obligation to respect and protect the right to privacy in the digital era and adopt legislation and practices—or adapt existing ones—to do so, protecting everyone under their jurisdictions, including against arbitrary or abusive interference by private parties.
132. However, international human rights law does not protect or recognize the so-called “right to be forgotten” in the terms outlined by the CJEU in the *Costeja* case. On the contrary, the Office of the Special Rapporteur is of the opinion that the application to the Americas of a private system for the removal and de-indexing of online content with such vague and ambiguous limits is particularly problematic in light of the wide regulatory margin of the protection of freedom of expression provided by article 13 of the American Convention on Human Rights.

²⁰⁹ CJUE. *Google Spain, S.L., Google Inc. / Agencia Española de Protección de Datos, Mario Costeja González*. Judgment of May 13, 2014. Para. 85.

²¹⁰ CJUE. *Google Spain, S.L., Google Inc. / Agencia Española de Protección de Datos, Mario Costeja González*. Judgment of May 13, 2014. Para. 85.

²¹¹ See, for example, Pérez de Acha, Gisela. ONG Derechos Digitales. Una panorámica sobre el derecho al olvido en la región. September, 2015. Available at: <https://r3d.mx/2016/07/12/el-erroneamente-llamado-derecho-al-olvido-no-es-un-derecho-es-una-forma-de-censura/>; Article 19. O Direito ao Esquecimento na América Latina. Libertad de expresión en el ámbito digital. January 2016. P. 60 and 61. Available at: <https://adcdigital.org.ar/wp-content/uploads/2016/04/LibEx-en-LatAm-AmbitoDigital.pdf>; Miguel Morachimo. Protección de datos personales: la nueva puerta falsa de la censura. Hiperderechos. July 21, 2016. Available at: <http://www.hiperderecho.org/2016/07/proteccion-datos-personales-la-nueva-puerta-falsa-la-censura/>.

133. The removal of content from the Internet constitute a clear interference with the right to freedom of expression, in both its individual and social dimensions, as well as the right of access to information by the people²¹². Information that has been removed does not circulate, which affects the right of individuals to express themselves and disseminate their opinions and ideas and the right of the community to receive information and ideas of all kinds. A similar effect—albeit not identical because of its dimension—is the de-indexing of content, insofar as it makes the information more difficult to find and renders it invisible.²¹³ Both have a limiting effect on the right to freedom of expression because they restrict the possibility to seek, receive and impart information and ideas regardless of national frontiers.
134. In the Americas, after many years of conflict and authoritarian regimes, individuals and human rights groups have maintained a legitimate claim to access to information regarding governmental and military activity of the past and gross human rights violations. People want to remember and not to forget. In this sense, it is important to recognize the particular context of the region and how a legal mechanism such as the so-called “right to be forgotten” and its incentive for de-indexation might impact the right to truth and memory.
135. According to the regional standards, prior censorship is prohibited except for the protection of minors at public events, and any restriction must be established by law, clearly and in detail. It must also be suitable, proportionate, and necessary for the accomplishment of a legitimate aim in a democratic society. It is not enough for the measure to be useful; it must be the least restrictive one. The protection of personal data is a legitimate aim for the establishment of restrictions to the right to freedom of expression. Nevertheless, any limitation on the right to freedom of expression—whether to protect privacy, as in the case of personal data, or honor and reputation—must respect the three-part test as developed by the inter-American case law and doctrine: it must be legally established in a law, both substantively and procedurally; it must be necessary and suitable, and it must be proportionate. Limitations on freedom of expression must also be ordered by a competent, independent, and impartial judge or court, with all due process guarantees.
136. Although the protection of personal data is a legitimate objective, at no time it may be invoked to limit or restrict the circulation of information about public persons, public servants or candidates to public office in the performance of their duties, information in the public interest, or information involving human rights violations.
137. If a State decides to adopt personal data protection systems that acknowledge the deindexing that is referred to as the “right to be forgotten” should do so on an absolutely exceptional basis. If enacted, laws on deindexing or the opposition of indexing should be designed in a clear, specific, and limited manner in order to protect privacy rights and the dignity of persons, respecting the rights to freedom of

²¹² IACHR. [Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, “la Nación” Mauricio Herrera Ulloa and Fernan Vargas Rohrmoser](#). 28 January 2002. Para. 97.

²¹³ Removal and de-indexation are neither synonymous nor should they be used interchangeably. The removal of content affects the platform or intermediary that hosts it - newspaper, blog, social network, etc. De-indexing affects search engines, intermediaries that index content hosted on other platforms - Google, Yahoo, Bing, etc. -.

expression and access to information. They should distinguish between information and personal data, establishing those cases in which the action is inadmissible, particularly when it violates freedom of expression on matters of public interest, and protecting lawful and legitimate speech. The IACHR and the Inter-American Court has reiterated that public officials are subject to greater scrutiny by society, and for that reason, a strong presumption should be put in place against content removal and de-indexing requests lodged by a public official, public person or a candidate to public office.

138. This is particularly relevant in relation to the information produced and disseminated by media outlets that use the Internet as a platform. The protection of personal data to which the right to be forgotten refers cannot lead to the imposition of restrictions on information disseminated by media outlets that could affect the privacy rights or reputation of an individual. As a general rule and according to several laws regarding personal data protection adopted in the region, the content created by a media outlet is not subject to protections derived from the right of *habeas data*²¹⁴. Media digital platforms cannot be understood as personal data controllers. They are public sources of information and platforms for the dissemination of opinions and ideas on matters of public interest, and therefore cannot be subject to a de-indexing order nor to the suppression of online content regarding matters of public interest²¹⁵.
139. Furthermore, the Office of the Special Rapporteur considers that procedures for de-indexing or removing content cannot be used as a preventive mechanism to protect the right to honor or reputation. Individuals have other remedies available to them to seek redress for the harm caused in the case of alleged dissemination of false, offensive or inaccurate information by digital media, such as the right of correction and reply, and civil actions for damages. These remedies are less harmful to the right to freedom of expression and require the plaintiff to bear the burden of proving the falsity or inaccuracy of the information being disseminated.
140. De-indexing laws should be restricted to those cases in which the petitioner demonstrates a substantive harm to his or her privacy and dignity. the deindexing measures should always be enforced through a court order issued within the framework of a proceeding respectful of due process and where affected parties can be heard, including the speaker, the publisher o media outlet and the

²¹⁴ See, for example, Uruguay. Ley Nº 18.331. [Protección de datos personales y acción de "habeas data"](#). Article 9; Colombia. Ley Estatutaria 1581 de 2012, [por la cual se dictan disposiciones generales para la protección de datos personales](#). Article 2 d), y Argentina. Ley 25.326. Protección de los datos personales. Article 1.

²¹⁵ For example, the IACHR has considered that the removal of content on the Internet may constitute prior censorship, explicitly prohibited in the American Convention. In its decision in the case of *newspaper La Nación (Mauricio Herrera Ulloa) vs. Costa Rica*, the IACHR determined that by ordering the removal of a series of critical articles regarding a public official from a newspaper's website, the State (through its judicial bodies) violated Article 13 of the American Convention. The IACHR understood that the decision of the Costa Rican court had "directly resulted in prior censorship, explicitly prohibited by the American Convention." The Commission argued that such measures are prohibited "even if it is supposed to prevent by that means a possible abuse of freedom of expression." In the case, the Commission considered that the judicial order constituted a violation of both the journalist's right to freedom of express as well as "the right of everyone to be well informed." IACHR. [Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, "la Nación" Mauricio Herrera Ulloa and Fernan Vargas Rohmoser](#). 28 January 2002. Para. 97.

intermediaries²¹⁶. This prevents that intermediary companies from being the ones responsible for examining and determining the appropriateness of restricting access to online content in those scenarios.

141. In sum, it bears repeating that intermediaries do not cease to be private entities with financial, social, and individual interests different from those of the State. Requiring them to conduct a quasi-adjudicatory exercise that weighs the rights of their users exceeds the scope of their competence and could create and encourage abuses against freedom of expression and access to information. In this regard, the Joint Declaration on Freedom of Expression and the Internet establishes that, “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).”²¹⁷
142. Transparency with respect to content de-indexing policies applied by private and public entities (including oversight bodies and the judicial branch) is fundamentally important. The law should subject intermediaries, government authorities, and courts to active transparency obligations, whereby information on the nature, volume, and outcomes of deindexing requests received is regularly published.²¹⁸

e. Internet, Intellectual Property and Access to Knowledge

143. Intellectual property, freedom of expression, and the right to culture are complementary rights, the purpose of intellectual property being “the promotion of literary, musical and artistic creativity, the enrichment of cultural heritage and the dissemination of knowledge and information goods to the general public.”²¹⁹ The UN Special Rapporteur on Cultural Rights has said that “Both intellectual property systems and the right to science and culture obligate governments ‘to recognize and reward human creativity and innovation and, at the same time, to ensure public access to the fruits of those endeavors. Striking the appropriate balance between these two goals is the central challenge that both regimes share.’”²²⁰
144. Copyright protection has a legitimate aim that could lead to imposing limits on the human rights to education, culture, and freedom of expression.²²¹ However, this

²¹⁶ Article 19. [The “Right to be forgotten”: remembering freedom of expression](#). Policy Brief. 2016; Access Now. [Position Paper: Understanding the “right to be forgotten” globally](#). September 2016.

²¹⁷ 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, [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011. Point 2. b).

²¹⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013. Para. 42.

²¹⁹ Article 19. The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age (2013). Page 11.

²²⁰ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. December 24, 2014. Para. 4.

²²¹ UN Special Rapporteur for Freedom of Opinion and Expression and the IACHR-OAS Special Rapporteur on Freedom of Expression. [Joint Declaration about the Stop Online Piracy Act \(SOPA\) and the Protection of](#)

protection cannot be implemented in a way that chills creativity or the free exchange of information and ideas on the Internet.²²² The advent of the Internet had a significant impact on the social dimension of freedom of expression by democratizing access to information, ideas, and opinions of all kinds and decentralizing the creative process. On the Internet, users not only receive content but also produce and distribute their own content, opening the closed circle that once included only record companies, businesses, and artist organizations, enabling the unauthorized use of copyright-protected material. It is important at this time to reconsider the role that the Internet plays in protecting copyright and the effectiveness of those regimens in achieving their legitimate objectives.

145. In this regard, the United Nations Special Rapporteur on Cultural Rights has held that “The right to protection of moral and material interests cannot be used to defend patent laws that inadequately respect the right to participate in cultural life, to enjoy the benefits of scientific progress and its applications, to scientific freedoms and the right to food and health and the rights of indigenous peoples and local communities.”²²³ Copyright must be understood as a measure to stimulate creation and invention by contributing to the expansion and preservation of cultural heritage and the development of the distinct cultural identities that converge and coexist on the Internet.²²⁴
146. In recent years, a number of measures have been promoted to strike the proper balance between protecting copyright and protecting the rights to education, culture, and freedom of expression. These include, for example, initiatives to promote open licensing and exceptions to existing copyright regimes. The United Nations Special Rapporteur on the Right to Culture recommended that exceptions and uncompensated uses of copyrighted material be adopted to promote a better balance between cultural rights and intellectual property rights. The uncompensated uses highlighted included the uncompensated use of copyrighted material in libraries, free school theater productions, noncommercial artistic activities, and initiatives to make works accessible to people with limited financial resources.²²⁵ The exceptions highlighted included adoption of fair use doctrine, in place in countries such as the

[Intellectual Property Act \(PROTECT IP Act\)](#). January 20, 2012; HUDOC. *Case of Ashby Donald and Others v. France*. Petition no 36769/08. January 10, 2013. Para. 36.

²²² 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, [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011. Point 2. b); 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, [Joint Declaration on the Internet and on Anti-Terrorism Measures](#). December 21, 2005.

²²³ United Nations. General Assembly. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/70/279. August 4, 2015.

²²⁴ United Nations Committee on Economic, Social and Cultural Rights. General Comment N° 17. The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant). UN Doc. E/C.12/GC/17. January 12, 2006. Para. 4.

²²⁵ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. December 24, 2014. Para. 72.

United States for example, where use for the purposes of education, criticism, parody, indexing, or personal use are theoretically exempt from penalty in the intellectual property regime.²²⁶

147. Particularly of note are international treaties that have in recent years included international obligations on intellectual property and regulations on Internet policy, which exert significant influence on the drafting of local regulations. States must take particular care to adjust the measures required under these treaties to fit local needs and to protect the rights of Internet users. It should also be noted that the special nature of these agreements and their negotiation process, which generally takes place in secret, in many cases lack the oversight, transparency, and social participation necessary to legitimately legislate exceptions to freedom of expression and the right to culture.²²⁷

i. Open Access Initiatives

148. Open access is a method of distributing knowledge with the goal of obtaining the maximum benefit for science and society. It entails publishing the full text of academic and scientific literature on the Internet publicly and free of charge, with no technical, economic, or legal barriers, where anyone can use it, copy it, and share it.²²⁸ Open access contributions include the results of original scientific research, raw data and metadata, materials, sources, digital reproductions of graphic and pictorial material, and scholarly multimedia material.²²⁹
149. The United Nations Rapporteur on Cultural Rights has highlighted the importance and potential of open licenses, especially for building and circulating scientific and academic knowledge. It has noted that “[s]cience is a process of discovery, collecting and synthesizing evidence and evolving models of the world” that requires access to as well as consultation, evaluation, and criticism of the raw evidence. These sources are often protected by copyright, and in order to get more subscribers, it is not unusual for specialized magazines to prohibit authors from disseminating their work on the Internet.²³⁰ It is important for States to circulate and promote training and use of open access licenses, particularly in academic and scientific communities, as well as for those who work for the State maintaining cultural heritage.²³¹
150. Existing open access initiatives include the Budapest Open Access Initiative, which since 2012 has recommended the use of creative commons licenses (or the

²²⁶ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. December 24, 2014. Para. 73.

²²⁷ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December 2013.

²²⁸ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, promoted by the Max Planck Society on October 22, 2003 and signed by around 400 academic and scientific institutions. Available at: https://openaccess.mpg.de/67605/berlin_declaration_engl.pdf

²²⁹ Budapest Open Access Initiative, Declaration on the Budapest Open Access Initiative. February 14, 2002. Available at: <http://www.budapestopenaccessinitiative.org/read>

²³⁰ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. December 24, 2014. Para. 79.

²³¹ Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, promoted by the Max Planck Society on October 22, 2003 and signed by around 400 academic and scientific institutions.. Available at: https://openaccess.mpg.de/67605/berlin_declaration_engl.pdf

equivalent) as the best way of licensing scientific and academic works for publication, distribution, use and reuse.²³² “Contracts replace an “all rights reserved” by a “some rights reserved” approach, employing standardized licenses where no compensation is sought by the copyright owner. The result is an agile, low-overhead copyright-management regime, benefiting both copyright owners and licensees.”²³³

ii. Protecting the Public Domain

151. The public domain is “the net sum of all information and cultural goods not subject to copyright that can be used and exchanged by the public at large without restrictions. It is part of the cultural heritage of all humankind that must be preserved.”²³⁴
152. The Declaration of Principles of the World Summit on the Information Society states that a “rich” public domain is essential for the growth of the information society, as it both bolsters and promotes diversification of the educated public, thereby generating new jobs, innovation, business opportunities, and the advancement of science.²³⁵ The information in the public domain should be easily accessible and must be protected from misappropriation.²³⁶ States should strengthen, protect, and promote “Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.”²³⁷
153. Protection of the public domain is essential for protecting and promoting universal access to scientific knowledge and the creation and circulation of scientific and technical information with the same opportunities for all.²³⁸ Because the role played by existing materials is so important for developing new works, the term for protecting intellectual property rights should not be longer than the time necessary to achieve its goal without harming freedom of expression. In this regard it is noteworthy that, as mentioned in another section of this chapter, the right to receive and impart information and ideas also includes the right of individuals to enjoyment of cultural goods, which in itself implies that there is an individual right to read, listen

²³² Budapest Open Access Initiative. *Ten years on from de Budapest Open Access Initiative: setting the default to open (2012)*. Available at: <http://www.budapestopenaccessinitiative.org/boai-10-recommendations>

²³³ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. December 24, 2014. Para. 77.

²³⁴ Article 19. The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age (2013). Para.13.

²³⁵ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. December 12, 2003. Para. 26.

²³⁶ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. December 12, 2003. Para. 8 and 9.

²³⁷ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. December 12, 2003. Para. 8 and 9.

²³⁸ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. December 12, 2003. Para. 28.

to, look at, and explore cultural goods without being subject to the restrictions of intellectual property. This includes being able to perform these activities online. Access to information in the public domain is also essential for the Internet, for which reason the protection of intellectual property rights must be regulated in the same way in this space.²³⁹

154. Digital heritage is also part of cultural heritage and must be protected and preserved for future generations.²⁴⁰ In developing the right to culture, the 2003 UNESCO Charter on the Preservation of Digital Heritage establishes that digital heritage is at risk due to rapid technological progress, the result of which is that the programs and devices that create content become obsolete very quickly. States must develop mechanisms and policies for preserving that digital heritage and making it available to anyone in any region, nation, and community in order to provide over time a representation of all peoples, nations, cultures, and languages.²⁴¹

iii. **Restrictions and Limitations on the Rights to Freedom of Expression and Access to Knowledge to Protect Copyright**

155. Restrictions on the rights to freedom of expression and access to knowledge on the Internet in connection to copyright protection must comply with the requirements established in the American Convention.²⁴² These limitations must pass the inter-American system's three-prong test: a) formal and material legality and legitimate objective; b) necessity in a democratic society and; c) proportionality. Moreover, there must be sufficient judicial control over the restriction in all cases with respect to due process guarantees, including user notifications.²⁴³
156. Punishing users for violating copyright by disconnecting them is a disproportionate and radical measure that is not compatible with international human rights law,²⁴⁴ even when a gradual mechanism is employed (three strikes, for example, in which the Internet is disconnected after three violations).²⁴⁵

²³⁹ From 2007 to 2011, the European Commission funded a Thematic Network on the digital public domain called COMMUNIA. The network delivered a set of policy recommendations for the strengthening and enrichment of the public domain in the digital environment. Some of the recommendations deal with the enforcement of copyright's limitations and exceptions, other with copyright's term or the challenges posed by digitalization. The policy recommendations for the digital public domain can be found here: <http://www.communia-association.org/recommendations/>

²⁴⁰ UNESCO. *Charter on the Preservation of Digital Heritage*. October 15, 2003.

²⁴¹ UNESCO. *Charter on the Preservation of Digital Heritage*. 15 October 2003.

²⁴² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 76.

²⁴³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 55.

²⁴⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 81.

²⁴⁵ United Nations. Human Rights Council. Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. UN Doc. A/HRC/28/57. December 24, 2014. Para. 51. See also, Article 19. The Right to Share: Principles on Freedom of Expression and Copyright in the Digital Age (2013). Page 17.

157. A requirement to block whole sites is also a measure that is disproportionate and not compatible with the protection of human rights online. The 2011 Joint Declaration on Freedom of Expression and Internet held that “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.”²⁴⁶
158. In addition to the proportionality tests and the impact such blockings might have on freedom of expression, it is important to stress the inefficacy of these measures. They can be easily circumvented by anyone with a basic knowledge about the Internet and using some widely available software.²⁴⁷ The 2011 Joint Declaration on Freedom of Expression and the Internet states that “Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognizing that no special content restrictions should be established for material disseminated over the Internet.”²⁴⁸
159. Along the same lines, State or ISP content filtering that users do not control constitutes prior restraint.²⁴⁹ The 2011 Joint Declaration on Freedom of Expression and the Internet indicates that “The State must at all times require products intended to facilitate filtration by end users to be accompanied by clear information intended to inform those users on how the filters work and the possible disadvantages should filtering turn out to be excessive.”²⁵⁰
160. In addition, and with regard to subsequent liability, criminal liability for non-commercial violations of intellectual property law are a disproportional interference

²⁴⁶ 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, [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011. Point 3 a).

²⁴⁷ On the shortcomings of the blocking solution as adopted in Europe, Singapore and Australia, see Roy, Alpana and Marsoof, Althaf, “The Blocking Injunction: A Comparative and Critical Review of the EU, Singaporean and Australian Regimes” (June 29, 2016). (2016) 38(2) E.I.P.R. 9. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802037

²⁴⁸ 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, *Joint Declaration on Freedom of Expression and the Internet*, (June 1, 2011), point 3 c), available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=849&IID=1>.

²⁴⁹ 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, [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011. Point 3 b).

²⁵⁰ 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, [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011. Point 3 c).

with freedom of expression. They have a chilling effect on the free circulation of information and ideas. Crimes perpetrated online should never involve punishments that are more severe than for those perpetrated in real life, as this would be a disproportionate restriction on Internet expression that could restrict and limit the internet as a space for the free exchange of ideas, information, and opinions.²⁵¹

161. At no time shall intermediaries be held criminally liable for omission or failure to comply with an order to restrict content. Measures should be limited to civil or administrative sanctions.²⁵² Similarly, intermediaries should never regulate the content produced by third parties. States must avoid adopting systems of objective or strict liability, as such systems foster private censorship of legitimate expressions,²⁵³ thereby illegitimately affecting the rights to freedom of expression, access to information, culture, and knowledge, among other human rights exercised and protected on the Internet.²⁵⁴ Although pursuing piracy is a legitimate public policy objective, doing so should take into account the nature of the Internet as a tool for expression and protect intermediaries, avoiding requiring them to conduct monitoring and oversight of the content created by users and third parties.²⁵⁵
162. Liability regimes requiring “notification and removal” procedures and that involve intermediaries removing content at the request of individuals transfer the jurisdictional authority of the State to the private sector and do not adequately guarantee due process.²⁵⁶

²⁵¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 74.

²⁵² Global Society Initiative. Manila Principles on Intermediary Liability. [Background](#). March 22, 2015. Page. 30.

²⁵³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 98.

²⁵⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 95.

²⁵⁵ UN Special Rapporteur for Freedom of Opinion and Expression and the IACHR-OAS Special Rapporteur on Freedom of Expression. [Joint Declaration about the Stop Online Piracy Act \(SOPA\) and the Protection of Intellectual Property Act \(PROTECT IP Act\)](#). January 20, 2012.

²⁵⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Pages 79-81.

CHAPTER III
RIGHT TO ACCESS TO
INFORMATION

RIGHT TO ACCESS TO INFORMATION

A. International Standards on the Right to Access to Information

163. The right to access to information is a fundamental individual right protected by article 13 of the American Convention that enables the exercise of other rights and constitutes a means of controlling and reporting abuses perpetrated or tolerated by public authorities.²⁵⁷
164. Like the right to freedom of expression, the right to access to information therefore has a dual nature, as it protects both those who actively exercise it and those who receive information through the media and/or official sources.²⁵⁸ It also entails a positive obligation for the State to provide its citizens with access to the information it has in its power, with the correlating right for people to access that information.²⁵⁹ At the regional level, there is broad consensus across the States Party to the Organization of American States as to the importance of access to public information and the need to protect it.²⁶⁰ Thus for example, the Model Inter-American Law on Access to Information establishes a series of principles and guidelines for designing and implementing access laws in the region.²⁶¹ First, it establishes a guarantee of the right to access to all information that is in the possession, custody or control, of any government authority, based on the principle of maximum disclosure. It then establishes that information from public institutions must be complete, timely and accessible, and subject to a clear and narrow regime of exceptions.²⁶²

²⁵⁷ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013; Organization of American States. General Assembly. [Inter-American Democratic Charter](#). AG/RES. 1 (XXVIII-E/01). Resolution adopted in Lima, Peru, September 11, 2001. Articles 4 and 6.

²⁵⁸ IACHR. Office of the Special Rapporteur for Freedom of Expression. [Lima Principles](#). November 16, 2000. Principle N° 1, and IACHR. [Annual Report 2011. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (The Right to Access to Public Information in the Americas, Inter-American Standards and comparison of legal frameworks. OEA/Ser.L/V/II. Doc. 69. December 30, 2011.

²⁵⁹ IACHR. [Access to Information on Reproductive Health from a Human Rights Perspective](#). OEA/ Ser.L/V/II. Doc.61. November 22, 2011). Para. 15.

²⁶⁰ IACHR. [Access to Information on Reproductive Health from a Human Rights Perspective](#). OEA/ Ser.L/V/II. Doc.61. November 22, 2011). Para. 24.

²⁶¹ Organization of American States. Permanent Council of the Organization of American States. Committee on Juridical and Political Affairs. [Model Inter-American Law on Access to Information](#). OEA/Ser.G, CP/CAJP-2840/10 Corr.1. April 29, 2010.

²⁶² Organization of American States. Permanent Council of the Organization of American States. Committee on Juridical and Political Affairs. [Model Inter-American Law on Access to Information](#). OEA/Ser.G, CP/CAJP-2840/10 Corr.1. April 29, 2010.

165. People have a right to ask for documentation and information kept in public archives that was generated or processed by the State, both to exercise their political rights and to exercise oversight over the State and its administration, thereby promoting transparency and accountability.²⁶³ Only through access to information can citizens participate in governance without discrimination and on equal footing.²⁶⁴
166. Access to information is also a means by which other rights can be effectively exercised, including the economic, social, and cultural rights of vulnerable or historically excluded groups²⁶⁵ and civil and political rights.²⁶⁶ Lack of access to information can contribute to or even constitute a violation of other rights enshrined in the Convention. For example, when vulnerable groups lack access to information, it may affect their right to live a life free from violence and discrimination. In the case of women, for example, the Commission has held that the exercise of the right of access to information is closely linked to the prevention of discrimination and violence suffered by this group, as well as access to justice for victims.²⁶⁷
167. Based on its nature, in principle, State information is considered to be public, and government documentation, official.²⁶⁸As the legitimate owners of that information, citizens do not need to demonstrate that they have a direct interest or that they are personally affected by it,²⁶⁹ and may disclose it so that it circulates and all of society can access it and review it.²⁷⁰
168. States must respect the principles of maximum disclosure, making disclosure of information the default and classification of information the exception.²⁷¹The subjects compelled by the right to access to information must also act in good faith and “interpret the law in such a way that it meets the aims of the right of access and that they ensure the strict application of the right, provide the necessary measures of assistance to petitioners, promote a culture of transparency, contribute to making

²⁶³ IACHR. Office of the Special Rapporteur for Freedom of Expression. [The Inter-American Legal Framework Regarding the Right to Access to Information](#). Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12. March 7, 2011. Para. 5.

²⁶⁴ Inter-American Court. *Case Claude-Reyes et al. v. Chile*. Judgment of September 19, 2006. Merits, Reparations and Costs. Series C No. 151. Para. 86.

²⁶⁵ IACHR. Office of the Special Rapporteur for Freedom of Expression. [The Inter-American Legal Framework Regarding the Right to Access to Information](#). Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12. March 7, 2011. Para. 5.

²⁶⁶ Organization of American States. General Assembly. [Access to Public Information: Strengthening Democracy](#). Resolution AG/RES. 2121 (XXXV-O/05). June 7, 2005.

²⁶⁷ IACHR. [Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015](#). Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.L/V/II Doc. 48/15. December 31, 2015. Para. 38.

²⁶⁸ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002. Para. 281.

²⁶⁹ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002. Para. 282.

²⁷⁰ IACHR. Office of the Special Rapporteur for Freedom of Expression. [The Inter-American Legal Framework Regarding the Right to Access to Information](#). Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12. March 7, 2011. Para. 18.

²⁷¹ Inter-American Court. *Case Claude-Reyes et al. v. Chile*. Judgment of September 19, 2006. Merits, Reparations and Costs. Series C No. 151.

public administration more transparent, and act with due diligence, professionalism, and institutional loyalty.”²⁷²

169. States should put laws in place that permit effective access to information, with complementary regulations that ensure proper implementation pursuant to the international standards on the subject.²⁷³ In the event of a legal conflict, the law on access to information should take precedence over other legislation, as the right to access to information is recognized as an indispensable prerequisite for other human rights to function and for the functioning of democracy itself.²⁷⁴
170. The Inter-American Court has established that the State has an obligation to respond to all requests for access and to provide its reasoning in cases in which, for a reason permitted under the Convention, it limits access in a specific case.²⁷⁵ The Commission, meanwhile, has said that the right to access to information is not fully satisfied by a State response declaring that the information requested does not exist. When it comes to information that the State has an obligation to keep, it must describe the actions it took in attempting to recover or reconstruct information that may have been lost or illegally removed. Should it fail to justify the situation, the right to access to information is understood to have been violated.²⁷⁶
171. For its part, the Declaration of Principles establishes that States have an obligation to guarantee access to information and stipulates that in order to be legitimate, exceptions must be clearly established by law and have a legitimate objective—i.e., real and imminent danger affecting national security in democratic societies.²⁷⁷ Secrecy laws should define precisely the concept of national security, specify clearly the criteria to be used to declare certain information secret, detail which officials are entitled to classify documents as secret, and set overall limits on the length of time documents may remain secret.²⁷⁸ When information must remain secret pursuant to a legitimate objective under the Convention, public authorities and their staff bear sole responsibility for protecting its confidentiality.
172. States thus have an obligation to a) respond promptly, fully, and accessibly to requests; b) provide a remedy that satisfies the right to access to information; c) provide a suitable and effective judicial remedy for reviewing refusals to turn over

²⁷² IACHR. [Access to Information on Reproductive Health from a Human Rights Perspective](#). OEA/ Ser.L/V/II. Doc.61. November 22, 2011). Para. 16.

²⁷³ IACHR. [Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015](#). Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.L/V/II Doc. 48/15. December 31, 2015. Para. 22.

²⁷⁴ IACHR. [Annual Report 2011. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (The Right to Access to Public Information in the Americas). OEA/Ser.L/V/II. Doc. 69. December 30, 2011. Para. 72.

²⁷⁵ Inter-American Court. *Case Claude-Reyes et al. v. Chile*. Judgment of September 19, 2006. Merits, Reparations and Costs. Series C No. 151. Para. 77.

²⁷⁶ IACHR. [Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015](#). Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.L/V/II Doc. 48/15. December 31, 2015. Para. 110.

²⁷⁷ IACHR. [Declaration of Principles on Freedom of Expression](#). 2000. Principle 4.

²⁷⁸ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. [Joint Declaration on Access to Information and on Secrecy Legislation](#). December 6, 2004.

information; d) provide the most possible proactive transparency; e) produce or collect information; e) generate a culture of transparency; f) adequately implement regulations on access to public information; and g) adjust the legal system to the requirements of the right to access to information.²⁷⁹ The procedures for accessing public information should be simple, prompt and free or low-cost.²⁸⁰

173. The right to access to information also entails a duty of active transparency that falls to the State: the obligation to make information in the public interest available. The Inter-American Commission has held that “the obligation to provide information proactively lays the groundwork for the States’ obligation to provide public information that is essential for people to be able to exercise their fundamental rights or satisfy their basic needs in this area.”²⁸¹
174. States must proactively include government information that is in the public interest to the public domain in order to guarantee easy, prompt, effective, and practical access (for example, through freedom of information laws).²⁸²

B. The Internet and the Right to Access to Information

175. The Internet has become “one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.”²⁸³ The formation of an inclusive information society requires universal ability to access and contribute information, ideas, and knowledge so citizens can participate in discussions on public affairs and be part of the decision-making process.²⁸⁴ The Internet offers a new opportunity for developing policies on proactive transparency and dissemination of information and ideas of all kinds. Its speed, decentralization, and low cost allow both the State and private parties to disseminate information without barriers of borders, opportunity, or bureaucracy that once hampered such circulation.²⁸⁵

²⁷⁹ IACHR. Office of the Special Rapporteur for Freedom of Expression. [The Inter-American Legal Framework Regarding the Right to Access to Information](#). Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12. 7 March 2011. Para. 23 to 45.

²⁸⁰ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. [Joint Declaration on Access to Information and on Secrecy Legislation](#). December 6, 2004.

²⁸¹ IACHR. [Annual Report 2015. Report of the Special Rapporteur for Freedom of Expression 2015](#). Chapter III (Access to Information, Violence Against Women, and the Administration of Justice in the Americas). OEA/Ser.L/V/II Doc. 48/15. December 31, 2015. Para. 52; IACHR. [Access to Information on Reproductive Health from a Human Rights Perspective](#). OEA/ Ser.L/V/II. Doc.61. November 22, 2011). Para. 25.

²⁸² United Nations. Human Rights Committee. [General Comment N° 34 – Article 19: Freedom of opinion and expression](#). UN Doc. CCPR/C/GC/34. September 12, 2011. Para. 19.

²⁸³ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 2.

²⁸⁴ World Summit on the Information Society. [Declaration of Principles, Building the Information Society: a global challenge in the new Millennium](#). Geneva 2003- Tunis 2005. Doc. WSIS-03/GENEVA/4-E. December 12, 2003. Para. 24.

²⁸⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013.

176. Access to public information over the Internet empowers citizens to actively participate in democratic State's decision-making processes.²⁸⁶ The nature of the Internet enables an increase in the amount of information that is publicly available, allowing it to be mass distributed at low-cost and published dynamically in such a way that it can be worked on and with.²⁸⁷ Governments should also examine the possibility of publishing data in a way that is machine-readable, and is made available under an open license such as *Creative Commons*. Machine-readable data is that which can be interpreted by computer code without the need for special equipment or operating systems. This allows the data to be accessed by the citizen to extract the information relevant to them, rather than use information that is constructed around the needs of a bureaucracy.
177. Access to information must also be guaranteed without discrimination. States must therefore ensure multilingualism and that the information is accessible over the Internet for persons with disabilities, as developed previously.
178. Principle 3 of the Declaration of Principles on Freedom of Expression states that, "Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it." This right is known as *habeas data* and is particularly relevant in the digital age, as many new actors now have the ability to collect, store, and process personal data, with the reasons for doing so having radically expanded.
179. *Habeas data* enables people to change, delete, or correct information considered sensitive, incorrect, biased, or discriminatory in order to preserve their rights to privacy, honor, personal identity, property, and accountability in the collection of information.²⁸⁸ Should an individual's data be stored somewhere, that individual has the right to obtain intelligible information on what it includes and why it is being stored, as well as to rectify it or delete it should its collection or use be in violation of applicable legal provisions.²⁸⁹
180. The Office of the Special Rapporteur for Freedom of Expression has emphasized that *habeas data* "is the common heritage of inter-American constitutional law, insofar as most of the constitutions of the States in the region recognize it, whether in its substantive or its procedural form."²⁹⁰ For cases in which there are no specific *habeas*

²⁸⁶ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 23.

²⁸⁷ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. [Joint Declaration on Access to Information and on Secrecy Legislation](#). December 6, 2004. See also, World Summit on the Information Society. [Tunis Commitment](#). Doc. WSIS-05/TUNIS/DOC/7-E. November 18, 2005. Para. 11.

²⁸⁸ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para. 289.

²⁸⁹ Office of the High Commissioner for Human Rights. *General Comment No. 16, Right to Privacy (Article 17)*. U.N. Doc. HRI/GEN/1/Rev.7 at 162. April 8, 1988. Para 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

²⁹⁰ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 140.

data laws, people can use access laws to access their data and States would be required to turn it over, but only to its owners.²⁹¹

181. In the context of a *habeas data* remedy, entities are required to use the information for objectives that are specific and explicitly stipulated. They are also required to ensure data security from accidents, access, or unauthorized processing. Through a *habeas data* remedy, individuals can verify if personal information collected by State entities or the private sector has been obtained legally. If obtained illegally, the remedy enables determination as to whether the responsible parties should be punished.²⁹²
182. In order to effectively facilitate access to information, the mechanism for bringing a *habeas data* remedy must be simple and not involving excessively complex administrative procedures; easy to access; and low-cost.²⁹³ Likewise, the citizen should not be required to explain the reason for requesting the information, as the fact alone that personal data exists in public or private records is enough to exercise the right.²⁹⁴ In the event of a restriction that blocks the exercise of the right to *habeas data*, it must meet standards of necessity and proportionality.²⁹⁵

²⁹¹ IACHR. Office of the Special Rapporteur for Freedom Of Expression. [The Inter-American Legal Framework Regarding the Right to Access to Information](#). Second Edition. OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12. March 7, 2011. Para. 62.

²⁹² IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para. 292.

²⁹³ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para. 293.

²⁹⁴ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para. 294.

²⁹⁵ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para. 294.

CHAPTER IV
RIGHT TO PRIVACY AND
PROTECTION OF PERSONAL DATA

RIGHT TO PRIVACY AND PROTECTION OF PERSONAL DATA

183. Respect for online freedom of expression assumes that there is privacy for people’s communications. Indeed, without a private sphere, free from the arbitrary interference of the State or private individuals, the right to freedom of thought and expression cannot be exercised fully. The regulatory framework of the right to privacy in the inter-American system is established in article 11 of the American Convention²⁹⁶ and articles V and X of the American Declaration.²⁹⁷
184. This right as it pertains to the field of human rights has been developed and interpreted in different ways in the regional and universal systems, but takes on new meaning with the advent of new technologies. The development of the Internet empowers and simplifies communications and the storage and standardization of information. But it also empowers States and private parties to more easily conduct monitoring, collection, and surveillance of data, representing a serious risk to privacy. Moreover, the Internet has also become a huge repository of information and personal data, including images. Their availability facilitates the exercise of other rights—such as family life, the right to health, freedom of expression and access to information—but it threatens the full exercise of the right to privacy online.²⁹⁸
185. The Office of the Special Rapporteur has stated that in view of this close relationship between freedom of expression and privacy, States should avoid the implementation of any measure that restricts, in an arbitrary or abusive manner, the privacy of individuals (article 11 of the American Convention). This privacy is understood in a broad sense as every personal and anonymous space that is free from intimidation or retaliation, and necessary for an individual to be able to freely form an opinion and express his or her ideas as well as to seek and receive information, without being forced to identify him or herself or reveal his or her beliefs and convictions or the sources he or she consults. Nevertheless, the defense of individual privacy must be based on reasonable and proportionate criteria that do not end up arbitrarily

²⁹⁶ [American Convention on Human Rights \(Pact of San José\)](#). Article 11 establishes that “1. [a]ll persons have the right to respect for their honor and recognition of their dignity. 2. No one must be the target of arbitrary or abusive interferences in their private life, that of their family, in their home or in their correspondence, nor of illegal attacks on their honor or reputation. 3. All persons have the right to the protection of the law against those interferences or those attacks.”

²⁹⁷ [American Declaration of the Rights and Duties of Man](#). Article V establishes that “[a]ll persons have the right to protection of the Law against abusive attacks on their honor, their reputation and their private and family life” and Article X establishes that “all persons have the right to the inviolability and circulation of their correspondence”.

²⁹⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#), Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 130 and following.

restricting the right to freedom of expression. It is thus important to recall, as stated in principle 10 of the Declaration of Principles, that privacy laws should not inhibit or restrict investigation and dissemination of information of public interest.

A. International Standards on Privacy and Data Protection

186. The legal protection spelled out in article 11 of the American Convention explicitly includes the protection of private life, the home,²⁹⁹ communications³⁰⁰ and family life.³⁰¹
187. According to the standards developed within the inter-American system, privacy “is characterized by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or the public authorities.”³⁰² In the case of *Artavia Murillo*, the Court found that private life includes aspects of an individual’s physical, emotional, and social identity, including personal autonomy and the right to establish and develop social relationships with other persons.³⁰³ The Court has held that privacy is strictly linked to the right to personal liberty enshrined in article 7 of the American Convention, adopting a broad concept of liberty as “the ability to do and not do all that is lawfully permitted.”³⁰⁴
188. As the Inter-American Court has concluded, the home is the proper or “natural” place for an individual’s personal or familial development.³⁰⁵ The space is characterized as one free of abusive or arbitrary invasions by the State or third parties.³⁰⁶ Effectively, the main factor for finding that the inviolability of the home has been transgressed is lack of consent or of a valid court order justifying the intrusion, not whether a particular domicile is personal or work-related.³⁰⁷

²⁹⁹ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Merits, Reparations and Costs. Series C No. 148; I/A Court H.R., *Case Escué-Zapata v. Colombia*. Judgment of July 4, 2007. Merits, Reparations and Costs. Series C No. 165; I/A Court H.R., *Case Fernández-Ortega et al. v. Mexico*. Judgment of August 30, 2010. Merits, Reparations and Costs. Series C No. 215.

³⁰⁰ I/A Court H.R. *Case Tristán Donoso v. Panamá*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193.

³⁰¹ I/A Court H.R., *Case Escué-Zapata v. Colombia*. Judgment of July 4, 2007. Merits, Reparations and Costs. Series C No. 165.

³⁰² I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Merits, Reparations and Costs. Series C No. 148. Para. 192.

³⁰³ I/A Court H.R. *Case of Artavia-Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*. Judgment of November 28, 2012. Merits, Reparations and Costs. Series C No. 257. Para. 143.

³⁰⁴ I/A Court H.R. *Case of Artavia-Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*. Judgment of November 28, 2012. Merits, Reparations and Costs. Series C No. 257. Para. 143.

³⁰⁵ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Merits, Reparations and Costs. Series C No. 148; I/A Court H.R., *Case Escué-Zapata v. Colombia*. Judgment of 4 July, 2007. Merits, Reparations and Costs. Series C No. 165; I/A Court H.R., *Case Fernández-Ortega et al. v. Mexico*. Judgment of August 3, 2010. Merits, Reparations and Costs. Series C No. 215.

³⁰⁶ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Merits, Reparations and Costs. Series C No. 148. Para. 194.

³⁰⁷ I/A Court H.R., *Case Escué-Zapata v. Colombia*. Judgment of July 4, 2007. Merits, Reparations and Costs. Series C No. 165. Para. 94.

189. Correspondence is also specifically protected in article 11 and protection has been extended through case law to cover “communications,” including communications using telephones and new technologies like the Internet.³⁰⁸ In the cases of *Tristán Donoso v. Panama* and *Escher et al. v. Brazil*, the Inter-American Court found that although these forms of communication are not specifically indicated in article 11, they are still protected.³⁰⁹ The protection extends to all personal and professional communications with the understanding that the protection of privacy includes the development of relationships between people, and in particular, a person’s professional life is often where he or she has the most opportunity to interact with the world.³¹⁰ The protection of privacy as it relates to communication also extends to information about the communication, such as phone numbers called, the frequency of calls, their duration, etc.³¹¹ This information is an integral part of communication, the same as its actual content, and storing it also constitutes an invasion of a person’s privacy and communications.³¹² In defining the scope of this type of information, the European Court included information about internet communications, known as metadata. Metadata is information about Internet connections and the different activities conducted online: the location of the equipment where the connection is made, the time, the communication recipients, time spent on forums, pages opened, details on e-mails sent, frequency, etc. Like the information on telephone communications protected by the case law of the inter-American system, this information is separate from the content yet still highly revelatory of personal relationships, habits and customs, preferences, lifestyles, etc.³¹³
190. Finally, family life is also explicitly protected under article 11 of the Convention. The inter-American system developed it mainly in the case of *Atala Riffo and daughters v. Chile*³¹⁴ and then in the case of *Artavia Murillo (In Vitro Fertilization) v. Costa Rica*.³¹⁵

³⁰⁸ ECHR. *Case Klass and others v. Germany*. Judgment September 6, 1978. Para. 29; ECHR. *Case Halford v. United Kingdom*. Judgment of May 27, 1997. Para. 44; ECHR. *Case Amann v. Switzerland*. Judgment of February 16, 2000. Para. 44; and ECHR. *Case Copland v. United Kingdom*. Judgment of March 13, 2007. Para. 41.

³⁰⁹ ECHR. *Case Klass and others v. Germany*. Judgment September 6, 1978. Para. 29; ECHR. *Case Halford v. United Kingdom*. Judgment of May 27, 1997. Para. 44; ECHR. *Case Amann v. Switzerland*. Judgment of February 16, 2000. Para. 44; and ECHR. *Case Copland v. United Kingdom*. Judgment of March 13, 2007. Para. 41.

³¹⁰ I/A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200. Para. 114. See also, ECHR. *Case Niemietz v. Germany*. Judgment of December 16, 1992. Para. 28 and 29, and *Case Huvig v. France*. Judgment of April 24, 1990. Para. 8 and 25.

³¹¹ I/A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200. Para. 114. In its ruling, the Inter-American Human Rights Court established that “article 11 applies to telephone conversations regardless of their content and may even include technical operations aimed at recording that content, through recording and listening to it, along with any other element of the communications process itself, for example, the destination of the calls that go out or the origin of those that enter, the identity of the interlocutors, the frequency, time or duration of the calls, aspects which may be verified without the need to record the content of the call or record the conversations. Ultimately, the protection of private life takes concrete form in the right that subjects other than the interlocutors may not illegally gain knowledge of the content of telephone conversations or other aspects, such as those mentioned above, inherent to the communications process”.

³¹² ECHR. *Case Klass and others v. Germany*. Judgment September 6, 1978. Para. 29; ECHR. *Case Halford v. United Kingdom*. Judgment of May 27, 1997. Para. 44; ECHR. *Case Amann v. Switzerland*. Judgment of February 16, 2000. Para. 44; and ECHR. *Case Copland v. United Kingdom*. Judgment of March 13, 2007. Para. 44.

³¹³ ECHR. *Case Niemietz v. Germany*. Judgment of December 16, 1992. Para. 28 and 29.

³¹⁴ I/A Court H.R. *Case of Atala Riffo and daughters v. Chile*. Judgment February 24, 2012. Merits, Reparations and Costs. Series C No. 239.

Both cases connect article 11(2) to article 17 of the American Convention, regarding protection of the family. Although it is addressing the issue of in vitro fertilization, the Court recognizes in *Artavia Murillo* that the right to privacy and family includes the right to form a family and connects it to the right to access to the benefits of science and technology in order to do so.³¹⁶

191. The Inter-American Commission has indicated that the right to privacy protects at least four legal rights: a) the right to have an individual sphere impervious to arbitrary interference from the State or third parties; b) the right to govern oneself by one's own rules defined autonomously according to one's individual life plan; c) the right to the confidentiality of all the data produced in that private space, with a corresponding prohibition on disclosure or circulation of information captured without the consent of its owner, in that space of private protection reserved for the individual; and d) the right to one's own image.³¹⁷
192. Respect for and guarantee of the full scope of the right to privacy as set forth in article 11 of the American Convention requires States to refrain from abusive or arbitrary meddling or interference. It also requires them to adopt specific measures for protecting people from abusive meddling at the hands of third parties. In the case of *Fonvecchia and D'Amico v. Argentina*, the Inter-American Court established clearly that "the State has an obligation to guarantee the right to privacy through positive actions, which may involve, in some cases, the adoption of measures to ensure that private life is protected against interference by public authorities as well as by individuals or private institutions, including the media."³¹⁸
193. All restrictions to the right to privacy, including the right to be free from arbitrary or abusive interference with communications, must pass the test of legality,

³¹⁵ I/A Court H.R. *Case of Artavia-Murillo et al. ("In Vitro Fertilization") v. Costa Rica*. Judgment of November 28, 2012. Merits, Reparations and Costs. Series C No. 257.

³¹⁶ I/A Court H.R. *Case of Artavia-Murillo et al. ("In Vitro Fertilization") v. Costa Rica*. Judgment of November 28, 2012. Merits, Reparations and Costs. Series C No. 257. Para. 150. In its ruling, the Court established that "the right to private life and reproductive freedom correlates with the right of access to the necessary medical technology to exercise that right. The right to enjoy the benefits of scientific progress has been internationally recognized and, in the Inter-American sphere, is contemplated in article XIII of the American Declaration and in article 14.1 b) of the Protocol of San Salvador. It should be pointed out that the United Nations General Assembly, in its Declaration about that right, pointed to the relationship between this and satisfaction of the material and spiritual needs of all population sectors. Therefore, pursuant to article 29 b) of the American Convention, the scope of the rights to private life, reproductive autonomy and starting a family, derived from articles 11.2 and 17.2 of the American Convention, extends to the right of all persons to benefit from scientific progress and its applications. From the right of access to the highest and most effective scientific progress for the exercise of reproductive autonomy and the possibility of starting a family, the right of access to the best health services in reproductive assistance techniques derives, and, therefore, the prohibition against disproportionate and unnecessary de jure or de facto restrictions for exercising the reproductive decisions that correspond to each person".

³¹⁷ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 131 and following.

³¹⁸ I/A Court H.R. *Case of Fonvecchia and D'Amico v. Argentina*. Judgment November 29, 2011. Merits, Reparations and Costs. Series C No. 238. Para. 49.

proportionality, and necessity established in the Convention itself and reaffirmed by the Inter-American Court.³¹⁹

B. The Internet and Protection of Privacy

194. States have an obligation to respect and protect the right to privacy in the digital era and adopt legislation and practices—or adapt existing ones—to do so,³²⁰ protecting everyone under their jurisdictions—including, pursuant to international law, those in their custody—without discrimination based on national origin, nationality, sex, race, religion, or for any other grounds.³²¹
195. With the advent of the Internet, new challenges emerged to protecting the right to privacy, both for the State in its role of guarantor and for private parties in their roles as users.
196. By nature, the Internet is currently without a doubt a natural space for personal development. Although in certain cases it can be construed as a domicile-like space for a person—their personal, professional, banking, or commercial web page—or as a means of communication—e-mail, messaging services, etc.—it cannot necessarily or by force be limited to these two characterizations.
197. The Internet also provides new “public spaces” in which to interact, opine, associate, participate, educate or receive education, inform or be informed, etc. The distinction between the personal and public realms is not always as clear to third parties, and neither is it clear, often, to the actors themselves—individuals—who participate.
198. The Internet by necessity presupposes the existence of and coexistence with intermediaries—service providers, servers, platforms, etc.—meaning that use of the Internet and interaction with it will necessarily generate data and leave a “digital footprint,”³²² even in its most private areas. States must protect the right to privacy from potentially arbitrary or abusive meddling from third parties as well.³²³
199. Indeed, the impact of technology upon privacy became apparent with the introduction of mass circulation newspapers and photographs. People who saw their

³¹⁹ I/A Court H.R. *Case of Fontevecchia and D’Amico v. Argentina*. Judgment November 29, 2011. Merits, Reparations and Costs. Series C No. 238, and /A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200.

³²⁰ United Nations. General Assembly. *The right to privacy in the digital age*. UN Doc. A/RES/68/167. December 18, 2013. Para. 4. Available at: <http://www.un.org/en/ga/68/resolutions.shtml>

³²¹ International Covenant on Civil and Political Rights. *General Comment N° 31, The Nature of the General Obligation Imposed on States Parties to the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.13. March 29, 2004. Para. 10. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Submit=Search&Lang=E

³²² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 23.

³²³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 23.

pictures in a newspaper were concerned that what they had assumed to be private was now public. With the internet, the technical capacity to gather, store and exchange personal information about people provided by digital technologies has led a new challenge in protecting privacy. Most social media companies have a business model that involves providing “free” services in exchange for ownership of the data generated by the user. This immensely complicates the right of people to determine when, how and to what extent information about them is communicated to others. The growing processing power of computers exacerbates the challenge as information can be harvested from multiple sources, processed and re-processed and then sold on. In fact the entire business model of the most successful companies directly impinges upon the right to privacy.

200. New technologies also create the possibility to locate and track personal data that was not possible before. Each computer, mobile phone or other device attached to the Internet has a unique Internet Protocol (IP) address, which provides a specific identifier for the device and which means in turn that they can be traced. The advent of GPS systems has meant that devices with unique IP addresses can be physically located, enabling anyone with access to that information to track the movements of the person with the device.
201. The internet has seen a batch of new tools designed to extract personal information from the user. Of the many tools that have been created to track Internet users, two familiar examples are cookies and web bugs. Cookies are small pieces of text which web browsers store on a user’s computer. The cookie ‘registers’ with the web browser each time the user accesses that browser and can be used for monitoring the user’s session history, storing any preferences, etc. Web bugs (or web beacons as they are sometimes known) are usually invisible to the user (they are typically only 1x1 pixel in size) and are embedded in web pages and emails. When the page/email containing the web bug is viewed, it sends information back to the server (including the IP address of the user, the time and date that the page/email was viewed and the browser it was viewed on).
202. While not intended to be exhaustive, this report outlines five of the challenges that arise or are magnified by the phenomenon of the Internet: a) protection of personal data; b) surveillance, monitoring, and collection; c) encryption and anonymity; d) “big data”; and e) the Internet of Things.

a. Protection of Personal Data

203. In order to function, the Internet requires the creation, storage, and management of data: personal data as well as other kinds. This means that an enormous amount of information about people can be collected, stored, and analyzed by States and third parties.³²⁴

³²⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 137.

204. To protect privacy on the Internet, the confidentiality of personal online data must be guaranteed. Latin America has general defined personal data broadly to include any information on identified or identifiable physical or juridical persons.³²⁵ The Commission highlighted that it is crucial to develop rules for data protection that regulate the storage, processing, and use of personal data, as well as its transfer, whether among State entities or third parties.³²⁶ Due to the cross-border nature of the Internet, the need to regulate data handling is not limited to national frameworks: An international framework for data regulation must be developed as well.³²⁷
205. States must adopt policies to prohibit data processing—including storage, analysis, and disclosure of personal data—except when authorized or when the person affected has given informed consent.³²⁸ Positive measures should also be taken to educate people on their rights and the legal requirements for processing personal data and to inform them when their data has been collected, stored, processed, or disclosed. Use of personal data that violates human rights must be prohibited, and effective and independent monitoring mechanisms must be established.³²⁹
206. An individual’s consent authorizes States and private parties to process his or her personal data.³³⁰ However, in order for consent to be valid, it must be informed and freely given.³³¹ States must ensure the general conditions are in place to guarantee that consent can effectively be informed and freely given.³³² When the State is the one processing the data, it must establish the guidelines and controls necessary to verify 1) that the data is not used for purposes other than the ones declared, 2) that the data is maintained and stored pursuant to those purposes and only during the period of time reported and consented to; and 3) that the data is shared only under the conditions and for the purposes reported and consented to.³³³

³²⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 138.

³²⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 138.

³²⁷ Organization of American States. Inter-American Juridical Committee. [Privacy and Data Protection](#). OEA/Ser.Q CJI/doc. 474/15 rev.2. (86th Regular Session, Rio de Janeiro, Brazil). March 26, 2015. Principle 11.

³²⁸ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013. Para. 82.

³²⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 139.

³³⁰ Organization of American States. Inter-American Juridical Committee. [Privacy and Data Protection](#). OEA/Ser.Q CJI/doc. 474/15 rev.2. (86th Regular Session, Rio de Janeiro, Brazil). March 26, 2015. Principle 2.

³³¹ Organization of American States. Inter-American Juridical Committee. [Privacy and Data Protection](#). OEA/Ser.Q CJI/doc. 474/15 rev.2. (86th Regular Session, Rio de Janeiro, Brazil). March 26, 2015. Principle 2.

³³² Organization of American States. Inter-American Juridical Committee. [Privacy and Data Protection](#). OEA/Ser.Q CJI/doc. 474/15 rev.2. (86th Regular Session, Rio de Janeiro, Brazil). March 26, 2015. Principle 2.

³³³ Office of the High Commissioner for Human Rights. *General Comment No. 16, Right to Privacy (Article 17)*. U.N. Doc. HRI/GEN/1/Rev.7 at 162. April 8, 1988. Para 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

207. The United Nations Office of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression warned that in many States, data protection laws are insufficient or inadequate and highlighted the need to adopt clear laws governing both the State and the private sector. The report highlights the urgency of the matter, particularly considering that Internet intermediaries collect and store a large volume of data, with some suits filed over the practice in some States of forcing intermediaries to collect and share such data.³³⁴
208. States must ensure a policy of transparency regarding legislation that applies to State and private data handling practices, data processing, procedures for challenging that processing, and the authority competent to resolve complaints.³³⁵ It is crucial for individuals to be able to access the information that is kept about them, update it, correct it, and where necessary, delete it.³³⁶
209. The right to access and the State's obligation to be transparent with the personal data it keeps also cover biometric data.³³⁷ Biometric data enable "systematic recognition of individuals based on biological and behavioral characteristics."³³⁸ The mechanism for using biometric data requires its collection in the form of fingerprints, iris scans, DNA, voice, etc., and the standardization of all that data into a single database that, combined with other sources of behavioral information, makes it possible to use statistical methods to identify individuals. States must observe strict standards of necessity and proportionality when determining which data to collect and the methods to be used for collecting biological and behavioral data; establish collection protocols that respect human rights; and guarantee the right to access to information regarding the policies and practices in force, the type of information collected, and the uses made of that information, also indicating the authority competent to collect and process that data. This process must be subject to both administrative and judicial oversight, and the State must investigate any human rights violation brought to its

³³⁴ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011. Para. 56.

³³⁵ Office of the High Commissioner for Human Rights. *General Comment No. 16, Right to Privacy (Article 17)*. U.N. Doc. HRI/GEN/1/Rev.7 at 162. April 8, 1988. Para 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

³³⁶ Office of the High Commissioner for Human Rights. *General Comment No. 16, Right to Privacy (Article 17)*. U.N. Doc. HRI/GEN/1/Rev.7 at 162. April 8, 1988. Para 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

Office of the High Commissioner for Human Rights. *General Comment No. 16, Right to Privacy (Article 17)*. U.N. Doc. HRI/GEN/1/Rev.7 at 162. April 8, 1988. Para 10. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11

³³⁷ In this respect, see Asociación por los Derechos Civiles (ADC). *Si nos conocemos más, nos cuidamos mejor: Informe sobre políticas de biometría en la Argentina*. May 2015. Available at: <https://adcdigital.org.ar/wp-content/uploads/2016/01/Si-nos-conocemos-mas.pdf>; Hernández, Valentina. *La acumulación compulsiva de datos personales en América Latina*. Derechos Digitales. October 1, 2015. Available at: https://www.derechosdigitales.org/9376/la-acumulacion-compulsiva-de-datos-personales-en-america-latina/?utm_content=buffer6ac89&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer; Rodríguez, Katitza. *Biometría en Argentina: la vigilancia masiva como política de estado*. Publicado por Fundación Vía Libre. Available at: <http://www.vialibre.org.ar/2012/01/10/biometria-en-argentina-la-vigilancia-masiva-como-politica-de-estado/>

³³⁸ Asociación por los Derechos Civiles (ADC). *Si nos conocemos más, nos cuidamos mejor: Informe sobre políticas de biometría en la Argentina*. May 2015. Available at: <https://adcdigital.org.ar/wp-content/uploads/2016/01/Si-nos-conocemos-mas.pdf>

attention that is perpetrated in the context of these practices.³³⁹

b. Surveillance, Monitoring, and Collection

210. Internet surveillance can come in different forms and nuances, including documentation, monitoring of activities and communications, or mass or targeted collection of online communications or activity.³⁴⁰ Targeted surveillance is generally protected in criminal proceedings or other kinds of investigations, and involves collecting and/or monitoring the communications of an identified or identifiable individual, and IP address, a specific device, a specific account, etc.³⁴¹ Mass data and communications surveillance involves tapping and monitoring entire cables, networks, or equipment, or buying server or intermediary data from a third party, then accessing all the data collected that has not been encrypted.³⁴²
211. Technologies developed in recent decades have dramatically reduced both the human and the financial costs of surveillance, thus the use of surveillance has increased radically as well.³⁴³ Considering these dangers and others involved in technological developments, the inter-American system has held that “the State must increase its commitment to adapt the traditional forms of protecting the right to privacy to current times.”³⁴⁴
212. Internet surveillance in any of its forms or nuances constitutes interference in the private lives of people and, when conducted illegally, can also affect the rights to due process and a fair trial, freedom of expression, and access to information.³⁴⁵ It is recognized both regionally and universally that illegal or arbitrary surveillance and interception and collection of personal data affect not only the right to privacy and freedom of expression but can also run contrary to the precepts of a democratic society.³⁴⁶ The United Nations Human Rights Committee has warned of the negative effects that surveillance, interception of communications and collection and analysis

³³⁹ Organization of American States. Inter-American Juridical Committee. [Privacy and Data Protection](#). OEA/Ser.Q CJI/doc. 474/15 rev.2. (86° Regular Session, Rio de Janeiro, Brazil). March 26, 2015. Principle 2.

³⁴⁰ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013.

³⁴¹ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013.

³⁴² United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013.

³⁴³ United Nations. General Assembly. *The right to privacy in the digital age*. UN Doc. A/RES/68/167. December 18, 2013. Para. 2.

³⁴⁴ I/A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200. Para. 115.

³⁴⁵ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013.

³⁴⁶ United Nations. General Assembly. *The right to privacy in the digital age*. UN Doc. A/RES/68/167. 18 December 2013. Para. 4. Available at: <http://www.un.org/en/ga/resolutions.shtml>, and IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013.

of personal data can have—particularly when performed indiscriminately—on the enjoyment and exercise of human rights.³⁴⁷

213. According to the international principles developed to date, this surveillance includes interception of communications regardless of whether the resulting information is analyzed or systemized.³⁴⁸ It includes both cases in which the State itself collects the communications and cases where States outsource that work— for example, by requiring servers and service providers to collect data and then demanding access to it, regardless of where it is stored, as a condition for the servers or providers to operate, or when they reserve the right to access data flows for local purposes such as pursuing criminals, oversight, etc.³⁴⁹ The standards developed in both the Inter-American and the European system aim at protecting not only the content of communications but also the data about the communications, or the metadata in the case of the Internet, as established above.³⁵⁰ Surveillance in all its forms constitutes interference in private life.
214. In the same vein, the systematic collection of public data —voluntarily submitted by the owner of such data, including as blog posts, social network activity, or any other public domain content—also constitutes interference in the private lives of people.³⁵¹ The fact that a person leaves public traces of his or her activities—unavoidable on the Internet—does not authorize the State to collect it systematically except in specific circumstances where such interference would be justified.
215. All network surveillance constitutes interference with individuals’ privacy. However, not all interference is *per se* illegitimate, and in exceptional cases, different degrees of interference are justifiable depending on the circumstances.³⁵² Terrorism and the fight against organized crime are examples of instances where the State has an obligation to prevent and protect that constitutes a legitimate objective that justifies the exceptional and supervised use of surveillance technologies and mechanisms.³⁵³

³⁴⁷ International Covenant on Civil and Political Rights. *General Comment N° 31, The Nature of the General Obligation Imposed on States Parties to the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.13. March 29, 2004. Para. 10. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=CCPR%2FC%2F21%2FRev.1%2FAdd.13&Submit=Search&Lang=E

³⁴⁸ Office of the High Commissioner for Human Rights. *General Comment No. 16, Right to Privacy (Article 17)*. U.N. Doc. HRI/GEN/1/Rev.7 at 162. April 8, 1988. Para 8. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

³⁴⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 74 and 75.

³⁵⁰ Organization of American States. Inter-American Juridical Committee. [Privacy and Data Protection](#). OEA/Ser.Q CJI/doc. 474/15 rev.2. (86th Regular Session, Rio de Janeiro, Brazil). March 26, 2015.

³⁵¹ ECHR. *Case Segerstedt-Wiberg v. Suizterland*. Judgment of June 6, 2006. Para. 71 and 72, and ECHR. *Case Rotaru v. Romania*. Judgment of May 4, 2000. Para. 43 and 44.

³⁵² United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013.

³⁵³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. 31 December, 2013. See also, United Nations. Human Rights Council. Special Rapporteur of the United Nations (UN) on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Special Rapporteurship for Freedom of Expression of the Inter-American Commission of Human Rights (OAS). [Joint Declaration on Surveillance Programs](#)

However, “it is crucial to understand that given the dynamic character of the Internet and of communications technology in general, this type of surveillance may constitute a particularly invasive act that seriously affects the right to privacy and freedom of thought and expression.”³⁵⁴ The United Nations General Assembly has highlighted that although public safety can justify the collection and systemization of certain information, states must guarantee that these measures respect human rights.³⁵⁵

216. In line with the European and universal systems, the Inter-American system established a three-prong test to verify the legitimacy of State or non-State interference with privacy, including electronic surveillance. Pursuant to this test, surveillance must be legal—both formally and materially—necessary, and proportional.³⁵⁶
217. The permissible instances of and conditions for surveillance must be established beforehand in a law and established explicitly, strictly, precisely and clearly, both substantively and procedurally.³⁵⁷ In view of the inherent risk of abuse of any surveillance system, these measures should be based on legislation that is particularly precise, clear and detailed, and States have to ensure a plural, democratic, and open consultation prior to the adoption of the applicable regulations. The objectives for which surveillance or the interception of communications would be permissible must be explicitly established in the law, and in all cases the laws must establish the need for a prior court order.³⁵⁸ The nature of the measures, as well as their scope and

[and their Impact on Freedom of Expression](#). June 21, 2013, and IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para 371.

³⁵⁴ Special Rapporteur of the United Nations (UN) on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Special Rapporteurship for Freedom of Expression of the Inter-American Commission of Human Rights (OAS). [Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression](#). June 21, 2013; 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. [Joint Declaration on Freedom of Expression and the Internet](#). June 1, 2011. Point 1 (a) and (b). See also, United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013.

³⁵⁵ United Nations. General Assembly. *The right to privacy in the digital age*. UN Doc. A/RES/68/167. December 18, 2013. Para. 4. Available at: <http://www.un.org/en/ga/68/resolutions.shtml>

³⁵⁶ I/A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200.

³⁵⁷ I/A Court H.R. *Case of Kimel v. Argentina*. Judgment of May 2, 2008. Merits, Reparations and Costs. Series C No. 177. Para. 63; I/A Court H.R. *Case of Usón-Ramírez v. Venezuela*. Judgment of November 20, 2009. Preliminary Objections, Merits, Reparations and Costs. Series C No. 207. Para. 55; Inter-American Court of Human Rights. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Serie A No. 5. Para. 39-40; I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of 22 November, 2005. Merits, Reparations and Costs. Series C No. 135. Para. 79; I/A Court H.R. *Case of Herrera-Ulloa v. Costa Rica*. Judgment of July 2, 2004. Preliminary Objections, Merits, Reparations and Costs. Series C No. 107. Para. 120; I/A Court H.R. *Case Tristán Donoso v. Panamá*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193. Para. 117; IACHR. *Annual Report 1994*. Chapter V (Report on the Compatibility of “Desacato” (Contempt) Laws with the American Convention on Human Rights). Title III. OEA/Ser. L/V/II.88 doc. 9 rev. February 17, 1995. Available at: <https://www.cidh.oas.org/annualrep/94eng/TOC.htm>

³⁵⁸ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013. Para. 81.

- duration, must be regulated, establishing the facts that could lead to them and the bodies responsible for authorizing, implementing and monitoring them.³⁵⁹
218. The laws and policies governing the nature, scope, and implementation of interception and surveillance mechanisms and when they are in force must be public, and the State is required to apply the principle of maximum disclosure developed in the framework of right to access information.³⁶⁰ The maximum disclosure requirement covers both policies and practices on electronic surveillance, including the acquisition, development, or updating of systems available for it; the protocols for its use; the conditions and guidelines for its authorization; and which authorities are in charge of its implementation, authorization, and supervision.³⁶¹ The Inter-American Commission notes with concern that some States in the region have acquired new surveillance technologies, yet the processes for its acquisition, use, availability, and monitoring lack sufficient regulation or dissemination.³⁶² In its Report on Terrorism and Human Rights, the Inter-American Commission highlighted that in complex contexts such as the fight against terrorism, the need for public information is even greater in order prevent abuses. It emphasized that States must demonstrate need for any measure that keeps certain information secret to protect national security and public order.³⁶³ Citing the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, the Commission noted that measures to keep such information secret must be justified by a legitimate and demonstrable aim³⁶⁴ and the information should be public unless the damage to some legitimate interest is substantial.³⁶⁵
219. Similarly, States must promote and disseminate knowledge and awareness regarding the policies imposed on Internet service providers and other intermediaries, whether established by law or by administrative regulation.
220. Limitations on rights that are established by law must pursue a pressing need that is compatible with the American Convention.³⁶⁶ Like other international treaties, the American Convention provides for specific instances where rights may be limited, including for reasons of national security, public morals, and the rights of others. The

³⁵⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 74 and 75.

³⁶⁰ [The Global Principles on National Security and the Right to Information \(Tshwane Principles\)](#), published by Open Society Foundations. June 12, 2013.

³⁶¹ [The Global Principles on National Security and the Right to Information \(Tshwane Principles\)](#), published by Open Society Foundations. June 12, 2013.

³⁶² IACHR. Office of the Special Rapporteur for Freedom of Expression. July 21, 2015. Press Release R80/15. [The Office of the Special Rapporteur Expresses Concern Over the Acquisition and Implementation of Surveillance Programs by States of the Hemisphere](#).

³⁶³ IACHR. [Terrorism and Human Rights](#). OEA/Ser. L/V/II.116. Doc. 5 rev. 1 corr. October 22, 2002. Para. 327.

³⁶⁴ [The Johannesburg Principles on National Security, Freedom of Expression and Access to Information](#), published by Article 19. London, United Kingdom, 1996. Principles 1 and 2.

³⁶⁵ [The Johannesburg Principles on National Security, Freedom of Expression and Access to Information](#), published by Article 19. London, United Kingdom, 1996. Principle 4.

³⁶⁶ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 76 to 78.

UN Special Rapporteur for Freedom of Expression has argued that given the broadness and ambiguity of these terms, laws limiting human rights for reasons of national security, for example, should clearly and specifically describe the criteria to be applied for determining the cases in which such limitations are legitimate and be careful to accurately define the concept.³⁶⁷ The concept of national security cannot be interpreted in any way and must be defined from a democratic perspective.³⁶⁸

221. Measures to limit the right to privacy online, surveillance in particular, must be necessary in a democratic society in order to be legitimate.³⁶⁹ In this regard, the inter-American system has held that it is not sufficient for the measures to be useful, reasonable, or convenient. Rather, they must meet a clear and pressing need in order to achieve the legitimate objectives being pursued.³⁷⁰
222. Finally, the proportionality of the measure will depend on balancing the pressing and necessary aim being pursued against the impact of the proposed limitations to the individual right. For the Internet, this element takes on new dimensions. A proportionality analysis must take into account the characteristics of its architecture to assess the impact that a surveillance measure may have on the exercise of human rights on the web.³⁷¹ Mass surveillance of communications is under no circumstances proportional.
223. The Joint Declaration on freedom of expression and responses to conflict situations emphasizes that “conflict situations should not be used to justify an increase in surveillance by State actors given that surveillance represents an invasion of privacy and a restriction on freedom of expression. In accordance with the three-part test for restrictions on freedom of expression and, in particular, the necessity part of that test, surveillance should be conducted only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs, on the one hand, and the rights to freedom of expression and privacy, on the other. Untargeted or “mass” surveillance is inherently disproportionate and is a violation of the rights to privacy and freedom of expression.”³⁷² Similarly,

³⁶⁷ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. UN Doc. A/HRC/23/40. April 17, 2013.

³⁶⁸ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 76 and following.

³⁶⁹ Necessary and Proportionate Coalition. [Necessary & Proportionate, International Principles on the Application of Human Rights to Communications Surveillance](#). May, 2014.

³⁷⁰ Inter-American Court of Human Rights. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*. Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. Para. 46; IACHR. [Annual Report 2008. Report of the Office of the Special Rapporteur for Freedom of Expression](#). Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February 25, 2009. Para. 86.

³⁷¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 160 and 161.

³⁷² 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. [Joint Declaration on Freedom of Expression and Responses to Conflict Situations](#). May 4, 2015. Point 8 a).

“requirements to retain or practices of retaining personal data on an indiscriminate basis for law enforcement or security purposes are not legitimate. Instead, personal data should be retained for law enforcement or security purposes only on a limited and targeted basis and in a manner which represents an appropriate balance between law enforcement and security needs and the rights to freedom of expression and privacy.”³⁷³

224. Likewise, the surveillance measures must be ordered by a competent, independent, and impartial judge or court, and the order itself must be properly reasoned in order to be legitimate.³⁷⁴ The Inter-American Court has held that the procedures requiring decisions be made without a hearing that includes the participation of the affected party, the motivation and justification must reflect the weighing of all legal requirements justifying the intervention.³⁷⁵ The law must clearly establish which authority is empowered to demand, implement, and oversee strict compliance with the judicial order authorizing the interference.³⁷⁶
225. Transparency is also essential in a democratic society, and States must publish statistics on the number of requests made, the number approved, the number rejected, the type of investigations for which the requests are made, the duration of the measures, a breakdown of requests by provider, etc.³⁷⁷
226. Transparency of Internet intermediaries also plays a particularly important role. States often depend on the consent and/or cooperation of intermediaries, and there are numerous initiatives aimed at forcing intermediaries to perform a certain amount of record-keeping, control, or monitoring of activity and of their users as a condition to operate. The Joint Declaration on surveillance programs and their impact on freedom of expression holds that in order to monitor the legality of the various instances of surveillance, States should allow and even encourage intermediaries to disseminate information on the processes they implement, indicating at least in aggregate the number and scope of requests from State agencies received and granted.³⁷⁸

³⁷³ 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. [Joint Declaration on Freedom of Expression and Responses to Conflict Situations](#). May 4, 2015. Point 8 b).

³⁷⁴ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 165.

³⁷⁵ I/A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200. Para. 131.

³⁷⁶ I/A Court H.R. *Case of Escher v. Brazil*. Judgment of July 6, 2009. Merits, Reparations and Costs. Series C No. 200. Para. 131.

³⁷⁷ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 81 and 82.

³⁷⁸ United Nations. Human Rights Council. Special Rapporteur of the United Nations (UN) on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Special Rapporteurship for Freedom of Expression of the Inter-American Commission of Human Rights (OAS). [Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression](#). June 21, 2013. Para. 169.

c. Encryption and Anonymity

227. Anonymity is a means of protecting privacy, and its connection to freedom of expression has been particularly noteworthy because it facilitates participation in the public discourse without the need to identify oneself, thereby preventing potential retaliation for an opinion.³⁷⁹ Based on this, the Office of the Special Rapporteur has held that anonymous spaces that are free of observation and where identities and activities are not documented must be guaranteed.³⁸⁰
228. States have an obligation to respect anonymous discourse as an exercise of privacy and freedom of expression and may only exceptionally require authentication or proof of identity from the person expressing it, applying a standard of proportionality.³⁸¹ To commit to the protection of human rights online, the private sector should also protect anonymous speech by not adding requirements to their platforms that the law does not establish.
229. Without prejudice to this, States can take measures to fully identify a person during a judicial investigation, as long as doing so is within the framework of proportionality.³⁸² For example, anonymity can be lifted when the speech is not protected by the right to freedom of expression—such as propaganda calling for war, hate speech that incites violence, incitements to genocide, child pornography—³⁸³ or subject to subsequent liability in a way that is in keeping with the American Convention.
230. For its part, encryption is another remedy for protecting informational privacy in the digital age, as well as the inviolability of communications.³⁸⁴ Encryption is mathematical process of converting messages, information, or data into a form unreadable by anyone except the intended recipient³⁸⁵ with encryption of data in transit (i.e. - e-mails, text messages, etc.) being distinct from encryption of stored data

³⁷⁹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 130 to 134.

³⁸⁰ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 130 to 134.

³⁸¹ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 134.

³⁸² IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 135.

³⁸³ IACHR. Annual Report 2013. [Annual Report 2013. Report of the Special Rapporteur for Freedom of Expression 2013](#) Chapter IV (Freedom of Expression and the Internet). OEA/Ser.L/V/II.149. Doc. 50. December 31, 2013. Para. 135.

³⁸⁴ United Nations. Human Rights Council. [Report of the Office of the United Nations High Commissioner for Human Rights: The right to privacy in the digital age](#). UN Doc. A/HRC/27/37. June 30, 2014.

³⁸⁵ United Nations. Human Rights Council. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. UN Doc. A/HRC/29/32. May 22, 2015. Para. 6.

(remote storage systems, the cloud, etc.).³⁸⁶

231. Measures to restrict encryption reduce people’s ability to protect themselves from illegal invasions of their privacy.³⁸⁷ The measures include limitations or even legal bans on private encryption, automatic encryption provided by certain intermediaries, or “default” privacy, as well as the imposition of centralized key registries or the creation of back doors to enable collection of communication even from encrypted devices. These measures should only be adopted by States exceptionally and when legal, necessary, and proportional.

d. “Big Data”

232. Ease of collection and data availability on the Internet create development opportunities for both States and private parties. “Big data” is a term that refers to the immense quantity of data generated on the web that can be captured, stored, processed, analyzed, and systemized to find trends, profiles, etc.³⁸⁸ Big data presents both opportunities and challenges when it comes to protecting human rights. Analysis of the data generated and currently available on the Internet could enable evaluation of social needs and trends that could potentially allow for the adoption of more and better public policies for guaranteeing the human rights of persons. For example, the United Nations has initiatives for researching and promoting the use of big data to produce and analyze social data.³⁸⁹ Likewise, large private companies are currently committed to developing technologies that will enable them to analyze the data made available by the existence of the Internet to evaluate market trends, preferences, profiles, etc. that may make it possible for them to provide society with more and better products and services.³⁹⁰

233. However, the general collection, analysis, and use of the information generated and made available by the Internet also presents important challenges for the protection of personal data. Currently there are regulatory issues surrounding ownership and transfer of data, but issues also exist when it comes to the technologies available for analysis.³⁹¹ Many of the technologies that are being used enable not only objective data and trend analysis but also inevitably enable identification of the users that

³⁸⁶ United Nations. Human Rights Council. [Report of the Office of the United Nations High Commissioner for Human Rights: The right to privacy in the digital age](#). UN Doc. A/HRC/27/37. June 30, 2014.

³⁸⁷ United Nations. General Assembly. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. May 16, 2011.

³⁸⁸ International Telecommunications Union. *Big Data – Cloud computing based requirements and capabilities*, ITU-T Series Y: Global information infrastructure, internet protocol aspects and next-generation networks. Recommendation ITU-T Y.3600. November, 2015. Page 1.

³⁸⁹ For example, the Global Task Force on Macrodatability in Official Statistics, created by the Statistical Commission in its Forty-fifth session March 4-7, 2014. See also, United Nations. Report of the Secretary-General. [Big data and modernization of statistical systems](#). UN Doc. E/CN.3/2014/11. December 20, 2013.

³⁹⁰ International Telecommunications Union. *Big Data: Big today, normal tomorrow*. ITU-T Technology Watch Report. November, 2013. Available at : http://www.itu.int/dms_pub/itu-t/oth/23/01/T23010000220001PDFE.pdf

³⁹¹ United Nations. Report of the Secretary-General. [Big data and modernization of statistical systems](#). UN Doc. E/CN.3/2014/11. December 20, 2013. Para. 34 and 35.

make up the critical mass analyzed.³⁹² States must ensure that the technology for making use of big data that is employed by both the public and private spheres guarantees due protection of human rights on the Internet.

e. The Internet of Things

234. It is also important to mention the implications of the development of the so-called Internet of Things and the new threats to privacy that could pose. Currently services available on the Internet are characterized by human communication using the web as a platform. But as chips become embedded in all goods – even everyday items – and where each object has a unique individual identifier, we are reaching a point when, in the near future, objects will be able to communicate with each other, without human intervention. The Internet will then become a physical experience of objects - an Internet of Things (IoT). Humans will be surrounded by ubiquitous objects, gathering information and communicating with service providers and would be at the center of a continuous information network connecting the objects in their lives.³⁹³
235. The Office of the Special Rapporteur recognizes the fast moving technological changes that characterizes this era, in which the implications of a technology is rarely understood before it becomes widespread and adopted. It is the responsibility of states, on behalf of their citizens to understand the public policy implications of new technologies and ensure that they operate in the public interest with adequate consumer and privacy protections.

³⁹² United Nations. General Assembly. *The right to privacy in the digital age*. UN Doc. A/RES/69/166. February 10, 2015. Available at:

http://www.un.org/ga/search/view_doc.asp?symbol=A%2FRES%2F69%2F166&Submit=Search&Lang=E.

³⁹³ The Internet Society. *The Internet of Things (IoT): An Overview Understanding the Issues and Challenges of a More Connected World*. October, 2015. Available at: <https://www.internetsociety.org/sites/default/files/ISOC-IoT-Overview-20151221-en.pdf>