

# TOWARDS INTERNET ACCESS AS A HUMAN RIGHT: AN INTERNATIONAL LAW PERSPECTIVE

ARTÍCULO

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## INTRODUCTION

Since the beginning of the twenty-first century, technology has evolved exponentially. At the end of 2019, over four billion people around the world had some form of access to the Internet.<sup>1</sup> However, another three billion remain unconnected.<sup>2</sup> The more interconnected the world becomes, the more challenges in the reg-

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<sup>1</sup> Natasha Veligura et al., *COVID-19's Impact on the Global Telecommunications Industry*, INTERNATIONAL FINANCE CORPORATION (May 2020), [https://www.ifc.org/wps/wcm/connect/id490aec-4d57-4cbf-82b3-d6842e-ecd9b2/IFC-Covid19Telecommunications\\_final\\_web\\_2.pdf?MOD=AJPERES&CVID=n9nxogP](https://www.ifc.org/wps/wcm/connect/id490aec-4d57-4cbf-82b3-d6842e-ecd9b2/IFC-Covid19Telecommunications_final_web_2.pdf?MOD=AJPERES&CVID=n9nxogP).

<sup>2</sup> *Id.*

ulations and forms of Internet use arise. As a result, Internet access has inserted itself at the forefront of the contemporary human rights discussions. Many even argue that “[b]roadband (or high-speed) Internet access is not a luxury, but a basic necessity for economic and human development in both developed and developing countries.”<sup>3</sup> This article will explore whether Internet access is recognized as a human right under International Law. Specifically, it first aims to discuss and discern between the different normative approaches by which a human right may acquire such a recognition. Moreover, it will examine the general scope and the debate among scholars on the topic of Internet access as a human right, and it will analyze the impact of Internet access amidst the COVID-19 pandemic.

Part I will discuss the development of human rights after World War II and explore different sources of International Law: the formal sources (positivist approach), and the modern sources (progressive approach). It will also review the international instruments that already attempt to guarantee access to the Internet as a right.

Part II will explore the existing debate among scholars and experts on the issue of access to the Internet as a human right. Some experts acknowledge the importance of the Internet in our day-to-day lives but argue that the Internet is not in itself a human right that should be protected. Since the Internet is a vehicle for protecting other rights, they believe that it cannot be a right in itself. In other words, they rationalize that the Internet is a means to guarantee other human rights, hence a derived right. Other experts argue that it is indeed this *derived* quality what makes the Internet a human right. It bears mentioning that most literature on this topic was produced before the COVID-19 pandemic. This is important as *time and historical circumstances* may give a human need the quality of human right. Soft law instruments support this, as they are a key element in the development of hard law instruments.<sup>4</sup>

Part III will provide a more practical view of the importance and impact of Internet access today. It will exemplify that *time and historical circumstances* are the key elements for understanding human rights. Thus, in the historical time we are in —with technological advances and the Coronavirus pandemic— require us to move accordingly. In emergencies, like the Coronavirus pandemic, the necessity and importance of Internet access has been evident. Therefore, Part III will illustrate how the access to Internet interacts with other aspects of our daily lives (subsidies, access to information, health, and education) in order to reflect or conclude that it is —and will be— an integral part of our daily life and, consequently, a guarantor of human dignity.

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<sup>3</sup> *Connecting for Inclusion: Broadband Access for All*, THE WORLD BANK, <https://www.worldbank.org/en/topic/digitaldevelopment/brief/connecting-for-inclusion-broadband-access-for-all> (last visited May 23, 2022).

<sup>4</sup> Luis E. Rodríguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 *COLO. J. INT'L ENVTL. L. & POL'Y* 1, 45 (2001).

## I. A HUMAN RIGHTS APPROACH TO THE INTERNET ACCESS

### A. *Development of Human Rights*

The development of human rights under International Law goes as far back as John Locke's *Two Treatises of Government*.<sup>5</sup> Scholar Mark W. Janis explains that, for John Locke, human rights, as opposed to government, came first in the natural order of things.<sup>6</sup> Yet, human rights —if compared to Municipal Law— had no guarantees at the international level.<sup>7</sup> This changed during the post-World War II era. Before the World War II era, and under the customary International Law conceptions at that time, it was anti-ethical for individuals to assert against the states, especially against their governments, any international human rights.<sup>8</sup> This notion changed with the Nuremberg Trials,<sup>9</sup> which imposed limits on the way a nation treated its citizens.<sup>10</sup> This historical event impacted the way that people perceived society, and it integrated itself to national heritage and jurisprudence.<sup>11</sup> As such, the Trials marked a period in the international and national legal system after which the relationship between individuals and national governments changed dramatically.<sup>12</sup> The result was that international state leaders sought to demonstrate that human rights were so significant that their application should not be left solely to the states.<sup>13</sup> Therefore in 1948, the international community, by virtue of the United Nations, enacted the Universal Declaration of Human Rights (hereinafter, "U.D.H.R."). The U.D.H.R., fueled by the atrocities of the Second World War, represented the international community's attempt at guaranteeing —by explicit provisions of International Law— inalienable human rights in all citizens around the globe.<sup>14</sup>

The U.D.H.R. is composed of thirty human rights which it details in a general manner.<sup>15</sup> This way, the U.D.H.R. provides a general basis from which other legal instruments can delineate more in-depth details and developments of and concerning those human rights. As a result, most of the protections and freedoms guaranteed by the U.D.H.R. were,

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5 MARK W. JANIS, *INTERNATIONAL LAW* (7<sup>th</sup> ed. 2016).

6 *Id.*

7 *Id.*

8 Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 831 (1997).

9 The Nuremberg Trials were a series of trials initiated against the leaders of the Nazi military post World War II at Nuremberg, Germany. See Arthur L. Berney, *Revisiting A Conference Commemorating the Nuremberg Trials: A Commentary from A Nuremberg Prosecutor*, 17 B.C. THIRD WORLD L.J. 275 (1997). See also JANIS, *supra* note 5 (explaining how The Nuremberg Trial sought to establish that "crimes against [I]nternational [L]aw are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of [I]nternational [L]aw be enforced.").

10 Bradley & Goldsmith, *supra* note 8.

11 Henry T. King Jr., *Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421 (2000).

12 *Id.*

13 JANIS, *supra* note 5.

14 See Bradley & Goldsmith, *supra* note 8, at 832; JANIS, *supra* note 5.

15 William J. Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 127 (2018).

and still are, incorporated into national constitutions and other domestic legal frameworks.<sup>16</sup> The U.D.H.R. thus, “has become a clear benchmark for the universal human rights standards that must be promoted and protected in all countries.”<sup>17</sup>

Despite its importance, this Declaration —like many other international instruments— is by definition, soft law and thus, not binding. This means that it enunciates particular principles and aspirations of universal significance, but sovereign states are the ones to draw obligations into carrying them.<sup>18</sup> Therefore it is said that “[i]nternational human rights instruments do not legislate human rights; they ‘recognize’ them and build upon that recognition . . .”<sup>19</sup> Nevertheless, note that “[m]any of the Universal Declaration’s provisions also have become incorporated into customary International Law, which is binding on all states.”<sup>20</sup> Thus, the U.D.H.R.’s practical effect along the years has been to bind all states. On this matter:

[T]he Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the [United Nations, (hereinafter, “U.N.”)] Charter and as established customary law, having the attributes *jus cogens* and constituting the heart of a global bill of rights.<sup>21</sup>

As mentioned, over the years, international actors have developed and modified the rights embodied in the U.D.H.R. with the purpose of extending it to other aspects that were not imagined or conceived in 1948. As we will note, this has precisely happened with Internet access.

#### i. Human Rights and International Law

The above leads us to international human rights, a branch of International Law by itself. For a human right to be qualified as such, it has to conform to International Law. The two formal legal sources of International Law which require state consent consist of: (a) international agreements, covenants, or treaties, and (b) customary international law.<sup>22</sup>

<sup>16</sup> *Universal Declaration of Human Rights*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/> (last visited May 23, 2022).

<sup>17</sup> *Id.* (stating that the U.D.H.R. has served as a model for many domestic constitutions, laws, regulations, and policies); see also, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1995).

<sup>18</sup> *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 409 (S.D.N.Y. 2002).

<sup>19</sup> *Id.* (citing THE INTERNATIONAL BILL OF RIGHTS 12, 15 (Louis Henkin, ed. 1981)).

<sup>20</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1995); see also, U.N. E.C.O.S.O.C., Commission on Human Rights, 43rd Sess., Doc. E/CN.4/1987/23, at 4 (1987).

<sup>21</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 326 (1995) (citing Justice M. Haleem, JUDICIAL COLLOQUIUM IN BANGALORE, DEVELOPING HUMAN RIGHTS JURISPRUDENCE, THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS 97 (London, Commonwealth Secretariat, 1998)).

<sup>22</sup> Bradley & Goldsmith, *supra* note 8, at 817; JANIS, *supra* note 5; Restatement (Third) of Foreign Relations Law of the United States § 102 (1987).

Treaties and covenants are the more direct and evident sources of human rights, these are also called *positive law*. Positive law creates express legal rights and obligations.<sup>23</sup> On the other hand, customary international law “is the law of the international community that ‘results from a general and consistent practice of states followed by them from a sense of legal obligation.’”<sup>24</sup> Hence, customary international law supposes consent by: (1) state practice over time, and (2) *opinio juris sive necessitates*, which is a term that refers to the fact that states perceive that they are obligated to act in accordance to that practice.<sup>25</sup> With these two requirements, customary international law is sometimes difficult to follow as it is not as evident as others International Law sources. Particularly, academics argue that:

Today, [customary international law] also regulates the relationship between a nation and its own citizens, particularly in the area of human rights. The scope of these customary international human rights norms is unclear. There is widespread agreement in the international community that [customary international law] prohibits acts such as torture, genocide, and slavery. Many commentators argue that it also prohibits certain applications of the death penalty, restrictions on religious freedom, and discrimination based on sexual orientation. Others even contend that [customary international law] confers various economic and social rights, such as the right to form and join trade unions and the right to a free primary education. *The list of putative [customary international law] norms keeps growing.*<sup>26</sup>

To this point, whether a human right is articulated, from a positivist approach, state consent is required either by a treaty —direct source— or by a customary practice —indirect source— for international actors to put the human right into practice. This conception is a traditional point of view on the creation of international norms. Professor Luis E. Rodríguez-Rivera stresses that the debate on human rights is, rather, related to its sources; that is, between positivists and progressists.<sup>27</sup> On this issue:

[M]any lawyers think that the doctrine of sources is exhausted by the statement: the consent of States is the ultimate source of [I]nternational [L]aw. . . . They point out that anything can count as law as long as it emerges from *consent* and nothing which is not consensually supported can count as such.<sup>28</sup>

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<sup>23</sup> JANIS, *supra* note 5.

<sup>24</sup> Bradley & Goldsmith, *supra* note 8, at 817-18 (citing Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987)).

<sup>25</sup> Hannum, *supra* note 21, at 319; see also, Omri Sender & Michael Wood, *A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law*, 50 ISR. L. REV. 299 (2017); Dr. Jur. Eric Engle, *U.N. Packing the State's Reputation? A Response to Professor Brewster's "Unpacking the State's Reputation"*, 114 PENN ST. L. REV. PENN STATIM 34, 37 (2010).

<sup>26</sup> Bradley & Goldsmith, *supra* note 8, at 818 (emphasis added).

<sup>27</sup> Rodríguez-Rivera, *supra* note 4, at 2.

<sup>28</sup> *Id.* at 3 (citing MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 265 (1989)).

The foregoing view is a *positivist approach* to international human rights. This approach “clearly restricts the development of new human rights[,]”<sup>29</sup> and perpetuates the consensual doctrine to establish a human right. Nevertheless, detractors of this consensual positive approach consider that it “undermines the very essence of human rights—that is, rights possessed by individuals by virtue of being a human being—.”<sup>30</sup>

To illustrate, professor Rodríguez-Rivera answers the question of whether or not the *right to environment* is a human right with: “it depends on the source.”<sup>31</sup> To professor Rodríguez-Rivera the defining element to consider something as a human right depends, mostly, on the International Law approach in which it is analyzed. In relevant part, Judge Higgins explained it as such:

A human right is a right held *vis á vis* the state, by virtue of being a human being. *But what are those rights? The answer to that question depends, once again, on the approach you take to the nature and sources of [I]nternational [L]aw.* Some will answer that the *source* of human-rights obligations is to be found in the various international instruments; and that whatever rights they contain and designate as human rights are thereby human rights, at least for the ratifying parties. They may in time become reflected in customary international law, and thus become human rights more generally. Others will say that the international instruments are just the vehicle for expressing the obligation and providing the detail about the way in which the human right is to be guaranteed. It is an interaction of demands by various actors, and state practice in relation thereto, that leads to the generation of norms and the expectation of compliance in relation to them.<sup>32</sup>

Applying this modern approach to the question of whether or not access to the Internet is a human right, evokes the same answer provided by professor Rodríguez-Rivera: *it depends on the source*. Consequently, for Internet access to be considered a human right under a positivist consensual approach, it has to achieve international legal status by one of the formal consent sources (i.e., international agreements; covenants, or treaties; state practice over time, and *opinio juris sive necessitates*). Nevertheless, the Internet might achieve human right condition under a modern approach if “the sources of [I]nternational [L]aw are expanded to conform to the evolution of modern [I]nternational [L]aw[,]”<sup>33</sup> in which the will of the people is recognized.<sup>34</sup> With this in mind, *Part B* will apply these normative standards to evaluate if, by way of any of the previous approaches, *Internet access* has achieved the international legal status of a human right.

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<sup>29</sup> *Id.* at 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* (citing ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 98-99 (1994)).

<sup>33</sup> *Id.* at 45 (emphasis added).

<sup>34</sup> *Id.*

*B. Defining the Right to the Internet and its Scope*

The Internet is one of those inventions that “has become an integral part of our economic, political, and social lives, altering the way we purchase goods, the way we bank, and the way we communicate with one another.”<sup>35</sup> Also, it has impacted and revolutionized the way we, work, educate, receive medical attention, eat, receive information, entertain, create art and—in cases of emergency such as hurricanes, pandemics, earthquakes, floods, tornadoes, and even war-based conflicts— survive. Its impact has been so profound that, in June 2012, the Human Rights Council sought state action “to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries.”<sup>36</sup>

The United States Supreme Court defined the Internet as “an international network of interconnected computers . . . [that] enables tens of millions of people to communicate with one another and to access vast amounts of information from around the world.”<sup>37</sup> In the 1990s, the Internet was considered “a unique and wholly *new medium* of worldwide human communication.”<sup>38</sup> The United States Supreme Court acknowledged that because it was during this time, that universities, corporate employers, community libraries, and local shops were beginning to provide access to the Internet for its consumers and staff.<sup>39</sup> Moreover, the Supreme Court recognized that people with Internet access took “advantage of a wide variety of communication and information retrieval methods,”<sup>40</sup> which “are constantly evolving and difficult to categorize precisely.”<sup>41</sup> Furthermore, since the 1990s, the Internet’s constant evolution has produced an extraordinary growth.<sup>42</sup> The table below further illustrates such growth.

**TABLE 1. INTERNET USERS’ GROWTH FROM 1993 THROUGH 2020**

Year	Users
1993	10 million. <sup>43</sup>
1995	40 million. <sup>44</sup>

<sup>35</sup> Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide and Beyond*, 24 HARV. HUM. RTS. J. 185, 189 (2011).

<sup>36</sup> G.A. U.N. Human Rts. Council, *The promotion, protection and enjoyment of human rights on the Internet*, U.N. Doc. A/HRC/RES/20/8, 1, 3 (July 16, 2012), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement>; see also Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT’L L.J. 393 (2013).

<sup>37</sup> *Reno v. A.C.L.U.*, 521 U.S. 844, 849-50 (1997).

<sup>38</sup> *Id.* (citing *A.C.L.U. v. Reno* 929 F. Supp. 824, 844 (1996)); see also *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1305 (11th Cir. 2012), in which it is stated that “[a]lthough *online* and *Internet* are largely synonymous terms, the Internet consists of distribution methods of significantly different types. Thus, an *online* activity may occur through public websites, restricted websites, peer-to-peer networks, e-mail, or other less common methods.”

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 851.

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

<sup>42</sup> *Id.* at 850.

<sup>43</sup> Hatem Ali, *supra* note 35.

<sup>44</sup> *Id.*

Year	Users
2002	670+ million. <sup>45</sup>
2007	1.4 billion. <sup>46</sup>
2011	2.2 billion. <sup>47</sup>
2015	2.9 billion. <sup>48</sup>
2019	4.1 billion. <sup>49</sup>
2021	5.1 billion. <sup>50</sup>

### i. Instruments

As mentioned, for *Internet access* to be uniformly considered a binding human right, it must comply with either: (1) the positivist's consensual approach —written treaties or state practice over time—, or (2) the modern progressive approach. Nonetheless, it is of no surprise that, as the Internet grows, so do the international, regional, or civil instruments that enable its access. In fact, some of these instruments at the international, national, and civil organization levels consider *access to the Internet* as: (1) an aspiration that must be followed to fully achieve a dignified life; (2) as a human right, or (3) as a fundamental right. Below, we will address each instrument category by separate.

#### a. Instruments that Consider Access to the Internet as an Aspiration to Fully Achieve a Dignified Life

Eleven legal instruments consider *access to the Internet* as an aspiration to fully achieve a dignified life. Table 2, below, describes how they embody this aspiration. The instruments are the following: (i) *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*;<sup>51</sup> (ii) *The promotion, protec-*

<sup>45</sup> *Id.*

<sup>46</sup> *Statistics, International Telecommunications Union*, <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx> (last visited May 23, 2022).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see also Brittany Grasmick, *Recognizing "Access to Information" As A Basic Human Right: A Necessary Step in Enforcing Human Rights Provisions Within Free Trade Agreements*, 12 *Loy. U. Chi. Int'l L. Rev.* 215, 227 (2015).

<sup>49</sup> INTERNATIONAL TELECOMMUNICATIONS UNION, *supra* note 46.

<sup>50</sup> *World Internet Usage Statistics News and World Population Stats, Internet World Stats*, <http://www.internetworldstats.com/stats.htm> (last visited May 23, 2022).

<sup>51</sup> Frank La Rue (Special Rapporteur), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, U.N. Doc. A/HRC/17/27, GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL (May 16, 2011), [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).



tion and enjoyment of human rights on the Internet (A/HRC/RES/32/13);<sup>52</sup> (iii) *The promotion, protection and enjoyment of human rights on the Internet* (A/HRC/20/8);<sup>53</sup> (iv) *Reflection and Analysis by The United Nations Educational, Scientific and Cultural Organization* (hereinafter, “U.N.E.S.C.O.”), *on the Internet* (186 EX/INF.11, U.N.E.S.C.O.);<sup>54</sup> (v) *Directive 2009/136/EC of the European Parliament and of the Council*;<sup>55</sup> (vi) *Fostering Freedom of Expression, Access to Information and Empowerment of People (Maputo Declaration)*;<sup>56</sup> (vii) *Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace*;<sup>57</sup> (viii) *Shaping Policies to Advance Media Freedom—Recommendations from the Organization for Security and Co-operation in Europe* (hereinafter, “O.S.C.E.”), *Internet 2013 Conference*;<sup>58</sup> (ix) *NETmundial Multistakeholder Statement*;<sup>59</sup> (x) *Declaration of Principles—Building the Information Society: a global challenge in the new Millennium (Geneva Declaration of Principles)*;<sup>60</sup> and (xi) *Tunis Agenda for the Information Society*.<sup>61</sup>

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52 *The promotion, protection, and enjoyment of human rights on the Internet*, A/HRC/32/13, GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL (July 18, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/156/90/PDF/G1615690.pdf?OpenElement>.

53 *The promotion, protection and enjoyment of human rights on the Internet*, U.N. Doc. A/HRC/RES/20/8, GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL, 1, 3 (July 16, 2012), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement>.

54 *Reflection and Analysis by UNESCO on the Internet*, 186 EX/INF.11, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (April 29, 2011), <https://unesdoc.unesco.org/ark:/48223/pf0000192199>.

55 *Directive 2009/136/EC of the European Parliament and of the Council* of 25 November 2009, THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION (Nov. 25, 2009), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009L0136>.

56 *Freedom of Expression, Access to Information and Empowerment of People (“Maputo Declaration”)*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (May 3, 2008), [https://en.unesco.org/sites/default/files/maputo\\_declaration.pdf](https://en.unesco.org/sites/default/files/maputo_declaration.pdf).

57 *Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (Oct. 15, 2003), [https://en.unesco.org/sites/default/files/eng\\_-\\_recommendation\\_concerning\\_the\\_promotion\\_and\\_use\\_of\\_multilingualism\\_and\\_universal\\_access\\_to\\_cyberspace1.pdf](https://en.unesco.org/sites/default/files/eng_-_recommendation_concerning_the_promotion_and_use_of_multilingualism_and_universal_access_to_cyberspace1.pdf).

58 *Shaping policies to advance media freedom- Recommendations from the Internet 2013 Conference*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (O.S.C.E.) (Feb. 2013), <https://www.osce.org/files/f/documents/9/e/100112.pdf>.

59 *NETmundial Multistakeholder Statement*, GLOBAL MULTISTAKEHOLDER MEETING ON THE FUTURE OF INTERNET GOVERNANCE (April 24, 2014), <https://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>.

60 *Declaration of Principles Building the Information Society: a global challenge in the new Millennium (Geneva Declaration of Principles)*, WSIS-03/GENEVA/DOC/4-E, INTERNATIONAL TELECOMMUNICATION UNION, (Dec. 12, 2003), <http://www.itu.int/net/wsis/docs/geneva/official/dop.html>.

61 *Tunis Agenda for the Information Society*, INTERNATIONAL TELECOMMUNICATION UNION, WSIS-05/TUNIS/DOC/6(Rev. 1)-E (Nov. 18, 2005), [https://www.itu.int/net/wsis/outcome/booklet/tunis-agenda\\_C.html](https://www.itu.int/net/wsis/outcome/booklet/tunis-agenda_C.html).

**TABLE 2. INSTRUMENTS BY STATES, GOVERNMENTAL ENTITIES, CIVIL SOCIETIES, AND INTERNATIONAL ORGANIZATIONS THAT INCLUDE ‘ACCESS TO INTERNET’ AS PART OF AN ASPIRATION TO ACHIEVE A DIGNIFIED LIFE**

Instrument	Spectrum of Right
Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/17/27, United Nations General Assembly, 2011) <sup>62</sup>	“Given that the Internet has become an indispensable tool for realizing a range of human rights, combating inequality, and accelerating development and human progress, <i>ensuring universal access to the Internet should be a priority for all States</i> . Each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, <i>to make the Internet widely available, accessible, and affordable to all segments of population.</i> ” <sup>63</sup>
The promotion, protection, and enjoyment of human rights on the Internet (A/HRC/RES/32/13, U.N. Human Rights Council, June 27, 2016) <sup>64</sup>	“ <i>Affirms</i> that quality education plays a decisive role in development, and therefore calls upon all States to promote digital literacy and <i>to facilitate access to information on the Internet</i> [for all children,] which can be an important tool in facilitating the promotion of the right to education, [and to support similar learning modules outside of schools].” <sup>65</sup>
The promotion, protection, and enjoyment of human rights on the Internet (A/HRC/RES/20/8, Human Rights Council - United Nations, July 16, 2012) <sup>66</sup>	“Calls upon all States <i>to promote and facilitate access to the Internet</i> and international cooperation aimed at the development of media and information and communications facilities in all countries.” <sup>67</sup>
Reflection and Analysis by United Nations Educational, Scientific and Cultural Organization, (hereinafter, “U.N.E.S.C.O”), on the Internet (186 EX/INF.11, (U.N.E.S.C.O., April 18, 2011) <sup>68</sup>	“As more social and human science [knowledge] is made available through the Internet, <i>there is a prevailing demand for sophisticated methods of access[ing and analyzing]</i> [this knowledge] to facilitate practical outcomes in policies and actions by stakeholders.” <sup>69</sup> “Access to information and knowledge is a prerequisite of building inclusive knowledge societies. . . . Once the basic barriers to [Internet] access . . . are overcome, <i>[the Internet can provide affordable distribution of freely available information on a massive scale].</i> ” <sup>70</sup>

<sup>62</sup> Frank La Rue (Special Rapporteur), *supra* note 51.

<sup>63</sup> *Id.* at 22 (emphasis added).

<sup>64</sup> GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL, *supra* note 52.

<sup>65</sup> *Id.* at 3 (emphasis added).

<sup>66</sup> GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL, *supra* note 53.

<sup>67</sup> *Id.* at 2 (emphasis added).

<sup>68</sup> U.N.E.S.C.O, *supra* note 54.

<sup>69</sup> *Id.* at 8 (emphasis added).

<sup>70</sup> *Id.* at 6, 10 (emphasis added).

Instrument	Spectrum of Right
European Parliament and Council (Directive 2009/136/EC, November 25, 2009) <sup>71</sup>	<p><i>“Provision of access at a fixed location and provision of telephone services</i></p> <p>1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.</p> <p>2. The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient <i>to permit functional Internet access</i>, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.”<sup>72</sup></p>
Fostering Freedom of Expression, Access to Information and Empowerment of People Maputo Declaration (U.N.E.S.C.O., May 3, 2008) <sup>73</sup>	<p><i>“Stressing the need for affordable access to Internet connectivity and [information and communications technology] for information- sharing, as well as the need to promote media literacy”</i><sup>74</sup></p>
Recommendation on the Promotion and Use of Multilingualism and Universal Access to Cyberspace (U.N.E.S.C.O., October 15, 2003) <sup>75</sup>	<p><i>“Member States and international organizations should recognize and support universal access to the Internet as an instrument for promoting the realization of the human rights as defined in Articles 19 and 27 of the Universal Declaration of Human Rights.”</i><sup>76</sup></p>
Recommendations from the Organization for Security and Co-operation in Europe Internet 2013 (O.S.C.E., February 2013) <sup>77</sup>	<p><i>“The conference acknowledges that both online and traditional media provide opportunities to strengthen the implementation of existing commitments of the O.S.C.E. participating States in the area of media freedom. Online media allow for more diversity and pluralism and the Internet offers specific benefits, including advancements in education, the economy, human rights, including the freedom to seek, produce, obtain, and impart information. Affordable access to broadband Internet shall be fostered and become a universal service.”</i><sup>78</sup></p>
NETmundial Multistakeholder Statement (Global Multistakeholder Meeting on the Future of Internet Governance, April 24, 2014) <sup>79</sup>	<p><i>“Internet governance should promote universal, equal opportunity, affordable and high-quality Internet access so it can be an effective tool for enabling human development and social inclusion. There should be no unreasonable or discriminatory barriers to entry for new users. Public access is a powerful tool for providing access to the Internet.”</i><sup>80</sup></p>

71 THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, supra note 55.

72 Id. at art. 4 (emphasis added).

73 U.N.E.S.C.O., supra note 56.

74 Id. at 1 (emphasis added).

75 INTERNATIONAL TELECOMMUNICATION UNION, supra note 57.

76 Id. at 6 (emphasis added).

77 O.S.C.E., supra note 58.

78 Id. at 2 (emphasis added).

79 GLOBAL MULTISTAKEHOLDER MEETING ON THE FUTURE OF INTERNET GOVERNANCE, supra note 59.

80 Id. at 7 (emphasis added).

Instrument	Spectrum of Right
Geneva Declaration of Principles (World Summit on the Information Society, hereinafter, "W.S.I.S."), December 12, 2003) <sup>81</sup>	"The Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent, and democratic, with the full involvement of governments, the private sector, civil society, and international organizations. <i>It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism.</i> " <sup>82</sup>
Tunis Agenda for the Information Society (hereinafter, "W.S.I.S."), November 18, 2005) <sup>83</sup>	"We reaffirm the principles enunciated in the Geneva phase of the W.S.I.S., in December 2003, that the Internet has evolved into a global facility available to the public and its governance should constitute a core issue of the Information Society agenda. The international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations. It should ensure an equitable distribution of resources, <i>facilitate access for all and ensure a stable and secure functioning of the Internet, taking into account multilingualism.</i> " <sup>84</sup>

a. Instruments that Consider Access to the Internet as a Human Right

Similarly, certain instruments consider *access to the Internet* as a human right. Table 3, below, describes how they embody it as a human right. These instruments are the following: (i) *International Covenant on Civil and Political Rights* (hereinafter, "I.C.C.P.R.");<sup>85</sup> (ii) *International Mechanism for Promoting Freedom of Expression, Joint Declaration by the U.N. Special Rapporteur on Freedom of Opinion and Expression, the O.S.C.E. Representative on Freedom of the Media and the Organization of American States* (hereinafter, "O.A.S."), *Special Rapporteur on Freedom of Expression*;<sup>86</sup> (iii) *Delhi Declaration for a Just and Equitable Internet*,<sup>87</sup> and (iv) *Freedom of Expression on the Internet*.<sup>88</sup>

<sup>81</sup> INTERNATIONAL TELECOMMUNICATION UNION, *supra* note 60.

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> INTERNATIONAL TELECOMMUNICATION UNION, *supra* note 61.

<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> *International Covenant on Civil and Political Rights*, 19, No. 95-20, 999 UNTS 171, GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL (Dec. 1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

<sup>86</sup> *International Mechanism for Promoting Freedom of Expression, Joint Declaration by the 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* (December 21, 2005), <https://www.article19.org/data/files/pdfs/standards/three-mandates-dec-2005.pdf>.

<sup>87</sup> *The Delhi Declaration for a Just and Equitable Internet*, JUST NET COALITION (Feb. 14-15, 2014), <https://justnetcoalition.org/delhi-declaration>.

**TABLE 3. INSTRUMENTS BY STATES, GOVERNMENTAL ENTITIES, CIVIL SOCIETIES AND INTERNATIONAL ORGANIZATIONS THAT INCLUDE ACCESS TO INTERNET AS A RIGHT**

Instrument	Spectrum of Right
International Covenant on Civil and Political Rights (hereinafter, I.C.C.P.R.) <sup>89</sup>	Article 19 of the I.C.C.P.R. states that: (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. <sup>90</sup>
Freedom of Expression on the Internet — A study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in O.S.C.E. participating States (Organization for Security and Cooperation in Europe (O.S.C.E.), 2011) <sup>91</sup>	“Everyone should have a right to participate in the information society and states have a responsibility to ensure citizens’ access to the Internet is guaranteed.” <sup>92</sup>
International Mechanism for Promoting Freedom of Expression (U.N. Special Rapporteur on Freedom of Opinion and Expression, O.S.C.E. Repres. on Freedom of the Media, O.A.S. Special Rapporteur on Freedom of Expression, December 21, 2005) <sup>93</sup>	“The right to freedom of expression imposes an obligation on all States to devote adequate resources to promote universal access to the Internet, including via public access points. The international community should make it a priority within assistance programmes to assist poorer States in fulfilling this obligation.” <sup>94</sup>
Delhi Declaration for a Just and Equitable Internet. <sup>95</sup>	“1. All people have the right to basic digital enablement, being the right to: access the Internet, and its content and applications; participate in content and applications development; and, to receive the necessary training and capacity-building for effective use of the Internet and other digital tools.” <sup>96</sup>

<sup>88</sup> Yaman Akdeniz, *Freedom of Expression on the Internet*, O.S.C.E. (Sept. 23, 2010), <https://www.osce.org/files/f/documents/c/9/105522.pdf>.

<sup>89</sup> GENERAL ASSEMBLY UNITED NATIONS HUMAN RIGHTS COUNCIL, *supra* note 85.

<sup>90</sup> *Id.* at art. 19.

<sup>91</sup> O.S.C.E., *supra* note 88.

<sup>92</sup> *Id.* at 10 (emphasis added).

<sup>93</sup> JOINT DECLARATION BY THE 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, *supra* note 86.

<sup>94</sup> *Id.* at 1 (emphasis added).

<sup>95</sup> JUST NET COALITION, *supra* note 87.

<sup>96</sup> *Id.* (emphasis added).

b. Instruments that Consider *Access to the Internet* as a Fundamental Right

There are also state constitutions and national laws that consider *access to the Internet* as a fundamental right. Table 4, below, describes how they embody it as a fundamental right. The states that guarantee the fundamental right to have access to the Internet are Portugal,<sup>97</sup> Ecuador,<sup>98</sup> Greece,<sup>99</sup> and Mexico.<sup>100</sup> Some countries, like Costa Rica,<sup>101</sup> and France,<sup>102</sup> have also incorporated, via jurisprudence, that Internet access is a fundamental right (see Table 5, below, for these landmark decisions). Finally, several states have guaranteed a fundamental right to Internet access in their legislation. Table 6 of this article describes those legislations.<sup>103</sup> Some countries that have incorporated by legislature the right to Internet access are Spain,<sup>104</sup> Finland<sup>105</sup>, Albania,<sup>106</sup> Turkey,<sup>107</sup> and Estonia.<sup>108</sup> As such, it can be said that certain states have acted following soft law instruments and contemporary technological advances. Such states have grasped the aspirations of these soft law instruments and have created a practice among them, in which Internet access is considered not only a fundamental right, but a human and a civil right.

**TABLE 4. STATES THAT INCLUDE ACCESS TO INTERNET AS A RIGHT IN THEIR CONSTITUTION**

Country	Instrument	Spectrum of Right
Portugal	(Constitution) <sup>109</sup>	Article 35: Use of computers “1. Every citizen shall possess the right to access to all computeri[z]ed data that concern him [or her], to require that they be corrected and updated, and to be informed of the purpose for which they are intended, all as laid down by law. . . . . 6. Everyone shall be guaranteed free access to public-use computer networks, and the law shall define both the rules that shall apply to cross-border data flows and the appropriate means for protecting personal data and such other data as may justifiably be safeguarded in the national interest.” <sup>110</sup>

<sup>97</sup> CONSTITUIÇÃO POLÍTICA DA REPÚBLICA PORTUGUESA Apr. 25, 1976, art. 35 (Portugal).

<sup>98</sup> CONSTITUCIÓN DE LA REPÚBLICA DE ECUADOR Oct. 20, 2008, art. 16 (Ecuador).

<sup>99</sup> 1975 SYNTAGMA TIS ELLADAS, art. 5, § A (Greece).

<sup>100</sup> CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS 1917, art. 60 (Mexico).

<sup>101</sup> Costa Rica Supreme Court Ruling Resolution No. 016882 (2012); *see also* Supreme Court Ruling Resolutions No. 2010-010627 and 2010-012790.

<sup>102</sup> Conseil Constitutionnel France, *Decision No. 2009-58* (June 10, 2009), [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/2009\\_58odc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/2009_58odc.pdf).

<sup>103</sup> *See* Table 6 (for a list of states that include access to Internet as a right in their legislation).

<sup>104</sup> Sustainable Economy Act No. 55 of March 5th, 2011, art. 52 (B.O.E. 2011, 4117) (Spain).

<sup>105</sup> Communication Market Act No. 393 of May 23, 2003, art. 1 (Finland).

<sup>106</sup> Electronic Communications in the Republic of Albania Act No. 9918 of May 19, 2008, art. 1 (Albania).

<sup>107</sup> Law on Provision of Universal Service and Amendments to Certain Laws Act No. 5369 of June 16, 2005, art. 1 (Turkey).

<sup>108</sup> Telecommunications Act of February 9, 2000, art. 1 (Estonia). This Act enshrined the Internet access as a human right. *See* Elle Hunt, *Estonian president delights in country's high proportion of unicorns*, THE GUARDIAN (June 29, 2018), <https://www.theguardian.com/world/2018/jun/29/estonia-unicorns-president-kersti-kaljulaid-delight>.

<sup>109</sup> Constituição Política da República Portuguesa Apr. 25, 1976 (PORTUGAL).

<sup>110</sup> *Id.* at art. 35 (translated by autor).

Ecuador	(Constitution) <sup>111</sup>	<p>Article 16</p> <p>“All persons, individually or collectively, have the right to:</p> <ol style="list-style-type: none"> <li>1. Free, intercultural, inclusive, diverse, and participatory communication in all spheres of social interaction, by any means or form, in their own language and with their own symbols.</li> <li>2. Universal access to information and communication technologies.</li> <li>3. The creation of media and access, under equal conditions, to use of radio spectrum frequencies for the management of public, private and community radio and television stations and to free bands for the use of wireless networks.</li> <li>4. Access and use of all forms of visual, auditory, sensory, and other communication that make it possible to include persons with disabilities.</li> <li>5. Become part of participation spaces as provided for by the Constitution in the field of communication.”<sup>112</sup></li> </ol>
Greece	(Constitution) <sup>113</sup>	<p>Article 5A</p> <p>“1. All persons have the right to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties.</p> <p>2. All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19.”<sup>114</sup></p>
Mexico	(Constitution) <sup>115</sup>	<p>Article 6</p> <p>“The State shall guarantee access to information and communication technology, access to the services of radio broadcast, telecommunications, and broadband Internet. To that end, the State shall establish effective competition conditions for the provision of such services.”<sup>116</sup></p>

<sup>111</sup> Constitución de la República DEL ECUADOR OCT. 20, 2008 (ECUADOR).

<sup>112</sup> Id. at art. 16 (translated by author).

<sup>113</sup> 1975 Syntagma TIS ELLADAS (GREECE).

<sup>114</sup> Id. at art. 5 § A (translated by author).

<sup>115</sup> Constitución Política DE LOS ESTADOS UNIDOS MEXICANOS FEB. 5, 1917 (MEXICO).

<sup>116</sup> Id. at art. 6 (translated by author).

**TABLE 5. STATES THAT CONSIDER ACCESS TO INTERNET AS A RIGHT BY WAY OF JUDICIAL DECISIONS**

Country	Instrument	Scope of Right
Costa Rica	(Supreme Court Ruling Decision No. 2010-010627) <sup>117</sup>	<p>“At this time, access to these technologies becomes a basic instrument to facilitate the exercise of fundamental rights such as democratic participation (electronic democracy) and citizen control, education, freedom of speech and expression, access to information and online public services, the right to interact with public authorities by electronic means and administrative transparency, among others. The fundamental right character of access to these technologies has even been affirmed, specifically, the right of access to the Internet or networks.”<sup>118</sup></p> <p>“Based on the aforementioned, the existence of a fundamental right to telecommunications is hereby established, which includes communications by any technological means, that is, telegrams, radio services, [I]nternet, fixed and cellular telephony, among others.”<sup>119</sup></p> <p>“In this way, the right to telecommunications is recognized today as a fundamental right and, as such, national and local authorities must take the necessary actions so that it can be properly developed.”<sup>120</sup></p>
France	(Constitutional Council’s Decision No. 2009-580) <sup>121</sup>	<p>Article 11 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims that: ‘The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write, and publish freely, except when such freedom is misused in cases determined by Law’. In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.”<sup>122</sup></p>

<sup>117</sup> COSTA RICA [SUPREME COURT] DECISION NO. 2010-010627, JUNE 18, 2010.

<sup>118</sup> *Id.* (translated by author).

<sup>119</sup> *Id.* (translated by author).

<sup>120</sup> *Id.* (translated by author).

<sup>121</sup> Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2009-580, June 10, 2009, 1.

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



**TABLE 6. STATES THAT INCLUDE ACCESS TO INTERNET AS A RIGHT IN THEIR LEGISLATIONS**

Country	Instrument	Spectrum of Right
Estonia	(Telecommunications Act of 2000) <sup>123</sup>	<p>Article 5</p> <p>“The set of telecommunications services specified in subsection [one] of this section comprises:</p> <p>... .</p> <p>2. [I]nternet service which universally available to all subscribers regardless of their geographical location, at a uniform price.”<sup>124</sup></p>
Spain	(B.O.E. Sustainable Economy Act No. 2 of March 4, 2011) <sup>125</sup>	<p>Article 52. <i>“Inclusion, as an integral part of the universal service, of a connection that allows broadband data communications at a speed of 1Mbit per second.</i></p> <p>1. The connection to the public communication network with functional access to the Internet, guaranteed by the universal telecommunications service, must allow broadband data communications at a downstream speed of 1Mbit per second. Said connection may be provided through any technology.</p> <p>The Government, within a period of four months from the entry into force of this Law, through Royal Decree, will establish the conditions of broadband access to the public network and may update this speed in accordance with social, economic, and technological evolution, taking into account the services used by the majority of users.”<sup>126</sup></p>
Finland	(Communications Market Act) <sup>127</sup>	<p>Section 60 c (363/2011):</p> <p><i>“Universal service obligation concerning the provision of universal telephone services</i></p> <p>... .</p> <p>(3) Provisions on the minimum rate of a functional Internet access referred to in subsection [two] above are laid down by decree of the Ministry of Transport and Communications. Further provisions on different user groups as referred to in subsection [two] above and their special needs within the scope of the universal service obligation are laid down by Government decree. Prior to the issuance of the decree, the Finnish Communications Regulatory Authority shall, where necessary, examine the data transfer service markets, prevailing access rates available to the majority of subscribers and level of technological development, as well as produce an estimate of the financial impacts of regulation on telecommunications operators and a clarification on the special needs of people with disabilities.”<sup>128</sup></p>

<sup>123</sup> Telecommunications Acts of 2000 art. 5 (Estonia).

<sup>124</sup> *Id.* (translated by author); see also Oreste Pollicino, *The Right to Internet Access: Quid Iuris?*, in *The Cambridge Handbook of New Human Rights: RECOGNITION, NOVELTY, RHETORIC 2* (A. VON ARNAULD ET AL. EDs., 2019).

<sup>125</sup> Sustainable Economy Act No. 2 of March 4th, 2022, art. 52 (B.O.E. 2011, 4117) (Spain).

<sup>126</sup> *Id.* (emphasis added) (translated by author).

<sup>127</sup> Communications Market Act 2003 §60(c) (Finland).

<sup>128</sup> *Id.* (emphasis added) (translated by author).

Albania	(Electronic communications in the Republic of Albania, Act No. 9918 of May 19, 2008) <sup>129</sup>	Article 1.- Scope of the Law “The scope of this Law is to promote competition and efficient infrastructure through principle of technological neutrality in electronic communications and to ensure the right and adequate services in the territory of the Republic of Albania.” <sup>130</sup> “Electronic communications networks include [I]nternet in Article 3 of this Act.” <sup>131</sup>
Turkey	(Universal Service Law No. 5369 of June 16 <sup>th</sup> , 2010) <sup>132</sup>	Article 2.- “For the purposes of this law, . . . . <i>the universal service</i> means electronic communications services, including access to Internet, which is accessible to anyone within the territory of Republic of Turkey regardless of the geographical position, and which is to be offered with a predefined level of quality and minimum standards in return for reasonable prices affordable to anybody.” <sup>133</sup>  Article 3.- “Provision of the universal service and regulations to be made in this regard[d] shall consider the principles that:  a) Anybody living in the territory of the Republic of Turkey, without any discrimination on the basis of region and place of residence, shall avail himself /herself of the universal service . . .” <sup>134</sup>

Notwithstanding, “[t]he real question is whether the proliferation and flourishing of rights and covenants . . . is generally achieving the result of a higher protection of the rights at stake.”<sup>135</sup> Before addressing such an inquiry, it bears highlighting that fundamental and human rights are not the same yet are often confused.<sup>136</sup>

*Fundamental rights* are those inherently awarded through a state’s constitution and which are enforced by a state court to ensure that the people’s rights are protected.<sup>137</sup> On the other hand, *human rights* are those that each human enjoys under global, regional, or international law.<sup>138</sup> However, over time, some fundamental rights have leveled to customary law, having achieved the characteristics of a *jus cogens* norm (peremptory norm).<sup>139</sup> The use of access to the Internet as a fundamental right can achieve, at some point, the

<sup>129</sup> Electronic Communications in the Republic of Albania art. 1 (Albania).

<sup>130</sup> *Id.* (translated by author).

<sup>131</sup> *Id.* (translated by author).

<sup>132</sup> Law on Provision of Universal Service and Amendments to Certain Laws Act No. 5369 of June 16, 2005, art. 2 (Turkey).

<sup>133</sup> *Id.* (translated by author).

<sup>134</sup> *Id.* art 3 (emphasis added).

<sup>135</sup> Oreste Pollicino, *The Right to Internet Access: Quid Iuris?*, in *THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC* 263-75 (A. von Arnould et al. eds., 2019).

<sup>136</sup> *Id.* at 264.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Hannum, *supra* note 21, at 326.

status of customary law. Thus, in a way, fundamental rights and human rights are intrinsically related. On this matter, some academics have suggested that “the concept of *fundamental rights* is at the semantic level identical with the term *human rights* commonly used in other protection systems and international documents.”<sup>140</sup>

As mentioned above, International Law status is achieved by international agreements, covenants or treaties; by customary practice, or by matters of human dignity approach. Oreste Pollicino’s approach,<sup>141</sup> to Internet access as a human right is “whether the right to Internet access is codified as autonomous human right in [I]nternational [L]aw.”<sup>142</sup> He argued that various reports have been issued that refer to access to the Internet as a human right and promote active intervention by stakeholders to achieve access to the Internet.<sup>143</sup> Yet, for Pollicino, those reports and instruments are considered soft law. Soft law describes a *norm* that serves as a recommendation or guide, which is usually obeyed but doesn’t fall under a state’s obligation.<sup>144</sup> Soft law is non-binding and lacks enforcement mechanisms.

On the contrary, a hard law instrument is binding law. Hard law is typically found in treaties and well-established customary practice, which are the sources of consensual International Law (positivist approach).<sup>145</sup> Thus, in a *hard law* and *soft law* analysis, it can be argued that access to the Internet is not a human right, since the instruments mentioned above are not hard law. In fact, there is an absence of an international treaty that guarantees access to the Internet. As such, the instruments mentioned are not legally binding because they are not considered hard law.

As seen, Internet access is given a fundamental rights rank at a national level. Approximately fifteen states guarantee access to the Internet as a fundamental right to their citizens in one way or another. Moreover, many other soft law instruments aspire to and recognize the necessity of having access to the Internet as a human right. But is this enough to argue that a consistent behavior among states is enough to grant all people access to the Internet as a human right, irrespective of the inexistence of a hard law approach? Does the creation of various instruments and covenants in fact contribute to the protection of the right at play? Because of the reasons that proceed, the answer is affirmative.

## II. Scholar Debate on the Internet Being Considered a Human Right

As mentioned, and despite the instruments previously at play and their effect on protecting Internet access, there is still an intense debate among scholars on whether access

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<sup>140</sup> Ewa Bonusiak & Marta Sagan, *Right to Good Administration*, 2018 REV. FAC. DREP ORADEA 237 (2018) (“[t]he term *fundamental rights* dominates in the jurisprudence of Community courts, while in external relations or activities related to Community foreign and security policy, the term ‘human rights’ appears more often.”).

<sup>141</sup> Oreste Pollicino, *supra* note 135. Pollicino is an Italian law professor. His areas of research include European and Comparative Constitutional Law, Media Law and Internet Law. He is a contributor to the Cambridge Handbook of New Human Rights.

<sup>142</sup> *Id.* at 265.

<sup>143</sup> *Id.*

<sup>144</sup> Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT’L L. REV. 87, 89 (2008).

<sup>145</sup> *Id.*

to the Internet should be considered a human right, bearing the same protections as other rights such as freedom of speech and access to information. In fact, one of the major arguments against access to the Internet being a human right is, essentially, this access is derived from *other* human rights and, therefore, *not a right in itself*. There are essentially two main documents and postures from which the debate of access to the Internet as a human right arose and from which arguments for and against Internet access as a human right are produced.

In 2011, the United Nations General Assembly published the *Report of the Special Rapporteur on the promotion and protection of the right of opinion and expression*, (hereinafter, “*Report of the Special Rapporteur*” or “*Report*”), by the Special Rapporteur, Frank La Rue.<sup>146</sup> This *Report of the Special Rapporteur* established that the Internet was a medium in which the right of freedom of opinion and expression can be exercised, as guaranteed by Article 19 of the U.D.H.R. Furthermore, it recognized that Article 19 “was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression[,]”<sup>147</sup> and other rights. Article 19 of the U.D.H.R. states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>148</sup>

The *Report* expressed that there are two aspects of the Internet, the first—which will not be discussed in this article—is *restriction of content*.<sup>149</sup> The second one is *access to Internet*.<sup>150</sup> The latter aspect refers to the Internet as a necessary infrastructure by which the exercise of other rights can be observed if “effective policies to attain universal access” are met.<sup>151</sup> The *Report of the Special Rapporteur* stressed that by not recognizing such access and by not implementing policies it “will [keep] perpetrat[ing] the digital divide.”<sup>152</sup> The *Report* also emphasized that access to “[t]he Internet offers a key means by which such groups can obtain information, assert their rights, and participate in public debates concerning social, economic and political changes to improve their situation.”<sup>153</sup> In short, the *Report* concluded “that the Internet has become an indispensable tool for realizing a range of human rights.”<sup>154</sup> As a result, several scholars have expressed that La Rue’s *Report* has indirectly recognized the access to the Internet as a human right.<sup>155</sup> Others, on the contrary, have stressed that since this *Report* never expressively stated that Internet access

<sup>146</sup> Frank La Rue, *supra* note 51.

<sup>147</sup> *Id.* at 7.

<sup>148</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>149</sup> Because the restriction of content on the Internet requires Internet access, the latter will be explained as a step towards satisfying the former.

<sup>150</sup> Frank La Rue, *supra* note 51.

<sup>151</sup> *Id.* at 16.

<sup>152</sup> *Id.* at 17 (“the term *digital divide* refers to the gap between people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access at all.” The divide varies with “wealth, gender, geographical and social lines within States.”).

<sup>153</sup> *Id.* at 17.

<sup>154</sup> *Id.* at 22.

<sup>155</sup> Kay Mathiesen, *Human Rights for the Digital Age*, 29 J. OF MASS MEDIA ETHICS 2, 4 (2014).

was a human right it could not be considered as so, but rather as part of other rights in itself.<sup>156</sup>

On the other hand, Vinton G. Cerf, (hereinafter, “Cerf”), argues that *access to Internet* is not a human right.<sup>157</sup> Cerf published an opinion piece on the New York Times on 2012 where he argued that “technology is an enabler of rights, not a right itself.”<sup>158</sup> Furthermore, Cerf stressed that “[t]here is a high bar for something to be considered a human right.”<sup>159</sup> Hence, “it must be among the things we as humans need in order to lead healthy, meaningful lives, like freedom from torture or freedom of conscience.”<sup>160</sup> Furthermore, Cerf contends that “[i]t is a mistake to place any particular technology in this exalted category, since over time we will end up valuing the wrong things.”<sup>161</sup> For Cerf, a right to Internet should be a *civil right* and not a human right, since the right for *access to Internet* is associated with other rights, such as the right to expression.<sup>162</sup> He further recognizes that the Internet is important in our society but states that it is just a means to improve human conditions and, therefore, not a right in itself.<sup>163</sup>

These two major postures —by La Rue and Cerf— have led to a controversial debate. Advocates for *access to Internet as a human right* have contended that specific articles, Article 19 and Article 27 of the U.D.H.R.,<sup>164</sup> “already provide [its] basis. . . .”<sup>165</sup> Moreover, that “[b]ecause the ability to access the Internet will gradually become a measure of the

<sup>156</sup> *Id.* (some scholars have also argued that “La Rue’s report never directly states that access to the Internet is a human right; what it does say is that ‘facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all States.’”).

<sup>157</sup> Vinton G. Cerf, *Internet Access Is Not a Human Right*, THE NEW YORK TIMES, (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html>; *Vint Cerf*, INTERNET HALL OF FAME, [https://www.internethalloffame.org//inductees/vint-cerf?gclid=CjwKCAiA6seQBhAfeiwAvPquizE8suKMUbeHQYPjxAtveQQsdsVRKvtmESQ26NoLLGsCEgpbzRObERoCTfgQAvD\\_BwE](https://www.internethalloffame.org//inductees/vint-cerf?gclid=CjwKCAiA6seQBhAfeiwAvPquizE8suKMUbeHQYPjxAtveQQsdsVRKvtmESQ26NoLLGsCEgpbzRObERoCTfgQAvD_BwE) (last visited May 24, 2022) (Vinton G. Cerf is a contributor, developer and architect that focuses on the spread of the Internet at a technical perspective. He is also known as the *father of the Internet*. At this moment Cerf is the Vice President and Chief Internet Evangelist for Google (2005- present) and has won numerous awards in relation to his contributions. He has also served at the Internet Corporation for Assigned Names and Numbers (I.C.A.N.N.) (2000-2007), Internet Society (I.S.O.C.) (1992-1995), and Visiting Committee on Advanced Technology for the U.S. National Institute of Standards and Technology, among others).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Article 27 states that:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Universal Declaration of Human Rights art 27, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>165</sup> Jeffrey (Chien-Fei) Li, *Internet Control or Internet Censorship? Comparing the Control Models of China, Singapore, and the United States to Guide Taiwan’s Choice*, 14 J. TECH. L. & POL’Y 1, 14–15 (2013).

ability to access information, it should rightly be deemed an independent human right under Article 19 of the I.C.C.P.R.<sup>166</sup>

As mentioned, Article 19 of the I.C.C.P.R.,<sup>167</sup> “recognize[s] the right for people to have access to public information as a basic and important human right.”<sup>168</sup> It is argued that the Internet “has disrupted traditional modes of social and political communication and scholarly publishing and knowledge dissemination, as well as long-standing business models.”<sup>169</sup> Hence, “civil liberties groups, human-rights activists, and legal scholars . . . argue that [it has to be] . . . a basic prerogative for citizens.”<sup>170</sup>

“[O]pponents suggest that the best way for people to discern whether or not something is as a human right or not[,] is by looking at the outcome that is trying to be ensured.”<sup>171</sup> If those outcomes are assisted by technology—for example: freedom of speech, right to assemble, among others—and not dependent on technology, then it should not be considered a human right.<sup>172</sup> Cerf illustrates this line of thought by arguing that:

[A]t one time if you didn't have a horse[,] it was hard to make a living. But the important right in that case was the right to make a living, not the right to a horse. Today, if I were granted a right to have a horse, I'm not sure where I would put it.<sup>173</sup>

As a result, proponents of this viewpoint conclude that Internet access is the vehicle for something else.<sup>174</sup> Opponents to the theory of the *access to Internet* as a human right

<sup>166</sup> *Id.*; see also Nicola Lucchi, *Internet Content Governance and Human Rights*, 16 VAND. J. ENT. & TECH. L. 809, 811 (2014).

<sup>167</sup> Article 19 of the I.C.C.P.R. states that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a. For respect of the rights or reputations of others.
  - b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

International Covenant on Civil and Political Rights art 19(2), 999 UNTS 171, Can TS 1976 No. 47 (Dec. 19, 1966) (entered into force 23 March 1976).

<sup>168</sup> Li, *supra* note 165, at 15.

<sup>169</sup> Nicola Lucchi, *Internet Content Governance and Human Rights*, 16 VAND. J. ENT. & TECH. L. 809, 822 (2014).

<sup>170</sup> *Id.*

<sup>171</sup> Brittany Grasmick, *Recognizing “Access to Information” as a Basic Human Right: A Necessary Step in Enforcing Human Rights Provisions Within Free Trade Agreements*, 12 LOY. U. CHI. INT’L L. REV. 215, 225 (2015).

<sup>172</sup> *Id.*

<sup>173</sup> Vinton G. Cerf, *Internet Access is not a Human Right*, THE NEW YORK TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html>.

<sup>174</sup> Grasmick, *supra* note 171, at 25.

have stressed that one has to be cautious of “our inability to predict new technological developments. . . [in a future because] immortalizing. . .” such right in International Law can bring an expansion of other *human rights*.<sup>175</sup> Professor Molly Land strikes down this argument by stating that, a right to Internet access is not equivalent as to individuals claiming a right to use *Twitter* or *Facebook*.<sup>176</sup> She points that the right to Internet access —as in Article 19(2) of the I.C.C.P.R.— “provide[s] a right to access technology necessary to ensure meaningful exercise of one’s right to freedom of expression and information; it does not provide a right to any particular technology in that process.”<sup>177</sup> Internet access use, as aligned with the U.D.H.R. principles, is for the improvement of human dignity and it is essential for satisfying human needs. Thus, opponents’ fear of an amplification of Internet access for trivial use, is discredited.

Similarly, opponents warn that “recognizing a new right to the Internet could lead to calls for rights in other specific technologies that might dilute the protections for freedom of expression in general.”<sup>178</sup> To this end, “a proliferation of new rights would be much more likely to contribute to a serious devaluation of the human rights currency than to enrich significantly the overall coverage provided by existing rights.”<sup>179</sup> Professor Land refutes this argument by establishing that:

Although La Rue[’s *Report*] is correct [in stating] that there is no right to the Internet “as such,” a close examination of Article 19(2) [of the I.C.C.P.R.] and its drafting history reveals that it does protect rights in and to technology. Further, it does so in a technologically neutral way, thus avoiding the difficulty of anticipating new technologies. Because it is an already existing right, it does not raise concerns about rights expansionism . . . [R]ecognition of rights in and to technology in Article 19(2) [of the I.C.C.P.R.] reflects a recognition of the importance of technology in promoting human rights in the area of freedom of expression and information. Although technology is always a means to an end, *this mea[n] can sometimes be so critically important for the achievement of human rights ends that it should and does meet the “high bar” Cerf identifies for recognition as a human right in and of itself*.<sup>180</sup>

For professor Land, Article 19 of the I.C.C.P.R. protects *media*,<sup>181</sup> “which includes technologies of connection such as the [I]nternet.”<sup>182</sup> Thus, “perhaps this might be the end of

<sup>175</sup> Molly Land, *Toward an International Law of the Internet*, 54 HARV. INT’L L.J. 393, 400 (2013).

<sup>176</sup> *Id.* at 410, 422.

<sup>177</sup> *Id.* at 422.

<sup>178</sup> *Id.* at 400.

<sup>179</sup> Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607, 614 (1984).

<sup>180</sup> Land, *supra* note 175, at 400-01 (emphasis added).

<sup>181</sup> See International Covenant on Civil and Political Rights art 19, 999 UNTS 171, Can TS 1976 No. 47 (December 19, 1966) (entered into force 23 March 1976).

<sup>182</sup> Land, *supra* note 175, at 413.

the discussion. The law is the law, and it is important to know what the law is for its own sake.”<sup>183</sup> She further stresses that:

Article 19(2) specifies that freedom of expression includes the freedom to seek, receive, and impart information “through any other media of his choice.” *This is an active right, one that protects the ability to engage in particular communicative activities through a medium*, rather than simply protecting the expression itself. Moreover, the word “freedom” can be read as extending to the remainder of the article, including media, *thus implying an ability to access a medium if necessary for the fulfillment of the right*.<sup>184</sup>

Similarly, professor Michael L. Best also argues that the medium is necessary to guarantee other rights.<sup>185</sup> Professor Best is very practical in his approach and suggests that the Internet should be a human right.<sup>186</sup> He argues that because “appropriate information technology is certainly part of my information right,”<sup>187</sup> then “access to the Internet itself has become a human right.”<sup>188</sup> He concludes that “[g]iven a symmetric claim to information as a universal human right, and my argument that the Internet is more than just an incrementally useful information technology, we are led directly to the conclusion above: *the Internet should be a human right in and of itself*.”<sup>189</sup>

On the other hand, opponents —like Ceft— argue that the Internet, as a medium, is not a human right because it is derived from others. Pollicino —in Part I of this article— supports this conclusion but on different grounds.<sup>190</sup> Pollicino points that, reports such as the *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, give access to the Internet* a human right quality which can be reaffirmed by International Law. In other words, for Pollicino:

[I]t seems possible to imply as in [I]nternational [L]aw there is [a] tendency to look at Internet access not as [an] autonomo[u]s “new right” but as

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 419-20 (emphasis added).

<sup>185</sup> Michael L. Best, *Can the Internet be a Human Right?*, 4 HUMAN RIGHTS & HUMAN WELFARE 23 (2004).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 24.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* Professor Best criticizes the fact that the international community had the chance to advance the claim of Internet access as a human right in different world’s summits but failed to do so:

The 2003 World Summit on the Information Society (WSIS), convened by the UN Secretary General and organized by the International Telecommunication Union (ITU), created another unique opportunity to advance a strong claim for the Internet as a human right. In the lead-up to the Geneva summit, there had been a flurry of preparatory conferences in Africa, Asia, Latin America and Europe[.]. . . But neither the W.S.I.S Declaration, nor the general discourse in Geneva, advanced the discussion beyond this simple reference to the Universal Declaration, thus missing the opportunity to bring the Information Society and Human Rights together in the 21st century.

*Id.* at 24-25.

<sup>190</sup> Pollicino, *supra* note 135 at 2.



a part of a right to participation of all citizens in the information society that can be achieved by the possibility for the citizens to have access to the Internet.<sup>191</sup>

Thus, “the impression is that the right to access to the Internet does not fully enjoy, under [I]nternational [L]aw, the status of autonomous human rights.”<sup>192</sup> Consequently, for Pollicino, “it seems that Internet access is very often connected to classic rights whose represents the digital projection and is not treated as an autonomous independent right.”<sup>193</sup> Pollicino’s approach is a legal and pragmatic one. For the Professor, the analysis for Internet access to be considered a human right is very straightforward, consequently, he adopts the consensual approach. He stresses that “it is an essential requirement that a human right must be enshrined in treaties and in treaty laws which not only provide for its exercise, but also ensure its enforcement.”<sup>194</sup> Accordingly, he asserts that:

[A]t the [I]nternational [L]aw level, provisions of this type are in reality lacking: there are reports, which are undoubtedly important although they cannot be considered to recogni[z]e or establish human rights in a strict sense. If anything, they invoke the idea of freedom as being an essential prerequisite for the exercise of other rights, which, as such, must not be impaired.<sup>195</sup>

He finalizes his approach by concluding that “as far as the language of International Law is concerned, the Internet seems to be considered just as another medium through which freedom of speech or democratic participation to the information society are exercised and protected.”<sup>196</sup> Bear in mind that the strongest argument opponents have is that: (1) Internet access is a derived right, and (2) Internet is not meaningful for human needs. This means that, in their eyes, Internet is a *medium*, a vehicle for enjoying other rights such as freedom of speech, information and assemble that are far more meaningful than that of *access to Internet*. Moreover, they propose that, since human rights protect humans and not technology, it should not be at the same rank as other essential human rights.

For Cerf, human rights must stand a high bar, thus, for him, “human right[s] ‘must be among the things we as humans need in order to lead healthy, *meaningful lives*.’”<sup>197</sup> Professor Kay Mathiesen rebuts the opponents’ arguments in various ways. For professor Mathiesen, this assertion is mistaken because, for instance, people may have healthy and meaningful lives and be deprived of many things that are listed in the

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191 *Id.* at 3.

192 *Id.* at 4.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 Mathiesen, *supra* note 155 (emphasis added) (citing Vinton G. Cerf, *Internet Access is not a Human Right*, THE NEW YORK TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html>).

U.D.H.R.<sup>198</sup> On that note, professor Mathiesen stresses that Cerf’s approach to human rights lacks the component of human dignity, which guided the redaction of the U.D.H.R. in 1948.<sup>199</sup>

Second, professor Mathiesen sides with Cerf on the fact that “it would be a mistake to put the right to the Internet alongside the human rights . . . .”<sup>200</sup> Nevertheless, the author makes a significant distinction. Mathiesen explains that “[n]ot all human rights are created equal[,] some human rights are *derived* from other more basic rights. A number of human rights theorists have pointed out the difference between primary human rights and *derived* human rights.”<sup>201</sup> She asserts that derived human rights are “perfectly reasonable.”<sup>202</sup> For example, the right to form a relationship is a primary right and the derived right is the right to get married.<sup>203</sup> She continues by contesting that if Cerf’s argument that “no right that is not primary should be designated a human right” is true, half of the rights listed in the U.D.H.R. would have been left out.<sup>204</sup>

Third, she contends that—for Cerf—the human rights underlying the *Internet right* are “freedom of speech and freedom of access to information[,] and those are not necessarily bound to any particular technology at any particular time.”<sup>205</sup> For Mathiesen, that line of thought reveals that, in Cerf’s view, “human rights are timeless and cannot mention features . . . that belong to a particular time.”<sup>206</sup>

In sum, some scholars suggest that a right to the Internet should be a civil right and not a human right, since the right for access to the Internet is associated with other rights. Others, on the other hand, wish to address that the mean is as valuable as the end,<sup>207</sup> and that humans rights are part of an ever-changing complex world.

### III. Time as a Defining Element of Human Rights: Internet Access’ Relevance During COVID-19

It is exactly the *time and/or historical circumstances* which Cert discards, we argue, that specifically this, should be a key element in determining whether something should

<sup>198</sup> *Id.* Mathiesen illustrates that “[f]or instance, it is not obvious that freedom of expression is necessary to live a healthy and meaningful life, [since] many women do not have equal free expression rights with men, but they nevertheless live healthy and meaningful lives.) *Id.* (I must express, however, that I don’t agree with the phrase “many women do not have equal free expression rights with men, but they nevertheless live healthy and meaningful lives”. No woman can live a meaningful life if her rights are not equal to that of men.).

<sup>199</sup> *Id.* at 4-5.

<sup>200</sup> *Id.* at 6.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (as it would have been the case of the right: to nationality, to marry, to join trade unions, to holidays with pay and compulsory elementary education).

<sup>205</sup> *Id.* at 5.

<sup>206</sup> *Id.* (in synthesis, Mathiesen concluded that opponents’ arguments of why there can be no human right to Internet access are “because (1) human rights protect the constituents of a good life —technology is merely a means we use to achieve that life—, and (2) valuing a means (such as the Internet) rather than the ends will lead us to make poor decisions.”).

<sup>207</sup> *Id.* (emphasis added).

be a human right. For instance, we do not agree with Cerf's example of the horse, mentioned above. If at one time in history a horse was a reliable vehicle for going places and satisfying other human needs, then it should have been a right at that moment. International human rights must keep up with time. Time is determinant on human needs. This is supported by the history of the U.D.H.R.<sup>208</sup> As stated above, in the post-World War II era there was an urge to evoke human rights that protected the lives of the people.<sup>209</sup> It was the necessity of that particular time which led, in 1948, the international community to recognize the importance of guarantying inalienable human rights.<sup>210</sup>

In 1948, when the U.D.H.R. was created, there was a need to emphasize and express the high standard that is the *right to life*. Any crime against the life of a single person would be condemned. Time was of the essence. Amid the results and atrocities that led to the Second World War, life was—and still is—a high priority. We stand by the argument that *time and historical circumstances* are the key elements for understanding human rights. And it cannot be said otherwise, because, in the first place, human rights had their origin motivated by the historical context in which they began to develop. Thus, time is of the essence for human rights. Human rights move in accordance with epochs to satisfy human needs.

In this sense, as of today, Internet access is essential to our everyday life and thus it must be considered a human right, regardless of whether it is later considered essential or not. Moreover, soft law instruments support this conclusion as more pro Internet instruments are currently being created at the international level. In addition, more countries are now moving towards guarantying the *access to the Internet* as a human right because of the importance it has. The soft law instruments of today are the hard law of tomorrow. An increase in soft law instruments contributes to supporting and promoting a general practice among international actors.

The majority of soft law instruments and state legislation enacted towards promoting Internet access as a human right were produced in the early years of the twenty-first century. This comes after the early stages of the Internet growth in the 1990s.<sup>211</sup> Thus, it is to be expected that with the technological advances—and with the lessons that the COVID-19 pandemic is furnishing— many more instruments and legislations will be produced. Not to say, the COVID-19 pandemic—a historical event—is an epoch that will mark the way for international actors to further promote access to the Internet. They will view Internet access in relation to the human dignity which permeates the U.D.H.R.<sup>212</sup>

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<sup>208</sup> *History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration> (last visited May 24, 2022).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Steve Case, *Steve Case: The Complete History of the Internet's Boom, Bust, Boom Cycle*, BUSINESS INSIDER (Jan. 14, 2011), <https://www.businessinsider.com/what-factors-led-to-the-bursting-of-the-internet-bubble-of-the-late-90s-2011-1>.

<sup>212</sup> See also Colleen McClain, Emily A. Vogels, Andrew Perrin, Stella Sechopoulos & Lee Rainie, *The Internet and the Pandemic*, PEW RESEARCH CENTER (Sept. 2021), <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/>.

Notwithstanding, it is necessary to remember that at the time the U.D.H.R. was created, the technological advances we have today, and the interconnection among billions of people was unimaginable. The same can be said about Cerf's horse example. At one time in history, the automotive industry was unthinkable, the only medium was, indeed, a horse. International Law cannot turn a blind eye to the historical circumstances of our times, or of any time.<sup>213</sup>

In this sense, now more than ever, amidst the COVID-19 pandemic, the Internet is an indispensable tool for many aspects of our daily lives. As a result of such pandemic, the world has been astounded by the importance that the Internet holds over our day-to-day life. As professor Christopher Yoo emphasized, "access to the Internet can make a life-or-death difference, simultaneously providing opportunities and challenges."<sup>214</sup> In 2019, the U.N. estimated that around fifty seven percent of the world's households had access to the Internet from home.<sup>215</sup> "Europe is the region with the highest Internet usage rates, [and] Africa the region with the lowest Internet usage rates."<sup>216</sup> "An estimated 4.1 billion people [used] the Internet in 2019."<sup>217</sup> Moreover, the U.N. estimated that the proportion of women using the Internet globally is forty eight percent, compared to fifty eight percent of men.<sup>218</sup>

Nonetheless, "there are about three and a half billion people who are not connected but we know it's more now, because quite a number of the people who used to be connected at their workplaces and other public spaces no longer have that access" due to the coronavirus pandemic.<sup>219</sup> This is worrying because "[f]or those people, lockdown means missing out on immediate access to vital public health information, remote work opportunities, online learning, telemedicine appointments, digital grocery deliveries, live-streamed religious services —weddings, and even funerals— as well as the countless other ways we are increasingly living our lives online."<sup>220</sup>

To view the Internet's relevance and the impact it has had on the COVID-19 pandemic, contemporary examples regarding the foregoing four areas, subsidies, access to information, health, and education, will be presented in the next subsections. These accounts and

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<sup>213</sup> In this context, the same can be said about existing human rights. They must be reinterpreted according to the times in which they are to be executed. Professor Rodríguez Rivera stressed, in relation to environmental rights, that "[a]lthough the above human rights are recognized as part of the international legal order, *existing rights must be reinterpreted with imagination and rigor in the context of environmental concerns which were not prevalent at the time existing rights were first formulated.*" Luis E. Rodríguez-Rivera, *supra* note 4 at 19 (emphasis added) (citing Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43 (Alan E. Boyle & Michael R. Anderson eds., 1996)).

<sup>214</sup> *Q & A with Professor Yoo on Internet Connectivity during the Novel Coronavirus Pandemic*, PENN LAW (May 5, 2020), <https://www.law.upenn.edu/live/news/10028-q-a-with-professor-yoo-on-Internet>.

<sup>215</sup> *Measuring Digital Development: Facts and Figures 2019*, INTERNATIONAL TELECOMMUNICATION UNION PUBLICATIONS 1, 9 (2019), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf>.

<sup>216</sup> *Id.* at 4.

<sup>217</sup> *Id.* at 3.

<sup>218</sup> *Id.* at 6.

<sup>219</sup> Eliza Mackintosh, *Almost Half the World Is Living through this Pandemic without Internet*, CNN (June 7, 2020), <https://edition.cnn.com/2020/06/07/world/Internet-inequality-coronavirus-intl/index.html>.

<sup>220</sup> *Id.*

examples will allow us to further put into context how important access to Internet has become, which in turn validates the notion that time is the key element in order to categorize something as a human right.

#### A. Subsidies

Amid the COVID-19 pandemic, many governments have granted subsidies to help ease the economic crisis caused by the health emergency. Without Internet access, people have not received these economic incentives. “When the crisis hit . . . India’s one point three billion Indians were placed under lockdown.”<sup>221</sup> The government of India approved an economic incentive for “women, widows, senior citizens and disabled people . . . [b]ut stuck at home without smartphones, many were unable to access the 500 to 1000 rupees in aid.”<sup>222</sup> This was the case of “Lal Bai, a sixty-five year-old widow.”<sup>223</sup> Bai lived “in a remote village . . . [and] couldn’t trek the five miles away into the nearest town to withdraw the government[s’] cash, and had no means of accessing the government funds online so she quickly found herself without any food left at home.”<sup>224</sup>

Similarly, in Puerto Rico, in the aftermath of Hurricane María in 2017, many affected people were unable to apply for post-disaster community development funds such as the R3 program —Repair, Reconstruction and Relocation of Housing— because of the lack of access to the Internet.<sup>225</sup> For instance:

According to Ariadna Godreau-Aubert, director of Puerto Rico Legal Aid, the limited participation of those affected is due, among other things, to the little promotion of the initiative; *the limited access to the Internet of the affected population, necessary to request assistance*; and bureaucratic demands including property titles.<sup>226</sup>

In Puerto Rico, those kinds of economic and social programs required Internet access. Thus, if people lacked access to the Internet, they were barred from requesting the economic and social assistance. Certainly, Internet access is fundamental in accessing subsidies and governmental funds. Consequently, the constant and rapid development of technology demands that Internet access be recognized as a right, because, in times of emergency, its importance is vital. In fact, the States assume that people have access to the Internet. Otherwise, it would not expect people to apply for government assistance through its Internet portals. Therefore, governments themselves sponsor its use without recognizing or guaranteeing its access.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Ricardo Cortés Chico, *El Programa de Reparación, Reconstrucción y Relocalización de Viviendas registra pocas solicitudes*, ELNUEVODIA.COM (June 18, 2020), <https://www.elnuevodia.com/noticias/locales/notas/el-programa-de-reparacion-reconstruccion-y-relocalizacion-de-viviendas-registra-pocas-solicitudes/> (emphasis added).

<sup>226</sup> *Id.* (emphasis added).

### B. Access to Information

In mid-March 2020, when many of the state governments were imposing a lockdown due to the COVID-19 pandemic, the U.N. issued a statement. The Human Rights Commission urged governments to guarantee access to the Internet.<sup>227</sup> The Commission states that:

*[I]nternet access is critical at a time of crisis. It is essential that governments refrain from blocking [I]nternet access; in those situations where [I]nternet has been blocked, governments should, as a matter of priority, ensure immediate access to the fastest and broadest possible [I]nternet service. Especially at a time of emergency, when access to information is of critical importance, broad restrictions on access to the [I]nternet cannot be justified on public order or national security grounds.*<sup>228</sup>

Furthermore, in 2018, only sixty four percent of the Colombian population had Internet access, and in 2019 that percentage was sixty five percent.<sup>229</sup> Angela Montiel is among the thirty six percent or thirty five percent that doesn't have access to the Internet.<sup>230</sup> During the coronavirus pandemic, "the only information Angela Montiel could get about Covid-19 was from her neighbors."<sup>231</sup> At the time, Mrs. Montiel was not even certain if the pandemic was true or not, as the only news she would get were from her neighbor. The following illustrates the conditions she found herself in when the pandemic began:

Before the lockdown, Angela would occasionally top up a S.I.M. card in order to use WhatsApp, but hasn't been able to recharge it since the lockdown. With no [I]nternet connection, there is no way to "work remotely" [.] Angela knits traditional [indigenous group] Wayuu mochila bags, but she can't sell them in the street under the current restrictions.

. . . .

It's impossible for her children to continue their education from home without access to school materials online. As for updates, they wait for phone calls from friends or family, who might bring news. Otherwise, they're in the dark.<sup>232</sup>

There are many families like the Montiels. In a globalized world, the flow of information travels constantly and immediately. There should be no reason for a person not to know

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<sup>227</sup> COVID-19: Governments must Promote and Protect Access to and Free Flow of Information during Pandemic – *International Experts*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Mar. 19, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729>.

<sup>228</sup> *Id.* (emphasis added).

<sup>229</sup> *Individuals using the Internet (% of population) - Colombia*, THE WORLD BANK, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?end=2018&locations=CO&start=2010&view=chart> (last visited May 24, 2022).

<sup>230</sup> Mackintosh, *supra* note 219.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

what is happening in his or her country/surroundings when there are others who have the benefit of knowing instantly what is happening in a country thousands of miles away.

### C. Telehealth

The COVID19 pandemic changed the way the world used telehealth, in 2019:

Only [eleven percent] of Americans used [telehealth]. . . . [A]s COVID-19 change[d] the way we interact[ed] . . . many patients [were] swiftly embracing virtual healthcare, with [forty six percent] of U.S. consumers [currently] using telehealth.<sup>233</sup>

In the United Kingdom, “[b]efore the virus, video appointments made up only [one] percent of 340 million or so visits to primary care doctors and nurses.”<sup>234</sup> Today, “[m]ore than [ninety percent] of primary care clinics in England are . . . using [Telemedicine].”<sup>235</sup> In practice “[t]elehealth consultations are typically [twenty percent] shorter than traditional in-person appointments, which can allow providers to see additional patients.”<sup>236</sup> At the same time, telehealth “enables older adults and people with disabilities [to] receive improved access to care.”<sup>237</sup> Similarly, costs are reduced.<sup>238</sup> On the other hand, patients “may not have access to a computer or smartphone to connect for video visits, and insurers are particularly wary of doctors charging for phone calls to follow up on lab results or tell someone to come to the office.”<sup>239</sup> Some doctors are experiencing patients who “stopped answering their phones [for consultation] . . . because they had run out of minutes.”<sup>240</sup> Susana Encarnación, a Dominican mother who moved to New London, Connecticut,<sup>241</sup> faced barriers in accessing health care during the coronavirus pandemic:

With no Wi-Fi or reliable [I]nternet access during the COVID-19 pandemic, Susana Encarnación of New London had some trouble during doctors’ appointments for her [nine] year old son, Jeremiah, who has asthma and attention deficit disorder.

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<sup>233</sup> Teri Oelrich, *The Coronavirus Pandemic Has Boosted Telehealth; Here’s How Existing Spaces Can Support Virtual Visits*, FORBES (January 8, 2020), <https://www.forbes.com/sites/coronavirusfrontlines/2020/06/08/the-coronavirus-pandemic-has-boosted-telehealth-heres-how-existing-spaces-can-support-virtual-visits/#7e209af97560>.

<sup>234</sup> Benjamin Mueller, *Telemedicine Arrives in the U.K.: ‘10 years of Change in One Week’*, THE NEW YORK TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/world/europe/telemedicine-uk-coronavirus.html>.

<sup>235</sup> *Id.*

<sup>236</sup> Oelrich, *supra* note 233.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> Reed Abelson, *Is Telemedicine Here to Stay?*, THE NEW YORK TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/health/covid-telemedicine-congress.html>.

<sup>240</sup> *Id.*

<sup>241</sup> Kate Farrish, *Health Care and Education Suffer When There’s no Internet Access*, THECTMIRROR (Aug. 23, 2020), <https://ctmirror.org/2020/08/23/health-care-and-education-suffer-when-theres-no-Internet-access/>.

[S]he and her husband used to have Wi-Fi, but it became too expensive. Phone appointments worked fine, but video doctor visits with only a phone hotspot often weren't reliable.<sup>242</sup>

Encarnación is one of the many suffering the effect of the digital divide.<sup>243</sup> During the pandemic the digital divide has crystallized.<sup>244</sup> “The lack of [I]nternet and Wi-Fi has a tremendous impact on immigrants, communities of color, the poor, the elderly and those who are homeless.”<sup>245</sup> Furthermore, “[m]any of the city’s undocumented residents also lack Wi-Fi and have missed out on health and mental health care.”<sup>246</sup> In fact, access to broadband Internet is a determinant of access to telemedicine for patients in rural communities.<sup>247</sup> Therefore, Internet access is an element on impact in the health industry. As such, “it should be a priority for policymakers interested in improving health and access to care for rural patients.”<sup>248</sup>

#### D. Education

By April 20, 2020, a sum of 1,291,004,434 students worldwide were affected due to the coronavirus pandemic.<sup>249</sup> This figure represents 81.8 percent enrolled learners.<sup>250</sup> This figure is staggering considering almost every student on Earth was taking classes from home. Thus, it comes with no surprise how important Internet access is when most students worldwide were depending on remote education to fulfil their academic courses. “What learning will look like will vary across communities and schools, and will depend on the quality of the Internet, students’ access to it, and the location of teachers.”<sup>251</sup> For Mahima, living in a village in India, attending classes remotely is a challenge.<sup>252</sup> Since she has no Wi-Fi at her home, she uses her mobile phone’s signal to take classes.<sup>253</sup> Her “phone[s] signal is strongest on the terrace of her house, so Mahima often has no choice but to study there in the searing heat.”<sup>254</sup> When the signal is bad, she cannot take classes:

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See Jacob K. Quinton, et al., *The Association of Broadband Internet Access and Telemedicine Utilization in rural Western Tennessee: an observational study*, BMC HEALTH SERVICES RESEARCH 21, 765 (2021), <https://bmchealthservres.biomedcentral.com/track/pdf/10.1186/s12913-021-06746-0.pdf>.

<sup>248</sup> *Id.*

<sup>249</sup> See *Global Monitoring of School Closures*, UNESCO, <https://en.unesco.org/covid19/educationresponse#schoolclosures> (last visited May 24, 2022).

<sup>250</sup> *Id.*

<sup>251</sup> Sidney Cohen, *N.W.T. To Be ‘Flexible’ for Home-based Education in Wake of COVID-19, Says Minister*, CBC (Mar. 30, 2020) <https://www.cbc.ca/news/canada/north/nwt-education-plan-covid-19-1.5515792>.

<sup>252</sup> Sat Singh et al., *India Coronavirus: Online Classes Expose Extent of Digital Divide*, BBC (July 22, 2020), <https://www.bbc.com/news/world-asia-india-53471749> (“[t]here is a clear difference in the user experience of doing online classes on a mobile phone versus a computer or a laptop”).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*



At times I miss lessons completely. I can't watch online videos sent by the teacher. Downloading is a big problem. We only get electricity a few hours a day, so keeping the phone charged is also an issue.

....

I have barely attended [ten to twelve] classes in the last one and half months. At times I feel like crying because of the backlog. I am so behind the syllabus.<sup>255</sup>

In Puerto Rico, a study conducted by the University of Puerto Rico, Humacao Campus registered that:

[Forty-five percent] of the surveyed students have limited access to the [I]nternet; [sixty percent] of these use cellphones to connect to cyberspace; [eight percent] do not have access to the [I]nternet in their homes and have to go far from their homes to achieve such access, meanwhile [two percent] use the neighbor's [I]nternet.<sup>256</sup>

Similarly, in New Mexico, Autumn Lee “hops in her car and drives [forty-five] minutes to the McDonald's nearest to her town . . . to connect to [a] reliable Wi-Fi from her car.”<sup>257</sup> At first, she used her phone for Wi-Fi but “[i]t took [her] one or two hours to watch a [twenty] minute lecture.”<sup>258</sup>

When such a significant percent of enrolled learners was connected to some form of online classes, there is no doubt that the access to the Internet is not the mean to some other human right—in this case, education— *but the right itself*.

## CONCLUSION

For a right to gain human rights status it must conform with International Law. From a consensual/positivist point of view, this happens with: (i) international agreements, covenants, or treaties, or (ii) by customary international law. In relevant, a consensual approach requires a state to bind and force itself to some obligations. States are reluctant to impose obligations of any kind on themselves, as it requires more responsibility and oversight from other actors. Moreover, they are even more reluctant to bind themselves with obligations that require a vast outlay of money. Thus, it is maybe a utopic aspiration for the people to wait and see if by way of a consensual approach an Internet access right is guaranteed among all States.

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<sup>255</sup> *Id.*

<sup>256</sup> *Estudio revela que brecha digital afecta a universitarios en tiempos de COVID-19*, 80GRADOS (July 24, 2020), <https://www.80grados.net/estudio-revela-que-brecha-digital-afecta-a-universitarios-en-tiempos-de-covid-19/> (translated by autor).

<sup>257</sup> *Id.*

<sup>258</sup> *Doing Schoolwork in the Parking Lot Is Not a Solution*, THE NEW YORK TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/opinion/sunday/broadband-internet-access-civil-rights.html>.

In the alternative, a modern approach seeks to expand International Law by the evolution of modern legal precepts in which the will of the people is recognized. Thus, the element of time and necessity is fundamental in determining whether a right should be considered a human right. As expressed above, *Internet access is not only fundamental in exercising other human rights, but is in itself a right*. Moreover, contemporary technological advances require us to move accordingly. In emergencies like the Coronavirus pandemic, the necessity and importance of Internet access has been eye-opening to some and reassuring for others. The result is that the Internet, as of today, is present (or should be) in our everyday aspects of life, to the point it has become a human survival tool, closely related to the essence and dignity of all.

Notwithstanding, more States need to come forward in enacting and demanding international individuals to act on this matter. Internet access as a right should be guaranteed, and its implantation is needed to eradicate the digital divide. We are aware that this right is not isolated from other factors, such as education on how to navigate hardware and infrastructure. Nevertheless, it is time to take that first step toward satisfying human needs such as education, health, information, and social and economic benefits, among others by guarantying Internet access as a human right for all. The times we live in have allowed for such a right to gain human rights status.