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# Protecting Freedom of Expression over the Internet: An International Approach

Alan Sears

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# Protecting Freedom of Expression over the Internet: An International Approach

NOTE

Alan Sears<sup>†</sup>

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### Abstract

Writing primarily in 2013, Alan Sears examines different aspects of the international legal framework as to how freedom of expression over the Internet may be protected. Even though the Internet has largely incorporated the concept of freedom of expression from its inception, the need for such protection has become increasingly evident. States around the world have progressively cracked down on Internet speech, a trend highlighted by recent events occurring during the Arab Spring. Alan thus focuses on the Middle East when exploring how Internet governance may be shaped, and human rights and trade agreements may be utilized, in order to make sure that the freedom of expression over the Internet remains respected. He discusses the advantages and disadvantages of the different frameworks, suggests proposals for improvements, and argues for the importance of engaging with different stakeholders in decision-making processes to better meet this end.

### I INTRODUCTION

Just as we are beginning to see the power that free resources produce, changes in the architecture of the Internet—both legal and technical—are sapping the Internet of this power. Fueled by a bias in favor of control, pushed by those whose financial interest favor control, our social and political institutions are ratifying changes in the Internet that will reestablish control and, in turn, reduce innovation on the Internet and in society generally.

—Lawrence Lessig<sup>1</sup>

The Internet has become a central and indispensable means of exercising the right to freedom of expression and opinion. In many ways, the modern conception of the Internet has become almost synonymous with freedom of expression. This is plainly not entirely true, given that there are countries that limit public access to the Internet, such as China. Even states that have a better track record respecting access have shown weakness when under pressure; this has been evidenced recently in Egypt and Turkey.

The Internet, from its inception and throughout its implementation, has been largely unregulated. This has likely led to the principles of freedom that a large portion of the world associates with the Internet today. On the other hand, many states have taken the position that they need to have more influence on the process, whether for purposes of streamlining the protocols for faster uptake, or for more malicious reasons such as controlling the process and flow of information.

No single method or framework by itself may be sufficient to ensure the freedom of speech over the Internet. Consequently, this Note will explore a multifaceted approach focusing on using an international legal framework to protect

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<sup>1</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 15 (2001).

freedom of expression over the Internet, with a spotlight on the Middle East.<sup>2</sup> The aim is to analyze procedures and structures relevant to this region, as opposed to presenting an exhaustive analysis of every method and paradigm that may be employed. For instance, there are many other ways in which freedom of expression over the internet may be preserved and protected domestically, such as through net neutrality and intellectual property laws, legislation aimed at limiting liability for intermediaries, or regulations that place restrictions on surveillance and data retention, to name but a few.<sup>3</sup> As this is a rapidly evolving field, the approach discussed in this Note will need to adapt to the constantly changing landscape.

After a brief introduction to the history of Internet in Part II of this note, Part III looks at Internet governance and possible regulation (or lack thereof), and how the growth of the Internet has introduced new issues regarding how states have stifled speech. Part IV looks to human rights agreements and other treaty arrangements as a method of enforcing, or at the least encouraging, freedom of speech on the Internet. An overarching theme is the importance of incorporating many different stakeholders into decision-making processes in order to preserve the freedom of expression.

## II A BRIEF HISTORY

What began as a defense project of the United States snowballed into something much greater.<sup>4</sup> Packet switching technology was theorized and created as an alternative to circuits as a means of communication.<sup>5</sup> In 1969, after much research and testing, the first messages between computers were sent over ARPANET, the precursor to the Internet.<sup>6</sup> ARPANET was a single network with limited capacity for expansion given the protocol it used for transmission.<sup>7</sup> The Internet that

<sup>2</sup> This issue is relevant across the entire world, and other locales will be touched upon as well. However, limitations on freedom of expression over the Internet are particularly pervasive in the Middle East—hence the focus on this region. The United States will also be heavily discussed, as it is the birthplace of the Internet; many of the standards and norms still in use today were created in the United States.

<sup>3</sup> These methods, while just as important to freedom of expression, are outside the scope of this paper as they are primarily enacted domestically. This is subject to change. Intellectual property law is becoming increasingly internationalized, and how this interacts with freedom of expression and the Internet could, in itself, be a topic for an article. Net neutrality is headed in the same direction—it has been framed (and recognized by the European Commission) as a policy objective, and the European Parliament recently passed a net neutrality law, subject to approval by the Council of Ministers. *See, e.g., Net Neutrality Law Adopted by European Parliament*, BBC NEWS (Apr. 3, 2014), <http://www.bbc.com/news/technology-26865869>; EUR. PARL. DOC. TA-PROV 281 (2014), [http://polcms.secure.europarl.europa.eu/cmsdata/upload/a5a15cc1-1999-4bff-a5ab-4dd572699bb9/att\\_20140616ATT85462-704162869106635421.pdf](http://polcms.secure.europarl.europa.eu/cmsdata/upload/a5a15cc1-1999-4bff-a5ab-4dd572699bb9/att_20140616ATT85462-704162869106635421.pdf); Council Directive 2009/140/EC, 2009 O.J. (L 337) 37.

<sup>4</sup> BARRY M. LEINER ET AL., BRIEF HISTORY OF THE INTERNET (2012), [http://www.internetsociety.org/sites/default/files/Brief\\_History\\_of\\_the\\_Internet.pdf](http://www.internetsociety.org/sites/default/files/Brief_History_of_the_Internet.pdf).

<sup>5</sup> *See id.* (discussing secure voice communication applications as among the possible uses of packet switching technology).

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

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

we know today is built on the underlying idea of open-architecture networking, which allows individual networks to choose the structure and network technology to implement.<sup>8</sup> The desire to connect multiple networks required a more robust protocol, which resulted in the development of the Transmission Control Protocol/Internet Protocol (TCP/IP) for the transmission and communication of data, which is still in use today.<sup>9</sup>

### III REGULATION OR GOVERNANCE OF THE INTERNET

Currently, there is little regulation of the Internet. A hodgepodge of organizations performs different roles in this “regulation,” which may be more accurately termed oversight, direction, or guidance. The control of the Internet’s technical structure is in the hands of a collection of decentralized and apolitical organizations, which are primarily based in the United States. They typically fall under the umbrella of technical governance, and are concerned with creating standards to foster Internet growth while keeping it functioning properly.<sup>10</sup> The other, newer side of the coin is policy governance, which involves what happens on the Internet and the direction in which the Internet develops.<sup>11</sup> Technical governance and policy governance do overlap.<sup>12</sup>

#### A TECHNICAL GOVERNANCE

Most technical governance organizations operate under a multi-stakeholder approach. Many of the organizations have maintained this approach from early in the development of the Internet. The multi-stakeholder approach is intended to expand the range of contributors in order to receive input from diverse interests and to consider how organizational decisions affect a wide array of differing groups.<sup>13</sup> The openness of the process increases the transparency of the process and increases the probability that proposed actions and plans will be accepted and widely implemented.<sup>14</sup>

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

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

<sup>10</sup> *Who Governs the Internet?*, GLOB. PARTNERS & ASSOCS. 3 (2012), [http://www.gp-digital.org/wp-content/uploads/pubs/who-governs-internet\\_web2.pdf](http://www.gp-digital.org/wp-content/uploads/pubs/who-governs-internet_web2.pdf) (describing the history of internet governance, issues with the current regime, as well as proposals for change).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> JOE WAZ & PHIL WEISER, INTERNET GOVERNANCE: THE ROLE OF MULTISTAKEHOLDER ORGANIZATIONS 5–6 (2012), <http://siliconflatirons.com/documents/publications/report/InternetGovernanceRoleofMSH0rgs.pdf>. The authors argue that one should see two elements in the multi-stakeholder approach: “(i) representation (or, at a minimum, openness to representation) from a diversity of economic and social interests (and not limited to a single economic perspective), (ii) a representational role for civil society, generally defined as relevant stakeholders other than government and industry.”

<sup>14</sup> U.N. Dev. Programme et al., *Multi-Stakeholder Decision-Making*, U.N. DEV. PROGRAMME 8 (2012), [http://www.undp.org/content/dam/undp/library/Environment%20and%20Energy/Climate%20Strategies/Multi-stakeholder%20Decision-Making\\_Sept%202012.pdf](http://www.undp.org/content/dam/undp/library/Environment%20and%20Energy/Climate%20Strategies/Multi-stakeholder%20Decision-Making_Sept%202012.pdf).

The Internet Engineering Task Force (IETF) is an open international community of network designers, operators, vendors, and researchers that has helped develop standards for Internet architecture.<sup>15</sup> It is the engineering body that makes many technical decisions about the underlying architecture of the Internet, and it has a very open governing structure—anyone can join to contribute and there are no membership fees.<sup>16</sup> As such, the process by which the IETF develops transmission standards and protocols (now including TCP/IP) has been noted to be more transparent and democratic than governmental processes.<sup>17</sup> Members of the IETF also helped create the Internet Society,<sup>18</sup> which is a global non-governmental organization dedicated to promoting the open and transparent development of the Internet.<sup>19</sup> The Internet Society participates in many conferences to support these values and helps to provide funds for the IETF.<sup>20</sup>

Another organization operating under the multi-stakeholder approach is the nonprofit organization Internet Corporation for Assigned Names and Numbers (ICANN), which oversees the Domain Name System (DNS) and Internet Protocol (IP) addresses, among others.<sup>21</sup> The Internet Assigned Numbers Authority (IANA), operating under a contract with the U.S. government, originally conducted many of these services, and ICANN later assumed these responsibilities.<sup>22</sup>

ICANN entered into an agreement with the predecessor of VeriSign, a for-profit company under contract with the U.S. government, which now controls the management of domains ending in “.com” and “.net.”<sup>23</sup> As these domains are used over the entire world, and are not country specific like “.co.uk” (United Kingdom) or “.com.br” (Brazil), states have pushed for more centralized control of these domains in light of *United States v. Bodog*.<sup>24</sup> In *Bodog*, a Canadian

<sup>15</sup> *About the IETF*, INTERNET ENG'G TASK FORCE, <http://www.ietf.org/about> (last visited Apr. 22, 2014). The IETF does not have a physical office and most of the work is accomplished through email lists, although meetings are held three times a year.

<sup>16</sup> *Getting Started in the IETF*, INTERNET ENG'G TASK FORCE, <http://www.ietf.org/newcomers.html> (last visited Apr. 22, 2014). The IETF is comprised of volunteers. Many times the volunteers can perform work for the IETF as part of their job and are essentially “sponsored,” but they are not a representative of their company and are viewed as individuals.

<sup>17</sup> Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L.J. 205, 207 (2010).

<sup>18</sup> Vint Cerf, *IETF and the Internet Society*, INTERNET SOC'Y (July 18, 1995), <http://www.internetsociety.org/internet/what-internet/history-internet/ietf-and-internet-society>.

<sup>19</sup> *Who We Are*, INTERNET SOC'Y, <http://www.internetsociety.org/who-we-are> (last visited Feb. 22, 2015).

<sup>20</sup> *Id.*; see also Cerf, *supra* note 18 (describing the relationship between the Internet Society and the IETF).

<sup>21</sup> *Welcome to ICANN!*, INTERNET CORP. FOR ASSIGNED NAMES & NOS., <http://www.icann.org/en/about/welcome> (last visited Feb. 22, 2015).

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

<sup>23</sup> Andrew Couts, *US Gov't Claims Right to Seize Any .com Domain*, DIG. TRENDS (Mar. 6, 2012), <http://www.digitaltrends.com/web/us-govt-claims-right-to-seize-any-com-domain>.

<sup>24</sup> See David Kravets, *Uncle Sam: If It Ends in .Com, It's .Seizable*, WIRED: THREAT LEVEL (Feb. 22, 2015), <http://www.wired.com/threatlevel/2012/03/feds-seize-foreign-sites/all/1>; see also *Indictment, United States v. Bodog Entm't Grp.*, No. 1:12-cr-00087-CCB (D. Md. Feb. 22, 2012).

gambling website was seized by the U.S. government under a U.S. District Court order.<sup>25</sup> This is particularly disconcerting to other nations, as it sets the precedent for the United States to seize foreign-operated domains in the future.<sup>26</sup>

ICANN remains controversial internationally, in part because it received its mandate through a Memorandum of Understanding with the U.S. government.<sup>27</sup> While ICANN has attempted to distance itself from the government, and the government announced it would end its unilateral supervision over the organization in 2009, a subagency of the U.S. Department of Commerce, the National Telecommunications & Information Administration (NTIA), still retains final approval over changes to the DNS root zone file.<sup>28</sup> However, some analysts do not find this troublesome, as the United States has not interfered even when ICANN has authorized new top-level domain zone files contrary to the U.S. government's stated opinions.<sup>29</sup> Recent positive developments imply that the situation is headed in the right direction. The United States recently announced the NTIA will cease its oversight function upon approval of a transition plan that will "[s]upport and enhance the multistakeholder model" and "[m]aintain the openness of the Internet," among other qualifications.<sup>30</sup> It also made clear that the government "will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution."<sup>31</sup>

As many of these technical governance institutions were founded or grew with strong input from the United States, they often reflect ingrained American ideas regarding the freedom of expression. The First Amendment of the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

<sup>25</sup> See Indictment, *supra* note 24.

<sup>26</sup> In addition to a First Amendment issue, there is likely a Fourth Amendment issue as well, which is outside the scope of this paper.

<sup>27</sup> *Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers* NAT'L TELECOMMS. & INFO. ADMIN. (Nov. 25, 1998), <http://www.ntia.doc.gov/page/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporation-assigned-; Who Governs the Internet?>, *supra* note 10, at 4–7.

<sup>28</sup> See Michael Froomkin, *Almost Free: An Analysis of ICANN's 'Affirmation of Commitments,'* 9 J. ON TELECOMM. & HIGH TECH L. 187, 192–203 (2011) (discussing ICANN's changing relationship with the U.S. government). "The root zone file is the master definition for the DNS and contains the authoritative list of top-level domains and the information needed to find the authoritative domain name servers for each domain name." *Id.* at 193 n.17. The process is convoluted. ICANN has a subsidiary, the Internet Assigned Numbers Authority (IANA), which is under contract with the U.S. government to administer domain names. When the IANA decides to make a change—such as the addition of a new domain—it is sent to VeriSign, which is in control of the root zone file. While VeriSign has been encouraged to cooperate with and follow ICANN/IANA instructions by the U.S. government, modifications to the root zone file require approval from an authorized U.S. government official in the NTIA.

<sup>29</sup> *Who Governs the Internet?*, *supra* note 10. An example of a top level domain the United States did not prefer to be authorized was the suffix ending with ".xxx" to be used for pornographic sites.

<sup>30</sup> Press Release, Nat'l Telecomms. & Info. Admin., NTIA Announces Intent to Transition Key Internet Domain Name Functions (Mar. 14, 2014), <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>.

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

petition the Government for a redress of grievances.”<sup>32</sup> To some extent, these values are reflected in how the Internet was developed in its early stages—there were purposefully no mechanisms built-in to allow central control.<sup>33</sup> From a freedom of expression standpoint, the early Internet was about as open as theoretically possible. However, not all states hold the same values or appreciate the bottom-up multi-stakeholder approach.

## B POLICY GOVERNANCE

The related and more recently-developed field of policy governance is still struggling to truly get its feet off the ground, but movements have been made toward the creation or designation of a centralized body to oversee Internet governance.<sup>34</sup> The International Telecommunication Union (ITU) is the United Nations (UN) agency for information and communication technologies. It is known for propagating standards to facilitate telephone, mobile, satellite, and Internet communications fluidly.<sup>35</sup> Following an action plan put forward by the ITU, the United Nations endorsed a two-phase conference held in Geneva in 2003 and Tunis in 2005.<sup>36</sup> The purpose of the conference was the “building of a people-centred, inclusive and development-oriented information society so as to enhance digital opportunities for all people in order to help to bridge the digital divide;”<sup>37</sup> one that is founded upon the principles of the multi-stakeholder approach.<sup>38</sup> One of the core issues addressed by this information society was Internet governance,<sup>39</sup> and the conference spawned a number of organizations to work towards that end, including the Working Group on Internet Governance,<sup>40</sup> which was tasked with the responsibility to investigate possible methods of Internet governance and to make proposals for action by 2005.<sup>41</sup> One of the results was an annual multi-stakeholder conference.<sup>42</sup> The Internet Governance Forum

<sup>32</sup> U.S. CONST. amend. I. These protections were officially extended to the Internet with the decision in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>33</sup> Simon Jeffery et al., *When Was the Internet Invented? A People's History of the Internet*, *GUARDIAN* (Oct. 22, 2009), <http://www.guardian.co.uk/technology/interactive/2009/oct/23/internet-arpanet>.

<sup>34</sup> *Who Governs the Internet?*, *supra* note 10.

<sup>35</sup> *Our Vision*, INT'L TELECOMM. UNION, <http://www.itu.int/en/about/Pages/vision.aspx> (last visited Dec. 26, 2012).

<sup>36</sup> G.A. Res. 56/183, ¶ 2 (Jan. 31, 2002).

<sup>37</sup> G.A. Res. 60/252, pmb. (Apr. 27, 2006).

<sup>38</sup> *Id.* ¶ 6.

<sup>39</sup> World Summit on the Information Society, *Declaration of Principles: Building the Information Society: A Global Challenge in the New Millennium*, ¶ 50 (Dec. 12, 2003), [http://www.itu.int/dms\\_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!PDF-E.pdf](http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!PDF-E.pdf).

<sup>40</sup> See G.A. Res. 59/220, ¶ 8 (Feb. 11, 2005) (welcoming the creation of the Working Group on Internet Governance and the Task Force on Financial Mechanisms).

<sup>41</sup> World Summit on the Information Society, *supra* note 39.

<sup>42</sup> See G.A. Res. 60/252, *supra* note 37, ¶¶ 7, 9 (welcoming the creation of the Digital Solidarity Fund and inviting the creation of the Internet Governance Forum); *What is the Internet Governance Forum?*, INTERNET GOVERNANCE FORUM, [http://www.intgovforum.org/cms/2011/press/Backgrounder\\_what\\_is\\_IGF\\_final.doc](http://www.intgovforum.org/cms/2011/press/Backgrounder_what_is_IGF_final.doc) (last visited Feb. 22, 2015). The IGF was created in 2006.

(IGF) brings together stakeholders from government, industry, and civil society to discuss the best ways to preserve the evolution of the Internet in a way that is beneficial to everyone.<sup>43</sup> While the decisions are non-binding, it has become one of the leading forums on public policy issues related to Internet governance.<sup>44</sup>

The ITU also oversees the International Telecommunication Regulations (ITRs), which is a treaty that was developed in 1988 to define the principles for the provision and operation of international communication; it has not been revisited until recently.<sup>45</sup> In December 2012, the World Conference on International Telecommunications (WCIT-12) convened to rework the treaty in the hope of improving online access and connectivity.<sup>46</sup> Even though the ITU has a structure that loosely resembles the multi-stakeholder approach, in that it is the only UN agency that has input from both states and private entities (including companies, academia, and other regulators),<sup>47</sup> only governments could put items on the conference's agenda.<sup>48</sup> One of the proposals from Russia would increase the ITU's role in Internet governance and remove control from the decentralized oversight currently implemented.<sup>49</sup> Companies such as Google and other entities and individuals have voiced their concern over such provisions, specifically fearing that governments might use them in order to limit free speech.<sup>50</sup> The Secretary-General of the ITU has downplayed these concerns,<sup>51</sup> however, the resulting impasse and failure of the conference to reach a consensus seem to reflect differing ideas about the role ITU should take in the future.<sup>52</sup>

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<sup>43</sup> *Id.*

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

<sup>45</sup> Hamadou I. Touré, U.N.: *We Seek to Bring Internet to All*, WIRED (Nov. 7, 2012), <http://www.wired.com/opinion/2012/11/head-of-itu-un-should-internet-regulation-effort/>. This treaty was the result of the 1988 World Administrative Telegraph and Telephone Conference (WATTC-88).

<sup>46</sup> *Id.*

<sup>47</sup> *Overview*, INT'L TELECOMM. UNION, <http://www.itu.int/en/about/Pages/overview.aspx> (last visited Feb. 22, 2015) (noting that membership is comprised of 193 Member States and, in addition, includes information and communication technology regulators, leading academic institutions, and about 700 private companies).

<sup>48</sup> Eric Pfanner, *Integrity of Internet Is Crux of Global Conference*, N.Y. TIMES (Nov. 27, 2012), <http://www.nytimes.com/2012/11/28/technology/dark-warnings-about-future-of-internet-access.html>.

<sup>49</sup> *Id.*

<sup>50</sup> See Vinton Cerf, *'Father of the Internet': Why We Must Fight for its Freedom*, CNN (Nov. 30, 2012), <http://edition.cnn.com/2012/11/29/business/opinion-cerf-google-internet-freedom/index.html> (arguing that governments are trying to use a closed-door meeting in order to gain more control of the Internet, possibly to allow "governments to justify the censorship of legitimate speech" or even cut off Internet access in their countries); see also L. Gordon Crovitz, *The U.N.'s Internet Sneak Attack*, WALL ST. J. (Nov. 25, 2012), <http://online.wsj.com/article/SB10001424127887324352004578136902821852508.html> (asserting that "China, Russia, Iran, and Arab countries are trying to hijack a U.N. agency that has nothing to do with the Internet.").

<sup>51</sup> Hamadou I. Touré, ITU Sec'y-Gen., Opening Remarks of the First Plenary of World Conference on International Telecommunications (WCIT-12) (Dec. 3, 2012), <http://www.itu.int/en/wcit-12/Pages/speech-toure2.aspx> (noting, "WCIT is not about taking over the Internet. And WCIT is not about Internet governance.").

<sup>52</sup> See Cyrus Farivar, *The UN's Telecom Conference is Finally Over. Who Won? Nobody Knows*,

The fears of a potential central body, such as the ITU, playing a policy governance role may be well founded.<sup>53</sup> Perhaps stating the obvious, any body whose primary constituents are states is likely to favor states. In the ITU's constitution, member states have the "right to stop, in accordance with their national law, the transmission of any private telegram which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency."<sup>54</sup> More ominously, member states also have the "right to cut off, in accordance with their national law, any other private telecommunications" for the same reasons.<sup>55</sup> With this in place, and were the ITU to take a more central role in Internet governance, states may find their acts which limit the freedom of expression expressly condoned; policies may be negatively influenced as to affect users of other countries.<sup>56</sup> However, as we shall see, many states have not waited for the Internet to be regulated by a central body to justify infringing rights through the manipulation of the Internet.

### C INTERNET GOVERNANCE: MOVING FORWARD

While this wide array of governing institutions and organizations seems complicated and unintuitive, the Internet has continued to flourish under their auspices. More voices are heard when Internet governance processes remain open. Closing the doors and letting only states deliberate may result in agreements that favor states concerning the freedom of expression.

What can be seen as a mostly positive development for Internet governance came in the form of the "Global Multistakeholder Meeting on the Future of Internet Governance," also known as the NETmundial conference, held in April 2014. This was a true multi-stakeholder conference,<sup>57</sup> coming in the wake of reports revealing the mass surveillance regimes in use today.<sup>58</sup> While the end

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ARS TECHNICA (Dec. 14, 2012), <http://arstechnica.com/tech-policy/2012/12/the-uns-telecom-conference-is-finally-over-who-won-nobody-knows/> (discussing differing views of states in regards to Internet policy and regulation and why they may or may not have signed the agreement; eighty-nine signed and fifty-five abstained or deferred).

<sup>53</sup> See Pfanner, *supra* note 48 (discussing the conferences fraught with politics and commercial concerns); see also *supra* text accompanying note 50.

<sup>54</sup> Int'l Telecomm. Union Const. ch. 6, <http://www.itu.int/net/about/basic-texts/constitution/chaptervi.aspx>.

<sup>55</sup> *Id.* art. 34(2).

<sup>56</sup> Jillian C. York, Opinion, *Multi-Stakeholder Approach to Internet Governance*, AL JAZEERA (Dec. 6, 2012), <http://www.aljazeera.com/indepth/opinion/2012/12/201212592631186992.html>.

<sup>57</sup> *Closing Session*, NETMUNDIAL (Apr. 24, 2014), <http://netmundial.br/wp-content/uploads/2014/04/NETMundial-23April2014-Closing-Session-en.pdf>. Out of the 900 people who participated, 19% were from government, 20% were from the private sector, 23% were from civil society, 10% were from academia, and 10% were from the technical community. *Id.* at 1.

<sup>58</sup> Alexander Klimburg, *Building a Pluralist Future for the Internet*, ATL. COUNCIL (Sept. 2, 2014), <http://www.atlanticcouncil.org/publications/articles/building-a-pluralist-future-for-the-internet>. After reports emerged—originating from Edward Snowden—that revealed mass surveillance used by the United States' National Security Agency (NSA), Brazil's president called for an "emergency meeting on the future of the Internet."

result was a non-binding statement that could have been more forceful in certain areas, the conference is largely seen as a success, and potentially a model, for more pluralistic Internet governance going forward.<sup>59</sup>

Despite this, in the end it may be that a greater threat comes from domestic laws and directives than from privileging states in international negotiations.<sup>60</sup> The novelty and uniqueness of the Internet has created some difficulties in regards to regulation. As most of the technical governance bodies are only concerned with the efficient functioning of the Internet, and there is no international working body setting policy for the broader environment—much like what is seen with domestic broadcast media—questions remain as to how much authority states should be able to apply in regulating content.<sup>61</sup>

As a consequence, there are no clear guidelines, nor an established set of rules and regulations, that govern takedowns or other enforcement measures regarding domains. This is why some states, such as the United States and Libya, have seized entire domain names,<sup>62</sup> while others block their citizens from accessing certain domains<sup>63</sup>—all done nearly indiscriminately.<sup>64</sup> This lack of consensus as to norms leaves a legal vacuum filled by states and companies left to self-regulation.<sup>65</sup>

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<sup>59</sup> *Id.*; *Closing Session*, *supra* note 57. Among the stronger points of the statement are that ICANN is to transition from U.S. quasi-control to globalization by September 2015, and the liability of Internet intermediaries was agreed to be limited; on the other hand, surveillance could have received a stronger reprimand and/or limitations, and net neutrality was not mentioned. As a point of reference, Russia and India were not pleased with the final document, preferring a more state-centered approach.

<sup>60</sup> *Id.*

<sup>61</sup> Andrew Puddephatt, *The Importance of Self Regulation of the Media in Upholding Freedom of Expression*, UNESCO 16 (Feb. 2011), <http://unesdoc.unesco.org/images/0019/001916/191623e.pdf>.

<sup>62</sup> Indictment, *supra* note 24; Robin Wauters, *Trouble In Clever Domain Land: Bit.ly And Others Risk Losing Theirs Swift.ly*, TECHCRUNCH (Oct. 6, 2010), <http://techcrunch.com/2010/10/06/trouble-in-clever-domain-land-bit-ly-and-others-risk-losing-theirs-swift-ly> (discussing the Libyan seizure of one of their top level domains ending in “.ly”).

<sup>63</sup> See Khaled Yacoub Oweis, *Syria Blocks Facebook in Internet Crackdown*, REUTERS (Nov. 23, 2007, 4:54 PM EST), <http://www.reuters.com/article/2007/11/23/us-syria-facebook-idUS0WE37285020071123>; see also Ben Woods, *UK ISPs Ordered to Block Pirate Bay website*, ZDNET (Apr. 30, 2012), <http://www.zdnet.com/uk-isps-ordered-to-block-pirate-bay-website-4010026040> (stating that private internet service providers, or ISPs, will block access to domains as a result of a court order).

<sup>64</sup> Andrew Couts, *U.S. Gov't Seizes 70 More Websites for Copyright Infringement—Not the Digital Kind*, DIGITAL TRENDS (July 12, 2012), <http://www.digitaltrends.com/web/u-s-govt-seizes-70-more-websites-for-copyright-infringement-not-the-digital-kind>. This article detailed that domain seizures have occurred en masse recently. In this instance, seventy domains were taken down at once when VeriSign complied with a court order after the Immigration and Customs Enforcement (ICE) identified websites selling counterfeit goods; over a two-year period 839 domains have been seized in the United States. At the international level, the United States is effectively operating in a grey space in their seizure of domain names. See also *Pakistan Blocks Youtube, 20K Other Websites*, HINDUSTAN TIMES (Oct. 8, 2012), <http://www.hindustantimes.com/technology/BusinessComputing-Updates/Pakistan-blocks-Youtube-20K-other-websites/SP-Article1-941449.aspx> (detailing how Pakistan has recently blocked 20,000 websites).

<sup>65</sup> Puddephatt, *supra* note 61.

D NATIONAL RESPONSES: INTERNET GROWTH AND  
THE SUPPRESSION OF SPEECH

Few people were able to predict the meteoric growth of the Internet and its use. What began with only a few interconnected computers in 1969,<sup>66</sup> grew to 16 million users in 1995.<sup>67</sup> Today, there are more than 2.9 billion users—approximately 40% of the world population.<sup>68</sup> Names of online companies and social media sites, as well as their derivatives (such as “tweet” for Twitter), have entered into the everyday lexicon of millions of people across the globe.<sup>69</sup> From a data perspective, growth has been explosive: More data was transmitted across the Internet in 2010 than in all the previous years combined.<sup>70</sup>

As mentioned before, the emergence of the Internet from the United States has in large part included the United States’ notion of freedom of expression.<sup>71</sup> However, not all states adhere to the same principles expounded in the U.S. Bill of Rights. States have thus responded in different ways to some of the challenges that result from the Internet and how it facilitates the rapid spread of information. Many states across the world have worked to limit speech in order to maintain control of their population. There are a number of different ways in which this is accomplished. Where the state has tightly regulated Internet service providers (ISPs) or central control of the autonomous systems (ASs) (in layman’s terms, the main pipeline to the rest of the Internet), the government can block certain content or, in more severe cases, shut down the Internet. As mentioned in a footnote above, the United States has seized domains through court orders.<sup>72</sup> In other instances, traffic is monitored and expression is limited through threats or actual physical harm.

In 2010, the Egyptian entrepreneur and blogger Khaled Said was brutally beaten to death by police after allegedly possessing evidence of police corruption.<sup>73</sup> His death became one of the catalysts for the Egyptian Revolution that was to follow during the Arab Spring.<sup>74</sup> Human rights activists posted morgue pictures of Said’s mangled face on Facebook and other social media sites; some of

<sup>66</sup> LEINER ET AL., *supra* note 4.

<sup>67</sup> *Internet Growth Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Apr. 14, 2014).

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

<sup>69</sup> A few examples are eBay, Facebook, and Twitter. See Ingrid Lunden, *Analyst: Twitter Passed 500M Users In June 2012, 140M Of Them In US; Jakarta ‘Biggest Tweeting’ City*, TECHCRUNCH (July 30, 2012), <http://techcrunch.com/2012/07/30/analyst-twitter-passed-500m-users-in-june-2012-140m-of-them-in-us-jakarta-biggest-tweeting-city> (discussing Twitter’s user base breaking 500 million users worldwide, making it the second largest social media site behind Facebook’s 1 billion users).

<sup>70</sup> See Ben Parr, *More Data Was Transmitted Over the Internet in 2010 Than All Previous Years Combined*, MASHABLE (Oct. 20, 2011), <http://mashable.com/2011/10/20/kirk-skaugen-web-2> (referencing a speech given by Kirk Skaugen, President of Intel’s Architecture Group, at the Web 2.0 Summit).

<sup>71</sup> See *supra* Section III.A.

<sup>72</sup> See *supra* text accompanying note 64.

<sup>73</sup> *Khaled Said: The Face that Launched a Revolution*, AHARAM ONLINE (June 6, 2012), <http://english.ahram.org.eg/News/43995.aspx>.

<sup>74</sup> *Id.*

the groups that were created online helped spread the word and organize demonstrations and protests.<sup>75</sup> The government responded to this perceived threat early in the Egyptian Revolution by shutting off the Internet to a vast majority of the people, presumably through government pressure on regulated ISPs.<sup>76</sup>

It is not only in Egypt that bloggers and activists have been targeted by state security forces for their actions online. In certain places, such as Libya and Syria, citizen journalists were targeted and killed in attacks by government forces for their work.<sup>77</sup> Additionally, these Internet users often face attacks from non-state actors, who have received implicit governmental approval for their actions. For instance, a man who created an online group promoting atheism in Indonesia was beaten by attackers who reported him to authorities—he was then prosecuted while the attackers went unpunished.<sup>78</sup>

It is more common for governments to limit expression in a less direct and drastic manner. Most exercise a more precise control of information by blocking access to certain domain names or to particular networks that host content contrary to their interests.<sup>79</sup> For example, Syria has prevented access to Facebook, among other sites, since 2007.<sup>80</sup> Pakistan has blocked access to YouTube and 20,000 other sites.<sup>81</sup> China has banned many social media sites as well, and has even blocked virtually all of Google's services, including e-mail, for a short time.<sup>82</sup> Iran has slowed Internet access in order to control protestors but has never fully blocked it.<sup>83</sup> It is no surprise then that Syria, China, Cuba, and Iran were recently rated as having the most restrictive practices relating to the

<sup>75</sup> See Jennifer Preston, *Movement Began With Outrage and a Facebook Page That Gave It an Outlet*, N.Y. TIMES (Feb. 5, 2011), <http://www.nytimes.com/2011/02/06/world/middleeast/06face.html> (discussing the background behind the Facebook page "We Are All Khaled Said," which had more than 473,000 users shortly after the Egyptian Revolution started).

<sup>76</sup> Larry Greenemeier, *How Was Egypt's Internet Access Shut Off?*, SCI. AM. (Jan. 28, 2011), <http://www.scientificamerican.com/article.cfm?id=egypt-internet-mubarak>. Five of Egypt's major service providers shut their connections to the Internet at almost the same time, cutting 93% of the population's access to the Internet. *Id.* Such a tactic would likely not be practically possible in more complex and distributed Internet ecosystems as those found in the United States and Canada. *Id.*

<sup>77</sup> FREEDOM HOUSE, *FREEDOM ON THE NET 2012: A GLOBAL ASSESSMENT OF INTERNET AND DIGITAL MEDIA 9* (Sanja Kelly et al. eds., 2012), [http://www.freedomhouse.org/sites/default/files/inline\\_images/FOTN%202012%20FINAL.pdf](http://www.freedomhouse.org/sites/default/files/inline_images/FOTN%202012%20FINAL.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Oweis, *supra* note 63. Many other sites, including online newspapers and YouTube, are also blocked. See Claire Duffett, *Facebook, Banned in Syria, is Widely Used—Even by the Government*, CHRISTIAN SCI. MONITOR (Nov. 18, 2010), <http://www.csmonitor.com/World/Global-News/2010/1118/Facebook-banned-in-Syria-is-widely-used-even-by-the-government> (discussing how the use of Facebook and other sites has increased in Syria despite the ban through the use of proxies and other workarounds).

<sup>81</sup> *Pakistan Blocks Youtube, 20K Other Websites*, *supra* note 64.

<sup>82</sup> *China Blocks Access to Bloomberg and Businessweek Sites*, BBC NEWS (June 29, 2012), <http://www.bbc.co.uk/news/technology-18648050>; Frederic Lardinois, *China Blocks Virtually all of Google's Web Services as 18th Party Congress Gets Underway*, TECHCRUNCH (Nov. 9, 2012), <http://techcrunch.com/2012/11/09/china-blocks-virtually-all-of-googles-web-services-as-18th-party-congress-gets-underway>.

<sup>83</sup> Greenemeier, *supra* note 76.

Internet.<sup>84</sup>

These restrictive practices are easier to implement in some countries than in others. Internet users across the world connect through 30,000 autonomous systems (ASs), with the majority of traffic flowing through fewer than 1,000 (many ASs are sublevels of other ASs).<sup>85</sup> Ninety percent of China's IP addresses connect to the wider Internet through only four ASs, whereas ninety percent of Russia's addresses connect through one of thirty-six ASs—China thus has far fewer points of control, and therefore requires less sophisticated filtering mechanisms.<sup>86</sup>

More than forty countries around the globe limit what Internet users are able to access online.<sup>87</sup> Overall, restrictions on Internet freedom have increased, although the methods of control are slowly becoming less visible.<sup>88</sup> Some states have enacted laws that limit freedom of expression over the Internet and prompt the arrests of Internet users.<sup>89</sup> It may come as no surprise then that freedom on the Internet has also been strongly correlated with democracy—of the seventeen nations found to experience a decline in freedom over the past year, only four were electoral democracies.<sup>90</sup> This suggests civil society is essential to keeping states in check.

Blocking sites such as Twitter and YouTube is not very effective in deterring anyone who is tech savvy. There are many ways to get around such measures, which include using virtual private networks (VPNs), Tor (which keeps communication anonymous), or Twitter's text service.<sup>91</sup> In repressive situations, perhaps the real danger lies in the resulting infringement of the right of access to information:<sup>92</sup> It limits the exposure of those using the services and effectively slows, or

<sup>84</sup> See FREEDOM HOUSE, *supra* note 77, at 21.

<sup>85</sup> *Mapping Local Internet Control—Research Methods*, BERKMAN CTR. FOR INTERNET & SOC'Y, <http://cyber.law.harvard.edu/netmaps/methods.php> (last visited Apr. 20, 2014); Hal Roberts et al., *Mapping Local Internet Control*, BERKMAN CTR. FOR INTERNET & SOC'Y (2012), [http://cyber.law.harvard.edu/netmaps/mlc\\_20110513.pdf](http://cyber.law.harvard.edu/netmaps/mlc_20110513.pdf).

<sup>86</sup> *Mapping Local Internet Control—Research Methods*, *supra* note 85. An Internet Protocol (IP) address is a unique identifier for any computer or device on a Transmission Control Protocol/Internet Protocol (TCP/IP) network, such as the Internet.

<sup>87</sup> York, *supra* note 56.

<sup>88</sup> FREEDOM HOUSE, *supra* note 77, at 1. Not only have technological advances made repressive practices harder to detect, but a less malicious form of oppression, the spreading of disinformation, has rapidly increased in usage among states. Before, this practice was primarily used only by Russia and China.

<sup>89</sup> See *Internet Censorship Law Raises Freedom of Speech Concerns*, NEW EUR. (Nov. 3, 2012, 10:28 AM), <http://www.neurope.eu/article/internet-censorship-law-raises-freedom-speech-concerns>.

<sup>90</sup> FREEDOM HOUSE, *supra* note 77, at 2.

<sup>91</sup> See Emily Siner, *So You Want To Evade Your Country's Twitter Ban? A Workaround*, NPR (Mar. 21, 2014, 3:57 PM), <http://www.npr.org/blogs/alltechconsidered/2014/03/21/292393830/so-you-want-to-evade-your-countrys-twitter-ban-a-workaround>; Jillian York, *Why Is Turkey Blocking Twitter?*, ELEC. FRONTIER FOUND.: DEEPLINKS BLOG (Mar. 20, 2014), <http://www.eff.org/deeplinks/2014/03/why-turkey-blocking-twitter>.

<sup>92</sup> The right of access to information is related to the right of freedom of expression and is enshrined in many international human rights documents. Relevant to this discussion, it is present in some form in the documents discussed below including the Universal Declaration of Human Rights (Art. 19), the International Covenant on Civil and Political Rights (Art. 19), the Arab Charter on Hu-

stops, the spreading of information—of abuses and violations of other human rights. Those who proactively take measures to circumvent blockages to seek this material most likely self-identify as anti-government, and thus will merely be “preaching to the choir.”<sup>93</sup> While it is important to mobilize and inform outside populations of abuses occurring in one’s country (so that outside countries have incentives to place external pressure on the state, potentially through sanctions or other measures), the true force of the information may be largely lost, as lasting change is most often successful when it is driven from within.

### E INTERNATIONAL JURISPRUDENCE

Both regionally and worldwide, limitations have been developed on governments restricting freedom of expression. While the standards examined in this section are largely inapplicable to the Middle East region,<sup>94</sup> they serve as persuasive authority around the world.<sup>95</sup>

The “three-part test” has become a well-recognized international standard on permissible restrictions on freedom of expression.<sup>96</sup> Restrictions “must be provided for by law in the clearest and most precise terms possible, pursue a legitimate aim recognized by international law, and be necessary to accomplish that objective.”<sup>97</sup> In addition, the measures taken must be proportionate to the

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man Rights (Art. 32), and the Cairo Declaration on Human Rights in Islam (Art. 22). The scope of the right varies between these documents. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 19; International Covenant on Civil and Political Rights, art. 19, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Arab Charter on Human Rights, May 22, 2004 (entered into force Mar. 15, 2008), *translated in* Mohammed Amin Al-Midani et al., *Arab Charter on Human Rights 2004*, 24 B.U. INT'L L.J. 147 (2006); Cairo Declaration on Human Rights in Islam, art. 19, Aug. 5, 1990, *translated in* Translation of the CDHRI, ORG. OF ISLAMIC COOPERATION, <http://www.oic-oci.org/english/article/human.htm> (last visited July 19, 2015).

<sup>93</sup> Charles Arthur, *Turkish Protesters Using Encryption Software to Evade Censors*, GUARDIAN (June 4, 2013, 8:29 AM), <http://www.theguardian.com/technology/2013/jun/04/turkish-protestors-encryption-software-evade-censors>.

<sup>94</sup> This is with two exceptions. The International Covenant on Civil and Political Rights contains a portion of the three-part test and has numerous state parties in the Middle East, and Turkey is subject to the European Court of Human Rights and is considered by many to form a part of the Middle East.

<sup>95</sup> *See* Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 109–22 (2008) (analyzing how the Inter-American Court imports norms from the *corpus juris* of international human rights law and contributes back into this system); *Caesar v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 7 (Mar. 11, 2005) (separate opinion of Cançado Trindade, J.) (“The work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances.”). In addition, the European Court of Human Rights is binding on all forty-seven member states of the Council of Europe and the Inter-American Court of Human Rights is currently binding on twenty-three out of the thirty-four active member states of the Organization of American States. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978).

<sup>96</sup> The three-part test is also known as the tripartite test.

<sup>97</sup> Catalina Botero Marino (O.A.S. Special Rapporteur for Freedom of Expression), *Freedom of Expression and the Internet*, ¶ 122, O.A.S. Doc. OEA/Ser.L/V/II CIDH/RELE/INF.11/13 (Dec. 31, 2013).

legitimate aim.<sup>98</sup> The Inter-American Court on Human Rights has recognized this standard.<sup>99</sup> Freedom of expression has been held to be, particularly in relation to matters of public interest, “a cornerstone of the survival of a democratic society.”<sup>100</sup> The Court has further held that in such a society “the state institutions or entities as such are exposed to public scrutiny and criticism, and their activities are inserted in the domain of public debate . . . [h]ence larger tolerance should face the affirmations and considerations made by citizens.”<sup>101</sup> Additionally, this increased level of tolerance of criticism of the state is not just limited to institutions: “[T]he opinions regarding a person’s qualification to hold office or the actions of public officials in the performance of their duties are afforded greater protection.”<sup>102</sup>

Article 10 § 1 of the European Convention on Human Rights outlines the right of freedom of expression, and § 2 delineates the three-part test.<sup>103</sup> The European Court of Human Rights has repeatedly recognized this rule,<sup>104</sup> and limitations on speech are interpreted strictly.<sup>105</sup> Additionally, publication on the Internet has been explicitly held to be covered by Article 10:

The Court has consistently emphasised that Article 10 guarantees

<sup>98</sup> *Id.* ¶ 124.

<sup>99</sup> *E.g.*, *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 120–23 (July 2, 2004); *Canese v. Paraguay*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 96 (Aug. 31, 2004); *Kimel v. Argentina*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 58 (May 2, 2008); *Usón Ramírez v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 207, ¶ 88 (Nov. 20, 2009).

<sup>100</sup> *Usón Ramírez v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 207, ¶ 47. The Court refers to its jurisprudence established in numerous cases.

<sup>101</sup> *Id.* ¶ 83.

<sup>102</sup> *Kimel v. Argentina*, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 86; *see also* *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 128; *Canese v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶¶ 97–98.

<sup>103</sup> Article 10—Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, C.E.T.S. No. 5 (entered into force Sept. 3, 1953).

<sup>104</sup> *E.g.*, *Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) ¶¶ 29–31 (1988); *Aleksey Ovchinnikov v. Russia*, App. No. 24061/04, Eur. Ct. H.R., ¶ 44 (2010), <http://hudoc.echr.coe.int/eng?i=001-102322>.

<sup>105</sup> Eur. Court of Human Rights Research Div., *Internet: Case-law of the European Court of Human Rights*, EUR. CT. HUM. RTS. 11 (2011) [hereinafter *Case-law of the ECHR*], [http://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf).

not only the right to impart information but also the right of the public to receive it. In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10.<sup>106</sup>

Like the Inter-American Court, European Court of Human Rights case law has also held that restrictions on political speech or matters of public interest are held to a higher standard than regular speech and must be narrowly tailored.<sup>107</sup> Specifically in regards to political speech, the Court held in *Sürek v. Turkey (No. 1)* that:

[T]he limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.<sup>108</sup>

In addition, Article 10 also applies to information or ideas that “offend, shock or disturb the State or any sector of the population,” not just to those that are received favorably or with indifference.<sup>109</sup> The right is respected “regardless of frontiers”—information received from abroad may only be restricted within the limitations and justifications set forth by § 2.<sup>110</sup>

Even as these standards have already been held to apply to online expression,<sup>111</sup> more cases will be heard specifically concerning freedom of expression over the Internet as time progresses.<sup>112</sup> Recently, in *Yıldırım v. Turkey*, a ban

<sup>106</sup> *Times Newspapers Ltd. v. United Kingdom* (Nos. 1 & 2), 2009-I Eur. Ct. H.R. 377, 389 (citations omitted).

<sup>107</sup> *Willem v. France*, App. No. 10883/05, Eur. Ct. H.R., ¶ 33 (2009), <http://hudoc.echr.coe.int/eng?i=001-93612>. However, one taking part in a public debate—for example—must respect the rights of others, but a certain amount of exaggeration and provocation is permitted.

<sup>108</sup> *Sürek v. Turkey (No. 1)*, 1999-IV Eur. Ct. H.R. 353, 383.

<sup>109</sup> *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976). This passage has also been quoted directly in the Inter-American Court in the case of “*The Last Temptation of Christ*” (*Olmedo-Bustos v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 47 (Feb. 5, 2001), which was later referenced in a number of cases. See, e.g., *Ivcher-Bronstein v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 152 (Feb. 6, 2001); *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 113 (July 2, 2004); *Canese v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 83 (Aug. 31, 2004); *Kimel v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 88 (May 2, 2008).

<sup>110</sup> *Cox v. Turkey*, App. No. 2933/03, 55 Eur. H.R. Rep. 13, ¶ 31 (2010).

<sup>111</sup> See *Times Newspapers Ltd.*, 2009-I Eur. Ct. H.R. 377. See generally *Case-law of the ECHR*, *supra* note 105, at 11–14; *Botero Marino*, *supra* note 97.

<sup>112</sup> E.g., *Delfi AS v. Estonia*, App. No. 64569/09, 58 Eur. H.R. Rep. 28 (2013). Not all decisions have been positive, however. For instance in this case, the news portal Delfi AS was held liable as

of an entire online platform, which had the effect of preventing all access to the applicant's own website, was held to be an infringement of freedom of expression.<sup>113</sup> This result has had a positive effect on domestic courts in Turkey, whose government has made recent moves to censor certain sites. After protests and security leaks, Turkey blocked both Twitter and YouTube.<sup>114</sup> Shortly afterward, the Constitutional Court held that the Twitter ban had to be lifted immediately.<sup>115</sup> A month later, the same court held that blocking YouTube was likewise a violation of freedom of expression and individual rights, citing *Yıldırım v. Turkey*.<sup>116</sup> While certain Twitter accounts continue to be banned,<sup>117</sup> this is a step in the right direction.

The prevalence of these standards is not limited to regional instruments, although there is more established case law within these systems. It should be noted that the International Covenant on Civil and Political Rights (ICCPR), that is to be discussed in Part IV, also has a form of the three-part test.

#### IV TREATIES

Where does this leave us? Are there not binding international treaties in place to protect human rights? There are, but as we shall see, the story does not end here. Treaty enforcement mechanisms can prove inadequate, resulting in states not being held accountable for their actions. Still, treaties remain a viable area through which the freedom of expression over the Internet may be protected.

##### A HUMAN RIGHTS INSTRUMENTS

Many of the states that currently limit freedom of expression over the Internet are parties to binding treaties concerning human rights. In fact, every UN

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an intermediary for an offensive comment posted by third-party user on its website, despite taking down the offensive comment the same day it was notified of its existence.

<sup>113</sup> *Yıldırım v. Turkey*, App. No. 3111/10, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng-press?i=001-115705>. The entire Google Sites platform was banned because a site was held by a national criminal court to be offensive to the memory of Mustafa Kemal Atatürk, who is credited with founding the Republic of Turkey.

<sup>114</sup> Gul Tuysuz & Ivan Watson, *Turkey Blocks YouTube Days After Twitter Crackdown*, CNN (Mar. 28, 2014, 10:43 AM), <http://www.cnn.com/2014/03/27/world/europe/turkey-youtube-blocked>.

<sup>115</sup> Anayasa Mahkemesi [AM] [Constitutional Court] Apr. 2, 2014, No. 2014/3986, <http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/472bbf6e-ce2c-4c83-a402-6bdd44702537?wordsOnly=False>, translated in Decision of the Constitutional Court, CONST. CT. REPUBLIC OF TURK. (Apr. 2, 2014), <http://www.anayasa.gov.tr/en/News/Detail/judgment/2014-3986.pdf>.

<sup>116</sup> Anayasa Mahkemesi [AM] [Constitutional Court] May 29, 2014, No. 2014/4705, <http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/e08bbc9d-6949-4951-9bac-3b51ddf0004c?wordsOnly=False>, translated in Decision of the Constitutional Court, CONST. CT. REPUBLIC OF TURK. (May 29, 2014), <http://www.anayasa.gov.tr/en/News/Detail/judgment/2014-4705.pdf>. The Court said that the banning of fifteen specific videos would be permissible, but the blocking of the entire site would constitute a violation of Article 26 of the Turkish Constitution (freedom of expression) and human rights.

<sup>117</sup> Efe Kerem Sözeri, *The Two Faces of Twitter*, BIANET: ENGLISH (Feb. 2, 2015), <http://www.bianet.org/english/world/161972-the-two-faces-of-twitter>.

member state has ratified at least one of the nine core human rights treaties, and eighty percent have ratified four or more.<sup>118</sup> Some of these agreements only cover certain fields of human rights,<sup>119</sup> while others, discussed below, directly contain provisions for the protection of freedom of speech.

Out of the experiences of World War II came the first widely adopted international human rights-specific agreement.<sup>120</sup> The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in 1948 and has become the foundation for legally binding human rights instruments,<sup>121</sup> some of which are discussed below. Article 19 of the UDHR specifically guarantees the right of “freedom of opinion and expression.”<sup>122</sup>

#### I INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

In order to give force to the right to freedom of opinion and expression, among many others, the International Covenant on Civil and Political Rights (ICCPR) was unanimously adopted by the United Nations General Assembly in 1966.<sup>123</sup> The ICCPR provides for similar protections, in Article 19, paragraph 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

<sup>118</sup> *The Foundation of International Human Rights Law*, UNITED NATIONS, [http://www.un.org/en/documents/udhr/hr\\_law.shtml](http://www.un.org/en/documents/udhr/hr_law.shtml) (last visited Apr. 22, 2014). The nine core human rights treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and the Convention on the Rights of Persons with Disabilities (CRPD). See *The Core International Human Rights Instruments and Their Monitoring Bodies*, OFF. U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Nov. 15, 2014).

<sup>119</sup> E.g., Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 112; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 211; Convention on the Elimination of All Forms of Discrimination Against Women, June 27, 1980, 1249 U.N.T.S. 13.

<sup>120</sup> *History of the Document*, UNITED NATIONS, <http://www.un.org/en/documents/udhr/history.shtml> (last visited Apr. 22, 2014). See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights, *supra* note 92.

<sup>121</sup> *The Foundation of International Human Rights Law*, *supra* note 118. See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights, *supra* note 92.

<sup>122</sup> See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, *supra* note 92, art. 19 (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

<sup>123</sup> International Covenant on Civil and Political Rights, *supra* note 92.

media of his choice.”<sup>124</sup> Even though the Internet was likely not envisaged during deliberations, it is implicitly covered under “any other media.”

However, paragraph 3 of the same article contains a broad exception authorizing the restriction of speech. Paragraph 3 states:

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

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>125</sup>

Authoritarian regimes in the Middle East and elsewhere have considered this paragraph to exempt them from guaranteeing rights under paragraph 2.<sup>126</sup> A general comment from the Human Rights Committee in 1983 did little to clarify this issue.<sup>127</sup> It merely stated that this exception must be “provided by law,” justified as “necessary,” and “may not put in jeopardy the right itself.”<sup>128</sup> In 2011, the Committee issued another comment that replaced the 1983 comment.<sup>129</sup> The tone seemed to change from one of prescribing the limits of restricting speech to one of prescribing how far the rights under Article 19 extend. For example, it clarified that “[a]ll forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.”<sup>130</sup> Protections for freedom of expression encompass a wide range of topics, from “political . . . and religious discourse” to even material that may be considered “deeply offensive,” although the latter is subject to restrictions under paragraph 3.<sup>131</sup> In addition, what little ambiguity existed as far as the Internet being a medium over which rights are protected has been completely removed.<sup>132</sup>

Many states, such as the United States, took some time in ratifying the agreement.<sup>133</sup> While the force of this treaty may be watered down by some nations

<sup>124</sup> *Id.* art. 19(2).

<sup>125</sup> *Id.* art. 19(3).

<sup>126</sup> See NAOMI SAKR, *SATELLITE REALMS: TRANSNATIONAL TELEVISION, GLOBALIZATION & THE MIDDLE EAST* 149 (2001).

<sup>127</sup> Human Rights Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* 181–82, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (May 27, 2008).

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

<sup>129</sup> Human Rights Comm., *General Comment No. 34: Article 19: Freedoms of Opinion and Expression*, ¶ 1, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

<sup>130</sup> *Id.* ¶ 9.

<sup>131</sup> *Id.* ¶ 11. “Deeply offensive” material is the only form of expression that is explicitly mentioned to be subject to paragraph 3’s restrictions.

<sup>132</sup> *Id.* ¶ 12 (“They include all forms of audio-visual as well as electronic and internet-based modes of expression.”).

<sup>133</sup> See Jimmy Carter, *US Finally Ratifies Human Rights Covenant*, CHRISTIAN SCI. MONITOR (June 29, 1992), <http://www.csmonitor.com/1992/0629/29191.html> (discussing how, as President, Carter signed the Covenant in 1977, it took another 15 years for the United States to ratify).

that have attached reservations, understandings, and declarations (RUDs),<sup>134</sup> it is interesting to note that many of the worst offenders have not attached RUDs at all.<sup>135</sup> After ratification, states oftentimes continue on as before and merely attached RUDs to excuse actions they knew would be in contravention of the treaty; in other words, they were already close to complying with the treaty—albeit with a few exceptions.<sup>136</sup> On the other hand, many nations completely disregard provisions in the treaties and make little effort in complying.<sup>137</sup> The prevalence of RUDs and the indifference of other states towards these instruments at the very least shows that despite having such a widely ratified, binding human rights treaty, disagreements persist as to which human rights are actually valued.

Within the ICCPR framework lies the Human Rights Committee, a body of independent experts from nations that have ratified the treaty, which monitors compliance.<sup>138</sup> States that have acceded to the treaty are obligated to submit reviews every four years to the Committee, which in turn addresses its concerns and recommendations in a “concluding observations” report.<sup>139</sup> However, reports from many state parties are long overdue,<sup>140</sup> and when they are submitted they tend to be descriptions of domestic law rather than a compliant report on how the treaty is being implemented.<sup>141</sup> The lack of a viable international enforcement mechanism to affect changes at the national level and the resultant low cost of ratification may be what has induced many states with less than stellar human rights records into participation.<sup>142</sup>

There is also an individual complaint procedure found in the Optional Protocol to the International Covenant on Civil and Political Rights that allows individuals to lodge comments or complaints on a wide range of human rights violations, including the freedom of expression.<sup>143</sup> Far fewer states are parties to the First Optional Protocol compared with the original document: the Optional Protocol has been ratified by 115 states (thirty-five signatories)<sup>144</sup> while

<sup>134</sup> See William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 280 (1995) (discussing the unprecedented number of RUDs the United States has: five reservations, five understandings, four declarations, and one proviso).

<sup>135</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 129 (2005).

<sup>136</sup> See *id.* at 130–31. But see MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 121–23 (2011) (offering an alternative explanation for the driving forces behind treaties).

<sup>137</sup> GOLDSMITH & POSNER, *supra* note 135, at 130–31; see also ANNE F. BAYEFISKY, *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* 7 (2001), <http://www.bayefsky.com/report/finalreport.pdf>.

<sup>138</sup> Carter, *supra* note 133; *Human Rights Committee*, OFF. UNITED NATIONS HIGH COMM'R HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Feb. 22, 2015).

<sup>139</sup> *Human Rights Committee*, *supra* note 138.

<sup>140</sup> BAYEFISKY, *supra* note 137.

<sup>141</sup> *Id.* at 22.

<sup>142</sup> *Id.* at 7.

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

<sup>144</sup> Status of the First Optional Protocol to the ICCPR, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-)

the original has been ratified by 168 states (seventy-four signatories).<sup>145</sup> Notable non-signatories include the United States and many states in southern Asia, the Middle East, and Africa that were parties to the original ICCPR treaty. Like the original treaty, many states have attached RUDs.

The individual complaint procedure is used sparingly,<sup>146</sup> although there may be a number of factors contributing to this phenomenon. It is likely in part due to the lesser number of parties to the agreement, as well as the fact that many RUDs were attached to not allow retroactive use of the Protocol (i.e., only claims concerning events that occurred after the Protocol went into force may be brought under the complaint procedure).<sup>147</sup> Another cause, at least among many European nations, is that they included a RUD that disallows the procedure to be used when the same case has already been “examined under another procedure of international investigation or settlement.”<sup>148</sup> A further reason is that the complaint procedure does not carry much weight. In order to bring a claim, the individual must have exhausted all domestic remedies.<sup>149</sup> When an individual is able to bring a claim, the Committee only issues “views,” even though the body sits much like a court.<sup>150</sup> These “views” are non-binding and rely on the duty of the state to “act in good faith” to cooperate with the Committee and provide an appropriate remedy.<sup>151</sup>

## 2 CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM (CDHRI)

Even though many Islamic nations voted in favor of the UDHR and subsequently signed and ratified the ICCPR, they simultaneously believed that these accords were based upon a historically Western conception of rights and did not properly reflect Islamic values.<sup>152</sup> In some degree a response to these accords, the Cairo Declaration on Human Rights in Islam (CDHRI) was adopted in 1990 by the forty-five member states of the Organisation of the Islamic Conference (OIC).<sup>153</sup> While claiming to complement the UDHR, many provisions may undermine

5&chapter=4&lang=en (last visited Oct. 12, 2014).

<sup>145</sup> Status of the ICCPR, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Oct. 12, 2014).

<sup>146</sup> BAYEFISKY, *supra* note 137. “Only 60 complaints are registered annually from a potential 1.4 billion people.” *Id.* at 7. While this figure is from 2001, the vast majority of the parties to the Optional Protocol for the ICCPR had already ratified it (all but twelve). Additionally, the figure is a combination of the complaints lodged across four of the core human rights treaties that contain individual complaint mechanisms.

<sup>147</sup> Status of the First Optional Protocol to the ICCPR, *supra* note 144.

<sup>148</sup> *Id. passim.*

<sup>149</sup> Human Rights Comm., *General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶ 5, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008).

<sup>150</sup> *Id.* ¶ 12.

<sup>151</sup> *Id.* ¶ 14–15.

<sup>152</sup> Jonathan Russell, *Human Rights: The Universal Declaration vs The Cairo Declaration*, LONDON SCH. ECON. & POL. SCI.: MIDDLE EAST CTR. (Dec. 10, 2012), <http://blogs.lse.ac.uk/mec/2012/12/10/1569>.

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

rights guaranteed under the UDHR.<sup>154</sup> For example, Article 22(a) states: “Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari’ah.”<sup>155</sup> Under such a rule, blasphemy and public apostasy would likely have dire consequences—in contravention of the UDHR and ICCPR.<sup>156</sup>

For this and other reasons, the CDHRI has been criticized.<sup>157</sup> Fortunately, steps have been made in the right direction with the recent creation of the Independent Permanent Commission on Human Rights (IPHRC) in order to uphold the values enshrined in the CDHRI.<sup>158</sup> Positive aspects can be found in that the IPHRC and its founding statute abandoned references to the Shari’ah, as well as in the insistence that members be independent human rights experts. With an expanding mandate, the potential thus remains to progress into a stronger body where individual complaints may be heard, perhaps similar to that once found in the European Commission on Human Rights.<sup>159</sup> However, civil society organizations also play a limited role and the review mechanism remains weak, with the IPHRC publishing only thematic reports in place of country-specific reports.<sup>160</sup> In addition, the framework uses human rights “diplomacy,” rather than “advocacy,” as other more stringent international systems use, and political decisions keep the instrument from living up to its potential.<sup>161</sup>

### 3 ARAB CHARTER ON HUMAN RIGHTS

A separate organization to the OIC, the League of Arab States, came into being in 1945.<sup>162</sup> The Arab Charter on Human Rights was first adopted in 1994 and contained provisions for the freedom to express opinions and religious beliefs in Article 27.<sup>163</sup> The document was criticized for a number of reasons, including

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

<sup>155</sup> Cairo Declaration on Human Rights in Islam, *supra* note 92, art. 22(a), translated in Translation of the CDHRI, *supra* note 92.

<sup>156</sup> Public apostasy would of course overlap with the freedom of thought and religion guaranteed under Article 18.

<sup>157</sup> See Turan Kayaoğlu, *It’s Time to Revise The Cairo Declaration of Human Rights in Islam*, BROOKINGS INSTITUTION (Apr. 23, 2012), <http://www.brookings.edu/research/opinions/2012/04/23-cairo-kayaoglu> (discussing some of the pitfalls of the CDHRI, such as how it is too restrictive, too ambiguous, and empowers states instead of individuals).

<sup>158</sup> TURAN KAYAOĞLU, A RIGHTS AGENDA FOR THE MUSLIM WORLD? THE ORGANIZATION OF ISLAMIC COOPERATION’S EVOLVING HUMAN RIGHTS FRAMEWORK 3–4 (Brookings Doha Ctr. Analysis Paper No. 6, 2013), <http://www.brookings.edu/~media/Research/Files/Papers/2013/1/08%20oic%20human%20rights%20kayaoglu/Turan%20Kayaoglu%20English.pdf>.

<sup>159</sup> *Id.* at 3; Turan Kayaoğlu, *Human Rights Experts’ Recommendations to Independent Permanent Human Rights Commission*, TODAY’S ZAMAN (Nov. 10, 2013), <http://www.todayszaman.com/news-330895-human-rights-experts-recommendations-to-independent-permanent-human-rights-commission.html>.

<sup>160</sup> KAYAOĞLU, *supra* note 158, at 4.

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

<sup>162</sup> *Arab Charter on Human Rights*, HUMANRIGHTS.CH (Aug. 8, 2011), <http://www.humanrights.ch/en/Standards/Other-Regions-Instruments/Arab-Charter-on-Human-Rights/index.html>.

<sup>163</sup> Arab Charter on Human Rights, *supra* note 92, art. 27.

lack of an enforcement mechanism.<sup>164</sup> Of the twenty-two member states, only Iraq signed the agreement, and no state ratified it.<sup>165</sup>

In 2004, a new version of the Charter was adopted, containing essentially the same provisions for freedom of expression in Article 30.<sup>166</sup> While the new version introduced an enforcement mechanism, it remains very weak. State compliance is monitored through reports given by the state to the seven-member expert Committee every three years after the initial report; in turn, the Committee makes observations and recommendations.<sup>167</sup> There is also no mechanism to allow for petitions or complaints from states or individuals.<sup>168</sup> The proposed Arab Court of Human Rights also never came to be, although it is still being discussed.<sup>169</sup>

#### 4 UNIVERSAL PERIODIC REVIEW (UPR)

The review mechanism under the ICCPR is not the only international method to measure the current condition of human rights in UN member states. The Human Rights Council was established by the UN General Assembly in 2006 in order to replace the controversial and widely criticized Human Rights Commission.<sup>170</sup> Its creation included a mandate to perform a Universal Periodic Review (UPR) of the “fulfilment by each State of its human rights obligations and commitments.”<sup>171</sup> This review is intended to complement and not duplicate other human rights mechanisms, such as the one found in the ICCPR.<sup>172</sup> One large advantage of UPR over other mechanisms is that no specific treaty must be ratified past the adoption of the UN Charter; all UN member states are subject to review.

Reviews are conducted in Working Groups lasting three and a half hours during which time only states can take the floor.<sup>173</sup> States under review are to present their national report and answer questions prepared in advance by

<sup>164</sup> Al-Midani et al., *supra* note 92, at 148.

<sup>165</sup> Press Release, Alkarma for Human Rights, Arab Charter on Human Rights: Written in 1994, It is Enforced in 2008 (Mar. 21, 2008), <http://en.alkarama.org/press-releases-k2/72-arab-charter-on-human-rights-written-in-1994-it-is-enforced-in-2008>.

<sup>166</sup> Arab Charter on Human Rights, *supra* note 92; see Alkarma for Human Rights, *supra* note 165 (noting that it took four years to gain the seventh ratification in order to make the treaty binding).

<sup>167</sup> See Alkarma for Human Rights, *supra* note 165.

<sup>168</sup> Al-Midani et al., *supra* note 92.

<sup>169</sup> *League of Arab States: The Establishment of an Arab Court of Human Rights Must be Consistent with Universal Standards*, FIDH (Mar. 26, 2013), <http://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/league-of-arab-states/The-establishment-of-an-Arab-Court-of-Human-Rights-must-be-consistent-with-13097>.

<sup>170</sup> See Philip Alston, *Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council*, 7 MELB. J. INT'L L. 185, 191–93 (2006) (discussing the sources of controversy and some of the contentious issues at the time); see also Carlos Villan Duran, *Lights and Shadows of the New United Nations Human Rights Council*, SUR: INT'L J. ON HUM. RTS., no. 5, 2006, at 6, 7 (noting that despite efforts to depoliticize the selection method of states serving on the Council as compared with the Commission, it is doubtful these changes will be effective).

<sup>171</sup> G.A. Res. 60/251, ¶ 5(e) (Mar. 15, 2006).

<sup>172</sup> Human Rights Council Res. 5/1, U.N. Doc. A/62/53, at 51–52 (June 18, 2007).

<sup>173</sup> *Id.*

other states; however, only recommendations made orally by these states during the interactive dialogue portion of the review are to be included in the report.<sup>174</sup> States under review are obligated to communicate their responses to the recommendations in an addendum to the Council. They are to clearly specify whether they accept or reject the recommendations.<sup>175</sup> The Working Group report is then revisited a few months later by the Human Rights Council plenary session during an hour long adoption process, where states under review, other states, and members of civil society (including non-governmental organizations [NGOs] and other groups) are allotted twenty minutes each in order to address concerns.<sup>176</sup> This is the only time when members of civil society are able to take the floor during the process.<sup>177</sup> The entire procedure is then replicated every four and a half years in order to monitor compliance with the recommendations made during the previous review.<sup>178</sup>

The ability of the state under review to reject recommendations nullifies much of what UPR was created to accomplish.<sup>179</sup> The ability to pick and choose which recommendations to honor effectively ensures the state will meet its goals for each review. Even if a state were to ignore recommendations and refuse to comply at all, the penalty is vague: "After exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism."<sup>180</sup>

Even though UPR is a "cooperative" process with the state under scrutiny,<sup>181</sup> there is limited input from stakeholders other than states. States under review are only "encouraged" to prepare their reports with consultations from other stakeholders, such as members and organizations of civil society.<sup>182</sup>

<sup>174</sup> *Id.* at 50–52; *State under Review Tutorial: Role of the State under Review at the UPR*, UPR INFO, <http://www.upr-info.org/sites/all/iframe/tutorials/State.php> (last visited Apr. 14, 2013).

<sup>175</sup> Human Rights Council Res. 16/21, Review of the Work and Functioning of the Human Rights Council, U.N. Doc. A/HRC/RES/16/21, at 4 (Mar. 25, 2011). Giving states the benefit of the doubt, there may be constitutional or practical concerns for the states under review to implement some of the recommendations.

<sup>176</sup> H.R.C. Res. 5/1, *supra* note 172, at 52; H.R.C. Res. 16/21, *supra* note 175, at 4.

<sup>177</sup> *See* H.R.C. Res. 5/1, *supra* note 172, at 50–51. Civil society groups are able to submit reports, in advance, which are then summarized by the Office of the High Commissioner for Human Rights. Additionally, states under review, when preparing their own national report in anticipation of the review, "are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders." *Id.* at 50. Overall, the review is based upon the national report (up to twenty pages and is prepared by the state under review), the compilation of UN information (up to ten pages and includes information on which treaties the states under review are parties to which is prepared by the Office of the High Commissioner for Human Rights), and a summary of other stakeholders' information (up to ten pages and includes information compiled from various reports submitted by NGOs and other organizations).

<sup>178</sup> H.R.C. Res. 16/21, *supra* note 175, at 3; *see also* H.R.C. Res. 5/1, *supra* note 172, at 50 ("The periodicity of the review for the first cycle will be of four years.").

<sup>179</sup> H.R.C. Res. 5/1, *supra* note 172, at 49. The first listed objective of the review is: "The improvement of the human rights situation on the ground."

<sup>180</sup> *Id.* at 53.

<sup>181</sup> *Id.* at 52.

<sup>182</sup> *See id.* at 50 ("States are encouraged to prepare the information through a broad consultation

## 5 ROOM FOR IMPROVEMENT

Reports on human rights by Amnesty International, Human Rights Watch, and the U.S. State Department have documented widespread violations in contravention of the ICCPR and other human rights treaties.<sup>183</sup> The rise of the Internet has made these violations more visible to both citizens of the state where the violation occurred and abroad.<sup>184</sup> This alone would warrant protection.

Critical legal minds have also pointed to the ineffectiveness of international human rights agreements, going so far as to say, “the [ICCPR] treaty has no self-enforcement or external enforcement mechanism.”<sup>185</sup> It is then argued that it is this low cost of ratification that induces widespread participation, including that of many authoritarian regimes notorious for human rights violations.<sup>186</sup> This is not to say that states completely disregard their obligations under these agreements, but when they do comply with the terms of the treaty, it is attributed to a “coincidence of interest.”<sup>187</sup> Regardless of the validity of these claims, it is obvious that, with the innate defects in the enforcement mechanisms of these instruments, shortcomings will persist until they are addressed.

This situation creates a difficult arena for human rights to flourish. Authoritarian regimes cannot be said to be an accurate representation of the people over whom they rule. Additionally, it is not in authoritarian states’ best interest to honor human rights provisions that allow dissidents to express themselves and to organize. How then can these states be expected to police themselves? This challenge becomes obvious as it becomes evident that the Internet is quickly becoming one of the prime mediums for the freedom of expression.

Keeping in mind related issues of Internet governance, this is yet another example of why the multi-stakeholder approach is crucial in preserving rights over the Internet. It is the people on the ground who are affected when human rights are violated, oftentimes at the hands of the state (the same state appearing before the review and pledging to increase human rights standards), which is unfortunately the only voice usually heard during these review processes. This situation is particularly true with the limiting of expression over the Internet—it is the state that often has the ability to manipulate the Internet, and it is the state that may in turn “discourage” individuals from posting content contrary to the state’s interest. Allowing greater integration of civil society and other outside bodies to participate in these mechanisms should be encouraged as they would help provide oversight and keep states accountable.

Research has supported this hypothesis, showing that ratification of human rights treaties is more beneficial to human rights when the state has stronger

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process at the national level with all relevant stakeholders.”).

<sup>183</sup> GOLDSMITH & POSNER, *supra* note 135, at 120. *But see* O’CONNELL, *supra* note 136, at ch. 3 (critiquing Goldsmith and Posner’s entire approach and understanding of international law).

<sup>184</sup> GOLDSMITH & POSNER, *supra* note 135, at 121.

<sup>185</sup> *Id.* at 127.

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

<sup>187</sup> *Id.* at 111. In other words, states have reasons apart from human rights law for not committing crimes against their populations—“the law does not supply the motivation.”

civil society organizations, especially international NGOs.<sup>188</sup> A similar positive result has been related to the strength of democracy within a given state.<sup>189</sup> Conversely, ratification of human rights treaties by authoritarian states with a weak civil society has been shown to have no effect, or even a negative one.<sup>190</sup> Other studies have focused on the effects of globalization and economic freedom, increases in which were only found to improve basic human rights (“physical integrity”) with no effect found upon empowerment rights (including the freedom of speech).<sup>191</sup> We must remember that the repression of expression over the Internet may manifest through attacks on a person’s physical integrity, as seen in the Khaled Said instance in Egypt and other examples discussed in Part III.

Under the current model, it is not realistic to expect the current paradigm to change any time in the near future. States will forever be hesitant (to put it mildly) to vote for a mechanism that will subject the state to true sanctions, which in turn may be seen as an infringement on the states sovereignty or as a loss in the amount of control they currently possess. This may be boiled down to the problem that is created when states are the makers and the subjects of the same law.<sup>192</sup>

While these international enforcement mechanisms might not have a direct, immediate impact as intended, international law as a whole has been purported to have numerous indirect benefits: It provides a common human rights language, reinforces the universality of human rights, signals the consensus of the international community, creates stigma for violators, creates increased expectations of compliance, encourages enforcement by international courts or agencies, and encourages domestic judicial enforcement.<sup>193</sup> On this last point, there is evidence to suggest that international law is having an effect at the national level, at least in some places. For instance, one researcher found references to 410 UN documents by U.S. domestic courts, twenty-eight percent of which were in relation to international civil rights and six percent to domestic civil rights.<sup>194</sup> At the very least, spreading awareness of these human rights issues is beneficial. Mechanisms such as the UPR and others bring about awareness by encouraging

<sup>188</sup> Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 950 (2005).

<sup>189</sup> *Id.*; see also Steven C. Poe et al., *Repressions of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993*, 43 INT’L STUD. Q. 291, 310 (1999) (“[W]e found that past levels of repression, democracy, population size, economic development, and international and civil wars are statistically and substantively significant determinants of personal integrity abuse.”).

<sup>190</sup> Neumayer, *supra* note 188, at 926.

<sup>191</sup> Axel Dreher et al., *Globalization, Economic Freedom, and Human Rights*, 56 J. CONFLICT RESOL. 516, 538 (2012). It should also be noted that the authors found that “empowerment rights rise with social globalization and economic freedom,” but observed that “these results are not robust to the choice of control variables.” *Id.*

<sup>192</sup> The same could be said for individuals.

<sup>193</sup> Douglass Cassel, *Does International Human Rights Law Make A Difference?*, 2 CHI. J. INT’L L. 121, 126–29 (2001).

<sup>194</sup> Paul Hellyer, *U.N. Documents in U.S. Case Law*, 99 LAW LIBR. J. 73, 74 (2007). There are likely many more than 410 cases—the author notes that the study only included opinions with proper *Bluebook* citations and that this likely leaves out the majority of opinions that referenced UN documents but which lacked proper *Bluebook* citations.

the production of reports, not just by states, but by civil society as well, which are then distributed on a wide scale.

## B TRADE AGREEMENTS

Apart from human rights agreements, trade agreements may also be used to protect human rights. It may seem a stretch to include human rights provisions into bilateral or regional trade agreements, but it is not so far-fetched as it might appear at first glance. Human rights have actually been at the center of such agreements for some time.<sup>195</sup> This can be seen with treaties signed in the nineteenth century to ban the trade in slaves, as well as the trade in goods manufactured by conflict labor.<sup>196</sup> More recently, nations and communities, ranging from the European Union to Brazil, have started to include human rights provisions in preferential trade agreements (PTAs).<sup>197</sup> These have increasingly become commonplace, although they range in enforceability.<sup>198</sup> They also range in breadth—Canada and the United States tend to detail specific human rights that are protected while the European Union includes universal human rights.<sup>199</sup>

While there are some benefits to human rights agreements, as noted above, problems generally lie with the enforcement mechanisms. It may simply be the result of the use of persuasion as opposed to coercion. Compliance with these instruments typically requires a coercive mechanism to make the cost of non-conformity outweigh the costs of keeping the status quo.<sup>200</sup> The PTAs that have “hard” mechanisms for the protection of human rights—ones that use coercion—have parties that predictably honor their obligations at a higher rate than those containing soft mechanisms using persuasion.<sup>201</sup> Making the benefits of the PTA conditional on human rights behaviors creates an economic and political incentive structure to promote reforms that may not otherwise be implemented.<sup>202</sup> Under this model, authoritarian states may still retain preferences for

<sup>195</sup> Susan Ariel Aaronson & Jean Pierre Chauffour, *The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?*, WORLD TRADE ORG. (Feb. 15, 2011), [http://www.wto.org/english/res\\_e/publications\\_e/wtr11\\_forum\\_e/wtr11\\_15feb11\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_15feb11_e.htm).

<sup>196</sup> *Id.* In the early nineteenth century, England signed treaties with the United States, Portugal, Denmark, and Sweden to ban trading slaves; later in the nineteenth century, countries such as the United States, England, Australia and Canada entered into agreements to ban goods resulting from conflict labor.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* Many were at first non-binding, or still are as they may only be included in the preamble; others have methods of enforcement including dialogue, the use of dispute settlement bodies, and possible suspension.

<sup>199</sup> *Id.*

<sup>200</sup> Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 596 (2005).

<sup>201</sup> *Id.* at 597. *Contra* Gabriele Spilker & Tobias Böhmelt, *The Impact of Preferential Trade Agreements on Governmental Repression Revisited*, 8 REV. INT'L ORG. 343 (2013) (positing that PTAs which include “hard” human rights mechanisms are unlikely to affect human rights compliance when controlling for a selection problem, namely that states generally agree on “hard” human rights mechanisms in PTAs only if they have a tendency to comply with human rights agreements in the first place).

<sup>202</sup> Hafner-Burton, *supra* note 200, at 595, 606.

repression and be coerced into changing their policies.<sup>203</sup> This stands in contrast to persuasion, which needs ideas to become instilled before changes are made—this obviously requires much more time.<sup>204</sup> In the case where sanctions may be used in place of withholding economic benefits, literature on economic bargaining has suggested that sanctions are rarely utilized—threats are often sufficient to coerce compliance.<sup>205</sup> This avoids the costs related to sanctions for both the sender and target.

For human rights provisions in multilateral treaties to be beneficial, there needs to be an effective method of enforcement. Environmental provisions offer an insightful parallel to the inclusion of human rights provisions in trade agreements. Like human rights provisions, they are a fairly recent phenomenon as there has been a marked increase in the number of provisions for protection of environment included in trade agreements over recent decades. Without a hard enforcement mechanism, these provisions may fall prey to the same inadequacies apparent in the environmental provisions of some regional trade agreements (RTAs) such as Mercosur, which have proved to be quite weak.<sup>206</sup> These weaknesses in upholding the provisions are the result of weak national policies and an inclination to not accept environmental provisions that are not already held by a majority of the members. Mercosur's environmental agency, the Working Subgroup on the Environment (Sub-Grupo No. 6), also has a weak institutional structure and a limited program—they have neither permanent agenda nor roles except the general admonition to achieve the objective of the Treaty.<sup>207</sup> Even with a recent agreement intended to expand and specify the environmental aims of Mercosur, there is little that can be done to resolve infractions of the environmental provisions.<sup>208</sup>

The Internet is still in its infancy, and how it evolves remains to be seen. However, in this short time, trade over the Internet has veritably exploded.<sup>209</sup> As

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<sup>203</sup> *Id.* at 600.

<sup>204</sup> *Id.*

<sup>205</sup> Daniel W. Drezner, *The Hidden Hand of Economic Coercion*, 57 INT'L ORG. 643, 647 (2003).

<sup>206</sup> Kathryn Hochstetler, *Fading Green? Environmental Politics in the Mercosur Free Trade Agreement*, 45 LATIN AM. POL. & SOC'Y, Winter 2003, at 1, 3.

<sup>207</sup> *Id.* at 3–4, 13. This belies the fact that developing countries will try and limit trade-limiting environmental provisions. Brazil seems to have higher expectations to protect the environment, leading to conflicts between some of the countries about how they can remain competitive with such structures in place; however, national environmental provisions have expanded in all the countries under the Mercosur framework.

<sup>208</sup> *Id.* at 13–14. The Environmental Framework Agreement in 2001 expanded and specified the environmental aims of Mercosur, without actually achieving much. The agreement affirmed the absence of an environmental dispute resolution mechanism—there is no regional court, and most conflicts are resolved through direct negotiations between the respective presidents. No institution has the ability to evaluate impacts on the environment, much less for transnational proposals. Much of the working group's time has been put towards investigating claims that environmental regulations were being used as nontariff barriers in the region, thus relegating much of it solely to trade promotion.

<sup>209</sup> See *Statistics and Data on Online Shopping*, STATISTA, <http://www.statista.com/topics/871/online-shopping> (last visited Dec. 26, 2012) (U.S. e-commerce sales grew from \$72 billion in 2002 to \$256 billion in 2011); see also Melanie Lee, *China's online trade hits \$45 billion in Q2*, *Taobao Reigns: Report*, REUTERS (Oct. 16, 2012, 12:21 AM), <http://www.reuters.com/>

trade will only continue to grow in prominence over the Internet with increasing globalization, it then becomes not so unreasonable to suggest that provisions for the protection of speech could be included in trade agreements. Sites like YouTube earn much of their revenue through ad sales, which are dependent upon the number of viewers. When states like Pakistan and China block YouTube, there are millions of potential users lost before they even have the opportunity to reach the site.<sup>210</sup> This can translate into substantial lost revenue for both YouTube and for the companies who advertise their products on YouTube.<sup>211</sup> There is thus an economic incentive to coincide with the protection of freedom of speech, among other human rights.

## V CONCLUSION

A multi-stakeholder approach to Internet governance would help retain a free and open Internet for the future. Currently, there is no single body overseeing Internet policy. The ITU aspires to fill this role, but Internet providers, mostly in the United States, have blocked effective governance by that body. Nevertheless, greater ITU governance would be a top-down approach from states that may merely give international force to the suppression of speech that is already occurring. These repressive practices lead to human rights violations (and in some cases are violations themselves) and have become commonplace across the world, with some states and regions worse perpetrators than others. States need to be held accountable for the violations occurring within their territory, and methods exist within international law that may be used to put pressure on states to change their practices.

There are numerous human rights-specific instruments used in order to keep a watch upon state parties. These human rights agreements generally do not live up to their potential, and there are ways in which they could be enhanced. Stronger enforcement mechanisms and more genuine input from civil society and other stakeholders could improve upon the processes. For the time being, these instruments have indirect benefits that pave the way for better mechanisms in the future.

Trade agreements, both bilateral and multilateral, may also be used to put pressure on states. “Hard” enforcement mechanisms, which withhold benefits or impose sanctions, are more efficient at producing results than “soft” mechanisms merely trying to persuade the states. Oftentimes, threats are sufficient to produce positive results in human rights.

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article/2012/10/16/net-us-china-ecommerce-idUSBRE89F06I20121016 (China’s growth has been more recent: e-commerce only represented 4% of China’s retail sales in 2011, but the transaction value jumped 30% to \$925 billion over the past year, which is equivalent to 12.5% of China’s gross domestic product).

<sup>210</sup> See *Pakistan Blocks Youtube, 20K Other Websites*, *supra* note 64 (discussing how Pakistan blocked YouTube and other sites for hosting “blasphemous” material); see also Emily Chang, *YouTube Blocked in China*, CNN (Mar. 26, 2009, 12:48 PM), <http://edition.cnn.com/2009/TECH/ptech/03/25/youtube.china> (explaining how China routinely blocks material it finds politically objectionable and how they initially blocked YouTube when riots were occurring in Tibet).

<sup>211</sup> The latter is assuming the products are online or are capable of being shipped to the end user.

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There is still a lot of work to be done, and it is unlikely that the current regime will rapidly change in the near future—incentives to positively modify the system are largely lacking. With more awareness among civil society, constituents may be able to play a larger and more effective role in keeping the Internet free and in pressuring states into acting in accordance with international human rights standards.