



Inter-American Human Rights System instruments and their application to the digital environment

Luis Fernando García

*Association for Progressive Communications (APC)
May 2016*

This handout forms part of a module for the APC Internet Rights Are Human Rights training curriculum. The module was produced through the APC project Examining Internet Freedom in Latin America (EXLILA), which was funded by the Open Society Foundations (OSF) and APC and coordinated by ONG Derechos Digitales.

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1. About this document

These materials are part of the Multimedia Training Kit (MMTK). The MMTK provides an integrated set of multimedia training materials and resources to support community media, community multimedia centres, telecentres, and other initiatives using information and communications technologies (ICTs) to empower communities and support development work.

This module has been commissioned by the Association for Progressive Communications (APC) and carried out with support from the Open Society Foundations (OSF).

2. Copyright information

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3. Module outline

This module explores the relationship between human rights, as understood in the Inter-American Human Rights System, and ICTs such as the internet. As well as this handout, it includes a set of presentation slides, exercises and case studies, and a list of additional readings. It raises the following general questions which should be considered by participants:

1. How has the internet changed people's lives? What rights have been affected positively or negatively due to access to the internet?
2. Should online and offline human rights be understood differently?
3. What should the role of the state be regarding the exercise of human rights online?
4. What are the implications of the global nature of the internet for national human rights laws and international human rights instruments?

This handout begins by describing the context for discussion about rights and the internet.

- Section 2 describes the working of the Inter-American Human Rights System.
- Section 3 explores the impact of the internet on the exercise of human rights.
- Section 4 looks at the application of Inter-American Human Rights System instruments to the exercise of rights on the internet, including:
 - The right to freedom of expression
 - The right to education
 - The right to participate in cultural life
 - The right to freedom of assembly and association
 - The right to privacy
 - The right to non-discrimination
 - The rights of women
 - The rights of persons with disabilities
 - The rights of indigenous peoples and communities.

4. Human rights in the Inter-American System

Human rights are inherent to all persons without distinction of any kind. These rights, enshrined in national and international law, are universal, interdependent and indivisible. This means that they are all equally important; therefore, improvement in the enjoyment of one right represents an advance for the rest, and similarly, violation of one right has a negative impact on the rest.

Recognition of human rights by a state implies a number of different obligations. When a state incorporates a particular right into its constitution, when it ratifies or adheres to an international human rights treaty, or when it is understood that a certain human rights obligation is part of customary international law, that state undertakes the obligation to respect and guarantee human rights.

A state's obligation to respect human rights requires that it refrain from interfering with or infringing the enjoyment of human rights. The obligation to guarantee human rights implies that the state must adopt positive actions to provide or enable exercise of the rights, as well as prevent, investigate, punish and redress violations of human rights, including those perpetrated by private actors.

While human rights are not absolute and may be subject to limitations, these limitations must meet certain requirements in order to be considered legitimate and compatible with states' obligations. In the first place, limitations on human rights must be clearly and precisely defined in law. Secondly, such limitations must serve a legitimate purpose, such as the protection of the rights of others, public order or national security, and these goals must also be precisely defined. Finally, any limitation should be appropriate, necessary for the legitimate purpose pursued, and proportionate, that is, striking a fair balance between limitation of the exercise of a given right and the benefit conferred on other human rights or the legitimate interest that the limitation is meant to protect.

Human rights are recognised and protected in various inter-American treaties and instruments, in particular the Charter of the Organization of American States (OAS) and, above all, the American Declaration of the Rights and Duties of Man, adopted in 1948 by the OAS. The American Declaration recognises civil, political, economic, social and cultural rights as equally important, indivisible and interdependent.

Although the American Declaration is not legally binding, it has been recognised as important for the interpretation of other national and international legal instruments. Some of its provisions are also regarded as part of international customary law.

The rights affirmed in the American Declaration were mainly developed in two of the Inter-American Human Rights System (IAHRS) instruments: the American Convention on Human Rights (ACHR) and the Additional Protocol to the American Convention on Human Rights in the Area of Social, Cultural and Economic Rights, more commonly known as the Protocol of San Salvador. These two instruments are legally binding upon states which have ratified or adhered to them; in some countries they may be invoked or implemented directly.

In addition to the ACHR and the Protocol of San Salvador, the Inter-American Human Rights System includes other treaties, like the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

The Inter-American System established two institutions for overseeing compliance with the system's instruments:

- The **Inter-American Commission on Human Rights**, the principal organ of the OAS for promoting and protecting human rights in the Americas. The Commission monitors the human rights situation in every OAS member state; carries out in-depth thematic analysis of rights such as freedom of expression and the rights of women, children, indigenous communities and migrants, through its special rapporteurships; and receives and studies individual complaints against OAS member states about violations of human rights recognised in the American Declaration or other Inter-American System instruments.
- The **Inter-American Court of Human Rights**, established by the American Convention on Human Rights. Its main task is to oversee compliance with Inter-American System human rights treaties, primarily the American Convention and some of the provisions of the Protocol of San Salvador, as well as other treaties. The Court rules on cases referred to it by the Inter-American Commission, when the Commission has determined that human rights have been violated and a state party to the ACHR (or other treaties that recognise the jurisdiction of the Court in specific cases) is at fault. The rulings of the Inter-American Court are fully binding. Furthermore, the Court acts in a consultative capacity, providing opinions when these are requested by states, the Commission or other Inter-American System bodies.

5. The impact of the internet on the exercise of human rights

Access to the internet, with its multidirectional and interactive nature, its speed and global reach, its relatively low cost and its decentralised and open design principles, which set it apart from other communications technologies, has changed our society in multiple ways. As is only natural, the internet has had an impact on the way in which human rights are exercised.

For instance, the internet has had an enormous impact on the right to freedom of expression, which includes the right to seek, receive and impart information and ideas of all kinds. Following the popularisation of the internet and other digital technologies, millions of people have acquired the opportunity to transmit and receive text, images and video from many different sources, interactively, with global reach and at increasing speed. This has unquestionably generated unprecedented possibilities for expression and information.

In consequence, and together with the opportunities for anonymous or pseudonymous expression enabled by the internet, phenomena like citizen journalism and user-generated content have emerged, and organisations have been able to send information to audiences they previously could not reach, with lower risks of reprisals for doing so. Of course, these opportunities have also enabled the dissemination of hate speech, offensive or discriminatory forms of expression, and the exchange of abusive content like child pornography. The global nature of the internet has hampered effective responses by states because their efforts are limited to national jurisdictions.

How should the right to freedom of expression online be regulated?

Another right that has been greatly strengthened by the internet is the right to association. The interactive and multidirectional character of the internet has given rise to online networks and communities that have enabled association between people with similar interests, goals or opinions. Sometimes online association has spilled out onto the streets, for example in organising and carrying out

rallies and political protests. The right to protest, which is closely linked to the right of association and assembly, can be seen online in petitions, messaging campaigns within social networks, or even cyber attacks that block access to a particular website.

Are online protests that temporarily block access to a website legitimate?

The rights of access to culture and education have been greatly potentiated by the internet and other digital technologies. Ease of copying, editing and disseminating cultural and educational goods have enabled access to them by people who otherwise would not have had access. The facilities made available by the internet and other digital technologies have enabled artistic creation and the recycling of cultural and scientific goods as derived content. Opportunities to access individual and mass education distance learning programmes have also expanded.

At the same time, ease of copying and exchanging cultural and scientific goods online has facilitated the infringement of copyright regulations, which has led powerful copyright owners to demand state action to prevent these activities.

Should protection of copyrights take precedence over the right of access to culture and knowledge, even when copyrights are infringed by persons who would otherwise not have access to the cultural or scientific goods in question?

As people increasingly conduct activities online, they also generate traces of their activity and data about their private lives that can be collected, stored and monitored. Monitoring of personal data arising from a person's activity on the internet may be motivated by legitimate reasons, such as criminal investigations, or by illegitimate reasons, like political repression. Personal data generated by internet users may also be collected and analysed by businesses for commercial and marketing reasons. Thus the internet poses unprecedented risks to the right to privacy.

Should privacy be sacrificed in the interests of the protection of security?

It has been argued that the analysis of the large amounts of data generated by activity on the internet could be used to discriminate against people in terms of access to services and the exercise of their rights. Building stereotyped profiles or applying them to discriminatory treatment of certain individuals could give rise to and enable acts of discrimination against certain groups of people.

In view of the important role the internet has begun to play in our society, people who lack access to it are at a considerable disadvantage compared to population groups who do enjoy internet access. Unequal participation by sectors of society in the digital environment could therefore widen existing economic and social inequalities.

In addition to the gap in access to the physical infrastructure for internet access, it is important to highlight other forms of inequality that have a disproportionate impact on access by certain groups. For instance, gender disparity in access to and use of information technology is a growing concern.

Poor design of hardware and software has often prevented persons with disabilities from accessing and using the internet on an equal basis. And the predominant use of the English language and the non-

availability of information in other languages, especially indigenous languages, have generated a linguistic gap in internet access, predominantly affecting indigenous peoples and communities.

Access to the internet has increasingly become essential for the enjoyment of rights, including economic, social and cultural rights. Therefore states are considered to have an obligation to guarantee universal internet access.

Should internet access be considered a right? What specific obligations should the state have to guarantee universal internet access?

Finally, it is important to note that the nature and design of the internet mean that the exercise of rights on the internet depends to a large extent on a wide spectrum of mainly private sector actors who operate as internet intermediaries. Providers of services like search engines, web hosting, content dissemination, social network platforms and other intermediaries have a decisive effect on opportunities for access and use of the internet, and moreover can potentiate or restrict the exercise of users' rights.

Given the importance of intermediaries for the working of the internet, public and private actors have sought to use intermediaries to limit rights, for example, by requiring information about their users or ordering them to monitor and control the behaviour of their users, on pain of being held liable for this behaviour. Some intermediaries have taken advantage of their position, for example, by collecting, analysing and selling their users' personal information.

In view of the global nature of the internet, some intermediaries have argued that individual states do not have jurisdiction to compel them to restrict their users' rights, and thus have set themselves up as entities that, on occasion, have greater influence on people's internet rights than state institutions themselves. Absence of jurisdiction, however, has also been used as an argument by some actors to obstruct the actions of organisations working to protect the rights of internet users.

Should internet intermediaries be held accountable for users' behaviour? What are the limits of states' action to regulate the behaviour of intermediaries?

6. Application of Inter-American Human Rights System instruments to the internet

Inter-American System instruments recognise human rights and oblige states in the Americas to respect and guarantee these rights for all people within their jurisdiction. As stated by the Inter-American Commission on Human Rights Special Rapporteur on freedom of expression in a report on freedom of expression and the internet, human rights obligations under the Inter-American System are wholly applicable to the digital environment. However, application of these instruments to the internet has certain special features.

The **right to freedom of expression** is protected under article 13 of the American Convention on Human Rights. Its protection in the Inter-American System is particularly robust compared with other international instruments such as article 19 of the International Covenant on Civil and Political Rights and article 10 of the European Convention on Human Rights.

As with most rights, the right to freedom of expression is subject to limitations, but article 13 of the ACHR establishes explicit requirements for legitimate limitations on this right. In the first place, prior censorship is prohibited, and it is stipulated that limitations to freedom of expression can only take the form of subsequent imposition of liability. This means that any restriction on freedom of expression must be imposed on the author of the expression, without excluding a given message from being communicated to the public. Civil or criminal liabilities may be involved, as well as the right of redress or reply. In the context of online expressions the latter may be particularly useful, as the interactive nature of the internet usually allows autonomous corrections, redress or replies to occur without the need for state intervention via the imposition of subsequent liability.

Nevertheless, subsequent liability must also comply with other specific requirements spelled out in article 13 of the ACHR and known in the Inter-American Human Rights System as the “tripartite test”: 1) the restriction must be provided for **by law** in the clearest and most precise terms possible, so that there is certainty about what constitutes an offence; 2) the restriction must pursue a **legitimate aim**, such as the protection of the rights of others, national security, public order or public health; these aims should be narrowly interpreted, and do not in themselves justify imposition of restrictions; and 3) the restriction must be **necessary in a democratic society**. This means that any measures taken must be: (i) **effective**, that is, appropriate for attaining the legitimate aim pursued; (ii) **necessary**, that is, they should be the least restrictive of the measures available to achieve the legitimate end pursued; and (iii) **proportionate**, that is, they should not sacrifice freedom of expression to an excessive or inordinate extent in comparison with the advantages to be had from protecting the aim pursued.

The OAS Special Rapporteur for Freedom of Expression has said that when applying restrictions to freedom of expression online, the special character of the internet must be taken into account, as any limitations can affect the general functioning of the internet. When assessing the legitimacy of restrictions to online expression, a systemic digital perspective must be adopted.

The risk involved in holding intermediaries (providers of services like search engines, web hosting, social networks and others) liable for content created by third parties is that it creates incentives for private censorship.

Article 13.3 of the ACHR prohibits indirect restrictions on freedom of expression. In the context of the internet it has been pointed out, for example, that internet traffic management by businesses providing internet access must not discriminate in terms of devices, content, author, origin or destination. This affirms that net neutrality is essential for guaranteeing the plurality and diversity of information flow on the internet.

As already indicated, the unprecedented potential contributed by the internet to the exercise of many human rights makes it essential that states progressively adopt measures to guarantee universal internet access.

The growing amount of available information has created a historic opportunity for the expansion, through the internet, of the **right to education** and the **right to participate in cultural life**, recognised by articles 13 and 14 of the Protocol of San Salvador. In this regard, copyright protection legislation that unduly restricts people’s rights to use the internet for education and access to knowledge and to science may be incompatible with the instruments of the Inter-American Human Rights System.

The internet has also greatly benefited the **right to assembly and association**, recognised in articles 15 and 16 of the ACHR. It has facilitated communication between persons with a previous connection with one another, but has also created unprecedented opportunities to create new communities of people who can interact regardless of their geographical location. At the same time it has greatly facilitated the ability of online groups to organise offline, for instance, to carry out protests, and to document and communicate in real time acts of repression or of police violence.

The **right to privacy**, recognised in article 11 of the ACHR, faces new challenges. The fact that a vast amount of personal information is generated when one uses the internet poses enormous risks to privacy. The processing of personal information by companies and governments gives them the power to monitor people's behaviour, and has serious implications.

An essential aspect of the right to privacy online is the right to communicate anonymously. Anonymity has been regarded as a safeguard that protects people from reprisals for the legitimate exercise of their right to freedom of expression. Encryption of communications has also been recognised as an extension of the right to secure, anonymous communication.

Article 11 of the ACHR provides for possible restrictions on the right to privacy; however, such restrictions must fulfil the requirements of being specified in law, pursuing a legitimate aim and being effective, necessary and proportionate.

There is concern that in the interests of security, states may institute measures of mass or abusive surveillance of persons. Invasions of privacy exert wide-ranging power over the individual subjected to surveillance, and moreover are carried out in secret, so there is a high risk of abuse.

As a result, the importance of clarity and precision about permissible procedures and the circumstances in which an authority may undertake surveillance measures has been asserted. Safeguards to prevent and avoid abuses are regarded as essential, for example, by establishing requirements such as: prior authorisation by a judge of the surveillance measure; transparency measures; the existence of independent supervisory bodies; and the right of users to be notified.

States are also obliged to guarantee that companies respect the right to privacy, for example, by requiring informed, prior consent to the processing of personal data, as well as by punishing wrongdoing by companies involving personal data processing.

In light of the obligation on states to guarantee universal internet access, it is essential to mention the **right to non-discrimination**, recognised in article 1.1 of the ACHR.

Collection and analysis of data generated by a person's activities on the internet can give rise to discriminatory practices that deprive that person of their human rights.

At the same time, since internet access has advantages for the exercise of rights, it is essential to ensure universal access to this technology as otherwise, instead of potentiating the exercise of rights, the gap in enjoyment of rights may be increased, to the detriment of the most vulnerable sectors of society.

For example, the existence of a gender gap in internet access has been recognised, as well as the prevalence of a digital environment that is often hostile and discriminatory against **women**. As part of their obligations under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), states must adopt programmes for the digital

inclusion of women, and for preventing and eradicating online violence and discrimination against women.

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities requires states to adopt policies to create opportunities for **persons with disabilities** to access information technologies.

Finally, for access to the internet to be truly plural, equitable and universal, it is important that states should promote the greatest possible linguistic diversity on the internet, so that groups like **indigenous peoples and communities** have the opportunity to communicate using these technologies as they see fit.