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ABSTRACT

The debate on the possible recognition of the use of the Internet as a human right matures. This paper, first, overviews arguments in favour and against the recognition of such a right. It then analyses how existing human rights, in particular the freedom of expression, function as legal tools to shield the content and connectivity of the Internet against unlawful interference. Next it turns to the doctrine of positive state obligations and the doctrine of human rights as living instruments. Both can be invoked to make existing rights protect content and to ensure connectivity. The example of the European Union's *Universal Service Directive* illustrates the importance of legal sources other than those taken from the fundamental rights category. This paper concludes that before a new right to the use of the Internet is recognised, one should take into account what is already protected and how. Still, one might argue that more is needed in human rights law than what currently exists.

1. INTRODUCTION: INTERNET PROTECTED AND THE POLICY AGENDA

The debate on the fundamental role of the Internet and other information and communications technologies (ICT) for contemporary society intensified in 2011. A BBC poll showed four in five adults regard Internet access as a fundamental right. [3] The Arab Spring, started in December 2010, was intensified by technology. [4] Late 2011 saw in the United States protests against the bills for the *Stop Online Piracy Act* (SOPA) and the *PROTECT IP Act* (PIPA). [5] In early 2012 followed a European movement against the proposed *Anti-Counterfeiting Trade Agreement* (ACTA). [6] In May 2011, Frank La Rue, the United Nations (UN) Special Rapporteur on the freedom of expression, explored key trends and challenges to the freedom of expression through the Internet. [7] This report proved to be a turning point in the discussion. [8] Having analysed the impact of the Internet in the contemporary world, in particular on the Arab protests, La Rue concluded 'the Internet has become an indispensable tool for realizing a range of human rights'. [9] He emphasised that there should be as little restriction as possible to the flow of information via the Internet, short of a few exceptions provided for in international human rights law. Further he argues that ensuring universal access to the Internet should be a priority for all states. Taking note of the La Rue report, on 29 June 2012 the UN Human Rights Council adopted a resolution, calling upon states to 'promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries'. [10]

The foregoing points at a growing consensus that the Internet constitutes a value in itself and should therefore receive legal protection. A next step in this development is the plea to give the Internet (or its use) the status of a fundamental right. In this context one can for instance point at the work of the *Internet Rights and Principles* coalition that has launched its

10 Internet Rights and Principles and currently drafts a *Charter of Human Rights and Principles for the Internet*. [11] [12] One can also recall Andrew Murray's *Bill of Rights for the Internet*, proposed in September 2010. [13] Some authors argue for other rights approaches that, when successful, might contribute to the protection of the Internet without explicitly talking about a right to (access) the Internet. For example, De Hert and Prins propose an explicit right to identity to face the developments of technology. [14] Bernal and Andrade further discuss the right to an on-line identity, the latter going beyond the defence of a right to online identity, by advocating a broader conceptualization of a right to personal identity (namely *vis-à-vis* new technological developments), which encompasses the sub rights of right to multiple identities and right to oblivion. [15]

Policy makers seem to be sensitive to some of these proposals. Brazil considers its own comprehensive legal statute on the Internet governance, including individual rights. [16] At the European policy level, the European Union (EU) *Digital Agenda* foresees a code (compilation) of the on-line rights summarising existing digital user rights in the EU in a clear and accessible way. [17] In March 2012 the Council of Europe has adopted its *Internet Governance strategy for 2012-2015*, building further on its 2011 *Declaration on Internet Governance Principles* and on its 2011 *Recommendation on the protection and promotion of the universality, integrity and openness of the Internet*. [18] [19] [20] The strategy focuses, amongst others, on 'exploring the possibilities for enhancing access to the Internet to enable the full exercise of rights and freedoms'. [21]

This paper wants to contribute to the discussion whether the use of the Internet is or should be protected by a means of human rights by trying to understand the arguments and also by trying to understand how the Internet is currently protected through human rights, in particular through the freedom of expression. The contribution starts with a brief overview of the main arguments in favour (section 2) and against specific human rights protection for the Internet (section 3). Then we look at existing rights to see how they protect the Internet and how content and connectivity - two core elements of the Internet - fall into the current human rights framework. [22] We argue that freedom of expression protects both content and connectivity against unjustified interference (section 4). Additional protection comes from other human rights, such as the right to privacy (section 5). To better understand the protective force of existing human rights one needs to understand the doctrine of positive human rights obligations (section 6) and the idea of human rights as living legal instruments (section 7). Using European cases such as *Jankovskis v. Lithuania* we try to understand the consequences of these doctrines when applied to the context of the Internet and its need for protection. We argue that they reinforce the protective power of existing human rights, offering a framework for Internet content and Internet connectivity, although they do not create a sufficient basis to provide connectivity. Existing rights thus do not create an entitlement to be digitally connected? However, as human rights are situated rights, taking shape in certain societies at certain moments of times, in some situations, a failure to provide Internet access could be deemed contrary to the existing human rights law. More is indeed needed: a full enjoyment of the use of the Internet requires also certain proactive measures to ensure a maximum level of connectivity. Consequently, public authorities should take positive measures to ensure universal connectivity. There is a legitimate cause to reform the current human rights framework in order to turn this in a legally binding engagement (section 8). As a conclusion, having attempted to draw a picture of the current state of the art in the human rights protection for the Internet, we argue that this picture should be taken into consideration before any new right is recognised. There is enough, but maybe some more is needed.

2. ARGUMENTS IN FAVOUR OF A RECOGNITION OF THE INTERNET AS A HUMAN RIGHT

There are different modes of regulating and protecting technologies, including powerful non-legal ones. [23] Hence, the case for a fundamental rights approach has to be made strong.

One should not call for human rights lightly. But on the other hand, one does equally not need to be too fundamentalist about fundamental or human rights either. These rights are not holly and are far from static. They evolve, simply because they reflect developments in the society, rather than eternal truths or state of beings of human kind. Protecting non-human entities, such as legal persons, animals and, why not, even the climate, is not unthinkable. 'It depends'.

The current system is characterised by the expanding and evolving nature of human rights. The international human rights system has advanced greatly since the *Universal Declaration of Human Rights* (1948) was first adopted. Since the adoption of the Declaration, the codification process regarding the definition of new rights and new international principles has continued. This expanding nature is still producing ramifications in the 21st century. With the ever-changing nature of society, human rights face a need for continuous evolution in order to address new challenges. [24] Human rights are situated rights: they take shape in certain societies at certain moments of time. Brownsword and Goodwin argue that in the future, where human rights remain the dominant language for moral reasoning - and there is every reason to expect that they will - technological developments are likely to force the creation of new human rights. To believe these authors, new rights that look to be on the horizon include the right to genetic privacy, the right to a unique identity and also the right to Internet access. [25]

Their 'guess-list' is not unrealistic. [26] The last suggested right by Brownsword and Goodwin would reflect the importance of the Internet for the contemporary world due to the unique nature of the network. The Internet is crucial for today's knowledge-based economy as it fosters competitiveness and innovation. It promotes development and social inclusion. It advances democracy and other human rights. [27] In particular, due to its difference from other types of media, it substantially boosts the freedom of expression. [28] La Rue stresses that the Internet allows for two-way communication, making the end-user not only a passive recipient of information but also an active publisher. Next, it makes possible inexpensive distribution of any type of content, thus making access to information and knowledge that was previously unattainable. Finally, it enables communication in a real time. As a result, the Internet for many people has become an intrinsic part of life. Those who have grown up with the Net - 'digital natives' - they 'use the network for homework and leisure with the same ease as they use a dictionary or a book or the telephone.' [29] Hence, on these grounds, La Rue in his 2011 report advocates for as little content restriction as possible and for access to the Internet to be widely available, accessible and affordable to all segments of population. [30] Murray strikes a similar chord and suggests 'no law shall be made which shall restrict the right of the individual to full and free access to the internet', short of limitations 'in accordance with the Universal Declaration of Human Rights'. [31]

The idea of making Internet (access) a fundamental right is timely because of recent developments towards control and censorship. More than in the recent past, there is a growing need of preserving and maintaining the very nature of the Internet. The success of the Internet is intimately connected to the 'openness' of its architecture, in particular the distributed network and open formats. [32] The Internet was designed without any contemplation of national boundaries. [33] In parallel, there was a romantic concept that the Internet was conceived as an egalitarian and uncontrollable space for exchange of information. [34] (Think of e.g. 1986*Hacker Manifesto* or John Perry Barlow's 1996 *Declaration of the Independence of Cyberspace*.) [35] [36]

However, some borders that recently emerged in the cyberspace lawfully *and* unlawfully restrict the flow of information. [37] According to La Rue, illegitimate restrictions take the form of arbitrary blocking or filtering (cf. paras 29-32), criminalisation of legitimate expression (33-37), (over)imposition of intermediary liability (38-48), disconnecting (including measures like 'three strikes') (49-50), cyber-attacks (51-52) and inadequate protection of privacy and personal data (53-59). [38] [39] Technological progress with regard to the Internet seems to go towards build-in functionalities to control it in an unprecedented

way. Sergey Brin, co-founder of Google, claims that threats to the freedom of the Internet, apart from the governments trying to control access and communications, also come from 'the entertainment industry's attempts to crack down on piracy' and 'the rise of 'restrictive' walled gardens such as Facebook and Apple, which tightly control what software can be released on their platforms'. [40] A recently proposed technology of network management (i.e. blocking, prioritizing or degrading of traffic) triggered the debate on network neutrality. [41] Thus it is not surprising that on a regular basis NGOs worldwide publish reports on civil liberties limitations in the cyberspace. [42]

These developments towards control and censorship bring us back to the very first function of human rights, i.e. to shield the individual against the unnecessary use or abuse of power by a state. With control and censorship appearing not only in the East but also in the West, it might not be a surprise to see persons turning to the language of human rights. There is a call for human rights every time a value is threatened. A specific right to protect the Internet creates the appropriate signal of alarm. Such a right, intelligently drafted, could also call for attention of policy makers with regard to the lack of access of many in the world due to cultural and economic reasons. A specific right recognizing universal access will help decrease the 'digital divide' - i.e. the schism between the technological 'haves' and 'have-nots' - both in its geographic dimension (urban versus rural areas and developed versus underdeveloped regions) and also in its social one (digital literacy, access for vulnerable groups or language barriers). [43] [44] When it comes to the geographical divide, the Northern hemisphere accounts for a much higher level of Internet penetration than the Southern hemisphere. [45] While the Scandinavian countries lead in terms of connectivity - Iceland and Norway each have more than 90 per cent of the population with Internet access - a vast number of countries have an Internet penetration less than five per cent and even less than one per cent. [46] La Rue notes that several initiatives already have been taken in an attempt to bridge the digital divide, like the Target 8.F of the *Millennium Development Goals* (2000) and the *Plan of Action* adopted at the Geneva World Summit on Information Society (2003). [47] [48] It is well known that these efforts are not enough and therefore one can observe calls for an enforceable (fundamental) right to access the Internet. [49]

On a national level, three jurisdictions already explicitly provided in their constitutional system a positive obligation to ensure connectivity. Art 5a(2) of the Greek Constitution, introduced in 2001, states 'all persons have the right to participate in the Information Society. *Facilitation of access* to electronically transmitted information, as well as of the production, exchange and diffusion thereof, *constitutes an obligation of the State*, always in observance of the guarantees of articles 9 [privacy], 9A [personal data] and 19 [secrecy of correspondence]' (italics ours). [50] The French Constitutional Court in 2009 declared that the freedom of expression implies 'freedom to access such services', yet rather in a different context (i.e. human rights as living instruments) (see section 7). Also, this time outside Europe, the Constitutional Court of Costa Rica declared in 2010 that, in the context of the information society, 'it is imposed on public authorities for the benefit of the governed to promote and ensure in universal form, access to these new technologies.' [51]

3. ARGUMENTS AGAINST A RECOGNITION OF THE INTERNET AS A HUMAN RIGHT

The foregoing voluntaristic pages may not convince all readers. Apart from disbelief in the legal system, also in the West, [52] there are counterarguments against a human rights approach in general and arguments against a human rights approach in this specific case. A first counterargument sees the Internet merely a technology, nothing less but certainly nothing more. In his commentary on the Arab Spring Protester as the 'Person of the Year 2011', TIME's Rick Stengel argues that technology indeed mattered for the Arab protests, but this did not make the Arab Spring a technological revolution. Social networks did not cause these movements, but they kept them alive and connected. DeLong-Bas observes that 'the use of modern technology and new social media has opened the door to new and

creative thinking about how to assemble, organize, plan, and strategize activities ranging from political to social change that are immediately conveyed at a global level.' [53] 'This was not a wired revolution; it was a human one, of hearts and minds, the oldest technology of all,' he concludes. [54] Technology is an enabler of rights, not a right itself.

Secondly, there is the argument about what merits a human rights level of protection. Vinton Cerf, co-designer of the Transmission Control Protocol/Internet Protocol (TCP/IP) is sceptical about protecting the Internet access by a means of human rights. [55] There is a high bar for something to be considered a human right, he holds The modern western 'human rights ideal' can be summed up as follows: *prima facie* everyone has an equal legitimate claim to those tangible and intangible goods and benefits most essential for human well being. [56] In other words, in the classical perspective, these rights are understood basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. [57] To believe Cerf, the things that we call human rights must be among the things humans need in order to lead healthy, meaningful lives, like freedom from torture or freedom of conscience. The Internet is valuable as a means to an end, but not as an end in itself. He concludes with a nice example: 'at one time if you didn't have a horse it was hard to make a living. But the important right in that case was the right to make a living, not the right to a horse'. [58] Cerf is more favourable of protection of Internet access by means of civil rights even though the same argumentation applies. Civil rights are different from human rights because they are conferred upon us by law, not intrinsic to us as human beings. The concept of universal service could serve as an example of protection by means of rights conferred by law (see section 8).

Thirdly there is the argument about human rights inflation in general. To frame this argument, it is useful to remind that calls for a fundamental right status for the Internet are not unique but axiomatic for the wider domain of all human rights. Why, from the formal viewpoint, do people frame interests in terms of human rights? One of the reasons is rhetoric: a claim sounds more practical. Another reason is enforcement: most modern human rights recognized come with some sort of enforcement mechanism, be it hard law (e.g. courts or compliance committees) or soft law (e.g. monitoring). Yet claims for the recognition of new fundamental rights should always be carefully examined. If they are rashly accepted, it could lead to a practice of fragmentation and constant increase of human rights. Paraphrasing Easterbrook, in going too much into detail, one might end up with 'a right to a horse'. [59] Inflation of rights could then diminish the value of other existing rights. Inclusion of new rights in the international human rights framework is only justified if there is a substantial added value to the protection offered by existing rights and when there is a consensus that a high level of protection is strictly necessary. Furthermore, as recognition of any right requires codifying, any codification would bring difficulties to define its scope, to choose the proper generation of a right as well as the correct legal instrument for regulation and - finally - it would risk becoming out-dated. [60]

As an example, the human rights rhetoric has been used to protect the environment as an answer to its progressive degradation. The clean and healthy environment is seen a public good indispensable for the life and welfare of the society as a whole. The extensive case law developed by human rights courts and supervisory bodies at regional and universal levels tends to indicate that an environmental dimension of human rights has been recognized. However, this approach - built on 'individualistic' perspective - seems ill suited to addressing environmental degradation as such and the diffused effects that such degradation has on society as a whole. To remedy that, Francioni argues for 'imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation'. [61] Yet some international instruments acknowledge this collective dimension and explicitly provide for the right to the environment, yet shaped very differently. [62] As a second example, a distinct right to water and sanitation was recognized by the UN and a handful of international human rights instruments. [63] Although it has been argued that this right could be easily interpreted from the rights to housing and health, there are a few reasons why it merits a separate

recognition. First, water and sanitation are primary needs and nowadays still many people suffer from a lack thereof. Second, not all aspects of the access to water and satiation are covered by existing rights, in particular the rights to housing and health. The scope of sanitation goes well beyond prevention of contamination of drinking water supplies and wastewater drainage. It is also about ensuring hygiene and safe water storage. [64] As a third example, as the new rights-holders emerge, *sui generis* human rights have been provided for persons with disabilities as well as specific rights for elderly people are being debated, as the existing international instruments have failed to address adequately the needs of these people. [65] [66] As a final example here, there is a general trend of NGOs and other stakeholders to continuously demand for the creation of more human rights. Baxi gives the example of interest groups of international airlines, hotels and travel agents who assiduously lobby the UN to proclaim a universal human right of tourism. [67]

One could also think of the new right to data protection in the EU, both in Art 8 of the EU *Charter of Fundamental Rights* and in Art 16 of the *Treaty on the Functioning of the European Union*. This recognition can be approved for at least two reasons. First, there were considerations with regard to the legitimacy of the EU data protection framework. The 1995 *Data Protection Directive* has only an internal market dimension and lacked a fundamental rights justification. [68] With a separate fundamental right for data protection this dimension is added. Second, the existing right to privacy did not suffice. Data protection explicitly protects values that are not at the core of privacy, such as the requirement of fair processing, consent, legitimacy and non-discrimination. Data protection laws serve a multiplicity of interests, which in some cases extend well beyond traditional conceptualisations of privacy. [69] What these examples have in common is that additional prominence and visibility has been given to the subject matter of protection. In result, it is easier and more practical to claim these things. On top of that, from the viewpoint of efficiency, an explicit recognition creates responsibilities and tools to ensure observance and to oversight enforcement, including soft mechanisms like monitoring.

Against the foregoing, one can argue that the 'visibility' argument in favour of more human rights recognition does not take into account the flexibility of existing rights. Technological advances often change the way in which we exercise our rights and freedoms, and thus broaden the practical scope of these rights. Freedom of movement now extends to moving around by car, plane and the Internet, and not just by foot, boat or bike. [70] Taking the argument of the flexibility of existing rights as a starting point, we will now in the following sections analyse how the current human rights framework protects the use of the Internet. We start with the classic right to the freedom of expression, and then turn to some other rights.

4. FREEDOM OF EXPRESSION SHIELDING INTERNET CONTENT AND CONNECTIVITY

In our analysis how the current human rights framework protects the use of the Internet, we will start with the freedom of expression as for our deliberations it is the most relevant element of this framework. Freedom of expression safeguards the right to inform and to be informed. Both Art 19 of the *Universal Declaration of Human Rights* (UDHR; non-binding) and Art 19 of the *International Covenant on Civil and Political Rights* (ICCPR) offer protection of the *substance* of the expression. They provide for freedom to 'hold opinions' and to 'seek, receive and impart information and ideas'. Similarly, Art 10 of the *European Convention on Human Rights* (ECHR) provides for 'freedom to hold opinions and to receive and impart information and ideas'. As content communicated over the Internet is no different than any other expression, it is protected by that freedom.

Freedom of expression also safeguards the *means* by which information is communicated. This issue raises some difficulties. Some international human rights instruments clearly protect the means of communication. Both Art 19 UDHR and Art 19 ICCPR explicitly provide for protection of the method by which the expression is communicated: 'through any media'

and 'either orally, in writing or in print, in the form of art, or through any other media of his choice', respectively. La Rue argues that Art 19 of UDHR and its ICCPR counterpart were drafted with foresight to include and to accommodate future technological developments. He concludes that Art 19 is equally applicable to new communication technologies such as the Internet. Furthermore, the new UN commentary to Art 19 ICCPR (2011) argues that public authorities 'shall take account of the extent to which developments [in ICT] have substantially changed communication practices around the world'. It further concludes 'states parties should take all necessary steps to foster the independence of these new media and to *ensure access of individuals thereto*' (italics ours). [71] Jayawickrama cites a number of judgements from around the world interpreting the phrase 'other media' from Art 19 ICCPR. The courts have included broadcasting through the airwaves and cable (including retransmission) and television - even though these might require a licence form the state, mail, telephone with a pre-recorded message, theatres, movies, educational establishments and public spaces as long as they respect their purposes. [72] [73]

At the European level, we note that Art 10 ECHR, as well as Art 11 of the EU *Charter of Fundamental Rights*, are *prima facie* silent with respect to forms of expression. There is no phrase like 'through any media'. Yet these provisions apply to various forms and means in which information is transmitted and received, because 'any restriction imposed on the means necessarily interferes with the right to receive and impart information'. [74] Van Dijk et al. claim that since the case law attributes to Art 10 ECHR a broad protection, the Internet also comes within its ambit. [75]

The inclusion of the method of communication in the scope of the freedom of expression as laid down in Art 10 ECHR is confirmed by case law. [76] For example, in *Jersild v. Denmark* (1994), having analysed the role of the press in a democratic society, the European Court of Human Rights (ECtHR) stated: 'although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media'. [77] In *Oberschlick v. Austria* (1991) [78] and in *De Haes and Gijsels v. Belgium* (1997) the Court further stated that Art 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. [79]

Freedom of expression is predominantly a negative right, i.e. it protects against unjustified interference. In very recent examples, i.e. *Scarlet v. Sabam* (2011) and *Sabam v. Netlog* (2012) cases, the Court of Justice of the European Union (ECJ) confronted private digital censorship. [80] [81] In both cases, the Luxembourg Court analysed whether an injunction requiring the installation of a system for filtering electronic communications in order to prevent copyright infringement is compatible with the EU law. Such a system would: (1) filter all electronic communications passing via services of an intermediary service provider (ISP) or stored on its servers by its users; (2) be applied indiscriminately to all its customers; (3) constitute a preventive measure; (4) be operated exclusively at the expense of an ISP; and (5) be applied for an unlimited period. Such a system would be capable of identifying copyrighted content and subsequently preventing making available to the public.

The Court based its decision on both EU secondary legislation (i.e. relevant directives) and fundamental rights (i.e. the *EU Charter of Fundamental Rights*). In both cases the Court quoted its previous judgement in *Promusicae*, stating that 'the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights'. [82] [83] The Court found that the freedom to conduct business, the right to protect personal data and the freedom to information would be undermined. With regard to the freedom of expression, in*Scarlet*, the Court held that such 'injunction could potentially undermine freedom of information since that *system might not distinguish adequately between unlawful content and lawful content*, with the result that its introduction could lead to the blocking of lawful communications' (italics ours). [84] The same argument was applied in *Netlog*. [85] In result, the Luxembourg Court in both cases ruled out a possibility to issue an injunction that requires installing such filtering systems. These cases suggest that the protection of the Internet - to the extent covered by the

freedom of expression - could be achieved by defining the limits of interference thereto.

However, freedom of expression is not an absolute right, at least in the European legal order. [86] Absolute rights such as the right not to be tortured are rights that must be respected at all times, and may not be restricted even for compelling reasons. In the European human rights law these rights tend to be the exception. [87] In general, limitations may be imposed on most human rights, and this as long as certain conditions are satisfied, for instance legality, necessity and proportionality, and legitimacy of the interference. [88] With regard to the expression on the Internet, La Rue argues that restrictions may only occur in limited cases: child sexual abuse content (colloquially: child pornography), hate speech, defamation and advocacy of genocide and of national, racial or religious hatred leading to discrimination, hostility or violence. [89] It seems La Rue tried to find a common denominator and to identify a universal catalogue of possible limitations. While for some items on his list he would find a broad international consensus (e.g. child sexual abuse content), for some other items - especially those limiting free speech - he might find some opposition: there are differences among jurisdictions what the legitimate expression is. As Lessig and Resnick put it, 'what constitutes 'political speech' in the United States (Nazi speech) is banned in Germany'. [90]

5. OTHER RIGHTS COULD ALSO GIVE SOME INTERNET PROTECTION

A certain level of the protection of the Internet, both of its content and connectivity, could most probably also be derived from other rights than this on the freedom of expression. Looking at the substantive provisions of the *European Convention*, these rights include: the right to privacy (Art 8), freedom of thought, conscience and religion (Art 9) and freedom of assembly and association (Art 11). These rights have a lot in common with the right to freedom of expression, i.e. they protect the means of their realisation, three are all negative rights and the very similar limitation criteria apply thereto. In addition, one can think of situations in which the following rights can play a role: the right to education (Art 2 of the *Additional Protocol* to ECHR), the right to take part in cultural life (Art 15 ICCPR) the right to an adequate standard of living (Art 11(1) of the *International Convenient on Economic, Social and Cultural Rights*).

It would bring us beyond the scope of this contribution to discuss all these rights. The rights to privacy and to data protection strike the eye. As the protection of correspondence and communications fall within the scope of the right to privacy, one could argue that the use of e-mail and social networking sites is protected too. [91] In both *Sabam* cases (cf. section 4), the ECJ argued that the contested filtering system would have a negative impact on protection of personal data. In *Scarlet*, 'the injunction … would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent'. [92] The IP addresses might constitute personal data. [93] In *Netlog*, 'the injunction … would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users'. [94] When it comes to initiatives on protection of privacy in the digital age, La Rue talks about preservation of online anonymity, in particular by refraining from adopting real-name registration systems, [95] and Murray calls for the right to employ encryption technology to ensure privacy and secrecy of communications. [96] As contemporary technology allows for almost perfect memory, exceeding the natural human capacity for memory, which is in some cases undesirable, Mayer-Schönberger calls for the reintroduction of 'forgetting'. [97]

Looking at criminal law, La Rue notes that states have an obligation to protect individuals against interference by third parties that undermines the enjoyment of freedom of expression. [98] La Rue, however, does not investigate the origins of this positive obligation in human rights law. The Strasbourg Court has already developed a number of positive obligations in the field of criminal law. [99] This obligation could most probably derived from the right to fair trial (Art 6 ECHR), the principle of no punishment without law (Art 7 ECHR),

the right to appeal in criminal matters (Art 2 of the *Seventh Protocol* to ECHR) and the right not to be tried or punished twice (Art 4 of the *Seventh Protocol* to ECHR). Of a special importance here is the duty of the state to properly investigate crimes, most recently articulated in the case of *Al-Skeini et al. v. the UK* (2011), in which the Court interpreted it from Art 2 (right to life). [100] It is our understanding that this duty applies to cybercrimes too.

Segura-Serrano argues that the right to development could also possibly be invoked in order to ensure universal connectivity, interpreted in the light of today's Internet role. [101] The right to development in the context of the Internet access is invoked in particular to bridge the geographical digital divide (see section 2). The UNESCO assessed in as early as 1998 that 'every citizen should have the right to meaningful participation in the information society' [102] and the World Summit on Information Society (WSIS) explicitly called to bridge the digital divide. [103] The question remains, however, as to whether the right to development has achieved a sufficient degree of legal status and whether it could be enforceable, taking into account disputes about its content and personal scope. The answer is no (or: not yet) as the right to development is *de facto* only a best efforts obligation imposed on public authorities. As Kirchmeier put it, the right to development can be described as soft law: generally accepted, but not legally binding. [104]

6. CONNECTIVITY AND THE DOCTRINE OF POSITIVE HUMAN RIGHTS OBLIGATIONS

We have shown in the two previous sections that freedom of expression (and perhaps a number of other rights) protects both the Internet content and connectivity against unlawful interference. But in order to fully enjoy the use of the Internet, a maximum level of connectivity must be ensured. La Rue therefore 'reminds all States of their positive obligation to promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to exercise this right, including the Internet.' [105]

One of the tools to ensure maximum connectivity could be the doctrine of positive human rights obligations. In this section we will analyse how the said doctrine contributes to this aim. [106] As this concept is less developed on the international level, we will focus in the following on European human rights law.

While negative obligations require states not to interfere in the exercise of rights and have always been regarded as inherent in the*European Convention*, the same is not necessarily true of positive. [107] [108] The convention itself provides for few positive obligations. [109] Thus they have been further developed by the Strasbourg Court, based on the principle of effectiveness, requiring interpretation in the sense which best protects individuals. As the Court is not competent to protect rights that do not have their basis in the convention, it has to find a link with rights that are recognised therein. The Court bases specific positive obligations both on a particular right within the ECHR and on the general obligation to respect human rights enshrined in Art 1. The ECtHR introduced the concept of positive obligations for the first time in the *Belgian linguistic case* (1968) and subsequently expanded the scope of what now has become the doctrine of positive human rights obligations. [110] Today, the idea of positive human rights obligations forms a recognised part of the rights guaranteed and observing these obligations goes hand in hand with observing the convention. [111] Lately, in *Appleby et al. v. the UK* (2003) the Court clarified that 'genuine, effective exercise of this freedom [of expression] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals'. [112] In *López-Ostra v. Spain* (1994) the Court clarified that a positive obligation requires public authorities to take 'reasonable and appropriate measures to secure' the rights of an individual. [113] These measures can be of a legal or practical nature, or both.

The ECtHR has not yet had the occasion to rule on a complaint concerning a denial or

restriction of the access to the Internet. [114] But resorting to the concept of positive obligations has enabled the Court to strengthen, and sometimes extend, the substantive requirements of ECHR. [115] In particular, the ECtHR appears increasingly willing to invoke the positive obligations doctrine in order to scrutinise the frailty and ineffectiveness of domestic laws, especially to protect vulnerable applicants. [116] This could pave the way to include proactive measures to ensure connectivity in the scope of Art 10 ECHR, albeit not unconditionally. If recognised, such a positive obligation would be of a substantive nature rather than of a procedural one. [117] However, at the current state of the convention's development, it is highly unlikely that the Court would find a breach of Art 10 ECHR solely on the grounds of the lack of Internet connectivity. It might, however, find that a state has failed to fulfil its obligation when hearing cases on more general aspects of the freedom of expression. It is our expectation that such cases would first deal with vulnerable people or people with a specific relationship with a state, e.g. imprisonment.

A first illustration of our hypothesis is the pending case of *Jankovskis v. Lithuania* about the refusal by prison authorities to give a prisoner access to the Internet. [118] The applicant wanted to enrol at university via the Internet. He requested information from the ministry of education about such a possibility. He was subsequently informed that all relevant information was posted on a website. The authorities refused him to access the Internet on the grounds that the prison rules in force did not extend thereto. A lower court observed that a list of prohibited items included, *inter alia*, phones, as a measure to prevent new crimes. The said court then concluded that the Internet ban was limiting such possibilities too. On appeal, a senior court also argued that while all prisoners' correspondence is subject to surveillance, the use of e-mail would omit any control.

It is our opinion that the Strasbourg Court could find a violation only with regard to the ultimate aim for which the Internet access was needed. If it had not been for Jankovskis' education desires, his Internet ban could be more easily said to be proportionate. If the Court finds a violation of Art 10 ECHR, it will most probably be based on the argument that the prison authorities have had a positive obligation to provide Jankovskis Internet access yet limited. [119] A prisoner's desire to pursue university education deserves appreciation, contributes to the resocialization aim and thus one should not limit that. As nowadays most of the higher education institutions make an extensive use of ICT, the process of education would probably be inefficient without the Internet. Taking into consideration his particular status, i.e. imprisonment, his Internet access should be restricted to certain purposes like learning and some enforcement measures should be employed to ensure observance of this limitation. From the technological viewpoint, his access might be limited, e.g. only to the university's website and/or its intranet, and, if necessary, his Internet traffic might be oversight. In this particular situation, a positive obligation might mean a requirement to develop and employ a technology (e.g. software) with these functionalities and to engage trained personnel to supervise. As a counterargument, the Court might consider whether any distance-learning methods that do not require the use of the computers and that can be reconciled with the strict prison rules were available, in particular whether these methods offered education in the similar field, of a similar quality and in the language understood by the applicant.

It is worth to mention here *Boulois v. Luxembourg* (2010) case. [120] Although its main concern was whether a right to a prison leave exists, one of the aspects of this case is of special significance here. The applicant, held under a semi-custodial regime, was deprived of a temporary release, which he needed *inter alia* to pursue education. Although the Court has recognised the legitimate aim of a policy of progressive social reintegration of prisoners, it held that a temporary release constitutes a privilege and not an enforceable right. Post-sentencing authorities have a certain degree of discretion in deciding whether a prisoner merits such a release. These authorities assess the personality of the prisoner, his or her progress and the risk of a further offence, among others. We observe that granting a prisoner the access to the Internet - in particular for educational purposes - might be considered a privilege too. Thus a decision to grant cannot be of an automatic nature and

certain discretionary criteria might be applied. We note that the concept of positive human rights obligations could be used to protect Internet content too. For example, in *Özgür Gündem v. Turkey*, a newspaper was a target of violence that remained unanswered by public authorities. The Court held that 'that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* [newspaper] in the exercise of its freedom of expression'. It is well possible that the Court might follow this path with regard to creation of the content on the Internet. [121]

7. THE DOCTRINE OF HUMAN RIGHTS AS A LIVING INSTRUMENT AND UNIVERSAL CONNECTIVITY

In June 2011 Lady Hale, a justice of the UK Supreme Court, gave a speech on the evolving nature of the *European Convention on Human Rights* and the limits to its growth. In her reasoning she pointed out that there are three governing ideas behind the evolution of the ECHR, i.e.

1. priority to the object and purpose of the convention,
2. the convention as a living instrument, and
3. practical and effective protection of rights. [122]

In the following section we will use her argumentation to show that yet another doctrine, this time this of human rights as living instruments, could contribute to a widening of the scope of the current rights, in particular the freedom of expression, to Internet aspects.

The doctrine of fundamental rights as living instruments is broad and could explain why the Internet in its entirety, i.e. not only its content but also the idea of proactive measures for connectivity too, could be based on the interpretation of existing rights, in particular the freedom of expression. Hale takes a historical perspective and argues first that in *Golder v the UK* (1975) the Court gave priority to the 'object and purpose' of the convention. [123] [124] It is about purposive rather than a literal construction of the language used. On the basis of this argument, one can assume that the intention was to ensure a full enjoyment of the freedom of expression. As we discussed in section 4, Art 10 applies if the expression is made on or via the Internet and/or any other medium developed in the future. Second, in 1978, in *Tyrer v the UK*, for the first time the Court has stressed that ECHR - drafted in 1950s - is a 'living instrument', i.e. 'must be interpreted in the light of present-day conditions' and practices among the contracting parties. [125] Paraphrasing Hale, if for most of contemporary Europe (access to) the Internet is an inseparable part of life, then this will influence the interpretation of the convention. Finally, in*Airey v Ireland* (1979) the Court articulated that the rights protected must be 'practical and effective' rather than 'theoretical or illusory'. [126] There is no point in having the right to the Internet if one cannot in practice exercise it. Hence one can observe a progressive character of the Strasbourg's case law. [127] However, Hale argues that there are some natural limits to the convention's growth and that such development should be a predictable one.

We saw in section 2 that some national legal systems already explicitly provide in their constitutional system for a positive obligation to ensure connectivity. We also mentioned a 2009 judgement of the French Constitutional Court declaring that the freedom of expression implies 'freedom to access such services'. Relevant here is that the French Constitutional Court used the concept of human rights as living instruments to include the protection of Internet access within the scope of the freedom of expression. Having analysed the 'present conditions' and Art 11 of the *Declaration of the Rights of Man and the Citizen* of 1789, which guarantees freedom of expression, the Court held (2009) that 'in the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services'. [128] It is well possible that the Strasbourg Court might follow this path.

However, as Murphy and Cuinn argued in 2010, it would be premature to try to characterise the stance of the Strasbourg Court on new technologies. The Court's decisions in this area are best seen as 'works in progress'. They give direction on individual complaints but taken together they do not allow for a full characterisation of the Court's stance. There is, however, evidence of more general trends including the Court's expansive approach to the interests protected by Art 8 and its development of positive obligations. [129] One could argue that, on the one hand, the more technology becomes indispensable part of our lives, the more protection it deserves. On the other hand, the more intrusive technology is, the individual merits more protection.

8. ADDITIONAL LEGAL SOURCES THAT ALREADY ENSURE CONNECTIVITY

Let us end this exploration of the human rights landscape with a short analysis of the added value of regular legal instruments. We have discussed in section 6 that La Rue 'reminds all States of their positive obligation to promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to exercise this right, including the Internet.' The states should adopt effective and concrete policies and strategies to make the Internet widely available, accessible and affordable to all. [130] Interesting about La Rue is that his report suggests a rights approach. However, a closer reading shows that he does not really insist on creating an explicit right to the Internet (access). In this section we will analyse a few tools outside the human rights framework. These proactive measures, as La Rue envisages them, are different from the concept of positive obligations discussed in section 6. [131] One of the examples of such measures is a universal service obligation. Universal service is a minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition. [132] This constitutes an enforceable right, but it is not conceived nor recognized as a fundamental or human right. The right, where it is recognized, figures in secondary legislation.

In the EU, the *Universal Service Directive*, as amended by Directive 2009/136, states that 'the connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to *permit functional Internet access*, taking into account prevailing technologies used by the majority of subscribers and technological feasibility' (italics ours). [133] This reinforces the policy that public telephone access should be capable to provide access to the 'public Internet' of a certain quality, although it does not dictate a specific transmission rate for the Member States to comply with. Recital 8 specifically states that it is 'not appropriate to mandate a specific data or bit rate at Community level.' [134] It should however be noted that this was the position some ten years ago. As the Directive contains a revision clause, enacted to take into account technological developments (Art 15), a revision process started in 2010. It raised a question and a debate on whether a broadband access should be included in universal service obligation. [135]

A number of EU Member States already include a high-speed Internet access in their universal service obligation, i.e. Estonia, Finland and Spain. [136] [137] [138] Other Member States (e.g. Poland) and the EU itself have adopted policies to ensure universal availability of broadband access. [139] The EU *Digital Agenda* contains a number of actions to be undertaken (cf. actions from 42 to 49) in order to achieve the very fast Internet. The EU's objective is 'to bring basic broadband to all Europeans by 2013 and to ensure that, by 2020, all Europeans have access to much higher Internet speeds of above 30 Mbps and 50% or more of European households subscribe to Internet connections above 100 Mbps.' For these purposes, in October 2011 the Commission proposed as a part of the *Connecting Europe Facility* to spend almost €9.2bn from 2014 to 2020 on pan-European high-speed broadband networks projects. This proposal now needs to be accepted by both the European Parliament and the Council. [140] Besides a human rights protection and

universal service obligation, universal connectivity could to be guaranteed by various means, such as, policy measures, including financial instruments, and/or by market efficiency. Should these measures prove effective, one could argue not to work with the human rights language but to rely only on these policies.

9. CONCLUSION: THE CURRENT FRAMEWORK DOES PROTECT, BUT NOT ENTIRELY

This paper examines how the current human rights framework protects the use of the Internet. We have shown that the right to freedom of expression - and perhaps a few other human rights (e.g. the right to privacy) - can be invoked to protect both content and connectivity of the Internet against unlawful interference. We have equally argued that the concepts of positive state obligations and of human rights as living instruments could be invoked to strengthen that protection. The current legal framework is not powerless, especially when complemented with other legal instruments.

Having said so, we equally observed in this paper that the current human rights framework does offer some protection to the use of the Internet but it does not cover it entirely. The main concern left outside is ensuring universal connectivity, an issue that within the EU is covered by secondary legislation. For us the question whether a specific human right is a proper means to protect the use of the Internet in its entirety remains unanswered, although we tend to see the benefits of a recognition more than the disadvantages. Human rights trigger policy making, so why not? Concerns as diverse as the ones identified in this paper - from the political (censorship) to the social (digital divide) - can be addressed by one single intelligently drafted new right. Regardless of the answer, before such a new right to freely use the Internet is recognised, one should take into account *what* is already protected and *how*.

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[3] BBC, *Internet access is 'a fundamental right'*, 8 March 2010, http://news.bbc.co.uk/2/hi/8548190.stm.

[4] In particular the posting of movies on the Internet has been crucial in the strategy of opponents of military regimes. R. Stengel, *Person of the Year Introduction*, Time, 14 December 2011, http://www.time.com/time/specials/packages/article/0,28804,2101745_2102139,00.html . Cf. also G. Ziccardi, *Resistance, Liberation Technology and Human Rights in the Digital Age*, Springer, 2013.

[5] J. Wortham, *A Political Coming of Age for the Tech Industry*, The New York Times, 17 January 2012, http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html

[6] D. Lee, *Acta: Europe braced for protests over anti-piracy treaty*, BBC, 6 February 2012, http://www.bbc.co.uk/news/technology-16906086; Irina Baraliuc, Serge Gutwirth and Sari Depreeuw. *Copyright enforcement in Europe after ACTA: What now?*, Netherlands Journal of Legal Philosophy, Vol 41(2), 2012, pp 99-104.

[7] UN Human Rights Council, *Report of the Special Rapporteur on the promotion and*

protection of the right to freedom of opinion and expression, Frank La Rue, 6 May 2011, A/HRC/17/27, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf .

[8] Article 19, a London-based NGO defending freedom of expression, immediately hailed the report as a milestone development and urged all governments to fully implement its recommendations. Cf. Article 19, *UN: ARTICLE 19 calls for global access to the internet*, press release, 21 October 2011, http://www.article19.org/resources.php/resource/2790/en/un:-article-19-calls-for-global-access-to-the-internet .

[9] UN Human Rights Council, *Report …*, op. cit., p 22.

[10] UN Human Rights Council, [Resolution on the] *promotion, protection and enjoyment of human rights on the Internet*, A/HRC/20/L.13, 29 June 2012, para 3, http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/20/L.13&Lang=E .

[11] Cf. http://irpcharter.org/campaign.

[12] Cf. http://irpcharter.org/charter.

[13] A. Murray, *A Bill of Rights for the Internet*, 2010, http://theitlawyer.blogspot.com/2010/10/bill-of-rights-for-internet.html .

[14] P. De Hert, *A right to identity to face the information society*, in: W. Bruggeman, R. van Eert and A. van Veldhoven (eds.), *What's in a name? Identiteitsfraude en -diefstal*, Maklu, 2012, pp 117-147; P. De Hert, *A right to identity to face the Internet of Things*, 2007, http://portal.unesco.org/ci/fr/files/25857/12021328273de_Hert-Paul.pdf/de%2BHert-Paul.pdf . J.E.J. Prins, *Een recht op identiteit*, Nederlands Juristenblad, Vol 82(14), 2007, p 849. See critically S. Gutwirth, *Beyond Identity?*, Identity in the Information Society, Vol 1(1), 2009, pp 122-133, http://www.springerlink.com/content/j4396418218787pm/fulltext.pdf.

[15] P. Bernal, *A right to an online identity?*, conference speech, Human Rights in the Digital Era, Leeds, 16 September 2011, http://prezi.com/jdszwv0kppsd/a-right-to-an-online-identity. N.N.G. Andrade, *Right to Personal Identity*. *The Challenges of Ambient Intelligence and the Need for a New Legal Conceptualization*, in: S. Gutwirth, Y. Poullet, P. De Hert et al. (eds.), *Computers, Privacy and Data Protection: an Element of Choice*, Springer, 2011, p 89.

[16] Cf. http://direitorio.fgv.br/civilrightsframeworkforinternet.

[17] Cf. Action 16 of the *Digital Agenda*. This would be a listing exercise rather than creation of any new rights. We judge this from a statement 'summarises'. The Council of Europe's *Internet Governance Strategy* foresees similarly 'drawing up a compendium of existing human rights for Internet users to help them in communicating with and seeking effective recourse to key Internet actors and government agencies when they consider their rights and freedoms have been adversely affected: to report an incident, lodge a complaint or seek a right to reply, redress or other form of recourse.' European Commission, *A Digital Agenda for Europe*, COM(2010) 245 final/2, Brussels, 26 August 2010, p 13, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF .

[18] Council of Europe, *Internet Governance - Council of Europe Strategy 2012-2015*, Strasbourg, 15 March 2012, CM(2011)175 final.

[19] Council of Europe, *Declaration of the Committee of Ministers on Internet governance principles*, Strasbourg, 21 September 2011, https://wcd.coe.int/ViewDoc.jsp?id=1835773.

[20] Council of Europe, *Recommendation of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet* , Strasbourg, 21 September 2011, CM/Rec(2011)8.

[21] Cf. para 8(b).

[22] Content and connectivity are two (out of four) central elements or key characteristics of the Internet architecture. Content and connectivity reflect the double nature of the Internet. While content is rather self-evident, connectivity means all necessary infrastructure to access the content, i.e. both physical (hardware, software, cables and wireless equipment) and logical one (communication protocols). It is apparent that these two elements are interdependent. The latter is an enabler for the former: in the digital world, there is no content without connectivity and connectivity without content is useless. (If one recognizes the Internet only as connectivity, we see this as an understanding *sensu stricto* .) With the third and the fourth elements - individual user and the society - we attempt to denote the actors and their respective interests with regard to the Internet. The individual user - apart from the need for both connectivity and content - wants protection of her identity, privacy and secrecy of communications, among others. Society as a whole has an interest in safety and security of individual users, development of the Internet and protection of common goods, in particular a secure environment free from cybercrime. Cf. also D. Wall, *Cybercrime*, Polity Press, 2007, pp 186-206, 210-214; A.D. Murray, *The Regulation of Cyberspace. Control in the Online Environment*, Routledge Cavendish, 2007, pp 203-230; L.A. Bygrave and J. Bing (eds.) *Internet Governance. Infrastructure and Institutions*, Oxford University Press, 2009. Compare also with Solum who identifies six characteristics or 'layers': content (symbols and images that are communicated), application (software to use the Internet), transport [Transmission Control Protocol (TCP) protocol, braking data into packets], Internet Protocol (handling the flow of data over the network), link (interface between end-user computer and the physical layer) and - finally - physical layer (cables and wireless equipment). The layers are organised in a vertical hierarchy. (L. Solum, *Models of Internet governance*, in L.A. Bygrave and J. Bing (eds.) *Internet Governance…,* op. cit., pp 65-66.) For our analysis, connectivity covers the 2nd, 3rd, 4th, 5 th and 6th layer.

[23] B. Morgan and K. Yeung, *An Introduction to Law and Regulation*, Cambridge University Press, 2007.

[24] M. Odello and S. Cavandoli (eds.), *Emerging areas of human rights in the 21st century: the role of the universal declaration of human rights* , Routledge, 2011, p 3.

[25] R. Brownsword and M. Goodwin, *Law and the Technologies of the Twenty-First Century*, Cambridge University Press, 2012, pp 225-245.

[26] One can ask the question whether a right to identity can cover Internet interest in the digital age, cf. section 5.

[27] For example, the European Parliament has observed that 'the Internet has become a means of expression of choice for political dissidents, democracy activists, human rights defenders and independent journalists worldwide.' European Parliament, *Freedom of expression on the Internet*, resolution, 6 July 2006, P6_TA(2006)0324, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0324&language=EN .

[28] As early as 1984 Pool contended that the then existing telecommunications technologies had the potential to enrich freedom of speech guaranteed by the existing human rights instruments. He held that electronic media could provide a broader access to more knowledge than ever before and therefore had the potential to open new vistas of freedom of speech and of access to information and ideas. I. De Sola Pool, *Technologies of Freedom*, Harvard University Press, 1984.

[29] J. Naughton, *A Brief History of the Future: the origins of the Internet*, Phoenix, 2000, p xii.

[30] UN Human Rights Council, *Report*…, op. cit., p 22.

[31] A. Murray, *A Bill of Rights for the Internet*, op. cit.

[32] Cf. J. Bing, *Building cyberspace: a brief history of Internet*, in L.A. Bygrave and J. Bing (eds.) *Internet Governance*…, op. cit., p 47.

[33] L. Guernsey, *Welcome to the World Wide Web. Passport, Please?*, The New York Times, 15 March 2001, http://www.nytimes.com/2001/03/15/technology/welcome-to-the-web-passport-please.html .

[34] For the history of the Internet, cf. e.g. J. Naughton, *A Brief History of the Future*…, op. cit.; J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World*, Oxford University Press, 2006; J. Bing, *Building cyberspace: a brief history of Internet*, in L.A. Bygrave and J. Bing (eds.) *Internet Governance.* op. cit. A short documentary video is worth attention too: M. Bilgil, *The History of the Internet*, 2009, http://www.lonja.de/the-history-of-the-internet.

[35] 'We explore... and you call us criminals. We seek after knowledge... and you call us criminals. We exist without skin color, without nationality, without religious bias... and you call us criminals.' http://www.mithral.com/~beberg/manifesto.html.

[36] 'Governments of the Industrial World … I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.' https://projects.eff.org/~barlow/Declaration-Final.html.

[37] Goldsmith and Wu argue that the creation of some of the borders in cyberspace was a response to local demands as well as to cultural and linguistic differences. Cf. further J. Goldsmith and T. Wu, *Who Controls the Internet?*, op. cit., ch 4.

[38] Cf. *Loi n°2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet* (Loi Hadopi, France), *Digital Economy Act 2010* (UK) and the proposed *Anti-Counterfeiting Trade Agreement* (ACTA).

[39] UN Human Rights Council, *Report*…, op. cit., pp 9-26. One could also group these restrictions as targeting either intermediaries or individuals (J. Goldmiths and T. Wu, *Who Controls the Internet*, op. cit., ch 5.) or classify them in three categories: national firewalls, user-blocking and content-blocking (E. Schweighofer, *New Borders in Cyberspace*, conference speech, Cyberspace 2009, Brno).

[40] I. Katz, *Web freedom faces greatest threat ever, warns Google's Sergey Brin*, Guardian, 15 April 2012, http://www.guardian.co.uk/technology/2012/apr/15/web-freedom-threat-google-brin .

[41] J.P. Sluijs, *From Competition to Freedom of Expression: Introducing Art. 10 ECHR in the European Network Neutrality Debate*, TILEC Discussion Paper No. 2011-040, p 6, http://ssrn.com/abstract=1927814. On 8 May 2012, the Netherlands became the first country in Europe to implement net neutrality in the law. EDRi-gram newsletter, *Netherlands - First Country In Europe With Net Neutrality*, 9 May 2012, http://www.edri.org/edrigram/number10.9/net-neutrality-law-netherlands . Official version: https://zoek.officielebekendmakingen.nl/kst-32549-29.html.

[42] Cf. Committee to Protect Journalists, *10 Most Censored Countries*, 2012, http://www.cpj.org/reports/CPJ.Ten.Most.Censored.5.2.12.pdf; Reporters sans frontières, *Enemies of the Internet & Countries Under Surveillance*, report for 2010:http://en.rsf.org/IMG/pdf/Internet_enemies.pdf, for 2011:http://12mars.rsf.org/i/Internet_Enemies.pdf, for 2012:http://en.rsf.org/IMG/pdf/rapport-internet2012_ang.pdf; OpenNet Initiative, *West Censoring East: The Use of Western Technologies by Middle East Censors*, 2010-2011, http://opennet.net/sites/opennet.net/files/ONI_WestCensoringEast.pdf . In 2012, the British daily 'Guardian' took stock of the new battlegrounds for the internet. Cf.

http://www.guardian.co.uk/technology/series/battle-for-the-internet .

[43] A. Segura-Serrano, *Internet Regulation and the Role of International Law*, Max Planck Yearbook of United Nations Law, Vol 10, 2006, pp 264-270.

[44] 'For instance, the majority of content on the World Wide Web is in English, even though this is not the first language of most users of the Web. … consider the common desktop personal computer: To what degree does the QWERTY keyboard (the standard keyboard available in most countries) privilege languages which are based on the Roman script or privilege, explicitly, the English language?' M. Best, *Can the Internet be a Human Right?*, Human Rights & Human Welfare, Vol 4, pp 29-30, http://www.du.edu/korbel/hrhw/volumes/2004/best-2004.pdf. In 2009, ICANN introduced internationalised domain names (IDN), i.e. domain names that include characters in non-Latin scripts such as Russian or Arabic or may contain Latin letters with diacritical marks, as it is common with European languages. They are meant to allow users to brand themselves better and target desired local markets more effectively. However, a question raises how a non-speaker of e.g. of Japanese can access such websites if their domain names exist only in Japanese. Cf. ICANN, *Internationalised domain names*,http://www.icann.org/en/resources/idn. Cf. further N. Oudshoorn and T. Pinch, *How Users Matter. The Co-Construction of Users and Technology*, MIT Press, 2003; and K. Mossberger, C.J. Tolbert and R.S. McNeal, *Digital Citizenship. The Internet, society and participation*, MIT Press, 2007.

[45] In the EU, the level of Internet access increased in all Member States between 2006 and 2011, however differences remain significant. In 2011 the household Internet access ranged from 45% in Bulgaria to 94% in the Netherlands. Share of those who never has gone on-line varies between five per cent in Sweden and 54% in Romania. (Eurostat, *Internet access and use in 2011. Almost a quarter of persons aged 16-74 in the EU27 have never used the internet*, press release, 14 December 2011, STAT/11/188.) Oxford Internet Institute has created in 2011 a map of worldwide Internet penetration, cf. http://www.oii.ox.ac.uk/vis/?id=4e3c0200. For more statistics on the information society in the EU, cf. e.g. Eurostat, *Information Society*, http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/introduction ; European Commission, *Digital Agenda Scoreboard 2011*, http://ec.europa.eu/information_society/digital-agenda/scoreboard/index_en.htm . Cf. also United Nations, *Statistical Yearbook 2009*, pp 128-139, http://unstats.un.org/unsd/syb/syb54/SYB54_Final.pdf; International Telecommunication Union, *Measuring the Information Society 2011*, http://www.itu.int/ITU-D/ict/publications/idi/index.html.

[46] D. Rowland, *'Virtual world, real rights?': Human rights and the Internet,* in: M. Odello, S. Cavandoli (eds.), *Emerging areas of human rights in the 21st century*…, op. cit., p 13.

[47] 'In cooperation with the private sector, make available benefits of new technologies, especially information and communications.' Cf. http://www.un.org/millenniumgoals.

[48] 'The objectives of the Plan of Action are to build an inclusive Information Society; to put the potential of knowledge and ICTs at the service of development; to promote the use of information and knowledge for the achievement of internationally agreed development goals, including those contained in the Millennium Declaration; and to address new challenges of the Information Society, at the national, regional and international levels.' Cf. http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf .

[49] Cf. A.P.M. Coomans (ed.). *Justiciability of Economic and Social Rights - Experiences from Domestic Systems*, Intersentia, 2006.

[50] The Constitution of Greece (as revised by the parliamentary resolution of 6 April 2001 of the VIIth Revisionary Parliament), http://www.nis.gr/npimages/docs/Constitution_EN.pdf.

[51] Translation unofficial from http://www.technollama.co.uk/costa-rican-court-declares-the-internet-as-a-fundamental-right . Original Spanish text: 'En este contexto de la sociedad de la información o del conocimiento, se impone a los poderes públicos, en beneficio de los administrados, promover y garantizar, en forma universal, el acceso a estas nuevas tecnologías.' Sala Constitucional De La Corte Suprema De Justicia, Judgement of 30 July 2010, sentencia: 12790, expediente: 09-013141-0007-CO.

[52] J. Gibson and Gr. Caldeira, *The Legal Cultures of Europe*, Law & Society Review, Vol 30(1), 1996, pp 1-55.

[53] N.J. DeLong-Bas, *The New Social Media and the Arab Spring*, Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/Public/focus/essay0611_social_media.html .

[54] R. Stengel, *Person of the Year…*, op. cit.

[55] V.G. Cerf, *Internet Access Is Not a Human Right,* New York Times, 4 January 2012, http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html .

[56] S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge University Press, 2006, p 2.

[57] J. Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, University of California Press, 1987; cited in A. Fagen, *Human Rights*, Internet Encyclopaedia of Philosophy, http://www.iep.utm.edu/hum-rts.

[58] V.G. Cerf, *Internet Access Is Not a Human Right,* op. cit.

[59] Easterbrook argued that that there was no more a 'law of cyberspace' than there was a 'law of the horse'. The dean of the Chicago Law School once was proud that they do not offer a course in 'the law of the horse' but rather only those 'law and …' courses that 'could illuminate the entire law.' The best way to learn the law applicable to specialized endeavours is to study general rules. F.H. Easterbrook, *Cyberspace and the Law of the Horse*, University of Chicago Legal Forum, Vol 207, 1996; L. Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, Harvard Law Review, Vol 113(2), 1999.

[60] Kuner discusses pros and cons of various possibilities for a proposed international data protection framework. These deliberations are equally important for a possible right to the use of the Internet. „Each approach to harmonization has its strengths and weaknesses. A convention can produce a greater degree of harmonization, since it results in a single text that is legally binding on States that enact it, but such binding nature can make States reluctant to do so. A convention can also be subject to reservations made by States that are party to it, which can result in a diminution of the very harmonization that the convention was supposed to accomplish, and a convention can be difficult to amend in the face of changing practices or technological evolution. A model law allows States more flexibility in implementation, which may incline them to adopt it, but this very flexibility can result in a lack of harmonization in implementation. Guidance documents and contractual terms and conditions can be adopted more swiftly and be taken up by a large number of parties, but their legally binding nature is of a lesser value than that of a multilateral convention.' C. Kuner, *An international legal framework for data protection: Issues and prospects*, Computer Law & Security Review, Vol 25(4), 2009, pp 307-317; cf. also R. Leenes, B.-J. Koops and P. De Hert (eds.) *Constitutional Rights and New Technologies. A Comparative Study*, Asser Press, 2008, ch 9, p 294. Let us imagine that the *Charter of Fundamental Rights of the European Union* - the most recent instrument in the field - were drafted today. It would most likely not include an explicit right to the use of the Internet, but its Art 11 - for the sake of clarity - would include wording like 'through any media of her choice'. That would explicitly include the Internet and/or its successors.

[61] F. Francioni, *International Human Rights in an Environmental Horizon*, European Journal of International Law, Vol 21, No 1, 3 May 2010, pp 41-55.

[62] Cf. e.g. Principle 1 of the 1972 *Stockholm Declaration on the Human Environment*; Arts 16, 21 and 24 of the 1981 *African Charter on Human and People's Rights*; Art 37 of the *EU Charter of Fundamental Rights*.

[63] Cf. UN Economic and Social Council, *General Comment No. 15. The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003, E/C.12/2002/11, http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf .

[64] Centre on Housing Rights and Evictions, *The human right to water and sanitation: Legal Bases, Practical Rationale and Definition*, 2008, p 6, http://www.wsscc.org/sites/default/files/publications/cohre_legal_basis_for_right_to_water_and_sanitation_2008 .

[65] Cf. the 2006 UN *Convention on the Rights of Persons with Disabilities*, http://www.un.org/disabilities/convention/conventionfull.shtml.

[66] P. De Hert and E. Mantovani, *Specific Human Rights for Older Persons? The inevitable colouring of Human Rights Law*, European Human Rights Law Review, Issue 4, 2010, pp 398-418; E. Mordini and P. De Hert (eds.), *Ageing and Invisibility, from Ambient Intelligence and Smart Environments*, IOS PRESS, 2010; J. Williams, *An international convention on the rights of older people?* in M. Odello, S. Cavandoli (eds.), *Emerging areas of human rights in the 21st century…,* op. cit., pp 128-148. Williams explicitly asks 'if children have special protection, why not older people?'.

[67] U. Baxi, *Too many, or too few, Human Rights?*, Human Rights Law Review, Vol 1(1), 2001, pp 1-10, cf. footnote 1.

[68] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[69] Cf. P. De Hert and S. Gutwirth, *Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action*, in S. Gutwirth (ed.), *Reinventing Data Protection*, Springer, 2009, pp 3-44.

[70] J. Harris, *Enhancing Evolution. The Ethical Case for Making Better People*, Princeton University Press, 2007, p 76.

[71] UN Human Rights Committee, *General comment No. 34. Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 21 July 2011, p 4, http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

[72] Art 10(1) ECHR permits for the states to require 'the licensing of broadcasting, television or cinema enterprises'. This provision was determined in 1950s, when the convention was drafted, by two factors: the state of the art in technology (i.e. limited number of available frequencies) and the state's monopoly for broadcasting. As the technology develops, the state's right to license the media companies is now understood as a guarantee of liberty and pluralism of information in order to fulfil public demand. M. Macovei, *A guide to the implementation of Article 10 of the European Convention on Human Rights*, 2nd ed., Strasbourg, 2004, p 14, http://echr.coe.int/NR/rdonlyres/C3804E16-817B-46D5-A51F-0AC1A8E0FB8D/0/DG2ENHRHAND022004.pdf .

[73] N. Jayawickramama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2001, pp 696-697.

[74] ECtHR, *Öztürk v. Turkey*, Judgement of 28 September 1999, Application No 22479/93, § 49.

[75] P. van Dijk et al, *Theory and Practice of the European Convention on Human Rights*, 4th ed., Intersentia, 2006, p 783.

[76] ECtHR, *Factsheet - New Technologies*, May 2011, http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES_New_technologies_EN.pdf ; Council of Europe, *Internet: Case-law of the European Court of Human Rights*, June 2011, http://www.echr.coe.int/NR/rdonlyres/E3B11782-7E42-418B-AC04-A29BEDC0400F/0/RAPPORT_RECHERCHE_Internet_Freedom_Expression_EN.pdf .

[77] ECtHR, *Jersild v. Denmark*, Judgement of 23 September 1994, Application No 15890/89, § 31. The Strasbourg Court further explicitly considered the relation between the means of communication and the scope of the protection by stating that 'in considering the 'duties and responsibilities' of a journalist, the potential impact of the medium concerned is an important factor … The audiovisual media have means of conveying through images meanings which the print media are not able to impart.'

[78] ECtHR, *Oberschlick v. Austria*, Judgement of 23 May 1991, Application No 11662/85, § 57.

[79] ECtHR, *De Haes and Gijsels v. Belgium*, Judgement of 24 February 1997, Application No 19983/92, § 48.

[80] ECJ, *Scarlet v. Sabam*, Judgement of 24 November 2011, Case C-70/10.

[81] ECJ, *Sabam v. Netlog*, Judgement of 16 February 2012, Case C-360/10.

[82] ECJ, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Judgement of 29 January 2008, Case C-275/06.

[83] ECJ, *Scarlet v. Sabam*, § 44; ECJ, *Sabam v Netlog*, § 42.

[84] ECJ, *Scarlet v. Sabam*, § 52.

[85] ECJ, *Sabam v. Netlog*, § 50.

[86] O. de Schutter, *International Human Rights Law*, Cambridge University Press, 2010, pp 257ff.

[87] Ibid., p 323.

[88] Cf. Art 19(3) ICCPR, Arts 8-11 ECHR and Art 52 CFR. Legality means prescription by law of a certain quality; necessity and proportionality - proving necessary in democratic society and limiting only to what is necessary for the fulfilment of that aim; and legitimacy - serving a legitimate aim. With regard to freedom of expression, these legitimate aims are: interests of national security, territorial integrity or public safety; prevention of disorder or crime; protection of health or morals; protection of the reputation or rights of others; preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

[89] UN Human Rights Council, *Report*…, op. cit. p 8.

[90] L. Lessig and P. Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, Michigan Law Review, Vol 98(2), 1999. Cf. also Tribunal de grande instance, Paris, *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France* v *Yahoo! Inc. et Société Yahoo! France* (LICRA v. Yahoo!), 20 November 2000.

[91] 'I would argue that internet use may also fall within Article 8 ECHR, the right to family and private life, as email, Skype, Facebook and Twitter are now essential tools of interaction between friends and family.' A. Wagner, *Is internet access a human right?*, Guardian, 11 January 2012, http://www.guardian.co.uk/law/2012/jan/11/is-internet-access-a-human-right .

[92] ECJ, *Scarlet v. Sabam*, § 51.

[93] Art 29 Working Party, *Opinion 4/2007 on the concept of personal data*, 20 June 2007, WP 136, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf .

[94] ECJ, *Sabam v. Netlog*, § 49.

[95] UN Human Rights Council, *Report*…, op. cit., pp 15, 22.

[96] A. Murray, *A Bill of Rights for the Internet*, op. cit.

[97] Cf. V. Mayer-Schönberger, *Delete - The Virtue of Forgetting in the Digital Age*; P. Bernal, *A Right to Delete?*, European Journal of Law and Technology, Vol 2(2), 2011, http://ejlt.org//article/view/75/147; B.-J. Koops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis Of The 'Right To Be Forgotten' In Big Data Practice*, SCRIPTed, Vol 8(3), 2011, p 229, http://script-ed.org/?p=43. The proposed General Data Protection Regulation provides in its Art 17 for the right to be forgotten. Cf. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* , Brussels, 25 January 2012, COM(2012) 11 final.

[98] UN Human Rights Council, *Report*…, op. cit. p 21, at 81. Cf. also M. Benatar and K. Gombeer, *Cyber Sanctions: Exploring a Blind Spot in the Current Legal Debate*, European Society of International Law, Conference Paper No 9/2011, http://ssrn.com/abstract=1989786.

[99] For more details see N. Mole and C. Harby, *Human rights handbook, No. 3, The right to a fair trial. A guide to the implementation of Article 6 of the European Convention on Human Rights* , Council of Europe, 2002, http://www.humanrights.coe.int/aware/GB/publi/materials/1093.pdf.

[100] 'Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.' ECtHR, *Al-Skeini et al. the UK*, Judgemet of 7 July 2011, Application 55721/07, § 164. Cf. also further cases quoted therein.

[101] A. Segura-Serrano, *Internet Regulation*…, op. cit., p 267.

[102] UNESCO, *Report of the Experts' Meeting on Cyberspace Law* (1998), 22 February 1999, CII/USP/ECY/99/01, http://unesdoc.unesco.org/images/0011/001163/116300e.pdf.

[103] The commitment „to bridge the digital divide' is reiterated a few times in the text of the *Declaration of Principles* of the World Summit on the Information Society, WSIS-03/GENEVA/DOC/4-E, Geneva, 12 December 2003, http://www.itu.int/wsis/docs/geneva/official/dop.html. This commitment is reaffirmed, also on numerous occasions, by the *Tunis Commitment* of the WSIS, Tunis, 18 November 2005, WSIS-05/TUNIS/DOC/7-E, http://www.itu.int/wsis/docs2/tunis/off/7.html.

[104] F. Kirchmeier, *The Right to Development - Where do we stand?*, http://library.fes.de/pdf-files/iez/global/50288.pdf.

[105] UN Human Rights Council, *Report*…, op. cit., p 19.

[106] For further information on the concept of positive obligations, cf. e.g. A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, 2004.

[107] „Negative obligations require member States to refrain from action, positive to take action. The Court has repeatedly stressed that the boundaries between the two types 'do not

lend themselves to precise definition." ECtHR, *Gül v. Switzerland*, Judgement of 19 February 1996, Application No 23218/94, Dissenting Opinion of Judge Martens, at 7.

[108] J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights* , Human Rights Handbooks, No. 7, Council of Europe, 2007, p 5, http://www.echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf .

[109] E.g. Art 2 ECHR (right to life) or Art 8 ECHR (privacy). States are obliged to 'protect' and 'respect'. Art 6(3) requires the states to provide free legal assistance in criminal cases.

[110] ECtHR, '*Belgian linguistic case*', Judgement of 23 July 1968, Applications No 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64; cf. operative part, § 3.

[111] J.-F. Akandji-Kombe, *Positive obligations…,* op. cit., p 4.

[112] The case concerned a group of environmental activists who wanted to campaign in a shopping centre that was a private property yet they were banned. Having balanced Art 10 with the property rights, the Court did not find that the state failed in any positive obligation to protect the applicants' freedom of expression as they had had alternative means of communicating their views to the public. ECtHR, *Appleby et al. v. the UK*, Judgement of 6 May 2003, Application No 44306/98, § 39.

[113] ECtHR, *López Ostra v. Spain*, Judgement of 9 December 1994, Application No 16798/90, § 51.

[114] Council of Europe, *Internet: Case-law of the European Court of Human Rights*, June 2011, p 27, http://www.echr.coe.int/NR/rdonlyres/E3B11782-7E42-418B-AC04-A29BEDC0400F/0/RAPPORT_RECHERCHE_Internet_Freedom_Expression_EN.pdf .

[115] J.-F. Akandji-Kombe, *Positive obligations…,* op. cit., p 6.

[116] P. Leach, *Positive Obligations from Strasbourg - Where do the Boundaries Lie?*, p 9, http://www.londonmet.ac.uk/londonmet/library/e38476_3.pdf.

[117] The criterion underlying the distinction here appears to lie in the substance of the action expected from the state. Substantial obligations are therefore those that require the basic measures needed for full enjoyment of the rights guaranteed. Procedural ones are those that call for the organisation of domestic procedures to ensure better protection. J.-F. Akandji-Kombe, *Positive obligations…,* op. cit., p 16.

[118] ECtHR, *Jankovskis v. Lithuania*, Application No 21575/08 lodged on 7 January 2008.

[119] From a technical viewpoint, the ECtHR applies a two-step test to determine whether there is an unjustified interference with Art 10 ECHR. Firstly, the Court will verify whether there was an interference with the right. Secondly, if so, whether such interference was justified, i.e. if it fulfils these three criteria. If at least one of them is not satisfied, the Court will find a violation of the right in question has occurred. Cf. further A. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*, 3rd ed., Oxford University Press, 2006, p 20.

[120] ECtHR, *Boulois v. Luxembourg*, Application No 37575/04, Judgement (Chamber) of 14 December 2010; Judgement (Grand Chamber) of 3 April 2012.

[121] ECtHR, *Özgür Gündem v. Turkey*, Judgement of 16 March 2000, Application no. 23144/93, §§ 43-46.

[122] Baroness [Brenda] Hale of Richmond, *Beanstalk or Living Instrument? How Tall Can the ECHR Grow?*, Barnard's Inn Reading 2011,

http://www.supremecourt.gov.uk/docs/speech_110616.pdf.

[123] For a historical overview of the concept of living instrument cf. e.g. G. Letsas,*The ECHR as a Living Instrument: Its Meaning and its Legitimacy*, http://ssrn.com/abstract=2021836.

[124] ECtHR, *Golder v. the UK*. Judgement of 21 February 1975, Application No 4451/70.

[125] ECtHR, *Tyrer v. the UK*, Judgement of 25 April 1978, Application No 5856/72, § 31.

[126] ECtHR, *Airey v. Ireland*, Judgement of 9 October 1979, Application No 6289/73.

[127] J.-F. Akandji-Kombe, *Positive obligations…,* op. cit., p 6.

[128] '… ce droit implique la liberté d'accéder à ces services'. Conseil constitutionnel, Décision n° 2009-580 DC du 10 juin 2009, § 12, http://www.conseil-constitutionnel.fr/decision/2009/2009580dc.htm.

[129] T. Murphy, and G. Cuinn, *Works in Progress: New Technologies and the European Court of Human Rights*, Human Rights Law Review, Vol 10(4), 2010, pp 636-638.

[130] UN Human Rights Council, *Report*…, op. cit., p 19.

[131] Here we simply mean that a general contribution from public authorities is necessary in order to ensure the highest possible level of connectivity, regardless of whether the Strasbourg Court actually recognises such a positive obligation.

[132] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

[133] Art 4(2) of the *Universal Service Directive*.

[134] J. Huntley, N. McKerrel and S. Ashgar *Universal Service, the Internet and the Access Deficit*, SCRIPTed Vol 1(2), 2004, p 301, http://www.law.ed.ac.uk/ahrc/script-ed/issue2/broadband.asp.

[135] Cf. European Commission, *European Broadband: investing in digitally driven growth*, Brussels, 20 September 2010, COM(2010) 472, http://ec.europa.eu/information_society/activities/broadband/docs/bb_communication.pdf , BEREC, *Report on Universal Service - reflections for the future*, BoR (10) 35, June 2010, http://erg.eu.int/doc/berec/bor_10_35_US.pdf. The Commission has been publishing data on the number of broadband lines in the Member States gathered in the context of Communications Committee (COCOM) since 2003. For the 2011 report, cf. http://ec.europa.eu/information_society/digital-agenda/scoreboard/docs/pillar/cocom_broadband_july_2011.pdf .

[136] Art 70 of the *Electronic Communications Act 2004*.

[137] Art 60c(2) of the *Communications Market Act 2003*.

[138] Art 52 of the *Sustainable Economy Act 2011*.

[139] Examples include the National Broadband Plan (*Narodowy Plan Szerokopasmowy*) and the Broadband Network of Eastern Poland (*Sieć Szerokopasmowa Polski Wschodniej*).

[140] European Commission, *A Digital Agenda for Europe*, op. cit.