

Schulich School of Law, Dalhousie University

Schulich Law Scholars

Articles, Book Chapters, & Popular Press

Faculty Scholarship

2011

Internet Access Rights: A Brief History and Intellectual Origins

Jonathon Penney

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works



Part of the [Communications Law Commons](#), [Constitutional Law Commons](#), [Human Rights Law Commons](#), [International Law Commons](#), [Internet Law Commons](#), [Law and Politics Commons](#), [Legal History Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

2011

Internet Access Rights: A Brief History and Intellectual Origins

Jonathon W. Penney

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Penney, Jonathon W. (2011) "Internet Access Rights: A Brief History and Intellectual Origins," *William Mitchell Law Review*: Vol. 38: Iss. 1, Article 11.

Available at: <http://open.mitchellhamline.edu/wmlr/vol38/iss1/11>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

INTERNET ACCESS RIGHTS: A BRIEF HISTORY AND INTELLECTUAL ORIGINS

Jonathon W. Penney[†]

I. INTRODUCTION.....	11
II. INTERNET ACCESS RIGHTS: TWO THREADS OF THOUGHT.....	15
A. <i>Cyber-Libertarianism</i>	16
B. <i>The International “Right to Communicate”</i>	18
III. THE RIGHT TO SEEK, RECEIVE, AND IMPART INFORMATION....	20
A. <i>The Special Rapporteur’s Findings and Article 19(2)</i>	20
B. <i>History and Origins</i>	21
1. <i>The Free Flow of Information Paradigm</i>	21
a. <i>The Free Flow Principle and Freedom of Information as Foundational to Other Freedoms</i>	23
b. <i>The Importance of the Means of Communication—Particularly Mass Communications—to Freedom of Information, and State Obligations to Promote Them</i>	27
2. <i>The Free Flow of Information Paradigm and the Origins of the Right to Seek, Receive, and Impart Information</i>	30
3. <i>A New Competing Paradigm</i>	34
IV. READING THE REPORT IN LIGHT OF THE FREE FLOW OF INFORMATION PARADIGM	38
V. INTERNET RIGHTS: FUTURE DIRECTIONS	41

[†] Visiting Researcher and Policy Fellow, Citizen Lab, Munk School of Global Affairs, University of Toronto and Doctoral Research Fellow, Balliol College, University of Oxford. Aspects of this article are based on a working paper presented as a lecture at Victoria University (Wellington) in 2010. The author would like to thank Brian Bender for the invitation to contribute to this special edition, as well as the various *William Mitchell Law Review* editors for comments and suggestions on earlier drafts. He would also like to thank Greg Lastowka for his helpful advice in putting these ideas in print.

I. INTRODUCTION

Promoting Internet freedom and resisting legal or technological forms of control has long been a *cause célèbre* among lawyers and cyberlaw scholars.¹ On the one hand, the Internet and its related technologies, it was thought, may hold “limitless” potential for new forms of individualism, self-determination, and “social progress.”² On the other hand, it may also spur new technologies of control, censorship, and surveillance, where freedom and privacy are threatened.³ In one future there is great liberty; in another, a great threat to it.

Yet, the running assumption in both of these scenarios is that people, for good or ill, will be connected to the Internet, and in increasing numbers. Is this a sound premise today? Does not fast

1. Early “cyber-libertarian” writers like John Perry Barlow argued that “cyberspace” was beyond the control and reach of both governments and industry. See John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUND. (Feb. 8, 1996), <https://projects.eff.org/~barlow/Declaration-Final.html>, reprinted in CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS 28 (Peter Ludlow ed., 2001); JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006). Following this lead, much of early cyberlaw scholarship argued that traditional laws ought not apply to cyberspace and virtual worlds. See, e.g., David R. Johnson & David G. Post, *And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law*, in COORDINATING THE INTERNET 62, 65 (Brian Kahin & James H. Keller eds., 1997) (arguing for a decentralized system of Internet governance); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1015–25 (1994) (advocating self-help, custom, and contract to regulate cyberspace); David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1387–91 (1996) (noting possibilities of internal regulation of the Internet through competing rule sets); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 419 (1997) (contending that as a general rule “self-governance is desirable for electronic communities”); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 912–17 (1996) (arguing that attempts to define rules for the development of cyberspace “rely on disintegrating concepts of territory and sector, while ignoring the new network and technological borders that transcend national boundaries”); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 555 (1998) (arguing for a “Lex Informatica,” which would regulate cyberspace through technological devices); Symposium, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 161 (1996) (arguing for metaphor of cyberspace as separate space).

2. See, e.g., ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW xi (1999).

3. *Id.*

and stable Internet connectivity remain a privilege for wealthy citizens living in wealthy states? And what if governments around the world take measures to block connectivity in a bid to suppress the destabilizing effects that the Internet, and the ideas it can quickly disseminate, can have on social or political order? This is not merely academic. If there is anything we have learned from recent protest movements, including the so-called “Arab Spring,” and heavy-handed government efforts to block, censor, suspend, and manipulate connectivity, it is that Internet access is anything but certain, especially when governments feel threatened.⁴

Despite these cold realities and hard truths about connectivity, the notion that people have a “right” to Internet access gained high-profile international recognition this year. In a report to the United Nations (U.N.) General Assembly earlier this year (the Report), the U.N. Special Rapporteur on Freedom of Expression, Frank La Rue, held that Internet access should be recognized as a human right.⁵ The finding garnered much international attention and acclaim.⁶ But at the same time, there has yet been very little

4. See, e.g., Joel R. Reidenberg, *States and Internet Enforcement*, 1 U. OTTAWA L. & TECH. J. 213, 223 (2003) (“States cannot ignore, and are likely to pursue, additional means of enforcement through intermediaries or proxies. Various points in the network infrastructure serve as gateways that in effect re-centralize access to the Internet. These gateways might be access providers, hosting services, or major switching hubs that are located within the jurisdiction of the interested state. The existence of these gateway points in an otherwise decentralized network entices states to focus efforts and find enforcement mechanisms that operate through the intermediaries at these points.”); Sahar Khamis & Katherine Vaughn, *Cyberactivism in the Egyptian Revolution: How Civic Engagement and Citizen Journalism Tilted the Balance*, ARAB MEDIA & SOC’Y, Summer 2011, available at http://www.arabmediasociety.org/articles/downloads/20110603105609_Khamis.pdf (describing former Egyptian President Hosni Mubarak’s effort to quell protesters by shutting down the Internet for nearly a week); Jillian C. York, *Policing Content in the Quasi-Public Sphere*, OPENNET INITIATIVE BULL., 4–5 (2010), <http://opennet.net/sites/opennet.net/files/PolicingContent.pdf> (citing Internet surveillance and censorship in such countries as China and Iran).

5. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur on Key Trends and Challenges to the Right of all Individuals to Seek, Receive and Impart Information and Ideas of All Kinds Through the Internet*, Human Rights Council, U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter Special Rapporteur] (by Frank La Rue).

6. See, e.g., *At the Crossroads of Globalization: Access to the Internet is Now a Human Right*, THE MAJALLA (June 9, 2011), <http://www.majalla.com/eng/2011/06/article3548>; Matthew Davis, *Internet Access a Human Right?*, JAKARTA GLOBE (July 12, 2011), <http://www.thejakartaglobe.com/bytethis/internet-access-a-human-right/452356>; *The Current: Internet Access as a Human Right*, CBCRADIO (June 9, 2011), <http://www.cbc.ca/thecurrent/episode/2011/06/09/internet-access-as-a-human-right>; *Internet as a Human Right: Not Just a Wishful Thinking*, TFM&A INDIA

systematic study of the Report, and the ideas about rights set out therein. This article aims to change this.

After all, this clear international recognition for Internet rights by a report tabled before the U.N. General Assembly raises some important questions. Where did these ideas arise from? Did they arise as a product of the technological changes of the times, or is there a broader evolution of ideas that might give some sense of their future direction? Comprehensive answers to these questions would take us far beyond the scope of this article; I will, nevertheless, aim to at least provide the first steps, or a foundation, for proper answers. Taking the Report as my focus, I trace the history and intellectual origins behind the Report's key findings on Internet access rights, linking the notion of Internet rights to a broader international and political context of evolving ideas about expression, information, and communication. This context will, I hope, tell us something not just about where these ideas came from, but their future movement too.

Indeed, the Report was not the first legal or institutional recognition of such ideas. In fact, ideas about "rights" to Internet access have slowly gained momentum around the world in recent years.⁷ In May 2009, the French parliament passed a new online

(June 10, 2011), <http://tfmaindia.com/internet-as-a-human-right-not-just-a-wishful-thinking>; Robin Hicks, *Should Internet Access Be a Basic Human Right?*, ASIA PAC. FUTUREGOV (July 6, 2011), <http://www.futuregov.asia/articles/2010/jul/06/should-internet-access-be-basic-human-right>; David Kravets, *U.N. Report Declares Internet Access a Human Right*, WIRED (June 3, 2011, 2:47 PM), <http://www.wired.com/threatlevel/2011/06/internet-a-human-right>; Dave Lee, *Should Internet Users Ever Be Cut Off?*, BBC (June 11, 2011, 01:39 UK), http://news.bbc.co.uk/2/hi/programmes/click_online/9509215.stm; Nathan Olivarez-Giles, *United Nations Report: Internet Access is a Human Right*, LOS ANGELES TIMES TECH. BLOG (June 3, 2011, 6:42 PM), <http://latimesblogs.latimes.com/technology/2011/06/united-nations-report-internet-access-is-a-human-right.html>; Nidhi Subbaraman, *UN Report: Internet Access is a Basic Human Right*, TECHNOLOG ON MSNBC.COM (June 3, 2011, 6:40 PM), http://technolog.msnbc.msn.com/_news/2011/06/03/6781285-un-report-internet-access-is-a-basic-human-right; *United Nations: Disconnecting People from the Internet Is a Violation of Human Rights*, AUSTRALIANPOLICYONLINE (June 15, 2011), <http://www.apo.org.au/research/united-nations-disconnecting-people-internet-violation-human-rights>; *United Nations: Internet Access Is a Human Right*, DUBAI CHRONICLE (June 7, 2011), <http://www.dubaichronicle.com/2011/06/07/united-nations-internet-access-is-a-human-right>; *United Nations report: Internet Access Is a Human Right*, ETHIOPIAN REV. (June 3, 2011, 9:42 PM), <http://www.ethiopianreview.com/index/2011/415708>; *UN Names Internet Access 'Basic Human Right'*, VOICE OF RUSSIA (June 7, 2011, 10:55 Moscow Time), <http://english.ruvr.ru/2011/06/07/51381532.html>.

7. And, past scholarship has, elsewhere, discussed the Internet in the context of human rights. See generally HUMAN RIGHTS AND THE INTERNET (Steven

copyright infringement law known as HADOPI, which gave power to a government agency to cut off people's Internet access for repeated copyright infringement.⁸ A month later, the country's Conseil Constitutionnel, or national constitutional court, found this power to cut off Internet connectivity an unconstitutional restriction on citizens' right to "freedom of expression and communication."⁹ In October 2009, the Finnish government passed a law making it a "right" not only for its citizens to have Internet access, but that the service provided by telecommunications companies must offer connectivity speeds of at least one megabit-per-second (Mbps).¹⁰ And in New Zealand, back in 2008, Internet access was likened to a basic human right by key government officials.¹¹

These instances may suggest a broader trend, but might also be seen as simply a handful of countries experimenting with different notions of Internet rights. Indeed, among these examples, there was no clear recognition for such ideas from a high level international body or high profile official. None, that is, until the Report, the focus of this article.

My discussion is divided into several sections. In section II, I provide some preliminary thoughts on some threads of intellectual thought that likely influenced the ideas in the Report. In section III, I turn my focus to the history and intellectual origins of the

Hick et al. eds., 2000). But often these works take a more conservative approach, avoiding the claim that Internet access should be conceived as a fundamental right. See Michael L. Best, *Can the Internet Be a Human Right?*, 4 HUM. RTS. & HUM. WELFARE 23, 24 (2004).

8. *French Online Copyright Infringement Law Faces Challenges but May Create Business Opportunities*, TELECOMM., MEDIA & ENT. UPDATE (Hogan & Hartson LLP, D.C.), 1 (May 21, 2009), available at http://www.hoganlovells.com/files/Publication/b3773467-7d3c-4d28-8546-be4e4952fba9/Presentation/PublicationAttachment/51918c8f-410b-4d7c-89c1-c40a85947978/TME_May2109.pdf.

9. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, J.O. 9675 (Fr.), translated in *Act Furthering the Diffusion and Protection of Creation on the Internet*, Décision n° 2009-580, 4 (June 10, 2009), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm_anglais/2009_580dc.pdf.

10. Saeed Ahmed, *Fast Internet Access Becomes a Legal Right in Finland*, CNN (October 15, 2009), <http://edition.cnn.com/2009/TECH/10/15/finland.internet.rights/index.html>.

11. Judith Tizard, the former Minister of Justice in New Zealand, suggested Internet connectivity was a basic human right. *Government Wavers on Web Cut-offs*, STUFF.CO.NZ, <http://www.stuff.co.nz/technology/it-telcos/644613> ("Judith is of the mind that Internet access is almost a human right now, similar to water and electricity.") (last updated Sept. 25, 2008).

right to “seek, receive, and impart information,” which constitutes the central basis for the Report. After setting out that history, I read the Report in light of this history in section IV and briefly set out some directions forward in section V. For greater clarity before moving on, when I say “Internet,” I mean the global system of public and private “electronics, computers, and communication networks” all connected and linked via the same basic architecture, the Internet’s TCP/IP protocol.¹² My use is largely consistent with popular understandings of the term, but will range from more popular components of the Internet, like the World Wide Web, to those components, or services, growing in popularity, like cloud-computing.

II. INTERNET ACCESS RIGHTS: TWO THREADS OF THOUGHT

What does a “right” to Internet access mean? Presumably, this means someone has the right to connect to the Internet without any kind of state interference with that right of access. But this simple explanation masks more complex issues, like whether such a right is not only *negative*, that is, it protects against government intrusion, but also imposes *positive* obligations on a state or government to provide Internet access, or a certain kind of access. The Special Rapporteur examined Internet access rights in both senses, not only talking about people’s freedom to access Internet content,¹³ but also state obligations to provide access to the physical infrastructure necessary for Internet connectivity.¹⁴ Though, the Report (and I will say more on this later) spends much more time on the former notion of Internet access rights, setting out ways that states are restricting access to the Internet, and its content, including filtering, censoring, criminalization of expression, intermediary liability, and cyber-attacks.¹⁵

These two aspects of Internet rights, their negative and positive components, have many different intellectual origins, not the least of which is political philosophy and rights theory more generally.¹⁶

12. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1195 (1998).

13. Special Rapporteur, *supra* note 5, at 9–16.

14. *Id.* at 16–19.

15. The Report recommendations demonstrate this too, providing several more recommendations on the former, compared to the latter. *See id.* at 19–22.

16. Twentieth century political philosopher Isaiah Berlin famously distinguished between the “negative” and “positive” notions of liberty in the history of political philosophy and rights theory. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 121 (1969).

But there are also more current threads of thought, tied more closely to Internet scholarship that should be examined to understand the broader findings of the Report. I examine them next.

Modern notions of a right to Internet access owe themselves to two more recent threads of intellectual thought: cyber-libertarianism and the “right to communicate.” This section discusses both of these in some detail.

A. *Cyber-Libertarianism*

Freedom, liberty, and the uniqueness of “cyberspace” were heralded by the first generation of the Internet’s thinkers, writers, and intellectuals—the cyber-libertarians and “information-age luminaries” like John Parry Barlow, Alvin Toffler, George Gilder, and Esther Dyson, whose thinking helped forge the early intellectual foundations for theorizing the Internet experience.¹⁷ These ideals and ideas were, says Lawrence Lessig, the “founding values of the Net.”¹⁸

These “founding values” received much attention from tech writers and cyberlaw scholars in the 1990s. In his famous *A Declaration of the Independence of Cyberspace*, Barlow proclaimed that he spoke with “no greater authority than that with which liberty itself always speaks.”¹⁹ Lessig’s influential *Code as Law* explained that the “challenge for our generation” is to “protect liberty” in cyberspace in the face of “architectures of control.”²⁰ And Yochai Benkler’s similarly popular *The Wealth of Networks* explores concepts of human freedom.²¹ First generation cyberlaw scholarship, influenced by these ideas, thus offered innovative ways to preserve liberty, self-government, and autonomy in cyberspace from coercion.²²

Given the uniqueness and importance these thinkers

17. NICK DYER-WITHEFORD, CYBER-MARX: CYCLES AND CIRCUITS OF STRUGGLE IN HIGH-TECHNOLOGY CAPITALISM 34 (1999); FRED TURNER, FROM COUNTERCULTURE TO CYBERCULTURE: STEWART BRAND, THE WHOLE EARTH NETWORK, AND THE RISE OF DIGITAL UTOPIANISM 261 (2006).

18. Lawrence Lessig, quoted in Wen Stephenson, *The Values of Code (and Code): An Email Exchange with Lawrence Lessig*, THE ATLANTIC ONLINE (Dec. 13, 1999), <http://www.theatlantic.com/past/docs/unbound/digicult/lessig.htm>.

19. Barlow, *supra* note 1, at 28.

20. LAWRENCE LESSIG, CODE VERSION 2.0 xv (2006).

21. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

22. See sources cited *supra* note 1.

attributed to the “cyberspace” experience and the new possibilities offered by the Internet, it is not surprising that one of the first modern expressions of a “right” or “freedom” of Internet connectivity emerged within this 1990s intellectual paradigm. In a 1997 piece entitled “Freedom to Connect” published in *Wired Magazine*, Leila Conners wrote that “[a]n essential component of the emerging global culture is the ability and freedom to connect—to anyone, anytime, anywhere, for anything.”²³

Before going further into the substance of Conners’s piece, it is worthwhile noting a few things about the place of publication. *Wired Magazine* was very influential in the 1990s among those interested in the Internet and related communication technology; it was the “Bible of Cyberspace.”²⁴ The magazine, for example, described itself as a “journal of record for the future” that “speaks not just to high-tech professionals and the business savvy, but also to the forward-looking, the culturally astute, and the simply curious.”²⁵

So, *Wired Magazine* was not just a mouthpiece for the cyber-libertarian writers—that would be an oversimplification; the magazine, after all, aimed to speak to more than just the information technology community, but also broad social and political events.²⁶ Still, *Wired Magazine*’s editorial line generally followed the same optimism about technology and the “new forms of social interaction and community” that the Internet offered.²⁷ That an article heralding a “right” or “freedom” to connect to the Internet appeared in its pages, then, is consistent with the broader intellectual currents in which *Wired* was situated, particularly throughout the 1990s.

Conners, though having a background in international politics and policy, was also familiar with the potential of media and technology.²⁸ A year before publishing her piece, she founded a multimedia group called Tree Media, which “creates” media to “support and sustain civil society.”²⁹ Her piece, interestingly,

23. Leila Conners, *Freedom to Connect*, WIRED MAGAZINE, Aug. 1997, at 106.

24. SHEILA STEINBERG, AN INTRODUCTION TO COMMUNICATION STUDIES 280 (2007).

25. *Wired* description as reprinted in DAVID BELL ET AL., CYBERCULTURE: THE KEY CONCEPTS 191 (2004).

26. *Id.*

27. *Id.*

28. *About Leila Conners*, TREE MEDIA GROUP, <http://www.treemedia.com/treemedia.com/Leila.html> (last visited Sept. 6, 2011).

29. *Id.*

combined a kind of internationalism with optimism about technology and the Internet. It heralded a “freedom to connect” not as a right in the period in which she was writing, but that might be recognized and affirmed in the future:

Someday this freedom may be seen as a basic human right, very closely aligned with the right of free speech. But while the freedom to connect is fairly widespread today, its foundations are shaky. As more nations grapple with the politics of connectivity, the liberty to log on may diminish.³⁰

Along with her discussion, Connors included a two page map of the world, which indicated the level of Internet censorship and regulation across different countries.³¹

Interestingly, Connors offers no thoughts on the obligation of states to provide Internet access. Instead, she speaks of it as a “basic human right” and connects it to free speech, saying the two ideas are closely related.³² She also brings an internationalist perspective, emphasizing the need to be vigilant about guarding these things not just in the United States, but also elsewhere in the world.³³ All of these ideas follow the cyber-libertarian line: emphasizing liberty and the need to prevent states from regulating and interfering with the Internet. Many of these themes, as we shall see later, are apparent in more contemporary conceptions of the Internet as a basic right or freedom.

B. The International “Right to Communicate”

A second line of thought relevant to the intellectual origins of modern ideas of Internet access rights is one Connors may have also drawn on, given her background in international politics and policy. That is, the movement, also in the 1980s and early 1990s, was for international recognition of a “right to communicate.”

Though the idea of a “right to communicate” was articulated as early as 1969 by the late U.N. official Jean d’Arcy (who believed the Universal Declaration of Human Rights (UDHR) would one day recognize such a right), it did not gain momentum until the mid-1980s among certain international institutions like U.N. Educational, Scientific, and Cultural Organization, or UNESCO.³⁴

30. Connors, *supra* note 23, at 106.

31. *Id.* at 106–107.

32. *Id.* at 106.

33. *Id.*

34. CEES J. HAMELINK, *THE POLITICS OF WORLD COMMUNICATIONS: A HUMAN*

In 1980, UNESCO brought the idea of a “right to communicate” to the international stage when its General Conference in Belgrade passed a resolution recognizing it as a “right of the public, of ethnic and social groups and of individuals to have access to information sources and to participate actively in the communication process.”³⁵ UNESCO also recognized the idea in subsequent resolutions in 1981 and 1983, and in 1985 UNESCO consultants prepared a “status report” on the right.³⁶

However, by the early 1990s, international interest in the idea began to wane. UNESCO showed less inclination to promote the idea in subsequent meetings.³⁷ And subsequent efforts by other international organizations and officials to take up the cause had little success.³⁸ The movement to codify communication rights internationally ultimately failed to gain traction for a number of reasons, not the least of which was that the rights, so expressed and advocated by these institutions, implied a kind of international obligation to provide a means for people to communicate that states in either the First or Third Worlds had neither the resources nor will to support or subsidize.³⁹

However, the notion of a “right to communicate” is clearly relevant to more recent Internet access rights claims, given the latter’s centrality in modern forms of interaction and global communication. Indeed, such claims for communication rights cleared the path for early insistence on the importance of access to the Internet and other information and communications technology (ICT), like the “Declaration of Principles” issued at the 2003 World Summit on the Information Society (WSIS), a summit convened by the U.N. Secretary General.⁴⁰ In addition to affirming that “[c]ommunication is a fundamental social process,” the Declaration also proclaimed a “commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information

RIGHTS PERSPECTIVE 293–98 (1994).

35. UNESCO Res. 4/19, Recs. of the General Conference, 21st Sess., Vol. 1, Sept. 23–Oct. 28, 1980 at 69, <http://unesdoc.unesco.org/images/0011/001140/114029e.pdf>; HAMELINK, *supra* note 34, at 297.

36. HAMELINK, *supra* note 34, at 297.

37. *Id.* at 298.

38. *Id.* at 297–300.

39. Karol Jakubowicz, *The Right to Public Expression: A Modest Proposal for an Important Human Right*, MEDIAPOLICY.ORG, 4–5 (2010), <http://mediapolicy.org/wp-content/uploads/right-to-freedom-of-expression1.pdf>.

40. Best, *supra* note 7, at 24.

and knowledge.”⁴¹ Insisting on the social, cultural, and economic importance of ICT access is only a degree removed from insisting on Internet access as a “right” for similar reasons. Thus, the WSIS has today become a forum for groups like the Association of Progressive Communications, who go beyond the 2003 principles in advocating for universal Internet access.⁴²

The “right to communicate” also attempted to build on earlier entrenched international recognition for both free expression and freedom of information.⁴³ But it was largely unsuccessful in gaining any lasting traction in the world community, so it thus offers a lesson of caution for Internet rights advocates.⁴⁴ But, as the next section will show, the failure of the communication rights movement is not the end of the story for Internet access rights.

III. THE RIGHT TO SEEK, RECEIVE, AND IMPART INFORMATION

Having given some preliminary background, both intellectual and legal-historical, for ideas about Internet access rights, I want to focus more specifically on the Special Rapporteur’s central legal foundation for his conception: the right to “seek, receive and impart information.”⁴⁵

A. *The Special Rapporteur’s Findings and Article 19(2)*

Indeed, in the Report’s summary this right is mentioned in the very first line and given importance first and foremost in relation to the Internet.⁴⁶ It is mentioned several times throughout the document and, again, at the very outset of the Report’s recommendations.⁴⁷ The source that the Special Rapporteur cites

41. World Summit on the Information Society: Geneva Declaration of Principles, ITU (Dec. 10–12, 2003), <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

42. APC... *on Internet Governance*, ASS’N FOR PROGRESSIVE COMM., <http://www.apc.org/en/blog/apc-internet-governance> (speaking of APC’s advocacy at the WSIS, and affirming its commitment to “[e]nsuring internet access is universal and affordable”) (last visited Sept. 10, 2011).

43. Jakubowicz, *supra* note 39, at 4 (discussing how the “right to communicate” movement failed because its advocates failed to offer a means by which states could turn the right to freedom of expression into a “positive” right that would impose obligations on states to “give them the tools of public expression”).

44. *Id.* at 2, 4.

45. Special Rapporteur, *supra* note 5, at 1.

46. *Id.*

47. *Id.* at 1, 4, 7, 10, 19.

for this right is Article 19(2) of the International Covenant on Civil Political Rights (ICCPR): “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁴⁸

So, understanding the Report’s finding concerning Internet access rights, which is based on the “right to seek, receive and impart information and ideas,”⁴⁹ requires understanding the legal and historical context underlying the language of the right, which is drawn from Article 19(2) of the ICCPR. In other words, the history and origins of the former are no doubt informed by those of the latter.

In this section, I trace the origins and history of this language, which basically codifies a broader international legal paradigm concerning freedom of information and expression: the Free Flow of Information Paradigm. The origins of the Free Flow of Information Paradigm in international law and politics go back to at least the Second World War, when the movement to adopt international covenants and bills of rights gained momentum.⁵⁰ The right to “seek, receive and impart information,” codified in the UDHR and ICCPR and re-invoked in the Report, emerged from within this paradigm. I set out this history in the next section.

B. *History and Origins*

1. *The Free Flow of Information Paradigm*

Freedom of information and expression “figured prominently” in Post-War efforts to draft international covenants and bills of rights.⁵¹ This was due in large part to American influence and its

48. International Covenant on Civil and Political Rights art. 19(2), Dec. 19, 1966, 999 U.N.T.S. 171.

49. Special Rapporteur, *supra* note 5, at 1, 4.

50. HAMELINK, *supra* note 34, at 152.

51. *Id.*; see also *id.* at 153 (describing subsequent treaties and efforts aimed at freedom of information); K. Venkata Raman, *Towards a New World Information and Communication Order: Problems of Access and Cultural Development*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY* 1027, 1035–36 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983); PHILIP M. TAYLOR, *GLOBAL COMMUNICATIONS, INTERNATIONAL AFFAIRS AND THE MEDIA SINCE 1945*, at 30–31 (1997); Muhammad I. Ayish, *International Communication in the 1990s: Implications for the Third World*, 68 INT’L AFF. 487, 490 (1992); Fred H. Cate, *The First Amendment and the “Free Flow” of Information*, 30 VA. J. INT’L L. 371, 373–74 (1990); Marian Koren, *Human Rights of Children: Their Right to Information*, 2 HUM. RTS. REV.

allies in the West.⁵² Spurred on by the U.S. Congress and the First Amendment values of the growing American media—that a free press and free exchange in the “marketplace of ideas” was essential to determining truth and preserving other fundamental rights—freedom of information became a key element of U.S. foreign policy in the 1940s and 1950s.⁵³ Of course, media and newsgathering was essential to this project, given its role in transmitting information and ideas around the world.⁵⁴ Indeed, newspapers and other media groups also promoted these ideas abroad.⁵⁵ For example, as early as 1945, the American Society of Newspaper Editors travelled to various countries to promote the “unrestricted” free exchange of ideas and information around the world, which it called the “free flow doctrine.”⁵⁶

But this new international focus on freedom of information was not just a product of American influence; it also had to do with the difficult challenges facing the world community in the Post-War period. Two central issues for a world community that was war-weary and longing for peace and stability were war propaganda and state censorship.⁵⁷ War propaganda was used extensively in the First World War and that use only intensified in the Second World War with the rise of mass media, particularly propaganda via shortwave radio.⁵⁸ And as governments used propaganda on their own citizens to ensure national support for war efforts and on foreign countries for psychological warfare, they also took steps to censor both national and foreign media—radio frequency “jamming” of international broadcasts was used by many countries during the war.⁵⁹ If the Post-War world community was serious about keeping, preserving, and promoting peace, they would have to do something to address these problems.

The consensus solution, successfully promoted internationally by the United States and its Western allies at the U.N. and its newly created agencies, was to promote the free and unrestricted flow of

54, 60–61 (2001).

52. HAMELINK, *supra* note 34, at 153.

53. *Id.* at 153–54; Ayish, *supra* note 51, at 490; Cate, *supra* note 51, at 373–74; Koren, *supra* note 51, at 54.

54. HAMELINK, *supra* note 34, at 152.

55. *Id.* at 152–53.

56. *Id.* at 152.

57. *Id.* at 136, 151; Raman, *supra* note 51, at 1035.

58. HAMELINK, *supra* note 34, at 137.

59. *Id.*

information and ideas globally.⁶⁰ The idea was that guaranteeing this would address both issues at once: opposing media restrictions and state censorship would also resolve the problem of war propaganda, as the diversity of expression, ideas, and opinions ensured by the flow of information across borders would render propaganda ineffective.⁶¹

The consensus that a “free flow” of ideas would best battle war propaganda and censorship reflected this broader Post-War Free Flow of Information Paradigm, which emphasized the unrestricted international flow of information and expression.⁶² In this paradigm of international law and politics, freedom of information was promoted not simply as a means to fight war propaganda and censorship, but as a foundational right in and of itself, linked to other important rights, freedoms, and interests, like free expression, progress, and peace.⁶³

a. The Free Flow Principle and Freedom of Information as Foundational to Other Freedoms

There were a few ideas or principles important to this Paradigm. The first was the idea that freedom of information was a foundational freedom and essential to promoting other important rights, interests, and freedoms, like free expression, progress, and peace.⁶⁴ The second key idea was the “Free Flow” principle,⁶⁵ which followed logically from the first principle. The Free Flow principle mandated that the free and unrestricted flow of information across borders and around the world should be maximized.⁶⁶ Both of

60. *Id.* at 153; Altaf Gauhar, *Free Flow of Information: Myths and Shibboleths*, 1 THIRD WORLD Q. 53, 55 (1979).

61. See John B. Whitton, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT’L L. 73, 74 (1949) (describing attending the Conference).

62. HAMELINK, *supra* note 34, at 153; see also Jan Servaes, *Communication and Development Paradigms: An Overview*, in COMMUNICATION FOR SOCIAL CHANGE ANTHOLOGY: HISTORICAL AND CONTEMPORARY READINGS 283, 286–87 (Alfonso Gumucio-Dagron & Thomas Tufte eds., 2006) (discussing the infusion of western ideals regarding freedom of information into the Post-War Freedom of Information Paradigm); Cate, *supra* note 51, at 373–74. See generally ACHAL MEHRA, FREE FLOW OF INFORMATION: A NEW PARADIGM (Greenwood Press, Inc. 1986) (describing the history and barriers of the international free flow of information).

63. Koren, *supra* note 51, at 54–55.

64. *Id.*

65. I borrow this nomenclature from Herbert I. Schiller. See Herbert I. Schiller, *The Genesis of the Free Flow of Information Principle*, in CRISIS IN INTERNATIONAL NEWS 161 (Jim Richstad & Michael H. Anderson eds., 1981).

66. Koren, *supra* note 51, at 54, 60.

these ideas or principles are apparent in Resolution 59(I), the U.N.'s first declaration on Freedom of Information, which was adopted unanimously by the U.N. General Assembly in its very first session in 1946:

Freedom of information is a fundamental human right and is the touchstone of all freedoms to which the United Nations is consecrated;

Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world⁶⁷

Freedom of information is so foundational, the Resolution declared that it touched *all* fundamental freedoms recognized by the U.N.⁶⁸ And, following from this, freedom of information must be guaranteed, including the “right” to “gather,” “transmit,” and “publish” news “anywhere” freely and “without fetters.”⁶⁹

In order to follow up on these declarations, that same resolution also announced an intention “to authorize the holding of a conference of all Members of the United Nations on freedom of information.”⁷⁰

These two principles were also apparent in UNESCO's founding constitution of 1945. UNESCO was founded as the U.N.'s “principal arm” to carry out the aims of security and peace in the U.N. Charter,⁷¹ and its constitution states:

[Signatory states] believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purpose of mutual understanding and a truer and more perfect knowledge of each other's lives.⁷²

Again, freedom of information and the “free exchange of ideas and

67. Declaration on Freedom of Information, G.A. Res. 59 (I), U.N. Doc. A/RES/59/1 (Dec. 14, 1946); HAMELINK, *supra* note 34, at 153; TAYLOR, *supra* note 51, at 30–31.

68. Declaration on Freedom of Information, *supra* note 67.

69. *Id.*

70. EDWARD H. LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS 536 (Mary Lou Bertucci et al. eds., 2d ed. 1996).

71. TAYLOR, *supra* note 51, at 30–31.

72. UNESCO'S CONSTITUTION (1945), *reprinted in* TAYLOR, *supra* note 51, at 30–31 (alteration in original).

knowledge” are to be promoted as they are linked to other fundamental goals and interests including “objective truth” and “mutual understanding.”⁷³ Following its constitution, a special section was created in UNESCO’s Mass Communication Division to deal with the “free flow of information.”⁷⁴

Subsequently, two international agreements were concluded under the “auspices” of UNESCO, which promote international circulation of cultural, scientific, and educational materials.⁷⁵ These included the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, signed December 10, 1948; and the Agreement on the Importation of Educational, Scientific and Cultural Materials, Lake Success, signed November 22, 1950.⁷⁶ Again, each agreement promotes the freer flow of information and cultural materials.

These ideas appear again and again. Pursuant to the 1946 U.N. General Assembly Resolution noted above, the U.N. Conference on Freedom of Information (the Conference) was convened in Geneva in 1948 by the U.N. Economic and Social Council.⁷⁷ Fifty-four countries participated in the Conference.⁷⁸ The “major objective” of the Conference, reflected in Resolution 59(I), was “the improvement in the means of sending information across frontiers in accordance with the view, solemnly affirmed by the Conference, that freedom of information is a fundamental human right”⁷⁹

The Conference issued a number of resolutions and authored three draft conventions on freedom of information.⁸⁰ The very first

73. *Id.*

74. Gauhar, *supra* note 60, at 55.

75. Egon Schwelb, *International Conventions on Human Rights*, 9 INT’L & COMP. L.Q. 654, 662 n.24 (1960) (“The Agreement of 1948 is in force among 14 States. It has been signed, but not ratified, by eight. The Agreement of 1950 is in force among 33 States. It has been signed, but not ratified, by 9.”).

76. *Id.*

77. LAWSON, *supra* note 70, at 536.

78. U.N. Conference on Freedom of Information, Mar. 23–Apr. 21, 1948, *Final Act of the United Nations Conference on Freedom of Information*, U.N. Doc. E/CONF.6/79, App. I [hereinafter U.N. Conference on Freedom of Information] (listing the delegations attending); HAMELINK, *supra* note 34, at 153. See Zechariah Chafee Jr., *Legal Problems of Freedom of Information in the United States*, 14 LAW & CONTEMP. PROBS. 545, 547 (1949) (describing the sessions in the Sub-Commission and at the Conference).

79. As described by John B. Whitton, who attended the Conference. See Whitton, *supra* note 61, at 73 (internal quotation marks omitted).

80. U.N. Conference on Freedom of Information, *supra* note 78, at Annex C,

resolution issued, Resolution No. 1, affirmed the following General Principles:

Freedom of information is a fundamental human right of the people, and is the touchstone of all freedoms to which the United Nations is dedicated, without which world peace cannot well be preserved; and

Freedom of information carries the right to gather, transmit, and disseminate news anywhere and everywhere without fetters; and

Freedom of information depends for its validity upon the availability to the people of a diversity of sources of news and of opinion; and

Freedom of information further depends upon the willingness of the press and other agencies of information to employ the privileges derived from the people without abuse, and to accept and comply with the obligations to seek the facts without prejudice⁸¹ and to spread knowledge without malicious intent

It was also at the Conference that freedom of information was linked more clearly to freedom of expression and opinion,⁸² which was a logical connection given that press freedom and the free exchange of ideas requires free expression as much as a free flow of information, expression, and ideas. Thus, the draft Convention on Freedom of Information issued by the Conference's *Final Act*, declared "that the free interchange of information *and opinions*, both in the national and in the international sphere, is a fundamental human right";⁸³ Conference Resolution No. 28 hailed "free interchange of information *and opinions* promotes the welfare of all nations and is indispensable to the peace of the world";⁸⁴ and Resolution No. 26, which dealt with "Measures Concerning the Free Publication and Reception of Information" recommended:

[T]hat States should from time to time review their laws of libel, taking into consideration the general conclusions of this Conference, in order to remove anomalies, and to secure to all persons the maximum freedom of expression

ch. I, Res. No. 1–6; HAMELINK, *supra* note 34, at 154.

81. U.N. Conference on Freedom of Information, *supra* note 78, at Annex C, ch. I, Res. No. 1.

82. *Id.* at Annex A, Draft Convention on Freedom of Information ("[T]he free interchange of information and opinions, both in the national and in the international sphere, is a fundamental human right . . .").

83. *Id.* (emphasis added).

84. *Id.* at Annex C, ch. III, Res. No. 28.

compatible with the maintenance of order and with due regard to the rights of others⁸⁵

And, returning to the free flow principle—which embodies the importance of freedom of information and expression—Resolution No. 2, which concerned the challenge of war propaganda, affirmed:

Whereas the attainment of a just and lasting peace depends in great degree upon the free flow of true and honest information to all peoples and upon the spirit of responsibility with which all personnel of the press and other agencies of information seek the truth and report the facts⁸⁶

These principles reflected the ideas of the U.N.’s General Assembly Resolution 59(I): emphasizing, again, how freedom of information is connected to other important “freedoms,” and the resolve to promote the unrestricted dissemination of information.⁸⁷

*b. The Importance of the Means of Communication—
Particularly Mass Communications—to Freedom of Information,
and State Obligations to Promote Them*

However, there is another recurring idea or principle of the Free Flow of Information Paradigm that is implied or is apparent in this resolution, and other documents, resolutions, and conventions of the period. That is, the importance of the *means* by which information and communications are transmitted; that is, the importance of information mediums—particularly those providing mass communications—to freedom of information, and with this, certain positive obligations states might have to promote the freedom and accessibility of such media. This is seen in the earlier Resolution 59(I), which implies the importance of media and mediums of information, when it spoke of the “right” to “gather, transmit, and publish news anywhere and everywhere without fetters.”⁸⁸ Publication or transmission of news and information “anywhere and everywhere” is a function of the mediums of information (in this case, mass communications)—there must be some medium through which to transmit, and publish material and news all over the world.

This same emphasis on the availability and importance of mass

85. *Id.* at Annex C, ch. III, Res. No. 26.

86. *Id.* at Annex C, ch. I, Res. No. 2.

87. *See* Declaration on Freedom of Information, *supra* note 67.

88. *Id.* ¶ 2.

communications media is apparent in the Conference Resolution No. 1, cited just above, discussing the importance of the “Press” and “other agencies of information” upon which “freedom of information” is dependent.⁸⁹ It is also implied in the affirmation that freedom of information “depends” on the “availability to the people of a diversity of sources of news and of opinion.”⁹⁰ Mediums of information that can reach a broad, even global, audience are essential to freedom of information.

Given the importance of communications mediums that transmit news and information, it is not surprising that several resolutions and conventions issued by the Conference implied or explicitly required an obligation for states to ensure the freedom of mass communications media, and, in some cases, take steps to ensure citizens have access to mass media technology.⁹¹ Indeed, the U.N. Conference on Freedom of Information set down some of the first “normative standards for the mass media” in its various resolutions.⁹²

The Conference, for example, completed a draft Convention on the Gathering and International Transmission of News, which affirmed that “Contracting States” desired to “implement the right of their people to be fully informed” and “improve understanding between their peoples through the free flow of information and opinion.”⁹³ Resolution No. 1, already noted and affirmed, among other things:

That the right of news personnel to have the widest possible access to the sources of information, to travel unhampered in pursuit thereof, and to transmit copy without unreasonable or discriminatory limitations, should be guaranteed by action on the national and international plane

. . . .

That in order to prevent abuses of freedom of information, governments in so far as they are able should

89. U.N. Conference on Freedom of Information, *supra* note 78, at Annex C, ch. I, Res. No. 1, pmbl.

90. *Id.*

91. Cess Hamelink, *MacBride with Hindsight*, in *BEYOND CULTURAL IMPERIALISM: GLOBALIZATION, COMMUNICATION AND THE NEW INTERNATIONAL ORDER* 92, 92 n.3 (Peter Golding & Phil Harris eds., 1997).

92. *Id.*

93. U.N. Conference on Freedom of Information, *supra* note 78, at Annex A, Draft Convention on the Gathering and International Transmission of News, pmbl.

support measures which will help to improve the quality of information and to make a diversity of news and opinion available to the people

. . . .

That encouragement should be given to the establishment and to the functioning within the territory of a State of one or more non-official organizations of persons employed in the collection and dissemination of information to the public, and that such organization or organizations should encourage the fulfilment [sic] *inter alia* of the following obligations by all individuals or organizations engaged in the collection and dissemination of information⁹⁴

Moreover, Chapter II of the Conference's *Final Act* set out a number of the Conference's resolutions that specifically addressed "Measures to Facilitate the Gathering and International Transmission of Information."⁹⁵ This included Resolution No. 13 which set out measures to fight state censorship and also affirmed positive obligations on states to promote the freedom of mediums of mass communications. Resolution No. 13 "[s]olemnly condemns the use in peace-time of censorship which restricts or controls freedom of information, and [i]nvites Governments to take the necessary steps to promote its progressive abolition"⁹⁶

Finally, Chapter III of the Conference's *Final Act* set out a number of resolutions that addressed "Measures Concerning the Free Publication and Reception of Information."⁹⁷ Many of the resolutions required or recommended that states take certain steps to promote information flows via "mass media." For example, Resolution No. 25 recommended that "all Governments should, to the extent that they make available materials and facilities for the mass media, undertake not to discriminate on political or personal grounds or on the basis of race, nationality, sex, language or religion, or against minorities."⁹⁸

And Resolution Number 27 recommended:

[T]hat Governments should undertake to put no obstacles in the way of persons or groups wishing to

94. *Id.* at Annex C, ch. I, Res. No. 1, ¶¶ 2, 4, 7.

95. *Id.* at Annex C, ch. II, Draft Convention on the Gathering and International Transmission of News, pmbl.

96. *Id.* at Annex C, ch. II, Res. No. 13.

97. *Id.* at Annex C, ch. III Draft Convention on the Gathering and International Transmission of News, pmbl.

98. *Id.* at Annex C, ch. III, Res. No. 25.

express themselves through the means of mass communication, and should ensure insofar as they are able that persons do not suffer discrimination in the use of the media on political or personal grounds or on the basis of race, sex, language or religion⁹⁹

In other words, this third idea or principle—accessible and free mediums of mass communications and information—is inextricably linked to the two other principles: that freedom of information is a “fundamental” freedom and the “Free Flow Principle.” That is, the promotion of the unrestricted flow of information nationally is a paramount aim. Though certainly not encapsulating all ideas, policies, or principles discussed at this time, these three principles or elements reflected the heart of the Free Flow of Information Paradigm.

It was from within this very Free Flow of Information Paradigm that the right to “seek, receive, and impart information” emerged, and found its way into Article 19 of the UDHR¹⁰⁰ and Article 19(2) of the ICCPR,¹⁰¹ two documents central to the drafting and wording of section 14 itself. The freedom to “seek, receive, and impart information,” I will show, invokes the key principles and ideas of the Free Flow of Information Paradigm, and so these principles constitute some of the key intellectual origins of the concept of Internet access rights set out in the Report.

2. The Free Flow of Information Paradigm and the Origins of the Right to Seek, Receive, and Impart Information

The right or freedom to “seek, receive, and impart information” emerged from within the Free Flow of Information Paradigm of international law and politics. The U.N.’s Economic and Social Council established a Commission on Human Rights in February 1946 with the responsibility to oversee the drafting of an “international bill of rights” and “international declarations or covenants” on civil liberties, which would ultimately result in the drafting of the UDHR and the ICCPR.¹⁰² In early 1947, the Commission set up a Sub-commission on “Freedom of Information

99. *Id.* at Annex C, ch. III, Res. No. 27.

100. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1949), at art. 19.

101. International Convention on Civil and Political Rights, *supra* note 48, at art. 19(2).

102. N.L. GUPTA, CROSSCULTURAL COMMUNICATION: GLOBAL PERSPECTIVE, 302 (1998); RAMESH THAKUR, THE UNITED NATIONS, PEACE AND SECURITY: FROM COLLECTIVE SECURITY TO THE RESPONSIBILITY TO PROTECT 103 (2006).

and the Press,” which spent considerable time planning the U.N. Conference on Freedom of Information that the General Assembly had called for in 1946.¹⁰³ The Commission held off finalizing language for provisions concerning freedom of expression and information in both the Declaration of Human Rights (later the UDHR) and the International Covenant on Human Rights (later the ICCPR) in order to receive input from the Conference.¹⁰⁴

In fact, the very first international document to use language reflected in the UDHR and ICCPR was Resolution 59(I), the U.N.’s 1946 declaration on Freedom of Information, which, as already discussed above, cited the right to “gather, transmit, and disseminate news anywhere and everywhere without fetters” (an early permutation of the right to “seek, receive, and impart information”) in calling for an international conference on freedom of information.¹⁰⁵ This language was later echoed in the preamble to the first resolution issued by that conference, convened in 1948, which recognized that “freedom of information carries the right to gather, transmit, and disseminate”¹⁰⁶ However, in the resolution itself, the right was ultimately expressed in language even closer to that later found in both the UDHR and ICCPR: “[E]veryone shall have the right to freedom of thought and expression: this shall include freedom to hold opinions without interference; and to seek, receive and impart information and ideas by any means and regardless of frontiers”¹⁰⁷ Indeed, two early drafts of provisions for freedom of expression and information formulated by the Sub-commission and referred to the Conference for consideration—one drafted by the British delegation and one drafted by the United States (by Mrs. Eleanor Roosevelt herself)—tracked the language of Resolution 59(I) and the 1948 Conference’s Resolution No. 1:

Draft 2: Draft Proposed by the Representative of the United States (Mrs. Roosevelt).

Every one shall have the right to freedom of

103. See Declaration on Freedom of Information, *supra* note 67; Chafee, *supra* note 78, at 545.

104. Chafee, *supra* note 78, at 545; Josef L. Kunz, *Freedom of Communications*, 49 AM. SOC’Y INT’L L. PROC. 99, 100 (1954).

105. See *supra* notes 64–70 and accompanying text (discussing two principles apparent from the text of the declaration).

106. U.N. Conference on Freedom of Information, *supra* note 78, at Annex C, ch. I, Res. No. 1, pmb1.

107. U.N. Conference on Freedom of Information, *supra* note 78, at Annex C, ch. I, Res. No. 1, ¶ 1.

information, speech and expression.

Every one shall be free to hold his opinion without molestation, to receive and seek information and the opinion of others from sources wherever situated, and to disseminate opinions and information, either by word, in writing, in the press, in books or by visual, auditive or other means.¹⁰⁸

The U.S. draft offered no limitations to the right, preferring instead to advocate for one general limitation.¹⁰⁹

The 1948 Conference on Freedom of Information, in addition to the numerous draft conventions and resolutions already discussed, would produce draft provisions for freedom of information and expression that would ultimately find their way into both the UDHR and the ICCPR.¹¹⁰ These drafts would also incorporate the language of Resolution 59(I), but also include elements of the sub-commission's drafts. To say the Conference draft provisions would prove influential is an understatement. In fact, the Conference draft provision for "Article 17 and 18" of the "Draft Declaration on Human Rights" (which would become the UDHR) would be fully adopted, with little change, as the official text of the UDHR's Article 19.¹¹¹ Here is a comparison of the provisions. First, the 1948 Conference Draft: "Everyone shall have the right to freedom of thought and expression; this right shall include freedom to hold opinions without interference and to seek, receive and impart information and ideas by any means and regardless of frontiers."¹¹² And now, the final version of Article 19 of the UDHR, which is strikingly similar: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."¹¹³ The ICCPR's 1948 Conference draft provisions would prove similarly influential, with the ICCPR's draft for Article 19 closely tracking the language of the 1948 Conference draft provision. Again, a comparison of the provisions, starting with the ICCPR 1948 Conference draft:

108. Chafee, *supra* note 78, at 581–82, app. I.

109. *Id.*

110. See U.N. Conference on Freedom of Information, *supra* note 78, at Annex B.

111. Chafee, *supra* note 78, at 545–46, 581–82, app. I; Kunz, *supra* note 104, at 103.

112. Chafee, *supra* note 78, at 545–46, 581–82, app. I.

113. Universal Declaration of Human Rights, *supra* note 100, at art. 19.

Every person shall have the right to freedom of thought and the right to freedom of expression without interference by governmental action: this right shall include freedom to hold opinions, to seek, receive and impart information and ideas, regardless of frontiers, either orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices.¹¹⁴

And, the final text for Article 19(2) of the ICCPR, again, strikingly similar:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.¹¹⁵

In other words, we can draw a direct line from the ideas and principles of the 1948 Conference on Freedom of Information to the final drafts of Article 19 for the UDHR and Article 19 of the ICCPR, the latter of which was essential to the Report.

In fact, if we return to Article 19 of the UDHR, we can see the three principles of the Free Flow of Information Paradigm reflected in its language: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹¹⁶

The first principle, which emphasized freedom of information as a foundational freedom that is inextricably connected to expression, is clearly reflected in the first two lines, which indicates that “freedom . . . to seek, receive, and impart information and ideas” is included in the broader right to “freedom of opinion and expression.”

The second principle, which emphasized the Free Flow of Information, is reflected in the language codifying the “freedom” to “seek, receive and impart information and ideas.” The use of “seek,” “receive,” and “impart” in unison aptly reflects the multi-directional and communicative nature of information flows that are free and unrestricted: they are not static, but multi-directional and provide interactive give-and-take.

114. Chafee, *supra* note 78, at 582, app. II.

115. International Covenant on Civil and Political Rights, *supra* note 48, at art. 19(2).

116. Universal Declaration of Human Rights, *supra* note 100, at art. 19.

And the third principle, recognizing the importance of free and accessible mass media to freedom of expression and information, is reflected in the final wording, which guaranteed the flow of information “through any media.” Given that mass media was understood as essential to carrying information and ideas across the globe, the nod to “regardless of frontiers” is also a nod to mass media and its essential role in the project of free expression and information.

These essential principles of the Free Flow of Information Paradigm, in which the language and understanding of the freedom to “seek, receive, and impart information” was forged, are thus also essential to understanding the rights to Internet access articulated in the Report.

Moreover, the fact that the Special Rapporteur, who is a human rights lawyer from Guatemala, based his findings on Internet access rights primarily on Article 19 of the ICCPR, which codifies the principles of the Free Flow of Information Paradigm, has even more significance today, because since the apex of the Free Flow of Information Paradigm, a new competing paradigm concerning the international law and politics of media, information, and expression has emerged. And that paradigm arose among both Third World and developing countries in the “south,” like Guatemala, and is oriented more toward their issues and challenges.¹¹⁷

3. *A New Competing Paradigm*

The Free Flow of Information Paradigm, largely advocated by the United States and other Western countries, remained influential at the international level for decades after the Post-War years.¹¹⁸ However, by the 1970s, a new paradigm began to emerge to challenge its predominance, and UNESCO would be the main “battleground” in which these competing paradigms would clash.¹¹⁹

117. See FREDERICK H. GAREAU, *THE UNITED NATIONS AND OTHER INTERNATIONAL INSTITUTIONS: A CRITICAL ANALYSIS* 129 (2002) (discussing how the promoters and advocates of a New World Information and Communication Order in the 1980s were attempting to champion the cause of Guatemala, which was concerned about how Western TV programming was putting its “culture at risk”). For information about Frank La Rue’s home country origins, see *Biography: Frank La Rue*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/genocide/bio/?content=rue_frank (last visited Sept. 4, 2011).

118. Cate, *supra* note 51, at 373–75 (noting the paradigm went “virtually unchallenged” before the 1960s); see also HAMELINK, *supra* note 34, at 173.

119. HAMELINK, *supra* note 34, at 173; Ayish, *supra* note 51, at 490–93; Cate,

The Soviet Union and its Eastern Bloc allies—who saw freedom of information as a threat to their security, as well as a powerful tool of Western influence—were the first to challenge the ideas of the Free Flow of Information Paradigm in the 1960s, but largely failed to gain any kind of international consensus or traction for their own ideas or proposals.¹²⁰ Rather, it was a related but different movement driven largely by Third World countries, which gained much more international momentum in the 1970s. The role and participation of Third World nations in international politics grew throughout the 1960s, and by the end of that decade, these countries focused on what they perceived as an “imbalance” in global mass communications between wealthier and poorer countries.¹²¹

This emerging paradigm rejected the unrestricted flow of free information and instead advocated state regulation of information and expression to guarantee more “balance” and to achieve certain social, political, and economic goals.¹²² These ideas were reflected in the movement’s notable call for a “New World Information and Communication Order” or NWICO, which was essentially a collection of proposals.¹²³ And while the NWICO movement originated among Third World countries, some of its proposals on issues of media concentration and monopoly did gain support from other countries, including Canada, Australia, and New Zealand.¹²⁴

supra note 51, at 375–81; Gauhar, *supra* note 60, at 55–58; Stephen Raube-Wilson, *The New World Information and Communication Order and International Human Rights Law*, 9 B.C. INT’L & COMP. L. REV. 107, 107–12 (1986) (describing the ongoing NWICO debate in UNESCO); Colleen Roach, *The Movement for a New World Information and Communication Order: A Second Wave?*, 12 MEDIA, CULTURE & SOC’Y 283, 283–85 (1990); William Fitzmaurice, Note, *The New World Information and Communication Order: Is the International Programme for the Development of Communication the Answer?*, 15 N.Y.U. J. INT’L L. & POL. 953, 953–70 (1982–1983) (describing the various paradigms debated in UNESCO).

120. Cate, *supra* note 51, at 375–81; Gauhar, *supra* note 60, at 55–56.

121. Ayish, *supra* note 51, at 492–93; Cate, *supra* note 51, at 375–76; Raube-Wilson, *supra* note 119, at 107–09. *See generally* Fitzmaurice, *supra* note 119 (discussing the international communication imbalance and a New World Information and Communication Order as the appropriate solution).

122. Ayish, *supra* note 51, at 492; Cate, *supra* note 51, at 375–76; Raube-Wilson, *supra* note 119, at 107–08.

123. *See* Fitzmaurice, *supra* note 119, at 954–55; Raube-Wilson, *supra* note 119, at 107–08. The term is largely attributed to Tunisian UNESCO delegate and MacBride Commission member Mustapha Masmoudi. *See* Cate, *supra* note 51, at 377.

124. *See* Gough Whitlam, *Living with the United States—British Dominions and New Pacific States*, 1991 AUSTL. INT’L L. NEWS 59, 63–64 (noting that NWICO proposals received support at times from various countries, including Australia, Canada, and

Still, the United States and many Western countries saw similarities between the NWICO movement's criticisms of the free flow doctrine and those of the Soviets, and thus saw it as a threat to freedom of information and free expression.¹²⁵ Throughout the 1970s, UNESCO became the battleground in which the ideals and principles of these competing paradigms clashed.¹²⁶ The NWICO movement would reach its apex in the early 1980s, with UNESCO's release of the MacBride Commission Report on a "New World Information and Communication Order."¹²⁷ Though the report did not adopt the more radical NWICO proposals, it did endorse many of the movement's ideas—including recommending regulations on media to promote certain "social, cultural, economic and political goals."¹²⁸ Despite its more moderate proposals, the MacBride Commission Report proved controversial, leading the United States, which viewed the report as an attack on press freedom and the free flow of information, to withhold funding for UNESCO in 1982 and withdraw from the agency in 1984.¹²⁹

Of course, in the context of these developments, the Free Flow of Information Paradigm and Article 19, did not fade into the background. It, too, remained as an important competing paradigm. In fact, the U.N. Human Rights Committee (HRC) would issue a General Comment interpreting Article 19 of the ICCPR around the time that NWICO was gaining international support, reaffirming the free flow paradigmatic principles.¹³⁰ Before 1992, when the HRC began issuing specific comments on the various reports submitted by individual countries concerning their ICCPR compliance, the HRC's General Comments were widely published as essential materials for interpreting the meaning

New Zealand).

125. See Cate, *supra* note 51, at 388–90; Gauhar, *supra* note 60, at 56–57; Raube-Wilson, *supra* note 119, at 108–09; Roach, *supra* note 119, at 284–85.

126. Ayish, *supra* note 51, at 492–93; Gauhar, *supra* note 60, at 56; Raube-Wilson, *supra* note 119, at 107–09.

127. Ayish, *supra* note 51, at 493; Cate, *supra* note 51, at 384; Raube-Wilson, *supra* note 119, at 107–08.

128. Ayish, *supra* note 51, at 493; Cate, *supra* note 51, at 385; Raube-Wilson, *supra* note 119, at 107–08.

129. Ayish, *supra* note 51, at 493–94; Cate, *supra* note 51, at 388–92; Raube-Wilson, *supra* note 119, at 107–08.

130. Office of the U.N. High Comm'r for Human Rights, General Comment No. 10: Freedom of Expression, art. 19, (June 29, 1983) [hereinafter General Comment No. 10], [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2bb2f14bf558182ac12563ed0048df17?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument).

and scope of articles in the ICCPR.¹³¹ The General Comment stated:

Paragraph 2 requires protection of the right to freedom of expression, which includes not only freedom to “impart information and ideas of all kinds,” but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice.” Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.¹³²

The General Comment’s interpretation of Article 19 of the ICCPR itself reflects many of the principles and ideas of the Free Flow of Information Paradigm: the importance of the free flow of information and free and accessible mass media.

So, when the Special Rapporteur Frank La Rue set out to explore the Internet rights in his Report, there was this broader background of competing paradigms from which to draw ideas. And, no doubt, he was likely aware of the NWICO paradigm because of a recent publication to which he contributed that discussed its development.¹³³

In articulating the nature and dimensions of Internet access rights and how they are threatened, the Special Rapporteur could

131. FRANCISCO FORREST MARTIN & STEPHEN J. SCHNABLY, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS 204 (2006) (noting that HRC comments are persuasive, but not binding authorities for interpreting the ICCPR); Shiyun Sun, *The Understanding and Interpretation of the ICCPR in the Context of China’s Possible Ratification*, 6 CHINESE J. INT’L L. 17, 25 (2007) (discussing General Comments as the “second most important basis” for interpreting the ICCPR, after the text itself).

132. General Comment No. 10, *supra* note 130.

133. See Guy Berger, *What Africa Tells Us About Access to Information*, FREEDOM OF INFORMATION: THE RIGHT TO KNOW 86, 86 (2010), <http://unesdoc.unesco.org/images/0019/001936/193653e.pdf> (“However, this third phase was also a period that coincided with the New World Information Order initiative, which lent itself to legitimising state ownership and control. As new regimes became entrenched in the 1970s and 1980s, so this “development” media became increasingly another kind of tool—i.e. one that was wielded to maintain political control. This meant a constriction and perversion of information, resulting in low volume, low value and low credibility information—in worst cases, hagiographic nonsense about the daily activities of the head of state.”).

have drawn on the NWICO paradigm and its ideas, which oriented concerns about freedom of information towards more social and economic aims, including media ownership and monopolies. The central thrust of NWICO was, after all, about promoting state regulation of media, rather than telling states to keep hands off, to allow access to ideas and the mediums through which they could be communicated.¹³⁴

But it was not the principles of NWICO that defined the Report's notion of Internet access rights. There was no mention of the MacBride Commission Report, no mention of UNESCO, and no mention of the need to regulate for monopolies or for a greater role for states. To the contrary, the main theme of the Report is that states constitute a great threat to the free flow of ideas of information and Internet freedom, and steps must be taken to address that threat and curtail the increasing regulation and censorship of the Internet by states.¹³⁵ Thus, Article 19(2) and its broader historical context and principles formed the central foundation of the Special Rapporteur's grand declaration concerning Internet access rights.

IV. READING THE REPORT IN LIGHT OF THE FREE FLOW OF INFORMATION PARADIGM

The previous section traced the origins of the ideas embodied in Article 19(2) of the ICCPR, and the Free Flow of Information Paradigm's ideas that it codified. This paradigm's influence is seen in several aspects of the Report, and the conception of Internet access rights it discusses.

The first principle of the Free Flow of Information Paradigm, which conceptualized freedom of information as a fundamental or foundational freedom tied to expression, is apparent throughout the Report. Right from the very beginning, the Special Rapporteur links the "right to freedom of opinion and expression," to the right to "seek, receive, and impart *information*" through the "Internet"; and in sections where the importance of the Internet as a medium for the "exchange [of] information and ideas" is linked to its capacity as a "key means" for the exercise of the right to "freedom of opinion and expression."¹³⁶

The second principle, which emphasized the "free flow" of

134. See *supra* text accompanying notes 122–30.

135. See Special Rapporteur, *supra* note 5, at 1.

136. *Id.* at 1, 6–7 (emphasis added).

information, is also apparent throughout the Report. In fact, the importance to promote, or protect, the “free flow of information” is discussed several times in the Report.¹³⁷ And, in the Report’s recommendations, the Special Rapporteur held that:

[T]here should be as little restriction as possible to the flow of information via the Internet, except in few, exceptional, and limited circumstances prescribed by international human rights law. He also stresses that the full guarantee of the right to freedom of expression must be the norm, and any limitation considered as an exception, and that this principle should never be reversed. Against this backdrop, the Special Rapporteur recommends the steps set out below.¹³⁸

This is a fairly clear and unmistakable affirmation of the “free flow of information” principle, which arises from Article 19(2)’s language, and its history and origins in the Free Flow of Information Paradigm.¹³⁹

And the third Free Flow of Information Paradigm principle, which recognized the importance of free and accessible mass media to freedom of expression and information, is not only explicitly and implicitly invoked over and over again in the Report, it is reflected by the central finding of the Report itself: that the Internet is essential to Article 19’s right of expression and the right to seek, receive, and impart information and ideas. For example, early on, the Special Rapporteur recognizes the power of the Internet in contemporary society:

The Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and North African region has shown the key role that the Internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights. As such, facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a

137. *Id.* at 4, 13, 15, 19, 22.

138. *Id.* at 19.

139. *See* International Covenant on Civil and Political Rights, *supra* note 48, at art. 19(2).

priority for all States.¹⁴⁰

From there, the Report goes on to link the Internet's powerful impact to the importance of freedom of expression and the exchange of ideas:

Very few if any developments in information technologies have had such a revolutionary effect as the creation of the Internet. Unlike any other medium of communication, such as radio, television and printed publications based on one-way transmission of information, the Internet represents a significant leap forward as an interactive medium Such platforms are particularly valuable in countries where there is no independent media, as they enable individuals to share critical views and to find objective information. Furthermore, producers of traditional media can also use the Internet to greatly expand their audiences at nominal cost. More generally, by enabling individuals to exchange information and ideas instantaneously and inexpensively across national borders, the Internet allows access to information and knowledge that was previously unattainable. This, in turn, contributes to the discovery of the truth and progress of society as a whole.¹⁴¹

After noting the importance of the Internet in its role as a medium of ideas and information, the Special Rapporteur finds that the Internet has become a “key means” for people to “exercise their right to freedom of opinion and expression, as guaranteed by [A]rticle 19”¹⁴² This, I would argue, constitutes a rather clear affirmation, or reflection, of this third central tenet of the Free Flow of Information Paradigm. All of the paradigm's principles are reflected in the Report, in many of its findings.

A final observation should be made. Earlier, I talked about Internet rights in both negative and positive terms; the former concerned restricting state intervention on access rights, while the positive component concerned positive obligations the state might have to actively provide people with the means to access the Internet. That is, where people might not have Internet access, the state would have to take steps to provide the infrastructure for that connectivity. The Report (as I noted much earlier) talks primarily about Internet access rights in *negative* terms; about the many ways that states are restricting people's access to the Internet, and its

140. Special Rapporteur, *supra* note 5, at 4.

141. *Id.* at 6–7

142. *Id.*

content, by way of filtering, censoring, criminalizing expression, intermediary liability, and cyber-attacks.¹⁴³ The Report does talk somewhat about the physical infrastructure needed for Internet access, and state obligations surrounding it, but its recommendations on these points amount mainly to a “call” for states to develop strategies to build Internet infrastructure, and more wealthy companies to “honour” their commitment to help underdeveloped countries to do so.¹⁴⁴ But, there are only a handful of recommendations on these points, compared to the lengthy ones on dealing with state restrictions on Internet access and its content.¹⁴⁵

Interestingly, the Free Flow of Information Paradigm, as noted, was similarly *negative* in orientation; it was concerned mainly with promoting the unrestricted flow of information and ideas internationally and across borders, and limiting state restrictions on media and mediums. Other than recognizing the importance of communication mediums to freedom of information and expression, it never resolutely imposed positive state obligations to provide people with the means or mediums to communicate. In other words, the general orientation of the Free Flow of Information Paradigm is also reflected in the overall orientation of the Report, articulating a conception of Internet access rights that is mainly *negative* in application and focus.

V. INTERNET RIGHTS: FUTURE DIRECTIONS

In the end, this paradigm of thought on information law and principles, codified in Article 19(2) of the ICCPR, constitutes the intellectual origins and the broader historical context of the concept of rights set out by the Report. Without this context, it is impossible to understand where these ideas came from, and, arguably, where ideas about Internet or information and communication rights will ultimately go in the years ahead. In this section, I discuss some potential future directions in light of this groundbreaking Report. What are some of its implications?

First, the Report will likely have some impact in national legal jurisdictions around the world, where courts may adopt its

143. *See id.* at 1.

144. *Id.* at 22.

145. *Compare id.* at 9–16 (discussing at length the “[r]estriction of content on the Internet,” which includes arbitrary blocking and filtering, criminalization of legitimate expression, intermediary liability, and cyber-attacks), *with id.* at 16–19 (discussing briefly access to “necessary infrastructure”).

reasoning when making legal rulings about people's access to the Internet, and government regulation of access and content. Of course, *how much* influence will depend upon the legal systems in question, and the legal culture those systems foster, but a clear declaration from a high profile U.N. adjudicative official like the Special Rapporteur will not go unnoticed, particularly given the global attention it received when the Report was released.

Second, the Report may also have a political impact. I noted earlier that the Report mainly discussed restrictions on Internet access rights; in making the finding of Internet access as a fundamental human right, the Report may still push governments to take positive steps to provide broader and better Internet access for populations. Indeed, there are real world legislative models in countries like Finland and Estonia, who are leading the way with statutory schemes guaranteeing citizen access to the Internet. The Report may, ultimately, foster public support for similar legislation in other jurisdictions.

Finally, given that the notion of Internet access rights set out in the Report is grounded in a longer, and continually evolving movement of ideas about information flow and communication rights, it is unlikely that this is a passing legal phase or fad; and the scope and basis for such rights claims will likely only broaden and strengthen with time, particularly as Internet use is integrated more and more in the daily lives of people around the world. And, indeed, this is linked to my purpose in undertaking this exploration. I have attempted to show, first and foremost, that the Report was not a surprising anomaly, nor did its ideas arise out of a vacuum; but that they arise, and can only be understood, within a broader historical and legal context. I hope that I have persuaded, or at least provided a persuasive foundation, for further study of these ideas and their origins.