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by

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Submitted in fulfilment of the requirements for the degree of Masters in Business Law (LL.M) in the College of Law and Management Studies, School of Law, Howard College, University of KwaZulu-Natal.

DURBAN

2015

Acknowledgements

I would firstly like to thank my supervisor, Devarasi Maduramuthu, for her guidance and feedback throughout the writing of this paper. I would also like to thank my best friends Ektaa and Trishaul who have always been there for me, not only on an academic level but on a personal one as well.

Lastly and most importantly, I want to thank my loving and supportive parents, Logie and Danny, who have always done everything to ensure I succeed in all my endeavours. I thank them for their love, support and help during the writing of this paper.

DECLARATION

I, Ashailyn Moodley, declare that:

- (i) The research reported in this dissertation, except where otherwise indicated, is my original work.
- (ii) This dissertation has not been submitted for any degree or examination at any other university.
- (iii) This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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CHAPTER 1 - INTRODUCTION

In this research paper, I pose the question: can Internet access be a human right? This question is one which is complex and warrants an in-depth analysis. This analysis is important, as Internet access 'has proven to be a valuable tool in the furtherance of promoting and protecting human rights' via its provision of unprecedented opportunities to disseminate information, opinions and ideas. It is however, 'not readily apparent that an actual right to Internet access currently exists under general international law or specifically in terms of international human rights law.' Rather than there being a right attributed to Internet access, it is widely viewed that 'it is merely an enabler' of other 'pre-existing rights such as freedom of expression'.

An important point to note, is that through the Internet's efficiency and growing use (over the past decade Internet usage has grown from 'approximately 1.3 billion to 2.9 billion users'⁵), it has become 'the preferred mode for political participation, education, employment, commerce and personal activity'.⁶ Therefore, Internet access can arguably be described as a basic requirement for social inclusion and economic participation⁷ (however at present approximately 60% of the world population does not have Internet access⁸). It is a well recognised opinion that Internet access is fast becoming vital to being part of a modern, technological society. Accordingly, being barred from accessing the Internet may result in being socially disadvantaged, as those without access do not hold the requisite ability to communicate or obtain information, via today's most efficient method. Following this line of reasoning, if Internet access is critical for 'normal social functioning', then the deprivation of access would invariably mean social exclusion, and growing growing growing growing the administration of access would invariably mean social exclusion, arguably leading to a human

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¹ Y Lim and S Sexton 'Essay: Internet as a Human Right' (2012) 7 Wash. JL Tech. & Arts 295, 298.

² S Tully 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights LR* 175, 175.

⁴ Lim & Sexton (note 1) above.

⁵ 'ICT Statistics 2014' available at http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.asp, accessed on 25 September 2014.

⁶ Tully (note 2 above) 176.

⁷ A Powell, A Byrne and D Daily 'The Essential Internet: Digital Exclusion in Low-Income American Communities' (2010) 2 *Policy and Internet* 161, 163.

⁸ Note 5 above.

⁹ Tully (note 2) above 177.

rights violation. 10 Over the past decade, this has become a growing belief, however there are also those who believe that Internet access is not and never will be a human right. These critics view Internet access as a modern luxury or at best, an enabler of other human rights.

In this paper, I will embark on analysing the right to Internet access using appropriate human rights theories, international conventions, philosophical arguments, legislation and jurisprudence to determine if Internet access can truly be acknowledged as a human right. If Internet access can be human right, the consequence will be that governments will be obligated to ensure that its citizens have Internet access via the necessary infrastructure, affordable connection rates and that online content is not restricted.

1.1. Background:

At present, there is still no international legal framework in the form of a covenant, declaration or resolution that expressly proclaims that Internet access is a human right. 11 However, it has been argued that due to its nature and the values which it promotes, Internet access is a human right in itself. These advocates rely on Article 19(2) of the International Covenant on Civil Political Rights (hereafter referred to as ICCPR), in support of this argument, which provides:

"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."12

Article 19(2) 'does not promise a right to Internet access; however it explicitly promotes the protection of technology used to communicate¹³ and access information while placing a limitation on governments from restricting access to communication. It can

¹⁰ Ibid

 $^{^{11}}$ M Land 'Toward an International Law of the Internet' (2013) 54 Harvard Int \sqcup 393, 393.

¹² International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 23 March 1976

¹³ Land (note 11) above.

thus be argued that to sufficiently exercise and enjoy the right to freedom of expression there needs to be sufficient access to information technologies. This provides a strong basis for a possible human rights claim to Internet access.

This human rights debate is not novel. Whilst widespread Internet use is approximately two decades old, this debate has origins which are centuries old in terms of arguments pertaining to the 'right to communicate' which has evolved to apply to an Information and Communication Technologies framework. 4 Recently, there have been many assertions made in support of a human right to Internet access. Tim Berners-Lee, the inventor of the 'World Wide Web', has stated that 'Internet access is akin to access to water.'15 Countries, such as Finland, 16 Estonia 17 and France 18 have already declared Internet access to be a fundamental right via legislation or judicial intervention. In 2011, The United Nation's (hereafter referred to as the UN) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, released a report (hereafter referred to as 'The UN Report')¹⁹ on the trends and challenges facing freedom of expression, which focused particularly on the Internet's role thereof. The UN Special Rapporteur, interprets Article 19 to be so inclusive as to adapt to any modern technological development. He has further highlighted the importance of the Internet in enabling other human rights and how its value as a means to educate, organise and track information about human rights violations.²⁰ A significant example of this, as highlighted by La Rue, is evidenced during the 'Arab Spring' revolution, where protestors used online social media to 'post' about human rights violations and as a tool to organise protests. The dissemination of information by protestors was so successful that governments shut down Internet access in hopes of stopping further protests and rallying of support. However, these

¹⁴ JS Winter 'Is Internet Access a Human Right? Linking Information and Communication Technology Development with Global Human Rights Efforts' (2013) 5 *The Global Studies J* 35, 35.

¹⁵ B Skepys 'Is There a Human Right to the Internet?' (2012) 5 J of Politics and Law 15, 15.

¹⁶ Communications Market Act of 2003 (Finland), Section 60C.

¹⁷ Collin Woodard 'Estonia, where being wired is a human right' available at http://www.csmonitor.com/2003/0701/p07s01-woeu.html, accessed on 4 August 2014

¹⁸ Conseil Constitution nel decision No. 2009-580DC, June 10, 2009, J.O. 9675

¹⁹ Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', Human Rights Council, Seventeenth Session, Agenda item 3, United Nations General Assembly, 16 May 2011.

²⁰ Lim (note 1) above 299.

subsequent Internet access restrictions fostered greater international attention on the human rights violations in these countries. It thus becomes clear, that the Internet access has the ability to 'increase transparency, reduce corruption, stir debate and keep pressure on governments.'²¹ The Internet acts as a proponent for attaining 'the ability to participate more significantly in politics by everyday individuals and results in dialogue being promoted in furtherance of influencing government and the democratic process for the better.'²² The Internet, as an avenue of communication and learning is distinctive due to the ease and efficiency with which its users can access information without authoritarian influence, ²³ e.g. governments become less likely to control information as they do through vertical forms of media such as radio and television, which provide information to the public who act as mere passive observers not immediately able to debate with the publishers of such information.

Due to the informative powers of the Internet, La Rue, in 'The UN Report,' urged governments to refrain from acting in such a manner that restricts and censors Internet content in the future, as this promotes violations of the right to freedom of expression and inhibits its values from being realised. 'The UN Report', ultimately amassed great press attention with many subsequent headlines reading, 'Internet Access Is A Human Right, United Nations Report Declares,'²⁴ however various journalists and authors have 'questioned the notion of Internet access being akin to and being deserving of recognition as a human right'.²⁵ Critics, such as Vinton Cerf, believe that 'the Internet is merely an enabler of human rights' and to hold it as a human right in itself would push us in the direction of 'valuing the wrong things'.²⁶ Brian Skepys believes that whilst there are many good reasons to support Information technology integration into all facets of society, the reasons put forth by advocates for Internet access rights, do not sufficiently establish why

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²¹ Ibid.

²² B Etling, R Faris and J Palfrey 'Political Change in the Digital Age. The Fragility and Promise of Online Organizing' (2010) 30 *SAIS Review* 37, 37.

²³ Lim (note 1) above, 299.

²⁴ The Huffington Post 'Internet Access Is A Human Right, United Nations Report Declares' available at http://www.huffingtonpost.com/2011/06/08/internet-access-human-right-united-nations-report n 872836.html, accessed 3 September 2014.

²⁵ Lim (note 1 above) 297.

²⁶ Vint Cerf 'Internet access is not a human right' *The New York Times* 4 January 2012, available at http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=0, accessed 1 September 2014.

Internet access should be considered to be a human right.²⁷ Skepys, states that: 'advocates for a human right to Internet access are idealists who lack argumentative weight, as no real argument has been put forth to justify why Internet access should have the protection of contemporary human rights theories'.²⁸ Skepys further asserts that to include Internet access into the exclusive grouping of human rights will result in 'human rights inflation' i.e.:

"the eroding expansion of human rights claims, that threaten to undermine the value of human rights and their function as protectors of a specific set of urgent norms." 29

1.2. Problem Statement:

The theme of this paper is establishing whether Internet access can be defined as a human right. My research aims to address the gap in knowledge for a possible future international legal framework to provide for Internet access to be acknowledged as a human right. At present there is still no international uniformity on Internet access rights therefore creating international discord. I believe, there should not be international legal ambiguity for such an important issue, as the Internet is becoming more prevalent in its integration into everyday life and can promote the underlying principles of human rights.

1.3. Purpose of the Study:

The purpose of this study is to determine if Internet access can be classified as a human right. There are many scholars, government officials and members of organisations etc. who believe that Internet access is a human right and therefore should be treated as such by governments which should provide the necessary infrastructure as well as refrain from restricting and censoring online content. However, to some, any human rights claim to Internet access is an exaggeration of its role in society. These critics believe that Internet

²⁷ Skepys (note 15) above.

²⁸ Ibid.

²⁹ Ibid.

access can be protected under the existing human right of freedom of expression, opinion, and speech³⁰ in terms of the ICCPR³¹ and that to view Internet access as a human right would be to over value its place in society.

Therefore, the purpose of this paper is to review several human rights theories as well as arguments for and against Internet access being acknowledged as a human right, with the goal of summarising and synthesising these viewpoints so as to ultimately reach a well-developed conclusion.

1.4. Significance of the Study

I believe Internet access rights deserve international attention due to its positive influence on the right to freedom of expression, which is inherently tied to human and economic development. While international non-uniformity with regard to Internet access rights remains, governments will persist in regulating Internet access in a manner that suits their purposes without heeding the advantages of providing access to its citizens. At present, some governments have proclaimed Internet access to be a human right while others simply overlook the issue all together; having no policies in place, while other governments heavily restrict online content. This non-uniformity cannot persist due to the importance which Internet access can provide to society.

The Internet is intrinsically an entity without national borders and the use of it or lack therefore can have far reaching implications; therefore any ensuing disagreement on the issue of Internet access rights can cause situations of severe international discord. There is an urgent need to resolve issues such as the provision of Internet connections through infrastructure, restriction of online content, censorship laws online etc. Uniformity can be reached via 'a legal framework which can address these various problems.'32

³⁰Note 1 above, 298.

³¹ Note 12 above.

If one were to conclude that Internet access is indeed a human right, an international human rights legal framework can be applied via covenants, resolutions etc. which can cure Internet access deficiencies and promote equality for society's marginalised groups, as at present 'Internet access is concentrated among socio-economic elites.' Supporting a human right to Internet access can drive the political willingness of governments toward a legally binding commitment. Once Internet access is an established human right via international instruments, domestic governments around the world will then be persuaded to adopt this view by adapting the right to Internet access into their domestic law.

1.5. Primary Research Questions

- What is a human right?
- What are the intellectual origins which gave rise to the concept of a human right to Internet access?
- What arguments support a human right to Internet access?
- What are the arguments against a human right to Internet access?
- In light of human rights theories, does Internet access warrant a classification as a human right?

1.6. Hypothesis

I aver that the Internet is not merely a technological luxury and that through a review of the literature, philosophical arguments and human rights theories it will be

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³³Note 2 above, 187.

³⁴lbid.

illustrated that Internet access does meet the standards of a human rights evaluation. It is further my contention that Internet access is a human right as it operates as a gatekeeper to the 'three components of our rights as human beings in realisation of our full potential, i.e. freedom of expression, democratic participation and economic livelihood.'³⁵ As such, through this paper's development, it will become clear that Internet access is essential for a person to realise his or her full human potential and that for an individual to be denied such access, is 'to be denied the right to be a fully functioning member of the global community.'³⁶

1.7. Issues Addressed

In Chapter 1, the stage is set for the question which is the title of this paper, i.e. 'can Internet access be a human right?' An introduction to the issues at hand is provided, accompanied by a background to the concept of a human right to Internet access. The gap in the knowledge is discussed by looking at the purpose and significance of the study within this paper. Chapter 1 also includes the research questions I will use in development of the analysis of whether Internet access can be considered a human right and I will also reach a hypothesis for this argument.

In Chapter 2, I will discuss the historical development of the concept of a human rights claim to Internet access. I will do this by analysing the definition of human rights as well as the development of the human right to freedom of expression as per the Universal Declaration of Human Rights (hereafter referred to as UDHR) and ICCPR³⁷, which is often used in support of Internet access rights claims. The historical development will also illustrate the formation of the 'Free Flow of Information Paradigm', which was created via the right to freedom of expression, and how it links to the promotion of the right to Internet access by applying the paradigm to 'The UN Report's' findings. I will further show the aspects which emanate from a possible right to Internet access, as evidenced by 'The UN

³⁵ N Bernasconi & J Maxlow 'Is Internet Access a Basic Human Right?' (2010) *Learning & Leading with Technology* 37 6, 6.

³⁶ Ibid.

³⁷ Note 12 above.

Report,' i.e. negative and positive aspects and provide practical examples of failures by governments on both aspects. Finally I will visit the intellectual origins of both aspects of a possible right to Internet access, i.e. cyber-libertarianism (negative aspect) and the international 'right to communicate' (positive aspect).

In Chapter 3, I review arguments and opinions of various scholars including Vinton Cerf and Brian Skepys who, while acknowledging the significance of Internet access, do not believe it should be equated to existing human rights such as freedom of expression. I will also analyse the argument claiming that a human right to Internet access promotes the weakening and over-inflation of the concept of human rights. A discussion of the relevant human rights theories will be done, highlighting two schools of thought, i.e. 'the orthodox approach and the political approach, to analyse popular arguments promoting a human right to Internet access.' Finally, I will point out some human rights theories which have been used to dismiss the notion of a human right to Internet access. This chapter serves to provide an opposing view to my overall belief that Internet access should be considered a human right. The failure of these arguments will be discussed at length in Chapter 5.

In Chapter 4, I will analyse arguments in promotion of a human right to Internet access by discussing various assertions made by key members of the political and technological arena. I will analyse 'The UN Report' and show how its findings promote a human right to Internet access. I will then evidence legislative and judicial intervention by various countries in their provision of a human right to Internet access, to evidence a growing prevalence of the idea of Internet access rights. Thereafter, using a human rights theory analysis, I will show that the same values which underpin Internet access also underpin the human right to freedom of expression and as a result Internet access can be considered a human right.

Chapter 5 is the conclusion of the paper that will bring all the arguments together in summary to form a subsequent conclusion, as well as providing recommendations for the future.

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³⁸ Skepys (note 15) above.

CHAPTER 2 – THE HISTORICAL DEVELOPMENT OF A HUMAN RIGHTS CLAIM TO INTERNET ACCESS

2.1. The Definition of Human Rights

What is a 'human right'? Human rights can be defined as those rights which are intrinsic to all human beings due to the very fact of them being human¹ 'irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status'² or circumstance and are therefore universal and inalienable. Hence every person is equally entitled to these rights without discrimination³ and nobody can be deprived of these rights under any circumstance. Human rights are essentially 'the norms that help to protect all people everywhere from severe political, legal, and social abuses.'⁴ As James Nickel summaries, human rights are:

"those aspects of our lives, which are critical to our capacity to choose and to pursue our conception of a worthwhile life." 5

The principle of having human rights and the starting point of international human rights law was first highlighted in the 'UDHR' in 1948 and have been echoed in subsequent "treaties, customary international law, general principles and other sources of international law" with international human rights law obliging member states to act or refrain from acting in certain circumstances to promote these human rights.

¹ M Sepúlveda et al. *Human Rights Reference Hand Book* 1 ed (2004) 3.

² Office of the High Commissioner for Human Rights 'What are human rights?' available at http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx, accessed 5 September 2014. ³ Ibid.

⁴ James Nickel 'Human Rights' available at http://plato.stanford.edu/entries/rights-human/, accessed 23 September 2014.

⁵ J Griffin *On Human Rights* 1 ed 2008.)

⁶ Note 2 above.

⁷ Ibid.

2.2. The Origins of the Right to Freedom of Expression

2.2.1. The UDHR and ICCPR:

The founding source in support for the argument that Internet access is a human right is found in Article 19 of the United Nation's 'UDHR', which states:

"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.⁸"

This article, along with the others within the 'UDHR', is not part of a binding treaty but rather a recommendatory resolution adopted by the UN General Assembly. The 'UDHR', has over time and universal acceptance, been acknowledged by member states as customary international law.' The 'UDHR' contains provisions which member states must uphold 'to provide what is essential for all human beings to achieve their full potential and to live a life free of fear and want.' Article 19, in its promotion of free expression is integral to every human being realising various fundamental human rights. The UN General Assembly has summed up this point quite succinctly, i.e.:

"Freedom of information is a fundamental human right and is the touchstone of all of the freedoms to which the UN is consecrated." ¹¹

The UDHR's promotion of free expression has been echoed in various conventions and treaties over the past decades including Article 19(2) of the ICCPR¹², Article 13 of the Convention on the Rights of the Child¹³ and Article 9 of the African Charter on Human and People's Rights¹⁴.

⁸ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1949).

⁹ Article 19 'International Guarantee', available at http://www.article19.org/pages/en/international-guarantee.html, accessed 10 September 2014.

¹⁰ TakingITGlobal '2008: Celebrating the 60th Anniversary of the Universal Declaration of Human Rights'

¹⁰ TakingITGlobal '2008: Celebrating the 60th Anniversary of the Universal Declaration of Human Rights' available at http://www.takingitglobal.org/themes/udhr60/, accessed 7 June 2014.

¹¹ United Nations G.A. Resolution 59(I), 14 Dec. 1946.

¹² International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 23 March 1976.

¹³ Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, 2 September 1990.

¹⁴ African Charter on Human and People's Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 21 October 1986.

'The UN Report'¹⁵ uses the right to 'seek, receive and impart information', as its main legal foundation in promoting Internet access, citing Article 19(2) of the International Covenant on Civil Political Rights (ICCPR) i.e.:

"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." ¹⁶

To understand the right to 'seek, receive and impart information', requires a historical analysis. This right is underpinned by the 'Free Flow of Information Paradigm', which developed shortly after the end of World War II.¹⁷ Due to the subsequent devastation caused by this war, the international community were united in their need for peace. The UN was formed to ensure that there would be an established set of rights as well as repercussions for those who violated the human rights of others. The UN promoted many principles on how human beings should be treated; 'one of these principles was the promotion of free, unrestricted flow of information and ideas on a global scale.' Free expression of information was thus promoted as foundational right.

In 1946, 'UN Resolution 59(I), which was the first declaration on 'Freedom of Information', was adopted by the General Assembly' and stated that:

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

¹⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth Session, Agenda item 3. 2011, A/HRC/17/27 16 May 2011).

¹⁶ Note 12 above.

¹⁷ CJ Hamelink *The Politics of World Communications: A Human Rights Perspective* (1994) 152.

¹⁸ Ibid 153.

¹⁹ M Koren 'Human Rights of Children: Their Right to Information' (2001) *Human Rights LR* 54, 55.

²⁰ JW Penney 'Internet Access Rights: A Brief History and Intellectual Origins' (2011) 38 William Mitchell LR 9, 24.

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 world . . . "²¹

From this Resolution, Article 19 of the 'UDHR' and Article 19(2) of the ICCPR were drafted as set out above.

2.2.2. The Free-Flow of Information Paradigm:

Therefore, 'a clear link between the principles of the 1948 'Conference on Freedom of Information' to the final drafts of both Article 19 for the UDHR and Article 19 of the ICCPR'²² is observed. We thus see three principles of the 'Free-Flow of Information Paradigm' in the wording of these two Articles, i.e.:

- 1. Emphasis that freedom of information as an underpinning freedom has a nexus to expression ("freedom . . . to seek, receive, and impart information and ideas"),
- 2. Emphasis on the free flow of information ('freedom' to 'seek, receive and impart information and ideas.' the use of these specific words show the unfettered 'back and forth' exchange of information disseminated vertically and horizontally), and
- 3. Emphasis on the 'importance of free and accessible mass media to freedom of expression and information (therefore, the fact that the flow of information is secured 'through any media', 'regardless of frontiers' shows the importance of mass media in any form).'23

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 $^{^{\}rm 21}$ Declaration on Freedom of Information, G.A. Res. 59 (I), U.N., 14 December 1946.

²² Penney (note 20) above, 33.

²³ Ibid. 34.

2.3. The Link between Article 19(2) and 'The UN Report' of 2011:

The above mentioned principles have a huge impact on the idea and promotion of Internet access, especially in terms of 'The UN Report', which utilise these principles numerous times to show a claim to such access rights:

- 1. The first principle is seen in 'The UN Report', when the 'right to freedom of opinion and expression', is connected to the right to 'seek, receive, and impart information' through the Internet. The first principle is also observed where the importance of the Internet as a medium of 'exchange of information and ideas' is connected via its role as a 'key means' in exercising the right to 'freedom of opinion and expression.'²⁴
- 2. The second principle is also present in 'The UN Report', as the protection and promotion of the 'free flow of information' is mentioned various times. ²⁵ It is prevalent, especially in the recommendations made, i.e.: 'only the least amount of limitation is to be placed on free-flow of information on the Internet with the exception of certain extraordinary circumstances. 'The UN Report' also communicates the importance of the unconditional assurance of the right to freedom of expression which should be upheld as the standard and must never be reversed.
- 3. The third principle is evidenced within the core of 'The UN Report's' findings that Internet access is essential to the right to seek, receive and impart information and ideas.²⁷ La Rue 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.'²⁸ Governments should therefore, as a priority, provide Internet access to its citizens with minimal restriction to online content.²⁹

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ihid

 $^{^{28}}$ Note 15 above , Recommendation 2.

²⁹ Ibid.

These core principles within the 'Free-Flow of Information Paradigm', created from the essence of the freedom to 'seek, receive, and impart information', are vital to coming to terms with the right to Internet access. As mentioned previously, a right to the Internet invokes the concept of a negative and positive aspect to the right. The positive aspect would 'mean that governments would be obliged to ensure all citizens received Internet access via the necessary infrastructure, resource commitment and private sector participation.' On the other hand, if Internet access was considered in terms of its negative aspect, then governments would be barred from restricting a citizen's access to online content. ³¹

2.4. The Negative and Positive Aspects of a possible Human Right to Internet Access:

The two equally key components of a right to the Internet mentioned above were addressed in 'The UN Report'³² and translated into:

- Access to online content (negative aspect); and
- Access to an Internet connection (positive aspect)

The Special Rapporteur, 'emphasizes that, both aspects of access should be effectively ensured by all governments as part of their existing obligation to respect, protect and fulfil the right to freedom of opinion and expression.'³³ However, this is not universally practised as there are examples of countries where Internet access is widely available but online content is heavily restricted. Whilst in other countries, online content is not restricted but 'access to connect to the Internet may not be widely available to the majority of that country's citizens'³⁴, due to lack of infrastructure or that the country's Internet service providers (hereafter ISPs) charge unaffordable connection/subscription rates etc.

³² Note 12 above.

³⁰ S Tully 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights LR* 175, 176.

³¹ Ibid.

³³ Ibid.

³⁴ Ibid.

2.4.1. Access to Online Content:

A good example of a country where the necessary infrastructure has been established to provide Internet access, albeit in a highly censored form, is the Democratic People's Republic of Korea (North Korea). This country has broadband infrastructure which provides free Internet access via the domestic only network called 'Kwangmyong'. Kwangmyong, hosts 'between 1 300 to 5 500 websites of various local corporate, government and educational websites however, it does not connect the general public to the World Wide Web'. ³⁶

Another country which highly censors its Internet access, notoriously known for its numerous Internet censorship laws and regulations, is the People's Republic of China. China's first commercial release of the Internet occurred in 1995.³⁷ However, from its inception, the government wanted to control what its citizens viewed online as the Internet's 'open nature' provided 'content which China sought to ban, such as independent news, pornography and anti-government discussions.'³⁸ The rapid means of communication the Internet provided made the Chinese government fearful of potentially harmful information about them being circulated to and by its citizens. Therefore, by 1996, Internet censorship in China had begun when citizens were now required to register with the police within 30 days of opening an Internet account. These citizens' Internet usage could now be monitored for communications which undermined government's authority. Such communications were banned under the guise of 'sensitive material' which could harm state security.³⁹

³⁵ K Ko et. al. 'The Internet dilemma and control policy: political and economic implications of the Internet in North Korea' (2009) 21 *Korean Journal of Defence Analysis* 279, 284.

³⁶ AY Mansourov 'North Korea on the Cusp of Digital Transformation' *Nautilus Institute Special Report,* available athttp://nautilus.org/wp-content/uploads/2011/12/DPRK_Digital_Transformation.pdf, accessed 6 October 2014.

³⁷ Judith Torner Blancafort & Emilo Fernández 'The Great Firewall of China: A case analysis on how foreign media view the online censorship in China' available at

https://ddd.uab.cat/pub/tfg/2014/126277/TFG_Judith_Torner_Blancafort.pdf, accessed 5 November 2014 ³⁸ Ibid.

³⁹ Ibid.

Approximately a decade later, China possesses a well established 'Internet police force' to monitor citizens online usage, as well as using the "chilling effect" (a discouraging or deterring effect on the exercise of individual rights caused by a fear of legal action)⁴⁰ tactics by publishing punishments meted out to those who posted harmful and illicit material over the Internet. The Internet blocking and surveillance system, known satirically as 'The Great Firewall of China', censors information by using DNS (Domain Name System) and IP (Internet Protocol) address blocking which are methods used to prohibit Internet users from accessing specific websites. The use of keyword blocking and scanning accessed websites for prohibited keywords also occurs. At present, China currently employs around two million people, dubbed 'public opinion analysts' to police the 'public opinion' of its Internet users.⁴¹

Hence, there are situations where governments, although able to provide the infrastructure necessary for Internet access to all its citizens, severely restricts the content that can be viewed. This is in contrast to the aims of the Internet; specifically, to provide an open platform to receive and transmit information freely and without restriction.

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⁴⁰ Katherine Martin 'New word notes: December 2013' available at http://public.oed.com/the-oed-today/recent-updates-to-the-oed/december-2013-update/new-words-katherine-martin/, accessed 28 October 2014.

⁴¹ Katie Hunt and CY Xu 'China 'employs 2 million to police internet' available at http://edition.cnn.com/2013/10/07/world/asia/china-internet-monitors/, access 28 October 2014.

2.4.2. Access to an Internet Connection:

On the other hand, there are situations where a country's government, while not restricting access to content online, cannot provide the infrastructure necessary to connect its citizens to the World Wide Web or provide Internet access that is affordable to its citizens. This is usually apparent in the context of 'developing countries'; these countries usually have insufficient budgets to accommodate the provision of Internet access to all its citizens or to subsidise Internet costs with ISPs. Therefore, there is a vast gap in Internet penetration of 'developed countries' versus 'developing countries'. In 2014, 'the estimated percentage of citizens using the Internet in all 'developing countries' was 31.2 %'⁴² and in 'developed countries', the percentage of citizens with Internet access was estimated to be at 78.4 %, equating worldwide penetration of the Internet to be 40.4%. 43 If we consider 'the African state of Burundi, we notice that out of the country's 8 million citizens, only 1.3 % have Internet access.'44 This is as a result of the country's decades of internal conflict obstructing economic development.⁴⁵ The situation in this 'developing country' highlights the fact that while governments might not unreasonably restrict content online; it lacks the necessary infrastructure and/or strategies to positively provide Internet access to its citizens.

As of January 2015, Internet statistics evidence that 46% of the South African population is connected to the Internet (including those with mobile connections) however mobile Internet connection in terms of the South African population is at 146 %. ⁴⁶ This means that there are almost 1.5 mobile Internet connections per South African citizen. This should translate into a higher Internet penetration than evidenced. However, the high volume of mobile Internet connections accounts for the total mobile subscriptions and not unique users. Therefore, whilst many more South African citizens have Internet capable phones rather than computers with Internet access, Internet usage is still quite low among

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⁴² ITU 'Statistics' available athttp://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx, accessed 25 October 2014.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ L Specker & I Briscoe 'Early Economic Recovery in Fragile States, A Case Study Burundi: Operational Challenges' (2010) *Clingedael Institute Papers* 1, 12.

We Are Social 'Digital, Social & Mobile In 2015', available at http://www.slideshare.net/wearesocialsg/digital-social-mobile-in-2015?ref=http://wearesocial.net/tag/statistics/, accessed 16 March 2015.

exclusive phone users.⁴⁷ The reason being is that mobile Internet has many limitations, including: lack of knowledge of the Internet or how to utilise it, the high cost attached to mobile data usage, the low mobile data transfer speeds making large downloads impractical as well as mobile browsing difficulties. Any statistic on the percentage of South Africans using the Internet would not effectively show the growing use of the Internet as the majority of those using the Internet on their mobile devices in South Africa use it almost exclusively for 'chat applications' such as Whatsapp and BBM rather than for the purposes of browsing, keeping up to date with the news, voicing opinions publicly, downloading/streaming media content or for educational purposes.⁴⁸

2.5. Two Threads of Thought on Internet Access

The two aspects of the right to 'Internet access each have its origins in two threads of thought, i.e. The Cyber-Libertarian thread (negative aspect) and 'right to communicate' thread (positive aspect).'⁴⁹

2.5.1. Cyber-Libertarianism:

Cyber-Libertarianism is the belief that individuals should have the liberty to pursue their own needs, wants and interests online⁵⁰. This thread gained large support in the 1990's.⁵¹ As Lawrence Lessig states, 'the Internet should be independent, self-contained, self-ruled and cannot be regulated by traditional tools,'⁵² i.e. 'it forms a society which is free from the constraints of the real world.'⁵³ Lawrence Lessig views the concepts of freedom, liberty and uniqueness of cyber-space as the 'founding values of the Internet' and believes

⁴⁷ I de Lanerolle 'The New Wave, Who Connects To The Internet, How They Connect and What They Do When They Connect' (2012) *South African Network Society Project, University of Witwatersrand*

⁴⁹ Penney (note 20) above, 16.

Adman Thierer & Berin Szoka 'Cyber-Libertarianism: The Case for Real Internet Freedom' available at http://techliberation.com/2009/08/12/cyber-libertarianism-the-case-for-real-internet-freedom/, access 20 September 2014.

⁵¹ Penney (note 20) above, 16.

⁵² Lawrence Lessig 'The laws of Cyberspace, Draft 3' available at http://cyber.law.harverd.edu/lesssig.html, accessed 7 October 2014.

⁵³ Penney (note 20) above, 16.

that 'our generation's greatest battle is the protection of liberty over the Internet against those who seek to restrict and control it.'54

Underpinning this belief, that true 'Internet freedom' is void of all state control; not a freedom for a government to reorder our affairs to enhance some supposed 'public interest', which cyber-libertarians believe is just a form of control by the ever unaccountable elites in power. Cyber-libertarians insist that the Internet should rather be a social space that is void of tyrannical restrictions by governments, as seen in China and North Korea (where the measures to restrict have become increasingly hostile). The first generation of cyber-libertarians used their ideas to provide 'ways to preserve liberty, self-government and autonomy over the Internet from coercion. These ideas of a 'right' to the Internet were first promoted in a 1997 Wired Magazine article, 'Freedom to Connect' by Leila Conners, who stated that 'it was essential to the growing global society that everyone is free to connect to the Internet at any time, from any place, for any reason. Her article purported the idea that the 'freedom to connect' should not just be a right in the 1990's (when she wrote her article) but that it should also be recognised in the future, i.e.:

"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." ⁵⁹

Hence, Conners' article promotes the early idea of the Internet being a 'basic human right' and 'promotes its connection to free speech, with a belief that the two ideas are closely related.' Her opinions follow the reasoning of cyber-libertarianism through her

⁵⁴ Ibid.

Note 50 above.

⁵⁶ Penney (note 20) above, 16.

⁵⁷ Ibid

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

promotion of liberty and stance against government interference with citizens' online content access. ⁶¹

2.5.2. The International 'Right to Communicate':

Although the 'right to communicate' was articulated in the 1960's by Jean d'Arcy, it was the United Nations Education, Scientific and Cultural Organisation (hereafter UNESCO) that brought it to the international stage in the 1980's. This occured when it passed a resolution recognising 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.' These rights claims, promoted the development of 'the 'Declaration of Principles' issued at the 2003 World Summit on the Information Society (hereafter WSIS), convened by the UN Secretary General.' These principles were adopted after rigorous negotiations.

These principles purport connectivity to be integral to building the 'Information Society' with some of these principles asserting the significance of the 'Information Society' in supporting and reinforcing various human rights. One such principle is 'Principle 4', which highlights how important the right to freedom of expression is to the Information Society. As per this principle, the importance of 'the right to freedom of expression and opinion outlined in Article 19 of the UDHR' was reaffirmed, with communication being stated as 'a fundamental social process, a basic human need and foundation of all social organisation. The principle that 'every human being should be given the chance to participate in the 'Information Society' is evidenced' with the principles also promoting a 'commitment to build a people-centred, inclusive and development-oriented information society, where

⁶¹ Ibid.

⁶² UNESCO Res. 4/19, Recs. of the General Conference, 21st Sess., Vol. 1, Sept. 23–Oct. 28, 1980 69.

⁶³ ML Best 'Can the Internet Be a Human Right?' (2004) 4 HRHW. 23, 24.

⁶⁴ Declaration of Principles, Building the /information Society: a Global Challenge in the New Millenium (WSIS-03/GENEVA/DOC/0004-E). First Phase of the WSIS (10-12 December 2003, Geneva), Principle 4.

⁶⁵ Sepúlveda et al. Note 1 above.

⁶⁶ Note 64 above.

⁶⁷ Ibid.

everyone can create, access, utilise and share information and knowledge'.⁶⁸ There is also an insistence on 'the social, cultural, and economic importance of ICT access, which can be viewed to almost claim that Internet access, be viewed as a human right.'⁶⁹ The importance of 'developing communication infrastructures through the requisite policy considerations in furtherance of universal service is highlighted.'⁷⁰ Importance is also placed on the ability to access information, as 'the removal of barriers to access information was also highlighted'⁷¹ and it was further declared that 'each person should have the opportunity to participate and benefit from the Information society.'⁷² These principles provide an argumentative basis for advocates of a human right to Internet access. The 'international right to communicate' subsequently forms one of the origins of the belief that Internet access should be recognised as a human right.

2.6. Conclusion:

Internet access rights are continually forming and evolving from its origins as codified in Article 19(2) of the ICCPR, right through to 'The UN Report' and beyond. This chapter provided a contextual backdrop from which we can trace the origins of a rights claim to Internet access. While this rights claim has come a long way in its fight to be realised, it has still not found international substantive weight in the form of an international covenant. However, the recommendation made by La Rue, will have persuasive value for governments who are deciding whether to proclaim Internet access a human right within their respective jurisdictions.

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⁶⁸ Ibid, Principle 1.

⁶⁹ Ibid, Principle 25.

⁷⁰ Ibid, Principle 23.

⁷¹ Ibid, Principle 25.

⁷² Ibid, Principle 19.

<u>CHAPTER 3 – WHY INTERNET ACCESS CANNOT BE CONSIDERED A HUMAN</u> RIGHT

The arguments advocating that Internet access should be considered a fundamental human right have also created high profile criticism over the past decade. The co-founder of Microsoft, Bill Gates, in an interview with 'Financial Times Magazine' stated that: 'there are more important issues to worry about than universal Internet access, such as fighting malaria.' One of the founders of the Internet – Vinton Cerf, does not think that Internet access should be seen as a fundamental human right; his view is that 'technology is an enabler of rights rather that a right in itself.' In this Chapter, I shall review some the criticisms of Internet access being recognised as a human right.

¹ Richard Waters 'An exclusive interview with Bill Gates' *The Financial Times Magazine* 1 November 2013, available at http://www.ft.com/intl/cms/s/2/dacd1f84-41bf-11e3-b064-00144feabdc0.html#ixzz2jQNJ33ly, accessed on 25 June 2014.

²Don Reisinger 'Vint Cerf: Internet access isn't a human right', available at http://www.cnet.com/news/vint-cerf-internet-access-isnt-a-human-right, accessed 20 May 2014.

3.1. Arguments Opposing a Human Rights Claim to Internet Access

In Norris' book, Digital Divide,³ -it was asserted that the Internet, 'builds credibility in government and fosters the growth of democracy through its expedience in providing public participation,'⁴ it also 'helps in the protection against human rights violations'⁵ and 'empowers those who have access to participate in global economic and social activities.'⁶ Whilst these are all true and persuasive reasons for why the Internet is useful and important, Brain Skepys believes that these arguments do not provide an adequate justification for a human right to Internet access – 'they are simply values without significant argumentative weight.'⁷ For something to be a human right, it must be needed by human beings to live 'healthy, meaningful lives, such as freedom from torture or freedom of conscience.'⁸

Eric Sterner thus argues that by framing Internet access as a human right, there is the risk of weakening the very concept of human rights. As discussed in previous chapters, to place Internet access on the pedestal of a human right creates a negative aspect to the right, i.e. freedom from governmental restriction and intrusion of online access and activity. However, the right to Internet access also creates a positive right to such access, i.e. 'the right's existence is based on the existence of the requisite technology rather than on our inherent humanity.' This provides a problem for advocates of a human right to Internet access as the Internet is intrinsically a manmade construct. Therefore, Sterner asserts that this would mean that a right to Internet access is 'based on the nature of the technology rather than the nature of the claimant' and a human right based on technological entitlement is incorrect as human rights are 'unique in that we possess them by the very reason that we are human.' However, Sterner's arguments fail as the process of providing

³ P Norris Digital Divide: Civil Engagement, Information Poverty, and the Internet Worldwide 1 ed (2001)

⁴B Skepys 'Is There a Human Right to the Internet?' (2012) 5 JPL 15, 15.

⁵lbid

⁶Ibid

⁷Ibid

⁸Note 2 above.

⁹ E Sterner 'The Folly of Internet Freedom -The Mistake of Talking About the Internet as a Human Right' (2011) 32 *The New Atlantis* 134, 136.

¹⁰lbid.

¹¹ Ibid. 137

many established human rights require positive action by governments e.g. a human right to water, requires governments to provide the adequate infrastructure to pipe clean water to its citizens. Therefore the presence of a need for technology or infrastructure to provide a certain object should not negate its acceptance as a human right. This will be discussed further in chapter 4.

Basic human rights such as freedom of expression, freedom of assembly and freedom of religion, 'express how an individual is allowed to live life in society.' 12 It has been suggested that Internet access is not a right in itself, but rather is a tool with which to exercise ones rights. It is further argued that these basic human rights do not depend on the availability of resources. 13 Having Internet access, encompasses access to various elements such as a computer, software, a router etc. therefore, if a person is without any of these elements they would not have Internet access and a human right would subsequently be violated. In South Africa, a 'developing country', it was recorded in 2011 that 16.3 million citizens were living in poverty. 14 Therefore, if Internet access is proclaimed a human right these citizens' right to Internet access will be in perpetual violation, unless they have access to the requisite technology. James Maxlow believes that it is unjustifiable for Internet access to have the status of a human right and states that, 'basic human rights are not invented as technologies emerge; they exist from the moment that humans came together in social groupings.'15 However, what Maxlow fails to identify is that human rights are not inert and incapable of being created but rather, they evolve to reflect developments in society. 16 The needs of society are continually changing and to be static in our beliefs of what a human being requires to live a worthwhile life is to be ignorant to a specific time's societal climate.

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¹²N Bernasconi & J Maxlow 'Is Internet Access a Basic Human Right?' (2010) *Learning & Leading with Technology* 37 6, 7.

¹³ Ibid.

¹⁴ Statistics South Africa 'Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011', available at <a href="http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-06/Report

¹⁵ Ibid.

¹⁶ P De Hert and D Kloza, 'Internet (access) as a new fundamental right. Inflating the current rights framework?' (2012) 3 *European J of Law and Technology*.

Therefore, human rights require evolution to still be relevant within the age it is to be assessed.¹⁷

However, some critics of a human right to Internet access would say that if we are to believe that a human right's existence depends on an invention, then this would mean that human rights appear and disappear in perpetuity. If we accept this, Vinton Cerf states that, 'we will end up valuing the wrong things.' Cerf believes that once we are bestowed a human right, it cannot be negated due to external factors. This links to Maxlow's argument that 'human rights are absolutely fundamental aspects of individualism in a societal context and does not change over time' he also believes that 'the bar is placed very high' for something to be considered a human right and is therefore a mistake to proclaim technology a human right as Internet access is merely a means to an end. Maxlow further states that human rights are not invented as technologies emerge; they exist from the time we formed societal groups. However Maxlow's assertions contradict the fact that many human rights owe their origins and means of supply to various technological advancements — this will be discussed further in subsequent chapters.

3.2. Human Rights Theories

To add a more substantial basis to prove or disprove a human rights claim, contemporary human rights theories will be used via the two major schools of thought, i.e. the orthodox approach and the political approach. These approaches will be utilised and applied to some of the most popular arguments advocating a human right to Internet access to assess whether they meet the requirements of a human rights evaluation.

¹⁸ Ibid.

¹⁷ Ibid.

¹⁹ Bernasconi (note 12) above.

²⁰ Ibid.

²¹ Ibid

3.2.1 The Orthodox Approach:

The principle feature of this approach is that, it describes human rights as being moral in nature and as a result all human beings possess them due to being human. No other factors or laws need to be in place for these rights to be afforded protection. These human rights are 'unalienable and awarded to all human beings by God.'²² This approach takes the stance that there are some standards which are vital attributes to being human and from this we can realise a group of human rights based on these attributes. Two major branches of thought derive from this approach to identify which values are fundamental to be protected by the net of human rights, i.e.: the concept of 'personhood' and the concept of 'basic capabilities'.

The concept of 'personhood' provides that 'human beings should be seen as agents and that human rights should guarantee this agency, therefore only rights that protect such agency can be classified as human rights.' ²³ Basic capabilities, unlike the concept of personhood, perceive that human rights should guarantee the freedom created via capability i.e. a state of having freedom of effective choice. Human rights, in this case, should therefore limit themselves as guarantors of these basic capabilities. ²⁴

3.2.2. The Political Approach:

To meet the standard of the political approach, a human right must be important 'within an international context and not natural in nature, but rather should have its creation rooted within a political system.'²⁵ Therefore, in terms of this approach, 'human rights are seen as the standard, built on the idea of membership in an organised and decent political society.'²⁶ This membership concept, i.e. the relation between a person and their state is an intrinsic aspect of a political society and is not grounded within the concept of natural rights. Brian Skepys makes an argument in support of Cerf, stating that;

²² Skepys (note 4) above, 16.

²³ Ibid.

²⁴A Sen 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy and Public Affairs* 315, 325.

²⁵ Skepys (note) above, 17

²⁶ J Cohen *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* 1 ed (2006).

"Human rights should only protect things that are instrumentally necessary for membership in a political community and, although the Internet is instrumentally valuable for membership, it should not be seen as a human right in and of itself because it is not necessary for membership. In claiming a human right to the Internet, advocates devalue the overall effectiveness of human rights through a process called - human rights inflation."²⁷

3.2.3. Why Popular Arguments in Support of Internet Access Rights Claims Fail:

Brian Skepys (2012), puts forward five of the most popular arguments²⁸ in support of Internet access being considered a human right. The 5 arguments are;

- 1. The Communication Argument;
- 2. The Autonomy Argument;
- 3. The Expression Argument;
- 4. The Equality Argument; and
- 5. The Assembly Argument.

The first two arguments stem from the orthodox approach and the latter three from the political approach.

3.2.3.1. The Communication Argument:

It is argued that 'the right to communicate is comprised of various norms which are seen to be of value – these include freedoms of expression, opinion and culture.'²⁹ In the promotion of Internet access being viewed as a human right, this argument is set out as follows:

'1) Communication is intrinsically valuable, and 2) the Internet is a technological instrument valuable for communication, and therefore 3) anything which is

²⁷ Skepys (note 4) above, 18.

²⁸ Ibid.

²⁹ Ibid. 20.

instrumentally necessary for something that is intrinsically valuable is a human right and therefore 4) Internet access is a human right.'³⁰

Skepys believes this argument is incorrect 'due to premise 1, i.e. that 'communication is intrinsically valuable' to the needs of human beings and as a result, vital to being human.'³¹ His problem with this argument is that there are people who choose lives of seclusion without having the urge to meet or communicate with anyone. However, Skepys' rebuttable is incorrect because it is based on the reasoning that some people might choose the life of a hermit. In actuality, everyone may choose any kind of lawful lifestyle they wish while shunning various things which are common place in society, however, this does not mean that those things are any less intrinsically valuable to what it is to be a human being. Communication or the freedom therefore is one such aspect of our lives which is definitely intrinsically valuable to human beings and is so evidenced by the freedom to express oneself being protected by its inclusion within the Universal Declaration of Human Rights under Article 19.³²

3.2.3.2. The Autonomy Argument:

This argument claims that 'a fundamental feature of autonomy is the presence of choices and options that a person does not regard as his most basic of needs.'³³ To illustrate this argument, Skepys uses the 'man in the pit' example: 'a man in a pit is alone and without luxury and will be stranded there indefinitely. However, he will possess enough nutrition to survive. This man can only decide when to eat or sleep and as a result has no autonomy (as his only choices regard his most basic needs). This argument can be likened to being a person in the 21st century without Internet access, as 'the Internet acts as a tool providing vastly greater opportunities, options and ideas.'³⁴ Therefore being without Internet access is akin to not having autonomy. This argument is broken up as follows:

³⁰ Skepys (note 4) above, 20.

³¹ Ibid

³² Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1949), Article 19.

³³ Skepys (note 4) above, 20.

³⁴ Ibid. 21.

'1) Autonomy is intrinsically valuable and 2) Internet access is intrinsically necessary for autonomy, therefore 3) anything instrumentally necessary for something that is intrinsically valuable is a human right and thus, 4) there is a human right to Internet access.'³⁵

Skepys believes that premise 2 fails as we do not see evidence of Internet access being absolutely necessary for autonomy. Whilst Internet access does promote the creation of more choice, it would be an unjustifiable notion to state that those individuals who have Internet access are the only human beings that are autonomous and therefore premise 2 should be rejected and the autonomy argument must therefore fail.

3.2.3.3. The Equality Argument:

In terms of the equality argument, 'It is not necessarily urgent to be individually autonomous but rather that it is urgent when some individuals are given more choices than others.'³⁶ Hence the digital divide is an urgent issue as Internet access provides vastly more choices to those who have Internet access, leaving those without access, unfairly deprived. The equality argument for Internet access being considered a human right as follows:

'1) Equality of options is intrinsically valuable and B) Internet access is instrumentally necessary for equality of options and 3) anything that is instrumentally necessary for something that is intrinsic for something that is intrinsically valuable is a human right, thus 4) there is a human right to Internet access.'³⁷

Skepys finds that premise 1 must fail even though the 'Western World' holds equality in the highest of regards, he states that Islamic societies, for example, do not hold much value in equality of options as certain groups, such as women, have a lesser degree of available options. Therefore 'any intervention by the International community to promote equality of options will seem parochial to the cultural and religious beliefs of Islam.' This argument invalid as Skepys is basing it on a patriarchal, religious belief. To state that we

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³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

should not consider equality of options as a paramount value because some believe that not all human beings are equal, is unreasonable. This is especially so since the 'UDHR' not only states in Article 1 that "all human beings are born free and equal in dignity and rights..." but the essence of equality is also echoed throughout the 'UDHR'. Whilst there are some sects of society that believe that not everyone is equal, this should not be a rationalisation for an acceptance of the digital divide.

3.2.3.4. The Expression Argument:

This argument deals with the membership concept. The Internet as a construct, promotes the idea of the right to freedom of expression. The 'UDHR' and ICCPR have already linked the idea of information media with free expression. If one considers freedom of expression, which is an established human right, a minimum level of it is required to meet the membership conditions. Therefore, to 'claim that there is a human right to Internet access seems justifiable, however to do this, it must be proved that Internet access is required for you to express yourself.'³⁹ The argument is broken down as follows:

'1) Membership in a political community is intrinsically valuable and 2) some level of free expression is instrumentally necessary for membership and if 3) Internet access is instrumentally necessary for free expression, keeping in mind 4) anything that is instrumentally necessary for something that is intrinsically valuable is a human right then therefore 5) there is a human right to Internet access.'⁴⁰

Skepys finds that the flaw in this argument is that it is not a certainty that Internet access is required for free expression; in fact it is not. The Internet 'is not a type of expression but rather an avenue where types of expression can be heard.'⁴¹ Therefore, for Internet access to be 'instrumentally necessary' for free expression it must be the only avenue for us to express ourselves, however, it is not – we have countless other means with which to express ourselves and therefore premise 3 causes the expression argument to fail. Skepys is right in this regard as premise 3 does cause the rest of the argument to fail. Whilst

41 Ibid.

³⁹ Skepys (note 4) above, 22.

⁴⁰ Ibid.

Internet access is instrumental in providing free expression it is not 'instrumentally necessary'.

3.2.3.5. The Assembly Argument:

The final argument falling under the political approach is that of assembly. The argument is set out as follows:

'1) Membership in a political community is intrinsically valuable and 2) Some level of assembly is instrumentally necessary for membership and seeing as 3) Internet access is instrumentally necessary for assembly, and further that 4) anything that is instrumentally necessary for something that is intrinsically valuable is a human right. Therefore, 5) there is a human right to Internet access.'42

The problem Skepys has with this argument is that, 'it is not readily identifiable what minimum standard is required with regard to assembly for membership in terms of the political approach to be met.'43 While Skepys submits that the Internet provides the largest and most efficient means of assembly, he believes it would be unfounded to claim that the right to assemble which we as human beings are entitled to must be on a level provided for by Internet access. Skepys concludes that premise 3 causes the assembly argument to fail as not having Internet access does not completely exclude your ability to assemble. Skepys' reasoning in this regard is valid as not having Internet access would not extinguish a person's ability to assemble as Internet access is not 'instrumentally necessary' for assembly.

⁴² Ibid.

⁴³ Ibid.

3.3. Conclusion

Whilst the innumerable benefits of Internet access are undeniable, many scholars and Information Technology experts believe that these benefits do not amount to a reasonable argument to justify Internet access being a human right. They believe that a human right to Internet access would weaken the construct of human rights through dilution (by accepting too many 'wants of society' rather than inherent human needs) and therefore Internet access should rather be viewed as an important enabler of various human rights. Some of these critics believe that human rights shouldn't depend on advances in technology as this will make us value the wrong things and that human rights have already been established when we came together to form civilised societies. The reality of this issue is that as society progresses more rights need to exist as moral and global standards change; 'this occurs because human rights are not static: they are inherently flexible; the precise meaning of rights may change over the years.'44 This is an unavoidable fact due to 'human rights instruments, to which member states bind themselves, being representations of the legal embodiment of a philosophical theory.'45 These human rights documents 'enshrine what was agreed to at the preparatory stage, not necessarily the entire scope of the philosophy underpinning it.'46 Internet access is far from an entity which is insignificant in nature as the values which it promotes are also found in established human rights such as freedom of expression (this is discussed further in Chapter 4) and therefore an international acknowledgement of a human right to Internet access would not cause any dilution or weakening of the concept of human rights. We currently live in a technological age which promotes globalisation and the current societal climate calls for an evolution of our human rights to encompass an acknowledgement of a human right to Internet access. International supervisory bodies can do this by relying on the general underlying principles and overall spirit of human rights and apply this to Internet access, in a theological manner.⁴⁷ Due to human rights not being static in nature and can thus evolve to cater for advancements in society and the accompanying needs which arise. In this chapter we have also considered whether Internet access could withstand a human rights evaluation. This evaluation was

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⁴⁴ RKM Smith *Textbook on International Human Rights* 6 ed (2014) 180.

⁴⁵ Ihid

⁴⁶ RKM Smith (note 44) above, 181.

⁴⁷ Ibid.

conducted on five of the most popular arguments advocating a human right to Internet access. Through this review of the political and orthodox human rights theory approaches, it was observed that while some arguments meet the requirements of a human rights theory evaluation others do not. However, every argument need not fulfil such an evaluation; if only one argument can succeed, then that would be sufficient to answer in the affirmative to the question: 'can Internet access be a human right?'.

<u>CHAPTER 4 – WHY INTERNET ACCESS SHOULD BE CONSIDERED A HUMAN</u> <u>RIGHT</u>

The Internet, as a medium of learning and communicating is extremely valuable to our growth as human beings; however, this is only true for the minority who have access to it. To those who have access, a veritable super highway of information is freely available at their finger tips, connecting them to millions of people in the sharing of ideas and information. Not only are Internet users connected to each other by the Internet but we're connected to hundreds of terabytes of data via our personal computers which have access (through cabling and routers) to 'external servers', which store the information. Dr Hamadoun Toure (the Secretary General of the International Telecommunication Union) stated that, 'the Internet is the most powerful potential source of enlightenment ever created.' The former Minister of Justice of New Zealand, Judith Tizard, believes that, 'Internet access should be viewed as almost a human right, similar to how water and electricity are viewed.'2 These recent opinions by prominent individuals such as Toure and Tizard evidences a trend towards the growing belief of the invaluable role Internet access can play in society and its possible recognition as a human right. In this chapter, I will focus on and consider not only why Internet access is of value but also why it should be acknowledged as a human right.

4.1. Public Perception

During a 2010 BBC survey, consisting of more than 27 000 individuals (across 26 countries) on both sides of the digital divide, 79 % of interviewees answered in the affirmative to the question, 'Is Internet access a human right?'.³ Another survey by the Centre of International Governance Innovation (CIGI) found that '83% of Internet users

¹ BBC 'Internet access is 'a fundamental right' available at

http://news.bbc.co.uk/2/hi/technology/8548190.stm, accessed on 3 July 2014.

² JW Penney 'Internet Access Rights: A Brief History and Intellectual Origins' (2011) 38 William Mitchell LR 9,

³ Note 1 above.

believe that affordable Internet access should be considered a human right.'⁴ In a 2009 British survey of those aged between 16 and 24, '75% claimed that they could not live without the Internet.'⁵ The majority of those surveyed therefore, support the idea of a human right to Internet access. They endorse this belief due to the positive changes it has brought to their lives as a result of the massive availability of information and greater freedom to express themselves which they have experienced. When analysing public opinion poll results however, it must be kept in mind that this research method has many shortcomings, such as researchers tending to lead a participant to a popular option, sampling errors occurring or even biases based on participant selection, taking place. Therefore drawing conclusions from such studies must be done carefully. Public surveys, nonetheless, can greatly influence the acceptance of a human right to access the Internet due to the importance public opinion plays within democratic societies.

The Director of the CIGI's Global Security & Politics Program, Fen Hampson, has stated that, 'at present, two thirds of the global population do not have Internet access⁶, and asserts that unless Internet access is provided to all, socio-economic issues, which plague the marginalised groups of society, will be compounded. As a result, the world's full potential for technological growth and general prosperity will be suppressed.⁷ Internet access allows individuals to freely express themselves⁸, politically participate and make a living through a global avenue. Due to the Internet's role as a gatekeeper of the three components to realise our full potential, i.e. freedom of expression, democratic participation and economic livelihood, there has emanated a growing belief that Internet access is already a basic human right and will soon become an essential human right.⁹

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Technology 37 6, 6.

⁴ Andrea Germanos 'Global Survey: Internet Access Should Be a Human Right', available at http://www.commondreams.org/news/2014/11/24/global-survey-internet-access-should-be-human-right, accessed on 24 November 2014.

⁵YouthNet 'Life Support Young people's needs in a digital age', available at http://www.socialfuturesobservatory.co.uk/wp-content/uploads/2014/10/life-support-young-peoples-needs-in-the-digital-age.pdf, accessed 3 July 2014.

⁶ Note 4 above.

⁷ Ibid.

⁸ S Tully 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights LR* 175, 176 ⁹ N Bernasconi& J Maxlow 'Is Internet Access a Basic Human Right?' (2010) *Learning & Leading with*

4.2. A Brief Analysis of the Human Right to Freedom of Expression

The Parliamentary Assembly of the Council of Europe has affirmed that:

"for a democratic society to exist it must promote and uphold the fundamental right to freedom of expression, as the progress of society and the development of every individual depends on the possibility of receiving and imparting information and ideas." ¹⁰

In the European Court of Human Rights case of *Handyside v United Kingdom 1976 (App 5493/72) ECHR*, the court stated that:

"Freedom of expression constitutes one of the essential foundations of society, one of the basic conditions for its progress and for the development of every man." ¹¹

These examples of European law promote the essentiality of the human right to freedom of expression which can be linked to Internet access as Internet access allows the free flow of information and ideas, enabling users to express themselves greater than ever before. Hence, to be without access to such a medium is argued to be tantamount to having your freedom of expression infringed, as the same values underpinning freedom of expression, are also promoted by Internet access. Therefore, it becomes possible to use these underpinned values of freedom of expression as a basis to argue that Internet access can be acknowledged as a human right. This concept of a nexus of underpinned values between freedom of expression and Internet access will be discussed in detail further in this chapter but first a discussion of some of the arguments in favour of a human right to Internet access will be done.

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¹⁰ Parliamentary Assembly of the Council Europe, Recommendation 1510, 28 June 2006.

¹¹Handyside v. United Kingdom 1976 (App 5493/72) ECHR at 49.

4.3. Arguments in Favour of a Human Rights Claim to Internet Access

4.3.1. 2011 UN Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression:

The idea of Internet access being considered a human right has grown globally over the last decade, with the most noteworthy proponent undoubtedly being 'The UN Report' submitted by human rights lawyer, Frank La Rue. Whilst 'The UN Report' does not explicitly state that Internet access should now be considered a human right, it strongly implies this via its warning of member states against restrictions on Internet access as well pleading to these states to hold themselves positively obligated to provide adequate infrastructure to ensure Internet access. In 'The UN Report', La Rue continually reiterates the value of the Internet in attaining the same goals of other human rights as well as the positive outcomes that arise from its use. A human right can be argued to have been created by 'The UN Report' prohibiting governments of member states from restricting Internet access and online content as well as placing an obligation on member states to provide the necessary infrastructure in the pursuit of universal Internet access to its citizens.

'The UN Report' explored 'key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet' and cites its source as Article 19(2) of the ICCPR, which states:

"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." ¹³

In La Rue's report, he made 88 recommendations to promote the right to freedom of expression online as well as further its protection. These include numerous

¹² Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth Session, Agenda item 3. 2011, A/HRC/17/27 16 May 2011).

¹³ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 23 March 1976, Article 19(2).

recommendations in the furtherance of the promotion and securing Internet access for all. La Rue stated, in his report, that 'the Internet is like no other medium as it enables individuals to seek, receive and impart information and ideas of all kinds instantaneously and inexpensively across national borders and believes that the Internet, through its enabling of other human rights, boosts a country's economic, social and political development and thus contributing to the progress of humankind as a whole by expanding the capacity of individuals to enjoy their right to freedom of opinion and expression.'14 La Rue also believes that when governments cut off Internet access, it is in violation of Article 19 paragraph 3 of the ICCPR, irrespective of the reason. 15 He further 'calls upon governments to ensure that Internet access is maintained at all times¹⁶ and he believes that 'due to the Internet becoming an indispensible tool for realising a range of human rights, combating inequality and accelerating development and human progress ensuring universal Internet access should be a priority to all governments.' La Rue also evidences how some countries have gone about labelling Internet access a human right for all its citizens 18. He highlights the fact that 'there are obstacles to this occurring in every country, due to a lack of basic commodities but reminds all states of their positive obligation to facilitate freedom of expression and therefore adopt concrete and effective policies in making the Internet widely available, accessible and affordable to all segments of the population.'19 La Rue also highlights the substantial and transformative potential of the Internet, citing the 'Arab Spring' revolution and stating that, during this revolt, 'the Internet played a key role in mobilising the population to call for justice, equality, accountability and better respect for human rights and that therefore member states, should make it their priority to facilitate access to all its citizens with the least amount of online content restriction as possible.'20 As a result of the UN releasing 'The UN Report' which called for its member states to provide the necessary infrastructure to provide Internet access (viewed as a positive access right) and warning against restriction and censorship of its citizens online usage (viewed as a

¹⁴ Note 12 above, Recommendation 67.

¹⁵ Ibid, Recommendation 78.

¹⁶Ibid, Recommendation 79.

¹⁷Ibid, Recommendation 85.

¹⁸Ibid, Recommendation 65.

¹⁹Ibid, Recommendation 66.

²⁰Ibid, Recommendation 68.

negative access right), 'The UN Report' is viewed as implicitly acknowledging a human right to Internet access.

4.3.2. Legislative and Judicial Intervention:

Prior to the release of 'The UN Report', investigation has shown that various countries had already accepted the belief and legal acknowledgment that Internet access constituted a human right. A few examples of legislative steps and judicial action taken by countries in their acknowledgement of a human right to Internet access will be mentioned below.

In Estonia, Internet access is considered a human right, 'essential for life in the 21st century.'²¹ In 2000 the Parliament of Estonia passed the Telecommunications Act²² which made provision for the universal service of Internet Services to all subscribers irrespective of their geological location and at a uniform price.²³ In 2000, the Estonian government also passed the Public Information Act²⁴ which guaranteed that everyone would have free access to public information through the Internet in public libraries. In 2004, Estonia passed the Electronic Communications Act²⁵, which provided the treatment of all public telephone network- enabled Internet connections as a universal service, which must be available to all end users requesting it²⁶. These pieces of legislation show the Estonian government's recognition of Internet access being a human right as a result of its vision to create a well-functioning e-administration and goal of providing Internet services to all its citizens, even those in rural areas.²⁷

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²¹Collin Woodard 'Estonia, where being wired is a human right', available at

http://www.csmonitor.com/2003/0701/p07s01-woeu.html, accessed 4 August 2014.

²² Telecommunications Act, 2000 (Estonia).

²³ Ibid, Section 5(2).

²⁴ Public Information Act, 2000 (Estonia).

²⁵ Electronic Communications Act 2004 (Estonia).

²⁶ Agnes Karpati 'Internet As Human Right: This is Estonia!', available at

http://estonianfreepress.com/2010/04/internet-as-human-right-this-is-estonia/, accessed 15 September 2014. ²⁷ Ibid.

In 2009, the Constitutional Council of France, in what would be known as the 'HADOPI Case', ²⁸ made a monumental decision furthering the promotion of Internet access being acknowledged as a fundamental human right. This case, dealt with the passing of the 'Act Furthering the Diffusion and Protection of Creation on the Internet' (also known as the HADOPI Act) by the French Parliament. This Act 'provided statutory power to the HADOPI governmental agency to disconnect a person's Internet access for repeatedly infringing copyright'.²⁹ The referral party contended that by giving an administrative authority power to impose penalties such as withholding Internet access, the French parliament would infringe the citizens' right to freedom of expression and communication as well as introducing disproportionate penalties. It was held that, as a result of the freedom guaranteed by Article 11 of the French 'Declaration of the Rights of Man and of Citizens, 1789', the 'French parliament was incorrect to vest an administrative authority with such powers for the purpose of protecting holders of copyright as well as related rights.'30 This judgement is an important 'Internet access - human rights' victory, as terminating a person's Internet access, as seen by the Constitutional Council of France, negatively impacts his or her fundamental right to freedom of expression. The Constitutional Council ruled that 'access to online communications services is a human right and cannot be withheld without a court's ruling'31 and 'the decision to block Internet access of an individual must only be made after a careful balancing of interests by a court and not by an agency, therefore the granting of such powers to an agency was held to be unconstitutional.'32

Evidence in support of Internet access being considered a human right can also be found in the Sala Constitucional De La Corte Suprema De Justica Decision No. 09---013141---0007---CO case, a 2010 Costa Rican Constitutional Court decision which dealt with 'the Costa Rican government being late in fulfilling an obligation to split up its

²⁸ Conseil Constitution nel decision No. 2009-580DC, June 10, 2009, J.O. 9675.

²⁹ Ibid.

³⁰ Ibid

³¹ Richard Wray 'French anti-filesharing law overturned', available at http://www.theguardian.com/technology/2009/jun/10/france-hadopi-law-filesharing, accessed 4 October 2014

³² Winston Maxwell 'Amendment to French HADOPI "three strikes" law adopted by parliament', available at http://www.hldataprotection.com/2009/09/articles/international-eu-privacy/amendment-to-french-hadopithree-strikes-law-adopted-by-parliament/, accessed 18 September 2014.

telecommunications monopoly.'³³ The court held that Internet access is so important in the current modern technological age, 'that to be restricted from its access can negatively impact various other rights including access to the government, equality, freedom of expression, education etc. and thus, Internet access should be on the same level as such fundamental human rights.³⁴, The judges, in this case, 'highlighted the importance of the Internet and subsequently stated that Internet access is a fundamental human right.'³⁵

Finland's government has also showed their belief, that Internet access should be a human right via the passing of Amendment C of Section 60 of the Communications Market Act of 2003, which provides universal Internet connection to all Finnish citizens:

"A telecommunications operator that the Finnish Communications Regulatory Authority has assigned as a universal service operator in universal telephone services ... at a reasonable price and regardless of the geographical location...³⁶...The subscriber connection shall also allow an appropriate Internet connection for all users, taking into account prevailing rates available to the majority of subscribers, technological feasibility and costs...³⁷... Provisions on the minimum rate of a functional Internet access referred to in subsection 2 above are laid down by decree of the Ministry of Transport and Communications.³⁸"

The Electronic Communications and Transactions Act³⁹ (hereafter ECTA) was enacted in South Africa in 2002. This Act dealt with various legal issues pertaining to electronic technology; one such issue was that of universal Internet access.

Section 6 of the ECTA⁴⁰ states:

³³ Andres 'Costa Rican court declares the Internet as a fundamental right', available at http://www.technollama.co.uk/costa-rican-court-declares-the-internet-as-a-fundamental-right, accessed 3 November 2014.

³⁴ Ibid.

³⁵ Sala Constitutional De La Corte Supreme De Justicia, Decision No. 09---013141---0007---CO, 2010.

³⁶ Communications Market Act of 2003, Section 60C (1) (Finland).

³⁷ Ibid, Section 60C (2).

³⁸Ibid, Section 60C (3).

³⁹ Electronic Communications and Transactions Act No. 25 of 2002.

⁴⁰ Ibid.

In respect of universal access, the national e-strategy must outline strategies and programmes to -

- (a) provide Internet connectivity to disadvantaged communities;
- (b) encourage the private sector to initiate schemes to provide universal access;
- (c) foster the adoption and use of new technologies for attaining universal access; &
- (d) stimulate public awareness, understanding and acceptance of the benefits of Internet connectivity and electronic transacting.

In the pursuit of realising the provision of universal Internet access as per ECTA, the South African government has rolled out many initiatives such as the 'Broadband Infraco', launched in 2010; this state owned enterprise was tasked with reducing bandwidth prices in South Africa. The former Minister of Public Enterprise, Malusi Gigaba, explained the importance of providing ICT infrastructure and services to disadvantaged communities by stating that it will have the effect of improving the government's ability to deliver services which are cost-effective and efficient.⁴¹ Further, it was stated by the Chairman of the 'Broadband Infraco', Andrew Mthembu, that broadband is 'as much a basic human right as having access to water, electricity and sanitation'⁴² and that broadband penetration rates and speeds need to be increased to unlock South Africa's full economic potential. At present, South Africa's online economy accounts for 2 % of the country's GDP, approximately R59 billion with expectations of reaching 2.5 % by 2016 (in 'developing countries', a 10 % increase in Internet access adds 1.28 % - 2.5 % to the country's GDP and globally, Internet access added 1 - 1.4 % to the employment growth rate)⁴³ thereby surpassing the country's agricultural yield GDP. To help South Africa become part of the digital community, Yunus Carrim, the former South African Communications minister formed the National Broadband Advisory Committee. One of this committee's key projects is 'South Africa Connect' which was launched in December 2013, with the ultimate goal of providing every South African citizen with access to broadband connection at a cost of 2.5 %

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⁴¹ James Etherington-Smith 'Broadband should be a human right in SA', available at http://mybroadband.co.za/news/telecoms/16695-broadband-should-be-a-human-right-in-sa-broadband-infraco-chair.html, accessed on 6 September 2014.

⁴² Ibid

⁴³A Human Right '4.6 billion people live without Internet access', available at, http://ahumanright.org/, accessed 7 September 2014.

or less than the average monthly income. The committee has a projected target of providing 50 % of the population with Internet access at 5 Mbps by 2016, 90 % at 5 Mbps by 2020 and 100% at 10 Mbps, with 80 % being provided with the option of 100 Mbps by 2030. 44

4.3.3. Values Underpinning Both Freedom of Expression and Internet access:

While everybody can agree on the value the Internet possesses, some believe that it should not be equated to the level of a human right. As mentioned in previous chapters, Vinton Cerf believes that it is a mistake to equate a technology to other human rights and that technology such as the Internet, is merely an enabler of rights, not a right itself. However, Mr Cerf's argument is based on 'an extremely narrow definition of human rights' as many of these rights owe its roots to technology. Rights such as housing and education all require technology to be realised. 'All the cables and coding that form the Internet are no more special than the nails and hammers used to build a house and as such neither should be considered a human right as they are enablers.' Building on this point, Internet access rights advocate, Kosta Grammatis, has stated that:

"Just as a house is more than the sum of its parts so too is the Internet; which is built on top of the brick and mortar society, we call civilisation. The Internet is its own unique society that enhances and grants a global perspective to our lives. To access the Internet is to be allowed global citizenship – the ability to collaborate, learn, empathise and participate globally."⁴⁸

⁴⁴ Government Notice, Department of Communications, Electronic Communications Act, 2005, South Africa Connect: Creating Opportunities, ensuring inclusion South Africa's Broadband Policy. Government Gazette 6 December 2013. No. 953

⁴⁵ Vinton G. Cerf 'Internet Access Is Not a Human Right', available at http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html, accessed 7 October 2014

⁴⁶ KostaGrammatis 'VINT CERF: INTERNET IS A HUMAN RIGHT', available at http://ahumanright.org/press/releases/2012/01-12-12%20A%20Human%20Right%20Release.pdf, accessed 4 October 2014

⁴⁷Ibid

⁴⁸lbid.

In proving that Internet access is not a mere enabler of human rights we must scrutinize what a human right really is. Human rights can be considered 'a bundle which encompasses an abstract expression of the right and some means for enabling that right.'⁴⁹ To determine which conceptual bundle of rights Internet access falls into, we should keep in mind James Nickel's definition of what human rights are:

"those aspects of our lives, which are critical to our capacity to choose and to pursue our conception of a worthwhile life." ⁵⁰

By using 'the capabilities approach', 'which promotes the idea that, those critical aspects of our lives, can be articulated via a grouping of capabilities which must be granted to society as a matter of justice, we can assert that rights develop from the very essence of being human, and these rights allow a person to live a life of dignity.'⁵¹ One such capability; the most important of which (for the purposes of Internet access), is:

"Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association." ⁵²

In the present day, 'this capability is interwoven into Internet access and as such, if Internet access is restricted, the ability to effectively participate politically will also be restricted.'⁵³ For Internet access to be given the status of a human right, it needs to be linked with the human goods that underlie other human rights within the bundle it falls into. The bundle that freedom of expression falls into should include Internet access as they both aim to promote the same free political participation. Therefore Internet access needs to be linked with the human goods underlying freedom of expression.

Thomas Emerson,⁵⁴ drawing on various scholars' ideas on freedom of expression, derived four 'broad categories' of values that underlie protection of free expression:

⁵²lbid.

⁴⁹Stephen Wicker & Stephanie Santoso 'Internet access Is a Human Right -Connecting Internet access with freedom of expression and creativity' (2013) *Communications of the ACM*.

⁵⁰ J Griffin *On Human Rights* 1 ed 2008.

⁵¹lbid.

⁵³ Ibid.

⁵⁴ TI Emerson *Toward a General Theory of the First Amendment* 1 ed 1963.

'Maintenance of a system of free expression is necessary:

- 1) as a means of assuring individual self-development,
- 2) as a means of attaining the truth,
- 3) as a method of securing participation by the members of society in social, including political, decision making, and
- 4) as a means of maintaining the balance between stability and change in society (by providing a mechanism for individuals to vent their frustration and reactions to change in an open forum).'55

On application, it becomes clear that these values are inextricably linked to Internet access. Applying Internet access to Emerson's model:

- 1) Internet access provides various avenues for self-development; be it through social media or blogging, an individual can develop his or her beliefs and opinions.
- 2) Internet access makes it very easy for an individual to attain the truth as it holds an almost infinite array of sources a person can immerse themselves in, during their pursuit of the truth.
- 3) Internet access has created an easily accessible global network allowing the freeflow of information and ideas; creating a global platform for discussion and debate that is unparalleled. An individual is thus able to participate as a member of a greater society in a greater number of ways.
- 4) Internet access provides an individual with a global outlet to express their feelings on any matter which causes them disdain, via blogging, participation on comments pages, social media, etc.

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⁵⁵ Ibid.

It is thus evident that Internet access promotes the same values which underpin the right to freedom of expression and consequently its acknowledgment as a human right is invaluable to society as it greatly surpasses all other methods of communication. In terms of Jean d'Arcy's⁵⁶ classification: broadcasting, advertising etc. is classed as 'vertical communication' (via television and radio) while individual to individual interaction is classed as 'horizontal communication' (via telephone and email). Vertical communication can greatly influence and shape public opinion due to its one-sidedness. The mass media can influence a person's beliefs, choices and opinions through propaganda, as such these vertical media 'create a barrier between the public and the event.'⁵⁷ By providing such a monumental platform for horizontal communication, 'Internet access subsequently erases any such barrier,'⁵⁸ freeing up society to form objective public opinion and be involved in more intellectual debate. Therefore, individuals are not limited to just believe everything that is 'piped' through to them by the vertical media; they are able to intellectually analyse and if need be, debunk what is reported through discussion and their own pursuit of the truth.

Internet access promotes individuals to 'live a life that encompasses personal freedom and creativity; this has been termed a 'convivial lifestyle'.'⁵⁹ For us, as human beings, to live a life of personal freedom and creativity, we require 'convivial tools' to realise autonomy, as we are then able to openly express ourselves and make our own decisions in the pursuit of participatory justice.⁶⁰ The Internet acts as such a tool, by ensuring we are able to realise our interests by being able to convey what they are publicly, to be discussed and debated. In this way, Internet access provides individuals with a 'loud, far reaching voice' that can equip those 'marginalised groups who, without Internet access, would not have an avenue to express their thoughts and opinions on a global scale.'⁶¹ Hence those 'without access are left with a void, in terms of a way to properly evaluate and decide on various issues including political decision making;'⁶² this is the very essence of the 'digital divide'. Therefore,

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⁵⁶ Wicker & Santoso (note 49) above.

⁵⁷ Ihid

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid

⁶² Ibid.

'Internet access can be seen to be in direct nexus with the human capabilities that are considered to ensure a life worth living⁶³ and so interwoven are they, that to deny Internet access, is to allow its associated capabilities to also be denied.

4.4. Conclusion

Freedom of expression is a fundamental human right that is required for all individuals to live a life of dignity and reach their full potential; this also applies to Internet access as evidenced above. It can thus be argued that, Internet access can be classified as a human right as the values and capabilities which underpin the already established human right of freedom of expression are the very same as Internet access. The concept of a human right to Internet access has already gained legislative and judicial support by various countries who believe Internet access should be provided to every human being. These countries lead the way forward and others should follow suit, as fast as reasonably possible, to promote the quality of their citizens' lives and growth of their country as a whole. While a well structured, shared definition of what a right to Internet access really entails has not yet materialised, a formal declaration by the international community will assist in clarification. Whilst 'The UN Report' falls short of this, it is a good starting point toward a formal legal structure. However, in the mean time, 'The UN Report' will surely have a very significant impact on realising the promotion of Internet access as a human right as courts and legislators will be persuaded to follow the reasoning behind it, especially due to the huge publicity and support it gained. An international, legal acknowledgment of Internet access rights, which has been negotiated by the international community, will quell any discord that may arise as a result of the borderless nature of the Internet. Through positive and negative obligations bolstered by 'The UN Report', there will be a greater acceptance of a human right to Internet access, which is not just an enabler of other human rights but should be correctly classified as a human right in itself. The acknowledgment of Internet

63 Ihid

access as a human right will inevitably become a more prevalent and accepted idea over time, as the Internet unavoidably becomes more integrated into our daily lives and no matter what the outcome of this debate in the short-term, Internet access will definitely be considered (someday) as the basic tap water of the future.

CHAPTER 5 – CONCLUSION

5.1. Concluding Remarks

The purpose of this dissertation was to determine whether 'Internet access' can be considered a human right. The importance of this realisation is that if Internet access can be classified as such, then steps can be taken by the international community in providing a binding international legal framework for domestic governments to adopt and adapt into their legal systems. Without an established international human right, domestic governments might purposefully ignore or simply overlook the important impact which Internet access can have on its citizens and the value it has in uplifting the lives of those from disadvantaged backgrounds. An internationally established, well defined right to Internet access can go a long way to drive the political willingness of domestic governments to recognise and commit itself to providing unrestricted Internet access to all its citizens. Human rights promote policy making and therefore various concerns, such as online copyright infringement, online censorship and infrastructural obstacles can be addressed by a newly drafted right to Internet access.¹

The intellectual origins of a human right to Internet access has formed over many decades, from its roots in Article 19(2) of the ICCPR² through to cyber-libertarianism and the 'right to communication'; these roots were integral in starting the debate on the issue. Arguably, the turning point in this debate, however, has to be the 'The UN Report' which 'effectively rekindled discussions about human rights in the context of information technologies,' more specifically the Internet. This report highlighted the importance of the Internet in realising the human right of '...freedom to seek, receive and impart information

¹ P De Hert and D Kloza, 'Internet (access) as a new fundamental right. Inflating the current rights framework?' (2012) 3 European J of Law and Technology.

² International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 23 March 1976.

³ JS Winter 'Is Internet Access a Human Right? Linking Information and Communication Technology Development with Global Human Rights Efforts' (2013) 5 *The Global Studies J* 35, 40.

and ideas of all kinds...' and has propelled worldwide debate and acceptance of Internet access being a human right.

The implications of 'The UN Report' are far reaching, as the reasoning behind La Rue's assertions will influence domestic legal jurisdictions to adopt legislation; promoting the right to Internet access. This will not only occur due to La Rue being a high profile UN official but also as a result of the global attention and support 'The UN Report' has received. La Rue's findings will thus prompt governments to initiate the provision of universal Internet access, following countries such as Estonia and Finland; where governments realised the 'Internet's universality, integrity and openness would be consistent with a human rights approach.' This idea of a right to Internet access is far from static, being a continually evolving concept that is being strengthened by proponents such as 'The UN Report' and various countries' legislative and judicial efforts. These latest developments will shape perceptions toward the belief that Internet access is not merely a tool to garner human rights realisation but rather a right in itself that deserves a higher threshold of human rights protection and promotion.

Whilst no one can reasonably dispute the value which the Internet can bring to the lives of every human being, many argue that Internet access fails to meet the criteria of what a human right truly is and thus, to place a human right status on a form of technology, will only promote a 'human rights inflation.' A 'human rights inflation' occurs when too many things are proclaimed as human rights thereby diluting the reverence the framework holds. However, Internet access is not merely an enabler of other rights or a modern luxury but is rapidly becoming 'essential for the preservation and participation of democracy'. In the course of this paper, human rights were defined to be 'those rights which are

⁴ Note 2 above, Article 19(2).

⁵ S Tully 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights LR* 175, 176.

⁶ B Skepys 'Is There a Human Right to the Internet?' (2012) 5 *J of Politics and Law* 15, 15.

⁷ Winter (Note 3) above.

fundamental to all human beings irrespective of any other factors, being the 'the norms that help to protect all people everywhere from severe political, legal, and social abuses.' It is immediately evident that the Internet can significantly help those experiencing severe political, legal and social abuses to express themselves. Internet access can provide citizens a platform for political participation and to voice any human rights violations. The use of the Internet, through its borderless and far reaching nature, can spark worldwide support and awareness of the abuses which can occur within a country. This highlights the inherent value the Internet has in providing protection through communication and can therefore be classified as something that protects against various abuses by those elites in positions of power (the core function of human rights). The Internet's ability to facilitate access and the dissemination of information globally provides various economic, political and social advantages. Therefore, those individuals, regions or nations without such a technology will be greatly disadvantaged. 10

However, it is also true that there are various 'strong, non-human rights approaches to protecting technologies such as Internet access and therefore arguments for a human right to Internet access must be very powerful and compelling.'¹¹ Those in opposition of a right, such as Skepys,¹² believe that the arguments promoting a human right to Internet access are not based on a sufficient human rights theory justification; he evidences this by analysing various arguments for a human right to Internet access and thereafter shows how they subsequently fail to stand up to human rights theory evaluation. James Maxlow, further asserts that basic human rights cannot be created as technologies emerge and that they existed from the time humans came together in societal groups.¹³ I argue that these assertions fail to prove that Internet access cannot be a human right as 'human rights are

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⁸ Office of the High Commissioner for Human Rights 'What are human rights?' available at http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx, accessed 5 September 2014.

⁹ James Nickel 'Human Rights' available at http://plato.stanford.edu/entries/rights-human/, accessed 23 September 2014.

Winter (note 3) above.

¹¹ De Hert & Kloza (note 1) above.

¹² B Skepys 'Is There a Human Right to the Internet?' (2012) 5 J of Politics and Law 15, 15.

¹³ N Bernasconi& J Maxlow 'Is Internet Access a Basic Human Right?' (2010) *Learning & Leading with Technology* 37 6, 7

not a holy construct and by no means static in nature; 14, due to societal changes, human rights need to continually evolve to address new challenges. 15 The international human rights system has greatly evolved 'since the adoption of the UDHR in 1948; the codification process, regarding the definition of new rights and new international principles has continued. 16 Human rights need to continually be evaluated and adapted to society's emerging challenges¹⁷ – this is appropriate at present, due to recent Internet restrictions, cyber-attacks and Internet blocking by various governments. These kinds of control are the reasoning behind why we have human rights, i.e. to protect human beings against the arbitrary abuse of power by his/her government. It is therefore obvious as to why many have turned to a human rights framework to protect Internet access. A human right to Internet access creates a need to take immediate action and will compel policy makers to address lack of Internet access and adopt strategies to close the digital divide.

Whilst human rights are not static or rigid, this does not mean that Internet access fails to stand up to a current human rights theory evaluation; it is argued in promotion of a human right to Internet access that such access is linked to the values which underpin other human rights, i.e. freedom of expression. This can be observed via the use of Thomas Emerson's¹⁸ model; which highlights that the values which underpin free expression also apply equally to Internet access. 'The Internet provides numerous means for development, making it easy to attain the truth, promote the free flow of information and provide an instrument for an individual to express their concerns.'19 Internet access can therefore remove communication and learning barriers; helping individuals realise their own personal autonomy by being able to openly express themselves and participate in the inner workings of democracy. 'The UN Report' has made it clear, the important role that the Internet plays

¹⁴ De Hert & Kloza (note 1) above.

¹⁵ M Odello and S Cavandoli *Emerging areas of human rights in the 21st century: the role of the universal* $\frac{declaration\ of\ human\ rights}{16}$ De Hert & Kloza (note 1) above.

¹⁷ Obello and Cavandoli (note 15) above.

¹⁸ TI Emerson *Toward a General Theory of the First Amendment* 1 ed (1963).

¹⁹ S Wicker and S Santoso 'Internet access is a Human Right - Connecting Internet access with Freedom of Expression and Creativity' (2013) 56 Communications of the ACM 43, 43.

in driving political change around the world. Therefore, denying Internet access would promote the denial of its associated capabilities.

Another argument put forward against a human right to Internet access, is that while various countries have put in place policies to provide universal Internet, these same countries fail to provide more urgent human rights such as water and housing. Thus, by this reasoning, a promotion of a human right to Internet access would amount to a waste of crucial funds that could help uplift the lives of the disadvantaged through the adequate provision of more urgent human rights. However, in providing Internet access to its citizens, states can help these individuals realise various human rights. Internet access can not only help people find economic opportunities, it can create them, as many can start their own online business ventures. Therefore, enormous economic progress Internet access can bring to a 'developing country' cannot be understated. Healthcare is another human right that can be attained via Internet access, as 'telemedicine technologies are revolutionising how the disadvantaged, poor sectors of society are able to attain access to adequate healthcare.²⁰, These healthcare technologies allow doctors who are continents away from their patients, to successfully diagnose diseases and health issues. The Internet can also be an invaluable medium to aid in disaster relief; by helping those isolated villages in 'developing countries' to communicate with those who can come to their aid. Those who are able to help can be notified immediately and therefore the efficiency of such communication can save countless lives. Internet access is therefore capable of enabling other human rights, however, from the arguments put forth in this paper it is clear that it can also promotes its own values as a separate human right. Internet access can truly aid society, especially those individuals from the disadvantaged sectors of society to realise various human rights and consequently, Internet access should be viewed as crucial to the lives of every human being in their pursuit of a life worth living.

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²⁰ A Human Right '4.6 billion people live without Internet access', available at http://ahumanright.org/, accessed on 23 September 2014.

The Internet can help an individual become a global citizen who can become engaged in a larger, global democratic participation. Those with Internet access are able to publically interact, pursue knowledge and participate politically in an unprecedented, far reaching manner, not provided for by any other medium. The Internet has thus become a crucial part of our contemporary, technologically advanced society as a whole. The nature of the Internet allows for not only a one sided dissemination of information but a multifacetted one, promoting intellectualism and debate rather than indoctrination. The Internet possesses the sum total of all human knowledge; it is an endless supply of continually, exponentially growing knowledge. From the Internet, your right to education can be fulfilled, as you can learn what you want, when you want. We all know the proverb - 'If you give a man a fish, you feed him for a day but teach a man to fish and he can feed himself for a lifetime' however, Kosta Grammatis states further, 'but give that man the Internet, and he can teach himself to fish and anything else he wants to do.'21

It is also argued that 'to join a state of technology to human rights is an incorrect notion as human rights are unique in that we possess them by the very reason that we are human.'22 However, if we analyse Article 19(2) of the ICCPR, we see it was indeed revolutionary; adopted in the 1950's, it had the consequences of being able to protect future communication technologies such as the Internet.²³ Article 19 therefore fosters an early basis for an 'international law of the Internet' and can provide guidance in terms of Internet governance debates.²⁴ This Article, in protecting technologies of communication, promotes the closing of the 'void in human rights law as there are various decisions on technologies that, while not violating international human rights law, affects them greatly.'25 Protection of such technologies, allows intervention and discussion on many decisions in the broader realm of affecting human rights.²⁶

²¹ Note 21 above.

 $^{^{22}}$ E Sterner 'The Folly of Internet Freedom -The Mistake of Talking About the Internet as a Human Right' (2011) 32 The New Atlantis 134, 137. 23 M Land 'Toward an International Law of the Internet' (2013) 54 Harv Int \sqcup 393, 408.

²⁴ Ibid, 394.

²⁵ Ibid.

²⁶ Ibid, 395.

The argument that Internet access should not be a human right as 'not having access to computer hardware and software would amount to a human rights violation and basic human rights do not depend on the availability of resources,'27 has no argumentative weight as water and housing which are established human rights, requiring many infrastructural components to allow its provision. Therefore, Internet access should not be treated any differently due to its infrastructural obstacles. Just as governments have policies in place with the eventual goal of providing human rights such as water and housing to every citizen, so too can governments in terms of a right to Internet access. With an international human rights framework in place, states will be compelled to adopt legislation and can thereafter put in place strategic policies that further the goal of universal access.

This paper posed the question, 'can Internet access be a human right?' Evidence suggests that any state can independently proclaim that it is such a right and subsequently enact legislation to provide it to all its citizens. However, what this paper pursued was a determination as to whether it was appropriate for Internet access to be structured within an International human rights framework; this is a crucial question to provide global uniformity on the matter. This paper reviewed arguments against and for the promotion of Internet access as a human right and ultimately concludes that Internet access can and must be a human right as among other advantages, it is important for the preservation of democracy.

Currently, in the majority of the world, Internet access is treated as merely a technology in pursuit of various pre-existing human rights and therefore is not treated as an independent right.²⁸ While the current human rights framework, i.e. Article 19(2) offers some protection for Internet access (as it is a medium that can be used to seek, receive and impart information), it is not sufficient. There has to be some change and in pursuit of this; a formal, international human right to Internet access must explicitly be adopted via a

²⁷ N Bernasconi & J Maxlow 'Is Internet Access a Basic Human Right?' (2010)*Learning & Leading with Technology* 37 6, 7.

²⁸ Tully (note 5) above, 175.

declaration by an international body. Although 'The UN Report' will assist in persuading governments to recognise Internet access as vital, it falls short of a formal, explicit declaration that will be binding on member states. A formal embodiment of a right is recommended as an international legal acknowledgement will spark 'the implementation of a right to Internet access based on mutual understanding and negotiation.²⁹,

A right to Internet access entails not only protection against state governments which illegitimately restrict Internet access and censor online content but also to provide the necessary infrastructure to provide access. In pursuit of this, strategic policies need to be adopted to provide the disadvantaged sectors of society with access. Policies need to keep in mind issues of affordability, practicality and the socio-economic climate within the country. A human right to Internet access will however not be unqualified. Just like any other human right, a right to Internet access will be subject to restrictions. The aims of these restrictions (e.g. rights of others, public interest, national security etc.) will have to be balanced against the interests of Internet users.

5.2. Recommendations

Going forward, I suggest the adoption of an international legal framework to protect a human right to Internet access. I further suggest that all states, in providing legislation in promotion of such a human right should consider and incorporate the following 7 factors:

Proportionate response,

The retaliation by state governments for any expression online should be focused on offensive content alone and not go too far in its punishment, i.e. a complete ban from Internet access for minor infringements. Restrictions to Internet access 'should only target legitimately threatening content that could incite violence

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²⁹ Winter (note 3) above, 44.

or cause a threat to public safety.'³⁰ 'Criminalisation should only result in extreme cases, such as child pornography or content inciting genocide, discrimination or violence etc.'³¹ Online restrictions must be 'appropriate, proportionate and necessary within a democratic society and any process in pursuit of this must contain the appropriate safeguards to discourage abuse.'³² Any limitation must be absolutely necessary, using the least restrictive means of achieving its aims.³³ In the event of intellectual property violations, an independent body or court must carefully assess if the individual interests of the Internet user, including his/her right to freedom of expression will be disproportionately infringed in determining any punishment with regards to his/her Internet access.

Detailed Legislative Regulations

Countries which adopt a human right to Internet access should formulate detailed legislation, providing protection of freedom of expression online as well as clearly setting out which online acts are illegal and further which acts are grounds for restricting access. International human rights law does include circumstances when restrictions to information apply, therefore legislation should also detail grounds for legitimate restriction.³⁴ Just as freedom of expression can be limited in certain circumstances, i.e. hate speech and incitement of violence, so too should there be limitations set out in legislation in terms of Internet access. However, these limitations must be legitimate, with the aim of 'protecting others' rights, national security, public health, public order and morals.'³⁵ States must also put in place legislative policies that will have the effect of providing access to the disadvantaged sectors of the public.

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³⁰ YJ Lim & SE Sexton 'Internet as a Human Right: A Practical Legal Framework To Address the Unique Nature of the Medium and To Promote Development' (2012) *Washington Journal of Law, Technology & Arts* 7 295,315.

³¹ Ibid.

³² Tully (note 5) above, 192.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

• Formation of an Independent body,

Legislation regulating a right to Internet access must be applied by an independent, sui generis body which has no commercial or political interests; such a body has also been recommended by 'The UN Report'.³⁶ This body must perform its function in a non-arbitrary or discriminatory manner, while protecting users from abusive restriction.³⁷ This body should have the power to hear evidence and then apply domestic law to uphold the values which the Internet promotes.³⁸ It is suggested that such a body 'should act like an administrative court by weighing the evidence in determining issues such as blocking, restricting and censoring Internet content of individuals.'³⁹ The role and responsibilities of ISPs in helping to regulate a right to Internet access needs to be further analysed and applied. ISPs can help this body by providing information about users' infringements as set out in legislation to help the independent body in its decisions to restrict or disconnect users.⁴⁰

• Judicial Review,

The decisions decided by such an independent body mentioned above, should be open to judicial review by a higher court already established in a country's domestic legal framework.⁴¹ An Internet user who is of the opinion that his/her Internet rights were infringed by the body's decision 'should have the ability to seek redress in a court of law.'⁴²

³⁶ Note 23 above.

³⁷ Tully (note 5) above, 192.

³⁸ Lim & Sexton (note 30) above, 316.

³⁹ Ibid.

⁴⁰ Tully (note 5) above, 191.

⁴¹ Lim & Sexton (note 30) above.

⁴² Ibid, 317.

Transparency

The proposed legislation and the decisions made by an independent body should be absolutely transparent. Processes of enforcement, court proceedings and legislative documents; detailing restriction criteria should be made public for every citizen to make themselves aware of; this is to foster greater accountability and will provide for a more legitimate right to Internet access.⁴³

International Co-operation

For an efficient, legitimate system of Internet rights protection, co-operation between different jurisdictions is key; this being the need for an international human rights framework. The Internet is an international construct, the use of which can have international implications. Therefore, a legal authority on Internet access within a state 'is just one player in a global web of authorities.' Hence, co-operation between jurisdictions will be ideal in addressing issues of online content, as someone who posts illicit content might be present in one country whilst an infringing downloader is in another – this is the borderless nature of the Internet.

• Partnership between government and technology companies

Governments, in forming legislation, should consider the role technology companies can play in promoting Internet access rights. A more active role by technology companies should be promoted as 'their position in the market and subsequent decisions can affect possible human rights to Internet access.' Whilst governments will play the lead role in enforcing Internet access rights, technology companies can be prompted to rectify a conflict of interest as governments will not

44 Ibid.

⁴³ Ibid.

⁴⁵ Land (note 23) above, 396.

be too eager in restricting their own ability to control online expressions. By being placed outside the sphere of users and government control, technology companies can enforce freedom of expression online by creating technology that makes it harder for governments to violate an international right to Internet access.⁴⁶

These factors will help promote a well developed system of Internet protection as a human right to Internet access fast becomes the primary method of communication, fostering a more technological society. The question of whether Internet access is a human right is crucial at present, due to the various examples of recent governmental online censorship and blocking practises. This has resulted in increasing interest around this debate, creating an urgency to take immediate action. I submit that sufficient argument has been tendered in this paper in support of a human right to Internet. The shortcomings of such an acknowledgement are greatly outweighed by the advantages. It is also submitted that 'in the future, technological developments are likely to force the creation of new human rights'. 47 International bodies should therefore start the implementation of an international human rights framework to Internet access. The road ahead to a universal human right to Internet access will be a long, arduous journey due to issues such as domestic governments' infrastructural obstacles and/or their unwillingness to acknowledge the immense value which the Internet has at unlocking human potential, promoting economic growth and facilitating the achievement of other human rights. Therefore, building towards a human right to Internet access is a venture worth pursuing for the betterment of all society.

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¹⁶ Ibid.

⁴⁷ R Brownsword & M Goodwin, *Law and the Technologies of the Twenty-First Century* 1 ed (2012) 225.

BIBLIOGRAPHY:

Conventions, Protocols, Resolutions and other International Instruments:

African Charter on Human and People's Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 21 October 1986.

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, 2 September 1990.

Declaration on Freedom of Information, G.A. Res. 59 (I), U.N., 14 December 1946.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 23 March 1976.

UNESCO Res. 4/19, Recs. of the General Conference, 21st Sess., Vol. 1, Sept. 23–Oct. 28, 1980 69.

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

Reports, Recommendations, and Directives:

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, Seventeenth Session, Agenda item 3. 2011, A/HRC/17/27 16 May 2011).

J Suderland 'Shattered Dreams: Impact of Spain's Housing Crisis on Vulnerable Groups' (2014) *Human Rights Watch Report*.

Legislation:

i) South African

Electronic Communications and Transactions Act No. 25 of 2002.

The Constitution of the Republic of South Africa, Act No. 108 of 1996

ii) Foreign

Communications Market Act of 2003 (Finland).

Electronic Communications Act 2004 (Estonia).

Public Information Act, 2000 (Estonia).

Telecommunications Act, 2000 (Estonia).

The Spanish Constitution of 1978 (Spain)

Cases

i) International

Handyside v. United Kingdom 1976 (App 5493/72) ECHR.

ii) Foreign

Conseil Constitution nel decision No. 2009-580DC, June 10, 2009, J.O. 9675

Sala Constitutional De La Corte Supreme De Justicia, decision No. 09---013141---0007---CO, 2010.

Text Books

Brownsword R & Goodwin M, Law and the Technologies of the Twenty-First Century (Cambridge: Cambridge Uni. Press, 2012)

Cohen J, *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (Oxford: Oxford Uni. Press, 2006)

Emerson TI, Toward a General Theory of the First Amendment (New York: Random House, 1963)

Griffin J, On Human Rights (Oxford: Oxford Uni. Press, 2008)

Hamelink CJ, *The Politics of World Communications: A Human Rights Perspective* (London: Sage, 1994)

Norris P, Digital Divide: Civil Engagement, Information Poverty, and the Internet Worldwide (Cambridge: Cambridge Uni. Press, 2001)

Odello M & Cavandoli S, Emerging areas of human rights in the 21st century: the role of the universal declaration of human rights (Yew York: Routledge, 2011)

Sepúlveda M et al., *Human Rights Reference Hand Book* (Costa Rica: University of Peace, 2004)

Journal Articles:

Bernasconi N & Maxlow J 'Is Internet Access a Basic Human Right?' (2010) 37 *Learning & Leading with Technology*.

Best ML 'Can the Internet Be a Human Right?' (2004) 4 HRHW.

Etling B, Faris R and Palfrey J 'Political Change in the Digital Age. The Fragility and Promise of Online Organizing' (2010) 30 SAIS Review.

Health 24 'SA's TB rate among the highest in the world' available at http://www.health24.com/Medical/Tuberculosis/News/SAs-TB-rate-among-the-highest-in-the-world-20140213, accessed 23 September 2014.

Human Sciences Research Council 'South African National HIV Prevalence, Incidence and Behaviour Survey, 2012' available at http://www.hsrc.ac.za/uploads/pageContent/4565/SABSSM%20IV%20LEO%20final.pdf, accessed 4 October 2014.

Ko K et. al. 'The Internet dilemma and control policy: political and economic implications of the Internet in North Korea' (2009) 21 Korean Journal of Defence Analysis 279, 284.

Koren M 'Human Rights of Children: Their Right to Information' (2001) Human Rights LR.

Land M 'Toward an International Law of the Internet' (2013) 54 Harvard Int LJ.

Lim Y & Sexton S 'Essay: Internet as a Human Right' (2012) 7 Wash. JL Tech. & Arts.

Penney JW 'Internet Access Rights: A Brief History and Intellectual Origins' (2011) 38 William Mitchell LR 9, 24.

Powell A, Byrne A and Daily, D 'The Essential Internet: Digital Exclusion in Low-Income American Communities' (2010) 2 *Policy and Internet*.

Sen A 'Elements of a Theory of Human Rights' (2004) 32 Philosophy and Public Affairs.

Skepys B 'Is There a Human Right to the Internet?' (2012) 5 J of Politics and Law.

Specker L & Briscoe I 'Early Economic Recovery in Fragile States, A Case Study Burundi: Operational Challenges' (2010) *Clingedael Institute Papers*.

Sterner E 'The Folly of Internet Freedom -The Mistake of Talking About the Internet as a Human Right' (2011) 32 *The New Atlantis* 134, 136

Tully S 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights LR*.

Wicker S & Santoso S 'Access to the Internet Is a Human Right -Connecting Internet access with freedom of expression and creativity' (2013) *Communications of the ACM*

Winter JS 'Is Internet Access a Human Right? Linking Information and Communication Technology Development with Global Human Rights Efforts' (2013) 5 *The Global Studies J.*

Websites

A Human Right '4.6 billion people live without Internet access', available at, http://ahumanright.org/, accessed 7 September 2014.

Al Jazeera 'Taking power through technology in the Arab Spring', available at http://www.aljazeera.com/indepth/opinion/2012/09/2012919115344299848.html, accessed 9 November 2014.

Andres 'Costa Rican court declares the Internet as a fundamental right', available at http://www.technollama.co.uk/costa-rican-court-declares-the-internet-as-a-fundamental-right, accessed 3 November 2014.

Anton 'South African Broadband Internet Forecast' available at http://www.vuyaafrica.co.za/2014/04/14/south-african-broadband-internet-forecast/, accessed 6 June 2014.

Article 19 'International Guarantee', available at http://www.article19.org/pages/en/international-guarantee.html, accessed 10 September 2014.

BBC 'Internet access is 'a fundamental right' available at http://news.bbc.co.uk/2/hi/technology/8548190.stm, accessed on 3 July 2014.

Blancafort JT & Fernández E 'The Great Firewall of China: A case analysis on how foreign media view the online censorship in China' available at https://ddd.uab.cat/pub/tfg/2014/126277/TFG_Judith_Torner_Blancafort.pdf, accessed 5 November 2014.

Cerf V 'Internet access is not a human right' *The New York Times* 4 January 2012, available at http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html? r=0, accessed 1 September 2014.

De Hert P and Kloza D, 'Internet (access) as a new fundamental right. Inflating the current rights framework?' (2012) 3 European J of Law and Technology

eNCA 'Internet access to become a basic human right', available at http://www.enca.com/south-africa/internet-become-basic-human-right, accessed 8 June 2014.

Etherington-Smith J 'Broadband should be a human right in SA', available at http://mybroadband.co.za/news/telecoms/16695-broadband-should-be-a-human-right-in-sa-broadband-infraco-chair.html, accessed on 6 September 2014.

Germanos A 'Global Survey: Internet Access Should Be a Human Right', available at http://www.commondreams.org/news/2014/11/24/global-survey-internet-access-should-be-human-right, accessed on 24 November 2014

Grammatis K 'VINT CERF: INTERNET IS A HUMAN RIGHT', available athttp://ahumanright.org/press/releases/2012/01-12-12%20A%20Human%20Right%20Release.pdf, accessed 4 October 2014

Hunt K and Xu CY 'China 'employs 2 million to police internet' available at http://edition.cnn.com/2013/10/07/world/asia/china-internet-monitors/, access 28 October 2014.

ITU 'ICT Statistics 2014', available at http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.asp, accessed on 4 September 2014.

Karpati A 'Internet As Human Right: This is Estonia!', available at http://estonianfreepress.com/2010/04/internet-as-human-right-this-is-estonia/, accessed 15 September 2014.

Lessig L 'The laws of Cyberspace, Draft 3' available at http://cyber.law.harverd.edu/lesssig.html, accessed 7 October 2014.

Mansourov AY 'North Korea on the Cusp of Digital Transformation' *Nautilus Institute Special Report,* available athttp://nautilus.org/wp-content/uploads/2011/12/DPRK_Digital_Transformation.pdf, accessed 6 October 2014.

Martin K 'New word notes: December 2013' available at http://public.oed.com/the-oed-today/recent-updates-to-the-oed/december-2013-update/new-words-katherine-martin/, accessed 28 October 2014.

Maxwell W 'Amendment to French HADOPI "three strikes" law adopted by parliament', available at http://www.hldataprotection.com/2009/09/articles/international-euprivacy/amendment-to-french-hadopi-three-strikes-law-adopted-by-parliament/, accessed 18 September 2014.

Nickel J 'Human Rights' available at http://plato.stanford.edu/entries/rights-human/, accessed 23 September 2014.

Office of the High Commissioner for Human Rights 'What are human rights?' available at http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx, accessed 5 September 2014.

Reisinger D 'Vint Cerf: Internet access isn't a human right', available at http://www.cnet.com/news/vint-cerf-internet-access-isnt-a-human-right, accessed 20 May 2014.

Research ICT Africa '2012 ICT Access and Use Survey', available at www.researchictafrica.net/home_archive_reader.php?aid=55, accessed 8 September 2014.

Statistics South Africa 'Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011', available at http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/Report-03-06/R

Statistics South Africa 'Quarterly Labour Force Survey Quarter 3, 2014' available at http://beta2.statssa.gov.za/publications/P0211/P02113rdQuarter2014.pdf, accessed 23 September 2014.

TakingITGlobal '2008: Celebrating the 60th Anniversary of the Universal Declaration of Human Rights' available at http://www.takingitglobal.org/themes/udhr60/, accessed 7 June 2014.

The Huffington Post 'Internet Access Is A Human Right, United Nations Report Declares' available at http://www.huffingtonpost.com/2011/06/08/internet-access-human-right-united-nations-report n 872836.html, accessed 3 September 2014

Thierer A & Szoka B 'Cyber-Libertarianism: The Case for Real Internet Freedom' available at http://techliberation.com/2009/08/12/cyber-libertarianism-the-case-for-real-internet-freedom/, access 20 September 2014.

Waters R 'An exclusive interview with Bill Gates' *The Financial Times Magazine* 1 November 2013, available at http://www.ft.com/intl/cms/s/2/dacd1f84-41bf-11e3-b064-00144feabdc0.html#ixzz2jQNJ33ly, accessed on 25 June 2014.

Williams M 'North Korea moves quietly onto the Internet' available at http://www.computerworld.com/article/2518914/enterprise-applications/north-korea-moves-quietly-onto-the-internet.html, accessed 6 October 2014.

Wray R 'French anti-filesharing law overturned', available at http://www.theguardian.com/technology/2009/jun/10/france-hadopi-law-filesharing, accessed 4 October 2014.

Woodard C 'Estonia, where being wired is a human right' available at http://www.csmonitor.com/2003/0701/p07s01-woeu.html, accessed on 4 August 2014.

YouthNet 'Life Support Young people's needs in a digital age', available at http://www.socialfuturesobservatory.co.uk/wp-content/uploads/2014/10/life-support-young-peoples-needs-in-the-digital-age.pdf, accessed 3 July 2014