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## **Access to the Internet – a human right?**

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During a high-level panel discussion on government responsibility for protecting human rights on the Internet, Judge Ineta Ziemele of the European Court of Human Rights (ECtHR) posed the question, is access to the Internet a human right, and if so, what obligations does this put on the state?<sup>1</sup> Paragraph 1 of Article 10 of the European Convention on Human Rights (CETS No. 5) states:

*"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."*

This imposes a negative obligation on the state – not to obstruct the exercise of these rights – but the positive obligation to enable their exercise is clearly stated in Article 1: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."*

The question is, does this positive obligation extend to the provision of specific communications technologies? Would we have asked the same question in the case of the telephone? The aim of this brief paper is to provide a glimpse of popular thinking, the possible legal case to be made for such a claim and to stimulate a discussion on possible future action by the Council of Europe.

In 2003, the *Christian Science Monitor* published an article on its website with the headline *"Estonia, where being wired is a human right"*. The article sang the praises of the high level of information technology in the country and contained the following sentence: *"In 2000, the parliament, perhaps inspired by their new gizmos, passed a law declaring Internet access a fundamental human right of its citizenry."*<sup>2</sup> Writing in the *Scientific American*, Tim Berners-Lee, the inventor of the World Wide Web, has a paragraph with the heading "Electronic Human Rights" but the content is about the threats to net neutrality and the author does not actually state what these electronic human rights might be.<sup>3</sup>

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<sup>1</sup> Federal Ministry for European and International Affairs of Austria and the Council of Europe conference "Our Internet - Our Rights, Our Freedoms - Towards the Council of Europe Strategy on Internet Governance 2012-2015", Vienna 24 – 25 November 2011.

<[http://www.coe.int/t/informationsociety/conf2011/default\\_EN.asp?>](http://www.coe.int/t/informationsociety/conf2011/default_EN.asp?>) Accessed 30.12.2011

<sup>2</sup> Woodward, Colin. "Estonia, where being wired is a human right", *Christian Science Monitor* (1 July 2003) <<http://www.csmonitor.com/2003/0701/p07s01-woeu.html>> Accessed 13.12.2011

<sup>3</sup> Berners-Lee, Tim. "Long Live the Web", *Scientific American* (2010) 303, No. 6: 80-85.

## United Nations

Following the publication of the 16 May 2011 report<sup>4</sup> by Frank La Rue, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, various websites and print media proceeded to claim that the Internet was indeed now a fundamental right; for example, the *Los Angeles Times* bore the headline "U.N. report: Internet access is a human right". In his analysis of the report, the author makes a curious and paradoxical statement: "*But while La Rue argues that Internet access is a basic human right, he also notes that giving people that right isn't yet always feasible in every nation. But that shouldn't stop governments from trying to give their people affordable access to the Web.*"<sup>5</sup> We would argue that it is not within the state's competence to "give" people basic human rights, they are universal and inherent.

As Stephanie Borg Psaila of the *DiploFoundation* points out: "*...nowhere does the Report state, in black and white, that Internet access is – or is now being considered – a human right.*"<sup>6</sup> The Special Rapporteur states, "Indeed, the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights" and the report refers to the Internet as "*a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights*".

## OSCE

In her testimony to the US Helsinki Commission in July 2011, Dunja Mijatović, the OSCE Representative on Freedom of the Media, said, "*In order to pay tribute to the unique contribution the Internet has given to participatory democracy, to freedom of expression and to freedom of the media, it is only fitting to enshrine the right to access the Internet on exactly that level where such rights belong, as a human right with constitutional rank.*"<sup>7</sup>

Thus, neither the UN Special Rapporteur nor the OSCE Representative claim that access to the Internet is an established right in itself but a means whereby human rights, principally freedom of expression and the freedom to receive and impart information, may be exercised. The situation in real life is, however, somewhat more complicated and there are clearly observable tendencies that could lead one to assume that access to the Internet is a fundamental right.

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<sup>4</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UNGA HRC A/HRC/17/27 16 May 2011

< [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/HRC/17/27](http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/17/27) > Accessed 13.12.2011

<sup>5</sup> Olivarez-Giles, Nathan. "U.N. report: Internet access is a human right", *Los Angeles Times* (3 June 2011). <<http://documents.latimes.com/un-report-internet-rights/>> Accessed 13.12.2011

<sup>6</sup> Borg Psaila, Stephanie. 'UN declares Internet access a human right' – does it really? *DiploFoundation* (10 June 2011) <<http://igbook.diplomacy.edu/2011/06/internet-access/>> Accessed 30.12.2011

<sup>7</sup> OSCE media freedom representative calls on governments to recognize access to the Internet as a human right. OSCE Press release 16 July 2011 <<http://www.osce.org/fom/81006>> Accessed 06.01.2012

## Council of Europe

As long ago as 1997, the Council of Europe Parliamentary Assembly (PACE) had recognised the potential of the rapidly developing information and communication technologies and adopted a resolution stating that "they must serve the promotion of freedoms, foster the self-fulfilment of citizens and their more effective participation in public affairs, stimulate economic development and employment, facilitate social and cultural progress and advance education and the acquisition of knowledge."<sup>8</sup> The resolution called upon national parliaments to take "*legislative action in order to ensure the most effective use of these technologies for the benefit of the public and to reconcile technological progress with respect for democratic principles and human rights*"<sup>9</sup> and to provide "*universally accessible and affordable computer facilities that cover all the possibilities offered by national and international networks.*"<sup>10</sup> At the end of the same year, these ideas were fleshed out.

European ministers participating at the 5<sup>th</sup> Ministerial Conference on Mass Media Policy agreed that their respective states should "*create a framework for access by the public to communications networks and new communications and information services on a universal basis, that is regardless of place of residence, at an affordable price, at individual and/or community level*". The participating states also undertook to "*define at national, regional or local level the basic services, especially in the field of information, education and culture, to which all individuals should have access*".<sup>11</sup> In 1999 this resolution was followed by a Council of Europe Committee of Ministers recommendation whose appendix setting out guidelines for a European policy in this context begins significantly with "Principle 1 – Access" that says, "*Member states should foster the creation and maintenance of public access points providing access for all to a minimum set of communication and information services in accordance with the principle of universal community service. This should include encouraging public administrations, educational institutions and private owners of access facilities to new communication and information services to enable the general public to use these facilities.*"<sup>12</sup>

Whether it was a coincidence or a result of the Committee of Ministers recommendation, a year later, in 2000, the Estonian parliament passed the Telecommunications Act (presumably the law referred to in the *Christian Science Monitor* article quoted above) that defined a universal service as "*a set of telecommunications services [...] which ensures, within an area determined in the licence of a public telephone operator, that all customers who wish to have access to the public telephone network shall have such access for a uniform and*

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<sup>8</sup> Resolution 1120 (1997) on the impact of the new communication and information technologies on democracy. Para.1.

<<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta97/ERES1120.htm>> Accessed 20.12.2011.

<sup>9</sup> Ibid. Para.4.i.a.

<sup>10</sup> Ibid. Para.4.ii.b.

<sup>11</sup> Resolution No. 1 "The impact of new communications technologies on human rights and democratic values". Para. 11 (i) & (ii) 5th European Ministerial Conference on Mass Media Policy – *The Information Society: a challenge for Europe*, Thessaloniki, 11-12 December 1997.

<sup>12</sup> Recommendation No. R (99) 14 on universal community service concerning new communication and information services and its Explanatory Memorandum  
<[http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(1999\)014&ExpMem\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1999)014&ExpMem_en.asp#TopOfPage)> Accessed 13.12.2011

*reasonable consideration.*<sup>13</sup> These services include *"Internet service which is universally available to all subscribers regardless of their geographical location, at a uniform price."*<sup>14</sup> Estonia's commitment to Internet access for all was also reflected in the Public Information Act passed the same year and which guarantees everyone *"the opportunity to have free access to public information through the Internet in public libraries."*<sup>15</sup>

## European Union

Only in 2002 do we see the appearance of EU Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) that made it incumbent upon all 27 member states and, presumably, the candidate countries to provide access to the Internet.<sup>16</sup> The relevant text reads as follows:

*Article 4. Provision of access at a fixed location*

*1. Member States shall ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking.*

*2. The connection provided shall be capable of allowing end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.*

The directive was amended in 2009 by Directive 2009/136/EC and the same article was replaced by:

*Article 4 Provision of access at a fixed location and provision of telephone services*

*1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.*

*2. The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.*

*3. Member States shall ensure that all reasonable requests for the provision of a publicly available telephone service over the network connection referred*

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<sup>13</sup> Telecommunications Act (2000) §5 (1).  
<<http://www.legaltext.ee/en/andmebaas/ava.asp?m=022>> Accessed 13.12.2011

This act was replaced by the Electronic Communications Act (2005) that, inter alia, transposes the 2002 telecommunications package of directives.

<sup>14</sup> Ibid. §5 (2) 2.

<sup>15</sup> Public Information Act (2000) §33.

<<http://www.eestipank.info/pub/en/dokumendid/dokumendid/oigusaktid/seadused/info.html>>  
Accessed 13.12.2011

<sup>16</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services. Art.4.

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0022:EN:HTML>>  
Accessed 13.12.2011

*to in paragraph 1 that allows for originating and receiving national and international calls are met by at least one undertaking.*<sup>17</sup>

It is important to remember that the Universal Service Directive is not a human rights approach based instrument but one based primarily on economic considerations. As Article 1 states, it “concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.”<sup>18</sup> The directive does not start out from the premise that all EU citizens have a fundamental right to Internet access but obliges those undertakings providing publicly available electronic communications networks and services to include certain mandatory services (which happen to include Internet access).<sup>19</sup> Moreover, Article 4 refers to “reasonable requests for connection at a fixed location” (reminiscent of the term “where practicable”) but does not elaborate on what might be an unreasonable request. On the other hand, without this proviso, EU member states would have to ensure Internet access to each and every isolated homestead in the most remote locations. This poses the question for those defending the proposition that access to the Internet is a human right – does a person have the right to Internet access wherever they may be? That is, does the state have the positive obligation to provide ubiquitous access?

## **European Court of Human Rights**

A recent study by the Research Division of the Court found that the “*Court has not yet had the occasion to rule on a complaint concerning a denial or restriction of access to the Internet*”.<sup>20</sup> However, the study concludes that there will a growing number of complaints concerning interference with access and, giving the example of a situation where a public service is available only on the Internet, it reminds the reader of the state’s positive obligation to provide the conditions for the exercise of the right to receive and impart information.<sup>21</sup>

## **Industry**

In an op-ed for the *New York Times*, Vint Cerf, the vice-president of Google, arguing that the Internet was not a human right *per se* but a means to an end,

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<sup>17</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Art.4. Interesting to note is how the directive reflects technological developments in that primacy is now given to access to a communications network, not necessarily a telephone network.

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:01:EN:HTML>>  
Accessed 13.12.2011.

<sup>18</sup> Ibid. Art.1.1.

<sup>19</sup> Ibid. Art.1.2.

<sup>20</sup> ECtHR Research Division. *Internet: Case-law of the European Court of Human Rights*. Strasbourg, CoE/ECtHR, June 2011. p. 27.

<sup>21</sup> Ibid. p.28.

gave an analogy: "... at one time if you didn't have a horse it was hard to make a living. But the important right in that case was the right to make a living, not the right to a horse."<sup>22</sup> Amnesty International blogger Scott Edwards countered Cerf's allegedly "exceptionally narrow portrayal of human rights from a legal and philosophical perspective"<sup>23</sup> with the analogy of the town square: "While access to the physical town square may not be a human right in isolation, it has always been for most inseparable from the right to association and expression. And denial of access to the town square through curfews, martial law, or emergency rules are tantamount to restriction on association and expression."<sup>24</sup> Writing for *The Guardian*, UK barrister Adam Wagner referred to both Cerf's piece and the Amnesty International blog but went further by proposing that "Internet use may also fall within Article 8 ECHR, the right to family and private life, as email, Skype, Facebook and Twitter are now essential tools of interaction between friends and family."<sup>25</sup> One could, of course, argue that the Internet and its associated social media have devalued this interaction by eliminating the need for face to face contact.

## Conclusion

UN Special Rapporteur Frank La Rue has, we believe, summed up the current state of affairs quite succinctly:

*The Special Rapporteur also remains concerned that the majority of the world's population remain without access to Internet connection. Although access to the Internet is not yet recognized as a right in international human rights law, States have a positive obligation to create an enabling environment for all individuals to exercise their right to freedom of opinion and expression.*<sup>26</sup>

We have seen that EU member states and those who have or are adopting EU legislation, are obliged under the Universal Service Directive, to provide access to the Internet. However, this obligation is not from a human rights but an economic perspective and other Council of Europe states are not under such an obligation by virtue of international law. There is, however, active support for Internet access as a human right from such prestigious organisations as the OSCE and Amnesty International as well as from various journalists around the world and in the context of the ongoing development of a possible universal set rules for Internet governance, further discussion on this topic is necessary.

Given the unique yet universal nature of the Internet and its unrivalled potential for freedom of expression, is the time ripe for the Council of Europe to consider

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<sup>22</sup> Vinton G. Cerf. "Internet Access Is Not a Human Right". *New York Times*, 5 January 2012. <[http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?\\_r=2](http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=2)> Accessed 15.01.2012

<sup>23</sup> Scott Edwards. "Is internet access a human right?" *Human Rights Now*. Amnesty International USA Web Log, 10 January 2012. <<http://blog.amnestyusa.org/business/is-internet-access-a-human-right/>> Accessed 15.01.2012

<sup>24</sup> Ibid.

<sup>25</sup> Adam Wagner. "Is internet access a human right?" *The Guardian*, 11 January 2012. <<http://www.guardian.co.uk/law/2012/jan/11/is-internet-access-a-human-right?newsfeed=true>> Accessed 15.01.2010

<sup>26</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. UNGA A/66/290 10 August 2011 <<http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>> Accessed 13.12.2011

the need for an additional protocol to the European Convention on Human Rights? If so, how would the positive obligations of the state be formulated in such a protocol? What would be the level of support for the drafting of such an instrument from the 47 member states?