This is a partial translation of the document originally in Spanish **"The Impact of Public Health Measures around the Covid-19 Pandemic"** click here

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1. – Introduction

The Covid-19 pandemic had and still has – at the time this work is being completed – a big impact on health and also on such other areas as education, work, entertainment and international trade. For the first time ever, a global health emergency has occurred at the same time that great technological advances are being made. However, there is only partial agreement regarding whether the laws and regulations governing the Internet and other technologies provide the necessary, sturdy protections to guarantee that fundamental rights be adequately exercised.

This work explores the discussion around the benefits offered to society by the Internet and other technologies. Furthermore, it explores their effects, as they have allowed or contributed to potential human rights violations during the course of the pandemic.

To this end, we have studied the impact on certain human rights included in specific regulations enacted either during the pandemic or to combat the disease. It should be noted that this study includes not only regulations related to the Internet and other technologies, but also other regulations which are not directly linked to the digital environment.

As such, this work proposes filling or supplementing the void in an attempt to achieve further progress in the protection of human rights at a time when, on the one hand, the use of technology is becoming critical and, on the other hand, in the face of a health emergency of such proportions as this one, with which humanity has not had to cope in recent times and in which extreme measures have been adopted to mitigate its effects on people's health.

Methodology and actions.

To carry out our research, an analytical-quantitative environmental method was used in order to conduct a study of various enacted regulations. The first step entailed gathering and systematizing the regulations to allow for a better analysis, as well as identifying similarities, overlaps, agreements and differences. Members of NGOs, the academia and public officials were also interviewed so that they could share their experiences, especially as they reported or passed knowledge about landmark cases or research worth taking into account in this study.

In particular, attention has been paid to the impact that specific laws have had on three countries – Argentina, Chile and Uruguay –, where such laws were relevant or related to fighting the pandemic and which could have affected the effective enjoyment of the rights of freedom of expression, privacy and right of assembly. Special attention was paid to the regulations introduced to handle the global Covid-19 emergency. The time frame selected for the regulations analyzed was the year 2020. Unfortunately, the pandemic extended beyond this year and more regulations, also related to the search for solutions, continued to be adopted, but are not part of this study.

We found it necessary to narrow down the search so as to have a clearer scope of which laws should be taken into consideration, to see whether or not they adequately protect the human rights previously mentioned. For example, we considered laws and regulations linked with the use of the Internet and other technologies, ranging from regulations that criminalize online expressions to those that implement massive monitoring programs, impose censorship or massive online blocking, or set up national artificial intelligence programs within the private and public sectors.

Other regulations were also studied which were not directly connected to the use of different technologies, but which allowed for their justification. The best examples are the regulations that imposed states of emergency.

We have found it necessary to summarize the content of the rights at stake. An analysis of any possible abuse of human rights does not usually consider the specificity and content of every right and how they can be affected. So, as it was previously stated, this study has focused on standards relating to the content and protection of the right to freedom of expression, privacy rights and rights of assembly.

Relying on specific cases of application of such laws and regulations, this research finishes by providing recommendations for the future so as to improve – and, if needed, to reform and repeal – the existing laws and by suggesting how to apply human rights regulations to existing frameworks in order to enhance their implementation.

The compilation of regulations was carried out through online searches of official resources, as specified below:

In Argentina, the information was gathered mainly from the following website: http://www.saij.gob.ar/docs-f/generales/digesto_emergencia_sanitaria_coronavirus.pdf[1].

In Chile, the information was gathered from: https://www.bcn.cl/coronavirus/leyes?pag=1&H=1&&texto=&tema=&tipo=Norma&orden=fecha_reciente&tnorma= and from https://www.consejotransparencia.cl/informacion/transparencia-pdp/[2].

Finally, the information regarding Uruguay was gathered from: https://www.impo.com.uy/normativa-covid-19-2/[3]

[1] Last access on February 25, 2021.
[2] Last access on February 25, 2021
[3] Last access on February 25, 2021.

This selection was made to simplify the systematization of the regulations as well as to especially focus on the analysis. In other words, certain regulations were necessarily left out of the analysis for the reasons explained above.

In order to compile landmark cases, interviews were carried out with the experts detailed below, who, in some cases, represented important academic centers or civil society organizations from the three countries involved:

In Argentina:

Agustina del Campo, Director of the Center for Studies on freedom of expression - CELE- University of Palermo (Centro de Estudios para la Libertad de Expresión - CELE- Universidad de Palermo)[4]

Valeria Milanés, Executive Director for the Association for Civil Rights (Asociación por los Derechos Civiles -ADC[5])

Eduardo Cimato, National Director of Personal Data Protection (Protección de Datos Personales)

Eugenia Braguinsky, National Director of Public Information Access (Acceso a la Información Pública)

In Chile:

Maria Paz Canales, Executive Director of Digital Rights (Derechos Digitales[6])

Jessica Matus Arena, Director of Protected Data (Datos Protegidos[7])

Dany Rayman Labrín, Director of Protected Data (Datos Protegidos)

Romina Garrido, expert in personal data protection

Gloria de la Fuente, President of the Chilean Transparency Council (CPLT).

In Uruguay:

Edison Lanzana, former Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights

Martín Prats, Official in the National Institute of Human Rights and Ombudsman's Office (Instituto Nacional de Derechos Humanos y Defensoría del Pueblo[8]), specialized in freedom of expression topics within the organization.

Gustavo Gómez, Executive Director of Observacom[9]

Fabrizio Scrolini, Executive Director of ILDA[10]

Javier Benech, Communication Department of the National General Prosecution Office

Gabriel Delpiazzo, President of the Executive Council of the Public Information Access Unit (Consejo Ejecutivo de la Unidad de Acceso a la Información Pública)

Gonzalo Sosa, Coordinator of the Regulatory Personal Data Protection Unit.

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[4] https://www.palermo.edu/cele/

[5] https://adc.org.ar/

[6] https://www.derechosdigitales.org/

[7] https://datosprotegidos.org/

[8] https://www.gub.uy/institucion-nacional-derechos-humanos-uruguay/

[9] https://www.observacom.org/

[10] https://idatosabiertos.org/tag/uruguay/

All in all, the activities carried out were the following:

1. Compilation of regulations in Argentina, Chile and Uruguay, in general, up to December 31, 2020. Said compilation comprises specific and related regulations issued during the pandemic, including frameworks for platforms or applications that use the Internet.
2. Compilation of international standards applied across the three countries in connection with human rights, especially freedom of expression and access to information, privacy and protection of personal data and right of assembly.
3. Analysis of the regulations mentioned in section 1 according to the standards mentioned in section 2.
4. Compilation of landmark cases to which the regulations mentioned in section 1 are applied.
5. Conclusions and recommendations.

3.- Applicable International Standards for Human Rights Protection.

3.1 – Introduction

There is widespread agreement at an international level that the Internet is an important tool for the exercise of various human rights. Since 2011 it has been claimed that access to the Internet is *"*also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.*"*

What is more, ten years ago a report from the United Nations understood that it is " essential to enjoy the right to freedom of expression, but also other rights, such as the right to education, the right to freedom of association and assembly, the right to full participation in social, cultural and political life and the right to social and economic development." Furthermore, this report describes the Internet as "an indispensable tool for full participation in political, cultural, social and economic life."

All in all, it is well known that different international organizations for the promotion and protection of human rights at a universal level describe the Internet as "necessary to ensure respect for other rights", as "essential to enjoy other rights", and as an "indispensable tool" for the exercise of certain rights. Consistently with what is proposed in this research, all such documents point to "other rights", regardless of the fact that reference is primarily made to the importance that the Internet has to exercise freedom of expression, as is logical and intuitive.

Much more information could certainly be added, even from statements obtained from documents that cannot be classified as recent. In a Resolution of The Human Rights Council (A/HRC/20/L.13) on "The promotion, protection and enjoyment of human rights on the Internet"[11] dated June 2012, the Council observed that "the exercise of human rights, in particular the right to freedom of expression, on the internet is an issue of increasing interest and importance as the rapid pace of technological development enables individuals all over the world to use new information and communications".

[11] *Search in* https://ap.ohchr.org/documents/S/HRC/d_res_dec/A_HRC_20_L13.pdf. Last access on June 29, 2021.

In said Resolution, the Council stated "that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Article 19 of the Universal Declaration of Human rights and the International Covenant on Civil and Political Rights".

These are widespread and general assumptions. And even though a lot has occurred since then, there are still no specific international treaties protecting freedom of expression on the Internet. Nor is there any specific case law in the Interamerican system for the protection of human rights from the Inter-American Court, whose decisions are binding in our region[12].

In spite of all this, in the international arena, some standards have begun to be established which arise from what in public international law is known as "soft" law.

The following documents can be added to the documents previously cited: the Joint Declaration by the Special Rapporteurship of The United Nations (UN) on Freedom of Expression and the Internet Special Rapporteurship for Freedom of Expression of the Commission on Human Rights of the OAS in 2012[13]; and the Special Rapporteur Report on Freedom of expression and Opinion of 2013 dealing with electronic monitoring and its impact on privacy and freedom of expression[14].

From all these documents it is revealed that there is absolutely no doubt that the Internet has had a positive impact as a tool for the exercise of fundamental rights. However, the global health emergency has brought to the forefront the negative impact that the Internet can have. The dissemination of fake news about health, creating confusion among the population and having a possible negative impact on health, is cited as a typical example of this.

Under this scenario, the regulations that have been introduced since the beginning of the emergency — about the Internet and other "non-digital" world issues which served as a basis for those issues — can, regardless of the good faith of their promoters, impact negatively on the exercise of fundamental rights.

In order to find out what sort of impact such regulations can actually have on the exercise of such human rights as analyzed in our research, it is necessary to determine which international standards are applicable and to establish a minimum level of respect for each of those rights. This will be briefly dealt with below.

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[12] Regarding the situation of the European system of protection of human rights, search*: case-law of the European Court of Human Rights* in http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf . Last access on June 29, 2021.

[13] *Search in* http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=888&lID=2 . From now on Affidavit 2012. Last access on June 29, 2021.

[14] *Search in* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf . From now on NU report 2013. Last access on June 29, 2021.

3.2 - Right to freedom of expression and opinion and right to access to information.

The right to freedom of expression is protected, at a universal level, under Article 19 of the Universal Declaration of Human Rights:

> Article 19: 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.

Moreover, also in connection with the issue of universal protection, we should also mention Article 19 of the International Covenant on Civil and Political Rights.

> Article 19
> 1. Everyone shall have the right to hold opinions without interference.
> 2. 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.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>   a. For respect of the rights or reputations of others;
>   b. For the protection of national security or of public order, or of public health or morals.

On the other hand, in the context of regional protection of freedom of expression, it is Article 13 of the American Convention on Human Rights that refers to freedom of thought and expression as one of the human rights included in the regional treaty:

> Article 13. Freedom of Thought and Expression
> 1.Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
> a. respect for the rights or reputations of others; or
> b. the protection of national security, public order, or public health or morals.
> 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of the government or private controls over newsprint, radio broadcasting frequencies, or equipment used in dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

The aim of this research is neither to make a detailed interpretative analysis of these regulations nor to develop jurisprudence in relation to universal or regional bodies for the protection of human rights. Undoubtedly, the exercise of freedom of expression is widely protected by regional and universal international treaties[15].

Regarding the interpretations made by bodies at world level, it is noteworthy that it was the UN Human Rights Committee, the body monitoring the implementation of the International Covenant on Civil and Political Rights, that interpreted the minimum standards derived from General Comment No. 34 on Article 19 of the treaty[16].

Although this General Comment is quite comprehensive, it does not refer specifically to the exercise of freedom of expression on the Internet. However, it is important to stress that the Committee took it on itself to clarify that Article 19 of the Covenant protects all forms of expression as well as the means for its dissemination, including electronic modes of expression, such as the Internet.

Within the sphere of the Inter-American System for the Protection of Human Rights, it is noteworthy that the Inter-American Court of Human Rights (I/A Court H.R.) has maintained that "A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas."[17]

In addition to Advisory Opinion No. 5, the Inter-American Court made a decision on its first two contentious cases under Article 13 of the American Convention in 2001 ("*The*

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[15] *See* Office of the Special Rapporteur for Freedom of Expression (Inter-American Commission on Human Rights). The inter-American legal framework regarding the right to freedom of expression, OEA/Ser.L/V/II.CIDH/RELE/INF.2/09, Washington D.C., 2009. Regarding the European system, see VOORHOOF, Dirk. Freedom of Expression under the European Human Rights System. From Sunday Times (n° 1) v. U.K. (1979) to Hachette Filipacchi Associés ("Ici Paris") v. France (2009). In: Y. Haeck, Héctor Olásolo, John Vervaele and Leo Zwaak (eds.), Inter-American and European Human Rights Journal, Issue 2009/1-2, 2010.

[16] *Search in* http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf. From now on General Comment No. 34. Last access on 29 June 2021.

[17] I/A Court HR., *Compulsory membership in an association prescribed by law for the practice of journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 50.

Last Temptation of Christ" (Olmedo-Bustos et al.)[18] *and Ivcher Bronstein*[19]). In 2004, the Court made a decision on two other cases (*Herrera Ulloa*[20] and *Ricardo Canese*[21]). One more case was added in 2005 (*Palamara Iribarne*[22]), and another one in 2006 (*Claude Reyes et al*.[23]). By mid-2008, another decision was added (*Kimel*[24]) and in 2009, the Inter-American Court issued rulings on four new cases (*Tristán Donoso*[25]*, Ríos et al.*[26]*, Perozo et al.*[27]*,* and *Usón Ramírez*[28]). Finally, in 2010 and 2011, two more decisions were annexed (*Gomes Lund et al.*[29]*,* and *Fontevecchia and D'Amico*[30]). More recently, other cases have completed the list, namely: *Vélez Restrepo and Family,* and *Uzcátegui et al* in 2012; *Memoli* in 2013; *Norín Catrimán et al* in 2014; *López Lone et al.,* and *Granier et al* in 2015; *I.V* in 2016; *Lagos del Campo* in 2017; and *Álvarez Ramos and Carvajal Carvajal* in 2018[31].

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[18] I/A Court H.R., Case of "*The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73

[19] I/A Court H.R., Case of *Ivcher Bronstein v. Perú*. Reparations and Costs. Judgment of February 6, 2001. Series C No. 74

[20] I/A Court H.R., Case of *Herrera Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107.

[21] I/A Court H.R., Case of *Ricardo Canese v. Paraguay*. Reparations and Costs. Judgment of August 31, 2004. Series C No. 111.

[22] I/A Court H.R., Case of *Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135.

[23] I/A Court H.R., Case of *Claude Reyes et al*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

[24] I/A Court H.R., Case of *Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 2, 2008. Series C No. 177.

[25] I/A Court H.R., Case of *Tristán Donoso v. Panamá*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193.

[26] I/A Court H.R., Case of *Ríos et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194

[27]] I/A Court H.R., Case of *Perozo et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195.

[28] I/A Court H.R., Case of *Usón Ramírez v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207.

[29] I/A Court H.R., Case of *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219.

[30] I/A Court H.R., Case of *Fontevecchia and D'Amico v. Argentina*. Merits, Reparations and Costs. Judgment of November 29, 2011. Series C No. 238.

[31] /A Court H.R., Case of *Vélez Restrepo and Family v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 3, 2012. Series C No. 248. From now on: I/A Court H.R., Case of *Vélez Restrepo and Family* v. Colombia. POMRC. 2012.

I/A Court H.R., Case of *Uzcátegui et al v. Venezuela*. Merits and Reparations. Judgment of September 3, 2012. Series C No. 249. From now on: I/A Court H.R., Case of Case of *Uzcátegui et al v. Venezuela*. MR. 2012.

I/A Court H.R., Case of *Mémoli v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 22, 2013. Series C No. 265. From now on: I/A Court H.R., Case of Case of *Mémoli v. Argentina*. POMRC. 2013.

I/A Court H.R., Case of *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile.* Merits, Reparations and Costs. Judgment of May 29, 2014. Series C No. 279. From now on: I/A Court H.R., Case of Case of *the Mapuche Indigenous People v. Chile*. MRC. 2014.

I/A Court H.R., Case of *López Lone et al v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 5, 2015. Series C No. 302. From now on: I/A Court H.R., Case of Case of *López Lone et al v. Honduras*. POMRC. 2015.

The list cited above does not intend to be exhaustive, and it should be stressed out that none of these decisions was based on facts related to the exercise of freedom of expression on the Internet. However, the jurisprudence derived from these cases would certainly have an impact, not only in the event that the Court were to make a decision on cases where freedom of expression has been violated on the Internet, but also because these decisions are extremely useful to determine whether local regulations adopted in different countries during the health emergency follow the standards for the exercise of freedom of expression and access to information.

Current case law has an impact on the exercise of freedom of expression in regulations related to the health emergency — regardless of whether they impact on the digital world or not — in at least three aspects: (1) The prohibition of prior censorship, (2) The right of access to information, and (3) The imposition of subsequent liability. These issues are traversed by three general interpretive criteria relevant to our topic of concern: the "democratic" significance of freedom of expression, its dual aspect and the three-part test, when analyzing restrictions.

Through the “democratic standard”, the Inter-American Court proposes that freedom of expression is a value which, if lost, endangers the validity of the essential principles for a democratic society. In the words of the Inter-American Court: “Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion [...]. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”[32]

Secondly, the “two-dimensional standard” postulates that what is included in freedom of expression should not only be linked to the individual aspect of the right, but also to its collective or social dimension. Again, following the Court, the right to freedom of expression “requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”[33]

Finally, reference will be made to the “three-part test”. Although the exercise of freedom of expression is not an absolute right within international law, both Article 19.3 of the International Covenant on Civil and Political Human Rights and Article 13.2 of the American Convention on Human Rights provide a "test" that must be applied when analyzing a possible restriction on freedom of expression and that is nowadays known as the "three-part test”.

I/A Court H.R., Case of *Granier et al. (Radio Caracas Television) v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 22, 2015. Series C No. 393. From now on: I/A Court H.R., Case of *Granier et al. (Radio Caracas Television) v. Venezuela.* POMRC. 2015.

[32] I/A Court H.R., *Compulsory membership in an association prescribed by law for the practice of journalism* (Arts. 13 and 29 American Convention on Human Rights), *supra*, para. 70.

[33] *Ibid*., para 30.

The I/A Court H.R. has mentioned this test in its decisions, understanding that the legality of restrictions on freedom of expression based on Article 13.2 will depend on whether these restrictions are aimed at satisfying an imperative public interest. Among the various options for achieving such objective, what should be chosen is the one which least restricts the protected right. Given this standard, it is not sufficient to prove that, for instance, the law serves a practical and suitable purpose. In order for the restrictions to be compatible with the Convention, they should be justified by collective purposes which, given their importance, clearly outweigh the social need for the full enjoyment of the right guaranteed by Article 13 and which do not limit the right proclaimed in Article 13 more than strictly necessary. In other words, the restriction should be proportional to the interest that justifies it and closely tailored to the achievement of this legitimate purpose[34].

This test is also used within the universal system for the protection of human rights. The above-mentioned UN report of 2011 stated, specifically in respect to the Internet, that restrictions on certain types of information or expression permitted under international human rights regulations in respect of content outside the Internet also apply to online content. Similarly, restrictions on the right to freedom of expression exercised via the Internet must also comply with international human rights regulations, including the following criteria, which are threefold and cumulative:

a) any restriction must be provided by law, must be drawn up precisely enough to allow an individual to regulate their conduct accordingly, and must be accessible to the public;
b) any restriction must be based on one of the legitimate grounds for restriction set forth in Article 19, paragraph 3, of the International Covenant, namely ensuring (i) respect for the rights or reputations of others, or (ii) the protection of national security, public order, or public health or morals; and
c) any restriction must be found to be necessary and proportionate, or to be the least restrictive means of achieving any of the above-mentioned specific objectives[35].

An issue that becomes relevant for this work concerns the definition and content of the criterion of the proportionality of restrictions.

During this health emergency, it became evident that, according to the medical studies carried out, the criteria to protect and prevent the COVID-19 virus transmission changed. Simply put, an action that may have seemed reasonable and appropriate at one time would disappear shortly thereafter on solid grounds, thus changing the paradigms of protection and prevention. As such, the definition of what is proportional and what is not could have been altered.

In any case, we believe it is important to take into account what was expressed in the above-mentioned Joint Declaration of 2011:

> When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other

[34] I/A Court H.R., *Compulsory membership in an association prescribed by law for the practice of journalism* (Arts. 13 and 29 American Convention on Human Rights), *supra*, para. 42.
[35] *See* paragraph 15.

> interests. Besides, in order to counter illegal content, greater emphasis should be given to the development of alternative and specific approaches which adapt to the singular characteristics of the Internet, and which also admit that no particular restrictions should be placed on the content of material disseminated via the Internet.

Let us now look at some brief observations on the main points suggested above arising from the jurisprudence of the Inter-American Human Rights System. The universal system differs from the Inter-American system as regards the prohibition of prior censorship, since express prohibition is only found in Article 13 of the American Convention. In this respect, and reaffirming concepts already developed in Advisory Opinion 5/85, the Inter-American Court stated that "Article 13(4) of the Convention establishes an exception to prior censorship, since it allows it in the case of public entertainment, but only in order to regulate access for the moral protection of children and adolescents. **In all other cases, any preventive measure implies the impairment of freedom of thought and expression[36].**"

In the context of international law, it is acknowledged that occasionally there are certain expressions that may be prohibited, and this applies directly to content on the Internet. The types of expressions that States are occasionally required to prohibit under international criminal law and/or international human rights law are child pornography; direct and public instigation to commit genocide; advocacy of national, racial or religious hatred which constitute incitement to discrimination, hostility or violence; and incitement to terrorism[37].

The issue of prohibiting or limiting prior censorship undoubtedly has an impact on pandemic-related regulations, whether or not they are related to the Internet. The connection between access to the Internet as an essential tool for the exercise of freedom of expression and access to information is clear, and this has been noted by the international bodies for the promotion and protection of human rights we have cited.

As regards the connection between the Internet and freedom of expression, it is important to stress that this technology has allowed expressions that were previously made individually and by word of mouth to be spread to such a number of people that is unimaginable for anyone expressing themselves on the Internet. It is understandable that today it is impossible to adequately exercise freedom of expression without access to the Internet. The different possibilities we have in order to express ourselves via blogs, social media, and platforms such as Twitter, etc., prove our point. Using this technology makes it very inexpensive for us to spread our words to thousands or even millions of people and it also means that we do not even need such means of communication as the press, radio and television, which used to be the paradigm of freedom of expression

In any event, one issue that we should be careful about is not to exaggerate the benefits of the Internet for the exercise of freedom of expression and for access to information, given that, as we noted when describing the Internet infrastructure, there are many private actors today that can act as barriers to our words and to how we access

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[36] IACHR, "La Última Tentación de Cristo" (Olmedo Bustos et al) v. Chile, supra, parag. 70. Our emphasis.

[37] *See* 2011 UN Report.

information. We are not referring here to the problem of lack of access to the Internet and what is known as the digital divide, which is also a problem, but rather to the possibility that certain expressions be blocked or censored by private actors involved in the Internet infrastructure, such as information search engines or Internet access providers[38]. It is important not to lose sight of these issues when mentioning the impact of the Internet on the exercise of freedom of expression.

Access to information is clearly guaranteed from the interpretation of Article 13 of the American Convention on Human Rights made by the IAHR Court in *Claude Reyes et al. v. Chile*, and in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. In short, as the Inter-American Court has explained:

> by expressly stipulating the rights to "seek" and "receive" "information," Article 13 of the American Convention protects every person's right to access information under the control of the State, with the exceptions permitted under the strict regime of restrictions established in the Convention. Consequently, this article safeguards the right of individuals to receive such information and the State's positive obligation to make it available, in such a way that the individual may have access to such information or receive a grounded response when, for any reason permitted by the Convention, the State may limit access to it for a specific case.

Not only did the IAHR Court construe that access to information is a right guaranteed by the Convention, but it also emphasized that the information "should be provided without the need to prove direct interest or personal involvement in order to obtain it". The Court also highlighted the importance of the "principle of maximum disclosure", which establishes the presumption that all information is accessible, subject to a very limited number of exceptions. Furthermore, in respect to the exceptions to which the right of access to information is subject, the Court noted that these should be previously established by law to ensure that they are not left to the arbitrary decision of the public authorities. Said legislation must be enacted "for reasons of general interest and in accordance with the purpose for which such restrictions have been established." On this last issue, the IAHR Court clarified that any restrictions prescribed by law have to pursue an objective permitted by the Convention, including "the protection of public health".

On this matter, the IAHR Court explained that the restrictions imposed must be necessary in a democratic society and that the burden of proof of possible restrictions to this right lies with the State. In other words, any limitation preventing citizens from exercising their right of access to information has to be subject to a review within the framework of the proportionality test cited above.

Both the universal and regional systems impose subsequent liability for certain expressions in a similar manner. In any event, the tripartite test must be taken into account when analyzing whether the imposition of subsequent liability should exceed the limits of an acceptable restriction.

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[38] *See* "The New Gatekeepers: Controlling Information in the Internet Age" on http://cima.ned.org/sites/default/files/final_2.pdf. Last access on 10 November 2021.

Regarding specifically the exercise of freedom of expression on the Internet, the Joint Declaration of 2011 has established three aspects to be taken into consideration:

> a. Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against 'libel tourism').
> b. Standards of liability, including defenses in civil cases, should take into account the overall public interest in protecting both the expression and the forum in which it is made (i.e., the need to preserve the 'public square' aspect of the Internet).
> c. For content that was uploaded in substantially the same form and at the same place, limitation periods for bringing legal cases should start to run from the first time the content was uploaded and only one action for damages should be allowed to be brought in respect of that content, where appropriate by allowing for damages suffered in all jurisdictions to be recovered at one time (the 'single publication' rule).

Finally, another issue that may be relevant to this work is linked to the acceptance of regulations that may affect what are known as "intermediaries", because of the content not created by them, such as in social media. We can basically distinguish four types of intermediaries involved in the provision of Internet services: (a) access providers, who render the service connecting the end user's computer, by means of cables or wireless signals; (b) transit providers, who allow interaction between the end computer and the access provider with the hosting providers; (c) hosting providers; and (d) content providers, which is what we call those who use the infrastructure previously mentioned to supply people having connected computers with a wide range of services, including information websites, services, electronic mail, connection between different end users and a great many others[39].

Now that we understand what we mean when we talk about intermediaries, the issue under discussion is which kind of liability may be imposed on them. In this respect, there are four alternatives that have been prescribed by different laws: absolute immunity, strict liability, subjective liability and conditional liability[40].

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[39] *See* Claudio Ruiz Gallardo and Juan Carlos Lara Gálvez, "Responsabilidad de los proveedores de servicios de Internet (ISPs) en relación con el ejercicio del derecho a la libertad de expresión en Latinoamérica", in Eduardo Bertoni (comp.), "*Hacia Una Internet Libre de Censura. Propuestas para América Latina*", Buenos Aires, Universidad de Palermo, 2012, p. 48, available at http://www.palermo.edu/cele/pdf/internet_libre_de_censura_libro.pdf . Last access on 29 June 2021.

[40] *See* Meléndez Juarbe, Hiram A, "Intermediarios y Libertad de Expresión", en Eduardo Bertoni (comp.), "*Hacia Una Internet Libre de Censura. Propuestas para América Latina",* Buenos Aires, Universidad de Palermo, 2012, p. 116-117, available at http://www.palermo.edu/cele/pdf/internet_libre_de_censura_libro.pdf Last access on 29 June 2021.

Referring specifically to the liability of intermediaries, the Joint Declaration of 2011 states that

> a. No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').
> b. Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

So far, we have discussed the extent of the right to freedom of expression and access to public information which must be applied in both digital and non-digital environments.

3.3 - Right of peaceful assembly

The right of peaceful assembly is universally granted by article 20 of the Universal Declaration of Human Rights:

> Article 20
> 1. Everyone has the right to freedom of peaceful assembly and association.
> 2. No one may be compelled to belong to an association.

Regarding universal protection, we should also mention Article 21 of the International Covenant on Civil and Political Rights:

> Article 21
> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

At a regional level, Article 15 of the American Convention on Human Rights includes the right of peaceful assembly as a human right:

> Article 15. Right of Assembly
> The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of the right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public

order, or to protect public health or morals or the rights or freedom of others.

As mentioned above, even though this research does not intend to carry out a detailed analysis on the interpretation of these norms or to explain the universal or regional protection bodies' case-law, we can raise the following two issues. First of all, the exercise of the right of peaceful assembly is widely protected by universal and regional treaties, and, second of all, as seen in this research, this is a right that has been put at risk after different regulations came into force as a way of protecting citizen's health during the public health emergency. This is why it is important to go over some basic notions within the scope of this right.

Upon reading the aforementioned rules, it can be understood that the right of assembly is not absolute and may be subject to certain restrictions. Something similar occurs in this respect to what happens with the exercise of the right to freedom of expression: Resolution 15/21[41] of the UN Human Rights Council proclaims that this right may be subject to "certain restrictions, which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others". As a result, it can be argued that this is similar to the tripartite test mentioned above. However, when the Council adds the word "certain" before "restrictions", it is a clear indication that the rule is freedom of peaceful assembly.

In order to add to what has already been established, we should also bear in mind General Comment No. 31 (2004) of the Human Rights Committee on the nature of the general obligation imposed on States Parties to the Covenant, in which the following is set forth:
"Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights" (paragraph 6). Once again, we find that the notion of proportion is key when analyzing the regulations that were approved during the public health emergency.

To interpret this right, we believe it is important to transcribe some paragraphs of the report presented by Maina Kiai, the Special Rapporteur on the rights to freedom of peaceful assembly and of association[42]. When it comes to the concept of assembly, the Report explains as follows: "An 'assembly' is an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in." Moreover, "the enjoyment of the right to hold and participate in peaceful assemblies entails the fulfillment by the State of its positive obligation to facilitate the exercise of this right."

Likewise, the regulations that are approved by the States must avoid "laws governing freedom of assembly [that] both avoid blanket time and location prohibitions, and

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[41] *See* *https://www.right-docs.org/doc/a-hrc-res-15-21*/ last access on November 11, 2021.

[42] See http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf Last access on August 3, 2021.

provide for the possibility of other less intrusive restrictions … Prohibition should be a measure of last resort and the authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities.*"*

Interpretations of this right that are highly relevant to the investigation are highlighted in the most recent Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association[43], Clément Nyaletsossi Voule. In said Report, the following concerns are expressed: "the abuse of technologies, such as facial recognition tools, and the surveillance of social media sites used by activists, of phone recordings and of location tracking from around the world. States should refrain from conducting targeted surveillance using digital tools against protesters."

The same report describes the worrying trend in the closing of civic space, which prevailed during 2020, where 43.4 percent of the global population lived in countries rated as having a repressed civic space. After the World Health Organization declared a pandemic in January 2020, all governments took extraordinary measures to restrict fundamental freedoms in order to respond to an unprecedented health emergency. However, individuals and groups continued to mobilize, using alternative forms of protest, such as "pot-banging" protests in Brazil, balcony protests in Spain, car protests in the Republic of Korea, and a global lesbian, gay, bisexual, transgender and intersex pride gathering online.
In a Joint Declaration on the right of peaceful assembly and democratic governance from 2020, the United Nations Special Rapporteur on the freedom of peaceful assembly and association, the Inter-American Commission for Human Rights (IACHR) and its Special Rapporteur on Freedom of Expression, the Special Rapporteur on Human Rights Defenders of the African Commission on Human and People's Rights (ACHPR) and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE), expressed the following:

> Protecting health, security and public order are not incompatible with the exercise of the right of peaceful assembly. Crisis situations, including public health emergencies, must not be used as a pretext for rights infringements and the imposition of undue restrictions on public freedoms. In particular, blanket bans of assemblies are likely to constitute an unnecessary and disproportionate infringement of the right, even in emergency situations[44].

Moreover, the Inter-American Court of Human Rights has expressed agreement with what we have expressed here so far. In order to provide the right of assembly with content, the Court states that "Article 15 of the American Convention recognizes the right of peaceful assembly, without arms." This right includes private meetings and also meetings in public places, whether they are static or involve movement. The ability to protest publicly and peacefully is one of the most accessible ways to exercise the right of freedom of expression, and can contribute to the protection of other rights. Therefore,

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[43] See https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/106/53/PDF/G2110653.pdf?OpenElement. Last access on August 3, 2021.
[44] See https://www.ohchr.org/sites/default/files/Documents/Issues/FAssociation/joint-declaration-democratic-governance/declaration-en.pdf. Last access on August 3, 2021.

the right of assembly is a basic right in a democratic society and should not be interpreted restrictively.

In this regard, the European Court of Human Rights has indicated that the right of assembly is of such importance that "a person cannot be penalized, even by a minor disciplinary penalty, for participating in a demonstration that has not been prohibited, so long as the person concerned does not himself commit any reprehensible act on such occasion"[45].

Notwithstanding the abovementioned characteristics of the right of assembly, it is important to note that, in the digital world, the Internet plays a key role in exercising this right: "The internet [...] provides new tools for those organizing peaceful assemblies, as well as the possibility of conducting assemblies in online spaces. In addition to being a powerful multiplier for the freedoms of association and peaceful assembly, the internet can also pose new threats to the exercise of these rights".[46]

Following the exercise of freedom of expression and access to information, the right of assembly and association appears, in general, to be intrinsically linked to Internet access. Together with the use of cell phones, and particularly with the use of social networks, the Internet has greatly enhanced people's possibility to organize street protests online and then to translate them into the real world. Nowadays, when one thinks of the relationship between the Internet and the right of assembly or association, one immediately connects it – as one did in the beginning and has done for some time now – with the events that have come to be known as the "Arab Spring".

Given the ease with which these meetings can be held between thousands of people and the danger that they could cause to public health, several governments reacted and limited this right, as we will see below.

Finally, it is worth mentioning that in the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association of the United Nations, presented in May 2012, the States were urged "to recognize the rights to freedom of peaceful assembly and of association can be exercised through new technologies, including through the Internet"[47].

These are some of the key concepts which are necessary if we are to understand what the right of assembly is, following the international standards for the protection of human rights.

3.4 - Right to Privacy

In this chapter, it seems interesting to mention how privacy protection is planned at the level of the universal human rights system and the Inter-American system. As a matter

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[45] See Inter-American Court of Human Rights, Case of López Lone Et. Al. V. Honduras. Preliminary objection, merits, reparations and costs. Judgment of October 5, 2015. C Series, No. 3025.

[46] *See* Online Freedom of Assembly and Peaceful Association, Alex Comninos, published by Association for Progressive Communications -APC-. Last access on August 3, 2021.

[47] See https://hrdaindia.org/assets/upload/8845272592012-UN%20SR%20FoAA%20Annual%20Report%20submitted%20to%20HRC-1.pdf. Last access on August 3, 2021.

of fact, the "right to privacy" is not mentioned as such. However, it cannot be inferred from this that it is not a fundamental human right provided for in the treaties.

At universal level, Article 12 of the Universal Declaration of Human Rights stipulates the following: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

We should also mention, regarding universal protection, Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which reads as follows: “1. No one shall be subjected to arbitrary or unlawful interference with **his** privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”

Regarding regional protection, it is Article 11 of the American Convention on Human Rights that is of particular relevance, as can be appreciated below.

> Article 11. Right to Privacy
> 1. Everyone has the right to have **his** honor respected and **his** dignity recognized.
> 2. No one may be the object of arbitrary or abusive interference with **his** private life, **his** family, **his** home, or **his** correspondence, or of unlawful attacks on his honor or reputation.
> 3. Everyone has the right to the protection of the law against such interference or attacks. [MOU1]

In this section, we are not going to conduct a detailed interpretative analysis on these norms or an examination on the universal or regional protection bodies, just as we did not when we analyzed the previous rights (freedom of expression and freedom of assembly). However, it is important to review some basic considerations on the content of this right given that, as it will be developed further in the following chapters, it has been put at risk by the technological developments and regulations that were driven in order to protect people’s health and to prevent the spread of the coronavirus.

Thus, although we have broadly pointed out the positive impact that the Internet can have on the exercise of certain human rights, the reference to the right to privacy offers a different perspective, given that the Internet is a tool that can negatively impact it instead of strengthening it.

In other words, in the same way that we outline the possibility offered by the Internet to access enormous amounts of data, similarly the Internet and other technologies offer the possibility of storing enormous amounts of private data so that their classification and search become relatively easier. In this sense, the advantages provided by the Internet to the exercise of freedom of expression and access to information are directly proportional to the negative impact it causes for privacy.

And perhaps this negative impact can be seen more clearly in the case of the protection of other rights, as in the possible violation of the right to privacy, there are non-governmental bodies (i.e., private companies) that are possibly responsible for its violation. And this would be the reason behind state regulations being launched to prevent this from happening. For instance, the following guidelines should be observed

in relation to the withholding of personal data[48]: "Any policy on data withholding must include information on why data is being withheld, for how long, who is withholding it and what is done with the data".

As regards why personal data is withheld, a fundamental aspect to consider is the (granting of) consent from the data owner. However, there may be occasions in which such consent might not be necessary; when it is, though, consent must be clear and true.

As regards how long data may be withheld, we must take into consideration the economic impact that the duty of withholding data for a long period of time may have. In terms of who may withhold such data, it is necessary to implement mechanisms to notify holders. And in regard to what is done with the data that has been withheld, there should be regulations on data transfer and on legal actions pertaining to such transfer.

It is not advisable to regulate the so-called "Right to be Forgotten", which in principle seems as a violation to the freedom of expression and access to information.

Another issue arising from the health emergency is the growing need of the Nations to surveil and monitor the activities of people, arguing that it is a matter of public health protection. This kind of surveillance and monitoring activities carried out through the Internet is another way of violating the right to privacy[49].

We will now analyze, at least roughly, how the protection of the right to privacy has been interpreted thus far. After interpreting article 17 of the ICCPR, the UN Human Rights Committee outlined, in General Observation No. 16[50], two important issues to analyze the regulations studied in this investigation. The first one is that "as every person lives in society, the protection of private life is necessarily relative. However, competent public authorities should only ask for such information pertaining to people's private lives whose knowledge is essential for the interest of the society in accordance with the Covenant". And the second is that "even regarding the interference under the Covenant, the precise circumstances in which such interference may be authorized must be specified in detail in the applicable law. The pertaining decision corresponds only to the authority appointed by law for such effect, who will give the necessary authorization after examining every case in particular".

Likewise, it is important to highlight that, even though there is no express mention of the right to privacy, the Human Rights Council emphasized in resolution 28/16[51] that Article 12 of the Universal Declaration of Human Rights and Article 17 of the ICCPR constitute the basis of such right in the International human rights law.

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[48] *See* Eduardo Bertoni (ed.), *"Hacia una Internet libre de censura. Propuestas para América Latina",* edited by the The Center for Studies on Freedom of Expression and Access to Information -CELE-, Universidad de Palermo, Buenos Aires, 2012, Epilogue, Conclusions and Recommendations for Latin America in http://www.palermo.edu/cele/pdf/internet_libre_de_censura_libro.pdf Last accessed on August 23, 2021

[49] *See* Network Surveillance: what does it mean to monitor and detect content online?, investigation from the CELE in http://www.palermo.edu/cele/pdf/El-deseo-de-observar-la-red.pdf Last accessed on August 23, 2021.

[50] http://hrlibrary.umn.edu/hrcommittee/Sgencom16.html Last accessed on August 23, 2021.

[51] See in https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/068/81/PDF/G1506881.pdf?OpenElement Last accessed on August 23, 2021.

The American Convention on Human Rights names Article 11 "Right to Privacy". A literal interpretation allows us to conclude on the clear understanding that "everyone has the right to have their honor respected" and on the prohibition of any individual's "unlawful attack on the honor or reputation"[52]. However, for the Inter-American Court Human Rights, the norm does not only afford this protection. The article itself provides more information about protection when it refers to private life, and this was seen in cases pertaining home protection, communications, reproductive autonomy and sexual expression.

The Inter-American Court Human Rights has stated that intimacy includes, among other aspects, freely making decisions regarding several areas of one's personal life, having a peaceful personal space, keeping certain aspects of private life confidential and controlling the dissemination of personal information to the public[53]. In other words, from the interpretation of article 11 of the ACHR we can conclude that not only does it refer to the protection of individuals' honor or reputation, but it also enshrines the right to a private life or to intimacy.

Another important matter to consider is that the rights included in Article 11 are not absolute rights, but an examination of the arbitrariness on interference against the right to private life must be subject to the application of the aforementioned proportionality test.

According to the Inter-American Court Human Rights, "the right to private life is not an absolute right and, thus, it may be limited by the States as long as the interference is not abusive or arbitrary; that is why such interference must be provided by law, it must follow a legitimate purpose, and it must comply with all adequacy, necessity and [strict] proportionality requirements, i.e., it must be necessary in a democratic society"[54].

Through the tripartite test application and the relevance of proportionality, we point out the similarity between the interpretation of interference in the right to privacy and the restrictions on the rights mentioned above. Succinctly put, the I/A Court H.R. case law and advisory opinions addressing Article 11 of the Convention can be grouped around four topics: 1. private life and privacy of residence, 2. private life and privacy of communication, 3. private life and sexuality, and 4. private life and reproductive autonomy. We have noticed that, up to now, the I/A Court H.R. has not decided on any case regarding the violation of personal data in relation to the protection of private life, either in the analogical world or in the digital one[55].

Given their relevance for this investigation, we will focus exclusively on the first two topics from now on.

The I/A Court H.R. stresses the relation between private life and the violation of domicile in seven judgements. In these judgements, the Court has explained that the

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[52] I/A Court H.R. Case Tristán Donoso v. Panamá. EPFRC. 2009, paragraph 57.

[53] I/A Court H.R. Case Fontevecchia and D'Amico v. Argentina. FRC. 2011, paragraph 48.

[54] /A Court H.R. Case Tristán Donoso v. Panamá. EPFRC. 2009, paragraph 56.

[55] See Zelada, Carlos, comment on Article 11 in American Convention of Human Rights, Comment, Second Edition, Christian Steiner and Marie Fuchs (Editors), Konrad Adenauer Stiftung, 2019.

right to private life is “intrinsically tied” to the place where the family home is located. For the Inter-American court, a violation of the home is also a violation of the personal and geographical sphere where people develop their private life. This is why an attack on someone’s domicile does not only infringe the right to use and enjoyment of the assets there (right to victims’ property), but it also entails the loss of one of the basic conditions for the existence of human beings: their intimacy.

The I/A Court H.R. considers people’s domicile the “natural” space where private life freely develops. According to the Court, “the area of privacy is characterized by being exempt from and immune to abusive or arbitrary invasions or aggressions by third parties or the public authority. In this sense, the domicile and the private life are intrinsically linked, because the domicile becomes a space where private life can be freely developed”[56]. It should be noted that, after the I/A Court H.R. interpreted this article, it became clear that the violation can come from either the State or private persons.

As regards the axis that links the protection of private life with communications, the I/A Court H.R. has explained that, even though telephone conversations are not expressly mentioned in Article 11 of the Convention, they are nevertheless a form of communication that, along written correspondence, is included within the area of protection of the right to private life[57].

On the same topic, it is relevant to consider for this investigation that, for the I/A Court H.R., the protection afforded by Article 11 to conversations may include technical operations destined to register their content, through recording and hearing, as well as any other element from the communicative process itself; for example, the destination of outgoing calls or the origin of incoming calls, as well as frequency, time and duration of calls. All of these are aspects that may be verified without any need to register the content of the call through the recording of conversations. In short, the protection of private life is materialized in the right that anyone other than the interlocutors shall not unlawfully know the content of telephone conversations or other types of conversations, such as the abovementioned, which are characteristic of the process of communication. [...] Today’s information flow puts the right to private life in a riskier situation, due to the development of new technological tools and their increasingly frequent use. This progress, especially in phone tappings and recordings, should not place people in a vulnerable position before the State or the individuals. This is why the State must make a commitment, greater than it has so far, to adapt the traditional formulas to protect the right to private life to the present[58].

4.- Analysis of Argentine, Chilean and Uruguayan Regulations.

In this section we will analyze some of the regulations used in these countries which have an impact in the exercise of the human rights investigated in this work. When the situation of any country is not mentioned, it should be understood that either there are no regulations or, if there are, that no comments are worth making.

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[56] I/A Court H.R. Case of Ituango Massacres v. Colombia. [Preliminary Objections, Merits, Reparations and Costs] 2006, paragraphs 193-194.
[57] I/A Court H.R. Case Tristán Donoso v. Panama. EPFRC. 2009, paragraph 55.
[58] Inter-American Court of Human Rights. Case Escher and others v. Brazil. EPFRC. 2009, paragraphs 114-115

4.1- Pandemic, Teleworking and the Protection of Privacy

In August 2020, Argentina passed Act No. 27555 to regulate "teleworking". It is interesting that the Argentine legislature took into consideration two issues for the protection of the privacy of those who chose to telework. Below we include the three provisions we wish to discuss:

> Section 9: Work equipment. Employers must provide equipment (hardware and software), work tools and any necessary support for the performance of tasks, and bear all costs of installation, maintenance and repair. Otherwise, compensation must be paid for the use of tools belonging to workers. Such compensation will be granted according to the rules established in the business.
>
> Section 15: Control System and Right to Intimacy. Control systems used to protect employer's goods and property information must involve unions in order to secure the intimacy of teleworkers and the privacy of their domicile.
>
> Section 16: Protection of Labor Information. Employers shall take all necessary actions, especially in relation to software, to guarantee the protection of any data used and processed by teleworkers for professional purposes; provided however that the use of surveillance software that violates the intimacy of such workers shall not be allowed.

As can be appreciated, it is provided that teleworking may include certain aspects for the protection of workers' privacy. It is an advantage that the use of surveillance software has been expressly forbidden and that, additionally, it is the employer who shall provide the required software to guarantee the safety of the data used at work.

In any case, there are certain matters that should be included in the legislation to ensure that the laws are being adequately enforced. An issue to consider, although it is outside our area of investigation, is the need to include special measures to ensure that women are working under the same conditions as men, working from home, and, on the other hand, the need to evaluate the impact of what has happened during the health emergency, especially in Argentina, where online education has been clearly affected. For example, the impact of teleworking in places where internet connectivity is precarious or where the number of devices is not enough for everyone who needs them, either for work or to study.

It is also interesting to note what happened in the Oriental Republic of Uruguay in this regard. Decree No. 94 was enacted on March 16, 2020 as a continuation of another Decree (No. 93), which had established a sanitary emergency and imposed a series of measures in order to mitigate and prevent the consequences of the spread of the Coronavirus. Decree No. 94 *urged* "all employers to implement and promote, whenever possible, workers' tasks at home; […] To such effect, this circumstance must be reported to the General Labor Inspectorate. Employers must supply the necessary instruments to perform the task assigned." In other words, even though teleworking was encouraged, neither did they specify how it should be carried out nor did they take into account the protection of personal data and the privacy of those who performed tasks under this modality.

However, this led to the proposal of a bill aimed at regulating teleworking in 2020. On March 21, 2020, the Uruguayan Senate brought a bill on "Teleworking. Promotion and Regulation" for discussion. This bill was approved by the Senate on August 10, 2021[59]. What was argued was that the law was necessary, since there was no regulation in this regard.

Even though analyzing the regulations passed in 2021 is beyond the time frame of this research, given that they are a direct consequence of the provisions of 2020, we would like to point out that the law passed by the Senate does not pay due attention to such basic issues as personal data protection and privacy of workers.

The approved Law simply defines telecommuting as: "The provision of work, in whole or in part, through the use of information and communication technologies, in an environment other than the one provided by the employer." And it then provides that: "It will be the employer's responsibility to provide the information technologies necessary for the worker to telework, as determined by the Executive Power in its regulations."

What remains to be seen is whether the regulations actually govern the protection of privacy and personal data when teleworking. At present, there are only some recommendations and guidelines available provided by the Electronic Government and Information and Knowledge Society Agency (by its acronym in Spanish AGESIC)[60].

4.2 - Pandemic, medical assistance and privacy protection

In this section, it seems appropriate to provide a theoretical framework on the concept of telemedicine. In this regard, Ambrosio Nouges points out that[61] in order to understand what telemedicine is, we must first address the concept of *eHealth*. The term *eHealth* is commonly used to encompass certain – sometimes confusing – concepts that are used to define how the Internet and other related technologies can be used in the health industry to improve the access, efficiency, effectiveness as well as the quality of clinical services and business processes used by healthcare organizations, physicians, patients, and consumers[62]. Thus, we could say that the term *eHealth* encompasses the following:

- Health informatics: the incorporation of health information networks and distributed systems of electronic medical records and associated services to collect, analyze and distribute health-related data[63].

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[59] *See* parliamentary procedure at https://parlamento.gub.uy/documentosyleyes/ficha-asunto/145860/ficha_completa Last access on August 24, 2021.

[60] *See* at https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-tecnología/gobierno-digital/teletrabajo Last access on August 23, 2021.

[61] See 'Telemedicina: la importancia del cuidado de los datos personales de pacientes' ['Telemedicine: the importance of caring for patients' personal data'] in Personal Data Protection: Doctrine and Jurisprudence. Tomo 2. Pablo Palazzi (comp.). CDYT, Colección Derecho y Tecnología, Buenos Aires, 2021, p. 187.

[62] Framework for the Implementation of Telemedicine Service. Pan American Health Organization, World Health Organization, Washington D.C. 2016.

[63] See citation 2.

- Telehealth and telemedicine: direct or indirect interaction with other health care providers (for a second opinion or an expert opinion), ill patients or citizens, including teleconsultation and social networks. While the term telemedicine is limited to direct medical care services, telehealth is defined in broader terms[64].
- E-learning: the use of technologies to teach and educate health-related matters.

In this regard, according to the cited author and following the "Inter-American Framework for Telemedicine Service" of the Pan American Health Organization (2016), it is established that the services included in telemedicine are:

- Remote assistance services: these may refer both to teleconsultations for remote monitoring, diagnosis or treatment of the patient, as well as telemonitoring services for (often chronic) patients, which often include records of biological parameters. These services also include electronic communication between professionals to carry out coordinated actions. Within remote assistance services, a distinction is often made between telecare and telemonitoring. Telemonitoring services broaden options for patients and enable continued attention at home. These services are carried out by health professionals and also contribute to empowering citizens and patients to take an active role in managing their disease. In addition, the length of hospital stays for patients is reduced, a new role is provided for physicians as a second line of support in multi-professional service environments, often coordinated by nursing professionals, and patients can take responsibility for their illness and take control over it
- Patient administrative management services: these include both requests for analytical tests and aspects related to billing for the provision of services.
- Distance training for professionals aiming at providing guidelines and evidence regarding health that facilitate the continuing education of health professionals.
- Collaborative online assessment and research: these include the use of ICT to share and spread good practices, as well as to create knowledge through members' actions and reactions.

The cited author later adds that, there is no doubt that telemedicine platforms process a very high percentage of sensitive data (and more specifically health data) and this is why all treatments carried out by said platforms should comply with the highest standards required to handle health data, regardless of the type of data in question. In other words, all data (whether sensitive or not, as defined by law) processed by a telemedicine application should have the highest level of protection required by the personal data protection law. In this regard, "it is key to adopt the strictest – both human and technical – security precautions and to submit the data to "encryption" processes, specifically in the IT field, which prevent it from being used for purposes other than those for which they were actually collected.

Having laid out the aforementioned conceptual framework, we will now look at what happened in the countries under study.

[64] National Academy of Sciences. The role of telehealth in an evolving health care environment - Workshop Summary [Internet]. Washington, DC: The National Academies; 2015.

Decree Law No. 27553 was approved in August 2020 in the Republic of Argentina. The first section of the Decree determines that the provisions are intended to:

> a. Establish that the prescription and dispensation of medicines, and all other prescriptions, may be drawn up and signed through handwritten, electronic or digital signatures, in electronic or digital prescriptions, throughout the national territory;
> b. Establish that health telecare platforms may be used across the national territory, in accordance with Act 25326 on the Protection of Personal Data and Act 26529 on Patient Rights.

When reading the different articles of the law mentioned, it can be seen that this law has provided that, the handling of patient data, in this respect and under Argentinian law, must be considered sensitive data, under the guiding principles of Act No. 25326 on personal data protection, for example:

> Section 4º- In order to implement this law, existing electronic systems must be further developed and/or adapted and regulations must be passed to implement the use of electronic or digital prescriptions and telehealth platforms, all of which must be regulated by such body as the national Executive Branch may establish from time to time and the bodies determined by each jurisdiction.

Likewise, these organizations are responsible for inspecting the electronic or digital prescription systems and telehealth platform systems which must guarantee the preservation of the online professional assistance, prescription, dispensation and filing databases. These organizations are also responsible for establishing what criteria are to be used and how access to such databases is to be controlled, as well as for making sure that the system operates correctly and that Act 25326 on personal data protection and Act 26529 on Patient Rights and other current regulations regarding the matter are followed.

Additionally, this law modified some of the provisions of Act No. 17132 on the Rules for the practice of medicine, odontology and their joint activity. In this sense, it was provided that:

> This remote assistance mode is authorized for practices to be conducted in the fields of medicine, odontology and assistance activities related thereto, […]. Telehealth may only be used for practices authorized to this specific end, following the protocols and platforms adopted for it by the competent authority.

In this sense, it is key to determine which platforms are ‘authorized’, given that the use of inappropriate platforms can have negative effects on patient privacy. No authorization on specific platforms was found when carrying out this research, which allows us to assume that health professionals chose and used the ones that they deemed most appropriate. Consequently, it can also be presumed that there may have been privacy violations or that, at least, privacy was put at risk, and this could have been avoided if a study of the existing platforms had been carried out.

In the Eastern Republic of Uruguay, Act No. 19689 was enacted on April 2, 2020, creating the "General Guidelines for the Implementation and Development of Telemedicine as the Provision of Health Services". Section 3.g of this rule specifically

guarantees safety in the exchange of information between professionals or health-care centers. This is a positive aspect, since it is a key obligation when it comes to protecting patients' personal data and privacy.

Likewise, it is clear that patients' consent is the legal foundation for the handling of personal data, as it is established in section 7 that "Patients must grant express consent to treatments, procedures, diagnoses, as well as to share and exchange personal information found in their medical records", within the constraints provided for in the wording of section 18 D of Act No. 18335. Consent, as referred to in this section, may be revoked by the patient at any time. Revocation shall be effective upon reliable communication to the medical attendants.

However, though not specifically referring to the provisions of this law, the AGESIC Personal Data Regulatory and Control Unit considered that[65]:

> 1. Notwithstanding the powers legally granted to other public entities, it is the Executive Branch-Ministry of Public Health that is legally responsible for determining the measures to be applied for the handling of data in the national health emergency situation declared by Decree No. 93/020, on March 13, 2020.
> 2. Health data directly related to the emergency situation indicated in the previous section may be handled without the data owners' prior informed consent in the context of the exceptions provided for in sections 90, 17 and 18 of Act No. 18331, enacted on August 11, 2008.
> 3. Even in those cases for which consent is not required due to the aforementioned exceptions, when handling and communicating data, under the responsibility of the acting entity, the remaining principles regarding data protection – especially those of veracity, purpose, data security and proactive responsibility – must be observed (sections 7, 8, 10 and 12 of Act No. 18331).

It is clear that the Unit referred to an issue different from telemedicine, but it is worth noting how this regulatory body released personal data treatment without the consent of the person concerned, as a consequence of the exceptions of the Personal Data Protection Act but based on a Presidential Decree.

Lastly, Article 8 of the Telemedicine Act is directly connected to said Personal Data Protection Act (No. 18331) in establishing that:

> Personal data and information supplied and stored by the implementation of telemedicine will be dealt with in conformity with the provisions of Act No. 18331, from August 11, 2008. Its supplementary regulatory legislation will determine security measures and proactive responsibility based on the kind of data, treatment and subjects involved.

This supplementary legislation is still pending[66], that is why, although it is propitious that an act determine the general guidelines to be followed, the effective protection of the right to privacy and personal data is still not clear.

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[65] Advisory opinion No. 2/2020 from March 20, 2020.

[66] In accordance with what was expressed in an event on May, 2021 by the Salud.uy Program Coordinator. *Search in* https://www.gub.uy/agencia-gobierno-electronico-sociedad-informacion-

4.3 The Pandemic and the Right to Assembly

On March 12, 2020, Decree of Necessity and Urgency (DNU) No. 260 was issued declaring a health emergency in the Republic of Argentina. Once the health emergency was declared, throughout the whole of 2020 (time frame under analysis in this research) a series of DNUs were passed, firstly implementing "preventive, mandatory and social isolation" (ASPO, by its acronym in Spanish); and afterwards modifying or supplementing this measure, with what is called "preventive, mandatory and social distancing" (DISPO, by its acronym in Spanish).

The first measure compelling the population to follow the ASPO was introduced on March 19, through DNU No. 297. This measure established that during the effectiveness of the "mandatory, preventive and social isolation", people were to remain in their usual residences or in the residence they were in at 00:00 hours on March 20, 2020, when this measure came into effect (Section 2). It was also stipulated that no cultural, recreational, sporting, religious, or any other type of event regardless of its nature, which involved public attendance, was allowed during the effectiveness of the ASPO.

This measure, with some exceptions, was successively extended by the following DNUs: no. 325 on March 31, 2020; no. 355 on April 11, 2020; no. 408 on April 26, 2020; no. 459 on May 10, 2020; no. 493 on May 24, 2020; no. 520 on June 7, 2020; no. 276 pm June 29, 2020; no. 605 on July 18, 2020; no. 641 on August 2, 2020; no. 677 on August 16, 2020; no. 714 on August 30, 2020; no. 754 on September 20, 2020; no. 792 on October 11, 2020; no. 814 on October 25, 2020; no. 875 on November 7, 2020; no. 956 on November 29, 2020; no. 985 on December 10, 2020; and no. 1033 on December 20, 2020.

In November 2020, DNU No. 875 introduced a measure entitled "mandatory, preventive and social distancing" (DISPO, by its acronym in Spanish). As it is strictly connected with the aim of this research, we find it necessary to determine the content of the restrictions derived from the ASPO and DISPO measures.

Given that the regulations issued are the same, and in the interest of brevity, only ASPO and DISPO restrictions under DNU no. 1033 dated December 2020 are cited below:

> SECTION 8. ACTIVITIES FORBIDDEN DURING MANDATORY, PREVENTIVE AND SOCIAL DISTANCING PERIOD: the following activities are forbidden in all places included in section 2 of this decree:
>
> 1. All family, religious, recreational, social or cultural events and all activities in general involving more than TWENTY (20) people in confined spaces. The same restriction shall be imposed for outdoor events and activities if they take place in private spaces of public access and in people's households, with the exception of the people sharing the same household.
> 2. All religious, recreational, social or cultural events in outdoor public spaces attended by more than ONE HUNDRED (100) people.

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conocimiento/comunicacion/noticias/telemedicina-sus-avances-post-pandemia Last access on August 23, 2021.

(…) and

> SECTION 17. ACTIVITIES FORBIDDEN DURING THE EFFECTIVENESS OF THE MANDATORY, PREVENTIVE AND SOCIAL ISOLATION PERIOD: the following activities are forbidden in all places included in section 9 of this decree:
>
> 1. Private and public events: social, cultural, recreational, sporting, religious and all other activities regardless of their nature that involve public attendance.
> 2. Shopping centers, cinemas, theaters, cultural centers, libraries, museums, restaurants, bars, gymnasiums, clubs and all other private or public places that involve public attendance.

It should be noted that through Administrative Decisions of the Chief of the Ministerial Cabinet, some exceptions were established over the course of the following months, for example, religious activities and nighttime activities, as well as other activities carried out in such venues as casinos or bingos. These exceptions were made in specific jurisdictions. This does not change the fact, though, that if the right to assembly was not fully restricted, at the very least it was limited in much of the Argentine territory.

DNU No. 1033 explains the grounds for imposing these restrictions or limitations to the right to assembly. Said DNU indicates

- That the rights enshrined in article 14 of the NATIONAL CONSTITUTION are the fundamental pillars of our legal system and they are subject to limitations and restrictions that may be introduced due to issues affecting public order, security and public health.

- That the International Covenant on Civil and Political Rights recognizes in article 12, paragraph 1, the right to "liberty of movement", and in article 12, paragraph 3, it establishes that the exercise of the rights set forth therein "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

- That, in a similar vein, article 22, paragraph 3 of the American Convention on Human Rights established that the exercise of the rights of liberty of movement and residence, set forth in article 22, paragraph 11, among others, "may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others."

- That all the measures adopted by the National government since the extension of the public health emergency set forth by Decree 260/20 are in line with the contents of Declaration 1/20 issued by the Inter-American Court of Human Rights on April 9, 2021 entitled "COVID-19 and Human Rights: The Problems and Challenges Must be Addressed from a Human Rights Perspective and with Respect for International Obligations", in relation to the fact that any measures

"that may impair or restrict the enjoyment and exercise of human rights must be temporarily limited, legal, adjusted to well-defined aims based on scientific criteria, reasonable, absolutely necessary and proportionate and in accordance with other requirements developed in Inter-American human rights law."

- That this decree, as well as Decree No. 297/20 and its extensions, is issued with the aim of containing and mitigating the propagation of the COVID-19 epidemic, and its application attempts to preserve public health by adopting, for such purpose, measures in proportion with the threat faced, in a temporary, reasonable and sectorized manner. The temporary and partial restriction to the freedom of movement is directed at preserving the collective right to public health and the subjective right to life. In fact, it is not just a question about the health of each person compelled to comply with the temporary distancing and isolation measures, but rather about the population as a whole, because public health, due to the way in which COVID-19 is transmitted, depends on each and every one of us complying with the distancing and/or isolation restrictions as the most effective way to take care of ourselves as a society.

It is important to mention that, evidently, the Executive branch of government had knowledge of and recognized the international standards that governed the restrictions of fundamental rights. It should be noted that DNU No. 1033 mentions that the restrictions had to be made by the introduction of "statutes" and that those statutes had to be temporary in order to ensure that the restriction be proportional.

However, these two points may very well constitute the grounds on which to question the restrictions to the right to assembly as enshrined in the international standards for the protection of the human rights laid out in this research.

The legal nature of the decrees of necessity and urgency is expressly established in the National Constitution of Argentina and supplemented by Act No. 26122. This act regulates the procedure by means of which the Congress of Argentina is allowed to act in relation to DNUs. It is therein established that a Joint Committee has the power to determine whether a Decree of Necessity and Urgency is valid or not, as well as the power to send its opinion to the plenary session of each Chamber for its express treatment, within the term of TEN (10) working days. On the other hand, section 22 of the aforementioned act determines that the Chambers shall state their opinion by means of a separate resolution, and they shall approve or reject the decrees in an express manner in accordance with article 82 of the national Constitution of Argentina.

As to the constitutional grounds for these decrees, the Constitution itself determines that it is Congress that is vested with legislative powers (sections 77 and 84). In this regard, though, section 99.3 establishes that:

> The Executive shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void.
> Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules do not refer to criminal issues, taxation, electoral matters, or the system of political parties, the Executive may issue decrees on grounds of necessity and urgency, which shall be decided upon a general

> agreement of ministers, who shall countersign them together with the Chief of the Ministerial Cabinet.

The Chief of the Ministerial Cabinet will personally and within ten days submit the decision to the consideration of the Joint Standing Committee Commission, made up based on the proportion of the political representation of each Chamber. This commission will submit its report within ten days to the plenary session of each Chamber for its express treatment, the report shall be examined immediately by both Chambers. A special act enacted with the absolute majority of all the members of each Chamber will regulate the procedure to be followed and the scope of Congress participation.

In other words, DNUs are part of the Argentine constitutional framework for the enactment of laws, but in a limited and exceptional manner. In the case under study, from the first DNU issued in March to the last one issued in December, it was argued – using similar or the same grounds – that due to the ongoing emergency situation it was deemed "impossible to pass acts using the ordinary procedure."

Therefore, what we need to analyze is whether the measures imposed using this mechanism as a consequence of the pandemic comply or not with one of the elements of the three-part test aforementioned: that any restriction to the right to assembly must be established by an act.

In view of the explanation above, there is no question that DNUs are instruments enshrined in the Argentinian Constitution, which allows the National Executive Branch to adopt such measures as adopted. However, they should be exceptional, rather than usual practice, as it seems to have occurred given the successive extension of the restrictions.