A NEW FRONTIER FOR AN INTERNATIONAL RIGHT WITH NO FRONTIERS: FREEDOM OF EXPRESSION & GENERATIVE AI OUTPUTS

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As people debate whether the First Amendment protects generative AI outputs, we should also reflect on what the global freedom of expression standard has to say on the matter. This standard will affect discussions around national and regional regulatory approaches to generative AI throughout the world. In addition, global corporate responsibility standards call on companies to respect international human rights in their operations, which may also impact how businesses that provide generative AI services approach their activities.

I argue that the global free expression standard protects the rights of individuals to seek and receive information of any kind, including gen AI outputs—and that if human speakers share gen AI outputs as part of their own speech, this global standard also protects those speakers' right to impart information. Governmental attempts to restrict gen AI outputs are therefore subject to the standard's safeguards on how this human right can be limited. Companies providing general-purpose gen AI services should also respect human rights, including freedom of expression, in their operations.

Introduction 1116

I. The Global Freedom of Expression Standard 1118

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A. Scope of Protection 1120
B. Permissible & Mandatory Limitations 1128
C. Challenges 1133
II. Freedom of Expression & Gen AI Outputs 1138
A. General Reflections 1139
B. Government Regulation & Jawboning 1141
C. Corporate Policies 1146
Conclusion 1156

Introduction

In recent years, a lively scholarly discourse has emerged about whether and how the U.S. First Amendment protects generative AI outputs.[1] Some have argued that such outputs are protected at the very least by the rights of AI users to receive information and to create their own speech.[2] Others would not recognize gen AI

[1] Generative AI (or gen AI) refers to "artificial intelligence (AI) that can create original content such as text, images, video, audio or software code in response to a user's prompt or request." Cole Stryker & Mark Scapicchio, *What Is Generative AI?*, IBM, https://perma.cc/9RHV-PQQS. Gen AI begins with a deep learning model, such as a large language model (LLM) for text generation, which is trained on data. *Id.* A process of tuning occurs to promote completion of specific tasks for content generation. *Id.* The outputs are then continually assessed and refined. *Id.*

[2] *See, e.g.*, Eugene Volokh, Mark A. Lemley & Peter Henderson, *Freedom of Speech & AI Outputs*, 3 J. Free Speech L. 651, 651–59 (2023) (observing that AI outputs should be protected because of AI users' rights to listen and to develop their own expression); Jack Balkin, *AI & the First Amendment: A Q&A with Jack Balkin*, Yale L. Sch. (Jan. 29, 2024), https://perma.cc/YCT6-PJV5 (stating "people and companies that use AI to produce content that they claim as their own have First Amendment rights as speakers. And people have rights to read or listen to content produced by AI, even though AI itself has no First Amendment rights"). *See also* Cass R. Sunstein, *Artificial Intelligence and the First Amendment*, 92 Geo. Wash. L. Rev. 1207, 1219–25 (2024) (noting that the rights of listeners as well as of creators who use AI outputs would be protected by the First Amendment approaches to governmental regulation that engage in viewpoint and content discrimination); Peter Salib, *AI Outputs Are Not Protected Speech*, 102 Wash. U. L. Rev. 83, 134–44 (2024) (commenting that AI outputs may be protected under constitutional protections for listeners as well as tools for speaking).

outputs as receiving such First Amendment protections.[3] The issue of whether gen AI program creators are entitled to free speech protections for such outputs has also spurred a variety of reactions.[4]

As this discourse on the First Amendment and gen AI unfolds, it is also important to reflect on what the global freedom of expression standard has to say on the matter. This standard will affect discussions about national and regional regulatory approaches to gen AI throughout the world. In addition, global corporate responsibility standards call on companies to respect international human rights norms in their operations, which may also impact how businesses that provide gen AI services approach their activities.[5]

Part I of this Article explores the scope of the existing global free expression standard. Part II considers the standard's application to gen AI outputs, including in various governmental and corporate contexts. Ultimately, this Article maintains that the global free expression standard protects the rights of individuals to seek and receive information of any kind, including gen AI outputs. In addition, if human speakers share gen AI outputs as part of their own speech, this global standard also protects those speakers' right to impart information. Governmental attempts to restrict gen AI outputs are therefore subject to the standard's safeguards on how this human right can be limited. And companies providing general-purpose gen AI

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[3] *See, e.g.*, David Atkinson, Jena D. Hwang & Jacob Morrison, *Intentionally Unintentional: GenAI Exceptionalism and the First Amendment*, 23 FIRST AMEND. L. REV. 173, 185–91 (2025) (arguing that AI outputs are not speech and therefore there can be no right to receive the outputs).

[4] *See, e.g.*, Volokh, Lemley & Henderson, *supra* note 2, at 651–53 (observing that AI program creators may be entitled to First Amendment protections for AI outputs but the question is a complicated one that may not need to be addressed, given the rights of listeners to AI outputs); Salib, *supra* note 2, at 112–26 (assessing that AI outputs are not protected speech of their program creators, as the outputs do not reflect human speech); Mackenzie Austin & Max Levy, *Speech Certainty: Algorithmic Speech and the Limits of the First Amendment*, 77 STAN. L. REV. 1, 67–69 (2025) (advocating for adoption of a "speech certainty" principle, which considers that AI outputs are not speech, as human programmers do not and cannot know what the outputs will be); Atkinson, Hwang & Morrison, *supra* note 3, at 183–85 (supporting the view that AI outputs are not the speech of human programmers, because the outputs lack human intentionality).

[5] When discussing corporate providers of gen AI services, this Article is focused on those major players providing access to general information such as Claude, Grok, Llama, and ChatGPT, rather than, for example, domain-specific services that focus on highly specific tasks. *See infra* notes 126–128 and accompanying text (discussing the reasons for differentiating such models and services).

services should also respect human rights, including freedom of expression, in their operations.

I. THE GLOBAL FREEDOM OF EXPRESSION STANDARD

The global standard for freedom of expression is set forth in Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR),[6] a foundational United Nations human rights treaty that was opened for signature in 1966, entered into force in 1976, and has 175 State Parties.[7] The United States joined in 1992, when President George H.W. Bush pressed the Senate to give its advice and consent to the treaty.[8] He stated that ratification of this treaty was urgent, as it would help the United States to promote democracy and basic rights throughout the world, particularly with respect to countries emerging from the Soviet Union,[9] an argument endorsed by the Senate Foreign Relations Committee (SFRC) when recommending the ICCPR to the full Senate for approval.[10] Both the President and the

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[6] International Covenant on Civil and Political Rights art. 19, ¶ 2, *opened for signature* Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S 171 [hereinafter ICCPR].

[7] *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, https://perma.cc/R6AX-KDVW [hereinafter *UN Treaty Collection: ICCPR*].

[8] David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1183 n.1 (1993). President Carter had transmitted the ICCPR to the Senate in 1978, but it languished there until President Bush pushed for the United States to become a party. *Id.*

[9] President Bush made the following case to the Senate:

> The end of the Cold War offers great opportunities for the forces of democracy and the rule of law throughout the world. I believe the United States has a special responsibility to assist those in other countries who are now working to make the transition to pluralist democracies. . . . United States ratification of the [ICCPR] at this moment in history would underscore our natural commitment to fostering democratic values through international law. The Covenant codifies the essential freedoms people must enjoy in a democratic society, such as the right to vote, freedom of peaceful assembly, equal protection of the law, the right to liberty and security, and freedom of opinion and expression.

S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 102-23, at 25 (1992) [hereinafter SFRC Report].

[10] The SFRC Report stated:

> In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact

SFRC noted that joining the treaty would enable the United States to help shape the scope of international norms on civil and political rights in a way that remaining out of the regime would preclude.[11]

The ICCPR freedom of expression standard provides: "Everyone shall have the right to freedom of expression; this right shall *include* freedom to *seek*, *receive and impart information and ideas of all kinds*, *regardless of frontiers*, either orally, in writing or in print, in the form of art, or through *any other media of his choice*."[12] This right to freedom of expression, however, is not absolute. Under Article 19(3), governments may restrict that right if they can meet their burden of demonstrating that a three-part test is satisfied: The law burdening speech must (1) be lawfully adopted and not improperly vague, (2) fulfill a legitimate public interest objective, and (3) be not only the least intrusive means to achieve the objective but also proportional to the harm to be averted.[13] Unlike the First Amendment, global norms on freedom of expression also require governments to prohibit speech that is likely

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> of U.S. efforts in the human rights field. . . . The historical changes in the Soviet Union and Eastern Europe have created an opportunity for democracy to grow and take hold. By ratifying the Covenant at this time, the United States can enhance its ability to promote democratic values and the rule of law, not only in Eastern Europe and the successor states of the Soviet Union but also in those countries in Africa and Asia which are beginning to move toward democratization.

Id. at 3.

[11] President Bush urged that "U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world." *Id.* at 25. The SFRC Report observed that "[r]atification of the Covenant will allow the United States to . . . help ensure that the limitations permitted under [Articles 19 and 20] are interpreted narrowly." *Id.* at 4. When it joined the treaty, the United States issued a declaration stating ICCPR parties "should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant." *UN Treaty Collection: ICCPR*, *supra* note 7.

[12] ICCPR, *supra* note 6, art. 19(2) (emphases added).

[13] *Id.* art. 19(3). Specifically, this provision states freedom of expression "may therefore be subject to certain restrictions, but these shall only be such as are [1] provided by law and [2] are necessary: [3] (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals." *Id.* For a discussion of this three-part test, see *infra* notes 51–63 and accompanying text.

to cause imminent harm; such restrictions on speech are also subject to the three-part test.[14]

Another aspect of the ICCPR's scope of protection for freedom of expression bears mention here. In contrast to the First Amendment, which affords free speech rights to corporations,[15] the ICCPR's human rights protections (including those for freedom of expression) extend to humans rather than legal persons as such. Specifically, the treaty provides that each State Party is required to respect and ensure "to all *individuals* within its territory and subject to its jurisdiction the rights recognized in the present Covenant,"[16] which is generally interpreted to mean that only humans (and not businesses) are holders of ICCPR rights.[17]

To lay the groundwork for assessing if the global freedom of expression standard covers gen AI outputs, Part I analyzes the scope of ICCPR Article 19(2)'s protection for freedom of expression, assesses permissible and mandatory restrictions on expression, and provides reflections on certain ongoing implementation challenges that may affect the standard's integration with respect to gen AI.

A. Scope of Protection

Under the Vienna Convention on the Law of Treaties, treaty interpretation begins with reviewing the text "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose."[18] A treaty's negotiating history may be consulted to confirm

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[14] See *infra* notes 66–72 and accompanying text for a description of these mandatory speech bans, UN expert interpretations, and relevant U.S. reservations to such obligations.

[15] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–45 (2010).

[16] ICCPR, *supra* note 6, art. 2(1) (emphasis added).

[17] The fact that ICCPR Article 2(1) refers to "individuals" rather than "persons" is considered significant in the assessment of whether legal persons can hold human rights. *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 31, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("The beneficiaries of the rights recognized by the Covenant are individuals."); Thomas Buergenthal, *To Respect and to Ensure, State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 73 (Louis Henkin ed., 1981) ("Juridical persons enjoy no rights under the covenant.").

[18] Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 59 Stat. 1055, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

the meaning derived from a textual analysis or to provide clarity should such analysis produce ambiguous, obscure, absurd, or unreasonable results.[19] In addition, it is widely recognized that the works of experts may be used not as a source of international obligations, but to assist in illuminating the meaning of such obligations.[20]

A few reflections are warranted on the phrasing of the ICCPR's protection for freedom of expression, particularly when juxtaposed with the U.S. First Amendment's much shorter text.[21] ICCPR Article 19(2) explicitly provides that freedom of expression "includes" (and therefore is not limited to) imparting as well as seeking and receiving information and ideas.[22] Thus, under the ICCPR's standard, the ability to seek as well as receive information and ideas does not need to be developed through interpretation (as was the case with the First Amendment).[23] Rather, the text itself explicitly covers seeking and receiving information and ideas, which are treated as aspects of the freedom of expression right that are on par with the ability to impart information and ideas, rather than as secondary or derivative rights. It is also notable that *seeking* is included as a separate concept from *receiving* information. As the drafters of the treaty text would not have included two fully synonymous words in a row,[24] it is fair to understand *seeking* as going beyond passive reception of available information. The human right to *seek* must encompass protection for proactive probing or searching for information and ideas.

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[19] *Id.* art. 32.

[20] *See* Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 (noting that the International Court of Justice can refer to "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law").

[21] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press").

[22] ICCPR, *supra* note 6, art. 19(2).

[23] *See* Volokh, Lemley & Henderson, *supra* note 2, at 655 n.12 (describing the Supreme Court's jurisprudential evolution of the rights of listeners and noting "that the Court has stressed listener interests as an important (and potentially independent) basis for [First Amendment] protection as well"); Sunstein, *supra* note 2, at 1221–23 (reviewing Supreme Court cases developing the rights of listeners in the First Amendment context, which led to protections for listeners "even when the law did not afford them to the speaker").

[24] *See Draft Articles on the Law of Treaties with Commentaries*, [1966] 2 Y.B. Int'l L. Comm'n 187, 219, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (noting "so far as the maxim *ut res magis valeat quam pereat* [that the thing may rather have effect than be destroyed] reflects a true general rule of

Three other aspects of the text of ICCPR Article 19(2) warrant examination for our purposes. First, unlike the phrasing of any other human right listed in the ICCPR, the ability to seek, receive, and impart information and ideas applies "regardless of frontiers." Thus, the language explicitly contemplates protection for imparting, seeking, and receiving information and ideas across borders. Second, presumably to underline the wide-ranging reach of protection for expression, the phrase "of all kinds" follows "information and ideas." Such phrasing makes it extremely difficult to argue that certain forms of information and ideas are not covered as expression under Article 19(2). Third, the text provides that the various facets of this right can be exercised through "any media of his choice" beyond the listed ways of engaging in oral, written, print, or artistic communication. This visionary language makes Article 19(2) capable of covering ever-evolving methods of communication. Like a three-stranded knot, each of these phrases synergistically reinforces the breadth of the right to seek, receive, and impart information and ideas.

In short, from a plain reading of ICCPR Article 19(2), it is evident that the global standard for freedom of expression is broad and includes the freedom to (1) seek, (2) receive, and (3) impart (4) information and ideas of all kinds, (5) regardless of frontiers, and (6) through any media of one's choice. And the negotiating history confirms the aim to define as broad a scope as possible for ICCPR Article 19(2)'s concept of freedom of expression.

Those negotiating the ICCPR drew upon the text of the 1948 Universal Declaration of Human Rights (UDHR), the first global human rights instrument, which was drafted under Eleanor Roosevelt's service as chair of the negotiations.[25] The UDHR provides: "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.*"[26] While the UDHR's language contains the key concepts of (1) seeking, (2)

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interpretation, it is embodied in article [31, paragraph 1 of the Vienna Convention] . . . . When a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.").

[25] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. *See also Universal Declaration of Human Rights (1948), Drafting History*, U.N., https://perma.cc/KVV6-XUBV.

[26] UDHR, *supra* note 25, art. 19 (emphases added).

receiving, and (3) imparting (4) information and ideas, (5) regardless of frontiers and (6) through any media, the new language added to the ICCPR includes the phrase "of all kinds" after "information or ideas" and "of his choice" after "through any media." Both additions to ICCPR Article 19(2) enhanced the UDHR's first attempt at articulating a broad right to free expression by explicitly covering "all kinds" of information or ideas and emphasizing user choice in the type of media selected to seek, receive and impart such information or ideas.[27]

Scholars reviewing the ICCPR's negotiating history have highlighted that the phrasing choices in Article 19(2) were intended to provide the broadest possible scope of protection for what qualifies as freedom of expression. For example, in his foundational analysis of the ICCPR, Manfred Nowak reflects on the key debates involving ICCPR Article 19(2), which focused on the terms "seek," "information and ideas of all kinds," and "through any media of one's choice."[28] He notes that during the treaty negotiations, the UN Secretary General questioned whether appropriate consideration had been given to including the right to seek and receive information as part of freedom of expression, but this concern that the right's breadth was excessive was not generally shared by the negotiators.[29]

Nowak also notes that the "right *actively* to seek information, which goes beyond mere passive reception, is also found in Article 19 of the UDHR," but did not

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[27] It should be noted that the ICCPR further developed this standard by separating the right to "freedom of opinion" (which cannot be limited under Article 19(3)) from the right to "freedom of expression" (which is subject to limitation under Article 19(3)). *See* ICCPR, *supra* note 6, art. 19(1) (commemorating "the right to hold opinions without interference" as a distinctive right from freedom of expression). Though a somewhat undertheorized right, the right to freedom of opinion can be fairly understood to mean freedom from compelled disclosure of opinions, discrimination or punishment for suspected views, and improper manipulation in the process of forming opinions. *See* Evelyn Aswad, *Losing the Freedom to Be Human*, 52 COLUM. HUM. RTS. L. REV. 306, 357–58 (2020). The inclusion of the concept of freedom of opinion can be attributed in significant measure to the sustained efforts of Professor Zachariah Chaffee, who was a U.S. delegate in relevant UDHR negotiations and forcefully made the case that persecution for suspected opinions was wrong, as had been evidenced by McCarthyism in the United States. *Id.* at 342–44.

[28] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 443–48 (2d rev. ed. 1993).

[29] *Id.* at 443.

appear in the 1955 European Convention on Human Rights (ECHR).[30] The implication of this comparison is that the ICCPR drafters may have intended to go beyond existing ECHR protections for expression by including protection for seeking information. Nowak highlights that some countries were concerned that "seeking" information and ideas could result in "shameless" research activities and sought to replace "seek" with the (apparently more modest) word "gather."[31] He notes that the Western states that defeated this proposal said "they intentionally desired to protect *active steps* to procure and study information."[32] From this episode in the negotiations, Nowak finds further evidence of the intended breadth of the ICCPR's protection for freedom of expression.[33] He concludes that the right to *seek* information "relates to all generally accessible information."[34]

In addition, Nowak notes that the phrase "of all kinds" was added after "information and ideas" to avoid any inadvertent exclusions that could have occurred with a listing of examples.[35] He reflects on the fact that the ECHR did not include "of all kinds" in its freedom of expression formulation, from which one can also infer that a broader scope was intended for the ICCPR's formulation.[36] He concludes "there can be no doubt that every communicable type of subjective idea and opinion, of value-neutral news and information, of commercial advertising, art works, political commentary regardless of how critical, pornography, etc., is protected by Article 19(2), subject to the permissible limitations in [ICCPR] para. 3."[37] From his review of the negotiating history, he also assesses that the phrase "any other media of his choice," which also does not appear in the ECHR, was intended

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[30] *Id.* at 446.

[31] *Id.*

[32] *Id.* (emphasis added). For these Western states, problematic ways of seeking information could be dealt with through ICCPR Article 19(3)'s limitations clause, rather than by reducing Article 19(2)'s scope of coverage for freedom of expression. *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 443 ("[N]o one was in favour of a narrow scope of application (e.g., in the sense of opinions and nothing else).").

[36] *Id.*

[37] *Id.* at 443–44.

to comprehensively cover all means of communication.[38] Other scholars have come to similar conclusions about ICCPR Article 19(2)'s breadth.[39]

The UN Human Rights Committee, the body of independent experts elected by ICCPR State Parties to monitor treaty implementation and make recommendations,[40] has also examined the breadth of the language of Article 19(2). For example, General Comment 34, which is the Committee's most recent and formal recommended interpretation of Article 19, stated that "[t]his right includes the expression and receipt of communications of *every form* of idea and opinion *capable of transmission* to others."[41] It also noted that Article 19 "protects all forms of expression and the means of their dissemination," including through "electronic and internet-

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[38] *Id.* at 445.

[39] For example, Karl Josef Partsch notes that the ICCPR's approach to freedom of expression consists of "three elements: 'seek, receive, and impart' information." Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, *in* THE INTERNATIONAL BILL OF HUMAN RIGHTS, *supra* note 17, at 209, 218. He interprets the rejection of the proposal to substitute "seek" with "gather" during the negotiations as meaning "the right of active inquiry and probing . . . should not be abandoned." *Id.* He concludes that proposals to define "information and ideas" were rejected as "creating a risk of restrictive interpretation." *Id.* In addition, he finds that the debate about whether to define any media of one's choice was resolved in favor of breadth to include "all media whether specifically enumerated or not." *Id.*

[40] ICCPR, *supra* note 6, arts. 28–45. The Human Rights Committee has three main functions. It (1) reviews the periodic reports of states about their treaty implementation, questions government representatives during in-person sessions, and makes public recommendations that states must answer publicly; (2) issues formal recommended interpretations of the treaty provisions; and (3) if an ICCPR State Party has consented, can hear individual complaints against the state and issue public decisions about the alleged violations. *See* Gerald L. Neuman, *Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members*, *in* THE HUMAN RIGHTS COVENANTS AT 50: THEIR PAST, PRESENT, AND FUTURE 31, 31–37 (Daniel Moeckli, Helen Keller & Corina Heri eds., 2018) (discussing the functions of the Human Rights Committee). While the Human Rights Committee does not have legally binding powers over State Parties, its impact is derived, among other things, from its ability to pressure countries on the world stage, to force a public dialogue about implementation matters, and to amplify the voices of advocates in domestic legal and political systems. *See id.* at 31–35. *See also infra* notes 77–80 and accompanying text (describing domestic court consideration of the Committee's views).

[41] U.N. Hum. Rts. Comm., General Comment No. 34, ¶ 11, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter GC 34] (emphases added).

based modes of expression."[42] With respect to the advent of "information and communication technologies, such as internet and mobile based electronic information dissemination systems," the Committee advised governments to "take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto."[43]

The UN Special Rapporteur on Freedom of Opinion and Expression (the "Special Rapporteur"), an independent expert position created and filled by UN Human Rights Council member states to monitor implementation of the rights to freedom of opinion and expression by all UN member states (not just ICCPR State Parties),[44] has similarly expounded upon the breadth of Article 19(2). For example, the Special Rapporteur has observed that "freedom of expression as defined in Article 19(2) involves expansive rights embodied by active verbs (seek, receive, impart) and the broadest possible scope (ideas of all kinds, regardless of frontiers, through any media)."[45] The Special Rapporteur has stated that Article 19(2) guarantees the rights of individuals to be both passive recipients and active seekers of information.[46] The

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[42] *Id.* ¶ 12.

[43] *Id.* ¶ 15. The Committee noted that the right to freedom of expression also "embraces a right of access to information held by public bodies." *Id.* ¶ 18. In addition, the Committee noted that "individual[s] should also be able to ascertain which public authorities or private individuals or bodies control or may control his or her files" and to have access to such files. *Id.*

[44] *See Special Rapporteur on Freedom of Opinion and Expression*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://perma.cc/8CQP-WA9M. Among other functions, the Special Rapporteur issues thematic and country-specific reports involving free expression matters, conducts visits to countries to examine implementation issues and reports publicly on findings, and corresponds publicly with countries in assessing whether their laws comply with the global freedom of expression standard. *Id.* An analysis of the impacts of UN Special Rapporteurs (who cover a wide variety of human rights topics beyond freedom of expression) found they were catalysts for change in various situations, particularly with respect to their country visits, which had positive impacts on, for example, releasing improperly held prisoners and improving pending legislation. Ted Piccone, *Catalysts for Rights: The Unique Contributions of the UN's Independent Experts on Human Rights*, BROOKINGS, viii-xi (2010), https://perma.cc/3ERU-AGZY.

[45] David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 12, U.N. Doc. A/74/486 (Oct. 9, 2019) [hereinafter SR 2019 Report].

[46] Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the*

Special Rapporteur has explained how silencing a speaker not only violates the speaker's rights but also undermines the right of others to seek and receive information.[47] It follows, therefore, that prior censorship interferes not only with the speaker's right to impart information but also with the rights of members of society to seek and receive information or ideas.[48] The Special Rapporteur has also noted that the breadth of the ideas and information that are protected under Article 19(2) is vast and it would be difficult to conceive of anything falling outside its scope.[49] The Special Rapporteur has highlighted the fact that the right applies beyond borders, as it "both anticipates technologies that enable data to cross borders in an in-

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Right to Freedom of Opinion and Expression: Summary of Cases Transmitted to Governments and Replies Received, ¶ 879, U.N. Doc. A/HRC/17/27/Add.1 (May 27, 2011). The Special Rapporteur has observed that freedom of expression is a "robustly articulated right," with *seeking and receiving* encompassing the "fundamentally human curiosity of learning" while *imparting* encompasses sharing information and the "framing [for] the object of such activity [is] as broad[] as possible (information and ideas *of all kinds*)." David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Research Rep. on Artistic Freedom of Expression*, ¶ 8, U.N. Doc. A/HRC/44/49/Add.2 (July 24, 2020) [hereinafter SR 2020 Report] (emphasis in original).

[47] *See, e.g.*, Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 54, U.N. Doc. A/HRC/20/17 (June 4, 2012) ("An attack against a journalist is not only a violation of his or her right to impart information, but also undermines the right of individuals and society at large to seek and receive information."). The Special Rapporteur has further elaborated that the "right [to receive information] is not merely a converse of the right to impart information, but it is a freedom in its own right." Abid Hussain (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,* ¶ 35, U.N. Doc. E/CN.4/1995/32 (Dec. 14, 1994) [hereinafter SR 1994 Report].

[48] SR 2020 Report, *supra* note 46, ¶ 16.

[49] SR 1994 Report, *supra* note 47, ¶ 31 (The phrasing of Article 19(2) "implies that every communicable type of idea, information, opinion, news, advertising, art, critical political commentary, etc. falls within the scope of protection. . . . [I]t is impossible . . . to exclude undesirable opinions or expressions, such as blasphemy or pornography, solely by restrictively defining or interpreting the scope of protection offered by article 19(2).").

stant and also affirms the right of journalists in exile to seek, receive and share information, ideas and images without hindrance or restrictions except as laid out in article 19(3)."[50]

In sum, a review of the text, negotiating history, and analysis of scholars and independent UN experts confirms the broadest possible scope is to be applied to ICCPR Article 19(2)'s right to freedom of expression. It is particularly notable that this provision explicitly covers not only imparting but also seeking and receiving information and ideas of all kinds. The right includes a component of proactive probing for information; it is not limited to passive reception of information. That said, this comprehensive right to freedom of expression may be restricted, and indeed must be restricted under certain circumstances, which are described in the next section.

B. Permissible & Mandatory Limitations

ICCPR Article 19(3) provides that governments have the discretion to restrict the right to freedom of expression, but only if they can meet the burden of demonstrating that each condition of a three-part test is met.[51] Specifically, Article 19(3) states that expression may be

> subject to certain restrictions, but these shall only be such as are [1] provided by law and are [2] necessary: [3] (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[52]

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[50] Irene Khan (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Journalists in Exile*, ¶ 16, U.N. Doc. A/HRC/56/53 (Apr. 26, 2024) (noting as well that "exile itself is an unlawful restriction of freedom of expression insofar as it hinders the right of journalists to exercise their right to access to and disseminate information and share their views freely in their own country"). Scholars have also tracked the Special Rapporteur's recognition of a right to access information from the government. *See* David Kaye & Azin Tadjdini, *Article 19-The Right to Freedom of Opinion and Expression*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 445, 455–57 (Humberto Cantú Rivera ed., 2024) (examining the evolution of the right to access governmental information since the Special Rapporteur first acknowledged this right in 1995).

[51] GC 34, *supra* note 41, ¶ 27.

[52] ICCPR, *supra* note 6, art. 19(3).

Under the "provided by law" test (which is also known as the "legality" condition), laws restricting freedom of expression must not be improperly vague, to ensure that persons affected by the restriction have appropriate notice and that those charged with carrying out the law have sufficient guidance to avoid arbitrarily or otherwise improperly implementing such laws.[53] Such laws must also be properly adopted[54] and comply with other provisions in the ICCPR, such as the ban on racial, religious, political, and other forms of discrimination.[55]

Next, Article 19(3) requires that a speech-restrictive regulation only be imposed for a legitimate public interest objective; this condition is known as the "legitimacy" test.[56] The acceptable public interest objectives for burdening speech are respect for the rights or reputations of others, national security, public health, order, or morals.[57] The Human Rights Committee considers this listing of objectives in the treaty text to be exhaustive; any restrictions must be applied solely for the stated reason, and they "must be directly related to the specific need on which they

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[53] GC 34, *supra* note 41, ¶ 25 ("[A] norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.").

[54] David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 37, U.N. Doc. A/72/350 (Aug. 18, 2017) ("The requirement of legality . . . requires that regular procedures be followed in the adoption of restrictions . . . .").

[55] GC 34, *supra* note 41, ¶ 26 (Laws that restrict expression "must also themselves be compatible with the provisions, aims and objectives of the Covenant. Laws must not violate the non-discrimination provisions of the Covenant. Laws must not provide for penalties that are incompatible with the Covenant, such as corporal punishment."). The non-discrimination obligations in the ICCPR require banning discrimination in implementing ICCPR rights and providing equal protection of the law with regard to "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." ICCPR, *supra* note 6, arts. 2, 26.

[56] David Kaye (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 8, U.N. Doc. A/HRC/38/35 (Apr. 6, 2018) [hereinafter SR 2018 Report].

[57] ICCPR, *supra* note 6, art. 19(3).

are predicated."[58] The Committee also cautions that governments can often improperly invoke the specified objectives as pretexts for impermissible goals.[59]

Finally, the last part of the tripartite test is the "necessity" condition, which derives from the word "necessary" in Article 19(3). Under this test, the burden on expression caused by a restriction must be not only the "least intrusive means" to achieve the legitimate objective, but also "proportional" to the harm to be averted.[60] The least intrusive means test can be assessed through a trilogy of questions:

(1) Can the harm be averted through a means that does not burden expression? If so, no burden on expression is needed or acceptable.

(2) If such means are not available, then is the selected burden on expression the least intrusive one to fulfill the legitimate objective? If not, then the government cannot justify its selected means.

(3) Is the selected burden on expression effective in achieving the objective? If not, then the burden on speech is illicit because it is burdening speech without achieving the objective.[61]

The Special Rapporteur has often opined that the least intrusive means test is not met unless there is imminent and likely harm to be avoided.[62] With regard to

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[58] GC 34, *supra* note 41, ¶ 22.

[59] *Id.* ¶ 30 (stating that national security is often improperly invoked "to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information").

[60] *Id.* ¶ 34 (noting restrictions "must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected").

[61] *See* SR 2019 Report, *supra* note 45, ¶ 52.

[62] *See, e.g.*, Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 52–53, U.N. Doc. A/68/362 (Sept. 4, 2013) ("For a restriction to be necessary, it must . . . not be more restrictive than is required for the achievement of the desired purpose or protected right . . . . [T]he authorities must demonstrate, in specific and individualized fashion, the precise nature of the *imminent* threat, as well as the necessity for and the proportionality of the specific action taken. A *direct and immediate* connection between the expression (or the information to be disclosed) and the alleged threat must be established." (emphases added)). *See also* Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 36, U.N. Doc. A/HRC/17/27 (May

proportionality, the Special Rapporteur has advised that this concept demands not only that "restrictions 'target a specific objective and do not unduly intrude upon other rights of targeted persons'" but also that "'interference with third part[y] rights . . . be limited and justified in the light of the [public] interest [aim].'"[63]

Overall, such interpretations of the legality, legitimacy, and necessity tests provide a principled set of conditions for assessing whether speech restrictions are justifiable under the ICCPR.[64] It is worth emphasizing, as Professor David Kaye has eloquently stated, that the global standard for free speech restrictions is not an amorphous balancing test of competing rights and interests, but rather requires speech regulators to bear the burden of answering crucial questions relating to the protection of speakers and listeners.[65]

Unlike the First Amendment, the ICCPR contains certain mandatory speech bans.[66] For example, Article 20 prohibits "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[67]

16, 2011) (stating that burdens on speech to pursue counter-terrorism or national security are only justifiable when "(a) the expression is intended to incite *imminent* violence; (b) it is *likely* to incite such violence; and (c) there is a *direct and immediate connection* between the expression and the likelihood or occurrence of such violence." (emphases added)).

[63] *See, e.g.*, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Special Rapporteur on Freedom of Religion or Belief, Letter from the Special Rapporteurs to the United States, U.N. Doc. OL USA 6/2017, at 3 (May 9, 2017), https://perma.cc/6NSQ-LEH5 (citations omitted).

[64] For an in-depth analysis of the UN independent experts' interpretations of the tripartite test as applied to particular situations, see Evelyn Mary Aswad, *Taking Exception to Assessments of American Exceptionalism: Why the United States Isn't Such an Outlier on Free Speech*, 126 DICK. L. REV. 69, 99–125 (2021).

[65] David Kaye, *Against Balancing*, MEDIUM (May 4, 2020), https://perma.cc/3A3H-24DU (observing that "if the test [for speech restrictions] is balancing, we are in the land of subjectivity, of weighing incomparables" and advocating for use of ICCPR Article 19(3)'s tripartite test).

[66] For a more comprehensive comparison of ICCPR protections for freedom of expression with the First Amendment, see generally Aswad, *supra* note 64 (comparing the ICCPR's tripartite test with First Amendment approaches to vagueness, governmental justifications for speech restrictions, and narrow tailoring through the least restrictive means test).

[67] ICCPR, *supra* note 6, art. 20(2). This Article also prohibits any propaganda for war. *Id.* art. 20(1). The United States has taken a reservation to ICCPR Article 20 (i.e., not taken on an obligation) to the extent it is inconsistent with the First Amendment. *See UN Treaty Collection: ICCPR*, *supra* note 7.

The UN Human Rights Committee and the Special Rapporteur have issued a variety of recommended interpretations that would significantly narrow the potential scope of this prohibition. To begin with, the Committee has made clear that any rules restricting expression under Article 20 must also satisfy Article 19(3)'s tripartite test.[68] In addition, the Special Rapporteur has issued a variety of narrow interpretations relating to Article 20(2).[69] It should be noted that a separate UN human rights treaty, the Convention on the Elimination of Racial Discrimination (CERD), contains a requirement for State Parties to criminalize racial hate speech.[70] The Committee on the Elimination of Racial Discrimination, the group of independent experts elected by CERD State Parties to monitor implementation of the pact and make recommendations, has interpreted this requirement as being subject to ICCPR Article 19(3)'s tripartite test. The Committee has noted that application of this test would require State Parties to examine the imminence and likelihood of potential harms in sustaining speech restrictions.[71] Such UN monitoring bodies' interpretations in the last 15 years are more speech protective than those issued in prior years and reflect an evolution in the approach of UN independent monitoring bodies to freedom of expression.[72]

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[68] GC 34, *supra* note 41, ¶ 50 ("The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3."). The Human Rights Committee has also emphasized that all speech restrictions (not only those that fall within Article 20) must meet the tripartite test. *Id.* ¶ 52.

[69] The Special Rapporteur has advised, for example, that "incitement" entails the concept of imminent and likely harm, and that the word "hostility" should be interpreted to mean an act of hostility rather than a feeling. *See* Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶¶ 44(c), 45(e), U.N. Doc. A/67/357 (Sept. 7, 2012).

[70] International Convention on the Elimination of All Forms of Racial Discrimination art. 4, o*pened for signature* Mar. 7, 1966, T.I.A.S. 94-1120, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Racial Discrimination Treaty].

[71] Comm. on the Elimination of Racial Discrimination, General Recommendation No. 35, ¶¶ 12, 19, U.N. Doc. CERD/C/GC/35 (Sept. 26, 2013).

[72] *See* Aswad, *supra* note 64, at 116–26 (describing the UN human rights machinery's shift in 2010–2013 to more speech protective approaches). A former American Civil Liberties Union president has also noted favorably the UN experts' recent speech protective interpretations. *See* Nadine Strossen, *United Nations Free Speech Standards as the Global Benchmark for Online Platforms' Hate Speech Policies*, 29 MICH. ST. INT'L L. REV. 307, 361 (2021).

Despite this evolution in the UN monitoring machinery's approach towards greater protection for speech, implementation challenges remain, a few of which bear specific mention before we address the application of the treaty's free expression standard to the gen AI context.

C. Challenges

As one commentator has stated, "[o]ne of the great questions of international affairs is how to promote respect for universal principles of human rights in a world where sovereign states can be persuaded but rarely compelled to do the right thing."[73] Though some UN human rights and related treaties provide for the International Court of Justice to rule on disputes through legally binding decisions,[74] there was no political will to create such a dispute resolution clause in the ICCPR. Nor is there a UN police force to ensure compliance with the treaty. Rather, as noted previously, there are independent experts monitoring ICCPR implementation (such as the Human Rights Committee and the UN Special Rapporteur), which recommend textual interpretations and spotlight compliance issues but are not empowered to issue legally binding decisions.[75]

And the treaty and its expert interpretations can be impactful even without a legally binding enforcement mechanism within the UN human rights system. To begin with, the International Court of Justice (ICJ)[76] and many domestic courts

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[73] PICCONE, *supra* note 44, at viii.

[74] For example, two conventions completed before the ICCPR contain dispute resolution clauses that designate the International Court of Justice as the forum to issue legally binding decisions about treaty disputes. *See, e.g.*, Racial Discrimination Treaty, *supra* note 70, art. 22 ("Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."); Convention on the Prevention and Punishment of the Crime of Genocide art. 9, *opened for signature* Dec. 9, 1948, S. EXEC. DOC. O, 81-1, 78 U.N.T.S. 277 ("Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").

[75] *See supra* notes 40, 44 (describing the functions of the Human Rights Committee and the Special Rapporteur on freedom of expression).

[76] The International Court of Justice has stated "it believes that it should ascribe great weight to the interpretation adopted by [the Human Rights Committee] that was established specifically to

view expert interpretations by treaty bodies, such as the Human Rights Committee, as highly persuasive, or at least engage with them when rendering decisions.[77] As the international law system relies in the first instance on each domestic system to incorporate and give effect to its international obligations,[78] such judicial consideration of treaty provisions and the views of the UN's human rights machinery can be significant.[79] Second, UN experts' independent oversight, public dialogues with

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supervise the application of the treaty." Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 636, ¶ 66 (Nov. 30).

[77] *See, e.g.*, Machiko Kanetake, *Engagement of Domestic Courts with the Findings of United Nations Human Rights Treaty Monitoring Bodies*, *in* THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW: COMPARATIVE PERSPECTIVES 293, 295–98 (Andre Nollkaemper et al. eds., 2024) (noting an International Law Association report finding that (1) most domestic courts take the position that "treaty bodies' interpretations deserve to be given considerable weight" and (2) with respect to almost 200 domestic cases examined from throughout the world, there were "abundant examples of judicial engagement with the Human Rights Committee's recommended treaty interpretations").

[78] Various constitutions incorporate international law, including international human rights treaties, in different ways, which can impact the implementation of those obligations. *See* Mary Kathryn Healy, *Constitutional Incorporation of International Human Rights Standards: An Effective Legal Mechanism?*, 2 CHI. J. INT'L L. ONLINE 114, 116–125 (2024) (noting a range of constitutional approaches to international human rights obligations, including constitutions that require "national actors to construe domestic law in favor of human rights conventions," grant human rights treaties the status of constitutional law, or provide for constitutional rights to be interpreted in conformity with international obligations).

[79] Kanetake, *supra* note 77, at 296–97 (explaining how Human Rights Committee General Comments were cited to favorably in UK, Canadian, Swiss, Kenyan and other domestic court decisions); Machiko Kanetake, *Cooperation Between Human Rights Bodies and Domestic Courts* ¶¶ 31–36, OXFORD PUB. INT'L L. ENCYCLOPEDIA (2021), https://perma.cc/9VWQ-R28S (noting "ample examples of domestic courts' explicit interpretive reference to the documents of UN treaty bodies," including Israel, Japan, Peru, Germany, Belize, and others in interpreting treaty provisions or even related domestic law provisions). Another commentator has examined comparative compliance rates between the European Court of Human Rights and UN treaty bodies and found

> empirical evidence tentatively suggests that the UN human rights treaty bodies can induce compliance equally as well as regional courts when their decisions concern conditional violations and are addressed to liberal democracies, but that the ECtHR performs comparatively better when it comes to findings of actual past and/or ongoing violations. However, when a State lacks the aspiration to adhere to the values embodied in human rights norms and in independent monitoring, both institutional settings as they currently exist are incapable of nudging such a State toward compliance with adverse decisions.

governments, and "naming and shaming" on the global stage can politically pressure governments and alter internal state dynamics on issues, including by amplifying the voices of local advocates on a variety of matters, such as the release of political prisoners or problematic draft legislation.[80] Third, for moral, economic, and national security reasons,[81] various governments pressure other countries to improve their implementation of civil and political rights. Treaty obligations and UN expert interpretations can be important tools in such bilateral and multilateral human rights diplomacy. As noted by the Bush Administration when joining the

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Andreas Von Staden, *Institutional Overlap and Comparative Effectiveness: Compliance with Torture-Related Decisions of the European Court of Human Rights, the Human Rights Committee, and the Committee Against Torture in Europe*, *in* INTERNATIONAL COURTS VERSUS NON-COMPLIANCE MECHANISMS: COMPARATIVE ADVANTAGES IN STRENGTHENING TREATY IMPLEMENTATION 287, 310–11 (Christina Voigt & Caroline Foster eds., 2024).

[80] *See* PICCONE, *supra* note 44, at 15–17 (describing domestic impacts of Special Rapporteur visits to countries, recommendations, and public pressure). As Professor Neuman has remarked about the Human Rights Committee (HRC):

> State authorities may be persuaded by the HRC's findings, and reexamine individual decisions or policies. [The HRC's] Views and Concluding Observations can reinforce internal political forces and social movements arguing for reform. The HRC's follow-up processes call upon states to document and explain their measures of implementation. At the international level, a treaty body must be understood as *an element in a broader network, where the outputs of the treaty body motivate or are utilized by other institutions that play different roles.* The HRC's findings possess an authority and objectivity that can be combined with the political power or financial resources of other external actors to induce change. The HRC's legal interpretations of the ICCPR provide an objective framework for criticizing the state's failure to respect human rights.

Neuman, *supra* note 40, at 34 (emphasis added).

[81] For example, in announcing its candidacy to run for a seat on the UN Human Rights Council in 2016, the U.S. government invoked all three reasons as animating its human rights diplomacy. *See Human Rights Commitments and Pledges of the United States of America*, U.S. DEP'T OF STATE (Feb. 29, 2016), https://perma.cc/25YL-EXZM ("The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected.").

ICCPR at the demise of the Soviet Union,[82] engaging in diplomatic pressure to promote such rights from within the "treaty tent" can be more effective than pressure exerted solely from outside the ICCPR.

In sum, despite the ICCPR's lack of a legally binding UN enforcement mechanism, the treaty and its expert interpretations can be important tools for free speech advocates throughout the world in a variety of ways. This is not to say that the web of actors who invoke the treaty and its expert interpretations at various pressure points have produced a stellar implementation record, but neither should the complex interplay of actors responding to free expression advocates' pressure to implement the treaty standards be easily dismissed.

Another challenge with respect to the implementation of the ICCPR that is particularly acute with respect to freedom of expression comes from some regional human rights systems, which espouse lower protections for speech. For example, in a comparison of the treatment of hate speech in the UN and European systems, it was evident that the European Court of Human Rights (ECtHR) provides fewer speech protections because, among other things, it (1) is much less willing to conclude that laws are impermissibly vague, (2) approves of a broader range of public interest justifications for banning speech, (3) fails to apply the "least intrusive means" test and only applies an amorphous proportionality test, and (4) invokes a "margin of appreciation" doctrine deferring to governmental judgements that burden speech, which is a doctrine the Human Rights Committee has explicitly rejected.[83] Some countries cite to such ECtHR jurisprudence and approaches when trying to defend their ICCPR violations.[84] Such invocations of regional jurisprudence are not legal justifications for violating a UN treaty, often create confusion in the international community about relevant standards, and can be a form of cultural relativism that has the potential to undermine universal minimum protections

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[82] *See supra* notes 9–11 and accompanying text.

[83] Evelyn Aswad & David Kaye, *Convergence and Conflict: Reflections on Global and Regional Approaches to Hate Speech*, 20 NW. J. HUM. RTS. 165, 190–98 (2022).

[84] *Id.* at 167 (noting Germany improperly invoked the ECtHR's jurisprudence to defend itself against the UN Special Rapporteur's criticism of its NetzDG laws). Other multilateral organizations have also improperly cited the ECtHR's approach to defend their departures from ICCPR Article 19. *Id.* at 169–70 (noting the Organization of Islamic Cooperation pointed to Europe's approach when trying to defend blasphemy bans).

for free expression.[85] This dynamic poses challenges to the ICCPR's protection for freedom of expression.

Moreover, the more speech-protective ICCPR interpretations of recent years—which have included linking the least intrusive means test to imminent and likely harm,[86] clarifying that Article 20 is subject to Article 19's tripartite test,[87] and pegging the concept of incitement in Article 20 to likely and imminent harm[88]—were not inevitable and did not happen by chance. As is the case with the evolution of interpretations in domestic legal systems, these advancements took sustained advocacy. The dedicated engagement of free expression advocates, including governments that have expended political capital to champion this right in their foreign policy and civil society organizations, was key to the evolution of these interpretations. The United States has traditionally been an important leader in the promotion of the broadest free speech protections in multilateral diplomacy, including by participating actively in UN discussions that develop norms on freedom of expression[89] and engaging with the Human Rights Committee in the drafting process for its most recent formal interpretation of freedom of expression.[90] Recent U.S. government decisions to pull out of human rights bodies, such as the Human Rights Council (where, among other things, states select experts to fill the position of Special Rapporteur on freedom of expression and discuss normative and compliance matters relating to free speech) and the reduction of funding to civil society organizations that advocate for free expression internationally leaves a vacuum in such

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[85] *Id.* at 170–71.

[86] *See supra* note 62 and accompanying text.

[87] *See supra* note 68 and accompanying text.

[88] *See supra* note 69 and accompanying text.

[89] *See, e.g.*, Suzanne Nossel, *Advancing Human Rights in the UN System* 15–16 (Council on Foreign Rels., Working Paper, 2012), https://perma.cc/P2TC-L3NC (describing active and successful U.S. diplomacy in defeating attempts to legitimize blasphemy bans at the UN).

[90] Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment 34*, 12 HUM. RTS. L. REV. 627, 650 (2012) (noting U.S. engagement in the formation of the Human Rights Committee's General Comment on freedom of expression).

fora that risks being filled by other countries that will seek to roll back such speech-protective interpretations.[91]

With this background in place about ICCPR Article 19(2)'s scope of coverage for freedom of expression, permissible limitations under Article 19(3), mandatory limitations, and various challenges facing the global free expression standard, the next Part turns to considering this human right in the context of gen AI outputs.

II. FREEDOM OF EXPRESSION & GEN AI OUTPUTS

Various gen AI models are evolving into formidable and dynamic gatekeepers for how information is accessed and communicated.[92] As The Future of Free Speech, a nonpartisan think tank at Vanderbilt University, has recently observed, given how generative AI "has become increasingly integrated into how hundreds of millions of people access information, create content, and engage in public discourse, the stakes for *content moderation* have only grown higher."[93]

While there has been a hailstorm of critiques about content moderation on social media for well over a decade, a funnel cloud is forming regarding content moderation for gen AI systems that shows signs it may mature into a tornado. This gatekeeping power over the flow of information and ideas is not only piquing the interest of governments, which increasingly seek to shape and control gen AI systems, but is also triggering concerns from civil society organizations and others, who are raising fundamental and thorny questions about how companies train gen AI systems and the impacts of their outputs.[94]

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[91] *See, e.g.*, Ashley Ray, *Global Summits to Watch in 2026: Bracing for a New Global (Dis)Order?*, COUNCIL ON FOREIGN RELS. (Dec. 17, 2025), https://perma.cc/4HGU-2AEB (noting U.S. withdrawal from the UN Human Rights Council in 2025 as impacting how global institutions "can be re-shaped without strong U.S. leadership"); FREEDOM HOUSE, *The Effects of the US Foreign Aid Freeze on Freedom House*, https://perma.cc/8SV4-NF3X (describing how funding reductions have affected Freedom House's international freedom of expression work).

[92] The growing importance of gen AI and its intersection with freedom of expression concerns is evident every day, as such systems "serve as research assistants, writing tools, educational resources, and information sources for users worldwide." Jordi Calvet-Bademunt et al., *Freedom of Expression in Generative AI Models*, *in* FUTURE OF FREE SPEECH, THAT VIOLATES MY POLICIES: AI LAWS, CHATBOTS, AND THE FUTURE OF EXPRESSION 5, 8 (2025), https://perma.cc/EB49-6Z5L.

[93] *Id.* (emphasis added).

[94] *See, e.g.*, Rhitu Chatterjee, *Their Teenage Sons Died by Suicide. Now, They are Sounding an Alarm about AI Chatbots*, NPR (Sept. 19, 2025, at 07:00 ET), https://perma.cc/J9HK-HYHL; Hadas Gold, *AI's Antisemitism Problem Is Bigger than Grok*, CNN BUS. (July 15, 2025, at 18:13 ET), https:

This Part begins with reflections about the intersection of ICCPR Article 19 and gen AI outputs. It then examines some problematic ways in which governments around the world are seeking to regulate gen AI outputs. And it concludes with some considerations about corporate policies relating to gen AI outputs and global corporate responsibility standards relating to human rights, particularly freedom of expression.

A. General Reflections

As we saw above, ICCPR Article 19(2) broadly protects individuals seeking, receiving, and imparting information and ideas of all kinds through any media of choice and across frontiers. Gen AI systems are not human and thus do not themselves hold human rights, including the right to seek, receive, or impart information and ideas. But if a human speaker uses a gen AI service as a tool to create speech, then that gen AI output, as shared by the human speaker, would be covered by ICCPR Article 19(2) as a human being *imparting* information and ideas of all kinds. A more complex question is whether the human creators of gen AI systems could be considered as "imparting" such outputs, but this issue need not be resolved here because, regardless of its answer, the user's right to seek and receive information and ideas of all kinds is at stake with regard to gen AI outputs. [95]

As discussed in Part I.A, the rights of individuals to seek and receive information and ideas are not derivative or secondary to those of the speaker in Article 19(2). Rather, the ability to seek and receive information and ideas is a facet of this human right that stands on its own. The ICCPR's text, negotiating history, and expert interpretations all point to the broadest possible interpretation of the scope of Article 19(2) and provide no basis for excluding gen AI outputs from the concept

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//perma.cc/M3FT-CCTA; *Generative AI Workplace Risk Assessment and Management*, REUTERS (Aug. 2025), https://perma.cc/4CN4-PEU8.

[95] The question of whether humans are "imparting" information and ideas of all kinds by creating, training, tuning, and refining gen AI systems is complex for a variety of reasons, including that program creators do not control the exact outputs the systems will generate. As human rights law has a human-centered approach, the issue arises of whether there is sufficient human intentionality for a gen AI output to qualify as a human "imparting" information. No matter how this question is ultimately answered, the fact remains that users have a (1) separate right to seek and receive (2) information and ideas "of all kinds" and through any media of their choice, which is an explicitly and purposefully broad formulation that covers machine-generated information. *See supra* Part I.A (discussing the text, negotiating history, and expert interpretations of ICCPR Article 19(2), which confirm the broadest possible scope for this provision).

of information that humans can seek and receive. As gen AI outputs contain information and individuals have the ICCPR Article 19(2) right to proactively search for (or seek) and receive information of all kinds through any media of their choice and across frontiers, it follows that the human right to seek and receive information is implicated when governments ban or otherwise restrict gen AI outputs.

Thus, if a government were to pass a law prohibiting gen AI outputs from containing criticisms or insults about a head of state, that law would implicate ICCPR Article 19(2)'s right to seek and receive information of all kinds through any media. To assess the acceptability of this law's restriction, the government would bear the burden of demonstrating that ICCPR Article 19(3)'s tripartite test of legality, legitimacy, and necessity is met. Such a law could not surmount any aspect of the tripartite test, including the legitimacy test, because insulating government officials from critiques or insults is not a recognized public interest objective for limiting freedom of expression.[96] That said, other governmental regulations that are properly promulgated, not unduly vague, pursue specified and legitimate public interest objectives, and are narrowly tailored to achieve the objective (i.e., are the least intrusive means) could pass the tripartite test.

In October 2025, a joint statement by free expression special rapporteurs from the UN and regional human rights systems generally espoused similar conclusions on the interaction of ICCPR Article 19 and gen AI outputs.[97] According to these experts, AI systems themselves are not human and cannot claim human rights.[98] But free expression rights of individuals are at stake with respect to gen AI; free expression "must be embedded throughout the lifecycle of AI, including its design,

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[96] *See* ICCPR, *supra* note 6, art. 19(3); GC 34, *supra* note 41, ¶ 38 ("[A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials . . . .").

[97] Joint Declaration on AI, Freedom of Expression and Media Freedom, OSCE REPRESENTATIVE ON FREEDOM MEDIA (Oct. 24, 2025), https://perma.cc/K4FF-3VFY [hereinafter Joint Declaration on AI] (commemorating the views of the freedom of expression experts from the UN, Organization for Security and Cooperation in Europe, Organization of American States, and African Commission on Human and Peoples' Rights).

[98] *Id.* at 1 ("affirming that human rights cannot be claimed by artificial intelligence").

development, training and deployment."[99] Because governmental restrictions on such systems involve free expression rights, those restrictions must pass the tripartite test.[100]

Let us now shift from hypotheticals and generalities to more concrete situations that emerge at the intersection of gen AI outputs and the global free expression standard.

B. Government Regulation & Jawboning

During the fall of 2025, the Global Network Initiative (GNI), a multistakeholder group that seeks to protect freedom of expression and privacy in the operations of participating information and communications (ICT) companies,[101] The Future of Free Speech, and Freedom House each issued reports that examined, among other things, how governments are seeking to regulate and influence gen AI services and outputs.[102] For example, several governments outright ban certain gen AI chatbots, claiming various national security, public order, or other concerns.[103] Among others, Russia banned the use of OpenAI's ChatGPT, claiming concerns of

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[99] *Id.* at 3.

[100] *Id.* at 5. Specifically, the group of experts stated that governments must

> [e]nsure, when responding to the risks and challenges posed by AI, that any restriction on the right to seek, receive and impart information conform to international standards on freedom of expression, specifically that such restriction is prescribed by law, pursue legitimate aim and is necessary and proportionate. Such restrictions should not result in an illegitimate suppression of political commentary, satire or other legitimate forms of expression that are permitted by international law.

Id.

[101] GLOB. NETWORK INITIATIVE, https://perma.cc/DT2D-HFUG. Participants include companies (such as Meta, Google, and Microsoft), academics, investors, and NGOs. *Members*, GLOB. NETWORK INITIATIVE, https://perma.cc/PE99-7MJ8.

[102] GLOB. NETWORK INITIATIVE, POLICY BRIEF ON GOVERNMENT INTERVENTIONS IN AI (2025), https://perma.cc/6DQV-CUP9; THE FUTURE OF FREE SPEECH, THAT VIOLATES MY POLICIES: AI LAWS, CHATBOTS, AND THE FUTURE OF EXPRESSION (2025), *supra* note 92; FREEDOM HOUSE, AN UNCERTAIN FUTURE FOR THE GLOBAL INTERNET (2025), https://perma.cc/9MXM-EBZV. This Part references some but certainly not all these reports' findings about how governments are attempting to regulate or influence gen AI.

[103] GLOB. NETWORK INITIATIVE, *supra* note 102, at 19 ("Others, such as Russia, Turkey, and China, block certain AI services entirely due to national security concerns, efforts to control information ecosystems, or to ensure alignment with domestic laws on content and data sovereignty.").

crime.[104] A Turkish court banned X.AI's Grok after it produced outputs that insulted political authorities in the country.[105] China has engaged in a variety of forms of gen AI censorship, including blocking access to ChatGPT.[106] Such categorical bans on gen AI chatbots are reminiscent of countries blocking access to social media, other platforms, and websites.[107]

Some countries openly engage in content and viewpoint restrictions in regulating gen AI services. For example, The Future of Free Speech highlighted China's requirement that "training data that may be politically sensitive or ideologically nonconforming must be excluded at the outset. Similarly, model outputs are expected to avoid content deemed 'harmful,' 'untrue,' or contrary to state-defined norms."[108] Likewise, Freedom House noted that Vietnam's regulatory frameworks "required generative AI chatbots to toe the Communist Party line on sensitive topics."[109] Such content and viewpoint restrictions on gen AI services evoke memories of about two decades of governmental attempts to regulate speech on social media

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[104] Ryan Morrison, *Russian Hackers Are Bypassing ChatGPT Restrictions Imposed by Open AI*, TECH MONITOR (Jan. 13, 2023), https://perma.cc/J394-4PE6.

[105] *Turkish Court Orders Ban on Elon Musk's AI Chatbot Grok for Offensive Content*, AP NEWS (July 9, 2025, at 4:44 ET), https://perma.cc/6AEG-BYNB.

[106] *See* Joanna Chiu, *New Tool Lets You Track Exactly When the Chinese Government Blocks Websites*, REST OF WORLD (Sept. 18, 2024), https://perma.cc/P54F-VYPK. *See also* Ge Chen, *Artificial Intelligence and Freedom of Expression in China, in* THAT VIOLATES MY POLICIES: AI LAWS, CHATBOTS, AND THE FUTURE OF EXPRESSION, *supra* note 92, at 167, 184.

[107] *See, e.g.*, Peter Suciu, *TikTok Users Should Take Note, China Has Banned U.S. Social Media*, FORBES (Mar. 15, 2024, at 11:44 ET), https://perma.cc/HST2-PRWK (stating China has banned Facebook, Instagram, YouTube, and Twitter); *Disrupted, Throttled, and Blocked: State Censorship, Control, and Increasing Isolation of Internet Users in Russia*, HUM. RTS. WATCH (July 30, 2025), https://perma.cc/6B66-CTBR (explaining that Russia blocks numerous websites and platforms); *Turkiye: Social Media, Messaging Platform Disruptions*, HUM. RTS. WATCH (Sept. 12, 2025, at 5:57 ET), https://perma.cc/WU2E-WHGG (noting that Turkey has severely slowed down social media and messaging platforms).

[108] Chen, *supra* note 106, at 172.

[109] FREEDOM HOUSE, *supra* note 102, at 14. Freedom House also noted the issue of government-issued models reflecting a restrictive speech environment. In particular, it highlighted that Thailand released "Pathumma LLM, a model trained to 'understand Thai context and culture,' in early 2025," which posed a risk of reflecting previous patterns of state censorship with regard to, among other things, criticisms of the monarchy. *Id.*

and other platforms to conform to domestic laws that do not comply with human rights standards.[110]

The GNI's report also highlighted the looming specter of governmental "jawboning" to shape gen AI services. Jawboning happens when "the government us[es] its power—or the threat of it—to indirectly bully individuals, institutions, or organizations into doing their bidding when it can't flat-out force them."[111] One of the examples of the potential for jawboning in the GNI report involves the UK Prime Minister pressing prominent gen AI companies to grant his government "pre-release access to their companies' latest AI models, so that a task force of British officials . . . could test them for dangers."[112] Again, such developments trigger memories of ICT companies "voluntarily" signing government-endorsed "codes of conduct" regarding harmful information to facilitate their operations in particular countries.[113]

Finally, there are risks that governments may seek to use gen AI services to engage in illicit surveillance activities, which would not only undermine privacy but also chill free expression. The GNI report notes that certain governments have already demanded chatbot logs and "it is likely that requests for user data, as well as law enforcement use of AI for surveillance purposes more broadly, will emerge in other jurisdictions as well."[114] The Freedom House report expresses concern that

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[110] *See, e.g.*, Andrew O'Donohue, Max Hoffman & Alan Makovsky, *Turkey Issued New Rules for Social Media. That May Mean that Media Censorship Wasn't Working.*, CARNEGIE ENDOWMENT FOR INT'L PEACE (July 30, 2020), https://perma.cc/5MU3-3MV3; Michael A. Samway & Warren Ryan, *The Internet, Human Rights, and the Private Sector*, 15 GEO. J. INT'L AFFS. 25, 26–27 (2014).

[111] *What Is Jawboning? And Does It Violate the First Amendment?*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Nov. 8, 2024), https://perma.cc/9QTT-CJAS.

[112] Billy Perrigo, *Inside the U.K.'s Bold Experiment in AI Safety*, TIME (Jan. 16, 2025, at 7:03 ET), https://perma.cc/MC58-PXMQ.

[113] *See, e.g.*, *Yahoo! Risks Abusing Rights in China*, HUM. RTS. WATCH (Aug. 9, 2002), https://perma.cc/RH8A-3AU6 (describing how Yahoo! signed China's "Public Pledge on Self-Discipline for the Chinese Internet Industry," which required it to, among other things, block anything the Chinese government would find harmful); J.J.W. van de Kerkhof, *Jawboning Content Moderation from a European Perspective*, *in* EUR. YEARBOOK OF CONST. L. 61, 76–80 (Maartje De Visser et al. eds., 2024) (discussing jawboning risks with respect to human rights and rule of law principles when ICT companies "voluntarily" agreed to the European Hate Speech Code of Conduct).

[114] GLOB. NETWORK INITIATIVE, *supra* note 102, at 20.

"Persian Gulf monarchies have emerged as hubs for AI investment" and that investment by repressive regimes "may serve to increase the efficacy and application of repressive surveillance methods."[115] Again, such concerns resurrect a long history of governments pressing ICT companies to assist in illicit surveillance activities. [116]

In the types of situations described above, the protection of ICCPR Article 19(2) is set in motion because the right of humans to seek and receive information of any kind is implicated by these governmental activities. Whether governments block certain gen AI services altogether or ban particular views or content from appearing in outputs, to enact regulations on speech, governments must surmount ICCPR Article 19(3)'s principled tripartite test, which in such scenarios would be extremely difficult to do. Application of the global freedom of expression standard to gen AI would not prevent all governmental regulation of gen AI; rather, the regulation would be judged by application of the legality, legitimacy, and necessity tests, because the protection for the human right to seek and receive information and ideas of all kinds has been triggered. Even if a government were to claim that restricting certain gen AI outputs was required under ICCPR Article 20 or Convention on the Elimination of Racial Discrimination Article 4, such a restriction would need to (1) fit properly within the scope of those articles and (2) pass Article 19(3)'s tripartite test. In sum, when they regulate gen AI outputs, governments are still on the hook to comply with the global standard that protects the right of humans to seek and receive information and ideas of all kinds.

But if past is prologue, then the consistent pattern of governmental attempts to control human discourse that occurs via these evolving information and communications technologies means that applying these principles will be easier said than done. To begin with, one can imagine governments crafting an argument along the following lines: Regulating gen AI outputs does not implicate any aspect of Article

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[115] FREEDOM HOUSE, *supra* note 102, at 15.

[116] *See, e.g.*, Thorin Klosowski, *The UK Is Still Trying to Backdoor Encryption for Apple Users*, ELEC. FRONTIER FOUND. (Oct. 1, 2025), https://perma.cc/S3BD-BBSD (discussing the removal of Apple's advanced data protection feature in the UK following pressure from the UK government to create a backdoor into Apple's encryption services); *Shi Tao*, AMNESTY INT'L, https://perma.cc/EE2A-Y99E (noting that emails and user information disclosed by Yahoo! were used as evidence against a Chinese journalist-dissident and led to his sentence of 10 years' imprisonment).

19(2) because chatbots are not humans and thus their outputs are not human speech, which means listeners have no rights relating to it, as some scholars have argued with respect to the First Amendment.[117] If such arguments were to take hold, imagine the unpalatable results that would follow, such as giving governments a license to block gen AI services or to impose content and viewpoint restrictions or other regulations on gen AI and its outputs without the constraints of ICCPR Article 19(3). Should such arguments be made in various fora—whether at the domestic court level, in the drafting of domestic laws and policies, or multilateral fora—free expression advocates should counter with an analysis of the breadth of ICCPR Article 19(2)'s phrasing, as well as its negotiating history, to explain why the human right to seek and receive information and ideas of all kinds is implicated when governments regulate gen AI outputs.[118] Citing to the joint statement of the UN and regional special rapporteurs may also be helpful.[119]

Given the variety of ways that the UN's human rights machinery can impact developments at the domestic level,[120] further elaborations and engagement on freedom of expression and gen AI by the UN Human Rights Committee and UN Special Rapporteur could also prove useful. That said, free expression advocates will need to be mindful of the risks of rollbacks on free expression interpretations, given the emerging vacuum in robust free speech leadership at the UN.[121] Those interested in preserving the free expression gains from the last 15 years should seek to engage in the normative work of UN experts on freedom of expression.

Considering the enormous geopolitical stakes and competition in AI, it is also likely that governments will revert to invoking the jurisprudence of regional human rights systems that are not as speech protective as the UN system when attempting to justify problematic regulation on gen AI. It will be important for free speech advocates—whether governments engaging in bilateral or multilateral diplomacy, or civil society seeking to influence domestic legislation or litigation—to stress the differences between UN and regional free expression norms and to advocate for the

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[117] Atkinson, Hwang & Morrison, *supra* note 3, at 185–96.

[118] See *supra* notes 22–50 and accompanying text for a discussion of the text, negotiating history, and expert analysis of ICCPR Article 19(2).

[119] *See supra* notes 97–100 and accompanying text.

[120] *See supra* notes 77–80 and accompanying text.

[121] *See supra* note 91 and accompanying text.

global minimum standards.[122] A breach of a UN treaty cannot be justified by reliance on the provisions or interpretations of a separate regional treaty that only applies to a sub-group of state parties.[123]

Given the global trend of governmental backsliding on free expression protections,[124] the road ahead will not be easy. But clarity with respect to the legal protections afforded by the UN's free expression standard to humans seeking and receiving information through gen AI outputs will be an important first step for free speech advocates to deploy in countering governmental overreach around the world.

C. Corporate Policies

Governments are not the only actors with power shaping gen AI outputs and impacting freedom of expression. Companies providing gen AI services of course also possess enormous power in this regard.

This power raises questions about appropriate corporate responsibility standards regarding freedom of expression. Indeed, The Future of Free Speech has recently observed that "[a]s generative AI systems become primary interfaces for information access and content creation, their content policies and training decisions increasingly shape what ideas can be easily expressed, explored, and debated in digital spaces."[125] Since February 2024, this think tank has been evaluating the impacts on freedom of expression by key gen AI models[126] with a focus on text-production abilities.[127] These models were selected because they are portrayed as generating

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[122] *See supra* notes 83–85 and accompanying text.

[123] *See* SR 2019 Report, *supra* note 45, ¶ 26 ("Regional human rights norms cannot, in any case, be invoked to justify departure from international human rights protections."). *See also* Vienna Convention, *supra* note 18, art. 31(2).

[124] FREEDOM HOUSE, *supra* note 102, at 2.

[125] Calvet-Bademunt et al., *supra* note 92, at 9.

[126] The models examined by The Future of Free Speech for its 2025 report were Alibaba's Qwen3-235B-A22B, Anthropic's Claude Sonnet 4, DeepSeek's DeepSeek-V3.1, Google's Gemini 2.5 Flash, Meta's Llama 4, Mistral AI's Mistral Medium 3.1, OpenAI's GPT-5, and xAI's Grok 4. *Id.* at 10.

[127] *Id.*

answers "across a wide range of topics and are marketed as tools for general information access, education, creativity, and research."[128] In analyzing these models, this expert group assessed publicly available corporate information about them (including any rules on prohibited content), submitted prompts across the models on contentious issues, and evaluated the responses based on a series of questions involving freedom of expression concerns.[129]

The Future of Free Speech found some improvement from 2024 to 2025 regarding respect for freedom of expression interests among the models. Its 2024 report had determined the gen AI systems were "systematically over-censoring legitimate discourse, refusing to engage with controversial but lawful content, and applying content restrictions that went far beyond legal requirements."[130] Though none of the models achieved impressive scores in the 2025 report,[131] the majority of those companies "made notable improvements in reducing unnecessary refusals and providing more nuanced responses to complex topics."[132] Some models performed well on certain criteria, but not on other criteria.[133] Overall, however, the

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[128] *Id.* at 11. These "general-purpose" gen AI models directly implicate freedom of expression concerns relating to seeking, receiving, and imparting information and ideas of all kinds. *Id.* This stands in contrast to domain-specific chatbots that are used for very targeted tasks, which do not implicate the same freedom of expression concerns due to the lack of "open-ended engagement with ideas." *Id.*

[129] *Id.* at 12. More specifically, the researchers considered

> each company's commitment to and policies on free expression; the model's willingness to engage with diverse perspectives; its degree of openness; the available information on its training; its usage policies and terms of service; the transparency toward users in content moderation decisions; performance when prompted with contested sociopolitical issues; and measures to empower expression, such as support for AI literacy and for diverse languages and cultures.

Id. at 14.

[130] *Id.* at 8.

[131] The expert group awarded Grok the top score of 65.2%, followed by ChatGPT-5 (60.3%), Claude (58.6%), Gemini (58.4%), Llama (57.9%), Mistral (45.8%), Deep Seek (31.5%), and Alibaba (21.9%). *Id.* at 13.

[132] *Id.* at 9.

[133] For example, Mistral was a top performer in terms of responses to prompts, but ranked third from the bottom due to other shortfalls. *Id.* at 13.

report noted that the usage policies (particularly on hate speech and disinformation) remained vague, restrictions on expression were rarely assessed against necessity and proportionality criteria nor were legitimate aims specified in limiting information, and there was no meaningful transparency in terms of the information used to train models by any company.[134] The report found that "no company has yet developed a fully coherent and transparent free-speech framework."[135]

But do private sector businesses, such as gen AI companies, have a responsibility to respect human rights, including freedom of expression, in their operations? Given human rights law standards are generally geared towards state action, this question was the subject of years of debate at the United Nations until the adoption in 2011 of the UN Guiding Principles on Business and Human Rights (UNGPs), a voluntary framework that companies can pledge to follow and which represents the expectations of the international community on corporate responsibility matters relating to human rights.[136] Under the UNGPs, companies are to "respect" human rights, which means that companies should avoid infringing on the enjoyment of human rights and address infringements when they occur.[137] In order to meet this standard, the UNGPs call on companies to, among other things, adopt human rights policies, develop internal teams with human rights expertise, engage in human rights due diligence to assess their most salient risks (including by consulting with a wide variety of stakeholders), develop mitigation measures, provide transparency about their efforts to respect human rights, and update their due diligence

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[134] *Id.* at 37.

[135] *Id.* at 15. While the researchers note that international human rights law (IHRL) is not a perfect standard, given the iterative nature of and non-public interactions with AI systems, they choose to use it in ranking AI systems, as IHRL is a global standard applicable around the world and a useful benchmark for assessing impacts on free expression. *Id.* at 21.

[136] Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, at 2 (July 6, 2011); John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs] (calling on companies to respect human rights and address adverse impacts).

[137] UNGPs, *supra* note 136, at Principle 11. This corporate responsibility to respect human rights applies whether or not the host country in which a company is operating has taken on human rights obligations or implements them. *Id.*

periodically.[138] While the UNGPs do not call upon companies to violate local law in order to respect human rights standards, businesses are supposed to know their human rights risks and show they proactively did what was possible to avoid infringing on those rights.[139] It should be noted the UNGPs define "human rights" as constituting at the very least the rights in the International Bill of Human Rights and a key declaration of the International Labor Organization,[140] and state it may be necessary to consult additional UN instruments in conducting human rights due diligence when particular contexts arise.[141]

In applying the UNGPs' framework to companies that market general-purpose gen AI services,[142] it is evident that the potential to infringe on freedom of expression poses a salient human rights risk that such companies will need to tackle from at least two angles.[143] First, such AI companies should engage in human rights due

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[138] *Id.* at Principles 13–20.

[139] *Id.* at Principle 23.

[140] *Id.* at Principle 12 ("The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."). The International Bill of Human Rights consists of the UDHR, the ICCPR, and the International Covenant on Economic, Social, and Cultural Rights. *Id.* at Commentary to Principle 12.

[141] *Id.* The fact that the UNGPs explicitly link the concept of internationally recognized human rights to those recognized in the UN system is worth noting because, at times, regional human rights systems provide fewer or less robust rights than those in the UN system. *See supra* notes 83–85 and accompanying text. It makes sense that the UN linked the UNGPs framework to its global understanding of human rights rather than call on companies to engage in a Sisyphean task of respecting conflicting notions of human rights across various regional or national systems that may provide fewer protections than the UN system.

[142] As highlighted above in note 5, this Article is primarily focused on major corporate players furnishing gen AI services and outputs that are marketed as providing general access to information, rather than more specific or focused topics or services. With respect to entities that market themselves as providing outputs from, for example, specific religious or ideological perspectives, the three-part test may need finessing, particularly with regard to the legitimacy test. In such situations, the legitimate objectives could be expanded in a transparent fashion while still maintaining the legality standard's requirement for clear rules and background on how the models are trained to enable the user to process those gen AI outputs in an informed manner.

[143] A variety of additional salient human rights risks will be at stake as well, but the focus of this analysis is on freedom of expression.

diligence to proactively assess if governmental regulation or pressure tactics transgress global free expression protections. If they identify such risks, they need to show what their plans are to avoid and mitigate those risks. In the past, ICT companies' mitigation measures in the face of illicit regulation or pressure that contravenes the ICCPR free expression standard have included interpreting governmental requests as narrowly as possible, challenging whether the government's request or rule is properly grounded in domestic law procedures, bringing lawsuits in domestic courts against those governments, and seeking the assistance of other actors (e.g., UN human rights mechanisms and other governments) to put pressure on the offending government.[144]

Under the UNGPs, gen AI companies would need to, among other things, develop the internal human rights capacity and teams to assess when governments are violating the global free expression standard, develop mitigation plans, and address harms should the mitigations not work. Such responsible corporate behavior can be an additional and important part of the complex web of actors seeking to promote governmental compliance at the domestic level with international human rights standards.[145] Indeed, if done in a serious and consistent manner, responsible corporate behavior that presses governments to respect freedom of expression with regard to gen AI outputs could end up among the significant legacies of ICT companies in the digital age. Conversely, corporate acquiescence or assistance to governments in violating freedom of expression rights in this space could result in profoundly negative legacies.

The other angle of corporate responsibility under the UNGPs regards whether a company's own policies infringe on the freedom of expression rights of individuals. In the context of corporate content moderation on social media, the UN Special Rapporteur urged companies to apply the ICCPR Article 19(3) tripartite test to their content curation decisions and systems as a way of implementing the responsibility under the UNGPs to respect freedom of expression.[146] Specifically, he called

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[144] *See, e.g.*, *Implementation Guidelines*, GLOB. NETWORK INITIATIVE, https://perma.cc/G56N-XW8M.

[145] *See supra* notes 77–80 and accompanying text (describing the various array of players pressing governments to adhere to international human rights norms in domestic legal systems).

[146] SR 2018 Report, *supra* note 56, ¶ 45 ("Companies should incorporate directly into their terms of service and 'community standards' relevant principles of human rights law that ensure content-related actions will be guided by the same standards of legality, necessity and legitimacy

on them to have clear rules about what posts were allowed,[147] to justify limits on speech by reference to ICCPR Article 19(3)'s list of public interest objectives,[148] and to assess if they were restricting speech in the least intrusive and proportional manner to achieve those aims.[149] He noted that if these social media companies' approaches differed from such human rights law standards, they should publicly justify those exceptional departures.[150]

So what would it mean for gen AI companies to respect freedom of expression in their own policies and operations, i.e., how do their own corporate choices about shaping the content of outputs risk infringing on the rights of users to seek, receive, and impart information? The UN and regional freedom of expression experts have called for AI companies to respect human rights, especially freedom of expression, in their operations, but without much specificity about what that would look like in

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that bind State regulation of expression."); SR 2019 Report, *supra* note 45, ¶ 41 ("Companies do not have the obligations of Governments, but their impact is of a sort that requires them to assess the same kind of questions about protecting their users' right to freedom of expression.").

[147] SR 2018 Report, *supra* note 56, ¶¶ 26–28, 46; SR 2019 Report, *supra* note 45, ¶¶ 46, 49.

[148] SR 2019 Report, *supra* note 45, ¶ 47(b). However, according to the Special Rapporteur, governments are better positioned to invoke certain aims (such as national security) than social media corporations are. *Id.*

[149] SR 2018 Report, *supra* note 56, ¶¶ 28, 44, 47 (encouraging companies to demonstrate the necessity and proportionality of their content moderation decisions); SR 2019 Report, *supra* note 45, ¶¶ 51–52 (noting that social media companies have a wide range of digital tools they can design and select from in the curation of posts on their platforms). For example, beyond content deletion, such companies have or can develop digital tools to

> restrict [content] virality, label its origin, suspend the relevant user, suspend the organization sponsoring the content, develop ratings to highlight a person's use of prohibited content, temporarily restrict content while a team is conducting a review, preclude users from monetizing their content, create friction in the sharing of content, affix warnings and labels to content, provide individuals with greater capacity to block other users, minimize the amplification of the content, interfere with bots and coordinated online mob behaviour, adopt geolocated restrictions and even promote counter-messaging.

Id. ¶ 51.

[150] SR 2019 Report, *supra* note 45, ¶ 48 ("When company rules differ from international standards, the companies should give a reasoned explanation of the policy difference in advance, in a way that articulates the variation.").

practice.[151] The Future of Free Speech has proposed that the responsibilities on freedom of expression held by major gen AI companies that provide access to general information should be assessed by examining, among other things, whether their rules and practices involving content meet the ICCPR's legality, legitimacy, and necessity tests.[152] But is that the right benchmark for assessing if these companies have respected users' freedom of expression rights in their general-purpose gen AI services?

While the gen AI space is rapidly evolving and thus the usual caveats and cautions apply to such a fast-changing landscape,[153] I generally agree that those proposals are an important launching point. However, applying the tripartite test in the context of gen AI is not as intuitive as in the context of corporate content moderation on social media. In the social media context, companies are judging the acceptability of the speech of millions, if not billions, of individuals on their platforms, and the application of Article 19(3)'s tripartite test brings a principled framework for exercising such immense power over human discourse. In the context of gen AI, though companies may not be "judging" the posts of individuals, corporate actors are making decisions that will both affect important systems used by humans for seeking and receiving information as well as influence key tools that humans use to create and impart content, which implicate ICCPR Article 19(2)'s protections for freedom of expression. Application of Article 19(3)'s tripartite test by those leading general-purpose gen AI companies can help bring a principled lens to corporate decisions that could adversely affect various angles of the right to freedom of expression.

In applying this tripartite test, these companies would need to consider internally (and eventually publicly answer) a series of rigorous questions about how they are affecting the information ecosystem. First, to meet the legality test, gen AI corporate policies on content would need to be transparent and understandable to both users and company employees charged with training, tuning, and evaluating the services. As the emerging global gatekeepers to vast troves of information and

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[151] *See* Joint Declaration on AI, *supra* note 97, at 8–9.

[152] CALVET-BADEMUNT et al., *supra* note 92, at 21–32.

[153] As Prof. Sunstein has observed when analyzing the intersection of the First Amendment with gen AI: "[A] cautionary note . . . : [T]he ground is shifting with extraordinary speed, and what seems to be *terra firma* might turn out, in a year or even a week, to be quicksand." Sunstein, *supra* note 2, at 1212.

ensuing communication, it would be beneficial for society to be able to assess corporate content rules and associated implementation measures embedded in the training, tuning, and evaluation phases.[154] This would certainly be an improvement to the current approach of generally opaque and secret rules for content moderation on gen AI systems. Moreover, companies would also need to ensure that their content rules and implementation practices are not deployed in a discriminatory manner.

Under the legitimacy test, general-purpose gen AI companies would need to publicly articulate why they are limiting outputs. In particular, they would need to state the ICCPR Article 19(3) public interest justification underlying those corporate decisions. Developing a public articulation for content moderation rules and their application would require companies to think more precisely internally when developing their rules and related implementation practices. Providing public rationales for content rules could also promote societal understanding, scrutiny, and debate about the rules and practices affecting the information ecosystem.

That said, complicated questions can emerge about whether profit-seeking companies should be limited to ICCPR Article 19(3)'s specified public interest objectives in gen AI content moderation. After all, at least in the social media context, corporate reasons for banning speech can often be highly influenced by commercial calculations triggered by advertiser demands and governmental pressure.[155] Nonetheless, a future in which the reasons for limiting access to gen AI outputs (and thus the ability to seek, receive, and impart information) are set by advertisers and governments is certainly not ideal. If companies that provide general-purpose AI services and others believe Article 19(3)'s listing of objectives is overly restrictive as applied to private actors, a potential starting point would be for the companies to

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[154] While companies are likely to raise concerns that full public transparency in implementing their content rules would endanger sensitive business information or empower bad actors who seek to game the systems, at the very least mechanisms should be created to provide independent third parties, such as researchers, with access to fuller information about training data, tuning practices, and evaluation methods.

[155] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1627 (2018) (noting that a main reason for corporate removal of offensive speech is "the threat that allowing such material poses to potential profits based in advertising revenue"); Danielle Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1041–49 (2018) (explaining how U.S. platforms changed their content moderation given threats of European regulation).

publicly explain why the objectives are unworkable and to articulate what alternative objectives they are using.[156] Surfacing such reasons could facilitate transparency and launch a useful societal discourse on the topic (including about whether corporate marketing as general-purpose systems is accurate).

Regarding the necessity condition, these companies would need to consider whether the limits they seek to place on outputs are necessary. Presumably, such an assessment should occur at various points in the training, tuning, and evaluation cycles of the gen AI models. With respect to the least intrusive means test, the companies would begin by assessing whether there are ways of achieving their objectives that do not burden speech interests. For example, are there ways to promote user digital literacy and resiliency when accessing the company's systems rather than programming its models not to answer prompts related to politically controversial issues? If such measures are not feasible, the companies would then need to assess the range of digital tools they have (or can create) that burden speech interests in pursuit of achieving the objectives and select the least intrusive one. For example, could various forms of age-gating, friction, or labels achieve an objective without banning content? Finally, the companies would need to assess if the tool they have selected is effective in achieving the objective. If it isn't, they would need to reconsider the selected tool, as it would be burdening the right to seek and receive information without fulfilling the stated objective. As to the proportionality test, companies would need to assess if the benefits of pursuing the public interest objective outweigh the burdens imposed on implicated persons. No doubt, assessments under the least intrusive means and proportionality tests require judgment calls involving situational context, the company's technical capacities, and other factors, but application of these tests brings a level of rigor and transparency to such decisions that would be welcome in this space.

In sum, to respect freedom of expression, companies that provide general-purpose gen AI services should begin by publicly recognizing that their design and content decisions affect the enjoyment of the human right to seek and receive information of all kinds as well as the ability of humans who use gen AI outputs to impart information and ideas. Companies pledging to abide by the UNGPs would have avenues by which they could limit gen AI outputs if they follow the tripartite

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[156] *See supra* note 150 and accompanying text (setting forth the Special Rapporteur's view that when companies do not live up to the Article 19(3) tripartite test, they should provide a public justification).

test above. In addition, if there are outputs that lead to near-term and likely serious harms, the companies would have an affirmative duty to address those harms in a similarly transparent manner. If for commercial or other reasons the companies' policies differ from this tripartite test, they should justify those departures and subject them to public scrutiny, as the Special Rapporteur called for in the context of social media companies. In other words, these companies would need to explain why they are limiting outputs that humans should otherwise be able to seek and receive under ICCPR Article 19(2). This would give AI companies a measure of flexibility as private actors in applying the Article 19(3) tripartite test while still mandating transparency that would subject differences from human rights standards to public debate.

While it may be evident that the ICCPR Article 19(3) tripartite test would press gen AI companies to answer some principled questions about how their choices impact the right to receive and seek information, it may not be clear why consideration of ICCPR Article 20 makes sense in the context of gen AI outputs. Some could question whether the concerns about incitement to harm underlying Article 20 are triggered in a private exchange with a chatbot. For example, it could be argued that if a chatbot produces an answer to a prompt that could be construed as incitement to violence or other hostile acts in a private exchange with a user, that is different from a human speaker spewing such language before an angry crowd or on social media to a large audience of followers. But concerns could remain that the scale at which a gen AI output containing incitement to unlawful acts would happen (i.e., thousands or millions receiving what the chatbot says in response to similar prompts) coupled with business models geared towards iterative responses and profiling users' interests and vulnerabilities to personalize and maximize engagement[157] could result in near-term, real world harms that need to be addressed. This is no doubt an area that will need further study, testing, and exploration. The point

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[157] *See* EURASIA GRP., TOP RISKS 2026, at 30–32 (2026), https://perma.cc/VA8L-9NEC (observing that, to maintain investment and valuation levels, gen AI companies will engage in "aggressive monetization schemes based on user data, ads woven into interactions [and] engagement maximizing algorithms" to animate their business models); Geoffrey A. Fowler, *ChatGPT's Year-End Review Knows Way Too Much. How to Fix Your Privacy Settings*, WASH. POST (Dec. 29, 2025), https://perma.cc/RG6T-2VAH ("Most AI companies keep a file on everything you say to their bots. Your words, pictures, clicks and ideas help make their AI smarter. They use it to personalize bot responses so you stick around longer. And your chats fuel their other businesses . . . .").

here is merely to highlight that there are ways in which private exchanges with chatbots could implicate duties to address incitement to unlawful violence, hostile acts, and discrimination.

Alas, there are few perfect solutions to complex problems. Perhaps that is particularly the case regarding fast-evolving ones. Nevertheless, the UNGPs and Article 19(3)'s tripartite test present a good first step in giving general-purpose gen AI companies a principled framework to consider important questions about their intersection with freedom of expression as well as to promote greater public understanding and scrutiny of these potent information and communication systems.[158]

Conclusion

Major companies providing general-purpose gen AI services are becoming increasingly powerful global gatekeepers in the information and ideas ecosystem. Gen AI models are pushing ICCPR Article 19's protection for free expression to a new frontier. Fortunately, the phrasing of the ICCPR standard is broad and visionary, enabling it to adapt to the many technological innovations that have occurred since the treaty's adoption decades ago. ICCPR Article 19(2)'s concept of freedom of expression explicitly protects not only *imparting* but also *seeking* and *receiving* information and ideas of all kinds across frontiers and by using any media of choice.

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[158] Some could argue that adhering to the UNGPs and the global free expression standard would entrench a more restrictive free speech culture than if these global companies deployed First Amendment principles. But these companies' current policies are nowhere near First Amendment standards. For example, in The Future of Free Speech's recent report, the assessed companies' current terms of service and policies suffer from serious vagueness problems and rarely address the topic of narrowly tailoring speech restrictions. *See* Calvet-Bademunt et al., *supra* note 92, at 23–28 (describing profound vagueness issues with gen AI corporate rules as well as a lack of available company analysis on why their rules are narrowly tailored). In the social media context, similar concerns were raised that use of ICCPR Article 19 in content moderation could cause companies to relinquish First Amendment values when, in reality, those companies' policies did not conform to First Amendment principles in the first place. *See* Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 Harv. L. Rev. 2259, 2274–84 (2014) (explaining how platform speech rules of U.S. social media companies were initially inspired by the First Amendment but became more speech restrictive than the First Amendment). Indeed, living up to the ICCPR Article 19 standard would not only make gen AI corporate policies more protective of freedom of expression interests and get them closer to First Amendment values, but would also bring a more principled approach to gen AI content moderation than relying solely on commercial factors, political considerations, or the personal inclinations of Silicon Valley executives.

The right to seek and receive information or ideas is clearly implicated when individuals use, or seek to use, gen AI services to acquire answers to their prompts. The right to impart information and ideas is also triggered when individuals use gen AI outputs in their own communications.

Governments are limiting or banning such outputs in a variety of ways that would not satisfy ICCPR Article 19(3)'s tripartite test for restricting freedom of expression. Companies are coming under increasing scrutiny about their own policies and practices relating to gen AI outputs. General-purpose gen AI companies should consider aligning with the UNGPs, conduct human rights due diligence, and apply the global freedom of expression standard by considering how not to infringe on access to information and ideas while also averting likely and near-term harms in a principled manner.

While advocates around the world will need to navigate a variety of challenges, they should deploy global freedom of expression and corporate responsibility standards in their efforts with governments and companies to bring a principled approach to the extraordinary power being exerted over information that flows through gen AI. Though things are evolving in the gen AI space at a remarkable pace, careful consideration of first principles—global freedom of expression and corporate responsibility standards—would be a useful starting point for governments, corporate actors, and civil society members grappling with what to do in crossing this frontier.