Comments from CELE regarding the Regional Consultation drafted by UNESCO on November 23, 2022. (UNESCO One Draft _ 15112022 SP-)

About the Center for Studies on Freedom of Expression and Access to Information (CELE)

CELE is a Center affiliated with the School of Law of the *Universidad de Palermo*. Its main objective is to inform debates around the protection and promotion of freedom of expression, especially in Latin America. To this end, CELE has two approaches: the technical legal investigation of the challenges and opportunities in the defense and promotion of freedom of expression and access to information, particularly on the Internet, and training and education in this area.

This document shares comments on the draft presented by UNESCO in its regional consultation on September 23, 2022, organized by ALAI and Observacom, with an in-person and virtual format in Bogotá, Colombia.

General comments:

UNESCO has historically been a staunch defender of freedom of expression globally. Given the proliferation of regulatory projects in various countries around the world aimed at illegitimately regulating freedom of expression on the Internet and which are contrary to international human rights standards, UNESCO's initiative to address this issue from the perspective of protecting this fundamental right acquires particular relevance. In addition, due to its work and history, UNESCO is in an ideal position to promote a broad, open, and participatory international debate on constructing a global regulatory framework on this matter. Perhaps we should first point out that considering its objectives and background, this process is somewhat surprising due to the established deadlines and the confidentiality that until now has governed the socialization and consultation process.

The regulation of Internet platforms posed new and unique challenges. UNESCO's global perspective, moreover, seems particularly relevant considering the eminently inter-jurisdictional nature of the services offered by Internet intermediaries and the conflict that arises from the different and numerous national bills of law in various parts of the world. The need to unify criteria for the regulation and, above all, the supervision of these services is imperative for different reasons: 1) there is still no consensus on the main goals of the regulation of intermediaries; 2) UNESCO mapped out more than 190 bills of law and highlighted that the vast majority do not comply with global human rights standards; 3) the resulting regulation will have a direct impact on the exercise of freedom of expression on the Internet; 4) the architecture of the Internet depends on intermediaries, and the incentives resulting from the different regulations will necessarily have an impact on said architecture and the potential of the Internet as a means and platform for the exercise of human rights.

Finally, UNESCO has always been and continues to be a respected voice, especially in the countries of the Global South in which programs such as the training of judges and prosecutors in freedom of expression have been particularly well received and attended; and where the organization has been leading the conversation around the safety of journalists, impunity, education, and culture, among other issues, for years. On the other hand, Europe has recently adopted the Digital Services Act, and the United States debates reforms to section 230 of the Communications Decency Act. These two

dominant regions, highly influential as they host a large part of the most prominent actors in terms of freedom of expression on the Internet, already have their own standards. Any proposal for a normative framework stemming from UNESCO will, in this context, probably have a more significant impact in the countries of the global South, where, although legislation and regulations are being debated, the necessary consensus for said regulation to be carried out has not yet been reached.

Some problematic points in the proposed draft:

a. Definitions:

There is currently a lot of debate about the need to regulate Internet platforms. However, there is little consensus regarding the diagnosis and even less regarding the possible ways of dealing with it. The diagnosis allows us to understand the premises of the document and informs the definitions and interpretations that must be given to the terms used. Considering the disagreements about how to define the problem and where to find possible solutions, the definition of the terms acquires even greater relevance.

I. Information as a public good:

UNESCO's document title indicates an objective regarding information as a public good. However, it is unclear how information is defined as a public good in this context. The term public good is a problematic term applied to information. Traditionally we speak of information of public interest but not of information as a public good in itself. Does the document refer only to information of public interest as a public good? Or does it refer to all information? The necessary derived developments depend on the definition of this concept. These are, for example, the relation of information as a public good with the protection of personal data; or the interaction of that concept with information subject to copyright. It could also be the link of said concept with information of a private or confidential nature.

From the perspective of the importance of public interest information for a democratic society, this concept could refer to measures similar to those adopted in the analog era to guarantee that journalistic information could be replicated exempted from copyright. This measure guarantees the circulation of journalistic information, ensuring the correct attribution to the source but establishing rules that allow the replication and wide dissemination of said information. This could be a possible interpretation; however, the document lacks definitions.

II. On the subjects bound by this regulatory framework.

The regulatory framework refers to “platforms.” However, it does not define what is meant by this term. During the closed Consultation developed by UNESCO, some tried classifying platforms by size or income generated. Some suggested a distinction between for-profit and non-profit. However, since there are no specific definitions, the regulatory framework could include all kinds of intermediaries, including social media sites or search engines, but also payment processing companies, app stores, messaging services, open, semi-closed, and closed platforms or services, conference platforms (like Zoom, Meet, or Microsoft Teams) or educational platforms (i.e. Google Classroom), etc.

III. On potentially harmful content

Although the title aims to protect information as a public good, the definition of the context of the document describes the objective of the bill as one that allows addressing **potentially harmful content** without affecting freedom of expression. This concept of potentially harmful information does not have a specific definition in the document either. The document even suggests that the concept is evolving and that regulatory authorities would be responsible for precisely defining what constitutes potentially harmful information in each context.

This concept of legal but potentially harmful content or information came from writings regarding platform self-regulation. However, the concept has already been explicitly addressed and rejected by international human rights courts. Advisory Opinion OC5/85 of the Inter-American Court of Human Rights, for example, flatly rules out the feasibility of state regulation tending to limit the circulation of legal but potentially harmful information or ideas. In fact, the Advisory Opinion arises from concerns very similar to those that are shared today at a global level. In this case, Costa Rica proposed establishing a compulsory membership in an association prescribed by law for the practice of journalism to guarantee the quality of the journalistic information published in the country's mass media. The Court understood that although the objective could be viable, state regulation through the imposition of obstacles and sanctions for the dissemination of information or ideas considered of low quality but legally protected was unnecessary, disproportionate, and contrary to the need to guarantee the broad and open exercise of freedom of expression. The Court even says in explicit terms that the social dimension of freedom of expression, which protects the freedom to receive information and ideas of all kinds, cannot be used as grounds to restrict individual freedom of expression[1]. In fact, and based on this conception of freedom of expression in its double dimension, the OAS Special Rapporteur for Freedom of Expression worked for years to decriminalize expression in Latin America and promote comprehensive protection of freedom of expression, whose protection was not conditional to the quality, veracity or accuracy of the information.

b. Conflict with the prohibition of prior censorship of the Inter-American System

The American Convention on Human Rights explicitly prohibits prior censorship and instead proposes the imposition of subsequent liability. According to this rule, the state cannot impose prior censorship to the publication or dissemination of content and, therefore, cannot send or delegate it to a third party.

The approach of the document proposed by UNESCO **is particularly problematic in the face of the prohibition of prior censorship**. On the one hand, it clearly establishes that it aims to address legal but potentially harmful information and ideas. In other words, the content that it orders to block or restrict (as "the platforms" deem appropriate, through different tools that include blocking, account cancellation, upload filters, demonetization, ranking, etc.) is legally protected content. On the other hand, even if it were illegal content, the international rule that governs us, at least in the Americas, maintains that prior censorship cannot and should not be a legitimate measure but that subsequent liability must be the resort.

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[1] Corte I.D.H., La Colegiación Obligatoria de Periodistas [Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism] (arts. 13 and 29 Convención Americana sobre Derechos Humanos [American Convention on Human Rights]). Advisory Opinion OC-5/85 November 13, 1985. Series C No. 5, par. 33.

c. Damage as the sole and central point of analysis refers to a strict liability regime

The potential damage of some legally protected pieces of information appears to be the central focus of concern in the document as it currently stands. Although the concern may be understandable and common, the exclusive focus on damage as the central element and the only sanctioning justification is problematic since it refers to the strict liability regime.

The objective liability regime is based on the danger that some tools or technologies pose, which by themselves must be responsible for any damage they cause without prejudice to the other factors of attribution of responsibility. In Latin America, the dichotomy of whether or not to apply strict liability to Internet intermediaries was extensively discussed. Both the Office of the Special Rapporteur for Freedom of Expression of the OAS and the supreme courts of different jurisdictions (Chile, Argentina, Colombia, and Mexico) ruled out and discouraged the application of the objective regime, considering it unnecessary and disproportionate in a democratic society. Applying a strict liability regime to Internet intermediaries means creating incentives so that private companies publishing third-party content have to limit the space for the exercise of freedom of expression beyond what is legally mandated, endangering the vigorous and necessary public debate in a democracy.

The document proposed by UNESCO, by focusing exclusively on the potential damage as a trigger for sanctions or necessary reparations to the users of "platforms," discards central elements of subjective liability, such as the attribution factor (fault or fraud) or the causal nexus (the relationship between expression and damage).

On the other hand, the document presumes the existence of damage, that is to say, it does not require the damage to be proven to enable sanctions or reparations. Furthermore, the damage it aims to address is potential damage, not imminent, actual, or serious. The formula the document currently proposes as a basis for the intervention of companies in the circulation of information and ideas is incompatible with the freedom of expression standards applicable in the American continent.

d. On the regulatory body

The proposed document refers multiple times to the preexistence of “regulatory systems.'' On the one hand, it should be noted first that there is no specific definition of regulatory systems in the document. Also, said lack of definition is heightened when observing the context of regulations and regulators in different countries, at least in Latin America. In our region, regulatory bodies have not always functioned, even to this day, with adequate independence, impartiality, and competence. It seems especially problematic that the document does not clearly establish express conditions of independence and impartiality or even technical competence to undertake its task.

It also seems especially questionable that there is no multistakeholder proposal for the supervisory or regulatory body, considering the specificity of the issue subject to regulation, and the state, social, economic interests, etc., involved in the debate. The recommendations regarding traditional media regulatory bodies have had special consideration by including diversity of the political sphere, special

mechanisms for the appointment of regulators, and even, in some cases, the participation of academic sectors, civil society, the specialized community, and industry.

In order to improve the document and the design of the regulatory framework, we suggest that UNESCO takes into account already existing organizations and forums which develop mechanisms for supervision and survey of structures and processes in companies. One of them is the Global Network Initiative, of which CELE is a part.

In terms of regulation and regulatory supervision, CELE has also carried out a study and analysis of different processes that, like this one, have tried to create instances of control and oversight on content moderation processes (especially) at the hand of companies and we have found some structural flaws in these antecedents. Among them, it is worth noting the absolute lack of indicators in some cases, the disproportionate dependence on quantitative indicators; the lack of qualitative indicators, and the lack of mechanisms tending to verify how the initiative in question contributed to addressing the problems identified by the regulators.

Finally, this issue is fraught with jurisdictional difficulties that have always been present and have introduced a challenge to Internet regulation. These jurisdictional challenges are not insurmountable but they present obstacles and conflicts that the document does not discuss. Thus, for example, it would be essential to understand how the regulatory system that the document proposes will deal with companies not present in the country in question.

IV. The proposed body has delegated discretionary powers that are incompatible with the legal standards of the international human rights system.

As we mentioned earlier in this document, the current wording of the proposed regulatory framework establishes that the regulatory system shall determine the object of regulation to be imposed on the Internet intermediary company. This delegation of restrictive powers, which directly or indirectly impact the right to freedom of expression, has been assigned in all international human rights frameworks to the legislative power. The requirement of the treaties, both universally and regionally, is that the restrictions be clearly and previously established by law.

Final thoughts

The document proposed by UNESCO is extensive and complex and addresses a variety of important issues and details. It would be hard to summarize all the possible reactions to this document in a short and clear response. However, we will highlight some additional challenges to those indicated, which we believe deserve special attention:

1. Anonymity. It seems particularly significant that any UNESCO regulatory framework promotes a strong protection of the right to anonymity on the Internet. Some of the provisions in this document seem contrary to anonymity.

2. Digital literacy: Digital literacy, human rights education, and media literacy are obligations of the state. Outsourcing these obligations without further ado to private companies seems at least questionable. It is also true that there is no indication regarding values, content, or even how said obligations will be subject to supervision by the states.

We appreciate the opportunity to comment on this important document, and to participate in this consultation process. CELE is available to continue the conversation and expand the contributions and points of view expressed in these comments. Given the significance of the issue that UNESCO's proposal addresses and what is at stake in this matter, we consider it imperative to promote and guarantee open, participatory, and plural discussion instances that allow expanding the points of view to achieve the necessary consensus around these issues.