

INTERNET PLATFORMS AND  
FREEDOM OF EXPRESSION

# Liability of Non-State Actors for Violations of the Freedom of Expression

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November, 2021

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**It is a publication  
from OBSERVACOM**  
Observatorio Latinoamericano  
de Regulación,  
Medios y Convergencia

Gral. César Díaz 1239/101  
Montevideo, Uruguay  
[www.observacom.org](http://www.observacom.org)

With the support of the Media and  
Communication Program for  
Latin America and the Caribbean of  
the Friedrich-Ebert-Stiftung.

**FES Comunicación**  
Calle 71 # 11-90  
Bogotá D.C, Colombia  
<https://fescomunica.fes.de>

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Design: Valentina Galacio



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# INTRODUCTION<sup>1</sup>

This work aims to promote the discussion on responsibility for actions that violate the right to freedom of expression (a human right included in international treaties), when it comes to acts in which the State does not intervene directly or indirectly. Rather, that such actions are carried out fundamentally by private companies and their victims are individuals or even legal entities.

Although it is true that principles and case law already exist that promote the international responsibility of States for human rights violations perpetrated by non-State agents, it is no less true that these legal elaborations came about as a consequence of cases where the violation was related to aberrant acts, ranging from torture, murder or the forced disappearance of people.

This brief study proposes that, since it is not possible on the basis of an adequate interpretation of international human rights treaties to establish a hierarchy between them, there are reasons why the arguments put forward in cases that we have described as aberrant are applicable, *mutatis mutandi*, to cases where the violation refers to human rights closely related to democracy and the autonomous development of people.<sup>2</sup>

That is why we say that we are going to “raise” the discussion, although the issue has already been “raised” for various violations that are indicated in this article.

We do not intend to conclude this discussion based on what is expressed in this work. Rather, what is discussed here should be read as notes that facilitate the exchange of well-founded opinions, to establish who is responsible for events carried out by private com-

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<sup>1</sup> This paper was originally written in Spanish

<sup>2</sup> The relationship between freedom of expression and democracy emerges clearly in Advisory Opinion No. 5 (AO-5) of the Inter-American Court of Human Rights (see [https://www.corteidh.or.cr/docs/opiniones/seriea\\_05\\_esp.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_05_esp.pdf)); also articles 1 and 2 of the Inter-American Democratic Charter, art. 3 (see [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm)).

panies that range from excessive moderation of content, to its filtering or even the refusal to allow users to modify or contribute to the platforms, including in this respect the massive collection of personal data and its subsequent treatment without the consent of the corresponding persons to whom such data pertains

It is necessary to clarify that we consider these types of acts as actions that violate the aforementioned fundamental rights, although we also believe that there are specificities that could lead to the opposite conclusion. Due to the limitations and the objective proposed in the work, these cases will be considered, without entering into a corresponding analysis, as violations of freedom of expression, access to information and privacy.

The work analyses how it is possible to address the issue both in the inter-American human rights system and in the universal system. Finally, brief conclusions are offered on the possible application of the principles established in different countries. •

# THE RESPONSIBILITY OF NON-STATE AGENTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (IAHRS)

The Inter-American Court of Human Rights dealt with this issue in a case that is just over three years old. This clarification is important because what is exposed here is the current jurisprudence of the Court, although, as will be seen, this argument was elaborated on the basis of cases resolved much earlier.

In the case of “López Soto et al. Vs. Venezuela” judgment of September 26, 2018,<sup>3</sup> the Inter-American Court established as follows:

Although, in its case law, the Court has recognized that “international responsibility may also arise from acts of private individuals that cannot, in principle, be attributed to the State,”<sup>4</sup> it is also true that a State cannot be held responsible for all the human rights violations committed between private individuals within its jurisdiction. Indeed, the nature *erga omnes* of the treaty-based guarantee obligations of the States does not entail their unlimited responsibility for all acts or deeds of individuals.<sup>5</sup> In other words, even though an act, omission or deed of an individual has the legal consequence of the violation of

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<sup>3</sup> See [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_362\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_362_esp.pdf).

<sup>4</sup> *Case of the “Mapiripán Massacre” v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, para. 111, and *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 192, para. 77.

<sup>5</sup> *Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs.* Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of Carvajal Carvajal et al. v. Colombia. Merits, reparations and costs.* Judgment of March 13, 2018. Series C No. 352, para. 161.

certain rights of another individual, this cannot automatically be attributed to the State, because it is necessary to take into account the particular circumstances of the case and the implementation of the said obligation of guarantee.<sup>6</sup>

It should be noted that in this paragraph, the Inter-American Court does not refer to the violation of any particular right as a consequence of the act of an individual. It simply says “an act...of an individual has the legal consequence of the violation of certain rights of another individual.” This is so because the Inter-American Court of Human Rights, if it were to imply something different pointing out some particular rights, would be making an order of precedence of the rights included in the Convention, an issue that we believe is incorrect, and a deeper examination of which goes beyond the limits of this work.

But it says something else, that for it to be possible to hold the State responsible, it is necessary to attend to “particular circumstances”. Which are? The Inter-American Court explains as follows

The formula used by the Inter-American Court to determine the scope of those obligations and to attribute responsibility to the State for failing in its duty of due diligence to prevent and protect private individuals or a group of individuals from the acts of other individuals was developed starting with the *Case of the Pueblo Bello Massacre v. Colombia*. In that case, it asserted that the “obligations to adopt prevention and protection measures for private individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger.”<sup>7</sup>

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<sup>6</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia*, *supra*, para. 123, and *Case of Gutiérrez Hernández et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of August 24, 2017. Series C No. 339, para. 140.

<sup>7</sup> *Case of the Pueblo Bello Massacre v. Colombia*, *supra*, para. 123, citing ECHR, *Case of Kiliç v. Turkey*, No. 22492/93. Judgment of March 28, 2000, paras. 62 and 63, and *Osman v. The United Kingdom*, No. 23452/94. Judgment of October 28, 1998, paras. 115 and 116.

Here we can highlight the two issues raised by the Court: knowledge of the risk of the violation of the right and reasonable possibilities of preventing its realization.

The Court summarizes this quite categorically:

In short, for the State to be held responsible for failure to comply with an obligation of due diligence to prevent violations and to protect the rights of a specific individual or group of individuals in relation to acts of other individuals, it is necessary, first, to establish that the State was aware of a real and imminent danger and, second, to evaluate whether reasonable measures were adopted to prevent or to avoid the danger in question. [...]

How did the Inter-American Court take the State's knowledge as proven? The answer is due to the context and complaints from individuals:

To determine whether the State was or should have been aware of the danger for a specific individual or group of individuals, the Court has taken different elements and indications into account, based on the circumstances of the case and the context in which it occurred. In cases of violence against women, the Court has analyzed the particular circumstances of each case, as regards how the State was informed of the facts, including the relevant context, and focusing on the reports filed or on the possibility of persons connected to the victims filing reports. In the *Case of González et al. ("Cotton Field")*, the Court understood that the State had been aware of the specific risk for the victims based on the reports of their disappearance filed before the state authorities, added to the context of violence and discrimination against women of which the State was aware.<sup>8</sup> In the *Case of Véliz Franco*, the Court established the State's awareness following the filing of a report by the victim's mother in which, although she did not indicate explicitly that María Isabel had been the victim of a wrongful act, it was

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<sup>8</sup> Cf. *Case of González et al. ("Cotton Field") v. Mexico, supra*, paras. 283 and 284.

reasonable to understand that she was in danger. The Court indicated that an additional factor that reinforced the State's awareness was constituted by the generalized impunity that existed in the country.<sup>9</sup> Lastly, in the *Case of Velázquez Paiz*, the Court considered that the telephone call that Claudina's parents made to the National Civil Police and the information provided to the patrol that arrived in response was sufficient proof. Added to this, the Court took into account the context of increased homicidal violence against women in Guatemala and the exacerbated acts of violence and cruelty carried out on the bodies of many of the victims.<sup>10</sup>

Clearly and as can be seen from the aforementioned, these cases refer to very serious violations of fundamental rights.<sup>11</sup> The question for this work is whether the State is responsible for repeated complaints from individuals, public events in the media, or rigorous reports from non-governmental organizations that are widely distributed and that report violations of the right to freedom of expression or access to information due to blocking practices, filtering, use of personal data, and other similar acts. If the State does not react, either through the mechanisms of sanction -administrative or judicial- or by initiating discussions on the regulation of such acts, we may understand that the responsibility of the State for the action of private companies is evident in light of the case law of the Inter-American Court. •

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<sup>9</sup> Cf. *Case of Veliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277, paras. 141 to 146.

<sup>10</sup> Cf. *Case of Velásquez Paiz et al. v. Guatemala, supra*, para. 121.

<sup>11</sup> However, there are cases already decided by International Courts where the violation is linked to other rights and the acts are committed by private actors. For example, the case decided by the European Court of Human Rights in *Tătar v. Romania* (application no. 67021/01) condemns Romania for not having taken the necessary actions due to the pollution caused by a company that resulted in damage to the health of the victims. On June 11, 2021, the United Nations Human Rights Committee recommended that Germany (see <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27798&LangID=E>) intensify its efforts to strengthen the legal framework on climate change, which, for obvious reasons, implies regulations on private activities. In other words, the obligation of the States to establish regulatory frameworks that prevent human rights violations that may be due to actions of private entities today refer to other rights, for example, environmental law, and not only to the serious violations that were indicated. I would like to thank Professor Helen Duffy, Gieskes Professor of International Human Rights and Humanitarian Law at the University of Leiden, for this observation.

# THE RESPONSIBILITY OF NON-STATE AGENTS IN THE UNIVERSAL SYSTEM

**I**n the setting of the universal system for the protection of human rights, we can begin by bringing to this discussion the document prepared by the Special Representative of the Secretary General for the issue of human rights and transnational corporations and other companies. The Special Representative included the “Guiding Principles on Business and Human Rights: Putting the United Nations Framework into Practice to ‘Protect, Respect and Remedy’” in his final report to the Human Rights Council (A/HRC/17/31), and the Council endorsed them in Resolution 17/4, of June 16, 2011.

It is pertinent to clarify that these Principles arise as an interpretation of the existing treaties in the universal system, and that -the Principles- can be considered as “soft law” contrary to the letter of the treaties that are “hard law”. Notwithstanding this, their relevance should not be diminished.

Among the “General Principles” of the Guiding Principles, and for the purposes of this work, we can highlight the following, which, it is important to remember, are derived from established standards in the field of the international protection of human rights:

These Guiding Principles are grounded in recognition of:

- a)** States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b)** The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; [...]

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

As a founding principle, it is established as follows:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Taking these principles into account, the question that arises is what happens when States fail to fulfil their obligations. The answer, as in the IACHR, is obviously to assign responsibility to the State for the acts of non-state agents.

Of particular importance is the work of the United Nations “Open-ended Intergovernmental Working Group” (OEIGWG). In June 2014, the UN Human Rights Council adopted a resolution proposed by Ecuador and South Africa to develop a legally binding international instrument on transnational corporations and other business enterprises with regard to human rights. An Intergovernmental Working Group (IGWG) was established with the mandate to develop this instrument. The first draft of the proposed treaty was published in 2018 and revised in 2019. On August 6, 2020, the IGWG published the second revised draft. On August 17, 2021, the IGWG published the third revised draft.<sup>12</sup>

We can highlight the articles in this draft treaty that show the interpretation answer to what is explained here. For example, in the Preamble section it stresses as follows:

[...] that the primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory, jurisdiction, or otherwise under their control, and ensure respect for and implementation of international human rights law.

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<sup>12</sup> See <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

The following articles are then established:

**1.2.** “Human rights abuse” shall mean any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment.

**3.3.** This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms binding on the State Parties of this (Legally Binding Instrument), including those recognized in the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, all core international human rights treaties and fundamental ILO Conventions to which a State is a Party, and customary international law.

**4.1.** Victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms.

**6.2.** States Parties shall take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships.

**8.6.** States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse.

A recent work by Antal Berkes<sup>13</sup> addresses this problem, providing several examples. This author explains as follows:

In general international law, the ICJ and arbitral tribunals consistently apply this gradual approach to violations committed by non-state entities: as a first step, they examine whether the conduct of the non-state actor is attributable to the respondent State and, if not, as a second step, they scrutinise the State's responsibility for the breach of its obligation of due diligence.<sup>14</sup>

However, in addition to the example of the International Court of Justice, Berkes offers others that are closer to the argument we read above:

The Committee against Torture engages the responsibility of the territorial State in each case where the applicants substantiate that the authorities failed to take appropriate measures to protect while they were aware of the immediate risk of torture or ill-treatment by non-state actors and had the power to react to it. This failure allows the Committee to conclude that the State had a 'tacit consent' in the sense of Article 16 of the Convention, or 'a form of encouragement and/or de facto permission', or even complicity. Other treaty bodies, such as the Committee on the Elimination of Discrimination against Women and the Human Rights Committee, confirmed this responsibility in their quasi-judicial practice.<sup>15</sup>

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<sup>13</sup> See Berkes, Antal. *International Human Rights Law Beyond State Territorial Control*, Cambridge University Press, June 2021.

<sup>14</sup> Antal Berkes, cit. pag. 251. In a footnote the author cites, among others, the following sources: Eritrea-Ethiopia Claims Commission, *Partial Award: Central Front – Eritrea's Claims* 2, 4, 6, 7, 8 & 22, 28 April 2004, *UNRIAA*, vol. XXVI, 138–139, para 67; *Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims* 1, 3, 5, 9–13, 14, 21, 25 & 26, 19 December 2005, *UNRIAA*, vol. XXVI, 313–314, paras 46–47.

<sup>15</sup> Antal Berkes, cit. pag. 254. En notas al pie se citan los siguientes antecedentes para dar sustento a su afirmación: Comité Contra La Tortura, *Hajrizi Dzemajl et al. v. Yugoslavia*, Complaint No. 161/2000, UN Doc. CAT/C/29/D/161/2000 (2 December 2002), para 9.2. Comité contra la Tortura, General comment No. 2, para 18. *The Vienna Intervention Centre against Domestic Violence et al. v. Austria*, Communication. No. 6/2005, UN Doc. CEDAW/C/39/D/6/2005 (1 October 2007), paras 12.1.1–12.1.4; *The Vienna Intervention Centre against Domestic Violence et al. v. Austria*, Communication No. 5/2005, UN Doc. CEDAW/C/39/D/5/2005 (1 October 2007), paras 12.1.1–12.1.4. Comité de Derechos Humanos, *Willian Eduardo Delgado Paez v. Colombia*, Communication no. 195/85, UN Doc. A/45/40(VOL.II) (SUPP) (4 October 1990), 43–49, para 5.6. Traducción propia.

Given all that has been expressed so far, it is clear that the standards of the universal system that are being developed and that, at least, constitute soft law, allow us to conclude on the responsibility of States for acts of private actors even when the violation refers, for example, to art. 19 or art. 17 of the International Covenant on Civil and Political Rights.<sup>16</sup>

In this sense, the Human Rights Committee in General Comment No.34<sup>17</sup> established as follows:

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. [...] The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.<sup>18</sup>

We believe that with respect to this forceful interpretation of the Accord it is not necessary to add much more. •

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<sup>16</sup> Article 17 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks. Article 19 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>17</sup> See [https://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.34\\_sp.doc](https://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.34_sp.doc)

<sup>18</sup> General Comment No. 31, para. 8; see Communication No. 633/1995, *Gauthier c. Canada*, opinion adopted April 7, 1999.

## CONCLUSIONS

This work has shown that both the standards of the ISHR and those pertaining to the United Nations system, make it necessary for the States parties to the international treaties that they have been obliged to comply with, based on the principle of *pacta sunt servanda* (Vienna Convention on the Law of Treaties<sup>19</sup>), must take seriously the situation of possible violations of the exercise of the rights to freedom of expression, access to information or privacy.

This statement is relevant at a time in which, and with increasing frequency, violations of these rights are reported by actions of local or international private companies. As previously mentioned, the actions that are most concerned about the possible violation of these rights are related to filtering or blocking of content, refusing people access to use platforms, collection of personal data or abusive moderation of content, etc. In these cases, the inaction of the States that are obliged to comply with the American Convention on Human Rights or with the International Covenant on Civil and Political Rights (ICCPR), may lead them to bear responsibility for the violation of due diligence and prevention that they are obliged to comply with, so that violations of such rights do not occur or cease to occur.

Neither is it lost on us that, in countries such as the United States of America, the protection of freedom of expression and of the press has been one of the fundamental pillars of democracy in said country since the application of the First Amendment to the U.S. Constitution. Nor does it escape us that there are interpretations in this area that advocate the impossibility of applying the principles enshrined in this amendment to actions of private entities, since, it is argued, they were designed as a control mechanism of government actions that could put at risk the freedom to express oneself freely.

It is not the objective of this paper to delve into this interpretation and whether it is correct or not. However, it cannot be forgotten that countries in the Americas such as the United States or Canada, are obliged to comply with the ICCPR. And there arises another con-

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<sup>19</sup> Ver [https://www.oas.org/xxxivga/spanish/reference\\_docs/convencion\\_viena.pdf](https://www.oas.org/xxxivga/spanish/reference_docs/convencion_viena.pdf)

troverly that we understand that has not yet been definitively resolved; this is the direct applicability of said treaty in domestic law.

For example, in the case of *Medellín v. Texas* resolved by the Supreme Court of the United States<sup>20</sup> in 2008, it was understood, and by a majority of 5-3, that a decision of the International Court of Justice against that country and a memorandum of the President to which it referred to on the obligatory nature of compliance of that judgment, did not constitute federal law directly applicable in the United States.

We must stress that this was not a unanimous decision. Judge Breyer, who was joined by Judge Souter and Judge Ginsburg, understood that the interpretation of the North American Constitution should be different:

The Supremacy Clause of the Constitution establishes that “all Treaties... made... under the authority of the United States, shall be the supreme Law of the State; and the Judges of each State shall be so bound.” Art. VI, cl. 2. The Clause means that the “courts” must consider “a treaty. . . as equivalent to an act of the legislator, provided that it operates by itself without the aid of any legislative provision.” [...] In the *Avena* case, the International Court of Justice (ICJ) (interpreting and applying the Vienna Convention on Consular Relations) issued a judgment requiring the United States to re-examine certain criminal proceedings in the cases of 51 Mexican citizens. [...] The question here is whether the *Avena* judgment of the ICJ is now enforceable as a matter of domestic law, that is, if it “operates by itself without the aid” of any other legislation. [...] Specifically, the United States has agreed to submit, in such cases, to the “compulsory jurisdiction” of the ICJ [...] the President of the United States has concluded that domestic courts should enforce this particular ICJ judgement. Memorandum to the Attorney General (February 28, 2005), (hereinafter, the President’s Memorandum). And Congress has done nothing to suggest otherwise. In these circumstances, I believe or that the treaty obligations, and therefore the judgment, decided as it does with the consent of the United States to the jurisdiction of the ICJ, binds the courts no less than would be “an act of the [federal] legislature”.

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<sup>20</sup> See <https://www.supremecourt.gov/opinions/07pdf/06-984.pdf>

In conclusion, this difference in criteria in the United States makes it impossible to be robust in the sense that even in the United States, where numerous technology companies are based, that country is not liable for violations of the ICCPR (which we assume as directly operational, although this can also be discussed) and the duty of diligence and prevention is not fulfilled.

Finally, we should state that this is an open debate. And even for the IACHR where, despite the Court's decisions being enforceable, none has specifically referred to violations of arts. 10 or 13 of the Convention perpetrated by non-state actors. It remains, for example, to determine whether when art. 13.3 of the Convention mentions violations of freedom of expression by "private actors" it is referring precisely to that which is the issue of discussion in this work: that private companies can violate fundamental rights and when this occurs and the States do not act, they may bear responsibility. •



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