

5-1-2017

# The Expanding Scope of Human Rights in a Technological World — Using the Interamerican Court of Human Rights to Establish a Minimum Data Protection Standard Across Latin America

Josiah Wolfson

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## Recommended Citation

Josiah Wolfson, *The Expanding Scope of Human Rights in a Technological World — Using the Interamerican Court of Human Rights to Establish a Minimum Data Protection Standard Across Latin America*, 48 U. Miami Inter-Am. L. Rev. 188 ()  
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# **The Expanding Scope of Human Rights in a Technological World—Using the Inter-American Court of Human Rights to Establish a Minimum Data Protection Standard across Latin America**

Josiah Wolfson\*

*Privacy is a human right that many in the world do not enjoy. The failure of many countries to prioritize privacy through the passage and enforcement of comprehensive data protection laws has left their citizens vulnerable. The Inter-American Court of Human Rights should use its authority to set a minimum data protection standard for its Member States.*

*This Note discusses the historical development of data protection, the current data protection gap in Latin America, and proposes the role that the Inter-American Court of Human Rights should play in advancing a minimum data protection standard in the region.*

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SECTION I: INTRODUCTION .....	189
SECTION II: THE HISTORICAL PROGRESSION OF DATA PROTECTION.....	195
<i>A. Europe</i> .....	196
<i>B. Asia</i> .....	201
<i>C. The United States</i> .....	202
<i>D. Latin America</i> .....	203
SECTION III. LATIN AMERICAN HAS A DATA PROTECTION GAP ...	208
<i>A. Not All Latin American States Have Adequate Data Protection Regulations</i> .....	209
1. Habeas Data .....	209
2. Industry Specific Data Regulations .....	210
<i>B. Latin American States Have a Reputation of Failing to Enforce Domestic Data Protection Laws</i> .....	211
SECTION IV: A MINIMUM DATA PROTECTION STANDARD WOULD BENEFIT THE ECONOMY.....	214
SECTION V: THERE ARE NO VIABLE ALTERNATIVES.....	218
SECTION VI: JURISDICTION OF THE COURT .....	221
<i>A. Adjudicatory Jurisdiction</i> .....	221
<i>B. Advisory Jurisdiction</i> .....	224
SECTION VII: THE COURT IS JUSTIFIED IN ADVANCING MINIMUM DATA PROTECTION STANDARD .....	227
<i>A. Treaty Interpretation</i> .....	227
<i>B. International Bodies</i> .....	228
SECTION VIII: THE IACTHR SHOULD PLAY A MORE ACTIVE ROLE IN THE REGION.....	229
SECTION IX: CONCLUSION.....	231

#### SECTION I: INTRODUCTION

My Jewish grandfather was living in Nazi-occupied Europe with his sister and parents in the late 1930s. With the rise of anti-Semitism in the region, his father decided that the family would leave

everything in search of a better life in the United States. One morning, my grandfather and his family went to the train station to begin the journey out of Europe. However, after officials at the train station reviewed their database of records, the officials refused to grant my family passage because Jews were banned from leaving the city. The Nazi Reich had partnered with International Business Machines (IBM), a privately owned census tabulating company, to systematically identify the Jews living in Europe and created a card sorting system that assisted the Nazis in the technological “automation of human destruction.”<sup>1</sup>

After the allies won World War II, many IBM executives were prosecuted for their roles in collecting and synthesizing the Jewish populations’ personal data.<sup>2</sup> The conclusion of the war ended the use of personal databases to discriminate against Jews, but the stored information in the databases was never destroyed.<sup>3</sup> The perils surrounding the unwanted use of people’s personal information is something many around the world still face today. Millions of people living in Latin America<sup>4</sup> remain at risk of private and public entities collecting, processing, and misusing their personal information because those governments have failed to implement comprehensive data protection laws.<sup>5</sup> In light of this human right gap, the Inter-

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<sup>1</sup> EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA’S MOST POWERFUL CORPORATION* 8 (2001); *see also* Marc Langheinrich, *Privacy by Design — Principles of Privacy-Aware Ubiquitous Systems*, SWISS FEDERAL INSTITUTE OF TECHNOLOGY, <http://graphics.stanford.edu/~bjohanso/csd2003-ospace/lanheinrich-privacy.pdf> (last visited Nov. 26, 2015); *see, e.g.*, VICTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN A DIGITAL AGE* (Princeton, 2009) (reporting that the Nazis used the information contained in the comprehensive Dutch Registry database to identify, deport, and murder a higher percentage (73%) of the Dutch Jewish population than other nations that did not maintain similar databases).

<sup>2</sup> *See* BLACK, *supra* note 1, at 6-15.

<sup>3</sup> *Id.*

<sup>4</sup> For purposes of this Article, Latin America includes all countries in the Americas, spanning from Mexico down to Argentina.

<sup>5</sup> Camila Tobón, *Data Privacy in Latin America: An Overview*, 44 no. 2 ABA INT’L LAW NEWS 1, 6 (2015) (asserting that Bolivia, Ecuador, El Salvador, Honduras, and Venezuela have yet to pass domestic data protection laws); *see* DLA PIPER’S GLOBAL DATA PROTECTION AND PRIVACY TEAM, DATA PROTECTION LAWS OF THE WORLD, [http://dlapiperdataprotection.com/#handbook/world-map-section/c1\\_HN](http://dlapiperdataprotection.com/#handbook/world-map-section/c1_HN) (last visited Nov. 26, 2015) [hereinafter DLA PIPER] (providing state by state comparison of data protection laws around the

American Court of Human Rights (“IACtHR”) should use its authority, pursuant to the American Convention on Human Rights (“American Convention”), to establish a minimum data protection standard across Latin America.<sup>6</sup>

Data protection laws generally require that the data controller<sup>7</sup> meet applicable conditions to store, process, or distribute personal<sup>8</sup> or sensitive<sup>9</sup> data about the data subject.<sup>10</sup> However, no data protection law is absolute in its protection of the data subject, and instead “must be considered in relation to [the law’s] function in society.”<sup>11</sup>

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world); *see also* Aldo M. Leiva, *Data Protection Law in Spain and Latin America: Survey of Legal Approaches*, 41 no. 4 ABA INT’L LAW NEWS 6 (2012).

<sup>6</sup> It is impossible to analyze this multifaceted issue from a macro perspective without generalizing my critique of the region as a whole. However, each Latin American country is unique and has made differing efforts to protect individual’s data through domestic regulations or the absence thereof. *See generally* PERMANENT COUNCIL OF THE ORGANIZATION OF AMERICAN STATES COMMITTEE ON POLITICAL AND JURIDICAL AFFAIRS, COMPARATIVE STUDY: DATA PROTECTION IN THE AMERICAS, OEA/Ser.G CP/CAJP-3063/12 (Apr. 3, 2012), [http://www.oas.org/es/sla/ddi/docs/CP-CAJP-3063-12\\_en.pdf](http://www.oas.org/es/sla/ddi/docs/CP-CAJP-3063-12_en.pdf) [hereinafter COMP ARATIVE STUDY] (addressing the Latin American State’s data protection regulations individually).

<sup>7</sup> *Data Protection Definitions*, UNIVERSITY OF OXFORD, <https://www.admin.ox.ac.uk/councilsec/compliance/dataprotection/definitions/> (last updated Nov. 28, 2013) (the person (or organization) who determines the purposes for which and the manner in which any personal data are, or are to be, processed (e.g. the University)).

<sup>8</sup> *Id.* (“Data which relate to a living individual who can be identified from that information, or from that and other information which is in the possession of or is likely to come into the possession of, the data controller. It includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual (subject to very limited exceptions).”).

<sup>9</sup> *Id.* (“Information relating to race or ethnic origin, political opinions, religious beliefs, physical/mental health, trade union membership, sexual life or criminal activities. Special conditions apply to the processing of this type of information, including an obligation to obtain the explicit consent of the individual (except in limited circumstances).”).

<sup>10</sup> *Id.* (“Any living individual who is the subject of personal data (e.g. student, applicant, member of staff, supervisor, referee etc).”).

<sup>11</sup> *See, e.g.*, CJEU, Joined cases C-92/09 and C-93/09, *Volker and Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, 9 November 2010, para. 48.

Therefore, the right to data protection is subject to limitations, such as national security.<sup>12</sup>

Data protection has become increasingly important because the development of technology has led to prevalent data collecting and processing in the public and private sectors.<sup>13</sup> Countless government entities report the recurrent collecting and tracking of individuals' online movement.<sup>14</sup> There is no indication of this trend slowing down as businesses continue to increase demand for big data processing jobs.<sup>15</sup>

Global media sources repeatedly inform the public of the dangers associated with the processing of personal data. The dangers surrounding inadequate data protection extend beyond voluntary consumers to the majority of people using modern technology, which tends to be conjoined with the participation in a modern society.<sup>16</sup> Consumers that refuse to participate in the market because

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<sup>12</sup> *Data Protection Definitions*, *supra* note 8; *e.g.*, (When “the processing is necessary for the administration of justice; for the exercise of any functions conferred by or under enactment; for the exercise of any functions of the Crown, a Minister of the Crown or a government department; for the exercise of any other functions of a public nature exercised in the public interest.”); *see also* FRA, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 2d Ed. 14 (2014), [http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf).

<sup>13</sup> *See generally* EUROPEAN DATA PROTECTION SUPERVISOR, PRIVACY AND COMPETITIVENESS IN THE AGE OF BIG DATA: THE INTERPLAY BETWEEN DATA PROTECTION, COMPETITION LAW AND CONSUMER PROTECTION IN THE DIGITAL ECONOMY (Mar. 1, 2014), [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26\\_competition\\_law\\_big\\_data\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf) (illustrating how “online services are driving the huge growth in the digital economy”).

<sup>14</sup> Ginger Adams Otis, *NSA can read emails, online chats and track Web browsing habits without warrant, documents leaked by Edward Snowden show*, NEW YORK DAILY NEWS (Aug. 1, 2013, 12:05 AM), <http://www.nydailynews.com/news/national/nsa-read-emails-warrent-docs-article-1.1413633>.

<sup>15</sup> Louis Columbus, *Where Big Data Jobs Will Be in 2015*, FORBES (Dec. 29, 2014, 3:23 PM), <http://www.forbes.com/sites/louiscolumbus/2014/12/29/where-big-data-jobs-will-be-in-2015/>.

<sup>16</sup> ABOUT THE DATA, <https://www.aboutthedata.com/> (discussing companies like Acxiom who collect and aggregate individuals' information from surveys, registrations, purchases, postings, public records, online searching, etc.).

of these dangers constrain the success of the global economy.<sup>17</sup> Although expert opinions vary on how far reaching the scope of data protection should be and what, if any, regulatory role states should play, there is a consensus that the topic of data protection—storage, processing, and movement of personal information—will remain an important issue in the future.<sup>18</sup>

In this age of social media, where people snap their every moment, the importance of data protection should be readily apparent. However, people either do not know or do not care that their personal and sometimes sensitive data may, once collected, be: (1) sold to private companies; (2) processed anywhere in the world; (3) accessed by a government agency without just cause; (4) stored for an indefinite period of time; and (5) used for an unintended purpose.<sup>19</sup> Consumers are often unaware that their personal data is in a database because they are uninformed and many countries permit data controllers to take advantage of this ignorance by not having a comprehensive data protection law. For example, most email accounts, which historically saved emails only to the consumers' personal hard drive, are now saved to a remote company server.<sup>20</sup> As individuals' data footprints have grown in size and technology has allowed for more far reaching data procurement and storage, the risks associated with individuals' personal data have increased.<sup>21</sup>

Entities in both the public and private sector regularly fail to provide adequate data security for the customers' or employees' per-

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<sup>17</sup> See discussion *infra* Section IV.

<sup>18</sup> Michael Yang, Francis J. Gorman, *What's Yours Is Mine Protection And Security In A Digital World*, 36 MD. B.J. 24, 24-33 (2003).

<sup>19</sup> See Kenneth M. Siegel, *Protecting the Most Valuable Corporate Asset: Electronic Data, Identity Theft, Personal Information, and the Role of Data Security in the Information Age*, 111 PENN ST. L. REV. 779, 783-89 (2007).

<sup>20</sup> Ilana R. Kattan, *Cloudy Privacy Protections: Why the Stored Communications Act Fails to Protect the Privacy of Communications Stored in the Cloud*, 13 VAND. J. ENT. & TECH. L. 617, 638-39 (2011).

<sup>21</sup> LEE A. BYGRAVE, *DATA PROTECTION LAW: APPROACHING ITS RATIONALE, LOGIC, AND LIMITS* 13 (2002).

sonal data, which increases the likelihood of those individuals' privacy being violated.<sup>22</sup> According to a recent report, the world's biggest tech companies are failing to comply with data privacy rights.<sup>23</sup> Data abuses most commonly occur because the personal data is (1) misused—leading to identity theft and fraud;<sup>24</sup> (2) leaked—when an entity inappropriately releases or voluntarily allows access to individual's information that should be kept private; (3) unsecured—when an entity that holds the information provides inadequate protection of the personal data.<sup>25</sup> Once an individual's personal data has been leaked or left unsecure, his risk of future associated harm increases.<sup>26</sup> The failure of adequate data protection mechanisms creates an environment where public and private entities may unjustifiably access, store, and distribute individuals' personal data without any consequence.

The majority of countries have established some form of data protection structure, and certain international bodies have adopted a regional data protection standard.<sup>27</sup> National strategies include stringent European-based data protection laws, habeas data provisions, and sector specific data regulatory structures.<sup>28</sup>

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<sup>22</sup> See generally Tsutomu Johnson, *Sorry I Lost Your Files: Cybersecurity Threats to Confidentiality*, 28 UTAH B.J. 41, 41-43 (2015) (claiming that a hacker looking to steal information [from a private corporation] will likely find the vault unlocked); see also Julie Hirschfeld Davis, *Hacking of Government Computers Exposed 21.5 Million People*, *The New York Times* (July 9, 2015), [http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html?\\_r=0](http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html?_r=0).

<sup>23</sup> Sam Thielman, *World's biggest tech companies get failing grade on data-privacy rights*, *THE GUARDIAN* (Nov. 3, 2015), <http://www.theguardian.com/technology/2015/nov/03/data-protection-failure-google-facebook-ranking-digital-rights>.

<sup>24</sup> Rob Waugh, *Worldwide cost of identity theft could be \$5 billion per year, Microsoft survey finds*, *WeLiveSecurity* (Feb. 12, 2014, 6:42 AM), <http://www.welivesecurity.com/2014/02/12/worldwide-cost-of-identity-theft-could-be-5-billion-per-year-microsoft-survey-finds/>.

<sup>25</sup> ANUPAM CHANDER ET AL., *SECURING PRIVACY IN THE INTERNET AGE* 113 (2008).

<sup>26</sup> *Id.* at 126.

<sup>27</sup> DLA PIPER, *supra* note 5.

<sup>28</sup> See generally Lee A. Bygrave, *Privacy and Data Protection in an International Perspective*, *SCANDINAVIAN STUD. IN L.* 165, 165-200 (2010), <http://www.uio.no/studier/emner/jus/jus/JUR5630/v11/undervisningsmateriale/Privacy%20and%20Data%20Protection%20in%20International%20Perspective.pdf>.

Data protection is comprised of a seemingly infinite number of topics, but the scope of this Note is limited to the need and ability of the IACtHR to advance a minimum data protection standard in the Latin America. This Note does not seek to propose the specifics of that minimum standard, nor does it evaluate the details of individual states' current domestic data protection laws. Specifically, Section II addresses the historical development of data protection. Section III discusses the data protection gap in Latin America. Section IV examines the economic benefits surrounding a minimum data protection standard. Section V demonstrates the absence of any viable alternatives. Section VI discusses the IACtHR's jurisdiction. Section VII provides a rational basis for the Court advancing a minimum data protection standard. Section VIII proposes the role that the IACtHR should play in the region.

## SECTION II: THE HISTORICAL PROGRESSION OF DATA PROTECTION

Data protection legislation has drawn on the principles of “a person's right of privacy, autonomy, integrity, and dignity.”<sup>29</sup> Since the first data protection laws, legislators have focused on protecting human rights, while attempting to avoid significantly stifling technological innovation and economic growth.<sup>30</sup> Warren and Brandeis' popular article, *The Right to Privacy*, was based on the idea that “[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”<sup>31</sup> Specifically, they asserted, under the right to informational privacy, the “right to be let alone” was not one of the “rights arising from contract or from special trust, but are rights as against the world.”<sup>32</sup> Judicial and legislative bodies have continued to expand the scope of the right to privacy in the years

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<sup>29</sup> *Id.* at 167.

<sup>30</sup> *See id.* at 180-86.

<sup>31</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 213 (1890); For more on the invention of the modern right to privacy, *see generally* Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979).

<sup>32</sup> Warren & Brandeis, *supra* note 31, at 193-213.

since in an attempt to adapt to technological advances, like the Internet and credit cards.<sup>33</sup> Institutions across the world now define a person's right to privacy or a person's right to freedom of expression to include his personal data, which may include text stored on paper or bytes stored in the form of electronic memory.<sup>34</sup>

The international community initially discussed a right to privacy in the aftermath of World War II.<sup>35</sup> In 1948, the United Nations adopted the Universal Declaration of Human Rights ("Declaration"), thereby granting the right of privacy for the first time in modern history.<sup>36</sup> Specifically, Article 12 of the Declaration states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."<sup>37</sup> Although different methods of data protection currently exist across individual countries and regions throughout the world, its roots are European.

#### A. *Europe*

Europe has been a trailblazer in the way it has propelled data protection laws globally and has maintained a regulatory framework with the highest protective standards of any continent. In 1950, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention").<sup>38</sup> The European Convention emulated the Declaration, in part, by providing a safeguard for privacy, but by also introducing the protection of a person's "private life." Article 8 of the Convention declares, in relevant part, "[e]veryone has the right to respect for his private and family life, his home and his correspondence" and that a government shall not interfere with this right unless its

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<sup>33</sup> JONATHAN K. SOBEL ET AL., *THE EVOLUTION OF DATA PROTECTION AS A PRIVACY CONCERN, AND THE CONTRACT LAW DYNAMICS UNDERLYING IT* 57 (2008).

<sup>34</sup> *See generally* RAYMOND T. NIMMER, *INFORMATIONAL LAW* Ch. 8 (2003).

<sup>35</sup> KEVIN M. KEENAN, *INVASION OF PRIVACY: A REFERENCE HANDBOOK* 129 (2005).

<sup>36</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter U.N. Declaration].

<sup>37</sup> *Id.* at art. 12.

<sup>38</sup> Eur. Conv. on H.R. Conv. Rome, Conv. for the Protection of H.R. and Fundamental Freedoms (Nov. 4, 1950) [hereinafter European Convention on Human Rights].

conduct follows from the limited exceptions listed in the Convention.<sup>39</sup>

The Council of Europe created the European Court of Human Rights (“ECtHR”) in 1959, which was tasked with enforcing the European Convention.<sup>40</sup> The ECtHR began to define the scope of Article 8 protections through its early jurisprudence. Specifically, the ECtHR considered whether States had violated Article 8 of the European Convention by interfering with individual petitioners’ right to private life, without a legally justified basis that was necessary and proportionate to that end.<sup>41</sup> The ECtHR has since interpreted Article 8 to include the protection of personal data.<sup>42</sup> The Court held that “the protection of personal data . . . is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the [European] Convention.”<sup>43</sup> Although the ECtHR has broadly interpreted the reach of Article 8, the Court has refrained from ruling that the processing of personal data, in and of itself, is a *per se* Article 8 trigger.<sup>44</sup>

In 1968, at the request of the Council of Europe, the Committee of Human Rights (“Committee”) conducted a study on the “effectiveness of the protection offered under the [European Convention] and by legislation of the member States to the right of privacy against violations caused by the use of modern scientific and technological devices.”<sup>45</sup> The Committee produced an interim report,

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<sup>39</sup> *Id.* at art. 8

<sup>40</sup> U.N. Declaration, *supra* note 36.

<sup>41</sup> Peter Hustinx, *EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation* 1, 3-4 (2015), [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15\\_Article\\_EUI\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15_Article_EUI_EN.pdf).

<sup>42</sup> *See e.g.*, *Klass v. Germany*, Eur. Ct. H.R. (1978); *Malone v. United Kingdom*, Eur. Ct. H.R. (1984); *Leander v. Sweden*, Eur. Ct. H.R. (1987); *Gaskin v. United Kingdom*, Eur. Ct. H.R. (1989); *Niemietz v. Germany*, Eur. Ct. H.R. (1992); *Halford v. United Kingdom*, Eur. Ct. H.R. (1997); *Amann v. Switzerland*, Eur. Ct. H.R. (2000); *Rotaru v. Romania*, Eur. Ct. H.R. (2000).

<sup>43</sup> *Z v. Finland*, Eur. Ct. H.R. at 95 (1997), [http://hudoc.echr.coe.int/eng?i=001-58033#{"itemid":\["001-58033"\]}](http://hudoc.echr.coe.int/eng?i=001-58033#{).

<sup>44</sup> Hustinx, *supra* note 41, at 7.

<sup>45</sup> FRITS W. HONDIUS, *EMERGING DATA PROTECTION IN EUROPE* 65, 65 (1975).

which concluded, in general, that the reach of the European Convention was still imprecise.<sup>46</sup> Specifically, the report found that the European Convention's human right structure did not sufficiently protect the right of privacy because it merely focused on the interferences by public authorities and failed to "extend to the relations of private parties *inter se*."<sup>47</sup>

In 1970, Hessen, Germany created a written regulation regarding data privacy through the domestic passage of the Bundesdatenschutzgesetz law, which became the world's first data protection law.<sup>48</sup> Germany subsequently passed a federal data protection law and a handful of European countries followed suit.<sup>49</sup> The individual States are said to have passed the progressive laws in response to the widespread discourse on data protection that began in the United States a decade earlier.<sup>50</sup> Over 45 years later, more than fifty percent of the domestic data protection laws around the world are from European countries.<sup>51</sup>

The Council of Europe, in an effort "to secure . . . for every individual . . . respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data," created the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Convention 108").<sup>52</sup> The Council of Europe opened Convention 108 for signature by the Council of Europe Member States in 1981

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<sup>46</sup> *Id.*

<sup>47</sup> *Id*; see e.g., *Marckx v. Belgium*, Eur. Ct. H.R. (1979), <http://hudoc.echr.coe.int/eng?i=001-57534> (showing that in addition to the primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for privacy enshrined in Article 8 of the European Convention).

<sup>48</sup> Datenschutzgesetz, Oct. 7, 1970, HESSISCHES GESETZ-UND VERORDNUNGSBLATT I, [hereinafter German Data Protection Act].

<sup>49</sup> Gesetz zum Missbrauch personenbezogener Daten bei der Datenverarbeitung [Act Concerning the Abuse of Data in Data Processing], Jan. 27, 1977, BGBl I at 201.

<sup>50</sup> *Id*; see also THOMAS HOEREN & SONJA EUSTERGERLING, PRIVACY AND DATA PROTECTION AT THE WORKPLACE IN GERMANY 211-12 (2005).

<sup>51</sup> Graham Greenleaf, *Global Data Privacy Laws: 89 Countries, and Accelerating*, 115 PRIVACY LAWS & BUS. INT'L REP. (2012), <http://ssrn.com/abstract=2000034>.

<sup>52</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1981 E.T.S. No. 108 [hereinafter Convention 108].

and all of the States, with the exception of Turkey, have since signed and ratified it.<sup>53</sup> Convention 108, which was the first binding regional data protection law in the world, set benchmarks designed to protect individuals from potential abuses that could arise with the collection and processing of personal data.<sup>54</sup> Convention 108 was designed to regulate a variety of issues, such as the trans-border flow of personal data.<sup>55</sup> Simply put, Convention 108's data protection restrictions have an extraterritorial dimension by prohibiting the export of data to countries that lack adequate data protection.<sup>56</sup>

By the 1990s, the Member States had passed individual domestic data protection laws within their respective States based on Convention 108's principles.<sup>57</sup> However, the European Union ("EU") quickly recognized that the variety of domestic data protection laws created inconsistency between the States, which obstructed the free flow of data and the functionality of the EU's internal market.<sup>58</sup>

In 1995, the EU, in an effort to increase the congruence of the States' domestic data protection laws, built on the success of Convention 108 and adopted Directive 95/46/EC ("Directive").<sup>59</sup> The

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<sup>53</sup> *Id.*

<sup>54</sup> FRA, HANDBOOK ON EUROPEAN DATA PROTECTION LAW 2d Ed. 14 (2014), [http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf).

<sup>55</sup> Julia Fromholz, *The European Union Data Privacy Directive*, 15 BERKELEY TECH. L.J. 461, 469 (2000).

<sup>56</sup> See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1504-05 (2000) (explaining that a state must fulfill the Convention 108's adequacy and enforcement criteria to process Europeans' data).

<sup>57</sup> See e.g., Loi No. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés [Law No. 78-17 of Jan. 6, 1978 concerning data processing, records and freedom], Journal Officiel du 7 janvier et rectificatif au [J.O.] du 25 janvier [hereinafter French Law]; The Danish Private Registers Act, No. 293, June 8, 1978, amended by Act No. 383, June 10, 1987, translated in Danish Ministry of Justice, Pub. No. 622 (Oct. 2, 1987) [hereinafter Danish Law]; Wet Persoonsregistraties [Act of Dec. 28, 1988, providing rules for the protection of privacy in connection with personal data files], Stb. 1988, at 665, translated in Council of Europe Doc. CJ-PD (89) 4 (Jan. 27, 1989), reprinted in A. Nugter, *Trans-border Flow of Personal Data Within the EC 397-410* (1990) [hereinafter Dutch Law].

<sup>58</sup> *Id.*

<sup>59</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 O.J. (L 281), 23/11/1995 P. 0031-0050, <http://eur-lex.europa.eu/Lex->

Directive required all Member States to pass domestic legislation that complied with the specifics of the Directive.<sup>60</sup> It has served as one of the most important pieces of legislation on data protection.<sup>61</sup> In short, the Directive specifies the general rules on data processing and explains the protection that data subjects are entitled to.<sup>62</sup> Moreover, the Directive prohibits an entity from possessing personal data that is not transparent, held for a legitimate purpose, and proportionate to the legitimate purpose.<sup>63</sup> Although the Directive has increased data protection consistency among the Member States, the laws across the region remain far from uniform. Some states, like France, have gone above and beyond the minimum requirements outlined in the Directive.<sup>64</sup> Critics complain that the Directive's failure to set a ceiling for the data protection standards has led to states passing overly onerous regulations, contrary to the Directive's intent of establishing a harmonized data protection standard.<sup>65</sup> The Directive serves as evidence that the right to "protection of personal data" has developed from its origins in informational privacy to a basic human right in and of itself.<sup>66</sup>

The European data protection regulations have had a global influence. As discussed above, Europe implemented a protectionist data protection structure, which requires a state to pass and enforce

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UriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML (protecting individual Europeans with regard to the processing of personal data and on the free movement thereof).

<sup>60</sup> *Id.*

<sup>61</sup> Eve M. Brunts et. al., *The International Clinical Trials Roadmap: Steering Clear of Legal and Practical Roadblocks*, 5 J. HEALTH & LIFE SCI. L. 1, 49 (2012).

<sup>62</sup> See generally Hustinx, *supra* note 41.

<sup>63</sup> *Id.*

<sup>64</sup> French Law, *supra* note 57, at art. 1, see e.g., France's relevant domestic law, which may be the broadest data protection law of any of the Member States. The domestic law states "Information technology should be at the service of every citizen. Its development shall take place in the context of international cooperation. It shall not violate human identity, human rights, privacy, or individual or public liberties."

<sup>65</sup> Tracie B. Loring, *An Analysis of the Informational Privacy Protection Afforded by the European Union and the United States*, 37 TEX. INT'L L.J. 421, 424-25 (2002).

<sup>66</sup> González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (2014); Convention 108, *supra* note 51, at art. 8.

a domestic data protection law that is adequate by European standards.<sup>67</sup> Non-member states around the world have performed the accession requirements, pursuant to Article 23 of Convention 108, in an attempt to gain access to the estimated 500 million consumers across Europe.<sup>68</sup>

### B. *Asia*

The Asia-Pacific region's data protection strategy is based on an economic incentive. In 2004, the Asia-Pacific Economic Cooperation ("APEC") 21 Member States, which account for a third of the world's population and half of the global Gross Domestic Production, adopted the APEC Privacy Framework ("Framework").<sup>69</sup> The Framework includes a number of popular privacy principles found in other domestic and regional data protection legislation.<sup>70</sup> For example, the Framework recommends the regulation of the collection, quality, security, use, access to, and correction of personal information.<sup>71</sup> However, critics have pointed to the voluntary nature of the agreement and the inexistence of enforcement measures, which make it superficial in nature.<sup>72</sup> Similarly, the Association of Southeast Asian Nations ("ASEAN") has committed to publish a best practices data protection manual in an effort to create further harmonization between the Member States' economies in the face of globalization.<sup>73</sup> Both organizations are attempting to set up uniform

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<sup>67</sup> Convention 108, *supra* note 51, at art. 23 (requiring that a petitioning state be found to have adequate domestic data protection regulations and effective enforcement mechanisms).

<sup>68</sup> Paul M. Schwartz, *European Data Protection Law and Restrictions on International Data Flows*, 80 IOWA L. REV. 471, 484 (1995).

<sup>69</sup> Graham Greenleaf, *Five years of the APEC Privacy Framework: Failure or promise?*, 25 COMP. L. & SECURITY REV. 28, 28 (2009).

<sup>70</sup> *See generally id.*

<sup>71</sup> *See generally* APEC SECRETARIAT, APEC PRIVACY FRAMEWORK, (2005), [http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~//media/Files/Groups/ECSG/05\\_ecsg\\_privacyframewk.ashx](http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~//media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx).

<sup>72</sup> *See generally* APEC GROUP ON SERVICES, MENU OF OPTIONS FOR VOLUNTARY LIBERALIZATION, FACILITATION, AND PROMOTION OF ECONOMIC AND TECHNICAL COOPERATION IN SERVICES TRADE AND INVESTMENT (Aug. 15, 2003), [http://www.apec.org/~//media/Files/Groups/GOS/03\\_cti\\_gos\\_moo.pdf](http://www.apec.org/~//media/Files/Groups/GOS/03_cti_gos_moo.pdf).

<sup>73</sup> EDWIN LEE YONG CIEH, BEYOND DATA PROTECTION: STRATEGIC CASE STUDIES AND PRACTICAL GUIDANCE—PERSONAL DATA PROTECTION AND

rules to encourage and stabilize e-commerce growth. However, neither the APEC nor ASEAN have established any legitimate measures to keep their respective nations accountable for passing or enforcing domestic data protection laws.

C. *The United States*

The United States (U.S.) has resisted the global trend toward comprehensive data protection.<sup>74</sup> Some domestic data protection bills have been proposed, but none have garnered the requisite legislative support to become law.<sup>75</sup> Instead, the U.S. data-protection scheme uses a sectoral<sup>76</sup> model that relies on the self-regulation of industries and individual businesses.<sup>77</sup> The U.S. data protection structure has created problems domestically and internationally.

The fragmented U.S. data protection structure fails to protect its citizens' personal information.<sup>78</sup> Simply put, data subjects' breach of privacy claims are repeatedly dismissed because the claims fail to violate the limited industry-specific sectoral laws. For example, a U.S. District Judge dismissed a class action lawsuit against Facebook for "secretly tracking the Internet activity of its users after they log off" because the Court found that subscribers didn't specify how they were harmed or what law Facebook had violated.<sup>79</sup> Data controllers in the U.S. make a practice of privately storing a mass

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PRIVACY LAW IN MALAYSIA 14 (Noriswadi Ismail, Edwin Lee Yong Cieh, eds., 2012).

<sup>74</sup> See generally Ryan Moshell, . . . and Then There Was One: The Outlook for A Self-Regulatory United States Amidst A Global Trend Toward Comprehensive Data Protection, 37 TEX. TECH L. REV. 357 (2005).

<sup>75</sup> *Id.* at 367 (Describing the self-regulatory model as "companies and industry bodies establish[ing] governance through codes and self-policing.").

<sup>76</sup> *Id.* (Describing the sectoral model as involving "no general laws; rather, it only targets those specific industries shown to be a threat to data privacy.").

<sup>77</sup> Anna E. Shimanek, *Do You Want Milk With Those Cookies?: Complying With the Safe Harbor Privacy Principles*, 26 J. CORP. L. 455, 472 (2001).

<sup>78</sup> Moshell, *supra* note 74, at 373.

<sup>79</sup> Joel Rosenblatt and Robert Burnson, *Facebook Wins Dismissal of \$15 Billion Users' Privacy Suit*, BLOOMBERG BUSINESS (Oct. 24, 2015, 2:35 AM), <http://www.bloomberg.com/news/articles/2015-10-24/facebook-wins-dismissal-of-15-billion-users-privacy-suit>; *but see*, *In re Linked In User Privacy Litig.*, 932 F. Supp. 2d 1089 (N.D. Cal. 2013) (explaining that the plaintiffs survived Linked In's motion to dismiss for lack of standing after the plaintiffs argued that they

amount of individuals' personal or sensitive data because the state's sectoral approach is too limited in scope to provide victims a cause of action and the U.S. Constitution lacks a provision that grants an explicit right to privacy generally.<sup>80</sup>

The U.S. data protection structure is becoming an obstacle for U.S. corporations conducting business with countries whose data protection laws regulate the transborder processing of data. In 2000, the EU approved the "safe harbor" framework, which allowed "certified multinationals to pass data between the EU and the United States without interruption or the risk of prosecution under European data protection laws."<sup>81</sup> However, the European Court of Justice's ruling in *Schrems v. Data Protection Authority* invalidated the US-EU Safe Harbor agreement.<sup>82</sup> The ruling nullified the safe harbor agreement, which more than 5,000 U.S. companies rely on to handle European customers' personal data.<sup>83</sup> EU privacy regulators have set a grace period through January 2016, at which time the EU and US authorities will try to negotiate a more protective agreement.<sup>84</sup>

#### D. Latin America

With the exception of the limited *habeas data* provisions, Latin America States had not adopted any data protection regulations until 1999.<sup>85</sup> The American Convention was adopted in 1969 at the Inter-American Specialized Conference on Human Rights in San José,

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relied on company's promise of surety when they paid for premium memberships).

<sup>80</sup> Jonathan P. Cody, *Protecting Privacy Over the Internet: Has the Time Come to Abandon Self-Regulation?*, 48 CATH. U. L. REV. 1183, 1193 (1999).

<sup>81</sup> Annette M. Schüller, et al., *Doing Business in the European Union: An Overview of Common Legal Issues*, COLO. LAW REV. 9, 19 (2002); see also Amy P. Monahan, *Deconstructing Information Walls: The Impact of the European Data Directive on U.S. Businesses*, 29 LAW & POL'Y INT'L BUS. 275, 288 (1998).

<sup>82</sup> Kelli Clark, *The EU Safe Harbor Agreement Is Dead, Here's What To Do About It*, FORBES BUSINESS (Oct. 27, 2015, 3:30 PM), <http://www.forbes.com/sites/riskmap/2015/10/27/the-eu-safe-harbor-agreement-is-dead-heres-what-to-do-about-it/#62c3674d7171>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Greenleaf, *supra* note 56, at 9 (stating that Chile first passed a domestic data protection law in 1999).

Costa Rica.<sup>86</sup> A decade later, the Organization of American States (“OAS”)<sup>87</sup> established the IACtHR, which was created to enforce and interpret the American Convention.<sup>88</sup> The Inter-American Commission of Human Rights (“IACHR”), which acts as an intermediary between the alleged victims and the Member States, was founded the same year to supplement the IACtHR with the human rights protection branch of the OAS.<sup>89</sup>

The IACtHR is structurally comparable to the ECtHR with both operating as the regional human right courts of their respective regions. However, the two entities have played different roles in interpreting and enforcing their respective human right conventions.<sup>90</sup> In the more than 35 years since its assembly, the IACtHR has produced a relatively limited and restricted jurisprudence. This is, in part, because the American Convention was adopted at a time when the region was plagued by political instability, violence, and economic turmoil.<sup>91</sup> Therefore, petitioners alleging Member State violations of first generation human rights have filled the IACtHR’s docket. For example, Mexico, one of the more politically and economically stable countries in the region, is currently being investigated by the IACHR for the forced disappearance of 43 Ayotzinapa students that went missing last year.<sup>92</sup> Additionally, the IACtHR has rendered

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<sup>86</sup> See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

<sup>87</sup> The OAS is a regional organization open to states across the Americas. The OAS has 35 Member States. See Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, as amended by Protocol of Amendment to the Charter of the Organization of American States (“Protocol of Buenos Aires”), Feb. 27, 1967, 721 U.N.T.S. 324, as amended by Protocol of Amendment to the Charter of the Organization of American States (“Protocol of Cartagena de Indias”), Dec. 5, 1985, 25 I.L.M. 529 (1986) [hereinafter OAS Charter].

<sup>88</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS, I/A COURT HISTORY (2015), <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh>.

<sup>89</sup> Charter of the Organization of American States (1948) (as amended by the Protocol of Buenos Aires 1967, Protocol of Cartagena de Indias 1985, Protocol of Washington 1992, Protocol of Managua 1993) ch. XV, art. 106.

<sup>90</sup> See generally SCOTT DAVIDSON, INTER-AMERICAN HUMAN RIGHTS SYSTEM 259, 259 (1997).

<sup>91</sup> *Id.* at 259.

<sup>92</sup> Joshua Partlow, *Mexico’s account of how 43 students disappeared is wrong*, THE WASHINGTON POST (Sept. 6, 2015), [https://www.washingtonpost.com/world/the\\_americas/mexicos-account-of-how-43-students-disappeared-is-](https://www.washingtonpost.com/world/the_americas/mexicos-account-of-how-43-students-disappeared-is-)

less than a quarter of the judgments of its European counterpart, in part, because the IACtHR has the smallest budget of any international court and has limited personnel.<sup>93</sup> Accordingly, the IACtHR has produced relatively limited legal analysis regarding the Convention's individual Articles because the Court has focused on the "questions of fact and proof of fact" regarding the human right violations, instead of analyzing the scope of the Convention's standards and its interpretation in the face of technological developments.<sup>94</sup>

The IACtHR has not sufficiently developed the scope of the American Convention to incorporate the concept of data protection. Article 11—right to privacy of the American Convention, mirrors Article 8—right to privacy of the European Convention.<sup>95</sup> The plain language written in the text of Article 11 stipulates the same protections, such as the right to private life, which are listed in Article 8 of the European Convention. Furthermore, Article 11 extends even further than Article 8 to include the protection against "unlawful attacks on [an individual's] honor or reputation."<sup>96</sup>

The IACtHR's jurisprudence addressing Article 11 right to privacy is more developed than the majority of the Convention's other human rights because of the volume of cases that the Court has heard on the subject.<sup>97</sup> Even so, the Court's past decisions on the right to privacy focus, like the early decision of the ECtHR, on preventing violations of physical intrusions of privacy.<sup>98</sup> The IACtHR has only

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wrong-new-report-says/2015/09/06/26a4a7be-5443-11e5-b225-90edbd49f362\_story.html.

<sup>93</sup> Diego García-Sayán, *The Role of the Inter-American Court of Human Rights in the Americas*, 19 U.C. DAVIS J. INT'L L. & POL'Y 103, 105 (2012).

<sup>94</sup> Davidson, *supra* note 90, at 260.

<sup>95</sup> American Convention, *supra* note 86, at arts. 8 & 11.

<sup>96</sup> *Id.* at art. 11 (stating "(1) Everyone has the right to have his honor respected and his dignity recognized. (2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. (3) Everyone has the right to the protection of the law against such interference or attacks.").

<sup>97</sup> See e.g., *García Asto and Ramírez Rojas v. Peru*, IA Ct. H.R. (2005); *Gomes Lund et al. v. Brazil*, IA Ct. H.R. (2010); *Kimel v. Argentina*, IA Ct. H.R. (2008); *Moiwana Community v. Suriname*, IA Ct. H.R. (2005).

<sup>98</sup> See LEE A. BYGRAVE, *DATA PROTECTION LAW: APPROACHING ITS RATIONALE, LOGIC AND LIMITS* Ch. 7. (2002).

addressed informational privacy in a limited capacity, which limited relation to data protection.<sup>99</sup>

Many Latin American countries have protected, in a limited capacity, personal information with the advent of the concept of *habeas data*, which, “derives from due-process doctrine based on the writ of *habeas corpus*.”<sup>100</sup> Specifically, *habeas data* translates from Latin to the idea “that you [the data subject] have the data,” and hinges on one’s right to control the information stored and revealed about him.<sup>101</sup> The right of *habeas data* was first established in Brazil’s 1988 Constitution,<sup>102</sup> and the right can now be found in some form in the majority of Latin American countries’ constitutions.<sup>103</sup> The inclusion of *habeas data* protections across the region coincided with the passage of new or reformed constitutions, in the 1980s and 1990s, which was the same time when data protection was popularized through Convention 108 and Directive 95/46/EC in Europe.<sup>104</sup>

While some Latin American countries still rely solely on a *habeas data* clause to protect personal data, other States have been more active in an effort to better regulate personal data. In recent years, some Latin American states have followed the European ap-

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<sup>99</sup> See e.g., *Escher et al. v. Brazil*, IA Ct. H.R. (2009) (holding that the state violated Article 11 when it applied unjustified wire-tapping as well as when it conducted warrantless searches of a petitioner’s home).

<sup>100</sup> Lee A. Bygrave, *Privacy and Data Protection in an International Perspective*, STOCKHOLM INSTITUTE FOR SCANDINAVIAN LAW 166, 169, (2010), <http://www.uio.no/studier/emner/jus/jus/JUR5630/v11/undervisningsmateriale/Privacy%20and%20Data%20Protection%20in%20International%20Perspective.pdf>.

<sup>101</sup> See Andres Guadamuz, *Habeas Data: The Latin American Response to Data Protection*, 2 THE JOURNAL OF INFORMATION, LAW AND TECHNOLOGY (2000), [www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000\\_2/guadamuz](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/guadamuz).

<sup>102</sup> Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009, 1021 (2011).

<sup>103</sup> White & Case, *From Habeas Data Action to Omnibus Data Protection: The Latin American Privacy Revolution*, 19 no. 9 LAT. AM. L. & BUS. REP. (2011), <http://www.whitecase.com/publications/article/habeas-data-action-omnibus-data-protection-latin-american-privacy-revolution> (listing Latin American countries with the right of *habeas data* as including Argentina, Brazil, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Honduras, Mexico, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela).

<sup>104</sup> See e.g., *id.* (listing Brazil, Colombia, Paraguay, Bolivia, Ecuador, and Venezuela).

proach by passing domestic legislation that parallels the data protection principles introduced by the relevant EU directives.<sup>105</sup> Argentina and Uruguay have gone so far as to petition the EU to evaluate their domestic laws as a requisite element for succession to Convention 108.<sup>106</sup> Other countries in the region, such as Mexico and Colombia, have passed data protection laws that would arguably meet the accession standard.<sup>107</sup> The majority of Latin America countries have participated in the ever-rapid global trend toward data protection regulation.<sup>108</sup> However, less than half of the members of the OAS have implemented a comprehensive data protection law.<sup>109</sup> Specifically, many of the region's domestic data protection laws only apply to the public or private sectors individually, and others have data protection laws, but fail to establish a Data Protection Authority ("DPA") to enforce it.<sup>110</sup>

The IACHR's conduct over the last fifteen years has been instrumental in creating an atmosphere where the states in the region have already been informed on issues surrounding data protection. The Inter-American Commission dealt with the issue of *habeas data* indirectly through its establishment of the OAS Office of the Special Rapporteur for Freedom of Expression ("Special Rapporteur") in 1998.<sup>111</sup> The Special Rapporteur operates within the juridical framework of the IACHR and is tasked with increasing awareness and observance of the freedom of expression across the Americas.<sup>112</sup> The IACHR, in reference to a report published by the Special Rapporteur, describes a *habeas data* action as "the right of any individual to have access to information referring to him and to modify,

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<sup>105</sup> Tobón, *supra* note 5, at 6.

<sup>106</sup> American Convention, *supra* note 86, at art. 23.

<sup>107</sup> Tobón, *supra* note 5, at 6.

<sup>108</sup> See generally DLA PIPER, *supra* note 5.

<sup>109</sup> *Id.*

<sup>110</sup> See generally Graham Greenleaf, *The influence of European data privacy standards outside Europe: implications for globalization of Convention 108* 2 INT'L DATA PRIVACY L., 68 (2012).

<sup>111</sup> ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132>.

<sup>112</sup> Santiago A. Canton, *The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas*, 56 U. MIAMI L. REV. 307, 309 (2002); Claudio Grossman, *Freedom of Expression in the Inter-American System for the Protection of Human Rights*, 7 ILSA J. INT'L & COMP. L. 411, 419 (2001).

remove, or correct such information, when necessary.”<sup>113</sup> The Commission continues by supporting the Special Rapporteur’s conclusion that a *habeas data* action is based on three premises:

- 1) the right of any individual to not have his privacy disturbed; 2) the right of any individual to access information referring to him in public or private databases, and to modify, remove, or correct information if it is sensitive, false, biased, or discriminatory; and 3) and the right of any individual to use the action of *habeas data* as an oversight mechanism.<sup>114</sup>

Furthermore, the IACHR has written guidelines advising states across the region not to arbitrarily interfere with its citizens’ personal data and to prohibit other private actors from the same abusive conduct.<sup>115</sup> In its 2013 report, the Special Rapporteur called for individual legislatures to respect international human rights obligations pursuant to the Internet and privacy.<sup>116</sup> Although the IACtHR has not addressed the protection of a person’s data through its case law, it has permitted *habeas data* actions. Petitioners have brought “the action of *habeas data* remedy” to investigate past human right violations by past or current governments in an attempt to discover information, such as the final resting place of relatives that had disappeared by past governmental regimes.<sup>117</sup>

### SECTION III. LATIN AMERICAN HAS A DATA PROTECTION GAP

The IACtHR should enforce a minimum data protection standard across the region. It must take action because a number of countries in the region have failed to pass comprehensive data protection

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<sup>113</sup> IACHR, REPORT ON THE SITUATION OF HUMAN RIGHTS DEFENDERS IN THE AMERICAS, OEA/Ser.L/V/II.124, ¶ 87 (2006), available at <http://www.cidh.org/countryrep/Defenders/defenderstoc.htm>.

<sup>114</sup> *Id.* at ¶ 89.

<sup>115</sup> *See id.*; see also Canton, *supra* note 112, at 312-13.

<sup>116</sup> *See* Inter-Am. C.H.R., Report of the Office of the Special Rapporteur for Freedom of Expression 477-530 (2013).

<sup>117</sup> Brian Farrell, *The Right to Habeas Corpus in the Inter-American Human Rights System*, 33 SUFFOLK TRANSNAT’L L. REV. 197, 199 (2010).

laws and some of the countries that have data protection laws fail to enforce them adequately.

*A. Not All Latin American States Have Adequate Data Protection Regulations*

While a number of Latin American countries, such as Bolivia, Ecuador, El Salvador, Honduras, and Venezuela, have failed to pass comprehensive data protection laws,<sup>118</sup> most Latin American countries afford their citizens the right of privacy in some form.<sup>119</sup> However, this conventional standard of privacy varies greatly from state to state because individual governments have interpreted the meaning of privacy in different historical and cultural contexts.<sup>120</sup> The antiquated privacy provisions fail to consider the modern issue of data protection, and both *habeas data* provisions and sector specific laws are too limited in scope to adequately protect individuals' personal data.<sup>121</sup>

1. Habeas Data

The majority of OAS States have a constitutional *habeas data* provision.<sup>122</sup> However, the right of *habeas data*, while progressive in the region when first introduced, falls short of providing sufficient personal data protection in the face of advancing technology.<sup>123</sup> For example, when a state relies solely on a *habeas data* construction to protect personal data, the system often does not (1) include a DPA; (2) address the topic of data transfers or sensitive data; (3) require database security measures; and (4) control the purpose or time personal information is stored.<sup>124</sup> Additionally, the *habeas data* remedy only applies after the damage has been done. Therefore, a *habeas data* provision serves only as a minimal protection of individual's

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<sup>118</sup> Tobón, *supra* note 5, at 6.

<sup>119</sup> COMPARATIVE STUDY, *supra* note 6, at 7.

<sup>120</sup> *See id.*

<sup>121</sup> *See id.* at 8.

<sup>122</sup> *See id.*; e.g., PARAGUAY [CONSTITUTION] 1992, art. 135, an English translation is available at [http://www.oefre.unibe.ch/law/icl/pa00000\\_.html](http://www.oefre.unibe.ch/law/icl/pa00000_.html); PERU [CONSTITUTION] 1993, art. 200, § 3, an English translation is available at [http://www.oefre.unibe.ch/law/icl/pa00000\\_.html](http://www.oefre.unibe.ch/law/icl/pa00000_.html).

<sup>123</sup> Maxim Gakh, Argentina's Protection of Personal Data: Initiation and Response, 2 I/S: J.L. & POL'Y FOR INFO. SOC'Y 781, 784 (2006).

<sup>124</sup> *Id.*

privacy and is immaterial in combating the violation of an individual's privacy through an abuse of his data privacy.

Argentina, as well as other Latin American countries, passed comprehensive personal data protection laws during the last two decades because of the limited protections *habeas data* provisions provide to their respective citizens.<sup>125</sup> It is unclear whether the recent data protection laws were passed in an effort to comply with the European system or if the legislative action was motivated by human rights. As more states adopt domestic data protection laws, the international community should pay particular attention to the states' self-regulation enforcement mechanisms.

## 2. Industry Specific Data Regulations

There are no industry specific laws in Latin America that adequately protect personal data. For example, elements of consumer protection laws overlap with data protection laws, but the consumer protection laws are too limited in scope to fulfill the data protection laws' purpose.<sup>126</sup> First, a consumer protection law, as denoted by its name, does not protect non-consumers. For example, it does not protect against a company's mismanagement of employee personal information nor does it regulate mega data stored by government entities. A consumer protection law may be used in a case of identity theft, but the consumer protection regulations do not provide a consumer with a claim against a company that stores his information in a database that makes him more susceptible to identity theft. Any state that was to expand the scope of its consumer protection law would not resolve the current state-to-state standard that lacks harmonization.<sup>127</sup>

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<sup>125</sup> See *id.* at 787; see generally DLA PIPER, *supra* note 5 (explaining the comprehensive data protection laws passed by Mexico, Peru and Costa Rica and other Latin American countries).

<sup>126</sup> See Robert G. Vaughn, *Consumer Protection Laws in South America*, 17 HASTINGS INT'L & COMP. L. REV. 275, 278 (1994).

<sup>127</sup> Robert Kossick, *The Internet in Latin America: New Opportunities, Developments, & Challenges*, 16 AM. U. INT'L L. REV. 1309, 1338 (2001).

*B. Latin American States Have a Reputation of Failing to Enforce Domestic Data Protection Laws*

The IACtHR should establish a minimum data protection standard in order to minimize the damage a victim would face if a State fails to enforce a violation of its domestic data protection regulations. The overlapping jurisdiction would provide victims with a second line of defense by an independent forum, which would allow victims to seek redress for violations that the State fails to enforce.

Many countries in Latin America, whether warranted or not, have a poor reputation of applying domestic laws indiscriminately throughout society or enforcing the laws at all.<sup>128</sup> Whether referring to the divide between “legal theory and judicial administration”<sup>129</sup> or analyzing the issue in terms of the symbolic versus operative value of the law,<sup>130</sup> the rift between the laws on the books and the states’ enforcement of those laws has been well documented throughout the region’s history.<sup>131</sup>

It is relevant to question how resilient Latin American governments will be in enforcing their newly adopted data protection laws. It is particularly appropriate to question a state like Chile, which

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<sup>128</sup> See Keith S. Rosenn, *Brazil’s Legal Culture: The Jeito Revisited*, 1 FLA. INT’L L.J. 1, 2-5 (1984) (illustrating the gap between law and society, as evidenced by the jeito, a Brazilian way of “coping with the formal legal system” by bending or bypassing law in widely established and culturally acceptable ways).

<sup>129</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15-18 (1910).

<sup>130</sup> Rogério Pires da Silva, *Protection of Personal Data in Brazil and the Provisions of Brazil’s New Internet Law*, 44 no. 2 ABA INT’L LAW NEWS 9, 10 (2015) (addressing the limited impact of Brazil’s new Internet law in light of the black market trading of individual’s personal data by corporations and government members alike).

<sup>131</sup> KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK 58 (1975) (arguing that disparity regarding the application of the domestic laws is rooted in various “historical and cultural factors” such as “idealism, paternalism, legalism, formalism, and lack of penetration.”); see also John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT’L L. J. 50, 54-60 (1996) (describing the conflict between the rules that govern the informal sector and the official legal system in Latin America, especially the fact that the formal system that serves elite interests leading most Latin Americans to ignore it).

passed a data protection law, but has failed to establish a Data Protection Act (“DPA”) to enforce the standards set out in the law.<sup>132</sup> While individuals may be able to bring a domestic cause of action in certain instances, it serves little practical function without a DPA regulating the enforcement of the law. Specifically, individuals are often unaware when their information is being used or stored by a corporation, especially when the data is moving between companies and over domestic borders.<sup>133</sup> Moreover, the limited burden a consumer’s individual suit would cause a large corporation or government entity is unlikely to deter the prohibited conduct and the potential damages would not justify a victim’s litigation costs.

There are two prevalent arguments that require further analysis. First, some argue that the notion of Latin America having an enforcement issue is outdated.<sup>134</sup> This theory is based on the idea that Latin American countries have taken action to address the gap between state law and social practice.<sup>135</sup> Specifically, states are said to have employed legal reforms, increased legal education, and improved the examination of values and actors within the informal sector in order to develop strategies to increase the enforcement of all laws.<sup>136</sup> While it is undisputed that a number of Latin American countries have improved the enforcement of their respective data protection laws over the last few decades, there remains a discernable enforcement gap in a number of Latin American countries.<sup>137</sup> Most Latin American countries have entered into an intellectual property treaty or a free trade agreement that include intellectual property protections. However, a number of those countries have not been diligent in enforcing those agreements because intellectual property is a modern right that those countries do not have a tradition of protecting.<sup>138</sup> For example, Mexico has passed a number of copyright laws dating back to 1997; however it continues to do a poor

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<sup>132</sup> Greenleaf, *supra* note 110, at 70.

<sup>133</sup> EUROPEAN DATA PROTECTION SUPERVISOR, *supra* note 12, at 35.

<sup>134</sup> Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 53-59 (2003).

<sup>135</sup> *Id.* at 54.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 56.

<sup>138</sup> David Switzer & Danny G. Pérez y Soto, *The State of Intellectual Property in Latin America: Legal Trends, Economic Development and Trade*, B&R LATIN AMERICA IP 1, 14 (2012).

job of enforcing the laws.<sup>139</sup> Although the purpose of the Mexican Federal Law on Copyright is to protect intellectual property in all forms, the state has failed to consistently enforce these provisions in practice.<sup>140</sup> The Mexican markets are saturated with unlicensed knockoff products, and 25% of pharmaceutical products sold in Mexico are counterfeit.<sup>141</sup> Even if the Mexican government intends to enforce these laws, issues of enforcement still arise in cases where the government makes a good-faith effort due to inadequate training and resources for the enforcement of the law and corruption in the administrative and judicial arenas.<sup>142</sup> Claims that the issue of enforcement is no longer a peril of Latin American states legal systems fail to disprove the overwhelming evidence to the contrary.<sup>143</sup> Latin American countries may fail to enforce the modern privacy protection laws since the laws relate to a modern right and those countries have a weak track record of enforcing laws relating to modern rights.

Second, academics claim that the enforcement critique is misleading because it fails to consider that “the gap between law and action is axiomatically ever present [and while it is true that] some rules [are] more closely followed than others, a full society-wide measure is quite impossible, and fair comparisons are elusive.”<sup>144</sup> This argument is not flawed, but the line of reasoning reinforces the argument for spreading the burden of enforcement to the IACtHR. The lack of a statistical analysis regarding the specific enforcement deficiencies based on individual states and their respective laws

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<sup>139</sup> See generally Mexico Federal Law on Copyright, Mar. 24, 1997, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128791](http://www.wipo.int/wipolex/en/text.jsp?file_id=128791) (An English translation of Mexico's *Ley Federal del Derecho de Autor*).

<sup>140</sup> Michael C. McClintock, *Sunrise Mexico; Sunset Nafta-Centric Ftaa-What Next and Why?*, 7 SW. J. L. & TRADE AM. 1, 48-50 (2000) (discussing the status of IP law in Latin America).

<sup>141</sup> Merri C. Moken, *Fake Pharmaceuticals: How They and Relevant Legislation or Lack Thereof Contribute to Consistently High and Increasing Drug Prices*, 29 AM. J.L. & MED. 525, 530 (2003).

<sup>142</sup> See McClintock, *supra* note 140, at 94.

<sup>143</sup> Mark Greenberg, *Recent Developments in Latin American Intellectual Property Law: The Venezuelan Response to Andean Pact Decision 313*, 25 U. MIAMI INTER-AM. L. REV. 131, 153 (1993) (claiming that Venezuela has only enforced three of the fifty thousand patents registered over a timespan of nearly forty years).

<sup>144</sup> Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 no. 4 AM. U. INT'L L. REV. 1031, 1057 (2011).

does not disprove the enforcement gap, but merely introduces the need for states to pay more attention to documenting and solving their enforcement failings. Whether or not it is reasonable to expect a state to completely eradicate the enforcement gap does not change a state's obligations under the American Convention.

The progress that some Latin American states have made in the area of enforcing legislation is commendable, but the majority of countries in the region will need to do more to reverse the longstanding belief that Latin America states fail to adequately enforce their respective laws. A victim is unlikely to bring a claim when he believes that the state will not fulfill its obligation to enforce the law.<sup>145</sup>

#### SECTION IV: A MINIMUM DATA PROTECTION STANDARD WOULD BENEFIT THE ECONOMY

A minimum data protection standard applied across Latin America would benefit both individual Latin American countries' and the global economy. Conversely, the region's failure to establish a harmonized data protection standard has resulted in a decreased economic viability as other regions continue to develop and modernize.

A universal adoption of a minimum data protection standard would, pursuant to the principle of free trade and the direct boost the European relations would have on Latin America, create a more conducive environment for international companies interested in conducting business in Latin America. Issues surrounding data protection have become a central consideration for corporations' compliance and risk management departments.<sup>146</sup> Some transnational businesses are concerned with the patchwork of data protection laws throughout Latin America because it causes uncertainty regarding

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<sup>145</sup> See e.g., Mariana Hernández Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 CARDOZO J. CONFLICT RESOL. 91, 92-97 (2008) (arguing that, although Latin American law purports to protect citizens, neither courts nor alternative dispute resolution enforce these laws effectively, and concluding that participatory law-making is essential to strengthening dispute resolution systems in Latin America).

<sup>146</sup> Raphaël Gellert, *Understanding Data Protection As Risk Regulation*, 18 J. INTERNET L. 3 (2015).

the law controlling the outsourced data.<sup>147</sup> Furthermore, a conscientious corporation may bear added legal costs aimed at avoiding state imposed civil and criminal penalties.<sup>148</sup> Accordingly, the failure to establish a coordinated data protection legal infrastructure serves as an obstacle to cross-border trade and investment.<sup>149</sup>

International organizations have illustrated the economic principles that support the adoption of widespread data protection laws. APEC has invested substantial time and resources in an attempt to create a harmonized data protection system among its Member States in support of its mantra of providing a “forum for facilitating economic growth, cooperation, trade, and investment in the Asia-Pacific region.”<sup>150</sup> Additionally, the World Trade Organization (WTO) promotes the free trade among nations in an effort to foster increased global economic output of more efficient, economic, and innovative products.<sup>151</sup> A minimum data protection standard in Latin America would serve to further open the Latin American market consistent with the economic goals of the WTO. Therefore, a widely accepted data protection standard in Latin America would help create a stable environment for economic opportunities and growth.

However, corporations in states that have not passed comprehensive data protection laws may advocate for a free market approach instead of a government-regulated system. Specifically,

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<sup>147</sup> Catherine L. Mann, *Balancing Issues and Overlapping Jurisdictions in the Global Electronic Marketplace: The UCITA Example*, 8 WASH. U. J. L. & POL'Y 215 (2002) (arguing that the policymakers' response to overlapping jurisdictions regarding the protection personal information “will materially affect whether individuals, firms, countries, and the world as a whole will benefit from the wealth of information and the possibilities of network externalities offered by the global Internet marketplace.”).

<sup>148</sup> Tobón, *supra* note 5, at 8.

<sup>149</sup> Juan M. Alcalá, *Transnational Disputes in A Global Economy*, 75 TEX. B.J. 512 (2012); Connolly, *A new regional approach to privacy in ASEAN*, GALEXIA (Oct. 2008), [http://www.galexia.com/public/research/articles/research\\_articles-art55.html](http://www.galexia.com/public/research/articles/research_articles-art55.html).

<sup>150</sup> APEC HOMEPAGE, [http://www.chinaapec.org/en/about\\_apec/](http://www.chinaapec.org/en/about_apec/) (last visited Nov. 18, 2015).

<sup>151</sup> WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_stand\\_for\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm) (last visited Nov. 18, 2015) (comprised of 159 Member Nations that account for 97 percent of global trade).

businesses may complain of increased costs of compliance, transaction, operating, and opportunity costs of conforming to a data protection regulatory scheme. Economic principles may even indicate that these costs are likely to be passed along to consumers.<sup>152</sup>

Nevertheless, the direct increase in European business investment alone would likely outweigh any negligible costs passed on to consumers. Experts project that more adequate data protection laws across Latin America may translate to more business flowing from Europe to those countries.<sup>153</sup> For example, European countries keep their call centers and data centers within Europe due to the stringent cross-border regulations of personal data.<sup>154</sup> However, the passage of adequate laws in another region like Latin America, with lower wages and operating costs, would appeal to those private and public entities that would see gains from outsourcing data related jobs. Colombia recently passed a comprehensive data protection law replicating the European adequacy requirements.<sup>155</sup> The law was designed especially to pass the adequacy standard required by Convention 108 and is expected to improve the country's economic potential.<sup>156</sup> Latin American countries would not only profit directly from European and other international investors, but would also benefit from the technological updates that would likely follow the adoption of data protection laws across Latin America.

A country's update to modern technological products produces improved productivity and efficiency nationally, which stimulates economic growth and may lead to an improved standard of living for the countries' respective citizens.<sup>157</sup> For example, products like

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<sup>152</sup> Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 9 (2000).

<sup>153</sup> Norberto Gaona, *LATAM Exporters Begin to Capitalize on Stronger Tools, Better Policies and Greater Access to Data*, NEARSHORE AMERICAS, <http://www.nearshoreamericas.com/ales-strengthening-latin-americas-exportation-global-services/> (last visited Nov. 18, 2015).

<sup>154</sup> John Tagliabue, *Eastern Europe Becomes a Center for Outsourcing*, THE NEW YORK TIMES (Apr. 19, 2007).

<sup>155</sup> Gaona, *supra* note 153.

<sup>156</sup> See Alejandro Ciero, *Latin America and the Right of Privacy in the Internet*, INT'L L. PRACTICUM, 33 (2001).

<sup>157</sup> Horacio E. Gutiérrez & Daniel Korn, *Facilitando the Cloud: Data Protection Regulation As A Driver of National Competitiveness in Latin America*, 45 U. MIAMI INTER-AM. L. REV. 33, 34 (2013) (Discussing the economic benefits of the

the cloud services are advertised to provide consumers with reduced capital costs, improved flexibility, streamline processes, and improved accessibility.<sup>158</sup> Specifically, the global market for cloud services is projected to amass more than \$241 billion by 2020.<sup>159</sup> Internet-based companies, like MercadoLibre<sup>160</sup> and Facebook, have experienced widespread success across the region with the increased use of modern technology in Latin America over the last decade.<sup>161</sup> Two out of three Latin Americans are now online, and they represent potential consumers and innovators, owners, and employees of tech-based companies. However, widespread use of modern tech products requires consumer confidence.<sup>162</sup> In short, a harmonized data protection standard would likely increase economic growth across the region by increasing opportunities in the multi-billion-dollar tech industry and increasing consumer confidence in new technological products.<sup>163</sup>

While the scope and length of this article discourages any further discussion of economics, future work may consider the choice that Latin American legislatures may face regarding the dilemma of whether to pass more strict and expansive data protection legislation in an attempt to entice investment from European corporations, or to either not pass a data protection law or to pass a narrow law to encourage U.S. investment.<sup>164</sup> If the IACtHR fails to create minimum data protections, the limited U.S. companies could conceivably entice Latin American countries to remove data protection laws or limit the scope of the laws, in essence creating a race to the least restrictive data protection regulations.

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cloud, such as job creation, cost savings, democratization of computing and social inclusion, increased agility, and security).

<sup>158</sup> *Id.* at 39-45.

<sup>159</sup> Paul M. Schwartz, *Information Privacy in the Cloud*, 161 U. PA. L. REV. 1623, 1627 (2013) (predicting that the global market for cloud services will amass \$241 billion by 2020).

<sup>160</sup> MercadoLibre is the largest e-commerce ecosystem in Latin America, *see Overview*, MERCADOLIBRE, <http://investor.mercadolibre.com/>.

<sup>161</sup> Americas Society/Council of the Americas, Infographics: Internet Access in Latin America, <http://www.as-coa.org/articles/infographics-internet-access-lat-in-america> (last visited Nov. 18, 2015).

<sup>162</sup> Gutiérrez, *supra* note 157, at 35.

<sup>163</sup> *Id.* at 34.

<sup>164</sup> Gaona, *supra* note 153.

## SECTION V: THERE ARE NO VIABLE ALTERNATIVES

The use of the IACtHR is the best forum to immediately implement a minimum data protection standard across Latin America. The IACtHR is the only forum that enjoys contentious jurisdiction over the majority of Latin American states and wields substantial influence, even if only through political pressure, across the region as a whole.<sup>165</sup> The influence of the IACtHR extends past the 20 States currently subject to the IACtHR's jurisdiction to the other 15 OAS Member States.<sup>166</sup> While some alternatives may seem viable upon first glance, systematic flaws surface upon further review. There are two alternatives that justify a brief analysis.

First, some encourage a wait-and-see approach because the European influence throughout Latin America has already proved important in motivating domestic data protection regulations and will likely continue.<sup>167</sup> Furthermore, five Latin American countries—Argentina, Uruguay, Mexico, Peru and Costa Rica—have already passed comprehensive data protection laws modeled after the EU system.<sup>168</sup> These countries account for an estimated 185 million people, which is a third of the total population of the region.<sup>169</sup> However, the purpose of the IACtHR is to require all states, not a mere majority of states, to comply with the human rights listed in the American Convention.

While the European data protection system may be the gold standard for governments looking to pass data protection legislation, not all Latin American countries have shown an interest in passing a European-style data protection law.<sup>170</sup> The potential gains associated with passing adequate data protection laws pursuant to the European standard, such as open data channels with Europe, have not been enough to motivate those Latin American countries that have

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<sup>165</sup> See *Inter-American Human Rights System*, INTERNATIONAL JUSTICE RESOURCE CENTER, <http://www.ijrcenter.org/regional/inter-american-system/> (last visited Nov. 18, 2015).

<sup>166</sup> *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Nov. 18, 2015).

<sup>167</sup> See generally Greenleaf, *supra* note 110.

<sup>168</sup> Tobón, *supra* note 5, at 4-6.

<sup>169</sup> White & Case, *supra* note 103.

<sup>170</sup> See generally, DLA PIPER, *supra* note 5.

yet to pass data protection laws.<sup>171</sup> Under the current structure, each of those Latin American countries has the autonomy to choose not to adopt a data protection law. There is reason to believe that some of these countries will not voluntarily adopt a data protection standard because of the protectionist economic policies engrained in a region's history.<sup>172</sup> Extensive harmonization of the European data protection standard, or any external standard, is extremely unlikely to occur in the near future, in part, because of the cultural differences between regions.<sup>173</sup>

Countries enjoy the autonomy to pass laws consistent with both the ideological and cultural principles that have been ingrained into the particular state throughout its history and are unlikely to waive that right without a clear motive. For example, Section II of this Note illustrates how the European data protection foundation arose subsequent to the privacy violations that occurred during World War II. In contrast, Latin America, with the historical prevalence of non-democratic regimes, developed the concept of habeas data to promote free flow of communication, which is said to promote democracy.<sup>174</sup> While there are also divides between individual countries within the same region, it is logical, for purposes of this limited example, to characterize the regions as distinct collective units.

The second alternative is to pass a regional data protection convention in Latin America. While this may seem like the ideal solution, the current environment in Latin America gives little reason for optimism regarding a regional data protection convention. A Latin American data protection convention would require widespread participation by the OAS Members. While the OAS was relatively active in entering into a number of conventions and bilateral agreements in the 1970's and 80's, the OAS has entered into only five

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<sup>171</sup> *Id.*

<sup>172</sup> Maria Fernanda Mierez, *Overarching Issues Involving Corporate Law in Latin America*, in *CORPORATE LAW CLIENT STRATEGIES IN LATIN AMERICA*, 77-78 (Thomson Reuters/Aspatore, 2015).

<sup>173</sup> See, e.g., Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 *STAN. L. REV.* 1315, 1370 (2000) (analyzing the problems of achieving international harmonization on data protection issues).

<sup>174</sup> ANUPAM CHANDER ET AL., *SECURING PRIVACY IN THE INTERNET AGE* 95 (2008) ("privacy questions seem to touch closer to the nation's psyche, and even culturally similar nationals differ profoundly over what they consider adequate in the regulation of privacy").

conventions since 2002.<sup>175</sup> However, one may look to the recent signing of the Convention on Protecting the Human Rights of Older Persons in an attempt to prove Latin American States' restored willingness for regional cooperation.<sup>176</sup> However, it is premature, with only five signatories, to declare the Human Rights of Older Persons Convention a success.<sup>177</sup> The natural inclination to give recent events more weight than the holistic view is problematic because it distorts the importance of the full overarching view. Therefore, time is the only absolute indicator of whether this Convention will see widespread adoption and spur further action by the Member States in the near future.

A sub-regional multi-state group like the Mercosur<sup>178</sup> would have a greater probability of successfully passing a data protection convention. The Mercosur States share geographical borders, close cultural similarities, and have historically agreed to conduct that enhances the economic prosperity of the region through free trade.<sup>179</sup> Even though the bloc only includes five states, the protection of the more than 260 million people in those states would be an achievement in itself. Additionally, any data protection convention among the Mercosur states may even inspire the five Associate Member States to take action.

However, current conflicts within the trade bloc may hamper any immediate action. Specifically, the bloc's future viability has been questioned in consideration of (1) the 2012 suspension of Paraguay; (2) the Uruguayan-Argentinian conflict that led to Uruguay signing a Trade and Investment Framework Agreement with the

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<sup>175</sup> *Multilateral Treaties*, ORGANIZATION OF AMERICAN STATES, MULTILATERAL TREATIES, [http://www.oas.org/dil/treaties\\_year\\_text.htm#2015](http://www.oas.org/dil/treaties_year_text.htm#2015) (last visited Nov. 26, 2015).

<sup>176</sup> Inter-American Convention on Protecting the Human Rights of Older Persons, Signatories and Ratifications, [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-70\\_human\\_rights\\_older\\_persons\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp) (last visited Nov. 26, 2015).

<sup>177</sup> *Id.*

<sup>178</sup> The Mercosur is a block of 5 Member States (Argentina, Brazil, Venezuela, Paraguay, and Uruguay) that have focused primarily on issues of free trade and democracy. See generally Stephen P. Sorensen, *Open Regionalism or Old-Fashioned Protectionism? A Look at the Performance of Mercosur's Auto Industry*, 30 U. MIAMI INTER-AM. L. REV. 371 (1999).

<sup>179</sup> Laura Lavia Haidempergher, *An Introduction to Mercosur*, 44 no. 2 ABA INT'L LAW NEWS 31 (2015).

U.S.; (3) Venezuela calling for a transition from the bloc's economic emphasis to social issues; and (4) the continued trade disputes between Argentina and Brazil.<sup>180</sup>

The direct implications of Mercosur agreeing to a data protection standard would benefit the region, but fall short of creating a minimum data protection standard across the whole region. Furthermore, all Mercosur Members, with the exception of Venezuela, have already passed domestic data protection laws. While action by the Union of South American Nations (USAN) would have a more far-reaching impact, the dilemma of widespread adoption, which the OAS historically struggles with, would have to be considered. A regional convention may become a realistic option in the future, but it is unlikely to succeed at present.

#### SECTION VI: JURISDICTION OF THE COURT

The American Convention provides the IACtHR with tools to enforce a minimum data protection standard across Latin America. However, the IACtHR must be careful to act only within its express authority when interpreting and enforcing the American Convention. The IACtHR enjoys both adjudicatory and advisory jurisdiction.<sup>181</sup>

##### A. *Adjudicatory Jurisdiction*

The IACtHR maintains contentious jurisdiction over the Member States of the American Convention.<sup>182</sup> Alleged victims submit complaints of state violations to the Commission, which may then work with the state to resolve the potential violation itself, reject the complaint, or submit the case to the IACtHR.<sup>183</sup> The IACtHR is limited in its interpretation of the American Convention by the specific facts introduced in the case before it.<sup>184</sup> The IACtHR has found that it is merely responsible for protecting the victims by penalizing the guilty state and should not look to resolve abstract questions in the

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<sup>180</sup> *Id.*; see also Danielle Renwick, *Mercosur: South America's Fractious Trade Bloc*, COUNCIL ON FOREIGN RELATIONS (2016).

<sup>181</sup> American Convention, *supra* note 86, at art. 62 & 64.

<sup>182</sup> *Id.* at art. 62.

<sup>183</sup> *Id.* at art. 44 & 51(1).

<sup>184</sup> *Id.* at art. 62.

case.<sup>185</sup> To that end, the IACtHR may impose monetary penalties on violating states or order the state to repair the victims subject to the particulars drawn out in the IACtHR's decision. States must respect the IACtHR's judgment and they almost always do.<sup>186</sup>

While there are definitive limits to the IACtHR's contentious jurisdiction, the IACtHR and IACHR still have practical options to help implement a minimum data protection standard in Latin America. Millions of people are online in Latin American countries that do not have comprehensive data protection laws. While the data is not public, it is reasonable to assume that at least one of the hundreds of claims brought before the Commission, especially in consideration of the recent popularization of the topic by the Special Rapporteur for Freedom of Expression, will address data protection.<sup>187</sup> It is of utmost importance that the Commission refers the case to the Court. The burden then shifts to the Court to find the violation of the Convention and to punish the state accordingly for either failing to create a data protection structure to protect its citizens or failing to enforce the previously enacted domestic data protection law.<sup>188</sup> However, the coordination between the two human rights bodies is challenging, even though they have a common objective, because they have met only eight times since the creation of the human rights bodies.<sup>189</sup>

Article 1(1) of the American Convention requires the states "to respect the rights and freedoms recognized herein and to ensure to

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<sup>185</sup> International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶49 (Dec. 9, 1994).

<sup>186</sup> American Convention, *supra* note 85, at art. 68(1); *see also* Thomas Buerghal, *New Upload-Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y. U. J. INT'L. L. & POL. 259 (2005).

<sup>187</sup> *Statistics*, IACHR, (Dec. 2015), <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> (showing that the Commission hears up to 2000 petitions annually).

<sup>188</sup> Those that claim my proposal is advocating for the Court to act as a legislative body raise a valid concern. However, the strategy merely encourages the Court to use the procedural structure provided by the American Convention to extend human rights across the hemisphere.

<sup>189</sup> Víctor Rodríguez Rescia, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593, 622 (2000).

all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.”<sup>190</sup> Moreover, Article 2 addresses the synchronization of States’ domestic laws and actions with the provisions of the American Convention.<sup>191</sup> Additionally, the IACtHR has interpreted Article 2 to apply an affirmative obligation that requires the state actors to protect against reasonably foreseeable third party human rights violations.<sup>192</sup> The IACtHR has repeatedly addressed the States’ responsibility to align their domestic law with the obligations set out by the American Convention.<sup>193</sup> The Court has also found that a state violates a victim’s Conventional rights, pursuant to Articles 8 and 25, when it fails to provide effective recourse.<sup>194</sup> It is therefore the Inter-American Human Rights Bodies’ responsibility to use its resources to compel a violating state to conform its behavior to the American Convention in order to protect individual victims.

A former president of the IACtHR claims the “international jurisdictional decisions should serve as interpretation guidelines for the domestic courts.”<sup>195</sup> Accordingly, a number of high-level domestic courts have adjudicated, and governments have legislated, in accordance with the IACtHR’s decisions.<sup>196</sup> For example, the Supreme Court of Argentina first held that the domestic court’s inter-

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<sup>190</sup> American Convention, *supra* note 86, at art. 1(1).

<sup>191</sup> *Id. supra* note 86, at art. 2.

<sup>192</sup> Ángel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT’L L.J. 185, 230-31 (2008).

<sup>193</sup> Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 4, ¶¶ 174-79 (July 29, 1988).

<sup>194</sup> Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9 (Oct. 6, 1987); “Laws that deny victims the possibility of knowing the truth and obtaining justice are contrary to the American Convention on Human Rights” because they deny the victim of an effective remedy. Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1854 (2011) (quoting Corte Constitucional [C.C.] [Constitutional Court], abril 3, 2002, Sentencia C-228/02 (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2002/c-228-02.htm>)

<sup>195</sup> Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEX. L. REV. 1835, 1839 (2011).

<sup>196</sup> *Id.* at 1838.

pretation of law must consider the relevant decisions by the IACtHR.<sup>197</sup> There are a number of countries that not only consider the IACtHR's perspective, but also legally bind their respective states to the Court's interpretation of those human rights norms.<sup>198</sup> Some critics may nevertheless contest that one adjudicatory decision by the IACtHR against a single state is unlikely to create a minimum data protection standard across Latin America. However, states that have not legally bound themselves to follow the strict interpretations of the Court may pass and enforce a domestic data protection law to preempt any future penalties by the Court.

### B. *Advisory Jurisdiction*

The Court should use its advisory authority<sup>199</sup> to establish a minimum data protection standard in Latin America. The adjudicatory jurisdiction provides the Court with a more expansive jurisdiction than the Court's advisory authority, which is subject to the unpredictability of petitioner's claims and the Commission's subsequent claim bifurcation process.<sup>200</sup> Furthermore, the Court's advisory opinions are not constricted by the specific facts of a petitioner's case.<sup>201</sup> Instead, the Court may publish advisory opinions on any topic submitted to it by a qualified entity, such as the Commission.<sup>202</sup> These submissions allow the IACtHR to address topics it

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<sup>197</sup> *Id.* at 1845-47.

<sup>198</sup> Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 289-93 (2003). For a more thorough analysis of the Court's jurisdiction, see generally Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT'L L. 1, 39 (1999).

<sup>199</sup> American Convention, *supra* note 86, at art. 64.

<sup>200</sup> "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 17 (Sept. 24, 1982) (explaining the expansive nature of the Court's advisory jurisdiction).

<sup>201</sup> Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 25 (1985); *Genie Lacayo v. Nicaragua Case, Judgment (Preliminary Objections)*, Inter-Am. Ct. H.R. (ser. C) No. 21, ¶¶ 49-50 (Jan. 27, 1995); see also American Convention, *supra* note 85, at Art. 62.

<sup>202</sup> The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 16 (Sept. 24, 1982) (holding that the Commission

may not otherwise consider under its contentious jurisdiction.<sup>203</sup> For example, at the request of the Commission, the IACtHR published an advisory opinion on whether Peru's domestic death penalty constitutional provision complied with the American Convention.<sup>204</sup> The IACtHR permitted the request for the advisory opinion based on the Commission's International Responsibility for the Promulgation and Enforcement of Laws.<sup>205</sup>

The Court's advisory opinions clarify, by way of judicial interpretation, particular principles of law.<sup>206</sup> Specifically, the advisory proceedings "make important contributions to the conceptual evolution of the international law of human rights."<sup>207</sup> Accordingly, the IACtHR has repeatedly used this jurisdictional measure to publish advisory opinions that reinforce the independent foundation of international human rights law.<sup>208</sup> However, the Court cannot use its advisory jurisdiction to require states to reform domestic laws.<sup>209</sup> The Court's advisory opinions are not binding like the Court's adjudicatory opinions. Yet, the advisory opinions have nevertheless proven influential and impacted both domestic and international law.<sup>210</sup> For example, the IACtHR issued an advisory opinion that

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has an absolute right to request advisory opinions of the IACtHR regarding the interpretation of the American Convention).

<sup>203</sup> "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, (Sept. 24, 1982).

<sup>204</sup> International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 49 (Dec. 9, 1994).

<sup>205</sup> Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241, 254 (2002).

<sup>206</sup> *Id.* at 242.

<sup>207</sup> *Id.* (quoting former International Criminal Court Judge Thomas Buergenthal).

<sup>208</sup> *Id.*

<sup>209</sup> Douglass Cassel, *Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?*, 20 HUM. RTS. L.J. 167, 173 (1999).

<sup>210</sup> Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 18 (1985); see e.g., Reports of the Inter-American Commission of Human Rights (art. 51 of the American Convention on Human Rights), Advisory Opinion OC-15/97, Inter-Am. Ct. H.R. (ser. A) No. 15, ¶ 26 (Nov. 14, 1997).

determined a Guatemalan death penalty reservation was in violation of the American Convention.<sup>211</sup> Guatemala was under no legal obligation to stop the execution, but its Supreme Court complied with the advisory opinion even after it had petitioned the IACtHR to decline to render the advisory opinion in the first place.<sup>212</sup> Advisory opinions published by international tribunals have been interpreted to contribute to an international common law and have been used to resolve doctrinal differences.<sup>213</sup>

The IACtHR has been willing to issue advisory opinions to “address controversial or developing issues in international law.”<sup>214</sup> Furthermore, states have been increasingly willing to petition the IACtHR for advisory opinions on issues without clear precedence. For example, Mexico requested an advisory opinion on a contentious matter that arose when the U.S. sentenced Mexican nationals to death without informing them of their rights to confer to their national consulate pursuant to the Vienna Convention.<sup>215</sup> The IACtHR published an advisory opinion, where it interpreted the relevant provisions of the Vienna Convention, even though there was a pending controversy between the U.S. and Mexico.<sup>216</sup>

The focus of this article hinges on the need and justification for the IACtHR to act in order to repair the human rights gap, regarding the absence of data protection laws in a number of Latin American countries. However, the IACtHR will not pay attention to the need to act if there is not a practical method to accomplish the proposed action. The IACtHR should not hesitate to use its adjudicatory authority if an applicable data protection case arrives, but the more practical course of action is to rely on its advisory authority to put the region on notice of its expansive data protection interpretation. It is reasonable to assume that a state or tribunal will seek an advi-

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<sup>211</sup> Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, (Sept. 8, 1983).

<sup>212</sup> *Id.*

<sup>213</sup> Pasqualucci, *supra* note 205, at 247.

<sup>214</sup> *Id.* at 241.

<sup>215</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 1 (Oct. 1, 1999).

<sup>216</sup> *Id.*

sory opinion from the IACtHR on the issue of data protection because of the increasing prevalence of the international processing of information contrasted with the current patchwork and gaps of Latin American data protection laws will likely hit an apex of uncertainty.

#### SECTION VII: THE COURT IS JUSTIFIED IN ADVANCING MINIMUM DATA PROTECTION STANDARD

The Inter-American Court is justified, pursuant to the right to privacy enshrined in the American Convention, to require all States that have accepted the Court's jurisdiction to safeguard their citizens' data in a manner supported by the general principles of statutory interpretation and comparative interpretations by other international bodies.

##### A. *Treaty Interpretation*

The general principles of treaty interpretation support the IACtHR's establishing a minimum data protection standard. Article 31 of the Vienna Convention on the Law of Treaties requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to [its] terms."<sup>217</sup> However, the Vienna Convention's modified textual approach of treaty interpretation is of minimal practical use here because human rights instruments are commonly drafted with considerable generality, which provides the interpreter with the impossible task of determining the drafter's intent.<sup>218</sup> The IACtHR has supported the Vienna Convention's notion that "the 'ordinary meaning' of terms [of a treaty] cannot of itself become the sole rule, for it must always be considered within its context and in particular, in the light of the object and purpose of the treaty."<sup>219</sup> Thus, judicial bodies responsible for interpreting the treaties may use their "authority by weighing the conflicting interests of

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<sup>217</sup> Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 125 (2003).

<sup>218</sup> The 1969 Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>219</sup> *Id.*; American Convention, *supra* note 86, at art. 64; Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-04/84, Inter-Am. Ct. H.R., (ser. A) No. 4, ¶ 23 (Jan. 19, 1984).

the parties in the context of contemporary regional or global concerns.”<sup>220</sup>

The American Convention was intended to protect the people in the region from human rights violations by public and private actors alike.<sup>221</sup> It is therefore reasonable for the Court to interpret the relevant Articles to protect the peoples’ human rights in the face of technological innovation. Some may contest that data protection was not considered by the drafters of the American Convention and thus falls outside the constructs of the document’s original intent. Even so, such an interpretation would not go against any general or specific purpose of the treaty. It is reasonable to interpret the purpose of Articles 11 and 13 as being designed to protect privacy and thus data as an extension of the same.

The IACtHR has strong support to decide on the issue of data protection based on the plain language of the American Convention. While any interpretation is subject to critique, the language of the relevant Articles, in consideration of the Court’s past interpretations, would make the inclusion of data protection altogether reasonable. Article 11 flatly prohibits “arbitrary or abusive interference with [a person’s] private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”<sup>222</sup> As referenced above, the term private life has been interpreted as broader in scope than mere privacy.

### B. *International Bodies*

The IACtHR should enforce a minimum data protection standard because other international human rights bodies have held that comparable clauses establish a person’s right to data protection. While the IACtHR is not bound by the words of the ECtHR, any cross-referencing between judicial bodies not only “enhances the weight of the decision by invoking multiple precedents, but [also] helps produce greater conformity of jurisprudence among the different human rights bodies.”<sup>223</sup> The ECtHR describes the European Convention of Human Rights as a “living instrument, which must

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<sup>220</sup> Shelton, *supra* note 217, at 125-26.

<sup>221</sup> American Convention, *supra* note 86, at arts. 1(1) & 2.

<sup>222</sup> American Convention, *supra* note 86, at art. 11.

<sup>223</sup> Shelton, *supra*, note 217, at 129.

be interpreted in the light of present day conditions.”<sup>224</sup> The European Court argues “that state law and practice cannot remain static while European standards evolve towards greater human rights protection.”<sup>225</sup> The IACtHR has historically relied heavily on interpretations made by the ECtHR.<sup>226</sup>

For example, In *Amann v. Switzerland*,<sup>227</sup> the ECtHR held that the State violated the petitioner’s right to privacy pursuant to Article 8 of the Convention when a government agency created and stored a card on the petitioner, which alleged that he had “contact with the Russian embassy” and conducted “business of various kinds with the company.”<sup>228</sup> The Court reasoned that the storage of the card in the instant case was enough to find that the State interfered with the Petitioner’s private life in violation of Article 8.<sup>229</sup> In making its decision in this case, the ECtHR stated “that the term ‘private life’ must not be interpreted restrictively.”<sup>230</sup> Similarly, the IACtHR should employ a wide scope approach while interpreting the American Convention for purposes of establishing a data protection standard in the region.

#### SECTION VIII: THE IACtHR SHOULD PLAY A MORE ACTIVE ROLE IN THE REGION

The IACtHR should take a more progressive approach in its interpretation of the human rights listed in the American Convention. The Court’s tradition of narrowly tailoring its interpretation of the Convention may be changing with recent Court jurisprudence addressing the application of the Convention to modern human rights issues.<sup>231</sup>

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<sup>224</sup> *Id.* at 126.

<sup>225</sup> *Id.*

<sup>226</sup> Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101 (2008).

<sup>227</sup> *Amann v Switzerland*, App. No. 27798/95, 30 Eur. H.R. Rep. 843 (2000).

<sup>228</sup> *Id.* ¶¶ 15 & 18.

<sup>229</sup> *Id.* ¶ 65.

<sup>230</sup> *Id.*

<sup>231</sup> *See e.g.*, *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012) (protecting a lesbian couple’s right to keep their child under the American Convention’s right against discrimination).

Article 26 of the American Convention promotes economic, social, and cultural rights by requiring “[t]he State Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means.”<sup>232</sup> However, the IACtHR has been relatively unassertive in promoting these rights.

Critics take issue with a more expansive interpretation of the American Convention.<sup>233</sup> They point to the fact that the Convention was adopted in a time of turmoil when the Member States refused to safeguard its citizens from human rights violations. Those advocating a limited application of the Convention argue that the Court should interpret the American Convention under the complementarity doctrine, which is referenced in the Convention’s Preamble and Article 46.<sup>234</sup> This position is consistent with the Court, which has specifically stated that the supervision of the IACtHR is complementary to the State’s domestic laws.<sup>235</sup> In short, the function of the Court is to achieve regional peace and justice and not to be a regional legislator.<sup>236</sup>

Member States have revoked their submission to the Court’s compulsive jurisdiction in the past and some States claim that an expansive interpretation of the Convention will increase the risk of additional States following suit. Nevertheless, there will always be a fragile balance in any multilateral treaty between maintaining widespread membership and conducting the duties that the treaty was intended to perform. To succumb to potential objecting states at the cost of protecting individual’s human rights across the region would be to stray from the purpose of the Court.

The failure of the Court to interpret the Convention in light of present day conditions will result in a widening gap in human rights protections over time with the development of technology, which

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<sup>232</sup> American Convention, *supra* note 86, at art. 26.

<sup>233</sup> See Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in *Cultures of Legality: Judicialization and Political Activism in Latin America* 112 (Javier Couso, Alexandra Huneeus, and Rachel Sieder eds., 2010).

<sup>234</sup> American Convention, *supra* note 86, at Preamble and art. 46.

<sup>235</sup> *Reverón Trujillo v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 197, ¶¶ 17 & 21 (June 30, 2009).

<sup>236</sup> OAS Charter, *supra* note 87, at art. 1.

harbors new ways to violate individual's human rights. The issue of data protection provides the Court with an opportunity to inform and even warn the region that the Court will remain relevant and vigilant in protecting against modern human rights violations.

The Court has shown signs that it may use a modern understanding of data protection in the global human rights context. For example, in the case of *Atala v. Chile*, the IACtHR held that Chile violated the petitioner's right to private life under Article 11 of the Convention when it investigated the lesbian couples upon a visit to their home.<sup>237</sup> The IACtHR has lagged behind the ECtHR, which first found that the right to privacy enshrined in the European Convention included the protection of homosexuals in the early 1980's.<sup>238</sup> However, the *Atala* decision may prove to become the beginning of the Court's expansive interpretation of Article 11. Thereby, opening the door for the Court to address the fundamental right of data protection under the Convention's right to privacy.

#### SECTION IX: CONCLUSION

With the end of World War II came the start of a conversation about privacy. That conversation has since developed into a discussion about the state's responsibility to protect an individual's personal data. Many countries now interpret data protection to be a fundamental right. Present day European data protection laws would have required a data controller to gain permission from my Grandpa and his family before storing their personal information in a database. However, a data controller would not be prohibited from storing my Grandpa's personal information in some Latin American countries because those states have failed to pass or enforce comprehensive data protection laws.

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<sup>237</sup> *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); Judge Diego García-Sayán, *The Role of the Inter-American Court of Human Rights in the Americas*, 19 U.C. DAVIS J. INT'L L. & POL'Y 103, 108 (2012) (discussing progressive decisions by the IACtHR).

<sup>238</sup> Robert A. Ermanski, *A Right to Privacy for Gay People Under International Human Rights Law*, 15 B.C. INT'L & COMP. L. REV. 141, 150 (1992).

The issues surrounding data protection have played a significant role in Latin America and the associated risks will prove ever more evident as countries in the region continue to develop. Latin Americans are in need of an obligatory data protection framework across the region. The IACtHR is the only feasible actor that has the authority and respect to require action by the Latin American states. Finally, the IACtHR is justified in acting to set a minimum data protection standard to resolve the need. Any delay by the IACtHR to act will only lead to more human rights violations.