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## Are There Universal Standards for Network Neutrality?

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## ARTICLES

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Arturo J. Carrillo

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# ARTICLES

## ARE THERE UNIVERSAL STANDARDS FOR NETWORK NEUTRALITY?<sup>†</sup>

Arturo J. Carrillo<sup>\*\*</sup>

### ABSTRACT

*The regulation of the Internet in general, and network neutrality in particular, has become a priority for many governments around the globe. The United States is no exception. It enacted new rules protecting net neutrality in 2015 and then famously undid them in 2017. Other countries similarly struggle to regulate net neutrality effectively, including Brazil, India and those that comprise the European Union. Most national debates of net neutrality policy tend to be fractious affairs. There is deep disagreement surrounding the best way to approach the issue. In previous work, I have shown how the design and implementation of net neutrality norms by States can lead to more coherent, just, and sustainable policies when they are guided by universally-recognized human rights norms. This Article advances that thesis by identifying which human rights norms apply to net neutrality across the board and explaining how those norms fully address the most critical issues at the heart of net neutrality policy debates everywhere. These include: defining the content and scope of net neutrality; promoting Internet access to help close the digital divide; and regulating zero-rating, among others. To substantiate the novel*

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*claim that universal standards govern net neutrality, this Article engages in a comparative analysis of the major human rights legal frameworks erected by the United Nations, the Organization of American States (“OAS”), and Europe. It also surveys the practice of States that have adopted some form of net neutrality regulations to date. These comparative studies reveal a significant degree of normative convergence suggesting that standards have begun to crystallize, at least with respect to the basic definitional elements of net neutrality. The Article concludes by explaining why the existence of universal standards for net neutrality matters to and in the United States.*

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## INTRODUCTION

The regulation of the Internet in general, and network neutrality in particular, has become a priority for many governments around the globe. The United States is no exception. It enacted new rules protecting net neutrality in 2015 and then famously undid them in 2017.<sup>1</sup> Other countries similarly struggle to regulate net neutrality effectively, including Brazil, India and those that comprise the European Union, generating intense controversy in their respective domestic arenas. Most national debates of net neutrality policy tend to be fractious affairs, revolving around the economic, technical and political consequences of regulating Internet traffic. Net neutrality is widely recognized as the idea that network providers must treat all data and content online equally to promote the widest possible access to information.<sup>2</sup> There is, however, deep disagreement surrounding the best way to implement this principle. The resulting discord has led many policymakers, digital rights activists, tech company representatives, and academics all over the world to ask whether universal standards governing net neutrality exist or could exist.<sup>3</sup>

In prior work, I have shown that international law offers a framework of human rights norms that can and should be applied to analyzing basic network neutrality issues like zero-rating.<sup>4</sup> I have further posited that the design and implementation of net neutrality norms by governments can lead to more coherent, just, and sustainable policies when they are guided by universally recognized human rights norms.<sup>5</sup> This Article advances the underlying thesis in this prior work—that human rights law is the natural and best source of universal net neutrality standards—by showing why it holds true today anywhere in the world. That is, I will identify which human rights norms apply to net neutrality across the board and explain how those norms fully address the most critical issues at the heart of net neutrality policy debates

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<sup>1</sup> Klint Finley, *The Wired Guide to Net Neutrality*, WIRED (May 9, 2018), <https://www.wired.com/story/guide-net-neutrality/?mbid=GuideCarveLeft>.

<sup>2</sup> Frank La Rue (U.N. Special Rapporteur on Freedom of Opinion & Expression), Dunja Mijatović (OSCE Representative on Freedom of the Media), Catalina Botero Marino (OAS Special Rapporteur on Freedom of Expression) & Faith Pansy Tlakula (ACHPR Special Rapporteur on Freedom of Expression & Access to Information), *Joint Declaration on Freedom of Expression on the Internet*, ¶ 5(a), OSCE (June 1, 2011) [hereinafter *Joint Declaration*].

<sup>3</sup> Arturo J. Carrillo, *Zero Rating and The Holy Grail: Universal Standards for Net Neutrality*, in NET NEUTRALITY RELOADED: ZERO RATING, SPECIALISED SERVICES, AD BLOCKING AND TRAFFIC MANAGEMENT 86, 86 (Luca Belli ed., 2016) [hereinafter Carrillo, *Holy Grail*].

<sup>4</sup> See generally Arturo J. Carrillo, *Having Your Cake and Eating It Too? Zero-Rating, Net Neutrality and International Law*, 19 STAN. TECH. L. REV. 364 (2016) [hereinafter Carrillo, *Having Your Cake and Eating It Too*].

<sup>5</sup> Carrillo, *Holy Grail*, *supra* note 3, at 100.

everywhere. These issues include the definition, content and scope of net neutrality; promoting Internet access—“connectivity”—to help close the digital divide; fostering media diversity; and regulating zero-rating as well as reasonable network management measures, among others.

These questions have enormous implications for any society, including the United States. They are of special significance in developing countries, where the majority of the population does not yet enjoy meaningful access to the Internet. In exploring them, this Article will proceed as follows. In Part I, I first engage in a comparative study of the major human rights legal regimes erected by the United Nations, the Organization of American States (“OAS”), and Europe to map the status of transnational normative development in relation to net neutrality. It turns out each of these frameworks is configured to protect net neutrality as human rights norms intrinsically linked to freedom of expression and non-discrimination guarantees. The final section of Part I lays out the results of a comparative law survey of national jurisdictions that claim to regulate net neutrality in some fashion. It focuses on the legislation of States that have adopted some form of net neutrality regulations to date, and seems to reflect a trend towards high-level convergence on the domestic plane. Though still a work in progress, this survey, when viewed alongside the preceding study of transnational legal regimes, tends to confirm that there is a significant overlap in regulatory approaches to net neutrality worldwide.

In Part II, I will analyze the results of the transnational and national comparative law studies from Part I to identify cross-cutting principles and norms that increasingly constitute a set of universal standards applicable to network neutrality. This analysis will reveal not just a significant degree of convergence across legal systems and jurisdictions, but also the nature of that convergence. Such standards seemed to have begun to crystalize at least with respect to a number of the basic definitional elements of net neutrality. While issues remain, the overlapping outcomes of the two meta-studies of net neutrality regulation effectively demonstrate why the international human rights legal framework has been, and will continue to be, the best suited to orienting policy-making in this area.

I conclude in Part III by explaining why the existence of universal standards for net neutrality matters to the United States. It is not just because our government is bound by its international legal obligations to protect net neutrality, and thus can be held liable for failing to do so. These universal standards matter, *inter alia*, because the emergence of the normative convergence that underpins them at both the transnational and national levels is a testament to the transcendent nature of the basic values embodied in the principle of net neutrality as promoted and protected by human rights law. What emerges from this concluding Part is not just a clearer picture of the universal standards that already apply to net neutrality as a norm of human rights in the United States and around the world. The greater lesson may be the way in which these standards can be used to constructively orient the definition,

design and implementation of that vital principle in the United States as well as all other countries.

## I. INTERNATIONAL & COMPARATIVE LAW AND NETWORK NEUTRALITY

This Part begins with an overview of the standards in the United Nations', Inter-American, and European human rights and legal systems that relate to the principle of net neutrality. These systems correspond to Sections A, B, and C, respectively. In the course of summarizing the pertinent norms from each of these transnational regimes, I will make reference to case study examples that show how some of those standards play out in practice. The final section of this first part is dedicated to summarizing the results to date of an ongoing comparative law study of national jurisdictions that have regulated net neutrality in some way. In this way, we examine both sides of the net neutrality coin in contemporary international and comparative law.

### A. *United Nations Human Rights System*

Network neutrality is a consolidated norm of international human rights law due in large part to the seminal role it plays in protecting freedom of expression and non-discrimination rights in the framework created under the auspices of the United Nations. The UN regime is commonly referred to as the “universal” human rights system, and for good reason. The International Covenant on Civil and Political Rights (“ICCPR”) has been signed and ratified by over 85% of the world’s states, and encompasses nearly 80% of the world’s population.<sup>6</sup> Its core principles apply to nearly all countries on the planet.<sup>7</sup> When discussing human rights online, the UN framework is the place to start. This is due not just to its (near) universal coverage, but also because, as we shall see, United Nations experts and authorities engaged in its development have expressly extended the framework’s application to the digital realm in three key areas: freedom of expression, non-discrimination, and exceptions to these rights.

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<sup>6</sup> See *Status of Ratifications Interactive Dashboard*, UNITED NATIONS OFF. HIGH COMMISSIONER ON HUM. RTS., <http://indicators.ohchr.org> (last visited Apr. 4, 2019).

<sup>7</sup> See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996). The Universal Declaration of Human Rights can be considered a source of customary international law for core norms like freedom of expression, which applies to all UN member States regardless of whether they have ratified the ICCPR or not.



## 1. Freedom of Expression

Article 19 of the ICCPR affirms the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of . . . choice.”<sup>8</sup> Freedom of expression enjoys near universal acceptance worldwide, not the least because it is an enabler of several other basic human rights. These include not just the corollary rights to hold opinions and religious beliefs without interference, but several others as well, such as the rights to education, freedom of association and assembly, to full participation in social, cultural and political life, and to social and economic development.<sup>9</sup>

Traditionally, freedom of expression under the ICCPR is comprised of four constituent elements, beginning with the right to impart and express information on the one hand, and the right to seek and receive information on the other.<sup>10</sup> The other two conventional elements are media rights, including media diversity, and the right to access to information from public bodies.<sup>11</sup> With the rise of electronic communications, this framework was obliged to evolve in at least two ways. First, the traditional rights comprising freedom of expression were deemed to apply to “internet-based modes of communication.”<sup>12</sup> This greatly expanded their protective writ to cover all forms of online expression. Second, the exercise of freedom of expression in the digital age, it can be argued, gave rise to two new constituent elements: the right to connect to Internet, and the free flow of information once online.<sup>13</sup>

It was in this context that net neutrality came to be recognized as an integral part of the human rights law framework. In 2011, international experts on freedom of expression from the United Nations, the OAS, and other regional human rights systems jointly declared that “[t]here should be no discrimination in the treatment of

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<sup>8</sup> International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 99 U.N.T.S. 171 [hereinafter ICCPR].

<sup>9</sup> Frank La Rue (Special Rapporteur on the Promotion of Freedom of Opinion and Expression), *Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 61, U.N. Doc. A/66/290 (Aug. 11, 2011) [hereinafter La Rue, *SR Report 2011*].

<sup>10</sup> U.N. Human Rights Committee, *General Comment No. 34*, paras. 11, 18, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter HRC, *General Comment No. 34*].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 12.

<sup>13</sup> See *infra* notes 16–20 and accompanying text.

Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.”<sup>14</sup> Thus, net neutrality became integrated with human rights law. The U.N. Human Rights Committee took this integration one step further by recognizing that “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [the exceptions regime set out in] paragraph 3 [of Article 19].”<sup>15</sup>

Within the U.N. system, the Special Rapporteur on Freedom of Opinion and Expression has further clarified the function of net neutrality in ensuring human rights online, highlighting the critical role of private actors in this context:

In the digital age, the freedom to choose among information sources is meaningful only when Internet content and applications of all kinds are transmitted without undue discrimination or interference by non-State actors, including providers. The State’s positive duty to promote freedom of expression argues strongly for network neutrality in order to promote the widest possible non-discriminatory access to information.<sup>16</sup>

As important as net neutrality is in ensuring the free flow of information online, it can only do so once connectivity, or access to the Internet, is established. This is why the Special Rapporteur has emphasized the “positive obligation [on governments] to promote . . . the enjoyment of the right to freedom of expression *and the means necessary to exercise this right*, which includes the Internet.”<sup>17</sup> Put simply, this means that “[g]iving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet.”<sup>18</sup> You cannot have one without the other.

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<sup>14</sup> *Joint Declaration*, *supra* note 2, ¶ 5(a).

<sup>15</sup> HRC, *General Comment No. 34*, *supra* note 10, ¶ 43; this regime is discussed in more detail below; *see infra* notes 37–58 and accompanying text.

<sup>16</sup> David Kaye (Special Rapporteur on the Promotion of Freedom of Opinion and Expression), *Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, ¶ 23, U.N. Doc. A/HRC/35/22 (Mar. 30, 2017) [hereinafter Kaye, *SR Report 2017*].

<sup>17</sup> La Rue, *SR Report 2011*, *supra* note 9, ¶ 61 (emphasis added).

<sup>18</sup> *Joint Declaration*, *supra* note 2, ¶ 6(a).

In this same vein, the UN General Assembly, in declaring that “the same rights that people have offline must also be protected online, in particular freedom of expression,” also recognized “the importance of applying [such] a human rights-based approach in providing and in expanding access to Internet.”<sup>19</sup> This approach includes not only the aforementioned obligation to promote universal access to the Internet, but also the duty “to ensure that persons are protected from any acts by private persons or entities [such as ISPs] that would impair the enjoyment of the freedoms of opinion and expression.”<sup>20</sup> In other words, private actors who engage in blocking, throttling or other degradation of the free flow of information online in violation of net neutrality principles are interfering with the affected users’ right to freedom of expression.

In short, network neutrality, together with connectivity, is “essential” to realizing freedom of expression online in all of its dimensions, especially those relating to the rights to seek, receive and impart information or ideas of all kind freely.<sup>21</sup> As noted, media diversity is another key dimension. This is “the degree to which [a variety of] opinions are represented in the media.”<sup>22</sup> Governments are obligated to promote media diversity as a means “to protect the rights of media users . . . to receive a wide range of information and ideas.”<sup>23</sup> This concept is itself closely related to, but distinct from, that of media *pluralism*, which is the structural dimension media understood as the manifestation of a wide range of outlets and sources for information, especially news.<sup>24</sup> The UN Human Rights Committee has stated that:

because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression. The State should not have monopoly control

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<sup>19</sup> Human Rights Council Res. 32/13, U.N. Doc. A/HRC/32/L.20, paras. 1, 5 (June 27, 2016).

<sup>20</sup> HRC, *General Comment No. 34*, *supra* note 10, ¶ 7.

<sup>21</sup> See La Rue, *SR Report 2011*, *supra* note 9, ¶ 61.

<sup>22</sup> Reporters Without Borders, *2018 World Press Freedom Index Detailed Methodology: Criteria Categories and Indicators*, <https://rsf.org/en/detailed-methodology> (last visited Apr. 4, 2019).

<sup>23</sup> HRC, *General Comment No. 34*, *supra* note 10, ¶ 14.

<sup>24</sup> Ambeyi Ligabo (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 21 U.N. Doc. A/HRC/7/14 (Mar. 7, 2008); see also Arturo J. Carrillo et al., *Supplemental Statement on Net Neutrality and Media Diversity*, GEO. WASH. LAW INT’L HUMAN RIGHTS CLINIC, Feb. 7, 2018, at 1, 2–3 [hereinafter Carrillo, *Statement*].

over the media and *should promote plurality of the media*. Consequently, States parties should take appropriate action . . . to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.<sup>25</sup>

Although the interplay of media pluralism and diversity with net neutrality is manifest, there has been relatively little research done to date on analyzing the nexus between them, with a few significant exceptions.<sup>26</sup> Suffice it to say for purposes of this study that net neutrality is as essential to safeguarding media pluralism and diversity in practice as it is in guaranteeing the enjoyment of the other better known dimensions of freedom of expression described above. Among other reasons, this is because net neutrality guarantees equal access to the Internet for all media outlets, sources and users, regardless of their size, content or resources, which ensures a freer flow of information online.<sup>27</sup>

## 2. Non-discrimination

Net neutrality is a norm of non-discrimination at heart.<sup>28</sup> On this point, the ICCPR establishes in Article 2 that State parties are obligated “to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the [human] rights recognized . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”<sup>29</sup>

What counts as “other status” for purposes of determining which additional distinctions might lead to negative (or positive) discrimination is in open question. What is certain is that international human rights law recognizes distinctions based on *economic* status or criteria, and evaluates whether their purpose or effect is to nullify or impair the exercise or enjoyment of other human rights.<sup>30</sup> This is the reason

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<sup>25</sup> HRC, *General Comment No. 34*, *supra* note 10, ¶ 40 (emphasis added).

<sup>26</sup> See Daniel O’Maley & Amba Kak, *Free Internet and the Cost to Media Pluralism: The Hazards of Zero-rating the News*, CTR. FOR INT’L MEDIA ASSISTANCE (Nov. 8, 2018), <https://www.cima.ned.org/publication/zero-rating-the-news/>; see also Carrillo, *Statement*, *supra* note 24.

<sup>27</sup> See Carrillo, *Statement*, *supra* note 24, at 4.

<sup>28</sup> See *supra* note 16 and accompanying text.

<sup>29</sup> ICCPR, *supra* note 8, art. 2.

<sup>30</sup> Erlingur Sveinn Haraldsson & Orn Snaevær Sveinsson, *Haraldsson and Sveinsson v. Iceland*, ¶ 10.2, Human Rights Committee, U.N. Doc. CCPR/C/91/D/1306/2004 (Dec. 14, 2007).

why proposed restrictions on net neutrality like zero-rating, which offers free preferential access to parts of the Internet, must be examined closely to evaluate their impact on the exercise of freedom of expression.

To the extent that network neutrality is understood as a principle of non-discrimination applied to users' rights to seek, receive or impart data or information online, it meshes organically with the core non-discrimination norms of international human rights law. But not all discrimination is *per se* illegal: international law differentiates between negative and positive types: The "principle of equality sometimes requires States [*sic*] parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited [by international law]."<sup>31</sup> For this reason, "[n]ot every differentiation of treatment will constitute [unlawful] discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under [international law]."<sup>32</sup> In other words, *positive* or *affirmative* discrimination can be an exceptional measure that enhances or increases the *overall* exercise and enjoyment of human rights.

A good example of such positive discrimination may be zero-rating, which is when Internet service providers ("ISPs") permit data usage under limited circumstances without charging for it or counting it against data caps, a practice some supporters say may promote greater access to the Internet.<sup>33</sup> Zero-rating, however, has many critics because it is a discriminatory restriction on network neutrality that, as we have seen, is part and parcel of the rights to freedom of expression and non-discrimination. Under most circumstances, zero-rating would, thus, be prohibited. The U.N. Special Rapporteur has come out against "paid prioritization," or the creation of fast lanes on the Internet by network providers, observing that the "hierarchy of data [created] undermines user choice."<sup>34</sup> Similarly, the Rapporteur takes a skeptical view of zero-rating as a policy for expanding connectivity, noting that "[t]he assumption that limited access will eventually ripen into full connectivity requires further study. It may be dependent upon factors such as user behavior, market conditions, the human rights landscape and the regulatory environment."<sup>35</sup>

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<sup>31</sup> U.N. Human Rights Committee, *General Comment No. 18*, ¶ 10, OHCHR (Nov. 10, 1989) [hereinafter HRC, *General Comment No. 18*].

<sup>32</sup> *Id.* ¶ 13.

<sup>33</sup> See generally Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at 418–27.

<sup>34</sup> Kaye, *SR Report 2017*, *supra* note 16, ¶ 24.

<sup>35</sup> *Id.* ¶ 27.

This debate matters because as we have seen, States are bound to ensure that all people within their territory have equal access to the Internet.<sup>36</sup>

### 3. The Exceptions Regime

It is for these reasons that Article 19.3 of the ICCPR expressly permits certain restrictions on the right to freedom of expression when necessary to “respect of the rights or reputations of others,” or to advance “the protection of national security, or of public order . . . , or of public health or morals.”<sup>37</sup> These are, generally speaking, the legitimate aims that may be invoked by States seeking to impose limits on fundamental human rights, including expression.<sup>38</sup> In addition to pursuing a legitimate goal, a State seeking to curtail freedom of expression (or any human right for that matter) must ensure that the measures doing so are “provided by law,” “necessary” to meet the stated aim, and “proportional.”<sup>39</sup> Such restrictions should be enacted into formal law through a transparent and participatory political process.<sup>40</sup> In any case, such laws “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”; they must also be accessible to the public.<sup>41</sup>

Assuming that a State’s goal is to advance a legitimate aim recognized by international human rights law, a proposed restriction on freedom of expression like zero-rating, to be permissible, must not only be provided by law but also be necessary and proportional in relation to that goal.<sup>42</sup> To be “necessary,” legally enacted limits must be “directly related to [meeting] the specific need on which they are predicated,” *i.e.* they must be effective at doing what they are intended to do.<sup>43</sup> A restriction is not indispensable, and thus, “violates the test of necessity[,] if the protection could be achieved in other ways that do not restrict freedom of

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<sup>36</sup> La Rue, *SR Report 2011*, *supra* note 9, ¶ 61.

<sup>37</sup> ICCPR, *supra* note 8, art. 19(3).

<sup>38</sup> Catalina Botero Marino (Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights), *Freedom of Expression and the Internet*, ¶ 28, OAS, U.N. Doc. OEA/Ser.L/V/II. (Dec. 31, 2013) [hereinafter *Freedom of Expression and the Internet*].

<sup>39</sup> HRC, *General Comment No. 34*, *supra* note 10, paras. 24, 33–34; ICCPR, *supra* note 8, art. 19(3).

<sup>40</sup> *Freedom of Expression and the Internet*, *supra* note 38, paras. 81–83.

<sup>41</sup> HRC, *General Comment No. 34*, *supra* note 10, ¶ 25.

<sup>42</sup> *Id.* ¶ 22.

<sup>43</sup> *Id.*

expression.”<sup>44</sup> Finally, any steps taken by States to limit expression, even if legitimate and necessary, cannot be “overbroad.”<sup>45</sup> Proportionate measures are those that are “appropriate to achieve their protective function” and “the least intrusive . . . amongst those [available].”<sup>46</sup> These restrictions are meant to set a high bar for recognizing a small set of narrowly tailored measures.<sup>47</sup>

In other words, returning to my original example, whether or not a zero-rating practice can be a permissible restriction on net neutrality, and thus freedom of expression, is a fact-specific and context driven question. Let me give an example of how this plays out in practice: Zambia. In a nutshell, permitting a zero-rated platform like Facebook’s Internet.org to operate in a country with a deep digital divide and poor infrastructure like Zambia most likely advances, rather than violates, that country’s human rights commitments. This will occur so long as the platform’s characteristics do not render its deployment unnecessary (because there are better alternatives) or overbroad (because it discriminates inappropriately or unfairly) in relation to the access goals pursued.<sup>48</sup>

India is another more high-profile example of how UN norms could and should apply in practice to the regulation of net neutrality. Indian regulators in 2015 confronted intense social backlash over so-called “zero-rating” plans offered by local mobile operators.<sup>49</sup> The spark was an Indian telecom joining forces with Facebook in early 2015 to roll out Internet.org, the latter’s online platform (now called “Free Basics”), with the stated objective of advancing connectivity in the developing world.<sup>50</sup> Among other things, Internet.org offered limited access to a bundle of select

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<sup>44</sup> *Id.* ¶ 33.

<sup>45</sup> *Id.* ¶ 34.

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

<sup>47</sup> *See id.* ¶ 35.

<sup>48</sup> Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at 424–26.

<sup>49</sup> *See* Harichandan Arakali, *Amazon, Facebook Square Off over Net Neutrality in India*, INT’L BUS. TIMES (Apr. 17, 2015, 12:57 PM), <http://www.ibtimes.com/amazon-facebook-square-over-net-neutrality-india-1886050> [<https://perma.cc/HHH4-4H5S>].

<sup>50</sup> Jon Russell, *Facebook Takes Internet.org and Its Free Mobil Data Services to India*, TECHCRUNCH (Feb. 9, 2015), <http://techcrunch.com/2015/02/09/internet-org-india> [<https://perma.cc/G7Y8-RXER>]; *see also* Mariella Moon, *‘Free Basics by Facebook’ Replaces Internet.org Website and App*, ENGADGET (Sept. 24, 2015), <http://www.engadget.com/2015/09/24/free-basics-by-facebook> [<https://perma.cc/9UEY-FHR5>] (stating that “Free Basics” offers a menu of services and applications to users in Asia, Africa and Latin America to choose from).

online content and services free of charge.<sup>51</sup> The roll out of Internet.org in February of that year sparked waves of protest from Indian civil society and digital rights activists around the world.<sup>52</sup> They worried that Facebook, a for-profit, multi-national corporation, would become through its Internet.org platform a “gatekeeper” to the Internet for millions of mobile phone users in the developing world, with nefarious consequences for local innovation, competition, and social development.<sup>53</sup>

In February 2016, India’s regulator chose to ban differential pricing, including zero-rating by telecoms, but not net neutrality *per se*.<sup>54</sup> Soon thereafter, the regulator executed an embarrassing “flip-flop” by issuing two new consultations on the topic,<sup>55</sup> which advocates believed might threaten to reintroduce zero-rating “through the back door.”<sup>56</sup> Ultimately, however, India ended up adopting a full set of net neutrality rules in July 2018 rapidly deemed “the world’s strongest” because they unambiguously protect against “any form of discrimination or interference in the treatment of content.”<sup>57</sup> The question remains whether India, in deciding to prohibit

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<sup>51</sup> Russell, *supra* note 50.

<sup>52</sup> See, e.g., *Open Letter to Mark Zuckerberg Regarding Internet.org, Net Neutrality, Privacy, and Security*, FACEBOOK (May 18, 2015, 6:34 AM), <https://www.facebook.com/notes/accessnoworg/open-letter-to-mark-zuckerberg-regarding-internetorg-net-neutrality-privacy-and-/935857379791271> [<https://perma.cc/DK58-36YX>] [hereinafter *Open Letter*].

<sup>53</sup> *Id.*; see also Mitchell Baker, *Zero Rating and the Open Internet*, LIZARD WRANGLING (May 6, 2015), <https://blog.lizardwrangler.com/2015/05/06/zero-rating-and-the-open-internet> [<https://perma.cc/592T-M6A2>].

<sup>54</sup> See Annie Gowen, *India Bans Facebook’s ‘Free’ Internet for the Poor*, WASH. POST (Feb. 8, 2016), [https://www.washingtonpost.com/world/indian-telecom-regulator-bans-facebooks-free-internet-for-the-poor/2016/02/08/561fc6a7-e87d-429d-ab62-7cdec43f60ac\\_story.html](https://www.washingtonpost.com/world/indian-telecom-regulator-bans-facebooks-free-internet-for-the-poor/2016/02/08/561fc6a7-e87d-429d-ab62-7cdec43f60ac_story.html) [<https://perma.cc/2CBQ-V8PB>]; Jesse Hempel, *India Bans Facebook’s Basics App to Support Net Neutrality*, WIRED (Feb. 8, 2016, 12:52 PM), <http://www.wired.com/2016/02/facebooks-free-basics-app-is-now-banned-in-india> [<https://perma.cc/9BMY-3PZA>].

<sup>55</sup> Manu Kasuhik, *TRAI’s Web of Confusion*, BUS. TODAY (July 31, 2016), <http://www.businesstoday.in/magazine/focus/the-telecom-regulator-must-first-simplify-its-processes-before-dealing-with-net-neutrality/story/234769.html> [<https://perma.cc/4L5P-T3X5>].

<sup>56</sup> Parminder Jeet Singh, *Free Basics, Now Through the Back Door*, THE HINDU (July 5, 2016), <http://www.thehindu.com/opinion/op-ed/parminder-jeet-singh-india-and-facebook-free-basics-now-through-the-backdoor/article8807948.ece> [<https://perma.cc/35QB-2Z22>].

<sup>57</sup> Rishi Iyengar, *India now Has the ‘World’s Strongest’ Net Neutrality Rules*, CNN (July 12, 2018, 12:10 PM), <https://money.cnn.com/2018/07/12/technology/india-net-neutrality-rules-telecom/index.html>; see also Adi Robertson, *India Just Approved Net Neutrality Rules that Ban ‘Any Form’ of Discrimination*, VERGE (July 11, 2018, 4:25 PM), <https://www.theverge.com/2018/7/11/17562108/india-department-of-telecommunications-trai-net-neutrality-proposal-approval>.



private sector zero-rating, is advancing its people's human rights in compliance with its international human rights obligations under the ICCPR. Given India's yawning digital divide, among other factors, the answer may be in the negative if the country is not doing enough otherwise to ensure Internet access for the more than 800 million Indians—two thirds of the country's population—who still do not have it.<sup>58</sup>

### B. *Inter-American Human Rights System*

In a report published in 2014, the OAS Special Rapporteur on Freedom of Expression (“OAS Special Rapporteur”) affirmed that American Convention on Human Rights Article 13 governing freedom of expression “applies fully to communications, ideas and information distributed through the Internet.”<sup>59</sup> Further interpreting the American Convention, the OAS Special Rapporteur expressly affirmed that respect for net neutrality “is a necessary condition for exercising freedom of expression on the Internet pursuant to the terms of Article 13.”<sup>60</sup> This is because “[n]et neutrality is part of the original design of the Internet [and] is fundamental for guaranteeing the plurality and diversity of the flow of information.”<sup>61</sup> As these statements indicate, the Inter-American human rights system goes even further than its UN counterpart to address and protect net neutrality principles in several important respects.

Article 13 of the American Convention follows Article 19 of the ICCPR in most key respects, but differs positively in others that are worth highlighting. Like its UN counterpart, Article 13 safeguards freedom of expression in all its dimensions and establishes an exceptions regime that functions almost identically to the Article 19 version described above.<sup>62</sup> American Convention Article 13 states in relevant part, “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other

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<sup>58</sup> *India: Human Development Indicators*, UNITED NATIONS DEV. PROGRAMME, <http://hdr.undp.org/en/countries/profiles/IND> (last visited Mar. 22, 2019) (indicating that less than 20% of India's population has Internet access of any kind); see Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at 428–29.

<sup>59</sup> *Freedom of Expression and the Internet*, *supra* note 38, ¶ 2 (citing *Joint Declaration*, *supra* note 2).

<sup>60</sup> *Id.* ¶ 25.

<sup>61</sup> *Id.* ¶¶ 27–28.

<sup>62</sup> *Id.* ¶¶ 1–2, 52–72.

medium of one's choice."<sup>63</sup> But, it also adopts an express ban on "prior censorship," as well as on restrictions "by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."<sup>64</sup> In this same vein, the American Convention articles which bar discrimination in the implementation and safeguarding of the treaty's rights expressly recognize unlawful distinctions made on the basis of "economic status."<sup>65</sup> This, too, distinguishes the Convention in contrast with its counterpart, the ICCPR.

It is difficult to overstate the significance of these normative protections for net neutrality and freedom of expression in the Americas. Among the primary legal consequences catalogued by the OAS Special Rapporteur for State parties to the American Convention to comply with are the following:

- Guarantee the effective implementation of the net neutrality principle through "adequate legislation," which should be "based on dialogue among all actors . . . to maintain the basic characteristics of the original environment, strengthening the Internet's democratizing capacity and fostering universal and nondiscriminatory access."<sup>66</sup>
- Ensure that persons' "free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference."<sup>67</sup>
- Guarantee that any restrictions to net neutrality and freedom of expression "be established by law, formerly and in practice, and that

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<sup>63</sup> American Convention on Human Rights: Pact of San José, Costa Rica art. 13(1), Nov. 22, 1969, O.A.S.T.S. No. 036, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

<sup>64</sup> *Freedom of Expression and the Internet*, *supra* note 38, ¶ 88; American Convention on Human Rights, *supra* note 63, art. 13(3).

<sup>65</sup> American Convention on Human Rights, *supra* note 63, arts. 1(1), 24.

<sup>66</sup> *Freedom of Expression and the Internet*, *supra* note 38, paras. 11, 26, 177–80 (outlining Special Rapporteur's discussion of the principles that should guide Internet governance at the national level, which contemplate multi-sectorial participation through democratic processes in the devising of Internet policies and regulations).

<sup>67</sup> *Id.* ¶ 25.

the laws in question be clear.”<sup>68</sup> Such restrictions must also advance a legitimate State objective of the type listed in Article 13 paragraph 2, which includes respecting the rights of others, and conform to basic principles of necessity, proportionality and due process.<sup>69</sup>

- Regulations or other implementing norms “that create uncertainty with regard to the scope of the right protected and whose interpretation could lead to arbitrary rulings that could arbitrarily compromise the right to freedom of expression would [also] be incompatible with the American Convention.”<sup>70</sup>
- Protect media and other pluralism online by “ensuring that changes are not made to the Internet that result in a reduction in the number of voices and amount of content available [to] allow for the search for and circulation of information and ideas of all kinds . . . pursuant to the terms of Article 13 of the American Convention.”<sup>71</sup> This is necessary because media and other types of “pluralism and diversity [are] essential conditions for public debate and the exercise of freedom of expression [and therefore] must be preserved in the digital era.”<sup>72</sup>
- Adopt measures necessary “to prevent or remove the illegitimate restrictions to Internet access put in place by private parties and corporations, such as policies that threaten net neutrality or foster anticompetitive practices.”<sup>73</sup>
- Respect and guarantee not just the individuals’ freedom of expression rights, but also those of society as well.<sup>74</sup> This “dual dimension” inherent in the right to freedom of expression means that it is “both the right to communicate to others one’s point of view and any information or opinion desired, as well as the right of everyone to

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<sup>68</sup> *Id.* ¶ 58.

<sup>69</sup> *Id.* ¶ 55.

<sup>70</sup> *Id.* ¶ 58.

<sup>71</sup> *Id.* ¶ 19.

<sup>72</sup> Edison Lanza (OAS Special Rapporteur on Freedom of Expression), *Standards for a Free, Open and Inclusive Internet*, ¶ 8 U.N. Doc. OEA/Ser.L/V/II (Mar. 15, 2017).

<sup>73</sup> *Freedom of Expression and the Internet*, *supra* note 38, ¶ 51.

<sup>74</sup> *Id.* ¶ 52.

receive and hear those points of view, information, opinions, stories and news, freely and without interference that would distort or block it.”<sup>75</sup>

Mexico is a good example of how international standards can positively influence the adoption of domestic norms protecting freedom of expression and net neutrality. In 2013, Mexico approved a bill to amend its Political Constitution in the area of telecommunications.<sup>76</sup> In a prescriptive move that tracks the special protections of American Convention Article 13.3, the Mexican legislature amended Article 7 of the Constitution, which safeguards freedom of expression, to prohibit restrictions of that right “by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means.”<sup>77</sup> This near verbatim incorporation of American Convention Article 13.3’s protections into Mexican constitutional law has substantial implications for the ongoing policy debates in that country around how best to define and regulate net neutrality, which was codified but not defined by the Federal Telecommunications and Broadcasting Law practices.<sup>78</sup> This is especially true with respect to the widespread zero-rating practices currently on display in Mexico that, on their face, would seem to contradict the aforementioned constitutional protections as well as the country’s human rights obligations.<sup>79</sup>

Colombia, on the other hand, has initiated a course of action that openly defies OAS and UN standards on protecting net neutrality. The country has enacted legislation that defines net neutrality and expressly claims to safeguard it.<sup>80</sup> At the

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<sup>75</sup> *Id.* ¶ 35.

<sup>76</sup> *Id.* ¶ 5.

<sup>77</sup> Constitución Política de los Estados Unidos Mexicanos, CP, art. 7, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 12-27-2013 (Arturo J. Carrillo trans.) (Mex.).

<sup>78</sup> MARICARMEN SEQUERA, LIA HERNÁNDEZ, CARLOS BRITO, ANDRÉ DELGADO & VALERIA BETANCOURT, KARISMA FOUNDATION, ¿CÓMO SE CONTRATA EN LATINOAMÉRICA EL ACCESO A INTERNET? ¿QUÉ TIENE QUE VER ÉSTO CON LA NEUTRALIDAD DE LA RED? 48–49 (Arturo J. Carrillo trans.) (2016) [hereinafter KARISMA FOUNDATION].

<sup>79</sup> *Id.* at 48–51; PAULA JARAMILLO, EXAMINANDO LO DERECHOS Y LAS LIBERTADES EN INTERNET EN LATINOAMÉRICA: INFORME CONSOLIDADO DE INVESTIGACIÓN (Arturo J. Carrillo trans.) (2016) [hereinafter APC REPORT].

<sup>80</sup> DERECHOS DIGITALES & INTERVOZES, NEUTRALIDAD DE RED EN AMÉRICA LATINA: REGLAMENTACIÓN, APLICACIÓN DE LA LEY PERSPECTIVAS 36 (2017) [hereinafter NEUTRALIDAD DE RED EN AMÉRICA LATINA].

same time, however, that legislation raises serious questions, first, about whether the definition is adequate, and second, whether the law's implementation will conform to international standards.

In 2011, Colombia enacted Law 1450 that seems to codify a strong concept of net neutrality, one which expressly prohibits blocking, interfering, discriminating or restricting Internet users' rights to access, send, receive or publish any content, application or service online.<sup>81</sup> At the same time, however, it goes on to stipulate that service providers can "make offers depending on the needs of market sectors or of the providers' subscribers according to their consumption and user profiles, *which shall not be construed as discrimination.*"<sup>82</sup> The implementing regulation makes clear that the Law's proviso authorizes plans that provide Internet access limited to certain "generic" types of services, content or applications, so long as the service providers offer plans with unlimited Internet access alongside those that would restrict it.<sup>83</sup> Karisma has correctly expressed concern that the conflicting language in the law and implementing regulation threatens to undermine the net neutrality provision and turn it into a "joke."<sup>84</sup> Accordingly, because Colombia is a monist State, where international human rights law once ratified forms part of a "constitutional bloc" of norms that can be directly invoked in Colombian courts, it is not hard to see how this panorama could easily give rise to legal claims denouncing Law 1450 on human rights grounds.<sup>85</sup>

Finally, Chile offers a telling example of the challenges to ensuring that otherwise strong net neutrality protections in law are adequately enforced. Chile is famous as the first country in the world to adopt a net neutrality law in 2010.<sup>86</sup> At a normative level, the Chilean Law's provisions create a "blanket" bar to practices that violate net neutrality, including zero-rating. It states that internet service providers ("ISPs") will not be able to arbitrarily block, interfere, discriminate, hinder or restrict content, applications or legal services that users seek to transmit or access through

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<sup>81</sup> L. 1450, Junio 16, 2011, DIARIO OFICIAL [D.O.] (Colom.) (Arturo J. Carrillo trans.).

<sup>82</sup> *Id.* (Arturo J. Carrillo trans.) (emphasis added).

<sup>83</sup> KARISMA FOUNDATION, *supra* note 78, at 37.

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

<sup>85</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93 (Arturo J. Carrillo trans.).

<sup>86</sup> Carrillo, *Having your Cake and Eating It Too*, *supra* note 4, at 398.

their networks.<sup>87</sup> The Law's prohibition on discrimination was initially applied to commonly zero-rated social media applications like Twitter, WhatsApp and Facebook.<sup>88</sup> In 2014, the *Subsecretaría de Telecomunicaciones de Chile (Subtel)*, the telecommunications regulator, announced that such services were no longer allowed, subjecting any company that utilized them to fines.<sup>89</sup> Facebook's Internet.org was similarly shut down.<sup>90</sup>

Digital rights advocates in Chile welcomed this regulation on the grounds that permitting zero-rated social media platforms was harmful to net neutrality "from a technical, economic and legal perspective."<sup>91</sup> In practice, however, Chile's net neutrality law today only bans zero-rating by mobile operators of social media apps and services offered as promotional or commercial schemes.<sup>92</sup> Some forms of zero-rating continue to exist or be permitted by Subtel, including zero-rated social media platforms.<sup>93</sup> Notably, in 2014 Subtel issued an opinion stating that Wikipedia Zero did not violate the terms of the law, or Subtel's interpretations of its net neutrality protections.<sup>94</sup> The result is normative dissonance, a situation where strong legal protections are not consistently implemented or enforced by the competent authorities, giving rise to potential human rights concerns.

### C. *European Human Rights and Legal Systems*

Europe contains three distinct but overlapping legal systems that address network neutrality. These are the Council of Europe ("CoE"), which includes the

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<sup>87</sup> Consagra el Principio de Neutralidad en la Red Para Los Consumidores y Usuarios de Internet, General de Telecomunicaciones Ley [Chilean Net Neutrality Law], 18.168, Art. 24 H(a) (Arturo J. Carrillo trans.) (2010).

<sup>88</sup> David Meyer, *In Chile, Mobile Carriers Can No Longer Offer Free Twitter, Facebook or WhatsApp*, GIGAOM (May 28, 2014), <https://gigaom.com/2014/05/28/in-chile-mobile-carriers-can-no-longer-offer-free-twitter-facebook-and-whatsapp>.

<sup>89</sup> *Id.*

<sup>90</sup> CAROLINA ROSSINI & TAYLOR MOORE, EXPLORING ZERO-RATING CHALLENGES: VIEWS FROM FIVE COUNTRIES, A PUBLIC KNOWLEDGE WORKING PAPER 17–18 (2015).

<sup>91</sup> Francisco Vera Hott, *¿Es Deseable Tener Excepciones a la Neutralidad de la Red?*, DERECHOS DIGITALES (Arturo J. Carrillo trans.) (Oct. 1, 2014), <https://derechosdigitales.org/7929/wikipedia-zero-en-chile-es-deseable-tener-excepciones-la-neutralidad-en-la-red/>.

<sup>92</sup> ROSSINI & MOORE, *supra* note 90, at 18–20.

<sup>93</sup> See, e.g., *Social Networks*, CLAROCHILE, <http://www.clarochile.cl/portal/cl/pc/personas/movil/redes-sociales/#04-redes-sociales-en-tu-plan> (Arturo J. Carrillo trans.) (last visited Apr. 2, 2019).

<sup>94</sup> ROSSINI & MOORE, *supra* note 90, at 19–20.

European Court of Human Rights; the European Union (“EU”) and its specialized judicial bodies, including the Court of Justice for the EU; and the Organization for Security and Cooperation in Europe (“OSCE”). I will focus on the first two because they establish frameworks of legally binding norms for Member States.

### 1. The Council of Europe

The Council of Europe is an intergovernmental organization founded in 1949, which currently has forty-seven Member States (including all twenty-eight EU Member States).<sup>95</sup> It was set up to promote democracy and protect human rights and the rule of law in Europe.<sup>96</sup> It should not be mistaken for the European Union, or one of the bodies of the European Union (such as the European Council, which is the highest policy-making body of the EU), although the two organizations have a close relationship.<sup>97</sup> To join the CoE, Member States must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms; they must also pledge to collaborate sincerely and effectively with the CoE’s efforts to secure the maintenance and further realization of human rights and fundamental freedoms.<sup>98</sup> In this vein, all CoE Member States have ratified the European Convention on Human Rights (“ECHR”) (not to be mistaken for the EU Charter of Fundamental Rights) and submitted themselves to the jurisdiction of the European Court of Human Rights (a different body from the European Court of Justice).<sup>99</sup>

The Council of Europe has a number of bodies that act to protect and promote human rights, but its principal organs are the Committee of Ministers, the Parliamentary Assembly, the Secretariat, and the European Court of Human Rights

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<sup>95</sup> *Our Member States*, COUNCIL OF EUR., <http://www.coe.int/en/web/about-us/our-member-states> (last visited Apr. 2, 2019).

<sup>96</sup> *What We Do*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/values> (last visited June 10, 2019).

<sup>97</sup> *Do Not Get Confused*, COUNCIL OF EUR., <http://www.coe.int/en/web/about-us/do-not-get-confused> (explaining the differences between different European Institutions) (last visited Apr. 2, 2019).

<sup>98</sup> Statute of the Council of Europe, arts. 1, 3, May 6, 1949, E.T.S. No. 1, <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052> [hereinafter Statute of the Council of Europe].

<sup>99</sup> Eur. Consult. Ass., *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Doc. No. 5, art. 8 (1950) [hereinafter *European Convention on Human Rights*]; *About Us*, COUNCIL OF EUR., <http://www.coe.int/en/web/about-us/who-we-are> (last visited Apr. 2, 2019).

("ECtHR").<sup>100</sup> The Committee of Ministers, made up of either the Ministers of Foreign Affairs of each Member State or the permanent diplomatic representative of those States in Strasbourg, is the CoE's main decision-making body.<sup>101</sup> Article 15(b) of the Statute of the Council of Europe authorizes the Committee of Ministers to formulate formal written "recommendations" to Member State governments and may request that they inform the CoE of any actions taken to implement and/or comply with it terms.<sup>102</sup> Thus, although these recommendations are not technically binding, there is a clear expectation that Member States take them into account, especially when legislating or regulating on the topic addressed.

The Committee of Ministers has adopted a number of "declarations" and "recommendations" recognizing the importance of protecting freedom of expression on the Internet.<sup>103</sup> Most notably, in January 2016, the Committee of Ministers adopted Recommendation CM/Rec(2016)1 on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality.<sup>104</sup> This Recommendation recognizes net neutrality as a principle that:

underpins non-discriminatory treatment of Internet traffic and the users' right to receive and impart information and to use services of their choice. It reinforces the full exercise and enjoyment of the right to freedom of expression because

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<sup>100</sup> *Structure*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/structure> (last visited June 10, 2019).

<sup>101</sup> *Committee of Ministers*, COUNCIL OF EUR., <http://www.coe.int/en/web/cm> (last visited Apr. 2, 2019).

<sup>102</sup> Statute of the Council of Europe, *supra* note 98, art. 15.

<sup>103</sup> See Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2007)(3) of the Committee to Member States on the Remit of Public Service Media in the Information Society*, 985th Sess., CM/Rec(2007)3 (2007); Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2007)16 on Measures to Promote the Public Service Value of the Internet*, 1010th Sess., CM/Rec(2007)16 (2007) [hereinafter *Recommendation CM/Rec(2007)16*]; Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2008)6 on Measures to Promote Respect for Freedom of Expression and Information with Regard to Internet Filters*, 1022nd Sess., CM/Rec(2008)6 (2008) [hereinafter *Recommendation CM/Rec(2008)6*]; Eur. Council Comm. of Ministers, *Declaration of the Committee of Ministers on Network Neutrality*, 1094th Sess. (Sept. 29, 2010); Eur. Council Comm. of Ministers, *Declaration by the Committee of Ministers on Internet Governance Principles*, 1121st Sess. (Sept. 21, 2011); Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2014)6 to Member States on a Guide to Human Rights for Internet Users*, 1197th Sess., CM/Rec(2014)6 (2014).

<sup>104</sup> Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2016)1 of the Committee of Ministers to Member States on Protecting and Promoting the Right to Freedom of Expression and the Right to Private Life with Regard to Network Neutrality*, 1244th Sess., CM/Rec(2016)1 (2016) [hereinafter *Recommendation CM/Rec(2016)1*].



Article 10 of the [European] Convention [on Human Rights] applies not only to the content of information but also to the means of its dissemination.<sup>105</sup>

With respect to network neutrality, Recommendation CM/Rec(2016)1's central provisions are as follows:

#### 1. General Principles

1.1 Internet users have the right to freedom of expression, including the right to receive and impart information, by using services, applications and devices of their choice, in full compliance with Article 10 of the [European] Convention [on Human Rights]. These rights must be enjoyed without discrimination on any ground such as gender, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>106</sup>

1.2. Internet users' right to receive and impart information should not be restricted by means of blocking, slowing down, degrading or discriminating Internet traffic associated with particular content, services, applications or devices, or traffic associated with services provided on the basis of exclusive arrangements or tariffs.<sup>107</sup>

(. . .)

#### 2. Equal treatment of Internet traffic

2.1. Internet traffic should be treated equally, without discrimination, restriction or interference irrespective of the sender, receiver, content, application, service or device. This is understood as the network neutrality principle for the purpose of this recommendation. The network neutrality principle applies to all Internet access services irrespective of the infrastructure or the network used for the Internet connection and regardless of the underlying technology used to transmit signals.<sup>108</sup>

EU Recommendation CM/Rec(2016)1 further highlights an underappreciated aspect of network neutrality: its impact on the right to private and family life as articulated

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<sup>105</sup> *Id.* ¶ 4.

<sup>106</sup> *Id.* Appendix.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

in the European Convention on Human Rights.<sup>109</sup> Specifically, it provides guidelines stating that:

the use of Internet traffic management techniques that are capable of assessing the content of communications is an interference with the right to respect for private and family life. Therefore, such use must be fully in line with Article 8 of the Convention, be tested against applicable legislation on the right to private life and personal data protection and reviewed by a competent authority within each member State in order to assess compliance with legislation.<sup>110</sup>

It should be emphasized that the declarations and recommendations issued by the Council of Ministers are subsequently implemented by Member States directly, or cited and used by the other principal EU organs in their work, most notably the European Court of Human Rights.<sup>111</sup> For example, the ECtHR, in its judgment in the case of *Ahmet Yildirim v. Turkey*,<sup>112</sup> referred to the CoE's declarations<sup>113</sup> and recommendations<sup>114</sup> addressing digital rights when determining the standards to apply under European Convention Article 10 on freedom of expression. In the end, the Court found a violation of Article 10 due to a Turkish court's decision in a criminal proceeding to block all websites hosted by Google Sites, instead of just blocking the allegedly unlawful site at issue.<sup>115</sup> This illustrates one of the main mechanisms through which the Committee of Ministers achieves the progressive

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<sup>109</sup> *European Convention on Human Rights*, *supra* note 99, art. 8.

<sup>110</sup> *Recommendation CM/Rec(2016)1*, *supra* note 104.

<sup>111</sup> See *Committee of Ministers*, COUNCIL OF EUR., <https://www.coe.int/en/web/cm> (last visited June 10, 2019).

<sup>112</sup> *Yildirim v. Turkey*, 2012-II Eur. Ct. H.R. 6–8 (2013).

<sup>113</sup> Eur. Council Comm. of Ministers, *Declaration of the Committee of Ministers on Human Rights and the Rule of Law in the Information Society*, CM(2005)56 (May 13, 2005); Eur. Council Comm. of Ministers, *Declaration on Freedom of Communication on the Internet Adopted by the Committee of Ministers*, 840th Sess. (May 28, 2003).

<sup>114</sup> *Recommendation CM/Rec(2007)16*, *supra* note 103; Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2007)11 on Promoting Freedom of Expression and Information in the New Information and Communications Environment*, 1005th Sess., CM/Rec(2007)11 (2007); Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2008)6*, *supra* note 103; Eur. Council Comm. of Ministers, *Recommendation CM/Rec(2012)3 of the Committee of Ministers to Member States on the Protection of Human Rights with Regard to Search Engines*, 1139th Sess., CM/Rec(2012)3 (2012).

<sup>115</sup> *Yildirim v. Turkey*, 2012-II Eur. Ct. H.R. ¶ 51.

realization of human rights: the CoE articulates and elaborates standards, which the ECtHR subsequently adopts and applies in its case law.

a. European Court of Human Rights (ECtHR)

The European Court of Human Rights interprets and applies the European Convention on Human Rights; as such, it plays a central role in regulating transnational freedom of expression on the continent.<sup>116</sup> Like its ICCPR and American Convention counterparts, Article 10 of the European Convention includes within its scope the right to receive and impart information: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>117</sup> In this regard, “the [European] Court has held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general.”<sup>118</sup> It has also established that Article 10 “applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the latter necessarily interferes with the right to receive and impart information.”<sup>119</sup>

With respect to human rights online, a leading ECtHR case is the aforementioned *Ahmet Yildirim v. Turkey*. There, the Court found that the State violated Article 10’s guarantees when a Turkish court ordered the wholesale blocking of access to the Google Sites website hosting service, in order to ensure that, as the result of a criminal sanction, a designated website, which allegedly offended the memory of Atatürk, was rendered inaccessible.<sup>120</sup> The Court deemed this measure to be overbroad, arbitrary and unnecessary because it blocked public access to all the websites hosted by Google Sites, including that of the applicant, who owned a different website from the offending one at issue.<sup>121</sup> The ECtHR employed similar reasoning in another case from Turkey to find a violation of Article 10

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<sup>116</sup> See *Structure*, *supra* note 100; *European Court of Human Rights*, COUNCIL OF EUR., <https://www.echr.coe.int/Pages/home.aspx?p=home&c=> (last visited June 10, 2019).

<sup>117</sup> *European Convention on Human Rights*, *supra* note 99, art. 10.

<sup>118</sup> *Times Newspapers Ltd. v. the United Kingdom* (nos. 1 and 2), 2009-I Eur. Ct. H.R. ¶ 27; *Yildirim*, 2012-II Eur. Ct. H.R. ¶ 48.

<sup>119</sup> *Yildirim*, 2012-II Eur. Ct. H.R. ¶ 50; *Cengiz and Others v. Turkey*, 2015-2 Eur. Ct. H.R. ¶ 56.

<sup>120</sup> *Yildirim*, 2012-II Eur. Ct. H.R. ¶ 68.

<sup>121</sup> *Id.* ¶¶ 65–66.

resulting from a blanket order blocking all access to YouTube because the website was found to be hosting particular videos that allegedly insulted the memory of Atatürk in violation of local law.<sup>122</sup>

In 2016, the ECtHR found that Estonia's refusal to provide access to two state-run online databases and the Council of Europe website for legal research constituted a violation of a prisoner's Article 10 right to receive information via the Internet.<sup>123</sup> The ECtHR emphasized that this decision arose against the factual background of Estonia granting prisoners limited access to the Internet, and could not be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners.<sup>124</sup> Finally, the ECtHR has determined that the "duties and responsibilities" to be imposed on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher with regards to third-party content.<sup>125</sup> This determination was based on the Recommendation of the Committee of Ministers to member States on "a new notion of media," which urges the adoption of a graduated and differentiated response to Internet actors.<sup>126</sup>

Article 10 of the European Convention on Human Rights protects the right to freedom of expression, subject to narrow exceptions. Paragraph 2 of Article 10 states that:

The exercise of [this] freedom[], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

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<sup>122</sup> *Cengiz and Others*, 2015-2 Eur. Ct. H.R. ¶ 57.

<sup>123</sup> *Kalda v. Estonia*, 2016-II Eur. Ct. H.R. ¶¶ 43, 54. The websites at issue were those of the Chancellor of Justice and the Estonian Parliament; the prisoner wanted to access legal opinions (Chancellor of Justice) and draft laws, explanatory memoranda, records and minutes of sittings (Estonian Parliament). *Id.* ¶¶ 10, 50.

<sup>124</sup> *Kalda v. Estonia*, 2016-II Eur. Ct. H.R. ¶¶ 45, 48.

<sup>125</sup> *Delfi AS v. Estonia*, App. No. 64569/09, Eur. Ct. H.R. ¶ 113 (2015).

<sup>126</sup> Eur. Council Committee of Ministers, *Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media*, COUNCIL OF EUR. (Sept. 21, 2011), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0).

reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>127</sup>

The exceptions regime outlined in this provision has been interpreted strictly by the ECtHR in the light of the essential role of freedom of expression in a democratic society; accordingly, measures limiting freedom of expression must be justified by a “pressing social need.”<sup>128</sup> As noted above, the ECtHR has held that Article 10 covers Internet communications,<sup>129</sup> and that restrictions on Internet access can thus constitute a violation of Article 10.<sup>130</sup> While the ECtHR has not yet directly addressed network neutrality *per se*, it seems clear that the Court’s eventual approach to that issue will be shaped by its existing jurisprudence as well as the aforementioned declarations and recommendations of the Committee of Ministers, which have done so.

## 2. European Union

The European Union (“EU”) is an economic and political union consisting of twenty-eight Member States,<sup>131</sup> founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.<sup>132</sup> The principal organs of the EU include the European Parliament, the European Council, the European Commission, and the Court of Justice for the European Union.<sup>133</sup> When the Lisbon Treaty entered into force in December 2009, it brought with it the recognition of the Charter of Fundamental Rights of the European Union, which was deemed to possess the same legal status as the Treaties on European Union.<sup>134</sup> The “Treaties on European Union”

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<sup>127</sup> *European Convention on Human Rights*, *supra* note 99.

<sup>128</sup> *Delfi AS*, App. No. 64569/09, Eur. Ct. H.R. ¶ 131.

<sup>129</sup> *Times Newspapers Ltd.*, 2009-I, Eur. Ct. H.R. ¶ 27; *Yildirim*, 2012-II Eur. Ct. H.R. ¶ 48; *Delfi*, App. No. 64569/09 ¶ 110.

<sup>130</sup> *Yildirim*, 2012-II Eur. Ct. H.R. ¶ 54.

<sup>131</sup> *EU Member Countries in Brief*, EUR. UNION, [https://europa.eu/european-union/about-eu/countries/member-countries\\_en](https://europa.eu/european-union/about-eu/countries/member-countries_en) (last visited Apr. 2, 2019).

<sup>132</sup> Charter of Fundamental Rights of the European Union, pmbL., 2012 O.J. (C 326) 391 [hereinafter CFR].

<sup>133</sup> *See EU Institutions and Other Bodies*, EUR. UNION, [https://europa.eu/european-union/about-eu/institutions-bodies\\_en#a-unique-institutional-set-up](https://europa.eu/european-union/about-eu/institutions-bodies_en#a-unique-institutional-set-up) (last visited Apr. 2, 2019).

<sup>134</sup> Consolidated Version of the Treaty on the Functioning of the European Union, art. 2, 2008 O.J. (C 115) 47 [hereinafter Consolidated TFEU]; CFR, *supra* note 132, art. 6.

is the collective name given to the constitutive treaties establishing the European Union, which include the Treaties that created the Union and the Treaties that amend or supplement those.<sup>135</sup> These include the Rome Treaty Establishing The European Economic Community (1957); the Maastricht Treaty on European Union, 1993; the Treaty of Amsterdam, 1999; Treaty of Nice, 2003; and the Lisbon Treaty of 2007 (which entered into force in 2009).

The Rome Treaty, as presently amended, is the Treaty on the Functioning of the European Union (“TFEU”); while the Maastricht Treaty, as presently amended, is the Treaty on European Union (“TEU”).<sup>136</sup> As noted, Article 6 of the TEU gives the Charter of Fundamental Rights the same legal value as the TEU, which means that EU Member States, by ratifying the Lisbon Treaty or acceding to the EU, are deemed to recognize the Charter of Fundamental Rights as applying to the interpretation of EU law, to EU actors, and to Member States when they are implementing EU law.<sup>137</sup>

The Charter of Fundamental Rights is a different treaty from the European Convention on Human Rights. It contains fifty rights (where the European Convention on Human Rights only has fourteen), including rights such as “the freedom to conduct a business in accordance with Union law and national laws and practices” (Article 16), “the right to protection of personal data” (Article 8), a general principle of non-discrimination (Article 21), and a guarantee that “Union policies shall ensure a high level of consumer protection” (Article 38).<sup>138</sup> Regarding freedom of expression, Charter Article 11 establishes that: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.”<sup>139</sup>

Unlike other international human rights instruments, the text of the Charter does not distinguish between absolute and qualified rights, as is evident from the

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<sup>135</sup> T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* 87 (2013).

<sup>136</sup> *See EU Treaties*, EUR. UNION, [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en).

<sup>137</sup> HARTLEY, *supra* note 135, at 157–58.

<sup>138</sup> *See CFR*, *supra* note 132.

<sup>139</sup> *Id.* art. 11.

verbatim reproduction of the text of Article 11. Instead, it includes a general limitations clause in Article 52, paragraph 1, which reads as follows:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.<sup>140</sup>

In addition, the general limitation clause sets out a rule in Article 52(3) designed to prevent conflict between Charter rights and European Convention rights that correspond to each other by providing for the meaning and scope of a given Charter right to be the same as the corresponding Convention right, while preserving the possibility of EU law providing more extensive protection.<sup>141</sup> The interpretation and enforcement of the Charter are the province of EU courts such as the Court of Justice of the European Union (“CJEU”), but not the European Court of Human Rights, which enforces the European Convention.<sup>142</sup> Importantly, the question of any integrated relationship between the two regional courts remains unresolved to date due to the CJEU’s refusal to find that the accession of the EU to the ECHR is compatible with the EU treaties.<sup>143</sup>

a. EU Regulation 2015/2120 and the BEREC Guidelines

In June 2015, the European Union passed EU Regulation 2015/2120, which sets out measures concerning open Internet access, including the principle of network

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<sup>140</sup> *Id.* art. 52(1).

<sup>141</sup> *Id.* art. 52(3) (scope and interpretation of rights and principles).

3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection . . . .

*Id.*

<sup>142</sup> See *Institutions and bodies*, EUR. UNION, [https://europa.eu/european-union/about-eu/institutions-bodies\\_en](https://europa.eu/european-union/about-eu/institutions-bodies_en) (last visited June 10, 2019); see also *supra* note 116 and accompanying text.

<sup>143</sup> Opinion 2/13 of the Court of Justice, *Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454 (Dec. 18, 2014).

neutrality.<sup>144</sup> Regulation 2015/2120 is a compromise text between the European Parliament (which was in favor of strong network neutrality protections) and the European Commission and European Council (which were initially less inclined towards strong network neutrality protections).<sup>145</sup> The self-proclaimed purpose of this Regulation is to “establish[] common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights.”<sup>146</sup> It did so in Article 3, by providing for robust network neutrality protections in the following terms:

1. End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service . . . .

3. Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.<sup>147</sup>

In addition, EU Regulation 2015/2120 prescribes detailed transparency measures in Article 4 and for national regulatory authorities to closely monitor and ensure compliance with Articles 3 and 4 in Article 5.<sup>148</sup> As context, Recital (33) of the Regulation references five community values that must be protected and balanced by national regulatory authorities in determining compliance with Articles 3 and 4: (1) the protection of personal data [Charter, Article 8]; (2) freedom of expression and information [Charter, Article 1]; (3) freedom to conduct a business [Charter, Article 16]; (4) non-discrimination [Charter, Article 21] and (5) consumer protection

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<sup>144</sup> Eur. Parl. Ass. & Eur. Council, *Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 Laying Down Measures Concerning Open Internet Access and Amending Directive 2002/22/EC on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services and Regulation (EU) No 531/2012 on Roaming on Public Mobile Communications Networks within the Union*, 2015 O.J. (L 310) [hereinafter *EU Regulation*].

<sup>145</sup> *Net neutrality wins in Europe!*, EUR. DIGITAL RTS. (Aug. 29, 2016), <https://edri.org/net-neutrality-wins-europe/>.

<sup>146</sup> *EU Regulation*, *supra* note 144, art. 1(1).

<sup>147</sup> *Id.* art. 3.

<sup>148</sup> *Id.* arts. 4–5.



[Charter, Article 38].<sup>149</sup> As noted, Regulation 2015/2120 prioritizes the twin aims of establishing common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights, and protecting end-users while simultaneously guaranteeing the continued functioning of the internet ecosystem as an engine of innovation.<sup>150</sup>

It is also worth noting that Article 8 of Regulation 2015/2120 amends Article 1 of Directive 2002/22/EC (on universal service and users' rights relating to electronic communications networks and services), replacing paragraph 3 as follows:

National measures regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This has the effect of introducing human rights protections into an older EU measure designed to ensure universal service in electronic communications networks, thereby ensuring that the human rights standards of protection are the same for both the EU Regulation 2015/2120 and Directive 2002/22/EC.

In order to promote a consistent application by Member States of the EU, Regulation 2015/2120 tasked the Body of European Regulators of Electronic Communications ("BEREC") with issuing guidelines for the implementation of the obligations of national regulatory authorities under Article 5, after consultation with stakeholders and in close cooperation with the European Commission.<sup>151</sup> BEREC produced its much anticipated Guidelines in August 2016.<sup>152</sup> These Guidelines set out recommended interpretations of each of the Regulation's Articles in light of their respective recitals, which the national regulatory authorities are expected to follow.

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<sup>149</sup> *Id.* ¶ 33; CFR, *supra* note 132, arts. 1, 8, 16, 21, 38. Recital (33) states that "[t]his Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter, notably the protection of personal data, the freedom of expression and information, the freedom to conduct a business, non-discrimination and consumer protection." *EU Regulation*, *supra* note 144, ¶ 33.

<sup>150</sup> *EU Regulation*, *supra* note 144.

<sup>151</sup> *Id.* art. 5(3).

<sup>152</sup> Body of European Regulators for Electronic Communications [BEREC], *BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*, at 1, Doc. No. BoR (16) 127 (2016) [hereinafter *BEREC Guidelines*].

Significantly, they start by reaffirming Regulation 2015/2120's aim to "safeguard equal and non-discriminatory treatment of traffic" and "related end-user's rights."<sup>153</sup>

Taken together, Regulation 2015/2120 and the BEREC Guidelines provide strong protection for network neutrality through the recognition of non-discrimination and freedom of expression rights, among others.<sup>154</sup> Both the EU Regulation and the Guidelines integrate core human rights standards into the normative and implementation frameworks for network neutrality in all its dimensions. Thus, the Guidelines confirm that the "Regulation observes the fundamental rights of, and the principles recognised in the Charter, notably the protection of personal data, the freedom of expression and information, the freedom to conduct a business, non-discrimination and consumer protection."<sup>155</sup> Furthermore, with regards to discussing possible restrictions to net neutrality, Regulation 2015/2120 expressly references the exceptions regimes of the Charter of Fundamental Rights and the European Convention on Human Rights in Recital (13).<sup>156</sup> Recital (13) provides that:

The requirement to comply with Union law [imposed by the Regulation on EU Member States] relates, *inter alia*, to the compliance with the requirements of the Charter of Fundamental Rights of the European Union ("the Charter") in relation to limitations on the exercise of fundamental rights and freedoms. As provided in Directive 2002/21/EC of the European Parliament and of the Council, any measures liable to restrict those fundamental rights or freedoms are only to be imposed if they are appropriate, proportionate and necessary within a democratic society, and if their implementation is subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms, including its provisions on effective judicial protection and due process.<sup>157</sup>

In this vein, EU Regulation 2015/2120's Article 3(2) provides that agreements between ISPs and end-users on commercial and technical conditions, as well as on the characteristics of Internet access services such as price, data volumes or speed,

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<sup>153</sup> *Id.* ¶ 3.

<sup>154</sup> *Id.* ¶ 20; *see also EU Regulation*, *supra* note 144, paras. 13, 33.

<sup>155</sup> *BEREC Guidelines*, *supra* note 152, paras. 20.

<sup>156</sup> *EU Regulation*, *supra* note 144, ¶ 13.

<sup>157</sup> *Id.*

are permitted, provided that such agreements and commercial practices do not limit the exercise of the end-users' rights laid down in Article 3(1).<sup>158</sup> In light of this framework, the BEREC Guidelines are obliged to address zero-rating as "a commercial practice . . . which could have different effects on end-users and the open internet, and hence on the end-user rights protected under the Regulation."<sup>159</sup> Accordingly, while not prohibiting zero-rating, the Guidelines require the comprehensive assessment on a case-by-case basis of differential pricing practices to determine when and if they limit the exercise of the end-users' rights laid down in Article 3(1) in relation to freedom of expression and information, as well as media pluralism.<sup>160</sup>

Finally, the BEREC Guidelines apply the human rights framework outlined in Regulation 2015/2120's Recital (13) to the interpretation of Article 3(3)(a) regarding the adoption of reasonable traffic management measures.<sup>161</sup> The effect of these provisions is to limit the circumstances under which non-reasonable traffic management measures can be required by law. They ensure that any such limits be compatible with fundamental rights and freedoms, meaning they can only be imposed if appropriate, proportionate and necessary within a democratic society.<sup>162</sup> At the same time, their implementation must conform to the procedural safeguards consecrated in the "European Convention for the Protection of Human Rights and Fundamental Freedoms, including the provisions on effective judicial protection and due process."<sup>163</sup> This ensures that non-reasonable traffic management measures

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<sup>158</sup> *Id.* arts. 3(1)–3(2); see also *id.* ¶ 7; *BEREC Guidelines*, *supra* note 152, ¶ 30.

<sup>159</sup> *BEREC Guidelines*, *supra* note 152, ¶ 40.

<sup>160</sup> *Id.* ¶ 46, n.13.

<sup>161</sup> *Id.* paras. 81–82. The *BEREC Guidelines* provide:

If an ISP applies traffic management measures which cannot be regarded as reasonable, NRAs should assess whether an ISP does so because it has to do so for legal reasons, namely to comply with the legislation or measures by public authorities specified in that exception. As explained in Recital 13, such legislation or measures must comply with the requirements of the Charter of Fundamental Rights, and notably Article 52 which states in particular that any limitation of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms.

*Id.*

<sup>162</sup> *Id.*

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

required by law must be compatible with human rights, and can be challenged by affected persons.

A 2019 report by a European nonprofit watchdog organization, partially sponsored by Mozilla, raises important questions about the effectiveness of the current EU regime for net neutrality in protecting that principle in practice.<sup>164</sup> In particular, it finds that in the two-and-a-half years since the BEREC Guidelines were adopted, most EU Member States permit widespread differential pricing practices (e.g., zero-rating) that negatively impact the European digital single market and users' privacy rights, among others.<sup>165</sup> The authors of the report further bemoan the lack of uniform interpretation and enforcement by national regulators of key BEREC standards in relation to these and other abuses of net neutrality in many of the EU Member States.<sup>166</sup>

#### D. Comparative Law Study of Net Neutrality Regulation

Since early 2018, my students in the George Washington University Law School International Human Rights Clinic and I have carried out a study of net neutrality laws worldwide to better understand which countries have legislated on the subject and in what terms. The results are attached in Annex A: *Comparative Law Study of Net Neutrality Regulations Around the World* (hereinafter *Comparative NN Table*). This research has been based largely, but not exclusively, on the "Zero Rating Map," a wiki compiled by the UN IGF Dynamic Coalition on Network Neutrality and coordinated by Professor Luca Belli.<sup>167</sup> Our research in preparing the *Table* was also informed by the wide consultation of online databases as well as a thorough review of secondary sources and specialized literature. When deciphering a country's net neutrality norms, we consulted primary sources whenever possible, including official regulatory and legislative databases.

The *Comparative NN Table* presents information on a total of fifty-three countries. This number encompasses all countries we could find that possess express

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<sup>164</sup> See generally EPICENTER.WORKS, THE NET NEUTRALITY SITUATION IN THE EU: EVALUATION OF THE FIRST TWO YEARS OF ENFORCEMENT (2019).

<sup>165</sup> *Id.* at 16.

<sup>166</sup> *Id.* at 19–21; see also iwona, *Net Neutrality to the Test—How Free Is Our Internet?*, EPICENTER.WORKS (Jan. 29, 2019), <https://epicenter.works/content/netzneutralitaet-in-europa-auf-dem-pruefstand-wie-frei-ist-unser-internet>.

<sup>167</sup> U.N. IGF Dynamic Coalition on Net Neutrality, *Zero Rating Map*, TABLEAU, <https://public.tableau.com/profile/zeroratingcts#!/vizhome/zeroratinginfo/Painel1> (last visited Apr. 6, 2019).

net neutrality regulation. In addition, it includes a number of States that do not yet have discernible net neutrality norms but are nonetheless reference points due to their political importance and/or large populations, like the United States and China. Finally, the *Table* lists a handful of countries lacking net neutrality norms that are nevertheless considered relevant as indicative of regional practice or because they are beacons in the ICT sector, such as South Africa and Israel.<sup>168</sup> Sources for the *Table* can be accessed by clicking on the digital tabs provided for each entry. The entries in the *Table* are sorted by region: North and Central America, Europe, South America, Africa, Asia and Middle East.<sup>169</sup>

Collectively, the goal is to provide a high-level overview of which States possess net neutrality norms globally and the basic elements they cover. To this end, the *Table* is organized around five columns of information for each entry. The first is whether the State possesses net neutrality rules at all. The next three columns deepen the inquiry by capturing whether, if the State does regulate net neutrality, those norms prohibit blocking, throttling, or differential pricing of online services or sources, respectively. The final column is for comments to clarify the prior entries where needed, as well as to provide links to the sources consulted. For instance, we use this column to highlight the extent to which the 28 EU countries' respective implementation of the 2015 EU Regulation conforms to the standards enunciated in 2016 by BEREC, especially in relation to zero-rating practices like paid prioritization.

### 1. NN Comparative Law Study Findings

A reading of the *Comparative NN Table* displays some interesting numbers. It shows that at least forty-six countries around the world today possess legal norms regulating net neutrality in some manner, twenty-eight of which are the Member States of the European Union subject to EU Regulation 2015/2120.<sup>170</sup> An additional nine are from Latin America (Argentina, Brazil, Colombia, Chile, Costa Rica, Ecuador, Mexico, Paraguay, and Peru) while two are from Scandinavia (Norway and Finland). India and Singapore are the only two Asian countries to address net

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<sup>168</sup> See *infra*, Annex A.

<sup>169</sup> See *infra*, Annex A.

<sup>170</sup> See *infra*, Annex A. The EU countries are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK. *EU Member Countries in Brief*, *supra* note 131.

neutrality in their law. The remaining States rounding out the tally are Canada, Turkey, Russia, Switzerland, Tunisia and Israel.

Of the forty-six States we identified expressly regulating net neutrality in some form, virtually all expressly prohibit blocking of websites, information and services, save for three (93%).<sup>171</sup> One exception is Mexico, which has not yet defined net neutrality in its law; the other two are Costa Rica and Tunisia, where some net neutrality protection has been realized via judicial decision, leaving its more general normative parameters unclear. Similarly, our study found that all but four States with net neutrality norms on the books have expressly prohibited throttling (91%). The first three exceptions are Mexico, Costa Rica and Tunisia, for the reasons just stated; the fourth is Peru, whose law authorizes throttling under certain circumstances.<sup>172</sup>

With respect to differential pricing, only eight States prohibit this practice either expressly or through a judicial or regulator's decision (less than 20%). Those countries are Canada, Italy, Slovenia, Chile, Argentina, Brazil, Tunisia and India. It is interesting to note that three of the eight countries to do so are Latin American. Tellingly, however, enforcement of this prohibition even in States with strong normative frameworks tends to be weak: Brazil and Chile are prime examples of this tendency.<sup>173</sup> Another region illustrating the difficulty in practice of restricting differential pricing, especially paid prioritization, is the European Union. In the EU, otherwise strong net neutrality protections are subject to a narrow exception for differential pricing in commercial settings.<sup>174</sup> As noted, EU Member States have adopted inconsistent approaches to dealing with these practices in their respective territories, giving rise to a troubling hodge-podge of deficient regulatory action with respect to the widespread practice of zero-rating generally.<sup>175</sup>

## II. UNIVERSAL NET NEUTRALITY STANDARDS

In this final Part, I will conduct a comparative analysis of the international and domestic legal systems surveyed to identify the extent of overlap in their ambits with respect to net neutrality. I begin by focusing on the transnational regimes described *supra* in Sections A, B and C to contrast the content and scope of their respective net

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<sup>171</sup> See *infra*, Annex A.

<sup>172</sup> See *infra*, Annex A.

<sup>173</sup> See NEUTRALIDAD DE RED EN AMÉRICA LATINA, *supra* note 80, at 18, 68; see also Christopher T. Marsden, *Comparative Case Studies in Implementing Net Neutrality: A Critical Study of Zero Rating*, SCRIPTED, Apr. 2016, at 1.

<sup>174</sup> See *supra* notes 158–66 and accompanying text.

<sup>175</sup> See *supra* notes 164–69 and accompanying text.

neutrality standards, as well as the legal status of those norms. Then, after contrasting the content, scope and legal nature of the various net neutrality rules that operate in the UN, OAS and European systems, I will compare the frameworks governing permissible restrictions to those same norms with special attention paid to zero-rating. Finally, I will identify other relevant but unexplored issues arising from the comparative analyses of the three regimes studied to flag them for future analysis.

These regional and international legal systems share a number of important characteristics among them; they differ in significant ways as well. One characteristic they share is that of being a “moving target”: each is constantly evolving, making any comparative exercise a provisional one at best. That said, this comparative study makes possible the identification of influential, high-level trends in the development and protection of net neutrality norms at an inter-governmental level. At the same time, it also makes possible the opportunity to cross-reference these high-level trends with those taking place *within* countries that regulate of net neutrality in some form, which was the subject of Section D *supra*. Accordingly, I will fold into the discussion the relevant findings of the comparative law study of State practice relating to net neutrality.

#### A. *Content, Scope and Nature of Net Neutrality Norms*

There seems to be few substantive differences between the definitions of network neutrality in the European legal systems, where it has received the most attention, and those advanced by the UN and OAS human rights frameworks. A review of the latter two human rights systems indicates that, although the normative content of their network neutrality protections may not be as fulsome as those enacted in Europe, their approach to protecting net neutrality as a norm of human rights is substantially similar to Europe’s; thus, providing a strong foundation for comparative analysis.

The levels of prescriptive content with respect to net neutrality are high in the European context and, for the time being, relatively uniform. On the one hand, the Committee of Ministers of the Council of Europe has set out human rights-infused standards protecting net neutrality *per se* in Recommendation CM/Rec(2016)1, which were transcribed above.<sup>176</sup> Not surprisingly, these standards largely mirror those previously adopted by the European Union in the EU Regulation also discussed above.<sup>177</sup> On the other, the BEREC Guidelines expressly ensure that the EU

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<sup>176</sup> See *supra* notes 105–12 and accompanying text.

<sup>177</sup> See *supra* notes 147–54 and accompanying text.

Regulation is interpreted with maximum respect for the human rights norms of the Fundamental Charter and the European Convention.<sup>178</sup> Although this apparent consensus appears to be fraying in practice as Member States act to comply with their international obligations, at least with respect to differential pricing and zero-rating in particular,<sup>179</sup> Europe nonetheless has set the benchmark against which other transnational and national approaches must be compared.

As in Europe, both the UN and OAS systems have embraced a definition of net neutrality that is framed in human rights terms. In these systems, the definition of net neutrality is that first expressed by international experts in the 2011 *Joint Declaration on Freedom of Expression on the Internet*: “[t]here should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.”<sup>180</sup> That basic definition reflects the consensus view of the regional experts on freedom of expression from the UN, the OAS, the OSCE, and the African Union who issued the Joint Declaration. It was further developed in the Inter-American context by the OAS Rapporteur on Freedom of Expression in two reports: *Report on Freedom of Expression and the Internet*, published in 2014, and *Standards for a Free, Open and Inclusive Internet*, in 2017.<sup>181</sup>

In the 2014 Report, the OAS Rapporteur elaborated on the definition from the Joint Declaration by explaining that “[t]he purpose of this principle is to ensure that free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference.”<sup>182</sup> Consequently, as noted in Part I.B., *supra*, the Rapporteur recognized that net neutrality is today “a necessary condition for exercising freedom of expression on the Internet pursuant to the terms of [American Convention] Article 13.”<sup>183</sup> Additionally, Article 13, of course, like

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<sup>178</sup> See *supra* notes 152–58 and accompanying text.

<sup>179</sup> See *supra* notes 164–69 and accompanying text.

<sup>180</sup> *Joint Declaration*, *supra* note 2, ¶ 5(a).

<sup>181</sup> See *Freedom of Expression and the Internet*, *supra* note 38, paras. 25–33; see also *supra* note 72 and accompanying text.

<sup>182</sup> *Id.* ¶ 25.

<sup>183</sup> *Id.*



Article 19(2) of the ICCPR, is a facsimile in relevant part of Article 10 of the European Convention and Article 11 of the European Charter.<sup>184</sup>

For this reason, the UN Special Rapporteur on Freedom of Expression was able to build on the 2011 Joint Declaration definition of net neutrality, subsequently declaring in 2017 that “[t]he State’s positive duty to promote freedom of expression argues strongly for network neutrality in order to promote the widest possible non-discriminatory access to information.”<sup>185</sup> In other words, there can be no doubt that the same core values of non-discrimination and freedom of expression that underpin network neutrality in Europe and the Americas have meshed perfectly with the corresponding rights enunciated in ICCPR Articles 2 and 19, thereby transforming that principle into an integral component of the ICCPR’s legal regime.<sup>186</sup> For these reasons, one can confidently affirm that “the concept of a data-neutral network based on the ‘end-to-end’ principle, as well as the term net neutrality itself, have been largely ‘uploaded’ into [UN] human rights law and discourse.”<sup>187</sup>

In light of the foregoing, then, one can be certain that the definitional core of net neutrality integrated into UN human rights law tracks that of the operative definitions prevailing in Europe and the Americas. Moreover, the same definitional elements are largely reproduced at the level of State practice, at least with respect to the application of the principle of non-discrimination to the treatment of data online as embodied by the widely prevalent prohibitions on blocking and throttling. State practice in relation to differential pricing and zero rating, however, is much less uniform. Thus, despite the vociferous affirmations of net neutrality purists to the contrary, it cannot be said that the definitional core of net neutrality reflected in inter-

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<sup>184</sup> See *supra* notes 8, 62–63, 117, 139 and accompanying text. Clearly there is a substantial amount of cross-fertilization and cross-referencing that occurs between the different systems. For example, the OAS Rapporteur in the 2013 Report on Freedom of Expression and the Internet made explicit reference to the leading European instrument addressing network neutrality at the time, namely, the Declaration of the Committee of Ministers on network neutrality, of September 29, 2010. See *Freedom of Expression and the Internet*, *supra* note 38. This Declaration, in turn, was the basis for the subsequent CoM Recommendation and the EU Regulation that followed. It is likely that as the principle of net neutrality is further examined by UN and OAS procedures and mechanisms, they will continue to build on the reinforced foundation laid by Europe in this respect.

<sup>185</sup> Kaye, *SR Report 2017*, *supra* note 16, ¶ 23.

<sup>186</sup> See *supra* Part I.A; see also Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at Part III.A (describing how net neutrality came to be an integral part of international human rights law); *Joint Declaration*, *supra* note 2, ¶ 6(a); Human Rights Council Res. 20/8, U.N. Doc. A/HRC/20/L.13, ¶ 1 (June 29, 2012).

<sup>187</sup> Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at 142.

governmental and State practice to date includes a blanket prohibition on zero-rating practices. Finally, as will be explained below, the remaining piece of the definitional puzzle relates to defining limits: any exceptions enacted by governments to net neutrality protections should follow the same strict rules that apply to enacting restrictions on the enjoyment of freedom of expression, non-discrimination and other fundamental human rights.

Deeper variances between the different systems are reflected not in the normative *content* of net neutrality norms, but rather in the legal *status* of those norms and the extent to which they are binding on Member States. The EU Regulation establishes “obligations to closely monitor and ensure compliance [by EU Member States] with the rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users rights as laid down in Articles 3 and 4.”<sup>188</sup> And, while the BEREC Guidelines are formally “recommendations” to national regulatory authorities (“NRA”) on how to implement said Articles of the Regulation, NRAs are urged to “take utmost account” of them.<sup>189</sup> It is unlikely that a State could act counter to the dictates of the Guidelines, and still be deemed in compliance with the underlying Regulation.

The EU is a highly developed legal and regulatory regime which creates explicit obligations regarding net neutrality that are binding on Member States and enforceable by a suite of political and judicial mechanisms, including the CJEU.<sup>190</sup> The Council of Europe is a parallel and overlapping regime covering a broader geographic area than the EU.<sup>191</sup> Although the declarations and recommendations of the Committee of Ministers do not enjoy the same legal status as EU Regulations, they are highly influential in shaping national policies and Member States are expected to follow them.<sup>192</sup> Moreover, as we have seen, they are a primary source of guidance for the European Court of Human Rights when it addresses issues arising under the Convention that deal with human rights online.<sup>193</sup>

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<sup>188</sup> BEREC *Guidelines*, *supra* note 152.

<sup>189</sup> *Id.*

<sup>190</sup> *See supra* Part I.C.2.

<sup>191</sup> *See supra* Part I.C.1.

<sup>192</sup> *See supra* notes 98–104 and accompanying text.

<sup>193</sup> *See supra* notes 112–16 and accompanying text.

In contrast to the European systems, the OAS and UN regimes studied have not yet profited from net neutrality-specific norms that would directly or indirectly bind their respective Member States. Rather, the legal obligations to enact net neutrality protections and enforce compliance with them at the national level flow from the duties incumbent on State Parties to the American Convention and the ICCPR, respectively, to respect and ensure respect for freedom of expression in a non-discriminatory manner (among other fundamental human rights).<sup>194</sup>

Though legal in nature, these derivative duties regarding net neutrality in the OAS and UN systems are not as precisely defined as they are in the European context; nor do they possess the sort of political foundation and institutional legitimacy that a Council of Europe Committee of Minister's Recommendation or a Regulation of the European Union (meaning the European Parliament and Council) have. The transnational enforcement mechanisms most likely to address network neutrality issues outside of Europe in the near to mid-term are the Inter-American Commission on Human Rights and the UN Human Rights Committee. Both are quasi-jurisdictional bodies whose findings and recommendations in contentious cases are not binding as a technical matter on State Parties, even though they do carry legal weight.

### B. *Permissible Restrictions on Net Neutrality*

The other major convergence confirmed by the survey of transnational legal systems that address network neutrality surrounds the framework for defining legitimate restrictions to that principle. No human right is absolute, and freedom of expression is no exception: the ICCPR Article 19(3);<sup>195</sup> American Convention Article 13(2);<sup>196</sup> European Convention Article 10(2);<sup>197</sup> and Article 52(3) of the Charter of Fundamental Rights,<sup>198</sup> all set up narrow conditions under which States can lawfully restrict freedom of expression. Because net neutrality is today an integral component of freedom of expression rights, it is a norm protected under the treaty-based human rights systems established by the United Nations, the OAS, and

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<sup>194</sup> See *supra* Parts I.A and I.B.

<sup>195</sup> See ICCPR, *supra* note 8, art. 19(3); see also *supra* text accompanying note 7.

<sup>196</sup> See American Convention on Human Rights, *supra* note 63, art. 13(2); see also *supra* text accompanying note 57.

<sup>197</sup> See *European Convention on Human Rights*, *supra* note 99, art. 10(2); see also *supra* text accompanying note 99.

<sup>198</sup> See CFR, *supra* note 132, art. 52(3) and accompanying text; see also *supra* text accompanying note 114.

in Europe to advance those rights. Accordingly, the principle of net neutrality shares not only a set of basic definitional elements, *but is also subject to the exceptions regimes established by each the respective legal frameworks of which it is part.*

In all the contexts studied, there are clearly enunciated rules that States must follow to lawfully restrict network neutrality and the human rights values it embodies. Moreover, these rules are substantially the same: any such limitation must be prescribed by law to further a legitimate State or social aim, and must be necessary as well as proportional in achieving that end.<sup>199</sup> While simply stated, this overarching systemic formula is notoriously complicated to apply in practice, not least because it is a heavily context-based and fact-dependent analysis.<sup>200</sup> Even so, one can now see why and how this specialized framework applies equally, for example, to evaluating the lawfulness of reasonable traffic management measures in Europe,<sup>201</sup> as it does to establishing whether India's net neutrality protections banning differential pricing and private sector zero-rating practices comply with the country's human rights obligations under the ICCPR.<sup>202</sup>

A final point of clarification regarding the normative convergences identified in this and the prior sub-section is required. As noted, it appears that net neutrality at its core enjoys a relatively high level of shared definitional specificity around the world, and that international human rights law provides a common normative framework for addressing its realization and protection. But that does not mean that *in practice* similar challenges or issues will necessarily lead to similar outcomes in different countries around the globe. This is due to the special nature of the exceptions regime in international law, which in any case can only be applied under defined circumstances in a specific national context and in light of the specific facts presented by a particular controversy.<sup>203</sup> This means that, all else being equal, the common standards for analyzing whether a given restriction on net neutrality, and thus freedom of expression, is legitimate, will operate differently between politically and economically advanced countries of the global North and a developing country in Latin America, such as Asia or Africa.<sup>204</sup> In other words, universal *standards* for

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<sup>199</sup> See *supra* notes 192–98 and accompanying text.

<sup>200</sup> Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at Part IV.

<sup>201</sup> See *supra* note 161 and accompanying text.

<sup>202</sup> See *supra* notes 49–58 and accompanying text.

<sup>203</sup> Carrillo, *Having Your Cake and Eating It Too*, *supra* note 4, at Parts III–IV.

<sup>204</sup> *Id.*

net neutrality do not have to mean uniform *outcomes* in the application of those standards to similar issues arising in different contexts.

### C. Other Issues

It is evident that the development of net neutrality standards in Europe is farther along than it is in any of the other legal systems examined. In addition to the looming challenge of how to address disparate State regulatory responses to widespread zero-rating practices by ISPs,<sup>205</sup> the European context gives rise to other interesting questions regarding the implementation and enforcement of net neutrality standards. The first has to do with EU Recommendation CM/Rec(2016)1's highlighting of the impact of net neutrality on the right to private and family life (ECHR Article 8).<sup>206</sup> While digital rights advocates in other circumstances have raised privacy concerns in relation to net neutrality,<sup>207</sup> this is an issue that has not been explored to the same extent as net neutrality's key role has in the realization of freedom of expression. This is especially true for the OAS and UN systems, though for slightly different reasons.<sup>208</sup> More work needs to be done on this front.

A second question from the European front flows from Article 16 of the Charter of Fundamental Rights, which enshrines the Right to Conduct a Business: "[t]he freedom to conduct a business in accordance with Union law and national laws and practices is recognised."<sup>209</sup> The issue here is whether an Internet access service provider can challenge national laws or decisions of the national regulatory authorities prohibiting the practice of zero-rating on the grounds that it violates the ISP's freedom to conduct a business. Though it is difficult to predict with any degree of certainty, such a challenge would unlikely succeed because the freedom to conduct a business can also be qualified under Article 52(3) of the Charter.<sup>210</sup> A balancing of the competing interests and values that a conflict between Article 16 and Article 11 on freedom of expression would create could well lead the CJEU or national

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<sup>205</sup> See *supra* notes 164–69 and accompanying text.

<sup>206</sup> *European Convention on Human Rights*, *supra* note 99, art. 8.

<sup>207</sup> See, e.g., EPICENTER.WORKS, *supra* note 164; see also *supra* note 51 and accompanying text.

<sup>208</sup> The OAS has a fuller development of net neutrality thanks to the Special Rapporteur's 2013 and 2017 Reports, but as a system has an underdeveloped practice and analysis of privacy rights under the American Convention on Human Rights. See *American Convention on Human Rights*, *supra* note 63. Conversely, the UN human rights system has analyzed privacy rights extensively in relation to the ICCPR, but has not expressly developed a framework for net neutrality *per se*.

<sup>209</sup> Consolidated TFEU, *supra* note 134, art 16.

<sup>210</sup> See *id.* art. 52(3).

policymaker to decide in favor of ensuring equal and non-discriminatory treatment of Internet traffic, given the robust net neutrality protections codified in EU and European law.<sup>211</sup>

Another issue ripe for deeper exploration more generally is the nexus between net neutrality, on the one hand, and media pluralism and diversity on the other. Early studies suggest that a lack of net neutrality protections gives rise to the practice of zero-rating news from select outlets and sources, which can work to the detriment of smaller outlets and independent sources. This can reinforce the dominance of large internet platforms as well as undermine media pluralism and diversity.<sup>212</sup> Indeed, motivated by these same concerns, Reporters Without Borders (RSF), a media freedom advocacy group, has started to systematically examine the status of net neutrality in the legal systems of the democratic countries in which it carries out its Media Ownership Monitoring (MOM) project.<sup>213</sup> The MOM project aims to bring transparency and rigor to the study of media pluralism in the developing world by identifying factors that contribute to the over or undue concentration of media ownership.<sup>214</sup> RSF has come to believe that weak or non-existent rules to guarantee net neutrality may be such a factor.

Finally, regarding the comparative law study of national jurisdictions that regulate net neutrality summarized in Part I.D.1 *supra*, there is similarly more to explore. In addition to deepening the inquiry into each State's legal framework for net neutrality, further empirical research is needed around implementation and enforcement: the practical impacts of net neutrality rules or their absence on the enjoyment of fundamental rights. While numerous States have begun to address such issues at a legislative and regulatory level, especially in Europe, no domestic or international court, tribunal or other jurisdictional body to date has directly addressed the issue of network neutrality as a function of freedom of expression, non-discrimination and other human rights. But there are strong indications that once such a case arises, whether in Europe or elsewhere, the pertinent jurisdictional body

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<sup>211</sup> *See id.* arts. 11, 16. In its previous case law, the CJEU has found that the Article 11 right to receive information can outweigh the Article 16 freedom to conduct a business, and that the Article 38 guarantee of consumer protection can outweigh Article 16. *See* Case C-283/11, *Sky Österreich GmbH v. Österreichischer Rundfunk*, 2013 E.C.R. CURIA (Jan. 22, 2013); Case C-12/11, *Denise McDonagh v. Ryanair Ltd.*, 2013 CURA (Jan. 31, 2013).

<sup>212</sup> O'Maley & Kak, *supra* note 26, at 17–19.

<sup>213</sup> *Media Ownership Matters*, REPORTERS WITHOUT BORDERS, <https://www.mom-rsf.org/> (last visited Apr. 6, 2019).

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

will most likely reaffirm the principle's integral role to promoting and protecting such rights.

### III. UNIVERSAL STANDARDS AND THE UNITED STATES

Even if there are universal standards for network neutrality, why should it matter to policymakers and advocates in the United States? I have shown that such standards are indeed crystalizing with respect to the basic definitional elements of network neutrality as a principle of non-discrimination applied to the way people access Internet data flows. At the same time, there is evidence of transnational acceptance of the requirement that any restrictions on that principle as an integral part of freedom of expression and non-discrimination must conform to the exceptions regime for human rights established by international law. It is true that some details vary between regimes, and that the implementation of the standards identified proceeds at a different pace and under varying circumstances across the regions and systems examined. Yet, it is equally true that the international human rights framework applicable to net neutrality is, by and large, uniform (if not precisely the same) around the globe.

This question of why the existence of universal standards matters is especially significant in light of the retrenchment in the United States of net neutrality protections, which are moribund after the Federal Communications Commission (FCC)'s repeal of the Obama-era 2015 *Open Internet Order* that notably embodied those very standards.<sup>215</sup> On February 1, 2019, the D.C. Circuit Court of Appeals heard oral arguments in the case of *Mozilla v. FCC, No. 18-1051*, the consolidated action in which a consortium of state attorney generals, internet industry organizations and companies, and civil society organizations are suing the FCC for repealing the 2015 Order that enacted strong net neutrality protections in the United States.<sup>216</sup> Many believe the case is headed to the Supreme Court regardless of its outcome in the D.C. Circuit.

The petitioners in *Mozilla* claim that the 2017 *Restoring Internet Freedom Order* that went into effect last June said protections should be overturned because it constitutes an "arbitrary and capricious" agency action in violation of the FCC's

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<sup>215</sup> Rules Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015); 47 C.F.R. pts. 1, 8, 20, <http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-07841.pdf>.

<sup>216</sup> John Bergmayer, *Advocates Showed Friday Why Court Must Restore Net Neutrality*, PUB. KNOWLEDGE: BLOG (Feb. 4, 2019), <https://www.publicknowledge.org/news-blog/blogs/advocates-showed-friday-why-court-must-restore-net-neutrality>.

legal mandate.<sup>217</sup> Though many of their arguments are technical, the concerns motivating them are not. They fear that in the absence of meaningful net neutrality rules, ISPs will abuse their unchecked power over fixed and especially mobile markets to throttle or even block content to the detriment of users and public safety; they also fear the effects of the unfettered use of paid prioritization on competition, innovation and mobile broadband pricing.<sup>218</sup>

Central to the debate playing out in Washington D.C. around the FCC's repeal of net neutrality in the United States is the question of impact: what, exactly, is the harm it will cause? In the absence of rules governing blocking, throttling and paid prioritization, how will the actions of the ISPs, which include companies like Comcast, Verizon, and AT&T, affect users' Internet access and online experience? Harms to competition and innovation are hotly contested by the parties. In addition to the debate around the repeal's economic effects, another area of concern relates to public safety. Much has been made of Verizon's throttling of California firefighters' "unlimited" data plan while combatting the rampant wildfires there last August.<sup>219</sup>

The evolving standards for net neutrality discussed in Parts I and II are relevant to these debates among U.S. policy makers and shapers for several reasons. First, these standards provide a clear framework for better understanding and combating the threat that a "net without neutrality"<sup>220</sup> poses to the enjoyment not just of economic opportunity and consumer rights, but of fundamental human rights as well. The human rights framework highlights the impact of net neutrality protections on social and political rights in the United States, especially freedom of expression, including media pluralism and diversity; non-discrimination and minority rights; privacy; and the ability to participate effectively in democratic society and government.<sup>221</sup> Furthermore, the application of human rights-based standards means that competent international forums are able to evaluate the United States'

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*; see also Jon Brodtkin, *Verizon Throttled Fire Department's "Unlimited" Data During Cal. Wildfire*, ARSTECHNICA (Aug. 21, 2018), <https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire/>.

<sup>220</sup> This catchy phrase capturing the essence of the issue is from the Pittsburgh Law Review's 2019 Publishing Symposium. See Symposium, *The Net Without Neutrality*, 80 U. PITT. L. REV. \_\_ (2019).

<sup>221</sup> See *supra* Part I, Sections A–C. See also Gigi Sohn, *Social Justice or Inequality: The Heart of the Net Neutrality Debate*, 80 U. PITT. L. REV. \_\_ (2019) (describing the profound negative impact on minority and vulnerable groups in the United States of failing to guarantee non-discrimination in communications policy generally, and with respect to net neutrality in particular).



compliance with its international law obligations in this regard. It is not difficult to foresee the U.S. being brought before regional or international human rights authorities for failing to protect net neutrality and for any harmful consequences that may result.<sup>222</sup> Any such body could find that such a failure generates State responsibility for (among other things) not fully guaranteeing freedom of expression.<sup>223</sup>

A second reason universal net neutrality standards matter stems from the potential trade related consequences of going out of sync with trading partners in Latin America and especially Europe, where robust protections prevail. As I have observed elsewhere, the United States is bound by the WTO's *General Agreement on Trade in Services* (GATS), and has additionally signed on to the *Basic Agreement on Trade in Telecommunications Services* (BATS), committing it to regulating its telecommunications services on the basis of several principles that are essential to net neutrality.<sup>224</sup> In particular, the BATS enshrines the United States' commitment to ensure that "interconnection" in telecommunications services, including Internet service, be provided to service suppliers from other WTO Member States on nondiscriminatory terms.<sup>225</sup> In theory if not in practice, its *volte face* on net neutrality has left the United States exposed to the risk of a WTO complaint by other WTO member States with strong protections in this respect on behalf of any disadvantaged service suppliers.<sup>226</sup>

A third reason for why we in the United States should care about universally recognized standards is that, not that long ago, the US was in the forefront of progressive normative developments in this area. The FCC's 2015 *Open Internet Order* (now repealed) contributed positively to shaping the world's understanding of how a State could regulate net neutrality effectively. It was widely admired outside the US for balancing strong protections with a flexible approach to regulation that took into account commercial and user practices. As such, the 2015 Order served as

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<sup>222</sup> See Arturo J. Carrillo & Dawn C. Nunziato, *The Price of Paid Prioritization: The International and Domestic Consequences of the Failure to Protect Net Neutrality in the United States*, 16 GEO. J. INT'L AFF. 98, 98 (2015) (arguing that a failure to protect net neutrality would expose the United States to legal liability for failing to protect human rights under its regional and international treaty obligations).

<sup>223</sup> See, e.g., *supra* notes 21 & 60 and accompanying text.

<sup>224</sup> *Id.* at 99.

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

<sup>226</sup> *Id.* at 99–100. The FCC's retreat from net neutrality protections could violate the terms of the BATS to ensure fair interconnection for foreign service suppliers that are subject to net neutrality restrictions. *Id.*

a model for other countries engaged in the process of developing enlightened regulation.<sup>227</sup> It is no exaggeration to say that, on topics of Internet regulation and policy, the eyes of the world's legislators are on the US, following closely what it does and does not do. Unfortunately, in the net neutrality arena, the US is for now leading a race to the bottom when it comes to (not) enacting rights-respecting regulation. But the outcome of the *Mozilla* case, or eventual Congressional action to legislate on the subject, may well alter the country's direction once again in this regard.

A fourth and final function of universal standards in the U.S. legal and policy contexts is that they can act as a bulwark against "definitional slippage."<sup>228</sup> If and when the time comes to reconstitute the net neutrality protections lost in this country, the existence of such standards could prove helpful to preserving the basic definitional and operational parameters once enshrined in the 2015 *Open Internet Order*. At a minimum, universal standards should make it more difficult to regulate or legislate beneath a normative "floor" of basic elements when these have been recognized and established through the widespread transnational and inter-governmental practice documented here.

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<sup>227</sup> See Reporters Without Borders, *RSF asks FCC not to ditch net neutrality* (Dec. 13, 2017), <https://rsf.org/en/news/rsf-asks-fcc-not-ditch-net-neutrality>.

<sup>228</sup> The term and inspiration for this concept come from Professor Andrea Matwyshyn and her presentation on the panel "Economic Impact" at the *Pittsburgh Law Review's* 2019 Publishing Symposium on March 1.