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4 Zero Rating and the Holy Grail: Universal Standards for Net Neutrality

by Arturo J. Carrillo

4.1 Introduction

In March of 2016, the Berkman Center for Internet and Society at Harvard University sponsored a workshop on zero rating attended by tech company representatives, digital rights activists from a range of countries, and U.S.-based academics. During the initial round of comments, the majority of participants highlighted a central, overarching question on the agenda: do universal standards or core principles exist to govern net neutrality, and by extension zero rating, that could be agreed upon by all stakeholders? Although much of the ensuing discussion reflected the difficulty of answering that question in the affirmative, there was one response that seemed to fit the bill: international human rights law. The point was simple. Why insist on searching for or creating new standards that could apply to net neutrality issues across the board when such a normative framework already exists? Why not view zero rating as a limitation on net neutrality understood as a norm of human rights, which net neutrality demonstrably is? Despite some support from a number of the Latin American activists present, the human rights response to the zero rating conundrum fell largely on deaf ears.

It is, of course, not surprising to find that in the United States the human rights framework is not a natural context for the discussion of net neutrality issues, though some attention has been drawn to it (Carrillo & Nunziato, 2015, pp. 102-104). Similarly, other frontline battles that have focused on zero rating (as in India) have been largely devoid of rigorous reference to technical human rights considerations. But national debates on net neutrality and zero rating have and will continue to play out differently in other regions of the world that are subject to more robust human rights legal frameworks, such as Europe and Latin America. There, universally-recognized human rights norms codified in regional treaties — the American Convention on Human Rights; the European Convention on Human Rights — provide objective standards for consistently and justly analyzing net neutrality issues through region-specific human rights mechanisms. The purpose of this paper is to take one region as a case study in progress — Latin America — to map the human-rights framework that governs freedom of expression online, including net

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neutrality and zero rating, with reference to the challenges that a number of Latin-American countries are facing.

This paper will argue that the implementation of net neutrality protections by States in Latin America (and elsewhere), when oriented by a respect for fundamental human rights, can lead to more just and sustainable policies and outcomes than when it is not. The lessons to be learned from the ongoing Latin American experience are relevant to other regions of the world because (1) the applicable United Nations-based/universal norms are global in effect, and (2) the core normative values embodied in both regional and universal human rights treaties are substantively the same, allowing for constructive comparison across regions.[145] Part I begins by outlining the rationale for why international human rights law, which includes regional human rights treaties like the American Convention on Human Rights of the Organization of American States (OAS), provides the most viable option for establishing a universal normative regime to govern net neutrality in practice. It then synthesizes in relevant part the universal (United Nations) and regional (OAS) human rights rules that apply to most countries in Latin America. In Part II, I consider this consolidated human rights framework in relation to ongoing net neutrality debates in different countries, namely Mexico, Colombia and Chile. Even a brief analysis illustrates how, in the long run, the human rights framework will increasingly shape national policy-making in this area, and not just in Latin America. What emerges is a clearer picture not only of the human rights standards that, in fact, already apply to the net neutrality principle everywhere in the world, but also of the manner in which the constructive application of that framework can shape its implementation globally in more equitable terms.

4.2 International Legal Frameworks

Before turning to the nuts and bolts of the above-referenced international legal framework, a threshold question remains. Even if one recognizes that net neutrality is today a consolidated norm of international human rights law (see Part I.A), why does it matter?

145 This is the reason why, for example, the Special Rapporteur on Freedom of Expression of the Organization of American States (OAS) will reference standards relating to freedom of expression from United Nations treaties and experts when interpreting the scope of application of the American Convention. See, e.g. OAS Special Rapporteur, 2014, para. 64 (discussing how the interpretation by the U.N. Rapporteur on Freedom of Expression and Opinion of the "right to response" in the digital realm offers a new and better kind of less restrictive alternative to measures that might unduly limit freedom of expression online under the American Convention).

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That is, what is to be gained by re-framing the zero rating debate in human rights terms? As it turns out, there are a number of compelling reasons for invoking the human rights legal framework in this respect. First and foremost, it situates net neutrality issues squarely within a universally recognized normative framework that imposes legal obligations on most, if not all, States. Safeguarding net neutrality is thus a duty incumbent on governments, rather than merely a desirable or contested policy alternative. This approach further ensures that discussions about how to restrict net neutrality through zero rating or sponsored data, like those taking place in the United States, Europe, India, and a host of other countries, transpire within the same, universally applicable regime established by international law (which includes regional human rights treaties), promoting greater normative and practical consistency across the board (though, of course, not guaranteeing it).

Second, under international human rights law, net neutrality is defined in human-centric rather than data-centric terms (see Part I.A). The discussion ceases to be about data packets or differential pricing and becomes more about people. This shift is not merely semantic because it portends important implications for the norm's implementation, especially in terms of connectivity.[146] As explained below, it means that zero rating practices as transgressions of net neutrality can no longer be discussed in all-or-nothing terms. Instead, these practices have to be viewed as proposed limits on some peoples' freedom of expression (understood as net neutrality) intended in substantial part to enhance the freedom of expression rights of others (i.e. through expanded connectivity). This consequentialist analysis emphasizes the value of maximizing the enjoyment of fundamental rights within a given society and thus promotes it, in accordance with the State's international legal obligations.

Third, the human rights framework provides structure and rigor to what often are heated contests of unmoored dogma: net neutrality absolutism clashing with the imperative to close the digital divide or the inviolability of the market place. Evaluating net neutrality regulation as a function of the State's duties under international law opens practical pathways for constructively debating zero rating,

146 There does not appear to be a universally accepted definition of connectivity in international law or practice. Connectivity for purposes of this paper is defined as access to the Internet and to Internet-based content or services. This is how most commentators refer to it.

not least because it establishes normative parameters that apply equally to all sides engaged in the discussions. People stop talking *past* each other, and start talking responsively *to* each other. At the same time — and this is critical — the human rights approach is the only one that expressly accounts for all the others. Generally speaking, my experience has been that those who view net neutrality as an inviolable network principle tend to pay little heed to what the economists and free market advocates say; others who critique net neutrality as a mere priority preference tend to prioritize competition, consumer choice or the public interest. In other words, the prevailing perspectives on net-neutrality and zero rating (the technical and economic analyses in particular) do not easily accommodate each other, if at all. With few exceptions, none pay anything more than lip service to human rights (Carrillo, 2016, Part II.A & pp. 155-56).

Recourse to human rights law in this context, then, is like finding the Holy Grail right in front of you. It provides the only viable framework for establishing a universal normative regime to govern net neutrality in practice, because it is the only option that operates as a unifying "theory of everything." All other approaches — those rooted in technical, economic, or public interest values — have a place in the human rights framework as quantitative and qualitative *inputs* for the analysis of the State's obligations to promote and protect the rights of their people (Carrillo, 2016, Part IV). The following sections will explain how this is so by mapping, respectively, the United Nations and Inter-American human rights systems in relevant part.

4.2.1 The United Nations Human Rights System

In Latin America, this system is commonly referred to as the "universal" human rights system, and for good reason. The International Covenant on Civil and Political Rights ("ICCPR") has 168 State Parties, encompassing over 85% of the world's population (OHCHR, 2016). Its core principles arguably apply to nearly all countries on he planet.[147] When discussing human rights online, the U.N. framework is the place to start. This is due not just to its (near) universal coverage, but also because United Nations experts and authorities engaged in its development have expressly extended the framework's application to the digital realm.

147 The Universal Declaration of Human Rights can be considered a source of customary international law for core norms like freedom of expression, which thus applies to all UN member States regardless of whether they have ratified the ICCPR or not.

Network neutrality is today a consolidated norm of international human rights law due to the seminal role it plays in the protection of freedom of expression and non-discrimination rights in contemporary society. 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." Freedom of expression enjoys near universal acceptance worldwide, not 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 right to education, the rights to freedom of association and assembly, the right to full participation in social, cultural and political life, and the right to social and economic development (U.N. Special Rapporteur, 2011, p. 18).

Traditionally, freedom of expression has been broken down into several constituent elements, including the right to impart and express information on the one hand, and the right to seek and receive information on the other (UNHRC, 2011, paras. 11, 18).[148] With the rise of electronic communications, this framework has evolved to accommodate the expression and receipt of information via the Internet. In international human rights law, it is settled that the constituent rights comprising freedom of expression will apply to all "internet-based modes of communication" (UNHRC, 2011, para. 12). International experts from the United Nations, the OAS, and other human rights systems have further recognized that "[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" (Joint Declaration, 2011, para. 5(a)). This, of course, is the technical definition of net neutrality. Among other things, it means 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]" (UNHRC, 2011, para. 43). This regime is discussed in more detail below.

148 The other elements are media rights, including media diversity and pluralism online, as well as access to information from public bodies.

Rounding out the panoply of freedom of expression elements relating to net neutrality is the right to access information *online*, or connectivity. Put simply, "[g]iving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet" (U.N. Special Rapporteur et. al. 2011, para. 6(a)). The U.N. General Assembly (2016) recently reaffirmed the "the importance of applying a comprehensive human rights-based approach in providing and in expanding access to Internet and requests all States to make efforts to bridge the many forms of digital divides[,]" (para. 5). While falling short of creating an independent human right to access, the General Assembly confirms the integral function of connectivity to the full and effective realization by States of fundamental rights like freedom of expression, among others (the right to education is another prominent example).

This positive obligation means that for States to meet their duty to respect and fulfill the right to freedom of expression, they must guarantee that all people within their territory have access to "the means necessary to exercise this right, which [today] includes the Internet" (U.N. Special Rapporteur, 2011, para. 61). Accordingly, the U.N. Human Rights Committee (2011) has called upon States "to take all necessary steps to foster the independence of [...] new media [...] such as internet and mobile based electronic information dissemination systems [...] *and to ensure access of all individuals thereto*" (para. 15) (emphasis added). Connectivity is thus "essential" to realizing freedom of expression (U.N. Special Rapporteur, 2011, para. 61). At the same time, the Human Rights Committee (2011) has affirmed that the duty incumbent on States to implement these norms includes the obligation "to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these [...] rights are amenable to application between private persons or entities." (para. 7).

Net neutrality is, at heart, a norm of non-discrimination. 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*." 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 (*Haraldsson and Sveinsson v. Iceland,* 2007). This is the reason why proposed restrictions on net neutrality like zero rating, which offer 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 request, 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 parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited [by international law]" (UNHRC, 1989, para. 10). 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]" (UNHRC, 1989, para. 13). In other words, positive or affirmative discrimination can be an exceptional measure which enhances or increases the *overall* exercise and enjoyment of human rights.

Zero rating acts as a discriminatory restriction on network neutrality, which, as we have seen, is part and parcel of the rights to freedom of expression and non-discrimination. Under international human rights law, there are some circumstances in which such a restriction may be permitted (Carrillo, 2016, Part III.B.6). This is because human rights norms in general, and freedom of expression in particular, are not absolute. Defamation laws are a classic example of the hard limits imposed on freedom of expression in order to protect the rights of others (UNHRC, 2011, para. 47).[149] And, just as "legitimate differentiation" in favor of historically disadvantaged groups can effectively advance the goals of non-discrimination, (UNHRC, 1989, para. 10), so too can the freedom of expression rights of *some* (to

149 Another good example is ICCPR Art. 20, which explicitly enumerates a series of offensive forms of expression that *must* be curtailed by States in order to meet their obligations under the treaty. ("1. Any propaganda for war shall be prohibited by law. 2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.")

impart or receive information freely) be curtailed through positive discrimination (zero rating) aimed at promoting the freedom of expression rights of *others* (to connectivity) (UNHRC, 2011, para. 28; Carrillo, 2016, Part IV.A). The issue then becomes whether such "legitimate" discrimination is necessary and proportional in relation to the compelling aim it seeks to advance.

Similarly, 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." These are, generally speaking, the legitimate aims that may be invoked by States seeking to impose limits on fundamental human rights, including expression (U.N. Special Rapporteur, 2013, para. 28). 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" (UNHRC, 2011, paras. 24-26, 33-34; ICCPR, 1966, art. 19.3). Generally speaking, such restrictions should be enacted into formal law through a transparent and participatory political process (U.N. Special Rapporteur, 2013, paras. 81-83). 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 (UNHRC, 2011, para. 35, note 275).

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 involving zero rating, to be permissible, must not only be provided by law, it must also be necessary and proportional in relation to that goal. This is meant to set a high bar for recognizing a small set of narrowly tailored measures (UNHRC, 2011, note 275 para. 35). 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 (UNHRC, 2011, para. 22). 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 expression" (UNHRC, 2011, para. 33). Finally, any steps taken by States to limit expression, even if legitimate and necessary, cannot be "overbroad" (UNHRC, 2011, para. 34). Proportionate measures are those that are "appropriate to achieve their protective function" and "the least intrusive ... amongst those [available]" (UNHRC, 2011, para. 34).

In other words, 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. For example, permitting a zero-rated platform like Internet.org to operate in a country with a deep digital divide and poor infrastructure like Zambia would most likely advance rather than violate its human rights commitments, so long as the national context and platform's characteristics did 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 (Carrillo, 2016, Part IV.C-D).

4.2.2 The Inter-American (OAS) Human Rights System

In her 2014 report, 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" (para. 2). Further interpreting the American Convention, the OAS Special Rapporteur (2014) observed that respecting net neutrality "is a necessary condition for exercising freedom of expression on the Internet pursuant to the terms Article 13" (para. 25). 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" (paras. 27-28). As these statements indicate, the Inter-American human rights system goes even further than its U.N. counterpart to address and protect net neutrality principles in several important respects.

Article 13 of the American Convention tracks article 19 of the ICCPR in most key respects, but differs positively in others that are worth highlighting. Like its U.N. counterpart, Article 13 safeguards freedom of expression in all its dimensions (para. 1) and establishes an exceptions regime that functions almost identically to the Article 19 version described above (para. 2).[150] But, it also adopts an express ban on "prior censorship" (para. 2), 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" (Art. 13.3)

150 For a detailed description of how the provisions in Article 13 are applied, please see the Report of the OAS Special Rapporteur on Freedom of Expression, paras 52-72.

(emphasis added). 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" (Arts. 1.1 and 24). 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 (2014) are that States party to the American Convention must:

- Guarantee the effective implementation of the net neutrality principle through "adequate legislation" (para. 26), 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" (para.11).[151]
- Ensure that "free access and [...] choice [by users] to use, send, receive or offer any lawful content, application or service through the Internet [that] is not subject to conditions, or directed or restricted, such as blocking, filtering or interference" (para. 25);
- Guarantee that any restrictions to net neutrality and freedom of expression "be established by law, formerly and in practice, and that the laws in question be clear" (para. 58).; 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. (para. 55).
- 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" (para. 58).
- Protect 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" (para. 19);

151 See the 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 (OAS Special Rapporteur, 2014, paras. 177-180).

- 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" (para. 51).
- Respect and guarantee not just the individuals' freedom of expression rights, but also those of society as well. 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 receive and hear those points of view, information, opinions, stories and news, freely and without interference that would distort or block it" (para. 19).

4.3 Net Neutrality in Latin America

Having canvassed the applicable legal norms of the United Nations and OAS systems in Part I, it is now possible to consider how the unified human rights framework comprised of both sets of norms applies in Latin American countries struggling to address net neutrality and zero rating issues. This Part has two objectives. The first is to identify the main challenges to safeguarding net neutrality in the region, using zero rating as an example; the second is to suggest a new perspective on how best to respond to those challenges in light of the applicable human rights law framework.

It helps that digital rights activists in Latin America have been active in this area. An excellent report published by the Colombian NGO Karisma Foundation ("Karisma Report") in conjunction with other digital rights advocates from around the region, in particular *Red para la Defensa de los Derechos Digitales* (R3D) in Mexico, captures and analyzes ongoing zero rating practices in five countries: Colombia, Mexico, Ecuador, Paraguay and Panama (Karisma Foundation, 2016). From this report I will discuss the first two — Mexico, Colombia — to briefly illustrate how the legal and policy debates in those countries around net neutrality have and will continue to be shaped by the human rights frameworks outlined in Part I. To that short list, I will add Chile, based on the work of *Derechos Digitales*, another respected NGO operating in the region and primary author of a seminal report on digital rights in Latin America (APC Report, 2016). All three countries — Colombia, Mexico and Chile — are parties to the American Convention and the ICCPR. The following case studies, though brief, allow for a diagnosis of the primary issues arising from the interplay of net

neutrality and human rights in practice. Not surprisingly, they revolve around the codification, implementation and enforcement of domestic legal norms.

Mexico is an example of the way in which international human rights standards can 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 (OAS Special Rapporteur, 2014, para. 5). 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" (Mexican Constitution, Art. 7).[152] 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 (Karisma Foundation, 2016, pp. 48-49). 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 (Karisma Foundation, 2016, pp. 48-51; APC Report, p. 5) as well as the country's human rights obligations.

Colombia, on the other hand, has enacted legislation that defines net neutrality and claims to safeguard it. At the same time, however, the law raises serious questions, first, about whether the definition is adequate, and second, regarding 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. 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*

152 Translation by the author.

discrimination" (Karisma Foundation, 2016, p. 37).[153] 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 which would restrict it (Karisma Foundation, 2016, p. 37). Karisma (2016) 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" (p.37). 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 (Colombian Constitution, Art. 93), it is not hard to see how this panorama could easily give rise to legal claims denouncing Law 1450 on human rights grounds.

Finally, Chile offers an illuminating 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. At a normative level, the Law's provisions create a "blanket" bar to practices that violate net neutrality, including zero rating. It states that 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 their networks. (Chilean Net Neutrality Law, 2010, Art. 24 H(a)). The Law's prohibition on discrimination was applied to commonly zero-rated social media applications like Twitter, WhatsApp and Facebook. In 2014, the *Subsecretería de Telecomunicaciones de Chile* (Subtel), the telecommunications regulator, announced that such services were no longer allowed, subjecting any company that utilized them to fines (Meyer, 2014). Facebook's Free Basics, part of Internet.org, was similarly shut down. (Rossini & Moore, 2015, pp. 17-18).

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."[154] (Vera Hott, 2014). 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

153 Translation by the author. Emphasis added.

154 Translation by author.

commercial schemes (Rossini & Moore, 2015, pp. 19-20). Some forms of zero rating continue to exist or be permitted by Subtel, including zero-rated social media platforms.[155] 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 (Rossini & Moore, 2015, pp. 19-20). 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.

In sum, the main challenges highlighted by the foregoing country case studies are (1) the need to enact strong constitutional, legislative and regulatory norms *domestically* to protect net neutrality in conformity with *international* (regional and universal) human rights standards; and (2) once an adequate legal framework has been established, ensuring that the national authorities charged with *implementing* and *enforcing* those net neutrality norms do so effectively and in line with the applicable international standards. As noted by *Derechos Digitales*, the Latin American experience has shown that, even where net neutrality "has been introduced as a relevant topic for regulation, this has happened in such a way as to leave the principle without effective practical application." (APC Report, 2016, p. 5).[156] Where this is the case, the question then becomes: how best to respond to the challenges identified?

Once again, the Latin American experience is telling. As the Karisma and APC Reports demonstrate, digital rights activists in Latin America are hard at work analyzing issues involving net neutrality and zero rating (among others) to advocate for more coherent public policies and equitable legal frameworks domestically. In doing so, these activists are actively exploring ways in which human rights standards, which often are part of domestic law, can be more effectively invoked in their pro-net neutrality advocacy (Karisma Foundation, 2016; APC Report, 2016). This work is important not just because of the normative and practical impact it has in their respective countries. It is important because the Latin American digital rights activists are at the same time forging a new social movement, one that increasingly emphasizes the role of human rights law in promoting

155 *See, e.g.*, ClaroChile, http://www.clarochile.cl/portal/cl/pc/personas/movil/redes-sociales/#04-redes-sociales-en-tu-plan .

156 Translation by the author.

and safeguarding net neutrality, rather than the other way around. To understand the significance of this distinction, it is necessary to take a quick look at how others have approached the issue.

By and large, the predominant approach to net neutrality advocacy has been to affirm that preserving an open Internet based on the end-to-end principle is necessary to ensuring freedom of expression and other human rights online (Belli & Van Bergen, 2013; NGO Coalition letter, 2015; Van Schewick, 2016). Advocates continue to stress that the original architecture of the Internet — decentralized, open and interconnected — together with the extraordinary benefits these characteristics have generated, are the primary and sufficient justification for enshrining the net neutrality principle in law and policy (Belli, 2015; Van Schewick, 2016). Clearly this approach has its strengths. But one weakness may be its reliance on what Lawrence Lessig (2006) calls the "is-ism" fallacy, the notion that conflates "how something is with how it must be" (p.32). Lessig (2006) cautions that "[t]here is no single way that the Net has to be; no single architecture that defines the nature of the Net" (p. 32). In this view, advocates for positive regulation of technology such as the Internet "should expect — and demand — that it can be made to reflect any set of values that we think important" (p. 32). In the case of net neutrality regulation, as we have seen, those values are best embodied in, and provided for by, the human rights law framework.

Respect for their human rights obligations under international law is today a primary reason for why States must effectively safeguard net neutrality (Carrillo, 2016, Part III.B). To view human rights protection as merely a beneficial *consequence* of preserving net neutrality on architectural grounds, as noted above, is to beg the questions of why strong net neutrality advances the values we want to preserve in the first place and what those values are. It works better to invert the proposition: *advancing human rights norms will better protect net neutrality*. Affirming that respect for net neutrality is a duty incumbent on States in line with their human rights obligations fortifies pro-net neutrality advocacy with a matrix of technical legal arguments that policy prescriptions alone, no matter how compelling, lack. Digital rights activists thus can — and should — insist that their government comply with its human rights obligations by adopting, implementing, and enforcing adequate net neutrality safeguards domestically, because that approach will in most cases enhance the impact and traction of their advocacy on the ground.

This is precisely the process underway in much of Latin America, where it has become apparent that advocacy strategies grounded on preferred policy prescriptions such as preserving the open Internet may be insufficient to adequately anchor strong net neutrality in domestic legislation and regulation in many countries. That is one of the lessons to be derived from the concise case studies of the Latin American experience examined above. In response, Latin American activists are increasingly drawing on human rights norms to ensure greater normative coherence and influence in their pro-net neutrality advocacy, a strategic shift that is reflected in the latest reports from the Karisma Foundation (2016) and *Derechos Digitales* (APC Report, 2016). As these strategies spread, deepen and mature throughout the region, we are sure to see further developments on net neutrality front in the Latin American context from which to learn.

4.4 Conclusion

As goes Latin America, so goes the world, at least with respect to net neutrality. That is to say that the experiences and lessons drawn from the region in relation to net neutrality and zero rating are relevant to what is happening — and will happen — in other parts of the world as well. As noted in the Introduction, the human rights standards that apply in Latin America are substantially the same that apply everywhere; the variations are in the systems and mechanisms in place regionally to enforce them. And the challenges faced by digital rights activists in Africa, Asia, Europe and elsewhere who care about net neutrality are also essentially the same: hold governments to their legal obligations to guarantee adequate codification, implementation and enforcement of strong domestic norms in line with international standards. This approach by definition promotes fuller enjoyment of freedom of expression and related human rights by more people than any other. It also provides a more coherent and consistent approach to net neutrality issues across countries and regions of the world, thanks to the universal standards that underlie it. As the convergence of human and digital rights deepens in this way, advocacy and policy outcomes around net neutrality issues will likely become more equitable, and consequently, more sustainable in the long run.

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