In the Constitutional Court of Colombia

WRITTEN COMMENTS SUBMITTED BY THE CENTRE FOR LAW AND DEMOCRACY

INTERVENTION AS AMICUS CURIAE IN PROCEEDING D-14516 on Ley 1450 de 2011

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1.0 Summary of Argument

[1] Colombia is a State Party to both the *International Covenant on Civil and Political Rights* and the *American Convention on Human Rights*, which guarantee the right to freedom of expression, respectively in Article 19 and Article 13. These treaties, and their interpretation by both official oversight bodies (such as the UN Human Rights Committee and the Inter-American Court of Human Rights) and other authoritative bodies, make it clear that freedom of expression is one of the most cherished human rights.

[2] States' obligations to respect freedom of expression require them not only not to impose undue restrictions on this right, but also to take positive measures to ensure a robust flow of information and ideas in society, which may extend to preventing private actors from interfering with freedom of expression. Two key aspects of States' positive obligations are to take steps to ensure, progressively and over time, not only universal access to the Internet but access which meets certain quality standards (referred to herein as "quality access"), including access to the full Internet. This is accompanied by an obligation to respect net neutrality, which prohibits discrimination in the treatment of Internet traffic, thus reinforcing the obligation to ensure access to the full Internet.

[3] Zero-rating schemes, which are permitted by Article 56(1) of Colombia's Law 1450 of 2011 (16 June), give users free access to certain online services or apps, while charging for access to other online content. Such schemes come with a heavy presumption against their validity in light of the positive obligations of States outlined above. Although such schemes can, in limited circumstances, help increase access to the Internet or to certain public interest content, in many cases they effectively trap users in walled gardens or at least create strong incentives for users to focus their usage of the Internet on the free services.

[4] At a minimum, the authorisation of zero-rating schemes by States could be legitimate only if they form part of a wider plan to promote universal quality access to the Internet in a way which respects net neutrality. States which authorise zero-rating schemes need to regularly assess their impact to make sure that they are contributing to, rather than obstructing, these goals. And any regulatory framework which authorises zero rating should meet strict standards of legality, including by being clear as to what exactly is being authorised.

[5] Colombia fails to meet its international obligations in this area in a number of ways. First, its authorisation of zero-rating does not appear to be part of a wider plan or strategy to foster universal quality access to the Internet in a way that respects net neutrality. Rather, it seems to be an *ad hoc* exception to net neutrality which is designed to serve the commercial interests or convenience of Internet access providers. Colombia also does not appear to have conducted any assessment of the impact of this arrangement on its positive obligations in this area, thus depriving it of the evidence it would need to justify such an

exception to net neutrality. In addition, the specific language of Article 56(1) is extremely vague and unclear, and hence fails to meet the required international law standards of legality. Finally, according to the information we have received, the regulator which is responsible for overseeing the application of Article 56(1) does not have the power to interpret and enforce it properly, substantially aggravating the underlying problem of its lack of clarity.

2.0 Statement of CLD Interest and Expertise

[6] The Centre for Law and Democracy (CLD) is a non-profit, human rights non-governmental organisation (NGO) which focuses on foundational rights for democracy. CLD believes in a world in which robust respect for human rights underpins strong participatory democracy at all levels of governance – local, national, regional and international – leading to social justice and equality. CLD works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association.

[7] To achieve this mission, CLD undertakes research and educational outreach to advance the understanding of civil society and the wider public globally about those human rights which serve as a foundation for or underpin democracy. Research and technical assistance are utilised to help governments and officials around the world to uphold international and constitutional standards regarding human rights which underpin democracy. CLD builds the understanding of inter-governmental organisations and non-governmental organisations regarding human rights which underpin democracy, so that they can better realise their goals. CLD also engages in a range of law reform efforts, whether through analysing and advocating for reform of laws, advocating for the adoption of human rights protective laws or supporting constitutional litigation. Extensive research and policy work are also part of CLD's mandate, with a view to contributing to ensuring continuous relevance and development of the key human rights which fall within its mandate.

[8] Based in Halifax, Canada, CLD is recognised as a global leader in international standard setting regarding freedom of expression, as demonstrated for example by its annual role in drafting the Joint Declarations of the four special international mandates on freedom of expression.[1] CLD has often engaged in constitutional litigation to promote respect for freedom of expression, sometimes providing its own amicus curiae briefs before courts and sometimes providing support to local lawyers arguing these cases. Over the last couple of years, in addition to this case, CLD has supported litigation before the

[1] The special mandates – namely the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – adopt a Joint Declaration each year with the support of CLD and Article 19. These Declarations are available at: https://www.law-democracy.org/live/legal-work/standard-setting/.

Constitutional Court in Indonesia challenging the government's power to block websites, before the High Court of Islamabad on interpreting the common law doctrine of "contempt of court" and before the Supreme Court of Sri Lanka in a case challenging the failure of the State to regulate broadcasting in a manner that protects the right of the public to receive diverse information and ideas. In addition, on 15 June 2021, CLD's Executive Director, Toby Mendel, the legal lawyer on this brief, appeared before the Inter-American Court of Human Rights in Case No. 13.015, *Emilio Palacio Urrutia v. Ecuador* as an expert witness for the Inter-American Commission on Human Rights.

[9] CLD is submitting this brief with a view to assisting the Constitutional Court in its task of interpreting international and constitutional guarantees of freedom of expression in Colombia. The organisation has no direct interest in the outcome of this case, other than its human rights interest.

3.0 Introduction

This case involves a constitutional challenge to part of Article 56(1) of Ley 1450 de 2011 (Junio 16) (Law 1450 of 2011 (16 June)).[2] CLD is not an expert in Colombian constitutional law and the substance of this amicus curiae brief does not enter into an analysis of it. Rather, we present here relevant international standards, in particular regarding the right to freedom of expression.

[10] We note that Colombia is a State Party to both the *International Covenant on Civil and Political Rights* (ICCPR)[3] and the *American Convention on Human Rights* (ACHR).[4] The main guarantees for freedom of expression in these two treaties are very similar, although the ACHR includes some additional protective language.[5] For purposes of this amicus curiae brief, the protections under both systems are largely treated as interchangeable except where a specific distinction is made.

[11] This amicus curiae brief presents not only standards from those two international law systems but also standards from other regional human rights systems, including the European and African systems. We note that the guarantee for freedom of expression found at Article 10 of the *European Convention on Human Rights* (ECHR)[6] is similar but somewhat weaker than the ACHR guarantee. As a result, protection under the ACHR can be assumed to be at least as strong as the protective principles established under the ECHR. The freedom of expression guarantee found at Article 9 of the *African Charter on Human and Peoples' Rights*[7] is different in nature and again weaker than the protection

[2] Diario Oficial No. 48.102 de 16 de junio de 2011.
[3] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976. Colombia ratified the ICCPR on 29 October 1969.
[4] 22 November 1969, in force 18 July 1978. Colombia ratified the ACHR on 28 May 1973.
[5] For example Article 13(2) ruling out most forms of prior censorship and Article 13(3) ruling out indirect means of restricting the right.
[6] 4 November 1950, in force 3 September 1953.
[7] 27 June 1981, in force 21 October 1986.

under the ACHR so, once again, protective principles under the former can largely be assumed to be included within the ambit of the latter.

4.0 Statement of Facts and Law

[12] This amicus curiae brief is submitted in support of the constitutional petition filed against Article 56(1) of Law 1450 of 2011 by Ana Bejarano Ricaurte, Emmanuel Vargas Penagos and Vanessa López Ochoa via the procedure for direct constitutional challenges established by Article 241(4) of the Constitution of Colombia. It is a direct constitutional challenge which does not arise from a specific legal case.

[13] Article 56(1) of Law 1450 of 2011 states as follows:

> **Spanish Original**
> Sin perjuicio de lo establecido en la Ley 1336 de 2006, no podrán bloquear, interferir, discriminar, ni restringir el derecho de cualquier usuario de Internet, para utilizar, enviar, recibir u ofrecer cualquier contenido, aplicación o servicio lícito a través de Internet. En este sentido, deberán ofrecer a cada usuario un servicio de acceso a Internet o de conectividad, que no distinga arbitrariamente contenidos, aplicaciones o servicios, basados en la fuente de origen o propiedad de estos. Los prestadores del servicio de Internet podrán hacer ofertas según las necesidades de los segmentos de mercado o de sus usuarios de acuerdo con sus perfiles de uso y consumo, lo cual no se entenderá como discriminación.
>
> **Unofficial English Translation**
> Without prejudice to what is established in Law 1336 of 2006, they shall not block, interfere, discriminate nor restrict the right of any Internet user to use, send, receive or offer any content, application or lawful service by means of the Internet. In this sense, they must offer each user an Internet access or connection service that does not arbitrarily distinguish content, applications or services based on their source of origin or owner. Internet service providers may make offers according to the needs of market segments or their users according to their usage and consumption profiles, which will not be understood as discrimination.[8]

[14] Article 56(1) enables "zero rating" plans in Colombia, whereby Internet service providers provide free access to certain online services, content or applications, without that access counting towards data caps in an individual's plan. As detailed in the constitutional petition submitted by Ana Bejarano Ricaurte, Emmanuel Vargas Penagos and Vanessa López Ochoa, such plans are widely offered in Colombia, and typically allow free access to Facebook, WhatsApp and a select number of other social media applications.[9]

[15] This amicus curiae brief argues that this article violates the Colombian Constitution in a number of ways by breaching its guarantees of freedom of expression. It also argues that Article 56(1) violates Article 13 of the ACHR and Article 19 of the ICCPR. Both of these are incorporated into Colombia's "bloque de constitucionalidad" (constitutional corpus)

[8] Although this provision refers to Law 1336 of 2006, in fact it should be Law 1336 of 2009.
[9] See Part IV of the original constitutional challenge, dated 11 November 2021.

under domestic law, meaning that they represent constitutional norms despite not being explicitly mentioned in the body of constitutional rules.[10]

5.0 Freedom of Expression Under International Law

5.1 International Guarantees

[16] The right to freedom of expression is guaranteed in all of the key general human rights instruments. The *Universal Declaration of Human Rights* (UDHR),[11] adopted in 1948 as a United Nations General Assembly resolution, is generally viewed as the flagship international statement of human rights. The right to freedom of expression is protected in Article 19 of the UDHR as follows:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR is not, as a General Assembly resolution, formally binding on States. However, its preeminent status and the fact that States rarely repudiate its principles means that at least parts of it, including its guarantees of freedom of expression, have very likely acquired legal force as customary international law.[12]

[17] The UDHR was given binding legal force through the adoption by the United Nations of two treaties, the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[13] There are now 173 States Parties to the ICCPR,[14] and it guarantees the right to freedom of expression in very similar terms to the UDHR, also in Article 19, as follows:

> (1) Everyone shall have the right to freedom of opinion.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

[18] The ACHR, for its part, guarantees freedom of expression in the following terms:

> 1. Everyone 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 medium of one's choice.

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[10] As argued in the original constitutional challenge, dated 11 November 2021.
[11] United Nations General Assembly Resolution 217A (III), 10 December 1948.
[12] See, for example, D'Amato, A., "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (2010, Faculty Working Papers, 88), *https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88*; and Meron, T., *Human Rights and Humanitarian Norms as Customary Law* (1989, Oxford, Clarendon Press).
[13] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 3 January 1976.
[14] As of February 2022.

…
3. The right of expression may not be restricted 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.

5.2 Importance of Freedom of Expression

[19] Freedom of expression is one of the most cherished and celebrated of all human rights. One of the reasons for this is that it is important both in its own right and as a means for securing respect for all other rights and, indeed, democracy itself. The UN General Assembly made this clear in Resolution 59(I), adopted at its first session in 1946:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[15]

[20] To understand the role of freedom of expression in a democracy, it is important to appreciate the broad underlying nature of this right as guaranteed by international law. It is not simply the right of everyone to say what they want (of course subject to limited restrictions). It has a much more profound nature. Indeed, understood properly, the right to freedom of expression protects and promotes the free flow of information and ideas in society, with special importance being given to promoting social debate about matters of public interest.

[21] Understood in that way, freedom of expression lies at the heart of democracy which depends on the ability of citizens to know about, debate and assess the positions of different parties and candidates, to hold them accountable and to participate in the conduct of public affairs. Achievement of these values is possible only where citizens can both access information and discuss openly. Authoritative international bodies have repeatedly stressed that freedom of expression is essential for democracy. To provide just one of these statements, from the Inter-American Court of Human Rights in the case of *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism:*

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a **conditio sine qua non** for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[16]

5.3 Restrictions on Freedom of Expression

[15] Adopted 14 December 1946.
[16] Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

[22] Under international law, the right to freedom of expression is not absolute and the legal systems of every country contain restrictions on speech. The approach taken under international law is to start from a broad presumption that all expressive activity is protected, whatever form it may take, and then to allow States to limit or restrict it, but only under certain conditions. Those conditions are set out in Article 19(3) of the ICCPR:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights and reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[23] An almost identical test, albeit adding a broad prohibition on prior censorship, is found at Articles 13(2) and (4) of the ACHR:

> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.
>
> …
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

[24] These provisions impose a strict three-part test for assessing the legitimacy of any restriction on freedom of expression. This test was summarised by the UN Human Rights Committee, the official body of independent experts that is charged with overseeing the ICCPR, in its 2011 General Comment No. 34 as follows:

> [Article 19(3) of the ICCPR] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.[17]

[25] The first part of the test, which is drawn directly from the language of Article 19(3), is that restrictions must be "provided by law". A key rationale for this is that only parliament, acting collectively pursuant to its formal law-making powers and procedures, should have the ability to decide what interests, in conformity with international law, warrant overriding freedom of expression. This rules out *ad hoc* or arbitrary action by elected officials or civil servants, no matter how senior, although it does not mean that parliament cannot delegate secondary law-making power to other actors (such as in the form of regulations under a law).

[17] General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 22. The Committee adopts general comments from time to time to provide a synopsis of its jurisprudence and thinking in relation to different aspects of rights. General Comment No. 34 is the most recent one on freedom of expression.

[26] It is not enough simply for there to be a law; that law must meet certain quality control standards. It must, fairly obviously, be accessible, normally meaning that it should have been published in the official gazette or whatever official publication serves to bring notice of laws to the general public.

[27] The law must also not be vague. When a restriction on freedom of expression is vague, it may be subject to a range of different interpretations, which may or may not reflect the proper intent of parliament in adopting the law. Put differently, vague rules effectively grant discretion to the authorities responsible for applying them – whether this is a regulatory body, the police or an administrator – to decide what they mean. This clearly undercuts the very idea that it is parliament which should decide on restrictions. The same is true where a law is clear but allocates broad discretion to the authorities in terms of how it is to be applied. An example of this might be a law which allowed the police to stop a demonstration if they deemed it not to be in the public interest.

[28] Vague provisions may also be applied in an inconsistent or unclear way. This fails to give individuals proper notice of what is and is not allowed, another key objective of the "provided by law" part of the test. In this case, especially where sanctions for breach of the rule are significant, individuals are likely to steer well clear of the potential zone of application of the rule to avoid any possibility of being censured, leading to what has been called a chilling effect on freedom of expression. In General Comment No. 34, the Human Rights Committee referred to the problem both of vagueness and granting too much discretion:

> For the purposes of [Article 19(3) of the ICCPR], a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[18]

[29] This part of the test does not necessarily rule out subordinate legislation (such as rules or regulations under a statute) as well as other delegated powers to make laws (such as rules adopted by a regulator or even judge-made law which can be understood as being derived from the constitution in common law countries), as long as these powers derive from a primary legal rule (i.e. a law or the constitution). The European Court of Human Rights summed up its jurisprudence on this issue in *Sanoma Uitgevers B.V. v. the Netherlands*:

> [A]s regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it.[19]

[18] *Ibid.*, para. 25.
[19] 14 September 2010, Application No. 38224/03, para. 83.

[30] The second part of the test is that the restriction must serve or protect one of the grounds or aims listed in Article 19(3). That article makes it quite clear that the list is exclusive and the UN Human Rights Committee has reinforced that point:

> Restrictions are not allowed on grounds not specified in [Article 19(3) of the ICCPR], even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[20]

Restrictions which do not serve one of the listed grounds are not legitimate.

[31] The third part of the test is that the restriction must be "necessary" to secure the ground or interest. Most international cases are decided on the basis of this part of the test, which is extremely complex. A few key features can be drawn from authoritative statements about this part of the test, namely:

- restrictions should not be overbroad in the sense that they should not affect speech beyond that which is harmful to the relevant ground or interest;
- restrictions should be rationally connected to the ground they aim to protect in the sense of having been carefully designed to protect it and representing the option for protecting it that impairs freedom of expression the least; and
- restrictions should be proportionate in the sense that the benefits outweigh the harm to freedom of expression.

5.4 Positive Freedom of Expression Obligations: General Nature

[32] It is well established that the right to freedom of expression is one of those rights which imposes both negative and positive obligations on States. As the European Court of Human Rights stated in the 2000 case of *Özgür Gündem v. Turkey*:

> The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. [references omitted][21]

[33] Negative obligations are so named because they require States to refrain from taking actions. The most typical negative obligations are not to impose content restrictions which go beyond what is permitted by Article 19(3) of the ICCPR and Articles 13(2) and (4) of the ACHR.

[34] Positive obligations, on the other hand, require States to take action to protect rights. While undue restrictions undermine the free flow of information and ideas in society, in

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[20] General Comment No. 34, note 17, para. 22. See also *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7 (UN Human Rights Committee).

[21] *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 43. See also *Appleby v. the United Kingdom*, 6 May 2003, Application No. 44306/98, para. 39 and *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98, para. 38.

other cases protecting and supporting the flow of information and ideas requires States to put in place protective or promotional measures.

[35] In some cases, positive measures on the part of States are needed to prevent the actions of private actors from undermining freedom of expression. For example, the case of *Özgür Gündem v. Turkey*, noted above, referred to States' positive obligations to prevent violent retaliation against the exercise of the right to freedom of expression (attacks on freedom of expression), to provide protection to persons who are at risk of such attacks and to investigate and prosecute those responsible where crimes of this sort do occur.[22] Another example of this is States' obligation to promote diversity, including by preventing private actors from accumulating media holdings that represent undue concentration of ownership.[23] The European Court of Human Rights has even held that States are required to provide legal aid to protect the freedom of expression rights of defendants against plaintiffs in complex defamation cases.[24]

[36] In other cases, positive obligations are not triggered in response to actions or potential actions of third parties but simply by the need for positive action to promote a robust flow of information and ideas. For example, positive obligations to promote diversity go well beyond simply preventing undue concentration of ownership. The 2007 Joint Declaration on Promoting Diversity in the Broadcast Media, adopted by the special international mandates on freedom of expression, set out a number of positive obligations in the area of diversity[25] while the African Commission on Human and Peoples' Rights has called for the "promotion and protection of African voices, including through media in local languages",[26] as part of the wider obligation to promote diversity. The obligation of States to enact legislation to give effect to the right of individuals to access information held by public authorities (the right to information) also falls into this category. As the Inter-American Court of Human Rights stated in the case of *Marcel Claude Reyes v. Chile*: "Consequently, this article [Article 13] protects the right of the individual to receive such information and the positive obligation of the State to provide it."[27]

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[22] For Inter-American standards in this area see OAS Special Rapporteur on Freedom of Expression, *Violence Against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators,* 31 December 2013, https://www.oas.org/en/iachr/expression/docs/reports/2014_04_22_Violence_WEB.pdf. For standards adopted by the European Court of Human Rights, see Toby Mendel, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, December 2012, pp. 30-31, https://rm.coe.int/16806f5bb3.

[23] On the decisions of the European Court of Human Rights on media diversity generally, see Mendel, *ibid.*, pp. 26-30. On ownership diversity, see Toby Mendel, Ángel Garcia Castillejo and Gustavo Gómez, *Concentration of Ownership and Freedom of Expression: Global Standards and Implications for the Americas* (2017, Paris, UNESCO), available in English and Spanish, https://unesdoc.unesco.org/ark:/48223/pf0000248091.

[24] See *Steel and Morris v. the United Kingdom*, 15 February 2005, Application No. 68416/01.

[25] 12 December 2007, https://www.osce.org/fom/66176?page=1.

[26] African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa*, adopted at the 32nd Ordinary Session, 17-23 October 2002. Available at: http://www.achpr.org/sessions/32nd/resolutions/62.

[27] 19 September 2006, Series C, No. 151, para. 77. See also, on recognition of the right to information, *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, Application No. 18030/11 (European Court of Human Rights).

[37] Although international courts have frequently referred explicitly to the idea of positive obligations on States in the area of freedom of expression, as indicated above, they have not tended to elaborate in detail on the general principles governing these positive obligations, focusing instead on the particular specifics of the positive obligation under consideration and the particular facts of the case. However, the jurisprudence, along with an application of general principles of both human rights and freedom of expression law, allow for some conclusions to be drawn.

[38] As a first point, positive obligations may or may not be such that they can be assessed pursuant to the three-part test set out in Article 19(3) of the ICCPR and Article 13(2) of the ACHR. For example, when international courts consider cases of States' positive obligations to prevent, protect against and prosecute attacks by private parties on freedom of expression, they do not normally employ the three-part test and, instead, consider whether States have done enough in this area (even though there are, necessarily, limits to this, on which see below).

[39] Second, in some cases, the characterisation of a measure as positive or negative depends on how you approach the matter. For example, from the perspective of information consumers, limits on concentration of ownership are a positive measure but from the perspective of media owners they can be seen as negative restrictions. In addition, some positive measures incorporate negative limits. For example, as the quote above from the case of *Marcel Claude Reyes v. Chile* makes clear, the right to information imposes a positive obligation on States but there are also limits to this right, i.e. the exceptions to the right of access, which represent negative restrictions on freedom of expression. As the Inter-American Court of Human Rights made clear in that case, such restrictions within positive obligations must meet the three-part test:

> Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.[28]

[40] Third, although restrictions on freedom of expression must be provided by law, as the three-part test indicates explicitly, some positive obligations can be discharged without any legislative backdrop or at least any direct legal rules. Again, the issue of addressing attacks on freedom of expression presents itself as an example. States may discharge their positive duty to prosecute by establishing dedicated police units via policy or even simply as an administrative matter or even, where the incidence of attacks is low, by investigating each case properly.[29]

[41] However, where legal rules form part of a State's actions to discharge its positive obligations, those legal provisions need to meet the standards of the "provided by law" part of the test for restrictions. These legal instruments impact freedom of expression, whether or not they are strictly construed as restrictions in the sense of Article 19(3) of the

[28] *Ibid.*, para. 77. See also paras. 88-92 of that decision elaborating in more detail on the nature of restrictions on the right to information.

[29] There will normally be some higher-level legal authorization even for these sorts of policy or administrative measures, but these do not, themselves, directly impact freedom of expression.

ICCPR and Article 13(2) of the ACHR, and it is not appropriate for them to be vague – such that those who might benefit from them cannot understand their implications – or to allocate excessive discretion to officials, thereby opening the door to bias, including potentially political bias, in their application, which can never be appropriate in the context of freedom of expression. Indeed, these elements of the provided by law rule should, for the same reasons, also apply to policy or administrative measures which States use to meet their positive freedom of expression obligations.

[42] For example, a subsidy scheme for public interest media content needs to be clear as to what sort of content it would support both to give fair notice to potential beneficiaries and to avoid bias in its application. As the special international mandates on freedom of expression stated in their 2007 Joint Declaration on Promoting Diversity in the Broadcast Media:

> Consideration should be given to providing support, based on equitable, objective criteria applied in a non-discriminatory fashion, for the production of content which makes an important contribution to diversity.[30]

It goes without saying that criteria could not be "equitable" and "objective" or applied in a "non-discriminatory fashion" unless they met the standards of clarity and prescriptiveness that are inherent in the "provided by law" part of the three-part test.

[43] Essentially by their very nature, positive obligations impose administrative or other costs on the public sector, albeit some more so than others. Courts need to be careful when imposing spending obligations on the public sector. Furthermore, the precise nature and scope of these obligations often depends heavily on the specific factual backdrop to each case. For example, in a country where attacks on freedom of expression are common, it might be necessary to put in place a specialised mechanism to address this, and this has been done in many countries,[31] while such a mechanism would not be required in a country where attacks were very rare.

[44] As a result of these factors, international courts have often been somewhat reluctant to spell out clear general principles governing the *extent or scope* of positive obligations, especially where these have spending implications. As the European Court of Human Rights noted in the case of *Özgür Gündem v. Turkey*, once again in the context of attacks on freedom of expression:

> The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be

[30] Note 25. The Declaration also highlighted the need for any regulatory measures to be applied by independent bodies.

[31] See, for example, Toby Mendel, *Supporting Freedom of Expression: A Practical Guide to Developing Specialised Safety Mechanisms* (2016, Paris, UNESCO), https://en.unesco.org/sites/default/files/supporting-freedom-of-expression_guide-safety-mechanisms.pdf and Eduardo Bertoni, *Prevent and Punish: In search of solutions to fight violence against journalists* (2015, Paris, UNESCO), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/Events/IDEI_2014/Prevent-and-Punish_Bertoni.pdf.

> interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. [references omitted][32]

However, the facts of that case were that a newspaper and its staff had been the subject of repeated violent attacks, which ultimately led to it being closed, and yet the government could only identify one protective measure that had been provided. This led the Court to conclude, "that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression."[33]

[45] The Inter-American Court of Human Rights has gone further in this context, holding that States,

> must adopt, when pertinent, the necessary and reasonable measures to prevent or protect the rights of those who are in that situation [of risk or vulnerability to attacks for exercising their right to freedom of expression], as well as, when appropriate, to investigate acts that harm them.[34]

And:

> States have the obligation to adopt special measures of prevention and protection for journalists subject to special risk owing to the exercise of their profession.[35]

It has also shown a willingness to embrace innovative solutions in this area. For example, in the case of *Vélez Restrepo and Family v. Colombia*, the Court ordered Colombia to incorporate "a specific module on the protection of the right to freedom of thought and expression and on the work of journalists and social communicators" into its human rights education programme for military personnel, based on its finding that they had beaten a cameraman who was filming abuses being committed by them.

[46] The right to information, which encompasses both positive and restrictive elements, provides potentially more scope for specific elaboration of the scope of the obligation, given that it is less context specific. The numerous authoritative statements about this right certainly elaborate extensively on its positive elements, such as the need for its scope to be broad, for the procedures for making and processing requests to be user-friendly, for effective appeals mechanisms to be available to requesters and for States to put in place a range of promotional measures.[36] However, almost all of the legal cases before international courts on this right are based on denials of access to information, i.e. the negative side of it. As such, these courts have not really had a chance to elaborate on the positive obligations of States in terms of the right to information beyond establishing generally that such a positive obligation exists.

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[32] Note 21, para. 43.
[33] *Ibid.*, para. 46.
[34] *Vélez Restrepo and Family v. Colombia*, 3 September 2012, Series C, No. 248, para. 189.
[35] *Ibid.*, para. 194.
[36] The indicators used on the RTI Rating, a methodology for assessing the strength of legal frameworks for the right to information, provide a good statement of both positive and restrictive standards governing this right. Available at: https://www.rti-rating.org/wp-content/uploads/2021/01/Indicators.final_.pdf.

[47] Here again, the Inter-American Court of Human Rights has shown a willingness to embrace innovative solutions to breaches. Thus, in the case of *Marcel Claude Reyes v. Chile*, the Court not only ordered Chile to provide the victims with the information they had sought (or a justified decision as to why it was exempt) and to pay them costs, but also to adopt legislation and other measures to give effect generally to the right to information, as well as to provide training to officials on this right.[37]

[48] International courts have gone quite some way in the area of media diversity in terms of elaborating general principles governing positive freedom of expression obligations. The European Court of Human Rights made it clear as far back as 1993 that States must provide for the licensing of private broadcasters, stating:

> Of all the means of ensuring that these values [media diversity] are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station.[38]

[49] It is also well established that the regulation of the media, including the issuance of licences to broadcasters, must be done by a body which is independent of government.[39] But the European Court of Human Rights has gone much further in this area. In the 2012 case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, a Grand Chamber of the Court[40] addressed the failure to grant a licensed broadcaster the frequencies it needed to go on air. The wider context was a period when Berlusconi was Prime Minister of Italy and the television market was dominated by the State broadcaster and the channels of Mediaset, owned by Berlusconi. The Court elaborated at length on the positive obligation of the State to promote diversity in the broadcast sector, including the following statements:

> 130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.
> …
> 133. A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature, a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it.

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[37] Note 27, para. 174.
[38] *Informationsverein Lentia and others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 39.
[39] See, for example, General Comment No. 34, note 17, para. 39 and the 2007 Joint Declaration on Promoting Diversity in the Broadcast Media, note 25.
[40] A Grand Chamber of the Court involves 17 judges and is usually relied upon where cases involve important or novel questions or it is necessary to settle the case law of the Court.

> 134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.[41] [references omitted]

[50] The African Commission on Human and Peoples' Rights engaged in similar reasoning in *Open Society Justice Initiative v. Cameroon*, finding that Cameroon violated the right to freedom of expression "because it lacks an independent licensing authority and the licensing procedures are neither fair nor transparent, and therefore fail to promote diversity in broadcasting."[42]

[51] Together, these cases, although each is context dependent, allow for some general conclusions to be drawn about the extent or scope of positive obligations. First, States are generally obliged to adopt measures which are "necessary" or "reasonable" to deliver the positive obligation. While this depends on the context and circumstances, it implies a minimum degree of effort by States to this end. This, in turn, suggests that States must advert explicitly to the need to deliver the positive obligation and undertake some degree of planning regarding how they are doing to meet the obligation. It also implies a level of effort that will, perhaps over time and perhaps in collaboration with private actors, actually deliver the positive obligation. This may need to be tempered by the reality of external factors – it is not possible to entirely prevent attacks on freedom of expression or to bring 100% of offenders to justice – but measures should be put in place which improve the situation.

[52] Second, actions which are counterproductive, in the sense of undermining delivery of the position obligation, are generally not legitimate, at least absent a clear and overriding justification based on the protection of another social interest. Here, only protection of one of the legitimate aims recognised in Article 19(3) of the ICCPR and Article 13(2) of the ACHR could potentially justify the continuation of such an action. Of course this is different from practical constraints such as cost and effort, which international courts have recognised as legitimate limits to the delivery of positive obligations.

[53] Third, the measures must be effective in delivering the positive obligation. The decision in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, where a breach was found despite formal compliance with established norms regarding licensing of private broadcasters due to the presence of other actions which effectively negated that, supports this proposition.

[54] Fourth, where a positive obligation is not being delivered effectively, international courts have shown that they are willing to go beyond the normal remedies and impose innovative solutions. Working back from this, it can be concluded that States are themselves expected to be engaged and innovative in coming up with means of delivering position obligations.

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[41] 7 June 2012, Application No. 38433/09.

[42] 25 May 2006, Communication No. 290/2004, para. 171, https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2006/72.

5.5 State Obligations vis-à-vis Private Actors

[55] International human rights law is primarily concerned with the direct obligations of the State, whether positive or negative. However, actions of private actors can have major impacts on the realisation of human rights. Human rights treaties require States to "give effect" to the fundamental human rights they recognise by enacting appropriate legislative and other measures.[43] Within the Inter-American human rights system, this means that States must ensure "the enactment of laws and the implementation of practices leading to real respect" for human rights guarantees.[44] As noted above, in some cases the positive obligations of States are based on their duty to prevent and address human rights impacts committed by non-State actors.[45] In this regard, the UN Human Rights Committee has stated:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights … would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[46]

[56] Human rights courts have adopted numerous decisions elaborating on the obligations of States to prevent, investigate and redress actions by private actors which violate human rights, for example in the context of violent acts, such as domestic violence or armed conflict.[47] As noted above, in the freedom of expression context this includes an obligation on the State to take action to protect those who are at risk for expressing themselves and to prosecute those who perpetrate such attacks.[48] States should also provide Internet intermediaries with protection from liability for the speech of third parties on their servers, so as to avoid them becoming censors in their own right.[49]

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[43] See Articles 1 and 2 of the ICCPR, Article 2 of the ACHR and Article 1 of the African Convention on Human and Peoples' Rights. See also General Comment No. 31, note 45, para. 7: "Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."

[44] *Pacheco Teruel et al. v. Honduras*, 27 April 2012, Series C, No. 241, para. 104 (Inter-American Court of Human Rights).

[45] Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 8.

[46] General Comment No. 31, note 45, para. 8.

[47] See, for example, *Velásquez-Rodríquez v. Honduras*, 29 July 1988, Series C, No. 4 (Inter-American Court of Human Rights); and *Pueblo Bello Massacre v. Colombia*, 31 January 2006, Series C, No. 140 (Inter-American Court of Human Rights).

[48] See, as examples from the Inter-American context, *Perozo et al. v. Venezuela*, 28 January 2009, Series C, No. 195 (Inter-American Court of Human Rights); and *Vélez Restrepo y. Familiares v Colombia*, 3 September 2012, Series C, No. 248 (Inter-American Court of Human Rights).

[49] 2011 Joint Declaration on Freedom of Expression and the Internet, *ibid.*, para 2(a). See also *Magyar Jeti Zr v. Hungary*, 4 March 2019, Application No. 11257/16 (European Court of Human Rights). The question of

[57] These State responsibilities go beyond merely responding to specific violations. States must also create proper regulatory and practical environments to realise human rights, including in relation to private actors. As explained by the African Commission on Human Rights, the obligation to "protect" rights may require the putting in place of regulatory frameworks to protect against interference by third parties:

> [T]he State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.[50] [references omitted]

[58] The Inter-American Court of Human Rights acknowledges that States cannot be held responsible for all human rights violations committed by private actors.[51] However, State responsibility may arise where such regulation is fundamental to the realisation of a right.

[59] In the digital era, there is increasing concern over monopolistic practices, particularly by social media companies. Historically, the primary threat to freedom of expression online has come from improper government interference with this right. For this reason, most human rights standards emphasise the dangers of government regulation, which remains a serious concern. However, modern private digital intermediaries wield enormous powers which, depending on how they are employed, can seriously undermine the ability of their users to exercise their right to freedom of expression. If so, States may have an obligation to put in place measures, including potentially regulatory measures, to ensure that these private companies do not unduly restrict freedom of expression. As with broadcasting regulation, this should be in a manner which strictly aligns with standards governing freedom of expression, including the principle of independent regulation.[52]

[60] At the same time, both legal and natural persons may serve as vehicles for protecting the rights of others. Leading human rights authorities have recognised that private actors can play a crucial role in ensuring freedom of expression and that States may accordingly have both positive and negative obligations to support those private actors in fulfilling those roles. Media outlets, for example, serve as vehicles by which journalists can impart information and ideas,[53] and also as key vehicles for the general public to receive them.[54]

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intermediary liability is complex and rapidly evolving for social media platforms and intermediaries that engage directly with user content.

[50] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, 13-27 October 2001, Communication No. 155/96, para. 46 (African Commission on Human and Peoples' Rights).

[51] *Perozo et al. v. Venezuela*, note 48, para. 170; and *Gonzales Lluy et al. v. Ecuador*, 1 September 2015, Series C, No. 298, para. 170 (Inter-American Court of Human Rights).

[52] See note 39.

[53] *Opinión Consultiva Titularidad de Derechos de la Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*, 26 February 2016, OC-22/16, paras. 115-117 (Inter-American Court of Human Rights).

[54] The European Court of Human Rights, for example, often considers the role of the press in acting as "public watchdogs" which share vital information with the public. See, for example, *Bladet Tromso and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para. 59.

In the digital era, States have obligations to promote the ability of Internet service providers to provide Internet access to the public.

6.0 Obligation to Promote Universal Quality Access to the Internet

[61] This part of the amicus curiae brief argues that States not only have a positive obligation to promote universal access to the Internet for those under their jurisdiction, but that this access must meet certain minimum conditions, which we refer to collectively using the term "quality access". The Internet is now so central to the ability both to communicate or voice one's views and to access information that not being able to access it unacceptably undercuts the freedom of expression opportunities available to people, rendering them second-class citizens and, for many in that situation, trapping them in a cycle of poverty and disadvantage. Furthermore, the ability to access key services online, usually via a combination of imparting and receiving information, means that the implications of an inability to access the Internet go far beyond freedom of expression to undermine a host of other rights, civil and political as well as economic, social and cultural, and indeed the ability to operate successfully in the modern world.

[62] Some of the statements referred to below go beyond Internet access and refer to wider notions such as digital or communications technologies. The Internet is by far the dominant platform in this regard, including in terms of hosting the websites which provide the information and services which are so essential to modern life. At the same time, use of the Internet depends on other technology, including wi-fi and cellular data plans, as well as the range of devices that actually connect people to the Internet. It is not necessary for purposes of this brief to delve into these technical details. When we refer to access to the Internet, we mean all of the factors which go into making this a practical reality.

6.1 A Duty to Promote Universal Access to the Internet

[63] As noted above, the Internet is now integrated into almost every facet of modern life and communications, such that participating in the free exchange of information and ideas in society requires having access to the Internet. The Internet is increasingly all-pervasive as a communications medium. Again as previously noted above, it facilitates not only the right to speak (or "impart" in the language of the ICCPR and ACHR) but also the rights to "seek" and "receive" information and ideas. As such, it is essential to both the individual and social dimensions of the right to freedom of expression which the Inter-American Court of Human Rights has often highlighted.[55] As the OAS Special Rapporteur on Freedom of Expression put it in her 2013 report on Freedom of Expression and the Internet:

[55] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, paras. 30-32.

> Given the Internet's multidirectional and interactive nature, its speed, and its global scope at a relatively low cost, as well as its decentralized and open design, access to it presents an unprecedented potential for effective realization of the right to seek, receive, and disseminate information in both its individual and collective dimensions. The Internet also serves as a platform for fulfilling other human rights.[56] [references omitted]

[64] There is growing consensus that States have a positive obligation to promote access to the Internet as part of the right to freedom of expression. For example, the UN Human Rights Committee's General Comment No. 34 provides:

> States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.[57]

[65] A resolution on freedom of expression adopted by the UN Human Rights Council as far back as 2009 highlights the importance of promoting universal access to the Internet, calling on States:

> To facilitate equal participation in, access to and use of information and communications technology, such as the Internet, applying a gender perspective, and to encourage international cooperation aimed at the development of media and information and communication facilities in all countries.[58]

The same resolution calls on States not to impose restrictions that are not consistent with Article 19(3) of the ICCPR, among other things, on access to or use of the Internet.[59]

[66] The most recent freedom of expression resolution, adopted by the UN Human Rights Council in 2020, reiterates the call on States not to restrict access to or use of the Internet.[60] It also calls on States:

> (h) To adopt and implement laws and policies that ensure the freedom to seek, receive and impart information, including by:
> …
> (iii) Facilitating and promoting access to and use of communications and digital technologies.[61]

[67] In parallel to its resolutions on freedom of expression, the UN Human Rights Council has also adopted a series of resolutions on "The Promotion, Protection and Enjoyment of Human Rights on the Internet". The most recent such resolution, adopted in July 2021, calls on States "to accelerate efforts to bridge digital divides, including the gender digital

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[56] OAS Special Rapporteur on Freedom of Expression, *Freedom of Expression and the Internet*, 31 December 2013, para. 36, http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20_web.pdf.
[57] Para. 15.
[58] Resolution 12/16, adopted by the UN Human Rights Council on 2 October 2009, para. 5(m).
[59] *Ibid.*, para. 5(p)(iii).
[60] Resolution 44/12, adopted by the UN Human Rights Council on 16 July 2020, para. 8(g).
[61] *Ibid.*, para. 8(h)(iii).

divide, and to enhance the use of information and communications technology, in order to promote the full enjoyment of human rights for all".[62] It also calls on States to "support civil society in its efforts to address barriers to digital access".[63]

[68] The special international mandates on freedom of expression have made some of the strongest statements, in their Joint Declarations, about the human rights obligations of States to ensure access to the Internet. In their 2011 Joint Declaration on Freedom of Expression and the Internet they stated unequivocally:

> Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.[64]

[69] They expanded upon this in their 2014 Joint Declaration on Universality and the Right to Freedom of Expression, stating:

> States should actively promote universal access to the Internet regardless of political, social, economic or cultural differences, including by respecting the principles of net neutrality and of the centrality of human rights to the development of the Internet.[65]

[70] The African Commission on Human and Peoples' Rights has also clearly recognised the obligation of States to provide access to the Internet. Its 2019 *Declaration of Principles of Freedom of Expression and Access to Information in Africa* states:

> States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.[66]

[71] This issue has not come up much before international human rights courts, in part due to the structural nature of the issue, which does not impose an obligation on States to provide everyone with immediate Internet access, thus largely precluding a claim by an individual who lacked access. In *Kalda v. Estonia*, the European Court of Human Rights had to assess the legitimacy of the authorities denying a prisoner access to certain online websites. As part of its consideration of the case, the Court noted:

> It considers that Article 10 [guaranteeing freedom of expression] cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners.[67]

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[62] Resolution 47/16, adopted by the UN Human Rights Council on 13 July 2021, para. 8. A similar statement was included in Resolution 38/7, 5 July 2018, para. 5.
[63] *Ibid.*, para. 9.
[64] 1 June 2011, para. 6(a), https://www.law-democracy.org/live/joint-declaration-on-access-to-the-internet/.
[65] 6 May 2014, para. 1(h)(iii), https://www.law-democracy.org/live/international-mandates-universality-and-freedom-of-expression/. See also the Joint Declaration on Media Independence and Diversity in the Digital Age, 2 May 2018, para. 1(a)(ii) and the Twentieth Anniversary Joint Declaration: Challenges to Freedom of Expression in the Next Decade, 10 July 2019, para. 2(a), https://www.law-democracy.org/live/20th-anniversary-joint-declaration-by-special-rapporteurs/.
[66] Note 26, Principle 37(2).
[67] 19 January 2016, Application No. 17429/10, para. 45.

However, it was also careful to note the context for this statement, which was that,

> [I]mprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information.[68]

Furthermore, there was no question about access to the Internet, *per se*, in that case, as the applicant did have access, albeit subject to a restricted system of permission which was designed specifically for prisoners.

[72] These international statements are supported by the recognition at the national level by a growing number of States of a constitutional obligation to provide access to the Internet. Such a right has, to give just a few examples, been recognised in Brazil, Costa Rica, Estonia, Finland and France.[69]

[73] At the same time, despite these positive statements about a human right to access the Internet, or a State obligation to promote such access, concerns have also been expressed about a universal right of access, in part due to the impossibility for many States of realising this in practice. In his 2011 report, issued by the UN Special Rapporteur on Freedom of Opinion and Expression just before the 2011 Joint Declaration stating clearly that States have an obligation to promote universal access, which he also signed, the Special Rapporteur recognised these challenges by noting that he,

> is acutely aware that universal access to the Internet for all individuals worldwide cannot be achieved instantly. However, … States should adopt effective and concrete policies and strategies – developed in consultation with individuals from all segments of society, including the private sector as well as relevant Government ministries – to make the Internet widely available, accessible and affordable to all.[70]

[74] In part, concerns about recognising a duty to promote access stems from a misunderstanding of the nature of this obligation. Unlike most aspects of the right to freedom of expression, which need to be respected immediately (or in short order, where practical steps such as passing legislation or providing training need to be taken), this right is subject to progressive realisation, in common with many economic and social rights. As the OAS Special Rapporteur on Freedom of Expression has stated:

> [T]o ensure the effective and universal enjoyment of the right to freedom of expression, steps should be taken to progressively guarantee access to the Internet for all persons.[71] [references omitted]

[75] As such, it does not require States to ensure that everyone has immediate access to the Internet, since this would simply be impossible. Rather, the obligation is to "promote" or

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[68] *Ibid.*
[69] See, for example, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, A/HRC/17/27, para. 65, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.
[70] *Ibid.*, para. 66.
[71] *Freedom of Expression and the Internet*, note 56, para. 37.

"facilitate" universal access, taking into account the challenges this may pose and practical constraints in delivering access. This does not mean that the right is illusory or theoretical in nature. While States are not obliged to ensure universal access in short order, neither may they simply ignore this obligation and do nothing.

[76] The UN Committee on Economic, Social and Cultural Rights, which plays a similar role to the UN Human Rights Committee but in relation to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[72] has elaborated extensively on the notion of progressive realisation of rights, including in its General Comment No. 3, stating, for example:

> [T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[73]

Significantly, the Committee has also noted:

> Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[74]

[77] The 2011 Joint Declaration of the special international mandates on freedom of expression set out a number of minimum steps that States should take to meet their obligations in this area, as follows:

> e. States are under a positive obligation to facilitate universal access to the Internet. At a minimum, States should:
>
> i. Put in place regulatory mechanisms – which could include pricing regimes, universal service requirements and licensing agreements – that foster greater access to the Internet, including for the poor and in 'last mile' rural areas.
> ii. Provide direct support to facilitate access, including by establishing community-based ICT centres and other public access points.
> iii. Promote adequate awareness about both how to use the Internet and the benefits it can bring, especially among the poor, children and the elderly, and isolated rural populations.
> iv. Put in place special measures to ensure equitable access to the Internet for the disabled and for disadvantaged persons.
>
> f. To implement the above, States should adopt detailed multi-year action plans for increasing access to the Internet which include clear and specific targets, as well as standards of transparency, public reporting and monitoring systems.[75]

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[72] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 3 January 1976. Ratified by Colombia on 29 October 1969.
[73] General Comment No. 3. The nature of States parties' obligations, 14 December 1990, para. 9, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en.
[74] *Ibid.*

Not surprisingly, this lines up well with the statement by the UN Special Rapporteur above, calling on States to "adopt effective and concrete policies and strategies … to make the Internet widely available, accessible and affordable".

[78] Similarly, the 2019 *Declaration of Principles of Freedom of Expression and Access to Information in Africa* indicates:

> States shall, in cooperation with all relevant stakeholders, adopt laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination, including by:
>
> a. developing independent and transparent regulatory mechanisms for effective oversight;
> b. improving information and communication technology and internet infrastructure for universal coverage;
> c. establishing mechanisms for regulating market competition to support lower pricing and encourage diversity;
> d. promoting local access initiatives such as community networks for enabling the increased connection of marginalised, unserved or underserved communities; and
> e. facilitating digital literacy skills for inclusive and autonomous use.[76]

[79] Understood in this way, this positive obligation is less onerous (unrealistic) than it might otherwise seem. Indeed, many States are already undertaking many if not all of the measures listed above.

[80] Recognising that many countries are still a long way from achieving this goal, the 2019 Joint Declaration, which focused on challenges facing freedom of expression in the next decade, calls on States to: "Expand significantly initiatives to provide universal and affordable Internet access."[77] And recognising the challenges faced by less wealthy States, the 2021 UN Human Rights Council resolution on The Promotion, Protection and Enjoyment of Human Rights on the Internet calls for support to be provided, including the following statement:

> *Stresses* that many States all over the world need support in expanding infrastructure, technological cooperation and capacity-building, including human and institutional capacity-building, to ensure the accessibility, affordability and availability of the Internet in order to bridge digital divides, to meet the Sustainable Development Goal and to ensure the full enjoyment of human rights.[78]

6.2 The Features That Constitute "Quality Access"

[81] The human rights obligation to promote universal access also imposes some conditions on the nature of that access, which together we call "quality access". Promoting access should be based on a human rights approach, since it is itself a human right. In its 2016

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[75] Note 64, paras. 6(e) and(f).
[76] Note 26, Principle 37(3).
[77] Note 65, para. 2(d).
[78] Note 62, para. 14.

resolution on The Promotion, Protection and Enjoyment of Human Rights on the Internet, the UN Human Rights Committee,

> *Also affirms* the importance of applying a comprehensive human rights-based approach in providing and in expanding access to the Internet, and requests all States to make efforts to bridge the many forms of digital divide.[79]

[82] The need to address the digital divide is a constant reference in authoritative statements about Internet access.[80] These, in turn, find a basis not only in the direct obligation to promote universal access for all, but also in the need to address discrimination, both direct and particularly systemic in nature, whether the victim group is women, minorities, the poor or any other identifiable group. For the poor, in particular, lack of access to the Internet is a structural element in the systemic discrimination against them at all levels which requires effective positive measures to address. Put differently, where the poor or other disadvantaged groups do not have access to the Internet, or only have sub-standard access, their chances of escaping the trap of poverty are significantly diminished. In this regard, 2019 *Declaration of Principles of Freedom of Expression and Access to Information in Africa* states:

> In providing access to the internet, States shall take specific measures to ensure that marginalised groups have effective exercise of their rights online.[81]

[83] One aspect of quality access is that access must be real, not simply illusory. Without attempting to elaborate on all of the implications of this, it involves such elements as affordability, both of access services themselves but also devices which are needed to enable access in practice, ability to access and use the Internet in local languages (which in turn has a number of different elements), some degree of reliability of access, albeit subject to practical and technical constraints, and access of sufficient bandwidth to allow practical access to key services and platforms. Many of these qualities are reflected in Principles 37(2) and 37(3) of the 2019 *Declaration of Principles of Freedom of Expression and Access to Information in Africa*, quoted above, which both refer to "equitable, affordable and meaningful access". Other qualities are referred to in the 2021 UN Human Rights Council resolution on The Promotion, Protection and Enjoyment of Human Rights on the Internet, which includes the following statement:

> *Also encourages* all States to take the necessary and appropriate measures to promote free, open interoperable, reliable and secure access to the Internet … in order to ensure the full enjoyment of human rights.[82]

[84] Beyond these features, it is implicit in the idea of bridging the digital divide and providing for non-discriminatory access that access be open and cover the whole Internet, not just parts of it. This also flows from the underlying rationale for the obligation to promote

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[79] Resolution 32/13, adopted by the UN Human Rights Council on 1 July 2016, para. 5.
[80] See, for example, para. 8 of UN Human Rights Council Resolution 47/16, note 62.
[81] Note 26, Principle 37(4). The OAS Special Rapporteur on Freedom of Expression has elaborated at some length on the types of measures needed to bridge the digital divide. See *Freedom of Expression and the Internet*, note 56, paras. 38-44.
[82] Resolution 47/16, note 62, para. 10.

universal access, including to promote freedom of expression, which means non-censored speech. The OAS Special Rapporteur on Freedom of Expression has noted that States should put in place measures "to prohibit blocking or limiting access to the Internet or any part of it".[83] The idea of full access to the Internet is also implicit in some of the terms used in the authoritative statements cited above to describe the notion of universal access, such as "meaningful", "equitable", "effective" and "free". This is without prejudice to the possibility of blocking access to illegal content online, subject to appropriate safeguards in accordance with Article 19(3) of the ICCPR and Article 13(2) of the ACHR. The requirement to provide access to the whole Internet is also reflected strongly in the principle of net neutrality, elaborated on in the next section of this brief. It goes without saying that net neutrality goes hand-in-hand with States' obligations to provide quality access to the Internet.

7.0 Net Neutrality

7.1 Net Neutrality as a Human Rights Obligation

[85] According to Timothy B. Lee, the founder of the World Wide Web, "Network neutrality is the idea that internet service providers (ISPs) … should treat all internet traffic equally."[84] Others have described it as follows:

> Network neutrality prescribes that Internet traffic shall be treated in a non-discriminatory fashion so that Internet users can freely choose online content, applications, services and devices without being influenced by discriminatory delivery of Internet traffic.[85]

[86] The obligation of States to protect network neutrality, or "net neutrality" for short, as part of the wider right to freedom of expression derives from different freedom of expression standards. Most importantly, the right to seek and receive information and ideas would be seriously undermined if the dominant practical means for doing this was subject to constraints and biases based on the commercial or other interests of companies which provide access to the Internet or other online services. Non-discrimination or equality in relation to freedom of expression is, as the quotes above make clear, also a key factor behind the human rights principle of net neutrality.

[87] The special international mandates on freedom of expression first made it clear that the right to freedom of expression places a positive obligation to protect net neutrality in their 2011 Joint Declaration on Freedom of Expression and the Internet, stating:

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[83] *Freedom of Expression and the Internet*, note 56, para. 37.
[84] *Network neutrality, explained*, updated 21 May 2015, VOX, https://www.vox.com/2015/2/26/18073512/network-neutrality.
[85] Luca Belli and Primavera de Filippi, *Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet* (2016: Springer International Publishing), p. 2, https://hal.archives-ouvertes.fr/hal-01382021/document.

> a. There 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.
>
> b. Internet intermediaries should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders.[86]

[88] They reiterated calls for States to "Respect and reinforce the principle of network neutrality" in their 2019 Twentieth Anniversary Joint Declaration: Challenges to Freedom of Expression in the Next Decade.[87]

[89] The 2021 UN Human Rights Council resolution on The Promotion, Protection and Enjoyment of Human Rights on the Internet also highlights States' obligations in this area when it,

> *Calls upon* States to ensure net neutrality, subject to reasonable network management, and to prohibit attempts by Internet access service providers to assign priority to certain types of Internet content or applications over others for payment or other commercial benefit;[88]

[90] The 2019 *Declaration of Principles of Freedom of Expression and Access to Information in Africa* also establishes the obligation of States to respect net neutrality, albeit without using that specific term, stating:

> States shall require that internet intermediaries enable access to all internet traffic equally without discrimination on the basis of the type or origin of content or the means used to transmit content, and that internet intermediaries shall not interfere with the free flow of information by blocking or giving preference to particular internet traffic.[89]

Instead of using the compendious term "net neutrality", this provision describes in some detail exactly what is covered, namely access to all Internet traffic, equally and without giving preference to particular content.

[91] In her 2013 report on Freedom of Expression and the Internet, the OAS Special Rapporteur on Freedom of Expression also highlighted States' obligations in this regard, stating:

> Traffic over the Internet should not be discriminated against, restricted, blocked or interfered with unless strictly necessary and proportional in order to preserve the integrity and security of the network; to prevent the transmission of online content at the express request – free and not incentivized – of the user; and to temporarily and exceptionally manage network congestion.
> …

[86] Note 64, para. 5. Net neutrality does not mean that Internet access providers cannot put in place reasonable Internet traffic management systems, which is discussed in greater detail below.
[87] Note 65, para. 2(e). See also the 2014 Joint Declaration on Universality and the Right to Freedom of Expression, note 65, para. 1(h)(iii) (quoted above).
[88] Note 62, para. 12.
[89] Note 26, Principle 39(1).

> It is the responsibility of States, through laws passed by the Legislative and through the oversight of the competent agencies, to make the principle of net neutrality valid pursuant to the terms expressed heretofore.[90]

Once again we see references to the idea of non-discrimination, subject to protecting the integrity and security of networks, and specifically the idea that access should be at the wish of the user, freely and without being prejudiced by incentives. The need for States to adopt legislation to give effect to this rule is also highlighted here.

[92] In setting out these standards, the Special Rapporteur relies on the Inter-American Court of Human Rights decision in the case of *Kimel v. Argentina* and, in particular, the following statement by the Court:

> [T]he State must not only minimize restrictions on the dissemination of information, but also extend equity rules, to the greatest possible extent, to the participation in the public debate of different types of information, fostering informative pluralism. Consequently, equity must regulate the flow of information.[91]

[93] Standards on this issue are perhaps most advanced within Europe, both at the Council of Europe, the leading regional human rights body for its 47 Members States, and the 27-country European Union. For example, Principle 4 of the Council of Europe's 2003 Declaration on Freedom of Communication on the Internet, titled "Removal of barriers to the participation of individuals in the information society", states:

> Member States should foster and encourage access for all to Internet communication and information services on a non-discriminatory basis at an affordable price. Furthermore, the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect.[92]

It is not surprising that this Declaration does not refer to "net neutrality" specifically, given that the term was just coined the same year it was adopted. But the core ideas expressed here are essentially the same.

[94] In 2010, the Council of Europe adopted a whole Declaration on Net Neutrality,[93] which sets out a number of standards in this area, of which the following are the most relevant for our purposes:

> 4. Users should have the greatest possible access to Internet-based content, applications and services of their choice, whether or not they are offered free of charge, using suitable devices of their choice. Such a general principle, commonly referred to as network neutrality, should apply irrespective of the infrastructure or the network used for Internet connectivity. Access to infrastructure is a prerequisite for the realisation of this objective.
> …

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[90] Note 56, paras. 30 and 32.
[91] 2 May 2008, Series C, No. 177, para. 57. The same Court also makes the same statement in the case of *Fontevecchia y D'Amico v. Argentina*, 29 November 2011, Series C, No. 238, para. 45.
[92] Adopted by the Committee of Ministers on 28 May 2003, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dfbd5f.
[93] Adopted by the Committee of Ministers on 29 September 2010, http://archive1.diplomacy.edu/pool/fileInline.php?IDPool=1204.

> 6. In so far as it is necessary in the context described above, traffic management should not be seen as a departure from the principle of network neutrality. However, exceptions to this principle should be considered with great circumspection and need to be justified by overriding public interests. In this context, member states should pay due attention to the provisions of Article 10 of the European Convention on Human Rights and the related case law of the European Court of Human Rights.

Subsequently, the Council of Europe adopted a Recommendation on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality, providing detailed guidance to Member States as to the relevant standards in this area.[94]

[95] The European Union has a specific regulation focusing on net neutrality[95] which, as a regulation, is automatically and directly binding in all 27 Member Countries. The 18-page regulation contains an enormous amount of detail on this issue, of which the most important standards for present purposes are found in the following parts of Article 3, Safeguarding of open internet access:

> 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.
>
> This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.
>
> 2. Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1.

7.2 Some Key Features of Net Neutrality

[96] The basic idea behind net neutrality is non-discrimination in the treatment of traffic and user choice about what to access and how (including through what devices). This seems simple enough but the practical reality is more complicated, as are boundary questions about its implications in different contexts. As reflected in the statements above, there are limits to net neutrality. First, as EU Regulation 2015/2120 makes clear, it does not extend to content (or applications or services) which is (validly under EU law, including human rights law) illegal. It is clearly appropriate for Internet access providers to block access to content which has been shown to be child pornography, for example.

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[94] Recommendation CM/Rec(2016)1, adopted by the Committee of Ministers on 13 January 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1e59.

[95] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 25 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.310.01.0001.01.ENG.

[97] Second, there are some valid technical limits to net neutrality, such as reasonable (and transparent) traffic management measures. It is unnecessary for present purposes to get into technical details here, but the EU Regulation, while allowing for traffic management measures, makes it clear that such measures "shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic".[96] Like regular traffic, the Internet needs its equivalent of stop signs and roundabouts, but these should not depend on the type or expensiveness of the vehicle, or the licence plate it carries. Content providers should not be able to pay to get priority here, any more than you can pay to have your car be given priority in ordinary traffic situations.

[98] Third, it is legitimate for commercial providers to offer certain options for Internet access services for different prices. Thus it is very common to charge different prices for different speeds of access so that users who wish to stream high-definition videos smoothly can pay more for access speeds that support this. The EU Regulation specifically recognises as legitimate certain commercial service characteristics such as "price, data volumes or speed".[97] These may be varied essentially without affecting user choice regarding access to content.

[99] Several of the authoritative statements above make it clear that net neutrality requires that access be given to ***all*** Internet content, at the choice of the user. Some of the statements go further and rule out any attempt to influence or bias this choice through the use of incentives or other means. The Council of Europe Declaration on Net Neutrality suggests that there may be exceptions to this principle, but notes that they "should be considered with great circumspection and need to be justified by overriding public interests", making specific reference in this context to the right to freedom of expression. In response to the COVID-19 pandemic, for example, some countries have sought to prevent Internet access providers from charging for data used to access COVID-19 information,[98] which would arguably meet the conditions set out in the Declaration on Net Neutrality (which, in turn, reflect general human rights standards in this area).

[100] A very specific issue which goes to the heart of the issues raised in this constitutional challenge is whether zero-rating schemes might be valid. This is addressed in more detail below. However, in the European context, this debate has largely been put to rest by a series of decisions in 2021 from the Court of Justice of the European Union about whether Regulation 2015/2120 would allow for zero-rating schemes. The Court very specifically found that zero rating schemes, which were a central issue in these cases, do not conform to the requirements of Article 3(3), stating:

> A 'zero tariff' option, such as that at issue in the main proceedings, draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. Consequently, such a commercial practice does not satisfy

[96] *Ibid.*, Article 3(3).
[97] *Ibid.*, Article 3(2).
[98] See below under 8.1 Background: Zero-Rating Schemes and Existing Regulation Globally.

the general obligation of equal treatment of traffic, without discrimination or interference, laid down in the first subparagraph of Article 3(3) of Regulation 2015/2120.[99]

8.0 Zero Rating/Price Discrimination Schemes

8.1 Background on Zero-Rating Schemes and Regulation Globally

[101] "Zero rating" is when Internet access providers charge users for some of their Internet traffic but not for other Internet traffic. In practice, this usually takes the form of mobile data plans which have a cap on the amount of data that can be used, but which exempt the use of certain apps or services (designated services) from counting towards that cap. Some variation on these schemes exists. For example, some zero-rating plans give free access to the designated services whether or not a user has bought a plan while others only include the free access with purchase of a plan. Another version is "earned data" plans, whereby users who consume certain content "earn" more open use data in exchange.[100]

[102] In most cases, access providers offer zero-rating plans as a way to incentivise users to sign up for their services, without receiving any direct benefit from the designated services. In other cases, however, service providers, normally social media companies, pay to have their services featured in what are known as "sponsored content" arrangements.

[103] The approach to zero-rating schemes varies from country to country. However, zero rating is most popular for social media and audio/video streaming sites, although video streaming is less common in developing countries.[101] One study of zero-rating plans in Europe found that they most commonly featured social media sites, although audio and video streaming services and communication/text services were also reasonably common.[102]

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[99] The Court repeats this exact language in three different judgments addressing slightly different zero-rating schemes, namely: Case C-34/20, 2 September 2021, para. 30, https://curia.europa.eu/juris/document/document.jsf?docid=245537&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=2737873; Case C-5/20, 2 September 2021, para. 27, https://curia.europa.eu/juris/document/document.jsf?docid=245535&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=2737860; and Case C-854/19, 2 September 2021, para. 28, https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-854/19&jur=C.

[100] For a discussion of these various options, see Erik Stallman and R. Stanley Adams, *Zero Rating: A Framework for Assessing Benefits and Harms*, Center for Democracy and Technology, January 2016, p. 4, https://cdt.org/wp-content/uploads/2016/01/CDT-Zero-Rating_Benefits-Harms5_1.pdf; and Guy Thurston Hoskins, "Beyond 'Zero Sum': The Case for Context in Regulating Zero Rating in the Global South", 8 *Internet Policy Review* 1 (2019), https://policyreview.info/articles/analysis/beyond-zero-sum-case-context-regulating-zero-rating-global-south.

[101] Helani Galpaya, "Zero-Rating in Emerging Economies", Global Commission on Internet Governance, February 2017, p. 2, https://www.cigionline.org/sites/default/files/documents/GCIG%20no.47_1.pdf.

[102] European Commission, *Zero-Rating Practices in Broadband Markets*, February 2017, p. 14, https://ec.europa.eu/competition/publications/reports/kd0217687enn.pdf.

[104] Zero rating schemes are present in countries with a range of levels of Internet access, but they have played a particular role in how people in the Global South access the Internet. In some countries with historically low Internet access rates, the Facebook Free Basics zero-rating scheme is popular. This initiative involves Facebook collaborating with mobile providers to offer free access to select websites, notably including Facebook, with a focus on countries with low rates of Internet access.[103] While Facebook presents such initiatives as a means for expanding global Internet access, critics note that such programmes effectively create "walled gardens", giving users unlimited access to Facebook and a few other services but effectively excluding especially poor users from accessing the rest of the Internet.[104]

[105] Zero-rating schemes have increasingly attracted regulatory attention. As noted above, decisions of the Court of Justice of the European Union in 2021 effectively held that Regulation (EU) 2015/2120 prohibits such schemes for EU countries. These rulings have not yet been fully implemented at the national level across Europe, but their practical effect will almost certainly be to eliminate or at least very severely restrict zero-rating plans within the EU. Prior to this ruling, several EU countries had already enacted restrictions on zero rating.[105]

[106] India has also taken action against zero rating, effectively banning it. A 2016 regulation prohibited Internet access providers from offering or charging discriminatory tariffs for data services on the basis of content, with only a limited exception for zero rating for emergency services.[106] The regulation was enacted following an active campaign by digital rights activists in India. This was motivated in part by Facebook's Free Basics programme, which activists criticised for giving free access to only a restricted number of websites pre-selected by Facebook rather than offering broader Internet access for the poor.[107] India has since maintained its zero-rating ban in updated net neutrality rules.[108]

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[103] Meta, "Free Basics", 2022, https://www.facebook.com/connectivity/solutions/free-basics/; and Toussaint Nothias, "The Rise and Fall… and Rise Again of Facebook's Free Basics", Global Media Technologies and Cultures Lab, 21 April 2020, https://globalmedia.mit.edu/2020/04/21/the-rise-and-fall-and-rise-again-of-facebooks-free-basics-civil-and-the-challenge-of-resistance-to-corporate-connectivity-projects/.

[104] See, for example, Jeremy Gillula, "Facebook's Free Basics: More Open, Better Security, but Still a Walled Garden, Electronic Frontier Foundation, 30 September 2015, https://www.eff.org/deeplinks/2015/09/facebooks-free-basics-more-open-better-security-still-walled-garden.

[105] For example, both the Netherlands and Slovenia had enacted strong limits on zero-rating schemes. These were struck down by domestic courts because of concerns about a conflict with the EU regulation; the new Court of Justice ruling presumably alters the situation and would not only permit but actually require such prohibitions to be re-introduced. International Bar Association, "EU Court of Justice Rules on Zero-Rating", https://www.ibanet.org/article/DAAB099C-A736-4ED7-BB4D-4719A1593A5F.

[106] Telecom Regulatory Authority of India, Notification No. 2 of 2016, Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, 8 February 2016, https://trai.gov.in/sites/default/files/Regulation_Data_Service.pdf.

[107] Aayush Soni, "India Deals Blow to Facebook in People-Powered 'Net Neutrality' Row", The Guardian, 8 February 2016, https://www.theguardian.com/technology/2016/feb/08/india-facebook-free-basics-net-neutrality-row; and Soutik Biswas, "Why is Mark Zuckerberg Angry at Critics in India?", BBC, 20 December 2015, https://www.bbc.com/news/world-asia-india-35192184.

[108] BBC, "India Adopts 'World's Strongest' Net Neutrality Norms", 12 July 2018, https://www.bbc.com/news/world-asia-india-44796436.

[107] Canada has not directly banned zero-rating schemes, but the Canadian Radio-television and Telecommunications Commission has put in place fairly strict criteria for when zero rating is permitted. In 2017, the Commission released a major decision finding that a zero-rating plan violated non-discrimination provisions in the Telecommunications Act.[109] Along with this decision, the Commission released a policy guidance document explaining how it would evaluate whether a differential pricing plan offered by an access provider was compliant with the Telecommunications Act,[110] which sets out four evaluation criteria to be used:

1. Agnostic treatment of data: This is considered to be the most important criterion by the Commission. It looks at whether the plan treats data differently based on its source or nature. Thus zero-rating traffic based on its content would not be legitimate but offering free services based on other criteria, such as the time of day, might be.
2. Exclusiveness of the offering: This looks at whether the plan is offered only to some customers or only for certain content.
3. Impact on Internet openness and innovation: The Commission will consider the impact of the plan on Internet access for Canadians. It notes that practices "that favour large, established content providers over smaller ones and new entrants are also likely to raise concerns."
4. Whether financial compensation is involved: Here the Commission will consider who benefits from and pays for the plan, noting that sponsored data agreements where a content provider pays for zero rating for their content are particularly suspect.[111]

In addition to these criteria, the "Commission will consider whether there are exceptional circumstances that demonstrate clear benefits to the public interest and/or minimal harm associated with a differential pricing practice."[112]

[108] In the United States, the Federal Communications Commission adopted the Open Internet Order in 2015 which, however, was revoked during the Donald Trump administration. This noted that some zero-rating schemes may harm competition and consumer choice in terms of data plans, and accordingly authorised the Commission to examine such practices on a case-by-case basis.[113] Following the revocation of the Open Internet Order, some states enacted their own net neutrality legislation.[114] California, for example,

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[109] Telecom Decision CRTC 2017-105, 20 April 2017, https://crtc.gc.ca/eng/archive/2017/2017-105.htm.
[110] Telecom Regulatory Policy CRTC 2017-104, 20 April 2017, https://crtc.gc.ca/eng/archive/2017/2017-104.htm.
[111] *Ibid.*, para. 126.
[112] *Ibid.*, para. 129.
[113] Federal Communications Commission, 47 CFR Parts 1, 8 and 20, Protecting and Promoting the Open Internet: Final Rule, 13 April 2015, paras. 151-152, https://www.govinfo.gov/content/pkg/FR-2015-04-13/pdf/2015-07841.pdf.
[114] Nicol Turner Lee, "California's Net Neutrality Law and the Case for Zero-Rating Government Services", Brookings, 19 April 2021, https://www.brookings.edu/blog/techtank/2021/04/19/californias-net-neutrality-law-and-the-case-for-zero-rating-government-services/.

adopted a net neutrality law in 2018 which severely limited zero rating.[115] This had significant impact nationally, resulting in a major provider suspending its zero-rating plan nationally.[116] The California legislation does not completely prohibit zero rating, but it prohibits any sponsored zero-rating plan, as well as any zero-rating plan which only applies to some of the content or services in a given category, such as music streaming, and not all of that content.[117]

[109] As can be seen from these examples, some countries are addressing zero rating within the framework of net neutrality laws while others are relying on non-discrimination or anti-competition provisions in the context of telecommunications regulation. At the same time, it is not always clear how the net neutrality laws which are increasingly being adopted by different countries impact zero rating. For example, Argentina's Ley 27.078 prohibits fixing prices for Internet access based on what content, services or apps are used, but lacks any implementing regulation clearly addressing zero rating, so that such plans are still allowed in practice.[118] Similarly, Nigeria introduced a new Code of Internet Governance in 2019 which expressly allows zero rating, with the qualifier that any zero-rating plans must comply with the policy objectives in the national communications policy as well as relevant competition regulations.[119] More specific guidance on what such compliance might entail is lacking, however. These examples show that the increased global interest in net neutrality laws, including to regulate zero rating, does not always translate into clear and decisive rules in this area.

[110] Chile provides a good example of the need for clear rules on zero rating. Chile was an early proponent of net neutrality, adopting a net neutrality law in 2010.[120] In 2014, the telecommunications regulator, Subtel, notified access providers in the country that their zero-rating plans, which focused on providing free access to social media platforms, violated the non-discrimination provision of the net neutrality law.[121] However, in 2015, Subtel amended its interpretation of the rules, allowing zero-rating plans as long as they did not block access to services which were similar to the zero-rated ones. It also

[115] California Civil Code, sections 3101(a)(5)-(6), as amended by Senate Bill No. 822, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822.
[116] AT&T, "Impact of California 'Net Neutrality' Law on Free Data Services", 17 March 2021, https://www.attpublicpolicy.com/congress/impact-of-california-net-neutrality-law-on-free-data-services/?source=email.
[117] California Civil Code, note 115, sections 3101(a)(5)-(6).
[118] Ley 27.078, 18 December 2014, Article 57(b), http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/239771/norma.htm#:~:text=Su%20objeto%20es%20posibilitar%20el,m%C3%A1s%20altos%20par%C3%A1metros%20de%20calidad; and Rodrigo Vargas Acosta, *Regulatory Issues in Matters of Freedom of Expression and the Internet in Latin America*, 2020, Derechos Digitales, p. 23, https://www.derechosdigitales.org/wp-content/uploads/tendencias-regulacion-digitales-eng.pdf (noting that zero rating is "permitted in fact").
[119] Nigeria Communications Commission, Internet Code of Practice, para. 3.6, https://www.ncc.gov.ng/docman-main/internet-governance/878-internet-code-practice/file.
[120] Ley 20.453, 18 August 2010, https://www.bcn.cl/leychile/navegar?idNorma=1016570.
[121] Strictly speaking, this was not a ban on zero-rating schemes, although this is how many commentors characterised it. Interestingly, Subtel told the Wikimedia Foundation that its reasoning did not apply to non-profit organisations, in response to a query from the Foundation. See Erik Stallman and R. Stanley Adams, note 100, p. 9.

signalled that it did not have the authority to sanction violations.[122] The result has been significant confusion around the legal standards and, in practice, zero-rating plans have continued.[123]

[111] While there is significant momentum towards banning or restricting zero rating, it should be noted that the practice is still largely unregulated in much of the world. In Africa, for example, there appears to be comparatively little interest in regulating zero rating, perhaps because of relatively low levels of Internet access in the continent and challenges for the average person to pay for mobile data.[124]

[112] Finally, while discussions around regulation of zero rating largely focus on State restrictions, in some cases governments have taken steps to promote zero rating of content with perceived social benefits. This often occurs through one-time arrangements between governments and telecommunications companies, such as the Guyana Ministry of Education signing a memorandum of understanding with the dominant local telecommunications provider to zero rate educational websites.[125] However, some governments have also attempted to regularise such practices. For example, South Africa issued a regulation under its Disaster Management Act to create options to zero rate websites offering educational content and health websites with COVID-19 information during the COVID-19 pandemic.[126]

8.2 The Impact of Zero-Rating Schemes on Freedom of Expression

[113] As demonstrated above, States have obligations to ensure, progressively, universal quality access to the Internet and to respect the principles of net neutrality. What States are required to do to meet these obligations will depend on the circumstances which prevail in any country but this will normally involve a range of legislative, policy and practical measures. It may also involve measures to restrict practices by private actors which undermine the achievement of these objectives. This section of the brief reviews the potential practical impact of zero-rating schemes on the realisation of the right to freedom of expression on the Internet.

[114] A superficial analysis may suggest that by offering free access to Internet services, zero-rating schemes should inevitably broaden the scope of access. However, a deeper analysis

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[122] For a detailed discussion of this, see Marco Correa Pérez, "Zero-rating y la neutralidad de la red", 2018, 7 *Revista chilena de derecho y tecnología* 1, https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0719-25842018000100107&lng=pt&nrm=iso&tlng=es.

[123] Rodrigo Vargas Acosta, note 118, p. 23.

[124] See, for example, arguments in Alison Gillwald, *et al.*, *Much Ado About Nothing? Zero-Rating in the African Context*, 2016, Research ICT Africa, https://researchictafrica.net/wp/wp-content/uploads/2021/09/2016_RIA_Zero-Rating_Policy_Paper_-_Much_ado_about_nothing.pdf.

[125] Guyana Chronicle, "GTT Zero Rates Several Educational Sites", 23 October 2020, https://guyanachronicle.com/2020/10/23/gtt-zero-rates-several-educational-sites.

[126] Directions on Zero-rating of Content and Websites for Education and Health, Government Notice 651 of 2020, 5 June 2020, https://openbylaws.org.za/za/act/gn/2020/651/eng/#:~:text=Zero%2Drating%20only%20applies%20to,also%20not%20be%20zero%2Drated.

of the impact of zero-rating schemes, viewed through the lens of States' obligations to progressively promote access to the whole Internet, as part of their obligations to promote universal quality access and to respect net neutrality, raises serious questions about this conclusion.

[115] It is important to distinguish here between situations where completely free access is being offered to limited services and situations where zero-rated access to certain services is offered in combination with a paid plan which gives access to the whole Internet, albeit subject to overall data caps. In the poorest countries, the first sort of zero-rating schemes appear to have had some impact in terms of increasing the number of people who can access at least part of the Internet.[127] However, this does not meet States' obligations in this area which are, progressively, to ensure access to all of the content on the Internet.

[116] The question then arises as to whether zero-rating schemes, which promoters typically bill as transitional, serve as an on-ramp or stepping stone to full or quality access to the Internet. States should certainly not assume that this is the case. The evidence is at best very inconclusive as to the extent to which this happens in practice.[128] As the UN Special Rapporteur on Freedom of Expression has noted:

> Zero rating arrangements may provide users with limited Internet access in areas that would otherwise completely lack access. However, broader Internet access may still remain out of reach for users, trapping them in permanently walled online gardens. The assumption that limited access will eventually ripen into full connectivity requires further study. It may be dependent upon factors such as user behaviour, market conditions, the human rights landscape and the regulatory environment.[129] [references omitted]

[117] While Facebook has claimed that 50% of Free Basics users subsequently take out a subscription to the full Internet,[130] independent research has reached very different conclusions. For example, one survey of users in eight countries in the Global South found that only 12% of respondents reported that they had not used the Internet prior to using a zero-rating plan, strongly suggesting that these plans are not serving as an on-ramp.[131]

[118] As a result, serious concerns remain that these zero-rating schemes effectively lock users permanently in "walled gardens" instead of offering a pathway to quality access to the Internet. If so, zero rating creates a "two-tiered" Internet where some people have access to all content while others are only able to access services which have been pre-selected

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[127] For a discussion of this in the African context, see Alison Gillwald, *et al.*, note 124, pp. 4-5.
[128] See, for example, Arturo Carillo, "Having Your Cake and Eating it Too? Zero-Rating, Net Neutrality, and International Law", 19 *Stanford Technology Law Review* 364, 421-422 (2016), https://law.stanford.edu/wp-content/uploads/2017/11/19-3-1-carrillo-final_0.pdf.
[129] Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, U.N. Doc. A/HRC/35/22, para. 27, https://undocs.org/A/HRC/35/22.
[130] As described by Guy Thurston Hoskins, note 100.
[131] *Ibid.*

for them by private companies.[132] It should be noted that these limits do not only extend to accessing information and ideas; they also limit the ability of users to speak freely on the Internet, since users are also limited sharing their views on the platforms which are zero rated.

[119] For users which combine zero-rating schemes with paid plans giving access to the whole Internet, the risk of walled gardens may be less serious, albeit depending on how much open data they have in their plans.[133] However, zero-rating schemes do provide very strong inducements for users to focus Internet usage on the free services, to the detriment of other services. While this is not necessarily a "walled garden" scenario, it might instead be described more as an "opium den"; you are free to leave but the seduction of the inducements makes this very difficult in practice. While the term "opium den" may be a bit strong, the risk of users concentrating their online time on the websites of free services is very real indeed, to the detriment of their other Internet usage and, indeed, to the chance that they will upgrade to higher data plans. As such, these schemes also promote a "two-tiered" Internet.

[120] This impact of zero-rating schemes means that they undermine all of the important values that underpin net neutrality, and the benefits that it brings, and hence represent a breach of States' obligation to respect net neutrality, as well as the obligation of States to progressively implement universal quality access to the Internet. As outlined above, together these require not only the formal ability to access the whole Internet but also prohibit commercial schemes which privilege certain parts of the Internet.

[121] The risk of zero-rating schemes having this sort of impact is likely higher in countries which are not in the very lowest levels of development, precisely because these States often have better options to realise their obligations. This helps explain why the European Union has taken a very clear stance here, completely banning these schemes to avoid the negative impact they have on those who use them.

[122] There are also other problems with the inducements that zero-rating schemes put in place. They likely represent unfair dominant market practices (see below). They also contribute to discrimination, since it will be the poor and other disadvantaged groups that are disproportionately being pushed towards the free services.

[123] The concerns about "walled gardens" and "opium dens" need to be viewed in light of the commercial environment in which zero-rating schemes operate. Zero-rating schemes raise serious concerns in terms of plurality and monopolistic practices (and potentially abuses of dominant market positions) because, in practice, they inevitably strongly favour "tech giants", in particular Facebook and its affiliated apps. One study found that Facebook and

[132] David Kaye and Brett Solomon, "Merely Connecting the Developing World to the Internet Isn't Enough", 13 October 2015, Slate, https://slate.com/technology/2015/10/the-u-n-wants-to-connect-the-world-to-the-internet-that-s-not-enough.html.

[133] For example, it can be easy enough to use up small data plans quite quickly and, after that, you are essentially in a walled garden again.

the services it owns were dominant among the zero-rating plans offered in Europe.[134] A study of 15 countries in Latin America also found that Facebook and WhatsApp were dominant zero-rating options, although Twitter was also commonly featured.[135] Zero-rating schemes thus significantly incentivise traffic to social media platforms which are already dominant market players.

[124] Another significant issue here is that where zero-rating schemes are promoted by corporate actors and are not constrained by regulation, they will inevitably reflect the commercial interests of their promoters more than the goals of increasing quality access to the Internet and certainly net neutrality.[136] As outlined above, some countries have placed strict conditions on zero-rating schemes in an effort to ensure that, to the extent that they are permitted, they are at least pushed to operate in the public interest. Absent such conditions, the chances that commercial interests happen to align with States' obligations in this area are at best remote.

[125] The underlying business model of most social media platforms is also relevant here. They make money not from subscriptions or the provision of services to users, but from advertising and other services they offer based on harvesting personal data from their users. The core stock-in-trade of this business is personal data, so the more of this these companies can harvest, the better business is. In turn, this comes from traffic through their sites so the more of that there is, the better. In other words, incentivising users to spend more time on their platforms directly drives their business models. Thus, although some social media companies have promoted zero-rating schemes as having public interest value, these schemes also directly align with their core business models.

[126] It is even unclear whether zero-rating schemes actually increase the overall affordability of Internet access. Ultimately, Internet access providers need to make a profit and, if they provide some services for free, they must make profits elsewhere. The UN Special Rapporteur on Freedom of Expression, for example, has expressed concern that zero rating arrangements "may increase the cost of metered data."[137] Some research supports this, showing a correlation between zero rating and increased mobile data plan costs.[138] As a result, zero-rating schemes may create an "artificial scarcity" in relation to the open Internet as capacity is consumed by free services, thereby promoting more expensive Internet plans and continued use of data caps, instead of seeing a transition to unlimited mobile Internet access for poorer users.[139]

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[134] European Commission, note 102, p. 18.
[135] Helani Galpaya, note 101, p. 2.
[136] This was a commonly cited complaint by activists campaigning against zero rating in India (referring to Facebook's Free Basics package).
[137] Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, note 129, para. 26.
[138] Epicenter Works, *The Net Neutrality Situation in the EU: Evaluation of the first Two Years of Enforcement*, 29 January 2019, https://en.epicenter.works/sites/default/files/2019_netneutrality_in_eu-epicenter.works-r1.pdf.
[139] Luca Belli, "Net neutrality, Zero-rating and the Minitelisation of the Internet", 2 *Journal of Cyber Policy* 96 (2016), https://internet-governance.fgv.br/sites/internet-governance.fgv.br/files/publicacoes/net_neutrality_zero-rating_the_minitelisation_of_the_internet_final.pdf.

[127] A related concern is that zero-rating schemes may facilitate the spread of harmful speech online, particularly disinformation and hate speech. One reason quality access to the Internet is important is that it enables users to access diverse perspectives which may counter such harmful speech. The algorithms that drive the user experience on most social media platforms, which are tailored to increasing traffic and hence profits, have a tendency to push users into information silos where they only hear perspectives which align with their previously held views and perspectives, including where these are racist or misinformed. In addition, zero-rating users may not be able to link through to articles or webpages referenced in the harmful speech content that is part of their social media silos. As such, zero rating may limit the ability of users to break out of these silos,[140] whereas quality access to the whole Internet does not suffer from that problem. The OAS has raised this concern in relation to disinformation in election contexts:

> [Zero-rating schemes have] been problematic in the face of disinformation campaigns: those who - for example - receive false information through social networks or almost exclusive private messaging services and cannot verify that information because they do not have access to the Internet in its entirety.[141]

[128] Despite the above, it is important to keep in mind that a very small number of zero-rating schemes are focused on increasing access to content and services that have important social benefits, such as educational content, health information, banking services or government services. Depending on how such plans are offered, they are likely to pose less of a risk to quality access to the Internet, including because almost no one would be content to remain in such a walled garden, and have important benefits in terms of ensuring access to public interest information. However, some caution should also be taken even with these kinds of programmes. First, it should be understood that they are significantly less desirable than quality (i.e. full) access to the Internet. Second, promised benefits from such programmes should be examined critically. For example, Facebook has argued that its Free Basics service will increase access to news websites and media content. However, a multi-country study found little evidence that Free Basics increased the audience reach of news media outlets and instead suggested that the programme risked promoting dominance of some media.[142]

[129] In summary, the following considerations should be taken into account when assessing the extent to which zero-rating schemes further the delivery of State obligations to protect freedom of expression, ensure quality access to the Internet and respect the principles of net neutrality:

- Claims that zero-rating schemes increase access to the Internet need to be examined critically, based on evidence rather than corporate claims. If the medium-term result is simply to give access to the free services or to lock users

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[140] *Ibid.*, p. 18.
[141] OAS, IACHR and Special Rapporteur on Freedom of Expression, Guide to Guarantee Freedom of Expression Regarding Deliberate Disinformation in Electoral Contexts, October 2019, p. 44, https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf.
[142] Daniel O'Maley and Amba Kak, *"Free Internet" and the Costs to Media Pluralism: The Hazards of Zero-Rating the News*, 2018, CIMA, https://www.cima.ned.org/wp-content/uploads/2018/11/CIMA_Zero-Rating-Paper_web_150ppi_v2.pdf.

into dominant patterns of use of those services to the detriment of wider access to the Internet, these schemes obstruct rather than advance States' obligations to progressively ensure universal quality access to the Internet and to respect net neutrality.

- To the extent that zero-rating schemes are able to promote quality access to the Internet, it is very unlikely that they will do so in an optimal manner where they are run simply along commercial lines. Rather, experience in other countries shows that regulatory measures are needed to minimise the negative impacts of these schemes and maximise whatever positive potential they may have.
- In assessing the value of zero-rating schemes, their systemic impact on the costs of Internet access needs to be considered. It is not sufficient simply to look at the superficial impact of these schemes; there is evidence to support the conclusion that they may actually drive up the cost of plans to access the full Internet. Their impact in terms of enabling monopolistic practices or abuses of dominant market positions also needs to be carefully assessed.
- In assessing the value of zero-rating schemes, their other impacts also need to be taken into account, such as the risk that they may facilitate the spread of harmful speech, especially disinformation and hate speech, due to their impact in terms of limiting access to diverse sources of information.

8.3 The Legal Conditions Governing any Zero-Rating Schemes

[130] As this brief has established, States have freedom of expression obligations to progressively promote universal quality access to the Internet, to respect net neutrality and to promote media diversity. The precise impact of zero-rating schemes, where they are allowed, will depend on all of the circumstances, including factual issues such as the level of and means by which the public access the Internet and its cost, as well as the legal and regulatory environment in which these schemes operate.[143] While the previous sub-section focused on considerations to take into account when assessing this impact, this sub-section looks at the legal tests that should be applied.

[131] A first issue here is that States which permit zero-rating schemes will only be able to meet their obligations in this area if they at least have a system for evaluating the impact of these schemes on the delivery of those obligations and, in particular, its overall impact on Internet accessibility. This flows from the demonstrated risks to various State freedom of expression obligations that zero-rating schemes pose. As the UN Special Rapporteur on Freedom of Expression has noted, States must "carefully scrutinize and if necessary reject arrangements" for zero-rating that fail to conform to their human rights obligations.[144] Similarly, the OAS Special Rapporteur on Freedom of Expression has articulated clearly the need for States to have systems in place for evaluating zero-rating plans:

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[143] For an argument that a country like Zambia, with low connectivity, is more likely to meet human rights obligations by permitting zero rating while a country like the United States is more likely to meet such obligations by banning zero rating see Arturo Carillo, "Having Your Cake and Eating it Too? Zero-Rating, Net Neutrality, and International Law", note 128.

[144] Report of the UN Special Rapporteur on Freedom of Expression, note 129, para. 28.

> In all cases, zero-rating policies must be evaluated in light of the legal regulations of each State, assessing the compatibility of those policies with the terms of the rules that govern and regulate net neutrality … States that allow for zero-rating plans to be offered should monitor their functionality and periodically evaluate their compatibility with human rights.[145]

In other words, it is not open to States just to approve or allow zero-rating schemes without making an effort to assess their impact on their obligations to promote quality access to the Internet and media diversity, and to respect net neutrality.

[132] The assessment of the impact of zero-rating schemes will not always be easy and may involve shorter- and longer-term considerations, as well as some factual uncertainty (i.e. as to their precise impact). Inasmuch as the evidence suggests that these schemes potentially interfere with the delivery of State obligations in the area of freedom of expression, the burden always lies with the State to justify them on the basis of at least plausible evidence. Where it is argued that zero-rating schemes do expand, at least in a limited way, access to the Internet, the availability of other, potentially more effective, schemes to do this needs to be taken into account, as well as whether such partial access helps users transition, over time, to better access arrangements. These alternatives may require resources but, within reason, that is included as part of States' positive obligation here. The longer-term goal of expanding quality access to the Internet in a way which respects net neutrality always needs to be the litmus test here. Conditions may also evolve over time, so the assessment needs to be updated periodically and, where conditions have changed, this may require changes to the rules, as well.

[133] As established above, standards on net neutrality involve non-discrimination rules in terms of the treatment of Internet traffic. This consideration also needs to be incorporated into assessments of zero-rating schemes and any associated regulation. Zero-rating schemes that are agnostic as to the content or source of zero-rated content are less offensive to the net neutrality standard of discrimination than those which privilege certain companies or platforms, although all such schemes fail to provide quality access to the Internet inasmuch as they do not provide access to the whole Internet.

[134] It is possible that some zero-rating schemes might deliver sufficient public interest benefits to justify their negative impacts, especially if the latter are minor. Zero-rating COVID 19 health information during the pandemic might be an example of such a benefit. But merely serving the commercial interests of private companies could not serve as such a justification any more than allowing companies to restrict freedom of expression in other ways to make profits could.

[135] A second, closely related issue here is that States' positive obligation to promote universal quality access to the Internet requires them to advert to how they are going to deliver this obligation, including by developing a plan to do so. As the special international mandates on freedom of expression indicated in their 2011 Joint Declaration on Freedom of

[145] OAS Special Rapporteur on Freedom of Expression, *Standards for a Free, Open, and Inclusive Internet*, 15 March 2017, para. 31, http://www.oas.org/en/iachr/expression/docs/publications/internet_2016_eng.pdf.

Expression and the Internet: "States should adopt detailed multi-year action plans for increasing access to the Internet which include clear and specific targets".[146] Put differently, any system which permits zero rating should not exist in a vacuum but, instead, be part of a package of measures, which together constitute a plan, which are designed to fulfil States' obligations in this area. States should certainly never avoid adopting or replace broader plans to promote Internet access with zero-rating schemes, which by definition do not meet their positive obligations to provide universal quality access to the Internet:

> [I]n no case will States be able to replace their policies of universal access to the Internet with zero-rating plans or policies. … Although zero-rating plans or policies may be considered acceptable in some States as part of a wider strategy to increase access, simply replacing access policies with zero-rating policies is incompatible with the development goals of the United Nations, and with the obligation of States to promote and protect individual human rights on the Internet.[147]

[136] Normally, States' approach to promoting universal quality access to the Internet will involve adopting a range of "laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination".[148] Various authoritative international statements have delved in some detail into the options that are available here, albeit noting that these need to be tailored to the circumstances of each State.[149] Many of these statements refer, among other things, to the need for pricing rules and to regulate "market competition to support lower pricing and encourage diversity."[150] The key point here is that States need to take coordinated action, pursuant to some sort of plan, to deliver their obligations to promote universal quality access to the Internet in a way which respects net neutrality. Just letting the market take care of this without doing more is not enough.

[137] Third, as noted above,[151] any legal rules and even policy instruments that are used to deliver positive obligations must meet the legality standard which is established as the first part of the three-part test for restrictions on freedom of expression. This requires such rules to be sufficiently clear and precise that they give adequate notice to both Internet intermediaries and users of what is allowed and under what conditions. As sub-section 8.1 Background on Zero-Rating Schemes and Regulation Globally clearly showed, many of the legal frameworks for zero-rating schemes manifestly fail to meet this standard, even after having been interpreted by courts and/or amended. Standards on legality are very well established under international law, which requires strict scrutiny of this feature for a legal rule to pass muster as an interference with freedom of expression.

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[146] Note 64, para. 6(f).
[147] OAS Special Rapporteur on Freedom of Expression, note 145, paras. 29-30.
[148] *Declaration of Principles on Freedom of Expression and Access to Information in Africa* 2019, note 26, Principle 37(3)(c). See also 2011 Joint Declaration on Freedom of Expression and the Internet, note 64, para. 6(e); and OAS Special Rapporteur on Freedom of Expression, *Freedom of Expression and the Internet*, note 56, para. 51.
[149] See, for example, the various statements referenced in the previous footnote.
[150] Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019, note 26, Principle 37(3)(c).
[151] See note 30 and the surrounding text.

[138] Fourth, States should have systems or mechanisms in place to ensure that they counter the natural tendency of zero-rating schemes to support monopolistic or anti-competitive practices, including with regard to their impact on media diversity as well as the broader notion of the right to access a diversity of information and ideas, as part of freedom of expression. It is recognised that monopolistic behaviour in the communications sector undermines freedom of expression. As indicated in the Inter-American Declaration of Principles on Freedom of Expression: "Monopolies or oligopolies in the ownership and control of the communication media … conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information."[152]

[139] Zero-rating schemes which zero rate only a few applications or services, such as Facebook or Twitter, but not other social media sites, pose a particular risk here and should, as a result, either be prohibited entirely or only allowed subject to very strict rules.[153] As one publication notes: "The greatest risk of potential market distortion comes from zero-rating plans that exempt a single content or service provider on an exclusive basis".[154] This is even more extreme in relation to Internet access plans that zero rate affiliate content (i.e. content of affiliates of the Internet access provider), which represents anti-competitive behaviour and which States should not allow.[155] As the Council of Europe Recommendation on Net Neutrality provides: "Internet service providers should not discriminate against traffic from other providers of content, applications and services which compete with their own products."[156] Sponsored data schemes, whereby online service providers pay Internet access providers to zero rate their content have a very strong tendency to favour better-resourced companies, and hence lead to consolidating control and reducing competition. As such, these should be scrutinised particularly carefully and not be permitted where it has not been shown that they do not suffer from these negative impacts.

[140] Finally, a number of other considerations should be taken into account when assessing any zero-rating schemes that are allowed. As noted above, regulation of the media is legitimate only if it is done by an independent regulatory body which is properly empowered.[157] This also applies to the regulation of zero-rating schemes and the sanctioning of any zero-rating behaviour which does not respect the rules. The special international mandates on freedom of expression have specifically highlighted the need to empower independent regulators to act against undue concentration of media ownership.[158]

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[152] Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, adopted 19 October 2000, Principle 12, http://www.iachr.org/declaration.htm.
[153] Report of the UN Special Rapporteur on Freedom of Expression, note 129, para. 28.
[154] Erik Stallman & R. Stanley Adams, note 100, p. 22.
[155] Report of the UN Special Rapporteur on Freedom of Expression, note 129, para. 28.
[156] Note 94, para. 3.1.
[157] See notes 42 and 52 and surrounding text. See also the Declaration of Principles on Freedom of Expression in Africa, note 26, Principle 37(3)(a).
[158] 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, 2 May 2018, para. 6(d), https://www.law-democracy.org/live/2018-joint-declaration-by-special-rapporteurs-on-media-independence/.

[141] States should also require Internet access providers which offer zero-rating plans to meet strict transparency requirements. International standards on net neutrality consistently call on States to require transparency and "meaningful corporate disclosures" in relation to internet traffic management practices.[159] This should extend to requiring clarity and transparency in relation to user contracts:

> Internet users should be entitled to an Internet connection with the characteristics defined in the contractual agreements that they have concluded with Internet access service providers on the basis of specific and adequate information that is provided to users with regard to all aspects which might affect their access to the Internet and their right to receive and impart information.[160]

Such transparency requirements should also apply specifically to zero-rating plans, which form part of the contractual arrangements with users. Requiring Internet access providers to disclose data on their zero-rating plans also helps researchers and policymakers to understand better the impact of such plans on access to the Internet and net neutrality.

[142] When considering or assessing zero-rating schemes, States should consult with a range of interested stakeholders, including users and civil society. This is better practice before adopting any regulation which impacts freedom of expression but is particularly important here, given the significant debate and uncertainty about the potential benefits and impact of zero-rating schemes, including on different groups in society. These consultations should reach out to vulnerable or marginalised groups, including those who are least able to afford mobile data plans.[161]

9.0 Assessment of the Colombian Approach

[143] Article 56(1) permits Internet access providers in Colombia to offer zero-rating plans. We understand that some limited additional regulation is in place in relation to zero rating. Specifically, Regulation 3502 of 2011 provides that Internet access providers can offer plans which are limited to "generic types" (tipos genéricos) of services, contents or applications, as long as they also make an unlimited plan available to users.[162] However, in practice this regulation appears to have had little impact on zero rating due to a mix of factors including its lack of clarity, including via-a-vis the primary legislation, and insufficient enforcement powers on the part of oversight bodies.[163]

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[159] Report of the UN Special Rapporteur on Freedom of Expression, note 129, para. 28; 2011 Joint Declaration on Freedom of Expression and the Internet, note 64, para. 6(f); and Council of Europe Recommendation on Net Neutrality, note 94, para. 5.1

[160] Council of Europe Recommendation on Net Neutrality, *ibid.*, para.1.3.

[161] Report of the UN Special Rapporteur on Freedom of Expression, note 129, para. 57.

[162] Resolution 3502 of 2011, 16 December 2011, Article 9, https://normograma.info/crc/docs/resolucion_crc_3502_2011.htm.

[163] For a detailed discussion of this see Juan Diego Castañeda and Laura Daniela González, *Neutralidad de la Red y Ofertas en Comerciales en Colombia*, 2017, Fundación Karisma, https://web.karisma.org.co/wp-content/uploads/download-manager-files/Agosto%209%20-%20Informe%20neutralidad%20de%20la%20red.pdf.

[144] Since Article 56(1) allows zero-rating schemes, this creates an obligation for Colombia to study carefully its actual impact on Colombia's obligations to promote universal quality access to the Internet, to respect net neutrality and to foster access to a diversity of information and ideas, including through the media. While we have not been able to study this comprehensively, it would appear that Colombia has not undertaken a proper assessment of the impact of Article 56(1)'s permissive approach to zero rating in light of the current situation regarding Internet access in the country. Such an assessment needs to be undertaken and then used to determine the wider legitimacy or otherwise of Article 56(1).

[145] Internet access rates in Colombia have increased dramatically in the decade since Law 1450 was enacted. For example, in 2019, 65% of Colombia's population had used the Internet in the last three months, compared to only 40% in 2011.[164] Colombia consistently ranks in the top two countries among the developing nations included in the Alliance for Affordable Internet's annual Affordability Drivers Index.[165] These positive achievements make it harder to justify measures like zero-rating to expand access in Colombia. Although Internet access for some people – in particular the poorest people – may remain unaffordable, Colombia should consider whether there are more positive alternative options for promoting Internet access, and even quality access, for these segments of the population. It should also critically evaluate whether zero-rating schemes are actually increasing access to the Internet for those populations and also whether they are serving as on-ramps to quality access or, instead, locking poorer users in "walled gardens" or "opium dens".

[146] Second, and even more serious, there is no evidence that Article 56(1) forms part of a wider plan on the part of Colombia to meet its obligations to promote universal quality access to the Internet. Indeed, the evidence we have seen suggests quite the opposite. Specifically, Article 56(1) appears to be a rather stand-alone provision which serves the commercial interests of private companies rather than a coherent part of a wider plan in this area.

[147] This conclusion is supported by the absence of a more developed regulatory regime around Article 56(1) and the ineffectiveness of what additional regulation does accompany it, namely Regulation 3502 of 2011. As a result, Colombia's regulatory environment lacks the standards necessary to ensure against zero-rating plans which pose a risk to increasing quality access to the Internet, to respect for net neutrality and to supporting media plurality. The analysis and evidence presented in this brief shows that zero-rating schemes come with a presumption of invalidity and that it is extremely unlikely that they could be legitimate, regardless of the specific context in any country, absent a carefully crafted regulatory regime which limits abuse and negative impacts.

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[164] The World Bank, Individuals Using the Internet (% of Population) - Colombia, International Telecommunications Union (ITU) World Telecommunication/ICT Indicators Database, https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=CO.

[165] See, for example, the 2019-2021 reports. Alliance for Affordable Internet, Affordability Report, https://a4ai.org/affordability-report/.

[148] Some specific observations reinforce this conclusion. Neither Law 1450 nor Regulation 3502 place limits on sponsored data plans or plans which favour affiliate content, which are highly suspect from a freedom of expression perspective. Similarly, there are no requirements for zero-rating plans in Colombia to be agnostic as to the content or source of zero-rated services. Colombia does not prohibit zero-rating plans which favour specific apps or services. Instead, the strong predominance of zero rating in favour of Facebook and WhatsApp, as detailed in the original brief, suggests that zero rating in Colombia may be enabling monopolistic behaviour. While Regulation 3502 does seek to impose some limits here, it is not sufficiently specific, particularly in light of the permissive language of Article 56(1), and thus leaves interpretive ambiguity as to its implications. A better approach would be to enshrine such a limit in the primary legislation rather than leaving it to regulation. In any case, it appears that Regulation 3502 is widely ignored in practice.

[149] These circumstances, as well as the actual language of Article 56(1), mean that the regime for zero rating in Colombia fails to meet the standards of legality required under international law. It fails to make clear what is and is not allowed, leaving broad scope for interpretation which, in practice, has essentially served as a carte blanche authorisation for zero-rating practices. On the one hand, Article 56(1) purports to ban discrimination in relation to the ability of users to access and take advantage of Internet content and services but, on the other, it allows this to be overridden based on the "needs of market segments or their users according to their usage and consumption profiles". This cannot possibly be considered to provide clear guidance as to when discrimination is and is not allowed. Indeed, it could be argued that the "exception" is so vague and unclear that it renders the main ban on discrimination largely ineffective.

[150] According to the information we have received, the regulator which is responsible for overseeing zero rating in Colombia is insufficiently empowered to interpret and enforce these rules, substantially aggravating the underlying problem of a lack of clarity in the regulatory regime. According to Fundación Karisma, the regulatory authority in this area is unable to enforce subsidiary regulations so as to restrict improper zero-rating practices.[166] As noted above, properly empowered, independent regulators are crucial to ensuring that any regime governing the information and communications sector reflects freedom of expression standards. Put differently, it does not matter how clear and legitimate a freedom of expression regime is if it is not enforced properly in practice. Because Law 1450 does not envision or allocate any regulatory responsibility for policing the zero-rating plans that are allowed under Article 56(1), it fails to protect freedom of expression properly.

[151] We are not aware whether Internet access providers which offer zero-rating plans in Colombia are required to be robustly transparent about how they work, including with users. We are also not aware whether broad consultations were undertaken with interested stakeholders prior to the adoption of the Article 56(1) regime. To the extent that either of

[166] Juan Diego Castañeda and Laura Daniela González, note 163, p. 51 ("En todo caso, la CRC no tiene competencia para aplicar su propia regulación, por lo cual es necesario estudiar vías de reforma para dotarla con capacidades que permitan una regulación efectiva.")

these are not present, that raises additional issues regarding the legitimacy of Colombia's zero-rating regime.

10.0 Conclusion

[152] International human rights treaties, including the ICCPR and ACHR, provide very strong protection for the right to freedom of expression, respectively in Article 19 and Article 13. This is because freedom of expression is very important both in its own right – as a core element of everyone's basic human dignity – and for the wider social benefits it supports – including democracy itself and the protection of all other human rights, among many others. These guarantees require States not to take actions which interfere with this right but, importantly, they also require States to take action in certain circumstances where this is necessary to protect the free flow of information and ideas in society. Such positive obligations cover circumstances both where States need to protect the right to freedom of expression against interferences by private third parties and where States need to take action to facilitate the free flow of information and ideas, and sometimes both at the same time.

[153] The Internet has become so central to the ability of individuals not only to express themselves but also to access information and ideas – both of which are protected by international guarantees of freedom of expression – that access to this communications medium is itself required for individuals to truly enjoy the right to freedom of expression. As such, it is now recognised that, as part of States' positive obligations to respect freedom of expression, they need, progressively, to ensure universal access to the Internet for their citizens. Certain features must be present for this access to pass muster under international law, such as that it be financially accessible (affordable) for all and that it extend to the whole Internet, rather than just parts of it, referred to in this brief as "quality access". These features are supported by States' obligation to respect net neutrality, or non-discrimination in the treatment of traffic flowing over the Internet.

[154] Zero-rating schemes are found in a number of countries, including in Colombia by virtue of Article 56(1) of Law 1450 of 2011 (16 June). These schemes give users free access to certain online content, services or apps, either as a free-standing arrangement (i.e. without any other access to the Internet) or as part of a paid plan which includes caps on access to the rest of the Internet. These schemes clearly fail to represent quality access to the Internet or to respect the principle of net neutrality, since they either provide exclusive access to only part of the Internet or significantly privilege access to part of it. However, their proponents argue that they at least give users access to some online content and/or that they serve as a means for introducing users to the Internet, often leading to fuller (quality) Internet access. The evidence suggests, however, that while this may be true in some cases, often zero-rating schemes leave users trapped in "walled online gardens", with effective access to only part of the Internet or stuck in "opium dens", with their access being heavily dominated by the free services.

[155] A proper human rights analysis shows that a number of conditions must be present before a zero-rating scheme might be legitimate. First, States which seek to justify such schemes, must undertake an assessment which provides concrete evidence that they do indeed advance the realisation of their positive obligation to promote universal quality access to the Internet in a way that respects net neutrality. It is not enough for States simply to assert this, any more than the mere assertion that a restriction on freedom of expression is necessary to protect national security or reputation would be enough.

[156] Second, the obligation to promote universal quality access to the Internet requires States to have a developed plan to realise this goal over time. States which authorise zero-rating schemes, and justify them on the basis that they help expand quality access to the Internet, but do nothing else in this regard, have not discharged their responsibilities under this obligation. Indeed, to do so States will normally be required to place clear conditions on zero-rating schemes rather than leaving the commercial companies which benefit from those schemes to run them as they might wish. Third, any legal regime which authorises zero-rating schemes must meet strict standards of legality, including by making it quite clear when these schemes are allowed and under what conditions.

[157] The Colombian zero-rating scheme fails to pass muster in relation to all of these conditions. We do not believe that any assessment has been undertaken which proves that zero rating in Colombia promotes or supports the country's obligation to promote universal quality access to the Internet in a way that respects net neutrality. Absent proof of this, Colombia will have failed to justify its authorisation of measures which otherwise represent a breach of net neutrality and a failure to provide quality access to the Internet. Furthermore, Colombia does not appear to have a developed plan to meet its obligation to provide universal quality access to the Internet. Among other things, Colombia has not put in place a clear and effectively applied set of conditions on the zero-rating schemes it allows so as to ensure that they do indeed make a contribution to its wider measures (plan) to promote universal quality access to the Internet. Finally, the specific legal regime in Colombia which authorises zero-rating schemes, namely Article 56(1) of Law 1450 of 2011 (16 June), signally fails to meet the requirements of legality. Indeed, the conditions under which this provision authorises zero-rating schemes is extremely unclear indeed.

[158] For these reasons, we believe that Article 56(1) of Law 1450 of 2011 (16 June) fails to pass constitutional muster in Colombia. Colombia has obligations to take progressive steps to promote universal quality access to the Internet in a way that respects net neutrality. The authorisation of zero-rating schemes essentially at the discretion of the companies that profit from these schemes, without any clear, effective conditions being placed on such schemes, and in the absence of a developed plan to promote universal quality access or any showing that these schemes do actually contribute to the promotion of that access all call for a finding that Colombia has not met its positive obligations to respect freedom of expression.

TABLE OF AUTHORITIES

Treaties

Cases

4. Case C-34/20, 2 September 2021 (Court of Justice of the European Union), https://curia.europa.eu/juris/document/document.jsf?docid=245537&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=2737873

5. Case C-854/19, 2 September 2021 (Court of Justice of the European Union), https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-854/19&jur=C

6. *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 7 June 2012, Application No. 38433/09 (European Court of Human Rights), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%226.\tCentro%20Europa%207%20S.R.L.%20and%20Di%20Stefano%20v.%20Italy%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-111399%22]}

7. *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf

8. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf

9. *Emilio Palacio Urrutia y Otros v. Ecuador*, 24 November 2021, Serie C, No. 446 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_446_esp.pdf

10. *Fontevecchia y D'Amico v. Argentina*, 29 November 2011, Series C, No. 238 (Inter-American Court of Human Rights), https://corteidh.or.cr/docs/casos/articulos/seriec_238_esp.pdf

11. *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98 (European Court of Human Rights), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Fuentes%20Bobo%20v.%20Spain%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58502%22]}

12. *Gonzales Lluy et al. v. Ecuador*, 1 September 2015, Series C, No. 298 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_298_esp.pdf

13. *Informationsverein Lentia and others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90 (European Court of Human Rights),

https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Informationsverein%20Lentia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57854%22]}

14. *Kalda v. Estonia*, 19 January 2016, Application No. 17429/10 (European Court of Human Rights), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Kalda%20v.%20Estonia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-160270%22]}

15. *Kimel v. Argentina*, 2 May 2008, Series C, No. 177 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf

16. *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, Application No. 18030/11 (European Court of Human Rights), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2230.\tMagyar%20Helsinki%20Bizottság%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-167828%22]}

17. *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991 (UN Human Rights Committee), http://hrlibrary.umn.edu/undocs/html/vws458.htm

18. *Open Society Justice Initiative v. Cameroon*, 25 May 2006, Communication No. 290/2004 (African Commission on Human and Peoples' Rights), https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2006/72

19. *Opinión Consultiva Titularidad de Derechos de la Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*, 26 February 2016, OC-22/16 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/opiniones/seriea_22_esp.pdf

20. *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93 (European Court of Human Rights), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2238.\tÖzgür%20Gündem%20v.%20Turkey%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58508%22]}

21. *Pacheco Teruel et al. v. Honduras*, 27 April 2012, Series C, No. 241 (Inter-American Court of Human Rights), https://corteidh.or.cr/docs/casos/articulos/seriec_241_esp.pdf

22. *Perozo et al. v. Venezuela*, 28 January 2009, Series C, No. 195 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_195_esp.pdf

23. *Pueblo Bello Massacre v. Colombia*, 31 January 2006, Series C, No. 140 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_140_esp.pdf

24. *Sanoma Uitgevers B.V. v. the Netherlands*, 14 September 2010, Application No. 38224/03 (European Court of Human Rights), https://hudoc.echr.coe.int/eng#{"appno":["38224/03"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-100448"]}

25. *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, 13-27 October 2001, Communication No. 155/96 (African Commission on Human and Peoples' Rights), https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf

26. *Steel and Morris v. United Kingdom*, 15 May 2005, Application No. 6846/01 (European Court of Human Rights), http://hudoc.echr.coe.int/eng?i=001-68224

27. *Velásquez-Rodríquez v. Honduras*, 29 July 1988, Series C, No. 4 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.pdf

28. *Vélez Restrepo and Family v. Colombia*, 3 September 2012, Series C, No. 248 (Inter-American Court of Human Rights), https://corteidh.or.cr/docs/casos/articulos/seriec_248_esp.pdf

Other Authorities

1. African Commission on Human and People's Rights, *Declaration of Principles on Freedom of Expression in Africa*, 10 November 2019, https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

2. Argentina, Ley 27.078, 18 December 2014, http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/239771/norma.htm#:~:text=Su%20objeto%20es%20posibilitar%20el,m%C3%A1s%20altos%20par%C3%A1metros%20de%20calidad

3. California Civil Code, as amended by Senate Bill No. 822, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822

4. Canadian Radio-television and Telecommunications Commission, Telecom Regulatory Policy CRTC 2017-104, 20 April 2017, https://crtc.gc.ca/eng/archive/2017/2017-104.htm

5. Canadian Radio-television and Telecommunications Commission, Telecom Decision CRTC 2017-105, 20 April 2017, https://crtc.gc.ca/eng/archive/2017/2017-105.htm

6. Chile, Ley 20.453, 18 August 2010, https://www.bcn.cl/leychile/navegar?idNorma=1016570

7. Council of Europe, 2003 Declaration on Freedom of Communication on the Internet, adopted by the Committee of Ministers on 29 September 2010, http://archive1.diplomacy.edu/pool/fileInline.php?IDPool=1204

8. Council of Europe, Recommendation CM/Rec(2016)1on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality, adopted by the Committee of Ministers on 13 January 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1e59

9. European Union, Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 25 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.310.01.0001.01.ENG

10. Federal Communications Commission, 47 CFR Parts 1, 8 and 20, Protecting and Promoting the Open Internet: Final Rule, 13 April 2015, https://www.govinfo.gov/content/pkg/FR-2015-04-13/pdf/2015-07841.pdf

11. Inter-American Commission on Human Rights, *Inter-American Declaration of Principles on Freedom of Expression*, 19 October 2000, https://www.cidh.oas.org/declaration.htm

12. Nigeria Communications Commission, Internet Code of Practice, https://www.ncc.gov.ng/docman-main/internet-governance/878-internet-code-practice/file

13. OAS, IACHR and Special Rapporteur on Freedom of Expression, *Guide to Guarantee Freedom of Expression Regarding Deliberate Disinformation in Electoral Contexts*, October 2019, https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf

14. OAS Special Rapporteur on Freedom of Expression, *Freedom of Expression and the Internet*, 31 December 2013,

http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20_web.pdf

15. OAS Special Rapporteur on Freedom of Expression, *Violence Against Journalists and Media Workers: Inter-American Standards and National Practices on Prevention, Protection and Prosecution of Perpetrators,* 31 December 2013, https://www.oas.org/en/iachr/expression/docs/reports/2014_04_22_Violence_WEB.pdf

16. OAS Special Rapporteur on Freedom of Expression, *Standards for a Free, Open, and Inclusive Internet*, 15 March 2017, http://www.oas.org/en/iachr/expression/docs/publications/internet_2016_eng.pdf

17. Special International Mandates on Freedom of Expression, Joint Declaration on Promoting Diversity in the Broadcast Media, 12 December 2007, https://www.osce.org/fom/66176?page=1

18. Special International Mandates on Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, 12 December 2011, http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf

19. Special International Mandates on Freedom of Expression, Joint Declaration on Universality and the Right to Freedom of Expression, 6 May 2014, https://www.law-democracy.org/live/international-mandates-universality-and-freedom-of-expression/

20. Special International Mandates on Freedom of Expression, Joint Declaration on Media Independence and Diversity in the Digital Age, 2 May 2018, https://www.lawdemocracy.org/live/2018-joint-declaration-by-special-rapporteurs-on-media-independence/

21. Special International Mandates on Freedom of Expression, Twentieth Anniversary Joint Declaration: Challenges to Freedom of Expression in the Next Decade, 10 July 2019, https://www.law-democracy.org/live/20th-anniversary-joint-declaration-by-special-rapporteurs/

22. South Africa, Directions on Zero-rating of Content and Websites for Education and Health, Government Notice 651 of 2020, 5 June 2020, https://openbylaws.org.za/za/act/gn/2020/651/eng/#:~:text=Zero%2Drating%20only%20applies%20to,also%20not%20be%20zero%2Drated

23. Telecom Regulatory Authority of India, Notification No. 2 of 2016, Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, 8 February 2016, https://trai.gov.in/sites/default/files/Regulation_Data_Service.pdf

24. UN Committee on Economic, Social and Cultural Rights, General Comment No. 3. The nature of States parties' obligations, 14 December 1990, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en

25. UN General Assembly Resolution 59(I), 14 December 1946, http://www.worldlii.org/int/other/UNGA/1946/87.pdf

26. UN Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en

27. UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf

28. UN Human Rights Council, Resolution 12/16, 2 October 2009, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F12%2F16&Language=E&DeviceType=Desktop

29. UN Human Rights Council, Resolution 32/13, 1 July 2016, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F32%2F13&Language=E&DeviceType=Desktop

30. UN Human Rights Council, Resolution 38/7, 5 July 2018, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/38/7

31. UN Human Rights Council, Resolution 44/12, 16 July 2020, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F44%2F12&Language=E&DeviceType=Desktop

32. UN Human Rights Council, Resolution 47/16, 13 July 2021, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F47%2F16&Language=E&DeviceType=Desktop

33. UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur pursuant to Human Rights Council resolution 7/36, 16 May 2011, https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

34. UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report on the promotion and protection of the right to freedom of opinion and expression, 30 March 2017, U.N. Doc. A/HRC/35/22, para. 27, https://undocs.org/A/HRC/35/22

35. *Universal Declaration of Human Rights*, United Nations General Assembly Resolution 217A (III), 10 December 1948, https://www.un.org/en/universal-declaration-human-rights/index.html

Other References

1. Acosta, R.V., *Regulatory Issues in Matters of Freedom of Expression and the Internet in Latin America*, 2020, Derechos Digitales, https://www.derechosdigitales.org/wp-content/uploads/tendencias-regulacion-digitales-eng.pdf

2. AT&T, "Impact of California 'Net Neutrality' Law on Free Data Services", 17 March 2021, https://www.attpublicpolicy.com/congress/impact-of-california-net-neutrality-law-on-free-data-services/?source=email

3. BBC, "India Adopts 'World's Strongest' Net Neutrality Norms", 12 July 2018, https://www.bbc.com/news/world-asia-india-44796436

4. Belli, L., "Net neutrality, Zero-rating and the Minitelisation of the Internet", 2 *Journal of Cyber Policy* 96 (2016), https://internet-governance.fgv.br/sites/internet-governance.fgv.br/files/publicacoes/net_neutrality_zero-rating_the_minitelisation_of_the_internet_final.pdf

5. Belli, L. and de Filippi, P., *Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet* (2016: Springer International Publishing), https://hal.archives-ouvertes.fr/hal-01382021/document

6. Bertoni, E., *Prevent and Punish: In search of solutions to fight violence against journalists* (2015, Paris, UNESCO), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/Events/IDEI_2014/Prevent-and-Punish_Bertoni.pdf

7. Biswas, S., "Why is Mark Zuckerberg Angry at Critics in India?", BBC, 20 December 2015, https://www.bbc.com/news/world-asia-india-35192184

8. Carillo, A., "Having Your Cake and Eating it Too? Zero-Rating, Net Neutrality, and International Law", 19 *Stanford Technology Law Review* 364 (2016), https://law.stanford.edu/wp-content/uploads/2017/11/19-3-1-carrillo-final_0.pdf

9. Castañeda, J.D., and González, L.D., *Neutralidad de la Red y Ofertas en Comerciales en Colombia*, 2017, Fundación Karisma, https://web.karisma.org.co/wp-content/uploads/download-manager-files/Agosto%209%20-%20Informe%20neutralidad%20de%20la%20red.pdf

10. Centre for Law and Democracy, RTI Rating, www.RTI-Rating.org

11. D'Amato, A., "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (2010, Faculty Working Papers, 88), https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88

12. Epicenter Works, *The Net Neutrality Situation in the EU: Evaluation of the first Two Years of Enforcement*, 29 January 2019, https://en.epicenter.works/sites/default/files/2019_netneutrality_in_eu-epicenter.works-r1.pdf

13. European Commission, *Zero-Rating Practices in Broadband Markets*, February 2017, https://ec.europa.eu/competition/publications/reports/kd0217687enn.pdf

14. Galpaya, H., "Zero-Rating in Emerging Economies", Global Commission on Internet Governance, February 2017, https://www.cigionline.org/sites/default/files/documents/GCIG%20no.47_1.pdf

15. Gillula, J., "Facebook's Free Basics: More Open, Better Security, but Still a Walled Garden, Electronic Frontier Foundation, 30 September 2015, https://www.eff.org/deeplinks/2015/09/facebooks-free-basics-more-open-better-security-still-walled-garden

16. Gillwald, A., *et al.*, *Much Ado About Nothing? Zero-Rating in the African Context*, 2016, Research ICT Africa, https://researchictafrica.net/wp/wp-content/uploads/2021/09/2016_RIA_Zero-Rating_Policy_Paper_-_Much_ado_about_nothing.pdf

17. Guyana Chronicle, "GTT Zero Rates Several Educational Sites", 23 October 2020, https://guyanachronicle.com/2020/10/23/gtt-zero-rates-several-educational-sites

18. Hoskins, G.T., "Beyond 'Zero Sum': The Case for Context in Regulating Zero Rating in the Global South", 8 *Internet Policy Review* 1 (2019), https://policyreview.info/articles/analysis/beyond-zero-sum-case-context-regulating-zero-rating-global-south

19. International Bar Association, "EU Court of Justice Rules on Zero-Rating", https://www.ibanet.org/article/DAAB099C-A736-4ED7-BB4D-4719A1593A5F

20. Kaye, D. and Solomon, B., "Merely Connecting the Developing World to the Internet Isn't Enough", 13 October 2015, Slate, https://slate.com/technology/2015/10/the-u-n-wants-to-connect-the-world-to-the-internet-that-s-not-enough.html

21. Lee, N.T., "California's Net Neutrality Law and the Case for Zero-Rating Government Services", Brookings, 19 April 2021, https://www.brookings.edu/blog/techtank/2021/04/19/californias-net-neutrality-law-and-the-case-for-zero-rating-government-services/

22. Lee, T. B., *Network neutrality, explained*, updated 21 May 2015, VOX, https://www.vox.com/2015/2/26/18073512/network-neutrality

23. Meta, "Free Basics", 2022, https://www.facebook.com/connectivity/solutions/free-basics/

24. Mendel, T., *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, December 2012, https://rm.coe.int/16806f5bb3

25. Mendel, T., *Supporting Freedom of Expression: A Practical Guide to Developing Specialised Safety Mechanisms* (2016, Paris, UNESCO), https://en.unesco.org/sites/default/files/supporting-freedom-of-expression_guide-safety-mechanisms.pdf

26. Mendel, T., Castillejo, A.G., and Gómez*, G., Concentration of Ownership and Freedom of Expression: Global Standards and Implications for the Americas* (2017, Paris, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000248091

27. Meron, T., *Human Rights and Humanitarian Norms as Customary Law* (1989, Oxford, Clarendon Press)

28. Nothias, T., "The Rise and Fall… and Rise Again of Facebook's Free Basics", Global Media Technologies and Cultures Lab, 21 April 2020, https://globalmedia.mit.edu/2020/04/21/the-rise-and-fall-and-rise-again-of-facebooks-free-basics-civil-and-the-challenge-of-resistance-to-corporate-connectivity-projects/

29. O'Maley, D. and Kak, A., *"Free Internet" and the Costs to Media Pluralism: The Hazards of Zero-Rating the News*, 2018, CIMA, https://www.cima.ned.org/wp-content/uploads/2018/11/CIMA_Zero-Rating-Paper_web_150ppi_v2.pdf

30. Pérez, M.C., "Zero-rating y la neutralidad de la red", 2018, 7 *Revista chilena de derecho y tecnología* 1, https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0719-25842018000100107&lng=pt&nrm=iso&tlng=es

31. Soni, A., "India Deals Blow to Facebook in People-Powered 'Net Neutrality' Row", The Guardian, 8 February 2016, https://www.theguardian.com/technology/2016/feb/08/india-facebook-free-basics-net-neutrality-row

32. Stallman, E. and Adams, R. S., *Zero Rating: A Framework for Assessing Benefits and Harms*, Center for Democracy and Technology, January 2016, https://cdt.org/wp-content/uploads/2016/01/CDT-Zero-Rating_Benefits-Harms5_1.pdf

33. World Bank, Individuals Using the Internet (% of Population) - Colombia, International Telecommunications Union (ITU) World Telecommunication/ICT Indicators Database, https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=CO