Internet Freedom and Human Rights

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Abstract

This article considers whether the Internet has become so significant, for the provision of, and access to, information and in the formation of political community and associated questions of participation, that it requires further human rights protection beyond freedom of expression. In short, should Internet freedom be configured as a human right? The article begins by considering the ubiquity of the Internet and its significance. A wider historical view is then taken to understand Internet freedom in terms of its lineage and development from earlier debates over freedom of expression and the right to communicate, through to the recognition of the significance of an information society and the need for Internet regulation on the international plane. The current debate over Internet freedom is then analysed with particular focus given to Hillary Clinton’s speech on Internet freedom and its subsequent articulation by Special Rapporteur Frank La Rue. The concluding part introduces the critical work of Evgeny Morozov and Jaron Lanier to an international law audience in order to deepen the debate over Internet freedom and to point to the concept’s limitations and dangers. It is too early to say whether a ‘right to Internet freedom’ has achieved universal recognition, but this article makes the case that it is worth taking seriously and that Internet freedom may need its own category of protection beyond freedom of expression.

The law has traditionally offered some protection for free speech – either through domestic constitutions, as an aspect of media law or as a human right. The rise of the Internet and the changing media landscape prompts the question: ‘Are traditional free speech protections adequate?’ In this article, I will consider whether the Internet has become so significant, for the provision of information, media content and in terms of our system of international communication, that it requires further protection. In short, should Internet freedom and access be configured as a human right? I will chart the history of this question from earlier iterations such as ‘the right to communicate’ to present-day discussions concerning the Internet, freedom and the significance of an information

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society. Methodologically, the article aims to place current debates within a broader context and to consider the role of communication within human rights. While it is too early to say whether a ‘right to Internet freedom’ already exists, the Internet – especially in its public sphere dimension – prompts a re-evaluation of freedom of expression jurisprudence, most notably in terms of the significance of questions of access and participation but also in terms of the magnification of the potential for harm, and it points to the need for a conceptual development of the area of Internet freedom.

The article concludes by engaging with the work of Evgeny Morozov and Jaron Lanier to look at the range of claims made for and against Internet freedom. The motivation here is to deepen analysis of the current debates over the nature of international regulation of speech and the Internet. Such discussions tend to revert to technology-centred, free speech-centred or culturally relativistic grounds. While some of this territory is well trodden, the ideas that underpin conceptions of Internet freedom and regulation remain central to the continued development of the international system and to the efficacy of the field of human rights itself.

1 The Internet and the Information Society

The Internet has certainly become a vital piece of infrastructure and a significant avenue for global communication, community formation and governance. While its emergence has led to a shift in our levels of international cooperation and interaction, it is by no means without danger or criticism. A variety of claims are made for the Internet as a mechanism that facilitates the international system and, in particular, human rights. However, not all actors in the international system see the Internet in such a way, and some actors are sending mixed messages – notable here is the USA, which calls for Internet freedom but which has also been embarrassed by the National Security Agency’s (NSA) surveillance scandal in the wake of Edward Snowden’s leaks to The Guardian newspaper.

A typical recent statement regarding the significance of the Internet comes from the UN Secretary-General, who, in addressing a forum on Internet security in 2014, not only specifically linked the Internet with freedom and the human rights framework but also said the following:

I am disturbed by how States abuse laws on Internet access. I am concerned that surveillance programmes are becoming too aggressive. I understand that national security and criminal activity may justify some exceptional and narrowly-tailored use of surveillance. But that is all the more reason to safeguard human rights and fundamental freedoms. Some argue that they need to curtail freedoms to preserve order. I say they need to protect freedom or they will undermine order.1


This quotation demonstrates the familiar balancing act between liberty and security as well as the argument that liberty will lead to a more secure community. The forum took place in Estonia, where there is sensitivity about Russian cyber-attacks on regional states as well as about the NSA revelations. Consequently, of interest is the inclusion of surveillance in discussions of Internet freedom. Surveillance must now be seen not only in the context of closed Internet states such as China but also of those that have championed Internet freedom in theory but that have, in practice, been revealed to be using the Internet and digital platforms to conduct widespread surveillance of citizens. These practices have done much to damage the credibility of earlier calls for Internet freedom.

In his concluding comments, the Secretary-General returns to more positive territory. While noting that Internet freedom must be on the international agenda alongside cyber-security and the digital divide, he states that the United Nations (UN) wants ‘to ensure that the Internet is an affordable, reliable, secure and trustworthy global public resource that can help people to improve our world’. There are dangers and there have been recent problems, but, ultimately, the vision of Internet freedom, and of the Internet as a global public good with a reformist capacity, is reinforced.

The question left hanging is what would be necessary in terms of international cooperation and even governance for this vision to achieve its transformative potential. Undoubtedly, the framing of the Internet’s significance in human rights terms brings with it a capacity to offer a powerful new rhetorical and normative tool for advocacy and standard setting, but it also can offer false hope and more of the same. While drawn to such critical perspectives regarding both the Internet and human rights, there is also radical potential in the concept of Internet freedom.

Despite reminders from both scholars and governments that the Internet is not in fact a ‘borderless world’, the notion of some kind of right to the Internet and to an Internet that is free from authoritarian or other controls still holds power. If we take the idea of Internet freedom seriously and give more thought to its content, the hope would be that it would not end up looking like a rehearsal of liberal internationalism but, rather, that it might offer something distinct. As with other efforts to rebrand first-generation rights, there is necessary scepticism regarding whether a right to Internet freedom offers anything in addition to the right to freedom of expression, or whether this is simply old wine in new bottles?

The arrival of the Internet and the development of digital media technologies have intensified debate over the need for international media regulation. Some have argued

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2 For further detail, see The Guardian’s online resources regarding the National Security Agency’s (NSA) surveillance program, available at http://www.theguardian.com/world/the-nsa-files (last visited 24 April 2015).

3 UN Secretary-General, supra note 2.


for greater regulation given the globalizing character and transnational impact of the Internet. Others have opposed such changes and have continued to uphold a private law model of media regulation and self-regulation cast in the neutral tones of infrastructure development and coordination, technical expertise and cooperation. With regard to the international law framework, a significant question that has been raised is how the right to freedom of expression can adapt to the digital context.  

A lingering concern is whether these benefits can or should be further protected through the international human rights framework – most specifically, whether its mechanisms of proportionality can balance the seemingly incommensurable values in play. Indeed, the Internet is viewed by many not as a place of democratic deliberation and interconnection but, rather, as an anarchic place of fragmentation, commodification and crime. Consequently, the debate over Internet regulation has been framed in a range of ways, which are often contradictory. It is remarkable how unregulated the Internet is at the level of international law and how regulation is viewed through lenses as various as crime, security, child protection, morality, development, culture, speech or privacy. Ideas of infrastructural equality (net neutrality) and broader notions of democratic freedom (to communicate, exchange, compete for market access and even to be anonymous or forgotten) have flavoured much of the discourse regarding Internet regulation, but so too have more authoritarian notions of government control, surveillance and punishment. On the one hand, the Internet and associated digital media technologies are presented as revolutionary, emancipatory and even as tools for democratization and the rebranding of liberal internationalism. On the other hand, the Internet represents information overload, the ‘deluge’ of big data, mass privacy and copyright violation and the resurgence of surveillance culture and control.

The protection of free speech and the benefits of globalization in the form of an information society have been resilient organizing principles within recent debates over Internet regulation. While controversial, ideas of revitalized mechanisms and spheres of political communication, along with the formation of global audiences and new forms of community, remain central to the Internet’s

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overriding narrative of progress. These grander claims, which have been made for the Internet’s paradigm-shifting place in international life, rely at least in part on efforts to re-articulate the significance of freedom of expression. The Human Rights Committee in its updated General Comment on Article 19 has also pointed to the need to take greater account of the Internet and digital media with regard to free speech protection.

General Comment No. 34 begins with foundational ideas regarding freedom of expression such as its catalytic role in the promotion and protection of other human rights, reinforcing the traditional significance not only of journalism but also of the media in all of its new and digital varieties, including ‘electronic and Internet-based modes of expression’. The Committee emphasizes the right of access to information – the accepted view of expression as having both aspects of giving and receiving. However, this notion is given context in terms of the increasing significance of the Internet and its interactive and communicative possibilities. The Committee exhorts states parties to:

- take account of the extent to which developments in information and communication technologies, such as the Internet and mobile-based electronic information 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.

Thus, protecting freedom of expression is said to involve practical safeguards against wide-ranging restrictions placed on websites and other platforms such as blogs, service providers and search engines. Any restrictions are to be construed narrowly and in light of broader systemic concerns to balance freedom of expression with other human rights. While such an approach falls short of calling for a right to Internet freedom, the Committee is clearly attempting to translate traditional human rights principles regarding freedom of expression into a digital media and Internet context. As the next section examines, such concerns to reinterpret freedom of expression in light of changing contexts of communicative forms and mechanisms has some lineage. As do the social foundations of speech protection – though the information society has a particular resonance, the constitutive public sphere significance of communication is not a new idea.

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14 UN Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, September 2011, Art. 19: Freedoms of Opinion and Expression.
15 Ibid., paras 3, 11.
16 Ibid., para. 15.
17 Ibid., paras 3, 43.
2 Free Speech, the Right to Communicate and an Information Society

The right to freedom of expression is commonly thought of as a central and facilitative human right, universally recognized and forming the basis for the contestation and safeguarding of other rights.\(^19\) In this sense, the theoretical foundations of free expression – what is often termed the right to free speech – can be traced back to the recognition of the need for unhindered political communication between citizens in their efforts to form and participate in government and the development of society. The 1948 Universal Declaration of Human Rights (UDHR) addresses freedom of expression in Article 19, which guarantees that \'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers\'.\(^20\) From this article flows an emphasis in the other international and regional instruments dealing with freedom of expression on two aspects: the right to express oneself and the right to seek and receive information.\(^21\) The article is also rather technologically neutral in addition to its interactive emphasis. It is not concerned with old media or new media but, rather, with \'any media and regardless of frontiers\'.

However, can we adapt the right to freedom of expression to extend it to deal with the imbalances that exist in terms of communication flows and access to communications technologies such as the Internet, when such access is of increasing significance in the present day? The concept of the right to communicate was first put forward in 1969 by Jean d\’Arcy who worked for the UN Office of Public Information.\(^22\) He was responding to changes in communications technologies such as satellite communication and argued that a new human right to communicate was needed in addition to Article 19 of the UDHR guaranteeing free expression. This idea was subsequently taken up in academic and policy circles and also notably by the UN Educational, Scientific and Cultural Organization (UNESCO) in the 1970s and 1980s.\(^23\)

However, an agreed definition of the right remained elusive, and it was not incorporated into an international human rights treaty. Some saw the right as a collective, umbrella right drawing on pre-existing rights such as Article 19, and others saw it as an individual right that would need its own expression. The right to communicate

\(^{19}\) See, e.g., M. Ignatieff, Human Rights as Politics and Idolatry (2001), at 90.


\(^{21}\) International Covenant on Civil and Political Rights 1976, 999 UNTS 171, Art. 19.


was also linked with efforts within UNESCO to develop a New World Information and Communications Order (NWICO). This association led to controversy and, along with a range of other factors, contributed to the withdrawal of the USA and the United Kingdom from the organization in the 1980s. UNESCO dropped the issue from its agenda. The right to communicate was a victim, in part, of Cold War politics and fears that NWICO would lead to further state controls over media and information and restrict free expression. However, some like Antonio Pasquali continue to defend what he regarded as ‘a tremendous and unequal battle for equity in global communication’.

These themes of inequality of access to media, information and communications infrastructure resurfaced in the context of the Internet’s emergence into everyday usage and its perceived potential to address these earlier concerns. What was earlier seen as a battle for equity in communication was resituated in a debate around access to information and communication technologies and the Internet and access to hardware such as inexpensive laptops and mobile and smart phones. This problem of inequality of access has been termed the digital divide. Addressing this divide was a principal concern of the international community in a series of summits held in Geneva in 2003 and in Tunis in 2005 – the World Summit on the Information Society process (WSIS) – which was aimed at developing soft law principles and mechanisms to ensure that the Internet and communications technologies would be used fairly and equally for wider benefit and to assist in the achievement of development.

The WSIS process saw a re-agitation for multilateral public governance of the Internet, and the International Telecommunications Union (ITU) sought to position itself as central to such a governance structure and as a broker between private sector interests as well as those of member states. The ITU dared to tread where UNESCO had failed, and it similarly met with fierce resistance from the USA and others to the

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idea of a UN-style framework for global governance of the Internet. What emerged instead was a confirmation of the private model of multi-stakeholder governance\textsuperscript{28} and the continuing role of the Internet Corporation for Assigned Names and Numbers (ICANN) in Internet domain name governance, US retention of control over key Internet infrastructure in the form of root servers and the creation of an Internet Governance Forum to enable civil society participation in the longer term. The WSIS process also produced declarations elaborating a number of principles regarding the information society, drawing conceptually on human rights and development goals.\textsuperscript{29} Subsequent forums have been held in Geneva to follow up in terms of implementation.

3 Internet Freedom as a Human Right?

So far these principles are emerging in a soft law context, and it remains uncertain whether calls for a revival of the right to communicate within an information society will be carried forward in the guise of Internet freedom or will rather go the way of the ‘right to communicate’ in the context of the NWICO. What is perhaps most significant here are the resilience and adaptability of the concept of a right to communicate and, more generally, the attraction of rights-based discourse to a new generation of activists concerned with issues of expression and communication.\textsuperscript{30} More recently, these themes have been linked to a broader developing category of Internet freedom. This concept has been picked up by governments, UN actors and civil society, most notably in Hillary Clinton’s remarks on Internet freedom while she was US Secretary of State.\textsuperscript{31}

On 21 January 2010, Secretary of State Clinton gave a significant and controversial speech on Internet freedom where she outlined the US commitment to Internet freedom and structured her understanding of the concept through the lens of Roosevelt’s Four Freedoms Speech, modified to include not only its original freedoms such as speech and religion but also the freedom to connect online. The discussion is framed initially by reference to the ‘on the ground’ effects of communication networks in assisting with disaster response in Haiti and with humanitarian fund raising. A picture is presented of a world mediated via the Internet that can be experienced in real time and where the communications infrastructure of the Internet and the spread of associated information networks are ‘forming a new nervous system for our planet’.\textsuperscript{32} However, the effects are mixed. Information is said to have ‘never been so free’, even in situations of authoritarian control.\textsuperscript{33} Yet information technologies and the connectivity they bring are also ‘being exploited to undermine human progress and political

\textsuperscript{28} See further J. Malcolm, \textit{Multi-Stakeholder Governance and the Internet Governance Forum} (2008).

\textsuperscript{29} Joyce, \textit{supra} note 10, at 513–515.

\textsuperscript{30} See, e.g., \url{http://www.internetdeclaration.org/} (last visited 24 April 2015).


\textsuperscript{32} Clinton, \textit{supra} note 31, at 2.

\textsuperscript{33} \textit{Ibid.}
Internet Freedom and Human Rights

The Internet and its invasive and surveillance dimension can be ‘hijacked by governments to crush dissent and deny human rights’. What is offered is a ‘principled’ approach to the Internet – ‘a single internet where all of humanity has equal access to knowledge and ideas’. If the lens offered is universal, its template is to some extent parochial and exemplified by the First Amendment to the US Constitution.

In her remarks, Clinton both makes the connection between the development of the Internet, its secure future and the human rights framework as typified by the UDHR, while she also offers up a peculiarly American conception of that framework with an emphasis on the export of liberal values such as speech and democracy, the opening up of market access and protection for intellectual property, along with a recognition of the need for protection and enforcement with regard to the darker side of the Internet – its potential adoption and misuse by cyber criminals, terror networks and those who would seek to harm and exploit women and children. While these are all familiar tropes in the ongoing debates over international regulation and management of the Internet, an unexpected ideological dimension is emphasized with a revival of a type of Cold War rhetoric: there are good and bad states and actors; progress is driven by both technology and principles and the struggle involves the breaking down and erection of barriers. Though for Clinton the Internet offers the possibility for transcendence of Cold War divisions and ‘stands for connection’, in some contexts ‘virtual walls are cropping up in place of visible walls’. The liberating idea of Internet freedom (with bloggers and netizens as the new pamphleteers) is then countered by a more troubling image of ‘a new information curtain ... descending across much of the world’.

Clinton recognizes that ‘free expression has its limits’, and these are characterized in terms of terror, hate speech, anonymity, privacy and intellectual property theft. Perhaps the historical context for her speech, when Wikileaks had achieved such prominence and notoriety, accounts for the inclusion of anonymity as a key limit. Part of the earlier libertarian promise of the Internet was that there would remain the possibility of anonymity, but it was hoped that this might represent not cover for the trolls and criminals but, rather, allow for a degree of freedom in terms of interactions online. Online anonymity as a value and as a technical possibility appears to be on the wane, whether in privacy jurisprudence, in discourse regarding the threats constituted by anonymity or in governmental efforts to prosecute otherwise anonymous leakers such as Chelsea Manning or Edward Snowden. Anonymity can of course be a protection for human rights activists working together online using tools such as the onion router (TOR) to cover their tracks and avoid government control. But increasingly,

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14 Ibid.
15 Ibid., at 3.
16 Ibid.
17 Ibid., at 4.
18 Ibid.
19 Ibid.
anonymity is presented as a cover for those who would seek to threaten national security rather than work to highlight governmental abuses, and its mechanisms, such as TOR and Wikileaks, are proving to be less than secure. While anonymity can assist certain groups to use the Internet for human rights-related activities and for avoiding related punishment or censorship, it appears that its place within the broader concept of Internet freedom is much less certain. Publicity may rely on secrecy, but secrecy confronts broader systemic demands for transparency and accountability.

Clinton’s vision of Internet freedom references the need to balance freedom of speech with religious and minority freedom, though no mention is made of contemporary flashpoints such as the Cartoon Controversy or Innocence of Muslims video. Rather, the focus is on repression in Saudi Arabia, Vietnam and China. A significant focus for Clinton’s conception of Internet freedom is the digital divide and the potential for the Internet to be ‘a great equalizer’, providing ‘access to knowledge and potential markets’. Economic growth and poverty eradication are significant end goals, but so too is the opening up of markets for countries such as the USA. In this context, cyber-security is not only to be afforded against the familiar threats of ‘[v]iolent extremists, criminal cartels, sexual predators, and authoritarian governments’ but also entails secure online commercial platforms and intellectual property protection. This will require a ‘coordinated response by all governments, the private sector, and the international community’. Allusions are made to soft law creation in the form of ‘norms of behaviour’ and a ‘global networked commons’, but there is also a threat of unilateral punitive action to protect US interests.

Several other significant strands of the concept of Internet freedom are developed. Clinton points to ‘the freedom to connect’ and references the role ‘online organizing’ has played in human rights advocacy and democratic reform processes. It is true that the Internet offers great potential in terms of online communication and coordination, but there remain serious challenges concerning the level and depth of ‘connection’ achieved through the Internet, especially in terms of empathy and the creation of ‘communities of concern’. What is helpful is the focus here on the communicative dimension of not only public diplomacy but also of international law and its institutional structures, illustrated especially in the field of human rights advocacy and protection. Connection is a useful frame through which to consider Internet freedom as it brings together various elements that are relevant not only to access and infrastructure but also to communication and content. In some sense, connection is a converged and technologically neutral concept. The community-forming and relational dimension of connection and, especially, the ethical dimension will prove to be vital avenues for further analysis and research if this concept of Internet freedom is to be

42 Clinton, supra note 31, at 5.
43 Ibid.
44 Ibid., at 6.
45 Ibid.
46 Ibid.
taken seriously. Indeed, Clinton herself points to our ‘need to work towards a world in which access to networks and information brings people closer together and expands the definition of the global community’.  

However, once again connection is configured in both the terms of rights and the empowerment of citizens as well as in the market terminology of Internet entrepreneurialism and informational economics – as Clinton warns: ‘If businesses in your nations are denied access to … [either political or commercial speech] it will inevitably impact on growth.’  

Connection is about ‘one internet, one global community, and a common body of knowledge’ and is thus aligned with the broader goals and mandates for peace and security (to avoid a ‘fragmented planet’), but it is also concerned with one market where there is ‘trust between firms and their customers’. Clinton’s vision for Internet freedom is both a parable of global progress through unity and an exercise in a rather parochial form of branding. It is problematic for these reasons, but it is also highly significant and has sparked wider debate on the issue and perhaps also signalled recognition of the need for a change in conceptions of US ownership of the Internet.

The debate over Internet freedom was taken a further step in the report from Special Rapporteur Frank La Rue on 16 May 2011, which provocatively suggested that access to the Internet should be considered in human rights terms and that achieving universal access to the Internet should be a priority for all states. La Rue’s report develops general principles on the right to freedom of expression and the Internet, considering topics such as blocking and filtering of content, intermediary liability, cyber attacks, privacy and data protection and access to the Internet and necessary infrastructure. In a converged online context, it is difficult to separate out these questions, and human rights methodologies offer some practical application in the balancing involved, given that an overarching framework is provided along with a methodology of proportionality. Such tools are useful, but, as many have noted, human rights frameworks and jurisprudence are not always able to resolve disputes involving incommensurable values and positions, however well intentioned such frameworks purport to be.

The context for the La Rue report on freedom of expression and the Internet was the UN Human Rights Council’s Resolution 7/36, along with the broader recognition of the increasing significance of the Internet reinforced by the early analysis of the Arab Spring. The latter context is clearly influential with La Rue remarking:

The Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and North African region

48 Clinton, supra note 31, at 11.
49 Ibid., at 8–9.
50 Ibid., at 10.
has shown the key role that the Internet can play in mobilizing the population to call for justice, equality, accountability and better respect for human rights.\textsuperscript{52}

As significant as these movements and their ramifications have been, at the present time it is by no means a simple calculation to equate related Internet activity and access with any resulting freedom. To take Egypt as a case in point, democracy has in fact been supplanted by military rule, and even traditional media have been interfered with in the most blunt manner.\textsuperscript{53}

Nevertheless, the attempt by the special rapporteur to consider the implications for free speech protection in terms of Internet freedom has been productive and welcome. La Rue has emphasized access to the Internet as being significant in free speech terms, along with the need to minimize restrictions placed upon Internet content. According to La Rue, access to the Internet has at least two dimensions: access to content (without the arbitrary and unwarranted filtering or blocking of content) and access to the infrastructure and equipment required to use the Internet.\textsuperscript{54} Access is clearly a significant element of Internet freedom that not only has both continuity with ideas within free speech (of expression and reception) but also is extended conceptually to acknowledge the importance of access to information and infrastructure, in a way that is resonant of strands of thinking within communications development discourse and the information society.

In terms of general principles regarding freedom of expression and the Internet, La Rue emphasizes the interactive nature of Web 2.0 forms and the ways in which the possibilities for self-publication have increased, such that ‘individuals are no longer passive recipients, but [are] also active publishers of information’.\textsuperscript{55} In truth, these changes have led to an increase in opinion, but perhaps at the expense of more objective forms of information traditionally gathered by accountability journalists. It is this kind of information that has underscored the watchdog function of the media. Digital and citizen media can still enhance and contribute to the collection, analysis and spread of such information in the form of news and investigative journalism, and the role can be complimentary as well as supplementary ‘where there is no independent media’.\textsuperscript{56}

A key aspect of the La Rue report is the statement that consideration of the Internet is critical to consideration of freedom of expression more broadly – ‘the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed by article 19’.\textsuperscript{57} It is also characterized, as elsewhere, as an ‘enabler’ and ‘facilitator’ whose character is shaped by speed, reach and anonymity.\textsuperscript{58} While the Internet’s reach highlights the need to act together to address threats such as online child pornography, it also creates new subjects for protection

\textsuperscript{52} Special Rapporteur’s Report, supra note 51, at 4.
\textsuperscript{53} An example being the imprisonment and ‘trial’ in Egypt of Al Jazeera journalists including Peter Greste.
\textsuperscript{54} Special Rapporteur’s Report, supra note 51, at 4.
\textsuperscript{55} Ibid., at 6.
\textsuperscript{56} Ibid., at 7.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
such as bloggers who have been imprisoned and Internet intermediaries such as Google who face disproportionate responsibility for online violations of defamation, privacy and data protection laws and for ensuring cyber security. ⁵⁹ Despite the growth of domestic jurisprudence establishing authority for the liability for intermediaries where a variety of media laws are violated, La Rue ‘believes that censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author.’ ⁶⁰ Although regulation with a multilateral and public character may be preferred for many aspects of the Internet, the approach taken to Internet regulation in general has been characterized as multi-stakeholder governance, ⁶¹ which involves a curious mix of private, public, domestic and international actors. While indicating a preference for public actors to be involved in the human rights-related dimensions of regulation, the special rapporteur takes account of the significance of multi-stakeholder governance elsewhere and notes the role of digital media and Internet-related multinational corporations such as Google, Microsoft and Yahoo in such governance, whether through the Global Network Initiative, through the development of norms via terms of service and through the impact of corporate responsibility measures such as Google’s transparency report or the development of policies regarding its operations in contexts where there is significant content restriction and Internet censorship, such as in China. ⁶² In relation to the significance of terms of service, the special rapporteur encourages corporations to establish clear and unambiguous terms of service in line with international human rights norms and principles, increase transparency of and accountability for their activities, and continuously review the impact of their services and technologies on the right to freedom of expression of their users, as well as the potential pitfalls involved when they are misused. ⁶³

These companies have also had notable influence on government policy, through involvement (often as defendants) in test cases with international significance such as those addressing search engine (intermediary) liability for defamation as well as through the complex process of drawing jurisdictional boundaries where online publication is multi-jurisdictional. ⁶⁴ However, there are also concerns about the levels of liability, responsibility and, ultimately, the forms of public and private power with which they are saddled. Google prides itself on doing no harm, but who is to judge and for whom? ⁶⁵

Further final dimensions addressed in the La Rue report are familiar – cyber-attacks, the threat of Internet disconnection, privacy and data protection and the question of ensuring universal access to the Internet. ⁶⁶ Ensuring Internet access involves

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⁵⁹ Ibid., at 10–12.
⁶⁰ Ibid., at 13.
⁶¹ Malcolm, supra note 28.
⁶³ Ibid., at 14.
⁶⁴ See, e.g., in the Australian context, Trkulja v. Google (No. 5), [2012] VSC 533.
⁶⁵ Google’s ‘philosophy’ including its adaptation of the credo ‘don’t be evil’ can be found online at https://www.google.com.au/intl/en/about/company/philosophy/ (last visited 24 April 2015).
⁶⁶ Special Rapporteur’s Report, supra note 51, at 14–19.
addressing the inequalities inherent in the digital divide and attempting to resolve imbalances in communication flows and, thus, also in terms of information, advocacy and political participation. These are themes familiar from earlier debates involving the right to communicate and in developing principles for an information society. Ultimately, questions of access, availability and affordability of the Internet are given highest priority by the special rapporteur. The report states that:

without Internet access, which facilitates economic development and the enjoyment of a range of human rights, marginalized groups and developing States remain trapped in a disadvantaged situation, thereby perpetuating inequality both within and between States ... to combat situations of inequality it is critical to ensure that marginalized or disadvantaged sections of society can express their grievances effectively and that their voices are heard.

Internet freedom clearly involves more than questions of infrastructure and the architecture of the Internet. Internet freedom engages with key human rights principles such as freedom of expression, privacy and even security. On this account, the Internet is more than the medium, it has become part of the message. Its infrastructure should be decentralized to a degree to avoid the potential for an Internet kill switch and to ensure the diversity of communication flows.

Despite the claims made for Internet freedom, any move towards global regulation of the Internet remains highly contested, as witnessed in the failure of the World Summit on the Information Society process to generate meaningful public regulation. As noted earlier, often such regulation is painted in fearful terms that suggest that authoritarian or controlled political systems, such as in China, the Middle East and Russia, might seek to influence mechanisms of global governance to subvert freedom of expression and political freedoms. Thus, ‘freedom’ is juxtaposed with ‘regulation’ at the international level. This approach does have parallels with the largely facilitative and protective (of media and expression) domestic media laws in contexts such as the USA and Europe. Media law operates in different modes but, at times, is heavily deregulatory in emphasis or presupposes a good media in public watchdog mode, which, save for extreme or limit cases, is to be protected rather than restrained.

An interesting question to be asked of advocates for Internet freedom as a human right, and/or as a sub-species of the right to freedom of expression, is whether such advocacy entails a broader argument for a human rights-centred approach and framework for Internet regulation. Or whether there is a preference asserted for freedom of expression as opposed to other rights such as privacy, religion and intellectual property? Recently, a founding figure of the Internet movement, Sir Tim Berners-Lee, has called for a more principled approach to Internet regulation, along the lines of a ‘Magna Carta’ for the Internet.

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67 Ibid.
68 Ibid., at 17.
Others have framed similar projects as an ‘international law of the Internet’ or ‘principles of international Internet law’. The key question for present purposes is to determine what place human rights principles such as freedom of speech or a newly articulated right to Internet freedom should play within such frameworks?

There is a further dimension to this question as well. A part of the argument for Internet freedom appears to involve not only the normative framework of human rights and its ongoing development in light of technological change but also a claim that freedom of speech in these new online spaces and forms is a central driver of the human rights movement and enabling its key methodologies of advocacy and publicity. From this perspective, the development of civil society and non-governmental organizations as actors within the international legal system has been essential to the development of human rights – configured not only as a system of natural law-inspired rights of the citizen against the state but also as part of a shift towards an active engagement with ideas of humanitarianism and the development of ethical relations across borders.

At another level, much of the anxiety expressed regarding ITU- or UN-driven regulation of the Internet reflects a broader anxiety about maintaining control over multilateral processes that themselves can be hijacked. The debate concerning Internet regulation and China’s attempts to control its Internet sovereignty is of special interest. Clinton’s remarks reference a contrasting position taken between the USA and China, but the Internet is still said to have resulted in ‘tremendous progress’ in China. Special Rapporteur La Rue is more direct in his criticism of blocking and filtering of the Internet in China, ‘which has in place one of the most sophisticated and extensive systems for controlling information on the Internet, [and which] has adopted extensive filtering systems that block access to websites containing terms such as “democracy” and “human rights”’.

China and the USA have become contrasting archetypes in the debate over Internet freedom. However, the picture is complicated by the coexistence in China of proliferating forms of interactive social media such as Weibo, alongside extensive government controls, and by the revelation in the USA that the government has placed pressure on Internet and digital media companies to collaborate in massive surveillance of citizens.

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74 Clinton, supra note 31, at 9–10.

75 Special Rapporteur’s Report, supra note 51, at 9.

76 Weibo is a massively successful Chinese language micro blogging platform that shares some similarities with Twitter and Facebook. See http://www.weibo.com (last visited 24 April 2015).
in the name of security. Though this latter revelation is often framed in terms of privacy concerns and data protection, the viability of the promise of Internet freedom is also at stake.

Framing Internet freedom in terms of human rights and understanding freedom of expression’s place online have been important developments. The Internet does offer international law and its participants with new forms of communication and the means to transcend space and time. But the Internet does not simply equate to political freedom or to democracy. This is clear from La Rue’s analysis and also in the criticism that he has received. In early 2012, Vinton Cerf, a significant figure at Google and in the Internet community, published a response to La Rue in the New York Times stating that Internet access is not a human right: ‘[T]echnology is an enabler of rights, not a right itself.’ According to Cerf, improving the Internet is just one avenue ‘by which to improve the human condition’. While Robert McDowell (US Federal Communications Commission commissioner) wrote in the Wall Street Journal of the ‘UN Threat to Internet Freedom’, arguing that the net had thrived to date precisely without top-down international regulation, and, as a result of the multi-stakeholder governance model, a ‘consensus-driven private-sector approach’ had held government interference to a minimum and should be broadened if reforms are called for.

Debates regarding Internet governance and freedom are ongoing, with the USA signaling a policy change in relation to ICANN, and the ITU re-agitating for global Internet regulations. The status quo remains for the present, and there is no unitary global regulator of the Internet. Nor has a right to Internet freedom or access been entrenched, though the special rapporteur’s analysis, in particular, has deepened understanding of the significance of the Internet for freedom of expression.

4 The Internet and the Development of Human Rights: Critical Perspectives on Internet Freedom

In this final section, having mapped out the policy debates over Internet freedom and human rights and charted their recent history back to efforts to conceive of a right to communicate, I return to critically examine the claims made for Internet freedom and the Internet. To do so, I turn to examine the work of Evgeny Morozov (critic) and Jaron Lanier (technology theorist) to add depth to, and unsettle, the terms of current debates over Internet regulation and freedom and to illustrate the ways in which the

79 Ibid.
claims for Internet freedom are both overblown in rhetoric and yet deserving of our attention. Morozov provides a significant critique of net freedom, and Lanier, with subtlety and a degree of eccentricity, highlights the need to remain cognizant of the human dimension in embracing technology. Both approaches contrast yet provide perspectives of significance for the debates within international law over whether the Internet should be recognized in human rights terms. Both point in their own way to the continuing significance of the Internet for the field of international law.

Evgeny Morozov’s book *The Net Delusion: How Not to Liberate the World* offers a blistering critique of the digital or cyber-utopianism and net-centrism involved in concepts such as Internet freedom. Morozov points to the twin developments of commodification and control that have increasingly defined the experience of the Internet and questions our too easily made assumptions regarding the Internet and its connections with democratization. He is particularly keen to widen our view to examine also how those in the West are implicated in reducing Internet freedoms. He states:

> The West has been slow to discover that the fight for democracy wasn’t won back in 1989. For two decades it has been resting on its laurels, expecting that Starbucks, MTV and Google will do the rest just fine. Such a laissez-faire approach to democratization has proved rather toothless against resurgent authoritarianism, which has masterfully adapted to this new, highly globalized world. Today’s authoritarianism is of the hedonism- and consumerism-friendly kind.

Morozov is critical of what he sees as a simplistic analysis of the Internet’s role in increasing freedom and of the ways in which its significance in terms of political freedoms has been increasingly hitched to corporate interest and the dominance of certain Internet platforms such as Facebook and Twitter. He offers the following shorthand as illustration of the broader point: ‘The Freedom Agenda is out; the Twitter Agenda is in.’ Morozov warns of the naivety involved in the popular idea that the development and spread of the Internet must lead to better outcomes in terms of political freedoms. He is also sceptical of the UN’s efforts to harness and package the Internet and information technologies as a means of self-reform: ‘Cyber-utopians ambitiously set out to build a new and improved United Nations, only to end up with a digital Cirque du Soleil.’

It is not that Morozov refuses to see potential in the Internet, rather he is critical of the ways in which a net freedom agenda both in the USA and within the international community has been accepted rather uncritically without deeper consideration of accompanying possibilities of propaganda, surveillance and censorship. He argues, however, against going to another extreme, that of ‘digital defeatism’. Such views coming in 2011 have proved remarkably prescient, but his tone of relentless critique

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81 For reasons of space, I focus here on the strands of his arguments relating to internet freedom. In this and subsequent work, Morozov offers a wide-ranging critique of the hypocrisies involved in much policy making regarding the Internet and of efforts to simplistically link the Internet to democratic reforms. Morozov, *The Net Delusion*, supra note 1; cf. Morozov, *To Save Everything, Click Here*, supra note 1.

82 Morozov, *The Net Delusion*, supra note 1, at ix.

83 Ibid., at xii.

84 Ibid., at xiii.

85 Ibid., at xv.
and cynicism perhaps does go too far. There is a danger that his powerful critical insights themselves may stray into the territory of rhetoric and over-simplification. His argument is also couched in the familiar terms of realism as a tonic against the temptations of cyber-utopianism and its related philosophy of action – Internet-centrism – which Morozov sees as framing questions regarding democracy not according to context and political realities but, rather, in terms of an Internet-related solution. To do so, he wagers, involves failing to appreciate ‘the highly political nature of technology’. 86

Morozov offers a critique of the easy assumptions made about the power of social media and online interactions in terms of focusing and facilitating movements for social change such as in the Arab Spring, but links such understandings in foreign policy to earlier efforts to harness media and culture for the purposes of public diplomacy during the Cold War era. 87 He warns against ‘unthinking glorification of digital activism’, which risks confusion of ‘priorities with capabilities’ and reinforces a certain utilitarianism as ‘clicktivism’. 88

In an early chapter entitled ‘Texting Like It’s 1989’, Morozov focuses on Secretary of State Clinton’s remarks on Internet freedom, as analysed earlier, and acknowledges that this was a seminal moment and a shift in the development of the notion of Internet freedom and its foreign policy significance. Morozov also points to the disturbing revisionism involved in linking Internet freedom with Cold War rhetoric, reflecting caustically that, ‘[c]xcessive optimism and empty McKinsey-speak aside, it was Clinton’s creative use of recent history that really stood out’. 89 He also argues that indulging in nostalgic and reductive metaphors of Internet firewalls as the new Berlin wall, risks underestimating the sophistication of practices of Internet control and censorship in China and elsewhere. 90 It further risks conflating the interests of an international community with the rather more parochial foreign policy concerns of the powerful.

In a chapter entitled ‘Open Networks, Narrow Minds: Cultural Contradictions of Internet Freedom’, Morozov looks at the repressive potential of many laws regarding the Internet within the West. In doing so, he highlights the censorship conducted by the private sector and its own regulatory power in developing terms of service, norms and practices surrounding the filtering and removal of certain content online. Governments are simply often not able to undertake the complex task of regulation of the Internet, which has left private companies with both a regulatory burden and power. 91 Intermediaries such as Google, You Tube and Facebook have achieved a dominance that, in practical terms, means that digital activists are bound to engage with these mechanisms if they seek global audiences. An example here is the human rights community’s reliance on You Tube, Facebook, Twitter and other commercial operators after an initial wave of independent sites failed to compete for attention.

86 Ibid., at xv–xvii.
87 Ibid., ch. 1 ‘The Google Doctrine’, ch. 7 ‘Why Kierkegaard Hates Slucktivism’.
88 Ibid., at 196–201.
89 Ibid., at 34.
90 Ibid., at 45.
91 Ibid., at 223.
This inevitably engages private interests in public decision making around content that is arguably offensive, political or at least contested. According to Morozov, these problems with Internet freedom need to be addressed in Silicon Valley as well as on the streets. He also points to the tensions between protecting certain forms of anonymity where they might be conducive to political and communicative freedoms, while facing up to the growth of cybercrime and its use of technologies of anonymity to avoid scrutiny and detection. Perhaps, after all, we would not wish to have a totally free Internet?

The problem is that Internet freedom can mean different things to different people, as can its exceptions cast in terms of security and terror. Morozov warns of the ‘cost of building government policy around highly ambiguous terms and then choosing to use them in completely different contexts’. Perhaps this is where the juridification of a concept such as Internet freedom and its analysis and development in human rights terms may prove more useful than Morozov appears to think. Just as the argument for free speech has been deployed in ambiguous, conflictual and contradictory ways, greater attention to its philosophical foundations and to its content in the human rights jurisprudence has offered certain benefits and a line of authoritative, if not always coherent, decision making in a contentious area of human rights adjudication. Such juridification has come at the expense of wider political understandings of the significance of speech, but it does provide one relevant framework and discourse for the resolution of disputes regarding expression. Perhaps we should not be too quick to dismiss Internet freedom as a human right after all.

Morozov is right, however, to point to the difficulties in terms of defending Internet freedom, on the one hand, while condoning and engaging in interference with and surveillance of sites that the West does not like, on the other. In doing so, he assists in pointing to the inherent pathologies of Internet freedom, and he concludes that in its current form ‘the Internet freedom agenda looks more like a marketing ploy’. Furthermore, he argues that all of the talk and positioning surrounding Internet freedom has led to increased governmental supervision and control of digital spaces for activism and expression, all with detrimental consequences in human rights terms.

The problem with Morozov’s critique is that he is uncertain as to what to replace Internet freedom with. In the concluding pages of his book, Morozov offers a rather vague sketch of what he sees as preferable – ‘cyber-realism’. To merely substitute idealism for realism at the end of his polemic seems to make his otherwise usefully critical insights less attractive although the turn to realism and a strain of pragmatism within the field of human rights is familiar (though not without its own critics).

By contrast, Jaron Lanier is an American theorist of technology, who has been involved in pioneering the development of virtual reality. His 2011 manifesto, You Are
Not A Gadget, provides a further critical, though perhaps more hopeful, lens for analysing the Internet. While his work engages less directly than Morozov’s with the debate over Internet freedom in human rights or foreign policy terms, Lanier advocates powerfully for a humanistic understanding of technology. He is concerned that free culture may actually be the undoing of the creative and culture industries and that digital forms may threaten as well as enhance individual and collective experience and exchange of knowledge and information. He writes that ‘[t]he frenetic energy of the original flowering of the web has reappeared in a new generation, but there is a new brittleness to the types of connection people make online. This is a side effect of the illusion that digital representations can capture much about actual human relationships.’ In part, this is an argument for a human-centred approach to technology, but Lanier is more forgiving of the role of the market in protecting intellectual property and establishing economic foundations for the media and culture industries than might be expected. Lanier is both a Silicon Valley insider and a deeply eccentric visionary whose politics are rooted in a mix of counterculture, romantic humanism and Internet-based entrepreneurial capitalism – perhaps, again, a very American blend of contemporary left politics?

Lanier offers a technology-specific approach to theorizing human rights and Internet freedom by emphasizing the human dimension of technology. He argues: ‘It is only human choice that makes the human world function’, and he is concerned with efforts to replace choice with technology. Lanier is attentive to the need to understand the ideological contours of debates regarding technology and argues that technology should be seen not as an end or good but, rather, as a tool with which to achieve the ends we desire. He presciently warns of several dangers in framing and implementing an information society including reductionism, inattention to architectural effects and over-simplification of complexity: ‘Information systems need to have information in order to run, but information underrepresents reality. Demand more from information than it can give, and you end up with monstrous designs.’

Lanier argues for a people not software-centred approach to the development of the digital environment. This argument comes from someone who knows and develops software and who is attuned to the ways in which its design can entrench both positive and negative outcomes. Lanier’s diagnosis is that the digital world has become shaped by a dominant ideology that he terms ‘cybernetic totalism’ and that this has led to failure on both the spiritual and behavioural level. Spiritually, the danger is that we invest hope in gadgets rather than in people and that we lose sight of the human in fixating upon ideas of a unitary information system with a preference for anonymity and the crowd. Lanier is also concerned that free culture in fact will deliver economic ruin for many while promising the false hope of getting lucky in the new digital economy.

98 Again for reasons of time and space, I am only able to address the key concerns in this text. Lanier, You Are Not a Gadget, supra note 1; see further Lanier, Who Owns the Future?, supra note 1.
99 Lanier, You Are Not a Gadget, supra note 1, at 71.
100 Ibid., at 107.
101 Ibid., at 69.
102 Ibid., at 75.
Lanier points to a flatness in developing global networks that will endanger diversity and creativity, replacing individual expression with a rather bland, if open, form of Wiki-style collective knowledge.\textsuperscript{103} His remedy relies also in part on a certain understanding of realism that is located in adopting a pragmatic approach to computationalism.\textsuperscript{104} He argues that while computationalism does not itself give people a special place, we should use this methodology creatively and speculatively in our efforts to grapple with complexity – in essence, he points to a new digital humanism, including exploration of post symbolic forms of communication.\textsuperscript{105}

Jaron Lanier’s work is esoteric and not fully developed, but it provides powerful insights in relation to the human and ideological dimensions of technology. He warns that ‘[p]eople will accept ideas presented in technological form that would be abhorrent in any other form’.\textsuperscript{106} While the idea of Internet freedom is problematic from a variety of perspectives, it also has power and potential in human rights terms along these humanistic lines. Lanier’s attention to some positives in the commodification of the culture industries and his scepticism regarding free culture and the open source tribe are also valuable reminders that the dichotomies that shape the Internet – public/private, commodified/free, speech/violation – demand unpacking, for they each have value and harm and increasingly blend in unanticipated ways.

The message is important: the medium of the Internet is a part of its meaning, but, for Lanier, the authors, not the mechanisms for expression and publication, are what are ultimately significant and should be valued. In his own way then, Lanier partly points to the benefits of grounding ideas of Internet freedom within a human-centred, if not specifically human rights, framework that is technologically literate but focused on human flourishing and protection of distinctiveness. The Internet may be one of many technologies of freedom, but it can also flatten the wealth of human experience and harm human rights to expression and privacy if technology itself is mistaken for freedom.

\section*{5 Conclusion}

Internet freedom deserves a critical reception, but if taken seriously and given deeper analysis and meaning, it might yet prove to be a significant and even rather dangerous idea. For some, it may be too early to make a call as to whether there is recognition of a human right of Internet freedom.\textsuperscript{107} Nevertheless, this article has attempted to take the notion of Internet freedom seriously and to chart its lineage through earlier debates over Internet regulation, an information society, the right to communicate and also freedom of expression more generally. In doing so, I have pointed to the need...

\textsuperscript{103} Ibid., ch. 9–11.
\textsuperscript{104} Ibid., at 157, ch. 12.
\textsuperscript{105} Ibid., at 177–178, 190–192.
\textsuperscript{106} Ibid., at 48.
\textsuperscript{107} For a more doctrinal approach to this question, which is in agreement on this aspect, see Tully, ‘A Human Right to Access the Internet? Problems and Prospects’, 14 \textit{Human Rights Law Review} (2014) 175, at 194–195.
to appreciate that Internet freedom – with its concerns regarding access, speech and participation – may build on traditional conceptions of freedom of expression, but requires different thinking and, ultimately, will require a different box, given the paradigm shift that the Internet represents in terms of communications technology.

Underlying these debates over the Internet and human rights are deeper divisions regarding the nature of political freedoms and the ways in which a human rights framework can, or should, help to shape, frame and even protect such freedoms. Processes of juridification, even those involving human rights advocacy, can of course have harmful, as well as beneficial, consequences. As Morozov and Lanier illustrate, so too can the Internet itself. But neither is static in form or effect.

Technology has helped to shape our experience of the world and has played its own role in shaping consciousness and understandings of human rights. The Internet is having an impact in this regard, but its effects are complex. The challenge for human rights jurisprudence and discourse is not only to bring both stability and a coherent framework to bear upon such complexities but also to adapt to them. In one critical respect, the concept of Internet freedom and the discourse of human rights share common ground – both are objects for critique and yet are also themselves critical tools.

The Internet is typically presented as futuristic, though in fact it may already be old technology. But in the shock of the new already old, there are familiar themes resonating in the debates over Internet freedom – themes that can be traced to the rise of the telegraph, to subsequent debates over the power of television, and through to the Cold War and its aftermath. Internet freedom may not yet be recognized as a human right, but these debates will help to shape future understanding of the significance of Internet freedom, both in terms of freedom of expression and on its own account. Most significantly, Internet freedom draws into view the importance of access and participation when translating traditional human rights conceptions of freedom of expression into digital and online contexts. It also points to the potential limitations of traditional freedom of expression jurisprudence when stretched to adapt to the context of the Internet and its myriad interactions, both beneficial and harmful.