INTERNET GOVERNANCE AND THE RESPONSIBILITY OF INTERNET SERVICE PROVIDERS

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I. INTRODUCTION[1]

Once upon a time, the Internet was hailed to be the ideal public sphere, where unfettered discussion could take place.[2] In the twenty-first century, however, the dreams have been sadly dashed. The cautionary tale is that the seemingly safest forum is also one of the most intrusive and dangerous places. Governments in various countries have by now developed powerful surveillance devices to trace the contents of communications and discover the identity of users.

Professor William Staples noted that the Internet is quickly becoming "much like the rest of social life," and "netizens"[3] actually live in "gated communities."[4] Yet this tight grip of the Internet could not have been achieved without the help of Internet service providers ("ISPs"). The companies whose activity is to provide access for the

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1 Some basic ideas of this paper were presented at the Fiftieth IAMCR-Conference in Paris on July 24, 2007. Generous and valuable support to this paper stems from lic. iur. Mirina Grosz, research assistant at the University of Zurich (Switzerland). The paper has also benefited from the comments of Professor Chin Leng Lim at the Department of Law, the University of Hong Kong.

2 *See* PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 232-33 (2001). *But see* Jason Lacharite, *Electronic Decentralisation in China: A Critical Analysis of Internet Filtering Policies in the People's Republic of China*, 37 AUSTL. J. POL. SCI. 333, 333-46 (2002) (describing limitations on unfettered access).

3 "Netizens" is a term used by Internet users to describe citizens of the Internet "who utilize the networks from their home, workplace, or school (among other places)." Wikipedia, the Free Encyclopedia, Netizen, http://en.wikipedia.org/wiki/Netizen (last visited Mar. 24, 2006).

4 WILLIAM G. STAPLES, EVERYDAY SURVEILLANCE 130 (2000).

public to communication services turn out to be powerful gatekeepers, storing the trail of data left by any users passing their "tollbooths."[5]

In 2002, these efficient and centralized points of control have attracted more than forty countries, from Western democracies to far Eastern regimes which restrict their citizens' Internet surfing capabilities at the level of ISPs.[6] The scope of regulated activities range from seemingly justified reasons of national security, anti-terrorism activity, and child pornography, to the minute details of one's sexual orientation.[7] In the Internet world, one's thoughts and expressions can be easily traced and documented by the state authorities, and their efforts often go hand in hand with ISPs' cooperation.[8] Not only can ISPs filter or censor information, but some of them are also—willingly or unwillingly—informers of governments, facing an increasing number of requests from the authorities to filter information, retain data, and reveal the identities of users.[9]

The definitive role that ISPs play in molding the democratic or counter-democratic culture on the Internet renders them comparable to, or even more powerful than, state institutions. After all, few can afford the huge resources that are needed to be qualified as an Internet giant, and few can master the delicate skills required to secure the licence from the authorities. In addition, only a handful of Internet companies can possess the power to offer online services in the steady trend towards global mergers. In stark contrast, all users must go through an ISP before going online. Due to the setup of the Internet, the ISPs are forced into the powerful and influential task of secret police and ready-made surveillance centers. America Online ("AOL"), Microsoft Network ("MSN"), and Earthlink accounted for approximately 43 percent of the U.S. Internet market in 2000,[10] while the five most frequently visited

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[5] Christof Demont-Heinrich, *Central Points of Control and Surveillance on a "Decentralized" Net*, INFO, Iss. 4, 2002, at.32, 33.

[6] *Id.*

[7] *See, e.g.*, Catherine Crump, *Data Retention: Privacy, Anonymity, and Accountability Online*, 56 STAN. L. REV. 191 (2003) (discussing attempts to counter terrorism through Internet controls); Mark Elmore, *Big Brother Where Art Thou, Electronic Surveillance and the Internet: Carving Away Fourth Amendment Privacy Protections*, 32 TEX. TECH L. REV. 1053 (2001) (discussing attempts to address Internet pornography).

[8] Demont-Heinrich, *supra* note 5, at 33.

[9] *See* Ronald J. Deibert & Nart Villeneuve, *Firewalls and Power: An Overview of Global State Censorship of the Internet*, *in* HUMAN RIGHTS IN THE DIGITAL AGE 111, 115 (Mathias Klang & Andrew Murray eds., 2004); *see also* discussion *infra* Part II.B.

[10] Demont-Heinrich, *supra* note 5, at 34.

websites in China in 2005 included Sina.com and Yahoo!.[11] One can easily imagine the devastating consequences if ISPs agree to be government auxiliaries to create a controlled environment. They are in a position to provide systematic account and evidence of one's activities and expressions, mercilessly exposing one's thoughts and piercing the veil of users' anonymity. Hence, ISP's power and status call for careful consideration and clarification.

Facing this alarming problem, efforts have been made by various scholars and politicians to impose human rights responsibility on ISPs, as non-state actors, in order to uphold the standard of freedom of expression.[12] This, however, proves to be an uphill battle. At the mercy of ISPs, the exposure of Internet users in having their communications transmitted is mainly due to the fact that the legal relations between users and ISPs are governed by private law provisions.[13] In contrast, the human right of freedom of expression is traditionally understood as a right directed against activities of governmental bodies, yet the state is considered to be the protector and guarantor of human rights.[14] In light of the dominating position of ISPs in Internet traffic, the question arises whether such an understanding is still appropriate. Indeed, international law is evolving with a shift of focus from state actors to the activities of business enterprises, especially transnational corporations.[15] At this juncture, one cannot help but ask to what extent it would be justified to apply freedom of expression standards against ISPs. Should human rights at least have an indirect impact on the legal position of dominant ISPs?

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[11] *See* Kevin J. Delaney, *Yahoo to Outline Stance on Privacy, Free Speech*, WALL ST. J. ASIA (Hong Kong), Feb. 14, 2006, at 4 (discussing Yahoo's response to China's requests for personal information).

[12] For example, the OpenNet Initiative Project, a collaborative partnership between the Citizen Lab at the Munk Centre for International Studies, University of Toronto, Berkman Center for Internet & Society at Harvard Law School, and the Cambridge Security Programme at the University of Cambridge, is a group of scholars advocating for free speech on the Internet. *See* OpenNet Initiative, About ONI, http://opennet.net/about (last visited May 11, 2008). Another example is the Berkman Center for Internet & Society at Harvard Law School. *See* Berkman Center, About, http://cyber.law.harvard.edu/about (last visited May 11, 2008).

[13] As ISPs are non-state actors, they are governed by private law. *See* discussion *infra* Part III.A.

[14] *See* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 84 (2003).

[15] *See* The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 3, 10, 14 -16, 19, *delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter *UN Report on Human Rights*]; *see also* discussion *infra* Part II.D.

This article aims to answer the above questions in light of the new, emerging legal and social order of the Internet. After mapping the extensive role that ISPs play in regulating the Internet as both censors and informers across the world in Part II of this paper, Part III will outline the emerging trend in international human rights jurisprudence, as well as national approaches to impose responsibility on non-state actors and transnational corporations in particular. Drawing on international human rights jurisprudence on freedom of expression, Part IV is an exploration of new initiatives and attempts to hold transnational corporations accountable for privacy and freedom of expression violations. In particular, it focuses on two recent cases of litigation concerning Chinese users against Yahoo! in Hong Kong and the United States, respectively. Discussion on the European Commission's guidelines on ISPs' disclosure of personal data and the U.S. Global Online Freedom Act of 2006 and 2007 will also be included. This article argues that in consideration of the degree of knowledge that ISPs possess and the material contribution that they have provided to assist the authorities in censoring or tracking information, they should be subject to international human rights standards.[16]

II. THE INVISIBLE MAN WORKING UNDER THE INVISIBLE HAND

As previously mentioned, the triumph of technology has pushed open the door of the cyberworld to many. It enables netizens to access the Internet and allows them to afford anonymity in the virtual world. As of March 19, 2007, 16.9 percent of the world's 6.6 billion people have become netizens.[17] In other words, 1.1 billion of the world's population are online and almost one in five people on this planet have high-speed lines.[18] Seemingly, this has fulfilled the promise of the Internet at its inception in 1969 to be an open and robust platform for the exchange of

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[16] The focus of this paper is largely on freedom of expression violations rather than privacy interference by ISPs. This is largely due to the fluid nature on the concept of privacy, for which an internationally agreed-upon standard has yet to be reached.

[17] World Internet Usage Statistics News and Population Stats, http://www.internetworldstats.com/stats.htm (last visited Mar. 11, 2008).

[18] Richard Wray, *China Overtaking US for Fast Internet Access as Africa Gets Left Behind*, GUARDIAN (London), June 14, 2007, *available at* http://www.guardian.co.uk/money/2007/jun/14/internetphonesbroadband.digitalmedia.

ideas.[19] It provided capacity for leverage,[20] adaptability, accessibility, ease for mastery, and generativity.[21] The utopian dream for the Internet was to be a place that knew no boundaries, where no sovereign ever reigned.[22] Netizens hurriedly acquired the status of bloggers,[23] citizen journalists,[24] and online publishers. In this space, anonymity and freedom of expression seemed to be safely guarded. One could be a hero or a villain, could roam around being invisible, or be forever in the limelight, just as one desired.

Yet, the days of euphoria were short lived. In 1999, Professor Lawrence Lessig sounded the alarm and foretold that the cyberworld, despite its apparent promise of freedom, would be a place most highly regulated.[25] In particular, he warned of the pairing of the government and commerce to be an invisible hand "constructing an architecture that perfects control—an architecture that makes possible highly efficient regulation."[26] Seven years later, Lessig confirmed his view that the Internet has proved to be the "most regulable space that man has ever known."[27]

With the single will of authorities and the simple reign of black letter law, control of the Internet is both impossible and impractical. The bitter irony in this story of the downfall of Internet democracy is that the companies that were once forerunners of Internet freedom turn out to be producers of technologies that facilitate regulation. The once best and brightest of Silicon Valley who wired the world, are today doing the

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[19] Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1975 (2006).

[20] What Zittrain means by providing capacity for leverage is that the Internet protocols can solve difficult problems of data distribution and enable cheaper implementation of network-aware services. *Id.* at 1981, 1987.

[21] *Id.* "Generativity" refers to the ability of users to generate new, valuable uses that are easy to distribute and in themselves can be future sources of innovation.

[22] *See* NORRIS, *supra* note 2, *passim*.

[23] As of May 2007, the San Francisco-based blog tracking company, Technocrati, estimated that there were at least 73.4 million blogs worldwide, not counting several million other blogs written in non English. In China alone, it is believed that there are more than 30 million blogs. China's Bloggers Investigative Report, http://www.chinagateway.com.cn/images/ch/blog/index.htm (last visited Mar. 24, 2008) (translation by the author).

[24] One example is Media Bloggers Association, which is dedicated to promote, protect, and educate its members to the development of citizen journalism as a distinct form of media. *See* Media Bloggers Association, About, http://www.mediabloggers.org/about (last visited May 4, 2008).

[25] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (1999).

[26] *Id.*

[27] LAWRENCE LESSIG, CODE VERSION 2.0, at 38 (2006).

exact opposite, intentionally or unintentionally.[28] Lessig has provided numerous telling examples of how these high tech companies end up being on the side of the regulators.[29] Some do it out of their own business concerns,[30] while others are lured by the economic incentives provided by their governments;[31] at other times, they are ordered by the ruling regimes.[32] Regardless of the process or the outcome, indisputably, ISPs have become the most important and obvious target of focal points of Internet control.[33] The decentralized legacy of the Internet has been replaced by efficient ISPs that can provide systematic monitoring to filter and hand in prized data to the authorities.

A. ISPs AS CENSORS

The Internet is well known for allowing massive information flows through its super highway. Any form of censorship or disruption of information flow runs contradictory to an open Net; however, Professor John Palfrey and law graduate, Robert Rogoyski, pointed out, that in the past decades there has been a gradual change of the techno-political culture of the Internet from a cheap, effective, and global distribution network to a state driven regulated entity. [34] This is partly due to the shared concerns of many countries to exert control over the information flow for various compelling state reasons; however, the targets that are subject to regulation have changed.[35] Rather than holding the actual speakers or writers to be legally liable for uttering or

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[28] Ronald Deibert, *The Geopolitics of Asian Cyberspace*, FAR E. ECON. REV., Dec. 2006, http://www.feer.com/articles1/2006/0612/free/p022.html (subscription required). These include Microsoft, Cisco, Yahoo!, Skype, and Google. *Id.*

[29] LESSIG, *supra* note 27, at 47-60.

[30] For example, Cyril Houri was inspired to develop IP mapping technology due to his own business interest of serving relevant advertisements to users no matter where they are. This technology was quickly used to trace the location and where about of the user. *Id.* at 58.

[31] A notorious example is that Google provides a sanitized version of its search results to the citizens of the People's Republic of China. *Id.* at 80.

[32] For instance, the German and French governments have insisted that search engine companies, like Google, to filter search results to Nazi propaganda. *See* Jonathan Zittrain and John Palfrey, *Reluctant Gatekeepers: Corporate Ethics on a Filtered Internet, in* Access Denied 103, 108-9 (Ronald Deibert et al. eds., 2008).

[33] Jack Goldsmith & Timothy Wu, *Digital Borders*, LEGAL AFF., Jan./Feb. 2006, at 40, 44.

[34] John G. Palfrey, Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of "Harmful" Speech to Network Neutrality*, 21 WASH. U. J.L. & POL'Y 31 (2006).

[35] *See* OpenNet Initiative, Global Internet Filtering Map, http://map.opennet.net/ (identifying countries that partake in filtering on the internet); *see also* Deibert & Villeneuve, *supra* note 9, at 121-22.

expressing offensive speech,[36] the intermediary carriers in the Internet age who have no actual knowledge of the content may also be liable.[37] Their culpability is closely linked to the architectural design of the Internet that enables control to move from end-to-end law enforcement to an intermediate stage of information restriction.[38] As a result, intermediaries are enlisted to block or to inspect packets of information.[39]

From the perspective of the states, ISPs are likely to provide effective, efficient, and economic means of control. From the perspective of ISPs, the corporations find themselves enforcing rules in jurisdictions in which they are doing business and whose views on freedom of expression may be entirely different from their home countries.[40] Thereby, the commercial filtering products are mainly developed by U.S. corporations.

The reasons for blocking are often vague and political, but the unintended and inevitable consequence is over-filtering. When ISPs are required to filter objectionable materials by the respective governments, they often have to respond quickly and will adopt the cheapest means to do so, resorting to filtering by IP address.[41] Nart Villeneuve, director of Technology Research at the Citizen Lab of the University of Toronto, explains that routers have the built-in capacity to block IP addresses with the consequence that all sites hosted on that server will be blocked too.[42] As many thousands of sites are often hosted on a server at a single IP

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[36] In English common law, the actual speaker of offensive speech is generally held liable. Disseminators of objectionable speech may also be liable though the standard is different and defences are available. For example, in the area of defamation, both the producer of the original libel and the disseminator may be liable, though the latter can plead the defence of innocent dissemination depending much on state of mind. *See* MICHAEL JONES, TEXTBOOK ON TORTS 508 (7th ed. 2000). In the area of disclosure of official secrets, the spy who disclosed the original speaker was liable but the newspapers which had reproduced part of the objectionable content escaped liability on the ground of public interest. Observer & Guardian v. United Kingdom, 14 Eur. H. R. Rep. 153 (1991).

[37] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1501 (15th ed. 2004).

[38] Palfrey & Rogoyski, *supra* note 34, at 31.

[39] *See id.*

[40] Tunisia and the Kingdom of Saudi Arabia use filtering technology provided by Secure Computing. Burma uses Fortinet and Yemen uses Websense to block access to politically sensitive materials on the Internet. Iran delegates filtering responsibility to ISPs and each will select its own technology. The primary ISP in Iran uses Secure Computing, while another one uses Websense. *See* Deibert, *supra* note 28; Nart Villeneuve, *The Filtering Matrix: Integrated Mechanisms of Information Control and the Demarcation of Borders in Cyberspace*, FIRST MONDAY, Jan. 4, 2006, http://firstmonday.org/issues/issue11_1/villeneuve/index.html.

[41] Villeneuve, *supra* note 40.

[42] *Id.*

address, unrelated web sites will also be blocked in the filtering process.[43] For instance, South Korean ISPs were required to block thirty-one web sites by the authorities, but in choosing to block by IP address, 3,167 unrelated domain names hosted on the same servers were blocked as well.[44] This problem of over-blocking and ISPs' refusal to carry packets is described by Zittrain as a crude form of Internet discipline, amounting to a form of "Internet death penalty."[45]

Since collateral filtering may be unintended, one of the consequences of over-blocking is that the ruling authorities may not even know what has actually been filtered because commercial companies who have the technical know-how to become the ultimate decision makers. In addition, the commercial lists of blocking, specifying how domains and URLs are both categorized and added to block lists, are seen as the commercial property of the filtering companies and ISPs, to which the public cannot have access.[46] In this sense, ISPs are no longer mere conduits or neutral intermediary carriers.

Besides filtering information, ISPs have assisted the governments in other ways. In 1995, the German Government requested CompuServe to remove porn sites from its servers.[47] After an initial objection, CompuServe devised a technology to filter content on a country-by-country basis.[48] In 2001, at the request of the French and German governments, Google removed pro-Nazi and racist sites from search results in its localized search engine.[49] Though the governments did not explicitly require blocking access to those websites, this removal had narrowed the choice of users, rendering its own role to be a "quasi-filter."[50] Since 2004, in China, Google has been notorious for its

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[43] *Id.*

[44] *See id.* In India, the authorities required ISPs to block a specific Yahoo! Group named *kynhun*, but the entire groups.yahoo.com domain was blocked resulting in many thousands of Yahoo! Groups becoming inaccessible to Internet users in India. *Id.* When Morocco tried to block five sites that promote independence for Western Sahara, it resulted in the blockage of at least 2,287 domains. *Id.* Similarly, in Canada, six hundred unrelated Web sites were blocked when Telus, a major ISP, attempted to block a site set up by workers on strike against the Telecommunications Workers Union. *Id.*

[45] Zittrain was mainly describing the situation of Internet pornography regulation in the US. *See* Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003).

[46] *See* Villeneuve, *supra* note 40.

[47] LESSIG, *supra* note 27, at 39.

[48] *Id.*

[49] OPENNET INITIATIVE, A STARTING POINT: LEGAL IMPLICATIONS OF INTERNET FILTERING 5 (Sept. 2004), *available at* http://opennet.net/docs/Legal_Implications.pdf.

[50] *Id.*

sanitized version of search results.[51] A search request for the Tiananmen Student Movement at Google.com would yield pictures of rolling tanks, whereas only smiling faces of passers-by would pop up at Google.com.cn.[52] While Google did not deny banning certain sensitive sites, it claimed that this policy was to improve the quality and efficiency of its search engine because including government banned sites would only damage user interface experience.[53] The objection made to this defense was that Google should at least have informed its users by flagging the blocked pages; however, the company explained that its users in China would feel frustrated just seeing results and links but being prevented from clicking through to the actual pages.[54] Without knowing what has been filtered and the alternatives available, users are said to be complacent under this practice of "digital deceit," without realizing that they are living in different cyber geo-zones under unjust barriers.[55]

In brief, the different filtering regimes are unlikely to specify their criteria of censorship. In addition, when commercial filtering technology and block lists are seen as the intellectual property of the manufacturer, the chance of challenge is minimal. Thus, the vague and arbitrary practice of ISPs, and its lack of transparency, rules out the possibility of accountability. This practice of secret censorship in broadly restricting access to the Internet necessarily means that the ISPs are in fact determining who can be online, what can be viewed, and who can say what is on a formerly free-for-all medium.

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[51] Google adopted this policy in October 2004. *See The Electronic Kowtow*, ASIAN WALL ST. J., June 15, 2005, at A11. Sites that are censored by Google include *The Epoch Times* and Dynamic Internet Technology. *The Epoch Times* is closely related to the spiritual group, Falun Gong, which is banned in China and condemned as an evil cult. *See* Simon Thomas, *Keep Searching: The Epoch Times Not Welcome on Google*, EPOCH TIMES, Sept. 25, 2004, http://www.theepochtimes.com/news/4-9-25/23439.html. Dynamic Internet Technology is an American company that provides technology for circumventing internet restrictions in China. *See* Will Knight, *Google Omits Controversial News Stories in China*, NEWSCIENTIST.COM, Sept. 21, 2004, http://www.newscientist.com (subscription required).

[52] *See* http://images.google.com/ (search "Tiananmen Square") (displaying rolling tank images); *cf.* http://images.google.com.cn (search "Tiananmen Square") (displaying fewer violent images to Chinese users of Google).

[53] Simon English, *Google Accused of Aiding Chinese Censors*, DAILY TELEGRAPH (London), Sept. 27, 2004, at 27.

[54] *See id.*

[55] Diebert, *supra* note 28.

B. THE BETRAYAL: ISPs AS INFORMERS

More troubling than acting as censors, ISPs are encouraged to be informers or the "secret police" of the Internet. One notorious story concerns Yahoo!, which turned over information about the Chinese journalist, Shi Tao, to the Chinese authorities.[56]

Shi Tao might have thought that he was being both clever and cautious enough by using an anonymous identity to send email through Yahoo!;[57] however, in 2004, this thirty-seven-year-old journalist who headed the Editorial Department of the Hunan's Contemporary Business News, learned his lesson the hard way.[58] His normal life came to an abrupt halt when he was arrested in April 2004, charged with the offence of illegally providing state secrets outside the country in violation of Article 110 of the Criminal Code of the People's Republic of China ("PRC").[59] On April 30, 2005, Shi was sentenced to ten years imprisonment.[60]

What he had disclosed in April 2004 was the content of "A Notice Regarding Current Stabilizing Work" in the PRC to the "Asia Democracy Foundation" in New York.[61] The document was classified as "top secret" by the authorities.[62] The content of the document essentially warned journalists of the dangers of social destabilization and risks resulting from the return of certain dissidents on the fifteenth anniversary of the crackdown of the Tiananmen Student Movement in 1989.[63] The account holder's information, which described the IP address, the corresponding user information, Shi Tao's telephone number, and the

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[56] *See* Human Rights in China, HRIC Case Highlight: Shi Tao and Yahoo, http://www.hrichina.org/public/highlight (summarizing Shi Tao's case) (last visited May 6, 2008).

[57] Changsha People's Procuratorate of Hunan Province v. Shi Tao (Changsha Interm. People's Ct. of Hunan Province, Apr. 27, 2005), *translated in* Case No. 19-10, at 29, http://www.globalvoicesonline.org/wp-content/ShiTao_verdict.pdf [hereinafter Shi Tao verdict].

[58] *Id.* at 32.

[59] *Id.* at 28-29.

[60] *Id.* at 32. In the judgment, it was revealed that Shi used his anonymous personal email account of huoyan-1989@yahoo.com.cn to send the notes. He identified himself as "198964." *Id.* at 29.

[61] *Id.* at 29.

[62] *Id.* However, it is commonly known in China that many "top secrets" of the government are in fact open secrets.

[63] HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM:" CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 107-08 app. III (2006), *available at* http://www.hrw.org/reports/2006/china0806/index.htm (follow hyperlink after "Download PDF file) (including a link to a copy of the email Shi Tao sent to the Asia Democracy Foundation, http://cdjp.org/archives/gb/529.html).

location of his terminal, was furnished by Yahoo! (Holdings) Hong Kong Ltd. ("Yahoo! (HK)") to the Mainland authorities.[64]

Many, including Amnesty International and Reporters without Borders, accused Yahoo! of helping the authorities to convict a political dissident.[65] Facing mounting pressure from the public, Yahoo! defended itself, stating that it had not betrayed its users, but that it had to operate within the law, regulations, and customs of the country in which it is based or else it would have no alternative but to leave the country.[66] This is hardly convincing. Yahoo! was seen as rolling over too quickly to the authorities without even asking what legal responsibility was imposed on it.[67] U.S. Congressman Christopher Smith likened Yahoo!'s response to a situation where the German secret police were searching for Anne Frank, and Yahoo! immediately gave her location.[68] One blogger angrily retorted that Yahoo!'s feeble explanation was in fact saying that in order to be legal, one had to be evil.[69] The further complexity and difficulty of this case based on the fact that the culprit Yahoo! is an international firm based in the United States who runs its business in mainland China[70] under Yahoo! China. The latter in turn is a subsidiary of Yahoo! (HK).[71] This raises the issue of possible liability of the U.S. company as a transnational corporation.

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[64] Changsha People's Procuratorate of Hunan Province v. Shi Tao, *supra* note 57, at 31.

[65] Amnesty Int'l, *China: Yahoo's Responsibility Towards Human Rights: Free Shi Tao from Prison in China!*, Jan. 31, 2006, at 1, http://www.amnesty.org/en/report/info/ASA17/003/2006 (follow "PDF" hyperlink); Reporters Without Borders, *Information Supplied by Yahoo! Helped Journalist Shi Tao Get 10 Years in Prison*, Sept. 6, 2005, http://www.rsf.org/print.php3?id_article=14884.

[66] *The Internet in China: A Tool for Freedom or Suppression?: Joint Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations and the Subcomm. on Asia and the Pacific of the Comm. on International Relations*, 109th Cong. 55, 58-59 (2006) [hereinafter *Joint Hearing on the Internet in China*] (statement of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.), *available at* http://www.foreignaffairs.house.gov/archives/109/26075.pdf.

[67] Letter from the Foreign Correspondents' Club, Hong Kong, to Pauline Wong, Head of Marketing, Yahoo! Holdings Hong Kong Limited (Feb. 18, 2006), *available at* http://www.fcchk.org/media/FCCtoYahoo.htm.

[68] *Joint Hearing on the Internet in China*, *supra* note 66, at 5 (statement of Congressman Christopher Smith).

[69] Posting of Rebecca MacKinnon, RConversation, http://rconversation.blogs.com, (Sept. 9, 2005, 04:25).

[70] Mainland China refers to the territory belonging to the People's Republic of China excluding Hong Kong and Macau.

[71] *See* RODERICK B. WOO, OFFICE OF THE PRIVACY COMM'R FOR PERSONAL DATA (Hong Kong), THE DISCLOSURE OF EMAIL SUBSCRIBER'S PERSONAL DATA BY EMAIL SERVICE PROVIDER TO PRC LAW ENFORCEMENT AGENCY 8 fig. (Report No. R07-3619, Mar. 14, 2007), *available at* http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf.

The Yahoo! story is not a lone case in demonstrating the close alliance between the ruling regime and private companies in order to achieve regulation in the cyber world. After Shi Tao's story was told worldwide, it was further revealed that in 2003, Yahoo! (HK) and Sina Beijing had supplied information to the Mainland authorities about Li Zhi, a former government worker who had contacted the China Democracy Party overseas through his email account.[72] In December 2003, Li was sentenced to eight years imprisonment for "inciting subversion."[73] His crime included criticizing the Communist Party in online discussion groups and encouraging others to join the China Democracy Party.[74] It is unknown how many other political dissidents are convicted in authoritarian regimes with the help of ISPs.

In more countries than just China, the reliance on ISPs by state authorities has also increased. For instance, in 2007, Google was alleged to have handed information of its user, who had posted insulting images of god Shiva on its social networking site, to the Indian government.[75] What was even more outrageous was that Google had passed the wrong information to the authority, leading to the arrest of an innocent person.[76] In addition, in the United States, as early as 1996, the *U.S. Electronic Communication Transactional Records Act* was enacted, requiring all ISPs to retain any records in their possession for ninety days to be available at the request of a governmental entity.[77] In 2006, it was revealed that AT&T was cooperating with the National Security Agency surveillance programme of the U.S. Government to monitor communications of its citizens with suspected terrorist ties outside of the United States.[78] One case has, thus far, been brought to challenge the legality of AT&T and the government's action.[79] The U.S. Court of Appeals ruled that the 1994 Communications Assistance for Law

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[72] Reporters Without Borders, *Verdict in Cyberdissident Li Zhi Case Confirms Implication of Yahoo!*, Feb. 27, 2006, http://www.rsf.org/article.php3?id_article=16579.

[73] *Id.*

[74] A Chinese version of the judgment is available at http://www.rsf.org/IMG/pdf/li_zhi_verdict.pdf.

[75] Seth Frinkelstein, *Do You Have any Idea Who Last Looked at Your Data?*, GUARDIAN.CO.UK, Nov. 15, 2007, http://www.guardian.co.uk/technology/2007/nov/15/comment.

[76] *Id.*

[77] 18 U.S.C. § 2703(f)(2) (1996).

[78] Electronic Frontier Found., Hepting v. AT&T, http://www.eff.org/cases/hepting (last visited May 5, 2008).

[79] *See id.* (providing information and links about the case against AT&T).

Enforcement Act[80] is lawful in requiring broadband providers to provide more efficient, standardized surveillance facilities for the police.[81]

In the same year, Google narrowly fended off a Justice Department request for search data of its users.[82] Again, in August 2005, the Government ordered the company to comply with a subpoena that would provide a "random sampling" of one million Internet addresses accessible through Google's search engine and one million search queries submitted to Google in a one-week period to implement the Child Online Protection Act.[83] In the end, the Justice Department came to a compromise by requesting merely fifty thousand URLs and five thousand search queries, and finally only looking at ten thousand and one thousand, respectively.[84] The scaled-down version makes one wonder about the arbitrariness of the initial request. Generally, ISPs are required by federal law to report child pornography sightings to the National Centre for Missing and Exploited Children.[85] Between 2001 and 2006, the overall number of requests from law enforcement for customer data doubled in the United States.[86] This habit of relying on ISP for law enforcement matters has also been acquired by Canada. In 2008, the Canadian Federal Court of Appeal has upheld a lower court decision in ordering eBay Canada Ltd. to produce the personal information of its suppliers to the Canada Revenue Agency.[87] This increase of requests by the government to ISPs has also given rise to new companies assisting ISPs and carriers to handle law enforcement demands.[88]

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[80] *See generally* 47 U.S.C. §§ 1001-1010 (2000).

[81] Am. Council on Educ. v. Fed. Commc'n Comm'n, 451 F.3d 226, 233 (D.C. Cir. 2006).

[82] *See* Gonzales v. Google, Inc., 234 F.R.D. 674, 688 (N.D. Cal. 2006).

[83] *Id.* at 697; *see generally* 47 U.S.C. § 231 (2000).

[84] *Gonzales*, 234 F.R.D. at 679.

[85] The Public Health and Welfare Act, 42 U.S.C. §13032 (b)(1) (2006).

[86] Christopher Rhoads, *More Surveillance Puts Strain on Carriers; Third Parties Help Telecom, Internet Firms Fill Law Enforcement's Increasing Data Requests*, WALL ST J., Feb. 9, 2006, at B3 ("CenturyTel Inc., a fixed-line phone company and ISP based in Louisiana, serving 2.5 million customers, received about 1500 subpoenas and court orders for customer data [in 2005]. Almost 20 [percent] of those requests were related to national security matters," a rise of 100 percent compared to the previous years.).

[87] Personal information that has to be disclosed includes the names, addresses, contact information and the amount of gross sales figures for all PowerSellers, referring to those who sell at least US$1,000 a month through the site. Rather than relying solely on a system of self-reporting and self-assessment, the Canada Revenue Agency will use the information to make sure the PowerSellers are reporting their revenue. *See eBay Canada Ltd. and eBay CS Vancouver Inc.* v. *The Minister of National Revenue*, 2008 FCA 141, available at http://www.canlii.org/en/ca/fca/doc/2008/2008fca141/2008fca141.pdf.

[88] *Id.*

It is indeed alarming to realize that the virtual world is as dangerous as the real world, if not more so. Professor Marcus Franda warns that the Internet has presented "unparalleled opportunities to collect, aggregate and disseminate information about a person or to develop a profile on a person that might be used by a government or . . . one's personal enemies . . . who previously lacked access to such a potentially invasive device."[89] The authorities are likely to base their decisions on a range of seemingly legitimate reasons, including national security, pornography, or anti-terrorism activity. Each area in turn calls for a careful review of compliance with procedural fairness, constitutional guarantees, and international legal standards. While it is becoming more common for the authorities to resort to ISPs, the legal questions entailed have also become increasingly sophisticated. In performing their roles as government filters and informers, ISPs have transformed and redefined how the Internet should be regulated, governed, and who should be responsible. Consequently, the standards and responsibilities of both individual states and ISPs are of pressing international concern, so that at the 2003 World Summit on the Information Society ("WSIS"), the issue of Internet governance was firmly put on the agenda.[90] This in turn requires an examination of freedom of expression principles governing non-state actors under international law.

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[89] MARCUS FRANDA, GOVERNING THE INTERNET: THE EMERGENCE OF AN INTERNATIONAL REGIME 157-58 (2001).

[90] *See* World Summit on the Info. Soc'y [WSIS], *Declaration of Principles, Building the Information Society: A Global Challenge in the New Millennium*, at § B, WSIS-03/Geneva Doc. 4-E (Dec. 12, 2003), *available at* http://www.itu.int/wsis/docs/geneva/official/dop.html; *see also* Rolf H. Weber & Mirina Grosz, *Internet Governance—From Vague Ideas to Realistic Implementation*, MEDIALEX 119, 123 (2007) (on file with author). The 2003 meeting did not arrive at any agreement, neither was the 2005 meeting in Tunis able to do so. The only consolation was that the Internet Governance Forum met for the first time in Athens in November 2006.

III. POTENTIAL EFFECTS OF FREEDOM OF EXPRESSION

A. THE RATIONALE FOR IMPOSING HUMAN RIGHTS LIABILITY ON ISPS AS NON-STATE ACTORS

1. NON-STATE ACTORS AND HUMAN RIGHTS IN INTERNATIONAL RIGHTS DOCTRINE

The traditional perception of international law only acknowledges states as its subjects.[91] However, over the years, various "non-state actors" such as individuals, non-governmental organizations ("NGOs"), and transnational enterprises ("TNEs") have emerged on the international stage, changing the system of international law considerably and challenging the understanding of who the legal subjects under international law should be.[92]

According to the doctrine of "negative" or defensive human rights, only governments could be held internationally responsible for human rights violations.[93] But with the increasing importance of non-state actors on the international level, this narrow perspective no longer seems appropriate, especially when considering the strong societal implications of the right to freedom of expression between private entities.[94] Individuals were granted their own legal status as potential subjects within the international legal framework comparatively late.[95]

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[91] *See* JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY 3 (2004); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 59 (2006); 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 289 (2d ed. 1912).

[92] Daniel Thürer, *The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State*, *in* NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW 37, 37 (Rainer Hoffmann ed., 1999); August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 37, 37 (Philip Alston ed., 2005); CLAPHAM, *supra* note 91, at 31.

[93] *See generally* TOMUSCHAT, *supra* note 14.

[94] *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 28-29 (2d rev. ed. 2005); Juhani Kortteinen, Kristian Myntti & Lauri Hannikainen, *Article 19*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 393, 394 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999). The very existence of sovereign states becomes dubious in cases known as "failed states," when the states' ability to maintain their monopoly on the legitimate use of physical force within their borders ceases. A step in the direction of non-state actors as duty-holders has been taken by the

At present, one pressing concern in international law debate is the liability of transnational corporations. The economic power these corporations have may exceed that of their host states, especially in developing countries, which raises the question whether they should be subject to human rights obligations and how their activities could be subdued to mechanisms of supervision.[96] Existing legal mechanisms today, however, are contained in codes of conduct, guidelines, ethical principles, and other non-binding arrangements.[97] Yet, the increasing power and influence of transnational corporations force the international community to find ways of acting directly against non-state actors and to change its limited perception of only holding states responsible to international law.[98]

Clearly, one exemplar of transnational corporations that can illustrate the legal intricacies in this area is ISPs. They are established in differing types of corporate structures. Some of them, such as Yahoo! or Google, are formed as transnational corporations conducting business across the globe; others are smaller, but still important for national markets. What is common to many ISPs is that a large number of them are regularly non-state actors on the international economic stage, usually relating to their users in terms of private law provisions.[99] Due to their function of providing access to communication services over the Internet, ISPs are in a special position compared to other service providers: their field of action, the Internet, is conceived of as a sphere beyond national boundaries, making regulation comparably ambitious.[100]

This is partly due to the classical understanding of human rights that the right to freedom of expression can only be protected from interference by non-state actors if the relation between the state and an

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Geneva Conventions on humanitarian law and international criminal law according to which individuals are not only rights holders but can also be held responsible for infringing certain duties.

[95] *See* NUMAN, *supra* note 91, at 9-10; LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 14 (1973).

[96] *See* Thürer, *supra* note 92, at 46-47; TOMUSCHAT, *supra* note 14, at 90-91.

[97] Philip Alston, *The "Not-a-Cat" Syndrome*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 30 (Philip Alston ed., 2005); *see also* Reinisch, *supra* note 92, at 39 (discussing the changing framework).

[98] *See generally* Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703, 717-18 (1997) (discussing development of international law); INTERNATIONAL HUMAN RIGHTS IN CONTEXT 321-402 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (discussing rights and duties).

[99] OPENNET INITIATIVE, *supra* note 49, at 4-6.

[100] ROLF H. WEBER, REGULATORY MODELS FOR THE ONLINE WORLD 41-55 (2002).

individual person can be expanded to the relation between individuals, respectively legal persons, among each other. For this purpose, two possibilities exist under the international legal framework: (i) either non-state actors can be directly bound by human-rights, which is sometimes known as "direct horizontal effect;"[101] or (ii) states can be obliged to protect human rights from violations committed by non-state actors.[102] Subsequently, human rights treaties granting the right to freedom of expression shall be examined under these two aspects, followed by an analysis of different international and national approaches to this issue.

2. RELEVANT CONTENTS OF INTERNATIONAL HUMAN RIGHTS-TREATIES

As multilateral treaties between states, the international human rights treaties encompassing the right to freedom of expression are generally subject to the interpretation rules of Articles 31–33 of the Vienna Convention on the Law of Treaties.[103] The interpretation of human rights treaties has to respect the particularities inherent in this special treaty.[104] According to Article 31 of the Vienna Convention, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and *in the light of its object and purpose.*"[105] In order to provide for effective human rights protection—the assumptive purpose of a human rights provision—the treaties should also be interpreted dynamically, taking into account the changing social contexts in which they are applied.[106]

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[101] CLAPHAM, *supra* note 91, at 190.

[102] KATJA WIESBROCK, INTERNATIONAL SCHUTZ DER MENSCHENRECHTE VOR VERLETZUNGEN DURCH PRIVATE 30 (1999); CLAPHAM, *supra* note 91, at 523-26.

[103] The methods of interpretation according to the Vienna Convention on the Law of Treaties for the most part correspond to the methods in national law. The text of the treaty is to be detected first, including its preambles and annexes. *See* Vienna Convention on the Laws of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Additionally the context as well as the object and purpose of the provision have to be considered. *Id.* However, the convention is reluctant when referring to the history of origins of a treaty; the preparatory work of the treaty and the circumstances of its conclusion shall only be used as supplementary means of interpretation. *See id.* art. 32.

[104] *See* WIESBROCK, *supra* note 102, at 8.

[105] Vienna Convention on the Laws of Treaties, *supra* note 103, art. 31.

[106] Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A.) at ¶ 31 (1978) (holding that the European Convention on Human Rights is a "living instrument" and that human rights are to be interpreted "in the light of present day conditions").

a. Direct Obligations of Non-State Actors

Regarding the text of the treaties, the typical wordings of international law provisions are generally centred around the formulation "everyone has the right to" freedom of expression without holding anyone accountable.[107] Nevertheless, some human rights provisions such as Articles 17 and 19 of the *American Convention on Human Rights* ("ACHR"), as well as Articles 23 and 24 of the *International Covenant on Civil and Political Rights* ("ICCPR") explicitly include not only the state, but also society and the family.[108] Articles 28 and 29 of the *African (Banjul) Charter on Human and Peoples' Rights* go even further and provide duties for individuals to respect and consider their fellow beings and to preserve and strengthen the national community and society.[109]

Although Article 10 of the European Convention on Human Rights ("ECHR") does not clarify who shall be responsible for any violations, it mentions the interference by public authorities explicitly in its first paragraph.[110] However, a glance at the history of the provision and its context shows that this reference merely draws a link to paragraph 2, which allows for the exercise of the freedom of expression to be subject to specific restrictions by the state.[111] In particular, public

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[107] *See* Universal Declaration of Human Rights art. 19, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); *see generally* International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, 999 U.N.T.S. 171 ("Everyone shall have the right to freedom of expression."); European Convention on Human Rights art. 10, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 (quoting similar language); Organization of African Unity (OAU), African Charter on Human and People's Rights art. 9, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5, *reprinted in* 21 I.L.M. 59 (1982) [hereinafter Banjul Charter] ("every individual shall have the right to express . . . his opinions"), *available at* http://www.achpr.org/english/_info/charter_en.html.

[108] American Convention on Human Rights, *supra* note 107, arts. 13, 19; International Covenant on Civil and Political Rights, *supra* note 107, art. 24 (describing the rights of the child).

[109] *See* WIESBROCK, *supra* note 102, at 32.

[110] European Convention on Human Rights, *supra* note 107, art. 10 para. 1 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.").

[111] *See* Council of Eur., Preparatory Work on Article 10 of the European Convention on Human Rights, ¶ 1, DH (56)15 (Aug. 17, 1956), *available at* http://www.echr.coe.int/Library/COLENTravauxprep.html (follow hyperlink after "Freedom of Expression"). The second paragraph of Article 10 reads:

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

authorities are not mentioned in the first sentence of the provision which stipulates that "everyone has the right to freedom of expression."[112] Arguably, possible breaches by non-state actors are not precluded by the wording of Article 10 ECHR.[113]

A study of the provisions of the right to freedom of expression in the different human rights treaties does not prohibit human rights obligations of non-state actors either. The explicit referral to state parties, for instance in Article 1 ECHR[114] and ACHR,[115] as well as Article 2 ICCPR,[116] can be interpreted as an allusion to the authors of the treaties.[117] The fact that non-state actors may not be made party to international procedures[118] and the lack of specific sanctions does not necessarily mean that non-state actors do not need to bear any legal obligations. They can still be bound by the material provisions of a human rights treaty, even if they do not have to fear legal consequences before an international institution.[119] Furthermore, the possibility to

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> protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.

[112] *See* Conference of Senior Officials Held at Strasbourg 8-17 June 1950 (1950), *reprinted in* COUNCIL OF EUR., IV COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 202 (doc. CM/WP 4 (50) 14), 204 (CM/WP 4 (50) 16), 242 (CM/WP 4 (50) 19) (1977).

[113] *See* WIESBROCK, *supra* note 102, at 26.

[114] European Convention on Human Rights, *supra* note 107, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.").

[115] American Convention on Human Rights, *supra* note 107, art. 1, para. 1

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[116] International Covenant on Civil and Political Rights, *supra* note 107, art. 2, para. 1

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[117] *See* WIESBROCK, *supra* note 102, at 33-34.

[118] *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 107, arts. 40-41; European Convention on Human Rights, *supra* note 107, arts. 33, 34, 46; American Convention of Human Rights, *supra* note 107, arts. 44-45; Banjul Charter, *supra* note 107, arts. 47-59; Optional Protocol to the International Covenant on Civil and Political Rights art. 1, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter Optional Protocol].

[119] *See, e.g.*, CLAPHAM, *supra* note 91, at 74-75.

stipulate treaty reservations and to regulate modalities on the termination of or the withdrawal from a treaty does not answer the question whether non-state actors can be bound by human rights provisions.[120]

In fact, rules which stipulate that no provisions may be interpreted to imply any state, group, or person a right to engage in any activity or perform any act aimed at the destruction or limitation of the codified human rights—such as Article 5 ICCPR, Article 17 ECHR, and Article 29 ACHR—may have already indicated that non-state actors can also be bound by them. This assumption is further supported by Article 2(3) ICCPR, Article 13 ECHR, and Article 25 ACHR which stipulate that any person whose human rights are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.[121]

In a nutshell, it can be assumed that positive, legal regulation directly binding non-state actors to human rights horizontally and establishing their liability does not exist today; however, neither the wording nor the context of the right to freedom of expression precludes such an obligation either. Moreover, several provisions seem to leave the issue open and therefore provide ample scope for courts' discretion and a legal development, which seems to be emerging today.

b. The State's Obligation and Responsibility to Protect Human Rights

A further differentiation concerns the question of whether there is an existing states' obligation to protect human rights from violations committed by non-state actors.

Article 2(1) ICCPR, Article 1 ECHR, and Article 1 ACHR acknowledge the principle that the implementation of human rights in international law is primarily a domestic matter.[122] The European states who are signatories to the ECHR are obliged to "*secure* to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention."[123] This obligation of the states is also specified by the ICCPR and the ACHR in holding that each state party "*undertakes to respect and to ensure*" to all individuals within its territory and subject to

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[120] *See* WIESBROCK, *supra* note 102, at 36.

[121] This is a very extensive interpretation. In terms of clarification it should be held that an individual primarily has a right against the state, which is in violation of a positive duty.

[122] *See* NOWAK, *supra* note 94, at 28-29.

[123] European Convention on Human Rights, *supra* note 107, art. 1 (emphasis added).

its jurisdiction the rights and freedoms recognized in the Convention or Covenant.[124]

The text of provisions guaranteeing the right to freedom of expression allows for the deduction of a general obligation of the states to actively secure the protection of human rights in their territories besides their general obligation to refrain from violating these provisions. To this extent, the classical "negative" perception of human rights and freedoms is complemented by positive obligations.[125] Hereby the possibility to limit the right to freedom of expression for the benefit of the protection of rights of others provided for under Article 10(2) ECHR suggests that the state party is obliged to balance the legally protected interests.[126] Furthermore, specific measures are prescribed with the prohibition by law of propaganda for war and of advocacy of national, racial, or religious hatred pursuant to Article 20 ICCPR.[127] Yet this interpretation does not allow for an expansion of these positive duties to a general state protection of private individuals from breaches by non-state actors.[128]

Finally, the general responsibility of states for their internationally wrongful acts, regulated in the GA Resolution Responsibility of States for Internationally Wrongful Acts,[129] may be applied. A state can be held responsible if the conduct of an "entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority" is considered an act of the state,[130] or if the entity is "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[131] Provided that an ISP's action can be attributed to a state and constitutes a breach of an international obligation, such as the violation of human rights, the state may be held liable.

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[124] International Covenant on Civil and Political Rights, *supra* note 107, art. 2, para. 1 (emphasis added); American Convention of Human Rights, *supra* note 107, art. 1, para. 1 (emphasis added).

[125] *See generally* CLAPHAM, *supra* note 91, at 523-26; *see also* NOWAK, *supra* note 94, at 40.

[126] *See* WIESBROCK, *supra* note 102, at 86-87.

[127] *See* NOWAK, *supra* note 94, at 39.

[128] *See* WIESBROCK, *supra* note 102, at 88-89.

[129] G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter ILC Draft Articles].

[130] *Id.* art. 5.

[131] *Id.* art. 8.

B. INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE

1. ICCPR HUMAN RIGHTS COMMITTEE

According to Articles 40 and 41 of the ICCPR and Article 1 of the First Optional Protocol ("OP"), the monitoring body for the ICCPR—namely the Human Rights Committee—is solely competent to receive and consider complaints claiming the violation of a right set forth in the Covenant by state parties and to transmit its views, reports, and general comments to the state parties concerned, respectively to the individual.[132] The Committee has taken a restrictive approach when examining responsibilities of non-state actors under the Covenant. In General Comment 31, the Committee stated that under:

> Article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law . . . . There may be circumstances in which a failure to ensure Covenant rights as required by article 2 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. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities.[133]

The wording suggests that the Committee was rather careful when expressing its opinion on the direct horizontal effect of international human rights obligations on non-state actors under general international law; its phrasing suggests that it merely wanted to hold that the ICCPR itself does not generate such rights and obligations.[134]

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[132] International Covenant on Civil and Political Rights, *supra* note 107, art. 40, para. 4; *id.* art. 41, para. 1; Optional Protocol, *supra* note 117, art. 5, para. 4; *see generally* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 98, at 705-78 (providing background on the Human Rights Committee).

[133] U.N. Human Rights Comm. [HRC], *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[134] CLAPHAM, *supra* note 91, at 329.

With special regard to the right to freedom of expression set forth in Article 19 ICCPR, the Committee did not answer the specific question on direct liability of non-state actions, but asked for further information by the states about their rules which define and clarify the actual scope of freedom of expression.[135] Yet the horizontal effects of the freedom of opinion in terms of a state obligation are generally acknowledged, given that the right is not only protected against interference by public authorities, but also by private parties.[136] This perception is supported by the phrasing of Article 19(3) ICCPR, referring to the special duties and responsibilities accompanying the exercise of freedom of expression, which was adopted in order to offer states parties a tool to counter abuse of power by the modern mass media.[137] It also results from the "travaux préparatoires." According to these an Indian motion was defeated to specifically mention "governmental interference," similarly as in Article 10, ECHR; private financial interests and media monopolies were perceived just as harmful to the free flow of information as government censorship.[138]

Two cases merit further examination: In *Hertzberg, et al. v. Finland*, five editors of the Finnish Broadcasting Company ("FBC") represented by the Finish organization SETA (Organization for Sexual Equality), submitted their cases to the Human Rights Committee, asserting that Finnish authorities, including organs of the FBC, had breached their right to freedom of expression and information by censuring their programmes dealing with homosexuality.[139] This was because the Finnish Penal Code made it criminal to "encourage indecent behaviour between persons of the same sex."[140] In its decision, the

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[135] HRC, *CCPR General Comment No. 10: Article 19 (Freedom of Opinion)*, ¶¶ 2-3 (June 29, 1983), *reprinted in* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc.HRI/GEN/1/Rev.7 (May 12, 2004).

[136] *See generally* CLAPHAM, *supra* note 91, at 328-32 (overviewing state obligations with regard to the protection of individuals from non-state actors with respect to different rights set forth in the Covenant).

[137] *See* NOWAK, *supra* note 94, at 448-49, 458.

[138] *Id.* at 448.

[139] Leo R. Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality) v. Finland, Communication No. R.14/61, ¶¶ 1, 2.1 (1982), *in Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40 at 161, U.N. Doc. A/37/40 (Sept. 22, 1982).

[140] In 1979, Paragraph 9 of Chapter 20 of the Finnish Penal Code stated:

> If someone publicly engages in an act violating sexual morality, thereby giving offence, he shall be sentenced for publicly violating sexual morality to imprisonment for at most six months or to a fine. Anyone who publicly encourages indecent

Committee stated that Article 19 had not been violated, since the criminal provision had not been directly applied to the applicants;[141] however, it held Finland directly responsible for the broadcasting company FBC "in which the State holds a dominant stake (90 percent) and which is placed under specific government control" and affirmed the applicability of 19(2) ICCPR to the censoring of broadcasts by company officials.[142]

In *Gauthier v. Canada,* the Canadian Government had restricted the right of access to the media facilities of the Parliament to media representatives who were members of a private organization, the Canadian Press Gallery. As a consequence, Robert B. Gauthier, publisher and author of the newspaper "National Capital News," was denied full membership to the Press Gallery.[143] In allowing a private organization to control access to the Parliamentary press facilities, and not protecting the media against arbitrary exclusion, or providing for a possibility of recourse, the Committee held the state party responsible for a violation of Article 19(2) ICCPR.[144]

2. REGIONAL HUMAN RIGHTS BODIES' JURISPRUDENCE

a. European Commission and European Court of Human Rights

The European Court of Human Rights ("ECHR") provides for individual applications (Article 34) and interstate applications (Article 33) in cases of violations of the Convention "by one of the High Contracting Parties." Furthermore, the Court may give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto (Article 47). Consequently, a complaint against a non-state actor will be declared inadmissible before the Court; however, by taking legal action against national civil judgments, the question whether the Convention itself can create

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behaviour between persons of the same sex shall be sentenced for encouragement to indecent behaviour between members of the same sex as decreed in subsection 1.

Id. ¶ 2.1. The statute has subsequently been repealed.

[141] *Id.* ¶¶ 10.1, 11.

[142] *Id.* ¶¶ 9.1, 10.2.

[143] Robert W. Gauthier v. Canada, Communication No. 633/1995, ¶ 2.1 (1999), *in Report of the Human Rights Committee, Vol. II,* U.N. GAOR, 54th Sess., Supp. No. 40 at 93, U.N. Doc. A/54/40 (2000).

[144] *Id.* ¶ 13.6.

obligations for individuals and private entities can be examined "indirectly."[145]

Cases dealing with the application of the Convention on individuals have already been handled by the European Commission.[146] In *Van der Heijden v. Netherlands,*[147] the question arose as to whether the dismissal based on the membership of Mr. Van der Heijden in a political party was compatible with Article 10 ECHR comprising the right to freedom of expression and Article 11 ECHR providing for freedom of assembly and association. Both provisions were regarded as applicable between the private employer and employee.[148]

The European Court for Human Rights confirmed the applicability of the right to freedom of expression between private players in its jurisdiction. In *Sunday Times v. United Kingdom,*[149] as well as in *Markt Intern v. Germany*[150] the Court examined whether Article 10 ECHR had been duly considered in the findings of the judgments. Both cases dealt with publications which were said to be damaging for the trade names; in both judgments, the Court implicitly held that Article 10 was applicable amongst private parties.[151]

The Strasbourg organs left the issue open on whether and to what extent the Convention creates horizontal obligations for individuals and private entities; however, they answered in the affirmative when referring to the applicability of human rights between private parties.[152] Consequently human rights can be infringed by non-state actors.[153]

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[145] *See* WIESBROCK, *supra* note 102, at 64-69.

[146] Before the Eleventh Protocol to the ECHR was established, the protection of human rights in Europe was effected by two different organs, namely the European Commission and the European Court of Human Rights. With the entry into force of the Eleventh Protocol, however, the Commission was suppressed and the Court became the only "constitutional" institution in Europe with an extended case law and effective implementation mechanisms making it the most important regional institution for the protection of human rights.

[147] Van der Heijden v. Netherlands, App. No. 11002/84, 41 Eur. Comm'n H.R. Dec. & Rep. 264 (1985).

[148] *Id.* at 269-70.

[149] Sunday Times v. United Kingdom, 2 Eur. H.R. Rep. 245, 268-69 (1979).

[150] Markt Intern & Beermann v. Germany, 12 Eur. H.R. Rep. 161, 170 (1989).

[151] In *Hertel v. Switzerland*, 1998-VI Eur. H.R. Rep. 2298, 2340 (Commission report), the publication of unscientific articles warning from the life-threatening effects of microwave ovens was addressed; their interdiction was also qualified as a violation of Article 10 of the ECHR.

[152] CLAPHAM, *supra* note 91, at 349, 351. Additionally, the contention that the legal order of the different countries shall be taken into account since the ECHR is understood as part of the national legal order which the national judges are bound to ensure is respected, consequently leads to the conclusion that the rights may have a horizontal effect. CLAPHAM, *supra* note 91, at 349-50.

[153] *Id.* at 351.

Numerous cases before the European Court of Human Rights addressed the issue of the states' obligations, derived from the wording of the ECHR, to take action to protect human rights from interferences by non-state actors.[154] With regard to the right to private life according to Article 8 ECHR, the Court has clearly assumed corresponding states' obligations.[155] It held that "the adoption of measures [was] designed to secure respect for private life even in the sphere of the relations of individuals between themselves."[156] This principle has been affirmed by the Court in various other contexts.[157] However, compared to its jurisdiction on Article 8 of the ECHR, the Court has been rather reserved in deriving positive obligations of the state parties from the right to freedom of expression.[158]

The Court based its argument for the existence of positive states' duties when referring to Article 10 ECHR on the key importance of freedom of expression "as one of the preconditions for a functioning democracy."[159] In *Özgür Gündem v. Turkey,* a daily newspaper under the same name in Istanbul, supporting the Kurdistan Workers' Party (Partiya Karkerên Kurdistan ["PKK"]), the newspaper and its staff were subjects to a campaign of violence and intimidation by unknown perpetrators which forced the newspapers eventual closure.[160] The question arose as to whether the Turkish authorities were responsible for the breaches against Article 10 ECHR. In its decision the Court stated that:

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[154] *See, e.g.*, CLAPHAM *supra* note 91, at 349-420.

[155] *See, e.g.*, X & Y v. Netherlands, 8 Eur. H.R. Rep. 235, 239 (1985); Gurgenidze v. Georgia, App. No. 71678/01, 11 (2007), http://www.echr.coe.int/echr; Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 41, 68. This aspect has its forerunners in the case *Young, James and Webster v. United Kingdom*, 4 Eur. H.R. Rep. (1981), the Commission's findings in the cases *Nat'l Union of Belgian Police v. Belgium*, 1 Eur. H.R. Rep. 578 (1975), and *Swedish Engine Drivers' v. Sweden*, Eur. H.R. Rep. 617 (ser. A) (1976).

[156] *X & Y*, 8 Eur. H.R. Rep. at 239-40.

[157] The Commission realized its competence by affirming that the protection of the rights under the Convention may call for activities of the states in certain circumstances. Rommelfanger v. Germany, App. No. 12242/86, 62 Eur. Comm'n H.R. Dec. & Rep. 151, 160 (1989); *see also* Guerra v. Italy, 26 Eur. H.R. Rep. 357, 373-74 (1998). However, in a differing opinion, the Court reiterated that states can be obliged to prevent concentrations of the press in order to protect freedom of expression. *See* Guerra v. Italy, 1998-I Eur. Ct. H.R. 210, 226; *see also* De Geillustreerde Pers N.V. v. Netherlands, App. No. 5178/71, 8 Eur. Comm'n H.R. Dec. & Rep. 5, 14 (1976).

[158] ROLF H. WEBER & MARKUS SOMMERHALDER, DAS RECHT DER PERSONENBEZOGENEN INFORMATION 153 (2007) (on file with author).

[159] Özgür Gündem v. Turkey, 31 Eur. H.R. Rep. 1082, 1100 (2000).

[160] *Id.* at 1098. The Turkish Government accused Özgür Gündem of being the "instrument of the terrorist organization PKK" and endorsing the organization's separatist aim of destroying the territorial integrity of Turkey by violent means. *Id.*

> 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 . . . . In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. 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 interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[161]

The Court finally concluded that the government had failed to comply with its positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.[162]

This approach was confirmed in *Bobo Fuentes v. Spain*.[163] Mr. Fuentes had been employed by the Spanish television company TVE as a producer.[164] His criticisms of certain management actions led to disciplinary proceedings between him and his employer which culminated in his dismissal.[165] The Government submitted that there had been no interference by the state in the applicant's freedom of expression and that the state could not be held responsible for the applicant' dismissal, as TVE was a private law undertaking.[166] The Court, however, pointed out that Article 10 ECHR also applies when the relations between employer and employee are governed by private law.[167] Moreover, it held that the state has a positive obligation in certain cases to protect the right to freedom of expression.[168]

Another question which arose out of the right to freedom of expression was whether private bodies can be obliged to respect the right to receive and impart information as a further aspect of Article 10 ECHR.[169] In *Vgt Verein gegen Tierfabriken v. Switzerland,*[170] the Commercial Television Company (today known as "Publisuisse") had

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[161] *Id.* at 1100.

[162] *Id.* at 1101.

[163] Fuentes Bobo v. Spain, 31 Eur. H.R. Rep. 1115 (2000).

[164] *Id.* at 1118.

[165] *Id.* at 1118-21.

[166] *Id.* at 1126.

[167] *Id.* at 1124.

[168] *Id.*

[169] *See generally* CLAPHAM, supra note 91, at 407-09.

[170] VgT Verein Gegen Tierfabriken v. Switzerland, 34 Eur. H.R. Rep. 159 (2001).

refused to broadcast the commercial of VgT, an association aiming at the protection of animals, with the argument that the commercial comprised "clear political character."[171] The Court did not attribute the acts of this company to the state, since it was established and governed by private law and had acted as a private party in this particular case. Moreover it held:

> [I]n addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation.[172]

The Court, however, did not explain this approach in further detail. Moreover, it stated that it "does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se."[173]

In *Appleby v. United Kingdom*, the Court held this position by stating that "a fair balance has to be struck between the general interest of the community and the interests of the individual."[174] In this case the applicants were inhibited from meeting in their town centre, a privately-owned shopping mall, to impart information and ideas by setting up a stand and distributing leaflets.[175] The Court balanced the property rights of the shopping centre with the right to freedom of expression of the applicants and thereby specially considered national U.S. cases on similar issues.[176] It concluded that the Government had not failed in any positive obligation to protect the applicants' freedom of expression.[177]

The Court also denied a right of access to information in *Leander v. Sweden*,[178] *Gaskin v. United Kingdom*,[179] and *Guerra and others v. Italy*.[180] In the latter case, at issue was a private chemical factory which had caused accidents due to its malfunctioning, the most serious one involving acute arsenic poisoning of one hundred fifty

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[171] *Id.* at 163.
[172] *Id.* at 171.
[173] *Id.*
[174] Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 185, 199.
[175] *Id.* at 190-92.
[176] *Id.* at 200.
[177] *Id.* at 201.
[178] Leander v. Sweden, App. No. 9248/81, 9 Eur. H.R. Rep. 433 (1987).
[179] Gaskin v. United Kingdom, App. No. 10454/83, 12 Eur. H.R. Rep. 36, 37 (1989).
[180] Guerra v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357, 382 (1998).

people.[181] The applicants argued that in refraining from providing information in order to protect the well-being and health of the population in situations in which the environment is at risk, the state violated Article 10(2) ECHR.[182] The Court refused this approach by stating that the freedom to receive information, according to Article 10(2) of the Convention,

> basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him . . . . That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.[183]

Furthermore, the Court did not acknowledge a general and unfettered right of access to the media.[184]

However, a different approach regarding the issue of freedom of expression was chosen in *Steel and Morris*[185] regarding libel proceedings. The Court held that states are obliged under the Convention to ensure that libel suits guarantee not only equality of arms between the parties, but that any award of damages is proportionate to the situation so that private parties may not use law to prevent the right to freedom of expression in an disproportional way.[186] A comparable form of indirect enforcement of non-state obligations concerns the situation where an applicant is denied a remedy against the interference with his rights due to his duty to respect other people's rights under Article 17 ECHR.[187]

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[181] *Id.* at 362.

[182] *Id.* at 368.

[183] *Id.* at 382 (internal quotations omitted). *But see* Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria, App. No. 15153/89, 20 Eur. H.R. Rep 56 (1994) (holding that Austria had a positive obligation with regard to the distribution of military magazines).

[184] *Guerra*, 26 Eur. H.R. Rep. at 382; *see also* X Ltd. & Y v. United Kingdom, App. No. 8710/79, 28 Eur. Comm'n H.R. Dec. & Rep. 77, 80 (1982); K v. United Kingdom, App. No. 12656/87, Eur. Comm'n on H.R. (May 13, 1988), *available at* cmiskp.echr.coe.int/gentkpss/gen-recent-hejud.asp (select "Search" tab; search for Application Number "12656/87"); Reeve v. Netherlands, App. No. 14869/89, Eur. Comm'n on H.R. (June 8, 1990), *available at* cmiskp.echr.coe.int/gentkpss/gen-recent-hejud.asp (select "Search" tab; search for Application Number "14869/89"); *see also* Hans Christian Krüger, *Use of the Media to Promote and Infringe Human Rights*, *in* HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 743 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) (compiling cases about the media and freedom of expression).

[185] Steel and Morris v. United Kingdom, 2005-II Eur. Ct. H.R. 1, 3.

[186] *Id.* at 39; *see also* CLAPHAM, *supra* note 91, at 410-11.

[187] Article 17 of the ECHR reads:

Accordingly, the right to freedom of expression shall not be applied contrary to the text and spirit of the Convention as a whole. Corresponding cases mainly concern situations in which the media is used to disperse racist or terrorist ideas.[188] These aspects implicate obligations of non-state actors regarding the right to freedom of expression, however, without expressly addressing this issue.

b. The Inter-American Commission and Inter-American Court on Human Rights

The former regulation of procedures before the ECHR-organs has also had a significant influence on the Inter-American human rights institutions: the ACHR provides for both interstate communications (Article 45) and individual petitions (Article 44) before the Inter-American Commission on Human Rights. The Commission is formally perceived as a Charter organ of the Organization of American States ("OAS").[189] Its country reports in particular are of notable importance for the organization.[190] Furthermore, the Commission acts in first instance to the Inter-American Court of Human Rights with its seat in San José, Costa Rica.[191] After completion of the procedures before the Commission, however, only state parties and the Commission itself may submit a case to the Court containing complaints of violation of the ACHR by a state.[192] The Court's jurisdiction is not compulsory.[193] A

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

European Convention on Human Rights, *supra* note 107, art 107.

[188] *See* Seurot v. France, App. No. 57383/00, Eur. Ct. H.R. (May 18, 2004), *available at* cmiskp.echr.coe.int/gentkpss/gen-recent-hejud.asp (select "Search" tab; search for Application Number "57383/00"); *see also* Norwood v. United Kingdom, 2004-XI Eur. Ct. H.R. 343, 345 (concerning racist remarks); Garaudy v. France, 2003-IX Eur. Ct. H.R. 369, 371 (concerning Holocaust negation); Krüger, *supra* note 184, at 750 (compiling other related cases).

[189] *See* CLAPHAM, *supra* note 91, at 421.

[190] *Id.*

[191] *See* TOMUSCHAT, *supra* note 14, at 211-12; INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 98, at 868-920; (addressing the Inter-American Commission and the Inter-American Court of Human Rights in further detail); *see generally* THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS, CASES AND MATERIALS (4th ed. 1995); JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (2003).

[192] PASQUALUCCI, *supra* note 191, at 6-7.

[193] *Id.*

further important role of the Court is to give advisory opinions (Article 64).[194]

The Court has emphasized that a petition cannot be addressed against private parties directly by stating:

> As far as concerns the human rights protected by the Convention, the jurisdiction of the organs established thereunder refer exclusively to the international responsibility of states and not to that of individuals. Any human rights violations committed by agents or officials of a state are, as the Court has already stated, the responsibility of that state.[195]

Questions on liability of private individuals under human rights can therefore only be subject to an "indirect" examination. Nevertheless, the issue has been addressed and worked on. The Commission's inquiries for country and annual reports stand out specifically on the issue of non-state actors' liability in international law with regard to acts of violence by "irregular armed groups," such as guerilla, paramilitary, and terror groups.[196]

Additionally, both the Inter-American Commission and the Court have supported the approach of a state obligation to ensure all rights in the American Convention on Human Rights and a duty to protect people from violations by non-state actors. Several cases dealt with the rights to life, humane treatment, personal liberty, etc. in the contexts of murder and disappearances.[197] Thereby, these illegal acts committed by non-state actors qualified as actual violations of human rights; state responsibility followed in case the state failed in its due diligence obligations under the Convention.[198] These also comprise the states' duty to ensure that violations of the Conventions are considered

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[194] *Id.*

[195] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, 1994 Inter-Am. Ct. H.R. (ser. A) No. 14, at 47-48 (Dec. 9, 1994).

[196] *See* CLAPHAM, *supra* note 91, at 421-24.

[197] In the context of violent attacks in Guatemala, the Inter-American Commission on Human Rights stated, "the government must prevent and suppress acts of violence, even forcefully, whether committed by public officials or private individuals, whether their motives are political or otherwise." INTER-AM COMM'N ON H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF GUATEMALA, ¶ 10 (1981), *available at* http://www.cidh.org/countryrep/Guatemala81eng/chap.2.htm. The Inter-American bodies have also considered specific cases with regard to indigenous peoples and the activities of corporations and private individuals.

[198] *See generally* CLAPHAM, *supra* note 91, at 425-26, 429-32.

illegal acts under national law and must be properly investigated and punished.[199]

The importance of freedom of expression, and its individual and social dimension, has been particularly stressed by both the Commission and the Court for a democratic society.[200] The Court has particularly underlined the important position of the media that makes the exercise of freedom of expression a reality, and it has held that the media are required to discharge their social functions responsibly.[201] In *Héctor Félix Miranda v. Mexico*,[202] the Commission applied its due diligence approach. It found that the state of Mexico had violated the right to freedom of thought and expression in Article 13 ACHR by failing to conduct a full investigation into the assassination of the critical journalist and by not complying with its obligations to prevent and punish the perpetrators of the acts of violence with the objective of silencing the exercise of freedom of expression.[203] The Commission repeated and emphasized this jurisprudence in *Victor Manual Oropeza v. Mexico*.[204] The Court also followed this approach in an order of provisional

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[199] In *Velàsquez Rodriguez v. Honduras*, 1988 Inter-Am. Y.B. H.R. 914, 984 (July 29, 1988), the Court pointed out that whatever the identity of the direct perpetrator may be, the state has an obligation of "due diligence" to prevent the violation or to respond to it as required by the Convention. The Court also pointed out what these obligations signify. *Id.* at 986; *see also* Juridical Condition & Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 102-04 (Sept. 17, 2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

[200] *See* Baruch Ivcher Bronstein v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, at 206 (Feb. 6, 2001); Olmedo Bustos et al. v. Chile (The Last Temptation of Christ Case), 2001 Inter-Am. Ct. H.R. (ser. C) No. 73, at 135 (Feb. 5, 2001); Herrera-Ulloa v. Costa Rica, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 108 (July 2, 2004), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf; Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, 1985 Inter-Am. Ct. H.R. (ser. A) No. 5, at 100 (Nov. 13, 1985).

[201] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *supra* note 200, at 102; *Herrera-Ulloa*, 2004 Inter-Am. Ct. H.R., ¶ 117.

[202] Miranda v. Mexico, Case 11.739, Inter-Am. C.H.R., Report No. 5/99, OEA/Ser.L./V/II.95, doc. 7 ¶¶ 41-56 (1998), *available at* http://www.law.wits.ac.za/humanrts/cases/1998/mexico5-99.html.

[203] *See also* Org. of Am. States, Inter-Am. Comm'n on Human Rights, *Inter-American Declaration of Principles of Freedom of Expression*, ¶ 9, *available at* www.cidh.org/basicos/english/basic21.principles%20freedom%20of%20expression.htm

> The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that the victims receive due compensation.

[204] Victor Manuel Oropeza v. Mexico, Case 11.740, Inter-Am. C.H.R., Report No. 130/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 3 (1999).

measures required to protect the life, personal safety, and freedom of expression of employees of Radio Caracas Television in *Luisiana Ríos et al. v. Venezuela.*[205]

c. The African Approach under the OAU human rights treaties

On the African continent, the Organization of African Unity ("OAU") established both the African Commission and the African Court on Human and Peoples' Rights.[206] The African (Banjul) Charter on Human and Peoples' Rights provides for interstate complaints as well as individual communications to the Commission (Articles 47 and 55). Article 55 explicitly states that individual communications may originate from authors other than states parties. In 1998, the OAU adopted a Protocol on the Establishment of an African Court on Human and Peoples' Rights which came into force on January 25, 2004.[207] In general, only the Commission and the states could go to court. Under certain circumstances, a special state declaration can also authorize the Court to hear cases brought to it directly by NGOs and individuals.[208] All of these efforts to empower individual rights through the African human rights' instruments are still in the process of development.[209]

Since the pre-colonial structures emphasized the community rather than the individual, the Western concept of a division between public/private and state/non-state actors generally has less resonance on the African continent.[210] However, standing out in this respect are the individual duties set forth in the Banjul Charter, such as the duty to respect and consider fellow-beings without discrimination, and to maintain relations aimed at promoting, safeguarding, and reinforcing mutual respect and tolerance (Article 28).

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[205] *See* Ríos v. Venezuela, Case 4109/2002, Inter-Am. C.H.R., Report No. 6/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ 12 (Sept. 8, 2004), *available at* http://www1.umn.edu/humanrts/cases/6-04.html (including the Commission's protective order in the summary of facts).

[206] *See generally* VINCENT O. ORLU NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM (2001).

[207] Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9,1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

[208] *See* TOMUSCHAT, *supra* note 14, at 165, 214; *see also* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 98, at 920.

[209] *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 98, at 920.

[210] *See* CLAPHAM, *supra* note 91, at 432; FATSAH OUGUERGOUZ, LA CHARTRE AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES 233 (1993).

In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad,*[211] the complaint brought forth addressed the harassment of journalists by unidentified individuals. The Commission based its decision on Article 1 of the Banjul Charter,[212] stating that "if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation."[213] Despite the fact, that Chad was in a civil war at the time, this could not excuse the state's violations of fundamental human rights such as the right to life (Article 4), the right to life and security of persons (Article 6), and the right to freedom of expression (Article 10), since the government had failed to intervene and to prevent the assassination and killing of individuals.[214] This was reiterated in general terms in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*[215] and also applied in *The Social and Economic Rights Action Center and the Center for Economic Social Rights v. Nigeria*[216] regarding the rights to health and a healthy environment, the right to natural resources, the right to housing, and the right to food in particular.

According to Article 9(2) of the Banjul Charter, however, the right to freedom of expression is subject to various restrictions on the African continent.[217] Often enough, the press is owned by the state or subject to strict governmental control.[218] In *International Pen (Senn and Sangare) v. Cote d'Ivoire,*[219] the Commission was criticized for not having stressed the importance of Article 9 since it did not decide on the detention of the complainant journalists under Article 9, but closed the case based on admissibility.[220] In *Media Rights Agenda and Others v.*

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[211] Commission Nationale des Droits de l'Homme et des Libertes v. Chad, Communication No. 74/92, Afr. Comm'n H. & Peoples' R., 4 Int'l Hum. Rts Rep. 94 (1997), *reprinted in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 98, at 934-35.

[212] *See* Banjul Charter, *supra* note 107, art. 1.

[213] Commission Nationale des Droits de l'Homme et des Libertes v. Chad, 4 Int. Hum. Rts R., para. 20.

[214] *Id.* para. 21-23.

[215] Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso, Communication No. 204/97, Afr. Comm'n H. & Peoples' R. (2001).

[216] Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, Communication No. 155/96, Afr. Comm'n H. & Peoples' R. (2001).

[217] Article 9 (2) of the Banjul Charter states "Every individual shall have the right to express and disseminate his opinions within the law." Banjul Charter, *supra* note 107, art. 9(2).

[218] *See* NMEHIELLE, *supra* note 206, at 107.

[219] International Pen (Senn and Sangare) v. Cote d'Ivoire, Comm. 138/94 (1997).

[220] The complainants had been released by the government. *See* NMEHIELLE, *supra* note 206, at 108.

Nigeria,[221] the Commission ruled that there was a violation of the right to freedom of expression in terms of Article 9(2) of the Banjul Charter regarding the proscription of the newspaper *The News* and the seizure of the TELL Magazine.[222] The payment of a registration fee and a pre-registration deposit for the registration of a newspaper, however, was found reconcilable with the right to freedom of expression, since they were not deemed as excessively high.[223] In this case, the Commission underlined the importance of Article 9 and of international law in general by holding that "[i]nternational human rights standards must always prevail over contradictory national law."[224]

d. Conclusion

The analysis of international human rights judgments with reference to non-state actor obligations regarding the right to freedom of expression shows that a variety of threats have been brought up by non-state actors. Human rights law has been developed accordingly. What stands out is that textual differences in the human rights instruments did not affect the judicial outcomes exceedingly. Moreover, similar approaches can be observed in international jurisdiction in general.[225] All of the judgments show reluctance against the affirmation of direct horizontal effects of the right to freedom of expression; however, they all acknowledge an obligation of the states to protect human rights from violations committed by non-state actors.

C. NATIONAL APPROACHES REGARDING THE HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS

International human rights are often codified in national constitutions and implemented by national courts. When analyzing the different national approaches, it has to be taken into account that the relation between national and international law is regulated differently

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[221] Media Rights Agenda v. Nigeria, Communication Nos. 105/93, 128/94, 130/94, 152/96, Afr. Comm'n H. & Peoples' R. (1998).

[222] *Id.* paras. 71, 75.

[223] *Id.* para. 56.

[224] *Id.* para. 66.

[225] *See* CLAPHAM, *supra* note 91, at 436.

from country to country.[226] The question on the rank of international law within the legal framework of a state in particular, is regulated inharmoniously within the international community. Moreover, different perceptions of the relationship between international human rights and constitutional rights exist. Generally, it can be expected that states accepting the higher-ranking of international human rights compared to their national law will be increasingly influenced by international human rights jurisprudence, even if there is no universal answer to the problem of vertical or horizontal application of basic rights.[227]

The following section will outline some national approaches and sketch the current tendencies in different countries regarding human rights obligations of non-state actors, based on the distinction drawn above between: (i) the direct obligation of non-state actors; and (ii) their indirect liability due to the obligation of states to protect their citizens from human rights violations committed by non-state actors.

1. APPROACHES IN EUROPE

Due to the influence of the 1789 French Déclaration des Droits de l'Homme et du Citoyen[228] in Europe, many national basic rights systems follow a strictly liberal approach, perceiving basic rights as solely directed against the state's power.[229] Yet several legal frameworks seem to permit indirect liability of non-state actors.

The Constitution of Germany generally conceives basic rights as negative, vertical rights;[230] however, the perception of fundamental rights binding a third party evolved in Germany first.[231] According to this theory, developed on the application of fundamental rights values in

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[226] *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 98, at 999. For the time being, the applicability of a specific law is mostly determined by the physical location of the server; even if this fact does not correspond to the global nature of the Internet, it will probably not be overcome within short time.

[227] *Du Plessis v. De Klerk*, 1996 (3) SA 850 (CC) at 871 (S. Afr.) ("It is nonetheless illuminating to examine the solutions arrived at by the Courts of other countries.").

[228] LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN [Declaration of Human Rights and the Rights of the Citizen] (Fr. 1789).

[229] Ulrich Scheuner, *Fundamental Rights and the Protection of the Individual Against Social Groups and Powers in the Constitutional System of the Federal Republic of Germany*, *in* RENÉ CASSIN, AMICORUM DISCIPULORUMQUE LIBER III, at 253, 253-54 (1971).

[230] DEAN SPIELMANN, L'EFFET POTENTIAL DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME ENTRE PERSONNES PRIVÉES 26-30 (1995); *see generally* Jörg Fedtke, Drittwirkung *in Germany*, *in* HUMAN RIGHTS AND THE PRIVATE SPHERE 125 (Dawn Oliver & Jörg Fedtke eds., 2007).

[231] SPIELMANN, *supra* note 230, at 26.

cases where two private parties are involved, the rights of the German Grundgesetz (Basic Law) are not only defensive rights directed against the state but they constitute an objective order of values ("eine objektive Werteordnung") which permeates the whole German legal system.[232] The *Lüth-Decision*[233] of the Federal Constitutional Court led to a consistent jurisprudence in support of this theory on the so-called "mittelbare Drittwirkung," pursuant to which the values and principles surrounding constitutional fundamental rights are to be considered by the courts when they are deciding private law cases.[234] The German approach on "Drittwirkung" has influenced legal orders outside Germany, especially the member states of the ECHR and Japan.[235]

Furthermore, Article 35(1) of the *Swiss* Constitution of 1999 states that constitutional rights should be realized in the entire Swiss legal system; Article 35(3) explicitly holds that "the authorities shall ensure that fundamental rights also be respected in relations among private parties whenever the analogy is applicable." This provision does not allow the imposition of direct obligations on private parties, rather it opts for an obligation of states through their public authorities in order to protect human rights from violations committed by non-state actors.[236] Only the fundamental rights between private individuals, however, are subject to this rule.

The United Kingdom is a member state of the ECHR. Following a dualistic approach to international law, it is forced to incorporate international treaties into national law by a separate decree;[237] in the case of the ECHR, the incorporation was carried out by the Human Rights Act of 1998.[238] Section 6 of the Act distinguishes government bodies (state actors) from bodies carrying out functions of a public nature (non-state actors). While state-actors are always liable under the Act, non-state actors are only liable when their functions are of a public nature and the

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[232] CLAPHAM, *supra* note 91, at 521-23 ("the rights of the 'Basic Law are not only individual rights in the sense of defensive rights against the State but . . . they constitute an objective order of values ['*eine objektive Wertordung*']").

[233] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198, (F.R.G.).

[234] *See* Fedtke, *supra* note 230, at 155. Nevertheless, the Bundesverfassungsgericht tends towards the "indirect effect." *Id.*

[235] *See* discussion *infra* Part III.C.2.c; *see* also Fedtke, *supra* note 230, at 125-56.

[236] *See* PATRICIA EGLI, DRITTWIRKUNG VON GRUNDRECHTEN: ZUGLEICH EIN BEITRAG ZUR DOGMATIK DER GRUNDRECHTLICHEN SCHUTZPFLICHTEN IM SCHWEIZER RECHT 151 (2002).

[237] ANTONIO CASSESE, INTERNATIONAL LAW 214 (2d ed. 2005).

[238] *See* CLAPHAM, *supra* note 91, at 464.

nature of the act is not private (Section 6(3)(b) and (5)).[239] With this rule, the correspondence to the law of state responsibility is unmistakable.[240] In order to constitute the state's liability, thus, the question arises which actions can be classified as of a public nature; this issue regarding the right to freedom of expression, has been discussed with special reference to BBC, Channel 4, ITV, and other private television stations.[241]

Some European provisions stand out by acknowledging the direct applicability of human rights against private bodies: Article 9(3) of the German Basic Law obliges private parties to respect the right to freedom of association; Article 8(3) of the Swiss Constitution holds that the right to equal salary of man and woman is applicable to private parties; the Italian Constitutional Court held that Article 2 of the Italian Constitution stating the inviolable nature of human rights has an *erga omnes* effect, making them applicable to social groups.[242] Other national legal systems seem to go a step further by not only punctually, but generally, binding citizens to their legal order, such as Article 9 of the Spanish Constitution.[243] Article 18 of the Portuguese Constitution of

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[239] Section 6 of the Human Rights Act reads as follows:

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
> (2) Subsection (1) does not apply to an act if –
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
> (3) In this section "public authority" includes –
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament . . . .
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

Human Rights Act, 1998, c. 42, § 6 (Eng.).

[240] *See* CLAPHAM, *supra* note 91, at 464; *see also* ILC Draft Articles, *supra* note 129, arts. 4, 5, 32.

[241] *See* CLAPHAM, *supra* note 91, at 472; *see also* British Broadcasting Corporation v. United Kingdom, App. No. 25798/94, Eur. Comm'n H.R. Dec. & Rep. 129 (1996) (discussing whether the BBC is precluded from bringing complaints under the ECHR in Strasbourg when perceived as a "core" public authority).

[242] Corte cost., 24 june 1970, n.122, Gazz. Uff. N. 177 (on file with author); *see* Claudio Zanghi, *La Protection des Droits de l'Homme dans les Rapports Entre Personnes Privéees*, *in* RENÉ CASSIN, AMICORUM DISCIPULORUMQUE LIBER III 269 (1971).

[243] CONSTITUCIÓN ESPAÑOLA [Constitution] art. 9, § 1 (Spain) ("Los ciudadanos y los poderes públicos están sujetos a la Constitución y al resto del ordenamiento jurídico.") ("Citizens and public authorities are bound by the Constitution and all other legal previsions.").

1976 even determines constitutional rights as explicitly binding on both public and private persons and bodies.[244] Therefore, this new perception of basic rights makes rights and freedoms become basic standards of social life, comprising a major part of the relationships between private individuals; however, the extent of this conception remains controversial.[245]

2. APPROACHES IN EAST ASIA

a. Situation in the People's Republic of China ("PRC")

The PRC Constitution may give the impression that non-state actors have to fulfill human rights obligations in certain circumstances.[246] But, a careful analysis reveals that the above proposition remains the exception rather than the norm.

In the constitutional history of the PRC, the authority that comes closest to confirming a citizen's constitutional right against a private individual would perhaps be the case of *Qi Yuling v. Chen Kezheng*, delivered by the Supreme People's Court in 2001.[247] The case had to be traced back to 1990 when Qi was a seventeen-year-old high school girl from Shandong province who passed the entrance exam to a technical college.[248] Chen, her classmate, failed the examination, but with the help of her father, who was a party official, stole Qi's admission notice to attend college.[249] Since then, Chen lived under the forged identity of

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[244] CONSTITUICÃO DA REPÚBLICA PORTUGUESA [Constitution] art. 18, §1 (Port.) ("Os preceitos constitucionais respeites aos direitos, liberdades e garantias são directamente aplicáveis e vinculam as entidades públicas e privadas.") ("This Constitution's provisions with regard to rights, freedoms and guarantees shall be directly applicable to and binding on public and private persons and bodies.").

[245] *See* WIESBROCK, *supra* note 102, at 48.

[246] XIAN FA [Constitution] art. 5 (2004) (P.R.C.), *translated in* Chinese Government's Official Web Portal, Constitution, http://english.gov.cn/2005-08/05/content_20813.htm ("All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law .... No organization or individual may enjoy the privilege of being above the Constitution."); *id.* art. 33 ("Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.").

[247] Qi Yuling v. Chen Xiaoqi, SUP. PEOPLE'S CT. GAZ. (Supreme People's Ct., June 28, 2001), *available at* http://www.lawinfochina.com (search for "Qi Yuling").

[248] Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM L. & POL'Y J. 199, 201 (2003) (Yuping Liu trans.) (summarizing the facts of *Qi Yuling* and discussing the case).

[249] *Id.* at 201-02.

Qi.[250] She graduated from college and got a well paid job at the Bank of China.[251] In stark contrast, Qi had to work in the village, suffered periods of unemployment, and had to support herself with low paid jobs.[252] When Qi discovered the truth, she decided to sue Chen, Chen's father, the vocational school, her own high school, the city education commission, and the local government agency for violating, *inter alia*, her basic right to education under Article 46 of the PRC Constitution and her right to her name.[253] The Supreme People's Court eventually ruled in favor of Qi and rewarded her damages for her economic loss and emotional distress in the amount of RMB 100,000 (approximately US$12,800).[254]

Some praised the *Qi* decision to be the equivalent of *Marbury v. Madison* in the United States,[255] and regarded it as the first step of judicialization of the Constitution in the PRC.[256] Seemingly, the opinion of the Supreme People's Court might have confirmed the direct application of the Constitution to a private relationship; however, this was considered an over-statement by some scholars as the Supreme People's Court framed the issue largely as a civil dispute between two individuals.[257] In addition, after *Qi,* there has been no other case confirming constitutional rights as enforceable against a non-state party.

Of interest to the discussion on ISPs' liability is a lawsuit against China Telecom in Shanghai in 2007, which was brought by a user who was not able to connect his website to the China Telecom network through the URL address.[258] Yet he could have access to the site through

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[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] Kui, *supra* note 248, at 202, 206-07. Article 46 of the PRC Constitution stipulates that all citizens have the right to receive education. XIAN FA [Constitution] art. 46 (2004) (P.R.C.), *translated in* Chinese Government's Official Web Portal, Constitution, http://english.gov.cn/2005-08/05/content_20813.htm ("The state promotes the all-round moral, intellectual and physical development of children and young people.").

[254] Kui, *supra* note 248, at 207-08.

[255] *Id.* at 199. *Marbury v. Madison*, 5 U.S. 137 (1803), is considered a landmark case for the court's power of judicial review.

[256] *See* Chris Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 271-274 (2003), *available at* http://www.hawaii.edu/aplpj/pdfs/v4-lin.pdf (discussing the viewpoints of various scholars).

[257] *Id.* at 274.

[258] *Du Dongjing v. Shanghai China Telecom Ltd.*, Shanghai Pudong New District People's Court, Civil Judgment No. 6518 (2007), delivered on Oct. 15, 2007 judgment affirmed by Shanghai First Intermediate People's Court, Civil Judgment No. 4268 (2007), delivered on March 28, 2008, available at http://cpblawg.net/?p=370. Du has a blog expressing his thoughts on the trial.

the IP address.[259] The site at issue was unrelated to politically sensitive information, but concerned personal finance software set up by the plaintiff himself.[260] When the plaintiff demanded rectification and asked for the reasons behind the denial of his access, the company refused either to give any information or to take any action.[261] He then decided to take legal proceedings based on breach of contract duty.[262] The court ruled that the Telecom Company was only obliged to provide broadband access to the Internet but not to guarantee access to any particular website. In addition, since the plaintiff could access the said website by using his IP address, the defendant company should not shoulder any liability. Other than confirming that ISPs companies do not have any duty to make their censorship practices transparent, the courts were indirectly and effectively saying that the plaintiff had pointed his finger at the wrong culprit. ISPs are mere conduits, whereas the real censor is the state, immune from lawsuits.

b. Hong Kong Special Administrative Region

If the situation in the PRC is far from optimistic, the legal conditions in Hong Kong could be said to be equally as confusing regarding the enforcement of human rights between private parties, with case law evolving.

The parameter of human rights enforcement has been generally set by section 7 of the *Hong Kong Bill of Rights Ordinance*,[263] which states that the Ordinance only binds the Government, public authorities, and any natural or juristic person acting on their behalf.[264] The Bill of Rights itself incorporates the ICCPR as applied to Hong Kong into domestic law.[265]

His blog name is Yetaai, *see* Yetaai, *The First Trial,* Aug. 5, 2007 at http://yetaai.blogspot.com/2007/08/first-trial.html and *A Practical Lawsuit Against China Internet Censorship*, May 9, 2007 at http://yetaai.blogspot.com/2007/05/practical-lawsuit-against-china.html

[259] *Id.*

[260] *See* Yetaai, *A Practical Lawsuit, id.*

[261] *Du v. Shanghai China Telecom, supra* note 258.

[262] *Id.*

[263] Hong Kong Bill of Rights Ordinance, (1991) (H.K.), *available at* http://www.hklii.org.

[264] *Id.* § 7.

[265] *Id.* § 2(3).

In 1991, the Hong Kong Court of Appeal ruled in *Tam Hing-yee v. Wu Tai-wai*[266] that the Ordinance would not apply to litigation between private individuals.[267] In so ruling, the court was aware of the fact that with this decision, "the Ordinance does not fully comply with the intention expressed in its preamble, namely 'to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights.'"[268] Later, when examining the situation in Hong Kong, the UN Human Rights Committee criticized the fact that this manner of incorporation of international human rights texts threatened to limit the remedies to governmental violations of rights.[269] It stipulated that "a State party does not only have an obligation to protect individuals against violations by Government officials but also by private parties."[270]

Despite the above ruling in *Tam Hing-yee,* human rights provisions have continuously been invoked in inter-citizen litigation. The record has been dotted with both success and failure. For instance, in 1994, the Hong Kong Court of Appeal ruled in *Cheung Ng Sheong Steven v. Eastweek Publisher Ltds. and another*[271] that the amount of damages awarded in libel action should not be so excessive as to pose "a risk that they will constitute an impediment to freedom of opinion and expression as laid down in Article 16 of the Hong Kong Bill of Rights."[272] To be specific, the Court of Appeal referred to s. 7 of the Bill of Rights Ordinance and ruled that the law in Hong Kong should be interpreted in accordance with the treaty obligations applicable.[273] After the case of *Cheung* and when the PRC Government resumed its political sovereignty in 1997, the Court of Final Appeal was invited to consider a

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[266] Tam Hing Yee v. Wu Tai Wai, [1991] H.K.C.182 (C.A.) (H.K.), *available at* http://www.hklii.org/hk/jud/eng/hkca/1991/CACV000118_1991-08295.html.

[267] *Id.* ¶ 12; *see also* Andrew Byrnes, *And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights, in* PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 318, 384-85 (Philip Alston ed., 2000) (discussing the case of *Tam Hing-yee v. Wu Tai-wai*).

[268] *Id.* ¶ 15 (quoting Hong Kong Bill of Rights Ordinance, (1991) (H.K.)).

[269] U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland,* ¶ 12, U.N. Doc. CCPR/C/79/Add.57 (Nov. 9, 1995).

[270] *Id.*

[271] [1994] H.K.C. 507 (C.A.) (H.K.).

[272] *Id.* ¶ 59.

[273] *Id.* ¶ 11.

similar issue in a defamation action in *Paul Tse v. Albert Cheng*.[274] The question at issue was about the interpretation of malice in the defense of fair comment in a libel action.[275] The Court gave a new liberal interpretation to the law of malice,[276] ruling that a generous approach has to be adopted for freedom of speech which is guaranteed under Article 27 of the Basic Law.[277] Hence, the Court of Final Appeal had indirectly recognized constitutional rights enforcement between private individuals. In 2002, however, the Court of Appeal explicitly affirmed the case of *Tam Hing-yee* in *A Solicitor v. the Law Society of Hong Kong*.[278] In this case, a solicitor argued that the costs order imposed on him by the Solicitors Disciplinary Tribunal was manifestly excessive and disproportionate impairing his right of access to the Tribunal and his right to a fair hearing guaranteed under Article 10 of the Bill of Rights and Article 39 of the Basic Law.[279] Though the Court ruled that the Tribunal was a public body and thus bound by human rights obligations,[280] it also endorsed the case of *Tam*.[281] Had the Court ruled otherwise, human rights principles would not apply to private individuals. Given this unsettled situation in Hong Kong, another occasion will be necessary for a higher level court to resolve the complex issue of inter-citizen human rights litigation.

c. Situation in Japan

A different approach on the East Asian continent regarding human-rights obligations of non-state actors is followed by Japan.[282] Its constitutional law was strongly influenced by the German doctrine of

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[274] [2000] 3 H.K.C.F.A.R. 339 (C.F.A.), *available at* http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=21112.

[275] *Id.*

[276] Before *Tse*, the orthodox understanding was that the defence of fair comment would be defeated in an action of defamation if malice was found. Malice was then understood to refer to ulterior motive of the defendant. In the case of *Tse*, Lord Nicholls interpreted fair comment to be a statement of honest comment regardless of motive. *See id.* ¶¶ 15-26.

[277] *Id.* ¶ 3.

[278] CACV 302/2002 (C.A.) (Feb. 18, 2004), *available at* http: www.judiciary.gov.hk (search for "CACV 302/2002").

[279] *Id.* The cost was about HK $1.1 million, approximately US $128,205.

[280] *Id.* ¶ 97.

[281] *Id.* ¶ 104.

[282] *See generally* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS LAW AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 28-285 (1998) (discussing the status of international law in Japan).

"Drittwirkung" (third-party-effect) and it adopted the two main theories, which differentiate between the "direct" and "indirect" third-party effects as outlined above.[283] Generally, the theory of "indirect" third-party effects seems to prevail. In terms of Japanese law, this perception acknowledges that human rights provisions can only be realized between private individuals through the "public policy concept," contained in Article 90 of the Japanese Civil Code, which states that any act which is contrary to the public order is null and void.[284] In a judgment by the Osaka District Court in 1993, this approach was endorsed with the wording: "the Constitution and the International Covenants on Human Rights are not intended to be directly applied to legal relations between private individuals, but are to be indirectly applied through provisions contained in specific substantive private law."[285]

3. APPROACHES IN THE UNITED STATES

The Amendments to the United States' Constitution, referred to as the Bill of Rights, are regularly formulated and perceived as defensive rights directed against the state.[286] The only exception is Amendment XIII absolutely forbidding slavery and involuntary servitude, hence allowing for direct applicability also between private parties.[287]

The U.S. Supreme Court interprets the Constitution as providing for special protection against interference by non-state actors where there is a degree of "state action."[288] The so-called "State Action Doctrine" thus permits a factual protection of fundamental rights against private individuals, inasmuch as their action can be attributed to the state. Or, in other words, the question arising is under what circumstances a state can be held responsible for a breach of rights committed by a private body or individual.

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[283] *Id.*; *see also* discussion *supra* Part III.A.1.

[284] IWASAWA, *supra* note 282, at 90.

[285] *Id.* at 91 (translating 1468 HANREI JIHŌ 122, 129, 130 (Osaka Dist. Ct., June 18, 1993)).

[286] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[287] *Id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[288] CLAPHAM, *supra* note 91, at 486.

Generally, the Supreme Court seems to set generously the scope of state action in cases which raise freedom of expression. In *Marsh v. Alabama*,[289] a follower of Jehovah's Witness was asked to stop distributing religious leaflets outside of the post office in the business block of the "company-owned town," known as Chickasaw.[290] This company town featured all the characteristics of a public community;[291] however, it was owned and governed by the private Gulf Shipbuilding Corporation.[292] When the Jehovah's Witness refused to stop, she was arrested by the deputy sheriff and later convicted of breach of the domestic peace.[293] The Supreme Court emphasized the importance of the guarantees safeguarded by the First Amendment and held that "the circumstance that the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the state's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."[294] In particular, Justice Black substantiated that "since the facilities of the company town were built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation"[295] and therefore subject to the Constitutional provisions.[296] The Supreme Court confirmed this jurisprudence in *Food Employees v Logan Plaza*.[297]

This broad-minded approach, however, was reversed by *Lloyd Corp Ltd v Tanner*.[298] In that case the applicant, Lloyd Corporation Ltd., operated a private shopping mall in which a strictly enforced policy forbade the distribution of leaflets within the building.[299] Since the defendant distributed handbill invitations to a meeting of the "Resistance Community" to protest against the Vietnam War, security guards caused the defendants to leave the shopping mall.[300] The Supreme Court ruled that the exercise of the freedom of expression on the private ground of

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[289] 326 U.S. 501 (1946).
[290] *Id.* at 503.
[291] *Id.* at 502.
[292] *Id.*
[293] *Id.* at 503-04.
[294] *Id.* at 509.
[295] *Id.* at 506.
[296] *Id.*
[297] 391 U.S. 308 (1968).
[298] 407 U.S. 551 (1972).
[299] *Id.* at 555.
[300] *Id.* at 556.

the shopping mall was not permissible, since the general protest did not have any connection to the mall;[301] additionally, it held that alternative methods for distributing the leaflets would have existed.[302] This interpretation was emphasized four years later in *Hudgens v. NLRB*;[303] however, it was questioned anew by *Prune Yard Shopping Center v. Robins*[304] when students' freedom of expression, by protesting against a UN resolution concerning Zionism, was given priority before the shopping mall's right to property.[305]

All of these cases addressed the situation in which a private body adopted a traditionally public function. State action according to the State Action Doctrine, however, can also be established "when the state is so involved with the private actor that the private actions become colored as state action, and therefore the non-state actor is bound to respect Constitutional rights."[306] This was the case in *Lebron v. National Railroad Passenger Corporation*.[307] Amtrak, the private corporation, denied the request of Lebron to place a billboard criticizing the political views of an American firm in Amtrak's Pennsylvania Station in New York City.[308] The Supreme Court found that due to its ties to the state and "its very nature," government-created and controlled corporations like Amtrak are part of the Government itself.[309]

4. APPROACHES IN SOUTH AFRICA

On the African continent, Sections 8(2) and (3) of the 1996 Constitution of the Republic of South Africa stand out in particular, clearly providing for direct horizontal effects of the national Bill of Rights.[310] The wording of section 8(2) demands for a case-by-case

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[301] *Id.* at 558, 566-67.

[302] *Id.* at 564.

[303] Hudgens v NLRB, 424 U.S. 507, 518-21 (1976).

[304] 447 U.S. 74 (1980).

[305] *Id.* at 88.

[306] *See* CLAPHAM, *supra* note 91, at 492.

[307] 513 U.S. 374 (1995).

[308] *Id.* at 377.

[309] *Id.* at 392. However, on remand, the Second Circuit Court of Appeals finally decided that Amtrak had not breached the First Amendment. Lebron v. Nat'l R.R. Passenger Corp., 69 F.3d 650 (2d Cir. 1995).

[310] S. AFR. CONST. 1996 § 8(2) ("A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."); *id.* § 8(3)

clarification as to whether the right in question should be "applicable" in the particular context. The Court's decision[311] in *Khumalo v. Holomisa*[312] was fairly clear regarding the right to freedom of expression: in this case a well-known politician sued the applicants—a media entity—for defamation arising out of the publication of an article in the *Sunday World*.[313] The applicants relied on section 16 of the Constitution which entrenches the right to freedom of expression.[314] The court left no doubt that freedom of expression in this case was of direct horizontal application, or in the words of the court:

> Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution.[315]

5. CONCLUSION

The approaches chosen in national parliaments and courts are as complex and variable as the various national legal orders themselves. A generally applicable, mandatory obligation of ISPs as private parties cannot be deduced from the national approach. Moreover, ISPs' human rights liabilities according to national jurisprudence will depend on the laws applicable to their field of action and their domicile. Although generally, the extension of human or constitutional rights into the private sphere is still perceived as a restriction to private freedoms, it cannot be precluded in advance either.[316]

> When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court: (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

see also Du Plessis v. De Klerk 1996 (3) SA 850 (CC) at ¶ 33 (S.Afr.), *available at* http://hei.unige.ch/~clapham/hrdoc/docs/SouthAfricaCCduplessis.pdf (hinting for a horizontal application of the Constitution before the Constitution of 1996 entered into force).

[311] *See* CLAPHAM, *supra* note 91, at 457.

[312] Khumalo v. Holomisa 2002 (5) SA 401 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2002/12.html.

[313] *Id.* ¶ 1.

[314] *Id.* ¶ 2.

[315] *Id.* ¶ 33.

[316] *See generally* CLAPHAM, *supra* note 91, at 437-41.

D. LIABILITY ISSUES

1. LIABILITY OF TRANSNATIONAL MEDIA CORPORATIONS UNDER INTERNATIONAL LAW

The developing perception that actors, other than states, may endanger human rights has especially been discussed in the context of transnational corporations ("TNCs") as a particular form of non-state actor.[317] It is commonly known that TNCs have emerged to become potent actors on the international stage, sometimes even more powerful than states and, most notably, with a transnational field of action.[318] This was also recognized by the UN Commission on Human Rights in the "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights" ("UN Norms"), adopted in 2003.[319] Relying on the Universal Declaration of Human Rights, the United Nations decided to impose direct responsibility onto transnational corporations to adhere to international human rights standards in general, encompassing the rights of privacy, freedom of thought, conscience, opinion, and expression, in particular.[320] As a positive attempt to deal with situations where a company is operating in a state that is unwilling to protect human rights, this document endorses a system of remedy for the victims in national courts and international

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[317] According to the U.N., the notion "transnational enterprises" is defined as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on the Promotion & Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter *UN Norms*]; *see also* CLAPHAM, *supra* note 91, at 199 (discussing the confusing application of the terms "transnational corporation," "multinational enterprises," etc.). For the purpose of this article, we shall use the term "transnational corporations" (TNCs).

[318] *See, e.g.*, Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 75 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) [hereinafter *Accountability of Multinational Enterprises*]; SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 1-6 (2004); David Weissbrodt & Muria Kruger, *Human Rights Responsibilities of Businesses as Non-State Actors*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 315, 315-318 (Philip Alston ed., 2005).

[319] *UN Norms*, *supra* note 317.

[320] *Id.* ¶ 12.

tribunals.[321] However, this is an untested area, as litigation and claims based on the same doctrine only have been advanced in cases of natural resources exploitation, environmental protection, and forced labour.[322]

It is an undisputed fact that TNCs can and do breach human rights. Notorious examples have been related to breach of labour rights by Nike, while Royal Dutch Shell and British Petroleum have been accused of environmental damage. The recent cases concerning freedom of expression and multimedia corporations such as Google, Yahoo!, and Microsoft mentioned above, have launched prevailing discussions[323] and have contributed to the initiation of this article with the objective of examining human rights obligations of non-state actors.[324]

In light of the "New International Economic Order," different activities have emerged towards a form of international regulation of TNCs in particular. However, a world-wide approach, in particular under the auspices of the UN, has failed to establish a binding code.[325] As outlined above, the human rights framework cannot be interpreted in a way to directly impose mandatory obligations and accountability mechanisms on non-state actors such as TNCs.[326] Nevertheless, non-binding codes have been established, which provide for the most obliging international standards effective for corporate conduct at present.[327]

The International Labor Organization ("ILO") established the "ILO Tripartite Declaration of Principles Concerning Multinational

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[321] *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001) (proposing a theory of corporate responsibility under international law).

[322] *Id.* at 446.

[323] For example, the mere size of such media enterprises may give rise to a set of issues concerning potential market concentration. *See, eg., Inter-American Declaration of Principles on Freedom of Expression, supra* note 203, ¶ 12

> Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

[324] Yahoo! has provided the Chinese authorities with private and confidential information about its users, Microsoft has admitted to shutting down a blog on the basis of a government request, and Google has launched a censored version of its search engine in China. AMNESTY INT'L, UNDERMINING FREEDOM OF EXPRESSION IN CHINA: THE ROLE OF YAHOO!, MICROSOFT AND GOOGLE 5-6 (July 2006), *available at* http://www.amnestyusa.org/business/Undermining_Freedom_of_Expression_in_China.pdf.

[325] *See Accountability of Multinational Enterprises, supra* note 318, at 84.

[326] *See* CLAPHAM, *supra* note 91, at 240; *UN Report on Human Rights, supra* note 15, ¶¶ 41, 44.

[327] *See Accountability of Multinational Enterprises, supra* note 318, at 84.

Enterprises and Social Policy" on November 16, 1977, which addressed the area of labor regulation and contained principles of relevance to both multinational and national enterprises.[328] In addition, the Organization for Economic Co-operation and Development ("OECD") enacted "The OECD Guidelines for Multinational Enterprises" containing recommendations addressed by the signing governments to transnational corporations operating in or from adhering countries and providing voluntary principles and standards for responsible business conduct for them, especially in the field of human rights.[329] The guidelines have been adopted by the thirty OECD states and accepted by nine non-member states in Paris on 27 June 2000.[330] As the United States has adopted the Guidelines, they are particularly applicable to U.S. media corporations such as Google, Yahoo!, and Microsoft.

Furthermore, the "UN Global Compact (2000)" was enacted upon the suggestion of the UN Secretary-General at the World Economic Forum in Davos, Switzerland.[331] It includes ten principles, two of which refer to human rights in particular.[332] Moreover, and remarkable in this context, the UN Norms outlined above deserve further mention.[333] The first paragraph stands out most notably in this context, addressing the entities that are deemed responsible under the norms: states and (explicitly) "transnational corporations and other business enterprises . . . within their respective spheres of activity and influence." The latter are obliged "to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law."[334] With this phrasing, the UN Norms address the issue that

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[328] *See, e.g.*, CLAPHAM, *supra* note 91, at 211-18.

[329] *See, e.g., id.* at 201-11.

[330] *See* Directorate for Fin. & Enter. Affairs, Guidelines for Multinational Enterprises, www.oecd.org/daf/investment/guidelines (last viewed May 8, 2008).

[331] *See, e.g.*, CLAPHAM, *supra* note 91, at 218-25.

[332] The first principle is that "[b]usinesses should support and respect the protection of internationally proclaimed human rights," and the second principle is "[b]usinesses should make sure that they are not complicit in human rights abuses." *Id.* at 218.

[333] *See supra* notes 317-20 and accompanying text; CLAPHAM, *supra* note 91, at 225-37; Weissbrodt & Kruger, *supra* note 318, at 315-50.

[334] *UN Norms*, *supra* note 317, ¶ 1. The full text holds that:

> States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect

transnational corporations need to comply with different legal frameworks; they must consider the local law in the fields of their action, the laws of the country in which they are incorporated, international law, policies, practices, and other laws.

Besides these international attempts, self-regulation approaches have also played an important role regarding TNCs' liability issues.[335] In the 1990s, several corporations adopted their own voluntary codes of conduct as a reaction to the pressure exercised by civil society and NGOs in particular.[336]

These regulatory frameworks all suffer from the shortfall of being non-binding. Nevertheless, several initiatives provide for ways to enhance accountability for compliance[337] and the effect of such so-called "soft obligation" mechanisms, which should generally not be underestimated due to their significance for the development of international law in particular.[338] There are considerable concerns regarding the efficacy of self-regulation mechanisms, since their implementation is not guaranteed beyond a reasonable doubt. In particular, worries have been expressed that such internal codes often may be more of a public relations exercise.[339]

Within the European Union, non-discrimination principles on grounds of nationality and equal pay for equal work stand out as primarily binding the European Member States; however, ultimately

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human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

Id.

[335] *See UN Report on Human Rights*, *supra* note 15, ¶¶ 63-81.

[336] *See Accountability of Multinational Enterprises*, *supra* note 318, at 80-81 (discussing NGO pressure against "unethical corporations" and their mobilization of public opinion).

[337] For example, complaints against multinational firms operating within the sphere of the OECD Guidelines can be brought to a so-called National Contact Point ("NCP") and are thereby subject to a non-judicial review procedure. Furthermore, the OECD Investment Committee is the responsible OECD body for overseeing the functioning of the Guidelines and for the enhancement of their effectiveness. *See* CLAPHAM, *supra* note 91, at 207-11. A company participating in the UN Global Compact is expected to publicly advocate its principles and to annually communicate on its actions. Under the UN Norms, TNCs should adopt and implement complying internal rules of operation. Furthermore, they are expected to periodically report on the rules' implementation. In addition, TNCs are subjected to periodic monitoring and verification by the United Nations. States must establish and reinforce the necessary legal and administrative framework for ensuring that the Norms are implemented. *See UN Norms*, *supra* note 317, ¶¶ 15-19.

[338] *See generally* Daniel Thürer, *Soft Law*, *in* ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, 452-460 (Rudolf Bernhard ed., 2000); *UN Report on Human Rights*, *supra* note 15, ¶¶ 45-62; CLAPHAM, *supra* note 91, at 100-07.

[339] *Accountability of Multinational Enterprises*, *supra* note 318, at 83.

being applicable to corporations, hence, charging them with direct obligations.[340] Recent treaties on the international level on corruption,[341] financing terrorism,[342] and organized crime,[343] to name a few, show that the behavior of TNCs is also addressed in international law treaties. Such treaties target corporate behavior as offences under the treaty and demand action against the legal persons in charge; however, it is left up to the states to find an effective way to hold these entities liable.[344] Therefore, the lack of strength of these provisions can be seen in their various implementations according to different national practices.[345]

In a nutshell, ISPs, when organized as TNCs, are unlikely to be held directly liable under an international binding legal framework, even if according tendencies can be discerned and their conduct specifically addressed in international treaties. However, non-binding codes may influence their field of activity. Most notably, the UN Norms mention the TNCs' duty to respect human rights and contribute to their realization, in particular the right to freedom of opinion and expression.[346] Furthermore, ISPs can become active themselves by applying self-regulative codes of conduct.

2. STATE OBLIGATION TO PROTECT HUMAN RIGHTS FROM TRANSNATIONAL CORPORATIONS' BREACHES

It is well established that states are bound by international human rights law to protect their citizens against non-state human rights abuses within their jurisdiction; however, when demanding states' control of

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[340] *See* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts arts. 12, 141, Nov. 10, 1997, 1997 O.J. (C 340) 3; *see also* CLAPHAM, *supra* note 91, at 189-190.

[341] *See* Criminal Convention on Corruption Preamble, Jan. 27, 1999, 38 I.L.M. 505, 505-06; *see also* United Nations Convention against Corruption, G.A. Res. 58/4, ¶ 2, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

[342] *See* International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, ¶1, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

[343] *See* United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, ¶ 2, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

[344] CLAPHAM, *supra* note 91, at 247-52.

[345] *UN Report on Human Rights*, *supra* note 15, ¶¶ 84-86; *see also id.* ¶¶ 19-32 (addressing corporate responsibility and accountability for international crimes); Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 139-195 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

[346] *UN Norms*, *supra* note 317, ¶ 12.

private entities and therewith the indirect imposition of human rights, the question arises which state should be addressed.[347] Is it the "host state" in which the TNC performs its activity or the "home state" in which the TNC is incorporated? Does it matter if the majority of shareholders come from a different country or should the nationality of the victim to the human rights violation be considered? With a glance at the powerful position that many TNCs have, especially in developing states, it becomes dubious whether a host state can effectively control the often more economically powerful entity.[348] These considerations combined with the fact that a TNCs' home state will usually be a developed country, suggest the referral to the home state. This, however, may bring up the delicate issue of extraterritorial jurisdiction.[349] Additionally, difficulties could arise from the perception that too much regulation could put corporations at a competitive disadvantage.[350]

Despite these considerations, "the state duty to protect against nonstate abuses is part of the international human rights regime's very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations."[351] Hence, the states concerned are obliged to protect individuals from breaches against their right to freedom of expression committed by ISPs. In doing so, they may be obliged to implement frameworks such as the OECD Guidelines, the UN Norms, and others.[352]

IV. NEW INITIATIVES IN NATIONAL COURTS AND NATIONAL LEGISLATION

Though there has been an emerging and evolving trend in international and national law for state authorities to extend their horizontal effect of human rights protection to non-state actors and to hold TNCs or individuals directly accountable for human rights

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[347] International Covenant on Civil and Political Rights, *supra* note 107, art. 2.

[348] *Accountability of Multinational Enterprises*, *supra* note 318, at 78.

[349] *See UN Report on Human Rights*, *supra* note 15, ¶ 15.

[350] *See Accountability of Multinational Enterprises*, *supra* note 318, at 80.

[351] *UN Report on Human Rights*, *supra* note 15, ¶ 18.

[352] *See UN Norms*, *supra* note 317, ¶ 17 ("States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.").

violations, a positive legal duty on ISPs to respect freedom of expression is not yet on the horizon. Facing this nebulous situation, individual complainants have resorted to suing ISPs in their home jurisdictions, rather than their host states.[353] The following discussion will cover two legal attempts to hold Yahoo! liable for transmitting information to the host state. In the Hong Kong case, local law of the home jurisdiction was used.[354] The complainant decided to make use of the difference in law between Hong Kong and mainland China, but failed.[355] In a related case which was originally filed before the U.S. District Court for the Northern District of California in April 2007,[356] the parties decided to fight a legal battle relying on international law principles and American law.[357] Much resistance is anticipated from the Western front.

A. AN UPHILL BATTLE BEFORE THE HONG KONG SAR PRIVACY COMMISSIONER

The tragic hero in this battle is the journalist, Shi Tao, whose story was related earlier in Part II of this article. In the verdict against him by the PRC Court, it was revealed that Yahoo! (HK) had handed over his personal information to the Chinese authorities.[358] This could imply that Yahoo! Inc. has been providing email services hosted on servers based outside Mainland China. Arguably, Yahoo! (HK) should be subject to Hong Kong legal jurisdiction and therefore, would not have been legally obliged to deliver information to the mainland authorities. Due to public concern and a formal complaint by Shi Tao, the Hong Kong Privacy Commissioner started investigations into whether Hong Kong personal data law was applicable to protect Shi Tao or like victims.[359] The Commissioner's report, however, was negative.[360]

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[353] These included the legal battles of Shi Tao and Wang Xiaoning, who were journalists in China. *See infra* Part IV.A-B.

[354] *See* H.K. OFFICE OF THE PRIVACY COMM'R FOR PERSONAL DATA, REPORT NO. R07-3619, REPORT PUBLISHED UNDER SECTION 48(2) OF THE PERSONAL DATA (PRIVACY) ORDINANCE (CAP. 486) § 1.1, (2007) [hereinafter H.K. REPORT], *available at* http://www.pcpd.org.hk/english/publications/files/Yahoo_e.pdf.

[355] Cynthia Wan and Gary Cheung, *Privacy Complaint over Yahoo's Mail Leak,* SOUTH CHINA MORNING POST, Apr. 1, 2004 at A3.

[356] Complaint ¶ 1, Wang v. Yahoo! Inc., No. 07-2151 (N.D. Cal. Apr. 18, 2007), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/4:2007cv02151/191339/1/0.pdf. The case was later settled in November 2007. *See* discussion *infra* Part IV.B.

[357] Complaint, *supra* note 356, ¶¶ 3-5.

[358] Shi Tao verdict, *supra* note 57, at 31.

[359] *See* H.K. REPORT, *supra* note 354, §§ 2.3-2.4.

First and foremost, while the *Personal Data (Privacy) Ordinance*[361] of Hong Kong protects personal data, the subsequent questions that one has to decide are whether the data user has violated his duty under the stated principles and whether the data user can rely on any exemption specified under the law. Under section 2 of the Ordinance, personal data is defined to mean "any data relating directly or indirectly to a living individual; from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and in a form in which access to or processing of the data is practicable."[362] In fact, Yahoo! (HK) provided the mainland authorities with the user registration information, the IP log-in information, and certain email contents.[363] But it claimed that back in 2004 it was not made aware of the exact nature or details of the investigation or the real identity of the user in the PRC.[364] This, however, was far from the truth, but was only revealed in July 2007, four months after the delivery of the Privacy Commissioner's report.[365] Subsequently, Yahoo! (HK) refused to provide further information on the exact details of the user's information and email contents which it had disclosed, based on possible violations of state secrets law.[366] The Commissioner ruled that an IP address and log on information *per se* were only indirect evidence relating to an individual.[367] In his opinion, only a telephone number, a business address, and a computer could be deduced from the information—that is to say, an IP address alone was not considered capable of directly identifying an individual conclusively. Thus, what Yahoo! (HK) had

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[360] *Id.* § 8.50.

[361] H.K., Personal Data (Privacy) Ordinance § 4 (1995), *available at* http://www.hklii.org/hk/legis/en/ord/486/s4.html.

[362] H.K., Personal Data (Privacy) Ordinance § 2 (1995), *available at* http://www.hklii.org/hk/legis/en/ord/486/s2.html.

[363] H.K. REPORT, *supra* note 354, § 6.9.

[364] *Id.* §§ 6.8, 6.11-12.

[365] In July 2007, the human rights organization Duihua secured documents proving that the Beijing State Security Bureau required Yahoo! (HK) to provide account registration, login times, corresponding IP addresses, and email content over a two-month period in early 2004 for a specific Yahoo! email account in a case of suspected "illegally providing state secrets to foreign entities." News Release, Dui Hua, Police Document Sheds Additional Light on Shi Tao Case (July 25, 2007), http://www.duihua.org/2007/07/police-document-sheds-additional-light.html; Beijing State Security Bureau Notice of Evidence Collection (Apr. 22, 2004), http://www.duihua.org/press/news/070725_ShiTao.pdf. This was contradictory to Yahoo!'s statement before the U.S. congressional subcommittees hearing in 2006. *See Joint Hearing on the Internet in China*, *supra* note 66, at 56 (statement of Michael Callahan).

[366] H.K. REPORT, *supra* note 354, §§ 7.14, 7.16.

[367] *Id.* §§ 8.7-.14.

disclosed did not amount to personal data. This interpretation is restrictively narrow and far from convincing since an IP address, phone number, and log on time are important leads for tracing the location of individual users. The IP address should be viewed as part and parcel of a package of information. Without it, the mainland authorities could not have tracked down and arrested Shi.

The Commissioner also gave a negative answer on the second point, about whether Yahoo! (HK) was a data user and whether it had breached its statutory duty.[368] The Commissioner found that Yahoo! China was a webpage owned by Yahoo! (HK) at the time of the incident, which is a subsidiary of Yahoo! Inc.;[369] however, Yahoo! China was operated by a Beijing based entity.[370] Therefore, Yahoo! (HK) did not have any control over the collection or disclosure of the users' data.[371] In other words, it would be more accurate to say that Yahoo! China was managed and controlled vertically by Yahoo! Inc. in the United States.[372] It may well have been enough for the Commissioner to conclude that Yahoo! (HK) was not a data user since it lacked substantive control of data and because none of the acts of collecting, holding, processing, or using of data took place in Hong Kong. Yet, the Commissioner went further and said the company could not be a data user because it was "compelled under the force of PRC law" to disclose the information, otherwise facing criminal or administrative sanctions.[373] In other words, since the act of disclosure was not voluntary, Yahoo! (HK) could not qualify as a data user and Hong Kong law did not apply. Following this logic, as long as an individual or business entity is complying with a state order, it is not disclosing information. As a result, this renders redundant both the first step, which examines the extent of substantive control of data, as well as the last step, which studies the availability of exemption.[374]

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[368] *Id.* § 8.26.

[369] *Id.* §§ 2.2.2, 2.5.1.

[370] *Id.* § 2.5.8.

[371] *Id.* § 2.5.12.

[372] *Id.* § 6.5.

[373] *Id.* § 8.25.

[374] Under section 57 of the Ordinance, disclosure for safeguarding security, defence and prevention as well as detection of crime would be treated as defences. H.K., Personal Data (Privacy) Ordinance § 57 (1995), *available at* http://www.hklii.org/hk/legis/en/ord/486/s57.html. Section 58 allows the defence of disclosure of data for crime detection. H.K., Personal Data (Privacy) Ordinance § 58 (1995), *available at* http://www.hklii.org/hk/legis/en/ord/486/s58.html.

The Commissioner ruled that since the disclosure was made pursuant to a lawful requirement by a foreign authority for the purpose of investigating a foreign crime, what Yahoo! (HK) did was perfectly legitimate.[375] In bringing the case before the Privacy Commissioner, the legal forum was necessarily confined to examine Hong Kong personal data law. Therefore, the human rights issue of freedom of expression was never raised. The legitimacy of Yahoo! (HK) in obeying the executive order given by the State Security Bureau, without a search warrant by the court, was never questioned. Given the fact that Hong Kong is part of the PRC, any ruling is bound to be intricately politically sensitive and delicate. We have probably witnessed how anxious the Commissioner was to steer away from political controversies. What is more, what we learn from all of this is that the attempt to extend the legal arm on ISPs in home jurisdiction may not work if the legal forum is overshadowed by the larger issue of political might.

B. INTERNATIONAL LAW IN NATIONAL COURTS

Nevertheless, undaunted and determined, Shi Tao decided to join others in *Wang Xiaoning and others v. Yahoo! Inc.* to fight the battle against Yahoo! Inc. in the U.S. Courts.[376] Yahoo! Inc. moved for a no cause of action dismissal.[377] For better or for worse, the case was settled in November 2007. Yahoo! agreed to pay legal costs and apologize to the journalists' families on the condition that the terms of the settlement would not be disclosed.[378] Yahoo! further pledged to set up a human rights fund "to provide humanitarian and legal aid to [online] dissidents."[379] While the legal and political fanfare has come to a temporary halt, the underlying issues concerning the possible liabilities of ISPs have remained unresolved. Thus the following analysis on Yahoo!'s potential liabilities under American law should not be overlooked.

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[375] H.K. REPORT, *supra* note 354, §§ 8.37-.40, 9.1-18.

[376] Dikky Sinn, *Jailed Chinese Reporter Joins Yahoo Suit*, ASSOCIATED PRESS, June 10, 2007, *available at* http://abcnews.com/print?id=3264204.

[377] Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order at 15:7-9, No. 07-2151 (N.D. Cal. Nov. 1, 2007), *available at* http://rconversation.blogs.com/YHOOmotion2.pdf.

[378] Ewen MacAskill, *Yahoo Forced to Apologise to Chinese Dissidents Over Crackdown on Journalists*, GUARDIAN (London), Nov. 14, 2007, at 18.

[379] *Id.* (quoting Jerry Yang, CEO of Yahoo!).

In the initial lawsuit, international human rights principles were enlisted and the *Alien Tort Statute* ("ATS"), which allows a non U.S. citizen to bring tortious claims against any legal person,[380] was invoked to resolve this embittered conflict.[381]

1. THE WANG CASE

The case of *Wang Xiaoning and others v. Yahoo! Inc.* was filed by Wang, on behalf of other Internet dissidents in the PRC.[382] Wang was the editor of two political magazines in the PRC.[383] On an email subscriber list, Wang advocated the end of one party rule in the PRC in 2001.[384] He was later detained for twenty months without trial and then sentenced to ten years in prison and two additional years of deprivation of political rights because of "'incitement to subvert state power,' advocating the establishment of an alternative political party, and communicating with an overseas organization the Chinese government considers hostile."[385] At the time of filing, it was identified that at least sixty other individuals have been imprisoned in the PRC for their Internet anti-government political activities, whose electronic communications were handed to the PRC authorities by Yahoo! Inc.[386]

The plaintiffs stated that in acting jointly and colluding with the PRC Government in infringing upon the freedom of speech and expression of the general public, the defendant company had violated universal, specific, and obligatory, customary international law, federal law, and state law.[387] The allegation was that Yahoo! Inc. had knowingly and willfully aided and abetted in the commission of torture, cruel, inhuman, or other degrading treatment or punishment, arbitrary arrest, and prolonged detention of the plaintiffs in the course of exercising their right to freedom of speech, association, and assembly at the hands of the

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[380] Alien Tort Claims Act, 28 U.S.C. § 1350 (2000); *see* CLAPHAM, *supra* note 91, at 443 (discussing the history of the ATS).

[381] Complaint, *supra* note 356, ¶7.

[382] *See id.* ¶ 6.

[383] *Id.* ¶ 29.

[384] *Id.* ¶ 40.

[385] *Id.* ¶¶ 36-38.

[386] *Id.* ¶ 12.

[387] *Id.* ¶ 48.

PRC authorities.[388] The defendant company was said to have substantially benefited from these acts.[389]

The plaintiffs invoked the U.S. Alien Tort Statute ("ATS") in particular.[390] For the scope of this article, the possible implications of the ATS and the applicability of the international human rights principles of freedom of expression under that statute deserve further examination.

The ATS provides an important mechanism regarding liability of TNCs. In one sentence, it confers upon the Federal District Courts "original jurisdiction over any civil action by an alien (non-U.S. citizen) for a tort only, committed in violation of the law of nations or a treaty of the United States."[391] Despite its record of more than two hundred years, the Act has only been increasingly relied on by different claimants since the 1980s.[392]

The Act itself does not specify the preconditions for its admissibility. Furthermore, what makes litigation under the Act rather ambitious is the fact that its application is heavily laden with sensitive political concerns. Other than deciding whether TNCs should shoulder human rights responsibility, the U.S. court also decides on the kind of demands possible, not only against the parties involved, but also against the foreign state and the U.S. government.[393] Hence, indirectly, it holds both the foreign state and the government accountable for human rights violations. Seen in the light of the current criticism of the substantial influence of the United States on the Internet, especially through the Internet Corporation for Assigned Names and Numbers ("ICANN"), litigation under the ATS seems especially delicate particularly taken in conjunction with the European proposal to internationalize Internet

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[388] *Id.* ¶¶ 1-2.

[389] *Id.* ¶ 28.

[390] *Id.* ¶ 3.

[391] 28 U.S.C. § 1350 (2000).

[392] *See, e.g.*, John Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) [hereinafter Unocal I] (addressing corporate responsibility for using slave labor) *rev'd in part* 395 F.3d 932, 933 (9th Cir. 2002); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997) (alleging responsibility for genocide); *see also* CLAPHAM, *supra* note 91, at 252 (discussing the ATS in further detail); Beth Stephens, *Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 345, at 209, 209-29. Before the 1980s, only twenty-one cases had been lodged under the Act. Neil J. Conley, Comment, *The Chinese Communist Party's New Comrade: Yahoo's Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo's Possible Liability Under the Alien Torts Claim Act*, 111 PENN ST. L. REV. 171, 183 (2006).

[393] *See* CLAPHAM, *supra* note 91, at 443.

governance and to curtail the policy-making of ICANN, specifically as submitted to the WSIS in 2005.[394]

As expected, the courts take cautious approaches as exemplified in the sole Supreme Court judgment under the ATS in *Sosa v. Alvarez-Machain*.[395] Alvarez was a Mexican national, and a physician by practice.[396] It was alleged that he was involved in prolonging the life of an agent of the U.S. Drug Enforcement Administration ("DEA") in order to extend the duration of interrogation and torture of the agent concerned in Mexico.[397] Alvarez was later abducted by a group led by Sosa and was flown to the United States for trial.[398] After his acquittal, he brought a civil action against Sosa and other DEA agents under the ATS, alleging arbitrary detention.[399] In 2004, the U.S. Supreme Court dismissed Alvarez' claim, mainly due to the fact that arbitrary detention is not a recognized cause of action under the statute.[400]

In setting the benchmark, the Court adopted a strict interpretation. First, the Court clearly stated that the ATS only deals with jurisdictional issues.[401] Second, the causes of action recognized by the ATS are the three narrow categories referred to by the famous jurist Blackstone, namely, offences constituting a violation of safe conducts, infringement of the rights of ambassadors, and piracy.[402] Having said that, the majority opinion reassured any future claimants that there is nothing that has "categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[403]

Nevertheless, a restrained attitude is urged for the standard of any new claim which should be based "on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the

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[394] *See* Viktor Mayer-Schönberger & Malte Ziewitz, *Jefferson Rebuffed: The United States and the Future of the Internet Governance*, 8 COLUM. SCI. & TECH. L. REV. 188, 188 (2007); Weber & Grosz, supra note 90, at 122.

[395] Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004).

[396] *Id.* at 697.

[397] *Id.*

[398] *Id.* at 698.

[399] *Id.*

[400] *See id.* at 738.

[401] The court does not have any authority for the creation of new cause of action for torts in violation of international law. *Id.* at 713.

[402] *Id.* at 715, 724.

[403] *Id.* at 725. The famous metaphor is that "the door is still ajar subject to vigilant door keeping . . . open to a narrow class of international norms today." *Id.* at 729.

18th-century paradigms."[404] The U.S. Supreme Court further elaborated a set of guidelines to determine whether any new causes of action should be recognized, giving a list of reasons for extreme caution in this context.[405]

Applying the law to the facts of *Wang*, the first issue is whether TNCs can generally be held liable for ATS violations. The answer is affirmative as established in the authority *Unocal Corporation,*[406] concerning an American oil company which, while doing business in Myanmar, played a contributory role in the perpetuation of various forms of abuse, including forced labor, torture, and rape by the military.[407] These human rights violations were qualified as jurisdictional issues constituting jurisdiction of the court.[408] Yet, the remaining issues are more perplexing.

Following the advice in *Sosa*, a decision needs to be made: (1) whether the rights at issue are recognized or should have been recognized under the ATS; and (2) whether the defendants could be linked to the alleged violations so as to incur legal liabilities.

2. RIGHTS AT ISSUE

In the case of *Wang v. Yahoo! Inc.*, the plaintiffs alleged torture, cruel, inhuman or degrading treatment or punishment, and arbitrary arrest and prolonged detention, for exercising their right of freedom of speech, association, and assembly.[409] All of these rights fall outside the

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[404] *Id.* at 725.

[405] *Id.* at 725-29. (1) The judiciary should bear in mind that different from the once prevalent concept, common law is not so much found or discovered but is either made or created; since common law is a product of human choice, the courts must recognize that they have no authority to derive "general" common law. *Id.* at 725. (2) The future court should look for legislative guidance before exercising innovative authority over substantive law. *Id.* at 726. (3) Generally, any decision to create a private right of action is better left to legislative judgment. *Id.* at 727. (4) Courts should be careful with regard to any collateral consequences such a decision would possibly have on the discretion of the legislative and executive branches in the US and other nations concerning the conduct of foreign relations and policies. *Id.* at 727-28. The last reminder is that the courts must be mindful of the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728.

[406] Unocal I, 963 F. Supp. 880, 899 (C.D. Cal. 1997), *rev'd in part*, 395 F.3d 932, 933 (9th Cir. 2002).

[407] The Myanmar military provided security and other services to Unocal for its pipeline project in Myanmar, formerly known as Burma. *Id.* at 883. The plaintiffs alleged serious human rights violations of the military with knowledge of Unocal. *Id.*

[408] John Doe I v. Unocal Corp., 395 F.3d 932, 944-45 (9th Cir. 2002) [hereinafter Unocal II].

[409] Complaint, *supra* note 356, ¶ 1.

three recognized categories of rights in *Sosa*.[410] Whether they are norms of "international character accepted by the civilized world and defined with a specificity comparable to the features" of rights in the eighteenth century is open to debate.[411]

According to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, only public officials or persons acting in official capacity could be held liable for the stated offences.[412] Torture is defined under Article 1 as intentionally inflicting severe pain or suffering on another in the performance of purported performance of official duties.[413] This includes extracting confession by torture.[414] The actions covered in the present case are thus prohibited by international law.[415] Wang himself alleged that he was kicked and beaten repeatedly by prison officials to get him to confess and to turn in names of other persons.[416] He was held in a high security forced labor prison,

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[410] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

[411] Though the above mentioned rights have been enshrined in numerous international treaties and conventions, the level of acceptance and specificity required by the Court has been debated ferociously in different district courts.

[412] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. U.N. HCHR Doc. A/Res/39/46 (Dec. 10, 1984), *available at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm [hereinafter *Convention against Torture*]. Article 1 stipulates that:

> [f]or the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. Torture is also prohibited under the ICCPR, the ECHR, the ACHR, and the Banjul Charter. International Covenant on Civil and Political Rights, *supra* note 107, art. 7; European Convention on Human Rights, *supra* note 107, art. 3; African Charter on Human and People's Rights, *supra* note 107, art. 5; Banjul Charter, *supra* note 107, art. 5.

[413] *Convention Against Torture*, *supra* note 412, art. 1.

[414] *Id.*

[415] Amnesty International listed in its report that by 2002, thirty-three Chinese prisoners of conscience had been jailed for using the Internet to access or disseminate information. *See* AMNESTY INT'L, PEOPLE'S REPUBLIC OF CHINA: STATE CONTROL OF THE INTERNET IN CHINA 1 (Nov. 2002), *available at* http://www.amnesty.org/en/library/asset/ASA17/007/2002/en/4a3cab2f-a3ff-11dc-9d08-f145a8145d2b/asa170072002en.pdf. Three had died in custody and two from torture. *Id.* at 16-19.

[416] Complaint, *supra* note 356, ¶ 39.

with no access to recreation or even sunlight for weeks and even months at a time.[417]

Even if the acts amount to torture, however, the United States has not ratified the Convention and has deemed Article 1 not to be self-executing.[418] In 2005, the case of *Ibrahim v. Titian Corporation* held that torture committed by private and non-state actors was not actionable under the ATS.[419] The case dealt with Iraqi detainees who suffered alleged acts of torture in the Abu Ghraib prison in Baghdad.[420] The detainees brought actions against American corporations who did contract work for the U.S. military and were accused of being involved in various acts of torture.[421]

Given that it is unlikely that the act of torture by private actors or TNCs would be considered actionable under the ATS, parties in *Wang* have to invoke *the Torture Victim Protection Act* of 1991 which allows civil action to be brought against an "individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another to "torture" or "extrajudicial killing."[422] Therefore, the plaintiffs must have exhausted all remedies in the place where the conduct occurred, and their success hinges on whether the plaintiffs can effectively argue that the defendants' act was "under the color of law."[423] This point will be further examined in the following part 3 of this article.

The U.S. Supreme Court refused to recognize arbitrary detention as a violation of the widely accepted and clearly defined international legal rights in *Sosa*.[424] Law graduate, Neil Conley, in discussing the possible application of the ATS on Yahoo!, has argued forcefully otherwise.[425] He puts forward the argument that *Sosa*, in refusing to recognize arbitrary detention as part of recognized international law, should be distinguished from the Yahoo! litigation because *Sosa* was concerned only with a half-day of unlawful detention.[426] However,

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[417] *Id.* ¶ 42.

[418] *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 552 (2004).

[419] Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 13-14 (D.C. Cir. 2005) (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)), *aff'd by* Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57 (2005).

[420] *Id.* at 12.

[421] *Id.*

[422] 28 U.S.C. §1350 (2000).

[423] *In re S. African Litig.*, 346 F. Supp. 2d at 552.

[424] Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

[425] Conley, *supra* note 392, *passim*.

[426] *Id.* at 190, 194-95.

victims in the PRC were often held under prolonged periods of detention, like the plaintiff Wang himself who had been detained for more than fourteen months without charge or trial.[427] In the opinion of Conley, such egregious violation would clearly fall beneath the international and the U.S. standard.[428]

What remains is the crux of the issue—the possible violation of freedom of expression under the ATS standard. As shown in Part III of this paper, freedom of expression is a widely accepted and recognized right internationally. The ICCPR in particular has been ratified by one hundred sixty nations, including the United States,[429] yet it is perceived as a non self-executing instrument by the U.S. Supreme Court.[430] Freedom of speech is prized highly in the U.S. Constitution. Indisputably, it is an established human rights norm. Its exact content, its level of guarantee, and its level of specificity, however, are matters of dispute. Article 19(3) of the ICCPR itself allows restrictions to be imposed on freedom of expression if they are provided by law and are necessary for the respect of the rights or reputations of others, as well as for the protection of national security, the public order (ordre public), or of public health, or morals.[431] Restrictions "provided by law" must abide by the principle of legality that the law must be "formulated with sufficient precision to enable the citizen to regulate his conduct" to foresee to a degree that is reasonable in all the circumstances, the consequences which a given action may entail.[432] Since the right to freedom of expression was notoriously at issue in the *Wang* case, the question arises whether its breach was justified under Article 19(3) ICCPR.

The imprisonment of the plaintiffs falls largely under the PRC state secret law, known for its broadness and vagueness, and arguably belongs to the category of "national security." State secrets are defined in general terms to be "matters that have a vital bearing on state security

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[427] Complaint, *supra* note 356, ¶ 38.

[428] Conley, *supra* note 392, at 197-201.

[429] Office of the United Nations High Comm'r for Human Rights, Status of Ratification of the Principal International Human Rights Treaties (June 9, 2004), http://www.unhchr.ch/pdf/report.pdf.

[430] Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004).

[431] International Covenant on Civil and Political Rights, *supra* note 107, art. 19(3).

[432] Sunday Times v. UK, 2 Eur. Ct. H.R. (ser. A No.30) 245 (1979), *available at* http://www.hrcr.org/safrica/limitations/sunday_times_uk.html. This case was a landmark decision on the interpretation on the restrictions allowed under article 10 of the ECHR. The ICCPR does not have its own court to interpret it rights. Article 10 of the ECHR is largely modelled after article 19 of the ICCPR. Rather than using the phrase "provided by law," it uses "prescribed by law."

and national interests and, as specified by legal procedure, are entrusted to a limited number of people for a given period of time" under Article 2 of the *Law of the People's Republic of China on Guarding State Secrets*.[433] Article 8 of the same legislation classifies state secrets into seven different categories, including any "matters that are classified as state secrets by the state secret-guarding department."[434] State secrets are further divided into three categories according to Article 9: (1) the most confidential information; (2) classified information; and (3) confidential information.[435] The categorization is based on the degree of secrecy and the consequence of disclosure.[436] Article 24 stipulates that no state secrets shall be divulged in private contacts or correspondence.[437] A person may be liable regardless of whether the disclosure is done intentionally or through negligence (Article 31).[438] The *Procedures for Implementing the Law of the PRC on the Protection of State Secrets* contain further specifications on state secrets.[439] The punishment for disclosure of such state secrets carries a maximum term of death penalty under Article 113 of the PRC Criminal Code.[440] Given the wide scope and vague definition, any information deemed by state organs to be state secrets will be treated so. As indicated earlier, the information that Shi Tao disclosed were "open secrets" widely known and their disclosure had not caused any harm to state security and national interests. Nevertheless, the information was categorized as "most confidential."[441]

Similarly, the offence of inciting subversive speech of which Wang has been convicted is equally vague and broad. It is a crime to subvert the government, or to overthrow the socialist system under Article 105 of the PRC Criminal Code or to collaborate with overseas groups in a manner likely to endanger the state under Article 106.[442]

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[433] Law of P.R.C. on Guarding State Secrets art. 2, (Sept. 5, 1988), *translated in* Congressional-Executive Comm'n on China, Selected Legal Provisions of the People's Republic of China Affecting Criminal Justice, http://www.cecc.gov/pages/newLaws/protectSecretsENG.php.

[434] *Id.* art. 8.

[435] *Id.* art. 9.

[436] *Id.*

[437] *Id.* art. 24.

[438] *Id.* art. 31.

[439] Procedures for Implementing the Law of the PRC on the Protection of State Secrets, State Council Decree No. 1 (May 25, 1990).

[440] Criminal Law of the People's Republic of China art. 113, (Mar. 14, 1997), *translated in* Criminal Law of the People's Republic of China, http://www.com-law.net/findlaw/crime/criminallaw2.html.

[441] Shi Tao verdict, *supra* note 57, at 30.

[442] Criminal Law of the People's Republic of China, *supra* note 440, arts. 105, 106.

These are acts grouped under the offence of "acts endangering state security" but their exact scope is unknown.[443] While the exact restrictions on freedom of expression may not be universally agreed upon, the PRC standard has clearly fallen well below the threshold of precision and foreseeability under the ICCPR requirement, although the PRC is a signatory to the Covenant.[444]

3. LINKAGE OF THE TNC TO THE ALLEGED VIOLATIONS

If the plaintiffs in *Wang* could successfully establish that there has been a violation of human rights under the ATS standard, the remaining hurdle is to establish a link between Yahoo! and the alleged international law violations through one of the following two ways: either it can be substantiated that Yahoo! engaged in state action by acting under the color of law in perpetrating these violations under the Torture Victim Protection Act ("TVPA"), or it can be established that Yahoo! aided and abetted the PRC regime by committing the violations named above.

a. Acting under the Color of Law

The TVPA only imposes liability, if an individual who "under actual or apparent authority or color of law, of any foreign nation"[445] subjects another to torture. Furthermore, the plaintiff must have exhausted all remedies where the conduct has occurred.[446] The latter requirement could be easily satisfied as the plaintiffs in the *Wang* case have gone through the criminal justice system in the PRC.[447] Given the political structure and reality in the PRC, it is impossible for them to ask for further legal redress.

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[443] *Id.* For instance, it is unclear whether mental intention will suffice or whether the *actus reus* of overthrowing the government is required.

[444] China signed the ICCPR on Oct. 5, 1998. Office of the United Nations High Comm'r for Human Rights, International Covenant on Civil and Political Rights New York, Mar. 5, 2008, http://www2.ohchr.org/english/bodies/ratification/4.htm.

[445] 28 U.S.C. §1350 (2000).

[446] *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 555 (2004).

[447] Shi Tao was convicted by the PRC court. *See supra* notes 57-60 and accompanying text. Wang was also convicted by the PRC court for "incitement to subvert state power." *See supra* notes 381-86 and accompanying text. Both are still in prison.

To act under the color of law requires that the individual must "act together with state officials or with significant aid."[448] Merely deriving an indirect economic benefit from unlawful state action is not sufficient.[449] Examples of recognized acts in the past include the active cooperation with government officials to suppress specific groups, as well as the making of payments to the military or the purchase of weapons.[450] Merely doing business with a repressive regime was not considered to be acting under the color of law as considered in *Re South African Litigation*.[451] Following an order from the PRC State Security Bureau in order to pass personal information to the authorities by Yahoo!, is unlikely, therefore, to be considered as acting under the color of law in perpetrating torture against the plaintiffs.

b. Aiding and Abetting

Since it will be difficult for the plaintiffs to establish that Yahoo! has acted under the color of law under the TVPA in the commission of torture, they have the alternative to show that Yahoo! has aided and abetted other international law violations. In *Re South African Litigation*, the U.S. District Court for the Southern District of New York firmly declared that the legal concept of aiding and abetting is not recognized under the ATS.[452] In the court's opinion, this concept might be an aspirational norm to be attained, but at the time of hearing, it was not considered sufficiently definite enough to be regarded as legally binding.[453] However, this approach is contrary to previous cases dealt with by the district courts.[454] Though Judge Sprizzo pointed out that those cases were decided before *Sosa*, a careful analysis of the legal concept is essential.[455]

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[448] *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 548.

[449] *Id.*

[450] Wiwa v. Royal Dutch Petroleum Co. No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293 (SDNY Feb. 28, 2002).

[451] *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 548.

[452] *Id.* at 549.

[453] *See id.* at 550. This is largely because ATS does not provide for such liability and the matter should be deferred to congress. *Id.*

[454] *See* Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003); Unocal I, 963 F. Supp. 880, 892 (C.D. Cal. 1997).

[455] *In re* S. African Apartheid Litig., 346 F. Supp. 2d at 550 n.12.

The standard of aiding and abetting a state to commit human rights violations has remained in flux in the United States.[456] Before *Sosa*, *Unocal II* held that corporations could be liable for aiding and abetting international law violations, however, the court could not reach a consensus on the legal standard.[457] In 2003, *Burnett v. Al Baraka Inv. & Dev. Corp.* required that: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury, (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time [that assistance was provided, and] (3) the defendant must knowingly and substantially assist the principal violation."[458] In *Cabello v. Fernadez-Larios*, the court set the standard of aiding and abetting after *Sosa*; that is, to be a test of "active participation," which requires the defendant to have (1) substantially assisted another who committed a violation of international law and (2) known that his actions would assist in the illegal or wrongful activity at the time he provided the assistance.[459]

Regardless of which standard one refers to, aiding and abetting hinges on the degree of knowledge and the level of material assistance offered to the state which has violated international law. This principle is also in accordance with the international law standard, which particularly recognizes the notion of complicity.[460] A state can incur liability for aiding or abetting another state if it has directly and substantially contributed "with knowledge of the circumstances" of the illegal act.[461] This approach extends to individual and corporate responsibility. Thereby, corporations are not required either to divest or not to invest in repressive regimes, but they are required not to lend their equipment to government forces knowing that it will be used to suppress human rights.[462]

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[456] *See* Conley, *supra* note 392, at 203-05.

[457] Unocal II, 395 F.3d at 933 (9th Cir. 2002). Two judges held that the test should be "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime." *Id.* at 947. Judge Reinhardt, on the other hand, applied the principles of joint venture: agency and reckless disregard. *Id.* at 970-76.

[458] Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 104 (D.C. Cir. 2003).

[459] Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158 (11th Cir. 2005).

[460] This is recognized in the International Court of Justice, the International Law Commission, the International Criminal Tribunal for the former Yugoslavia, and the South African Truth and Reconciliation Commission. *See* Ratner, *supra* note 321, at 501-04.

[461] *Id.* at 501.

[462] *Id.* at 502.

Re South African Litigation should be further distinguished from the Yahoo! case since the former is mainly about whether TNCs should be liable for doing business in an apartheid regime, whereas the Yahoo! case is about more than doing business. It is about an implied understanding of doing business in the PRC, the level of assistance that ISPs have to offer, and the economic benefits that they can derive. Yahoo! has been insisting that it did not know about the alleged offences that the claimants had committed and that it had little option but to cooperate with the authorities.[463] This may be seemingly true. But a closer look will reveal that the connection between ISPs and the ruling regime is remarkably intimate in the PRC.[464] In addition to the fact that ISPs are closely and heavily regulated by the authorities, they kowtow to the Chinese regime to reap their economic benefits.[465] In March 2002, without prompting, the China Internet Industry initiated the "voluntary" Public Pledge of Self-Discipline for China Internet Industry.[466] Article 9(1) states that signatories are required to "monitor the information publicized by users on websites according to [Chinese] law and remove the harmful information promptly."[467] In addition, signatories are also required to refrain from "establishing links to websites that contain harmful information so as to ensure that the content of the network information is lawful and healthy" under Article 9(2).[468] More than one hundred Internet companies or Internet-related companies voluntarily signed the Public Pledge when it was first launched,[469] including Yahoo!, Sinanet, and Sohu. By July 2002, more than three hundred companies had signed the Pledge,[470] and these businesses have essentially agreed to

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[463] *Joint Hearing on the Internet in China*, *supra* note 66, at 59 (statement of Michael Callahan).

[464] Anne S. Y. Cheung, *The Business of Governance: China's Legislation on Content Regulation in Cyberspace*, 38 N.Y.U. J. INT'L L. & POL. 1 (2005-2006).

[465] Kowtow is a Chinese expression that literally means bowing. It is so commonly used that Collins Cobuild dictionary defines it as being "too eager to obey or be polite to someone in authority." COLLINS COBUILD ADVANCED LEARNER'S ENGLISH DICTIONARY 798 (5th ed. 2006).

[466] *See* Internet Soc'y of China, http://www.isc.org.cn; Deibert & Villeneuve, *supra* note 9, at 115.

[467] Internet Soc'y of China, Public Pledge on Self-Regulation and Professional Ethics for China Internet Industry (Jan. 25, 2005), http://www.isc.org.cn/20020417/ca102762.htm. The Pledge was formulated by the Internet Society of China, a society that is supported by the Chinese government.

[468] *Id.* art. 9(2).

[469] *China's Internet Industry Wants Self-Discipline*, PEOPLE'S DAILY ONLINE (Mar. 26, 2002), http://english.peopledaily.com.cn/200203/26/print20020326_92885.html.

[470] *Internet Portals in China Sign Pact to Restrict Access to Information Deemed Subversive*, July 15, 2002, *reprinted in* GOVERNANCE WORLD WATCH, July, 2000, at 10, 10, HTTP://UNPAN1.UN.ORG/INTRADOC/GROUPS/PUBLIC/DOCUMENTS/UN/UNPAN004666.PDF.

act as "little brothers" in policing Internet messages and informers. In exchange, their smooth operation in China will be guaranteed.

Given the PRC's tight grip on political speech and its human rights record, it is hardly convincing that Yahoo! denied knowledge of what the personal information it had handed to the Chinese authorities would be used for. Furthermore, Yahoo!'s help was substantial. Although details of torture and the treatment of the individual victims may not be known, its role in aiding and abetting the violations of victims' freedom of expression is beyond doubt.

c. Deference to Executive and Legislative Branch

In his work, Conley has outlined the U.S. state policy on the ATS.[471] The U.S. State Department has issued annual human rights reports to criticize the practice of foreign states and the PRC has been on the agenda for years.[472] The PRC's record of free speech violations has been a constant subject of criticism.[473] From this perspective, ATS litigation may advance U.S. foreign policy. *Wang v. Yahoo!* will not only be a wrangling over ISPs' liability towards their users—it will also provide a forum for the court to iron out the complexities of the nature of human rights complaints against TNCs and whether TNCs can be held liable for aiding and abetting international law violations. Ultimately, it is a wrestle to keep the door open for international human rights claims against non-state actors.

C. LEGISLATIVE INITIATIVES

As an alternative to the outlined approaches above, it is for powerful nation-states to impose their own legal or semi-legal order to regulate ISPs. Two initiatives shall be examined in the following paragraphs.

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[471] *See* Conley, *supra* note 392, at 210-11 (discussing US policy on the ATS).

[472] *See, e.g.*, Fact Sheet, U.S. Dep't of State, Increased Respect for Human Rights in China a U.S. Priority (Apr. 18, 2006), http://usinfo.state.gov/eap/Archive/2006/Apr/19-741526.html.

[473] *See, e.g.*, AMNESTY INT'L, UNDERMINING FREEDOM OF EXPRESSION IN CHINA (July 2006), http://www.amnesty.org.hk; Press Release, Reporters Without Borders, Repression Continues in China, Six Months Before Olympic Games, http://www.rsf.org/rubrique.php3?id_rubrique=174.

1. EUROPEAN COMMISSION'S GUIDELINES ON ISPS RETENTION AND DISCLOSURE OF PERSONAL DATA

In March 2006, the European Parliament and the Council of the European Union enacted the *Data Retention Directive*, requiring all providers of electronic communications services and networks to keep traffic data related to phone calls and emails for a period of six months to two years.[474] Traffic data is defined to include the information necessary to identify the originator and the recipient of phone calls and emails, together with information on the time, date, and duration of these phone calls and emails.[475] Such data must be made available to the law enforcers at the national level, as well as to law enforcers in other member states.[476] In turn, state authorities are required to comply with the procedural standard of necessity and proportionality in their legal implementation, set out by Article 8.[477] Member states are expected to transpose the requirements of the Directive into national laws until March 2009.[478] It is important to note that the 2006 Directive is a departure from the 2002 Directive on Privacy and Electronic Communications, which required communication providers of member states to erase the information no longer useful for billing purpose.[479] While the 2002 Directive focused on security and confidentiality, the 2006 enactment could be seen as an attempt to strike a reasonable balance between law enforcement, combating of terrorist activities, and crime investigation on the one hand, and the protection of privacy on the other.[480]

Following the 2006 Directive, Google might be the first ISP called to account for its data retention policy. In May 2007, Google was requested by the Article 29 Working Group, a European Union group of data protection experts, to justify its privacy policies of keeping user data anonymous for eighteen to twenty-four months.[481] While Google

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[474] Council Directive 2006/24/EC art. 6, 2006 O.J. (L 105) 54, 58.

[475] *Id.* art. 5.

[476] *Id.* art. 4.

[477] *Id.* art. 8.

[478] *Id.* art. 15.

[479] Council Directive 2002/58/EC art. 6, 2002 O.J. (L 201) 37, 44.

[480] *See generally* Francesca Bignami, *Privacy and Law Enforcement in the European Union: The Data Retention Directive*, 8 CHI. J. INT'L L. 233 (2007).

[481] James Niccolai, *Google Bends Privacy Policy to EU Concerns*, IDG NEWS SERVICE, June 12, 2007, *available at* http://www.infoworld.com/article/07/06/12/Google-bends-to-EU-privacy-concerns_1.html. In April 2008, the Article 29 Working Group issued a report calling for greater

defended its data retention policy for legitimate interests in security, innovation, and anti-fraud efforts, it agreed to reduce the retention period from twenty-four to eighteen months.[482] However, this could constitute a small victory as local data retention laws may oblige service providers to retain data for twenty-four months instead, indirectly requiring them to be state helpers and informers.

2. GLOBAL ONLINE FREEDOM ACT 2006 AND 2007

Since many Internet companies are based in the United States, attention has been directed to the possible role that the U.S. government might play in regulating ISPs. The U.S. House of Representatives Committee on International Relations (Subcommittee on Global Human Rights) held a hearing on February 15, 2006, calling Yahoo!, Microsoft, Google, and Cisco to account for their deals in China.[483] When pressed by Congressman Tom Lantos as to whether Yahoo! had made any offers of assistance to the families of those harmed by their actions, Yahoo! offered the feeble answer that they believed the best way to engage this is a government-to-government issue.[484]

Senator Christopher Smith called for the introduction of the *Global Online Freedom Act of 2006*[485] and *2007*[486] as an enactment to protect the freedom of expression on the Internet. Under the proposed legislation of 2007, a U.S. office on Global Internet Freedom will be established.[487] Among other duties, the Office will be required to

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privacy protection with major focus on the responsibility of advertising-supported search engines, *see* Article 29 Data Protection Working Party, *Opinion on Data Protection Issues Related to Search Engines (unofficial final version)*, at http://www.cbpweb.nl/downloads_int/Opinie%20WP29%20zoekmachines.pdf. Though the Report does not carry any legal status, it is believed that its recommendations would be adopted by the European Commission. *See* Anne Broache, *Europeans Warn Search Engines: Delete User Data Sooner,* at http://www.news.com/8301-10784_3-9913319-7.html?tag=newsmap.

[482] *Id.*

[483] *Joint Hearing on the Internet in China*, *supra* note 66, at v.

[484] *Id.* at 99 (statement of Michael Callahan).

[485] Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. (2006).

[486] Global Online Freedom Act of 2007, H.R. 275, 110th Cong. (2007). Furthermore, in July 2008, initiative was made in the European Parliament to establish a European version of the Global Online Freedom Act, to prevent Europe's Internet companies from being forced to censor and monitor the Internet due to demands made by repressive regimes. *See Members of European Parliament Urged to Support Global Online Freedom Act's European Version,* REPORTERS WITHOUT BORDERS, July 16, 2008 at http://www.rsf.org:80/article.php3?id_article=27851; text of the proposed European Global Online Freedom Act is available at http://www.julesmaaten.eu/_uploads/EU%20GOFA.htm.

[487] *Id.* § 104(a).

document and report all religious and political censorship in certain "Internet restricting countries."[488] U.S. companies will be prohibited from storing user information in these countries.[489] They will be required to list out data censored or removed.[490] Furthermore, they will be prohibited from blocking online content of U.S. supported sites.[491] Additionally, they may not provide individual information to any foreign official of an Internet restricting country, except for legitimate foreign law enforcement purposes.[492] The latter will be defined in accordance with international standards set out in the ICCPR.[493] Of particular relevance to our early discussion of the *Alien Tort Statute*, is the fact that the Act allows individuals aggrieved by the disclosure of personal identification to file suit in any U.S. district court.[494] The result of the *Global Online Freedom Act* is not known at the time of writing. Though the above legislative hearing and attempt may be dismissed as empty gestures on the part of both the U.S. government and the Internet companies, the increasing public pressure should not be underestimated.[495]

V. CONCLUSION

In the twenty-first century, rather than gliding gracefully along the Internet super highway, many find themselves only bumping along a rocky road towards a distanced destination named democracy. Some have been stopped at checkpoints. Some, like Shi and Wang, have even been struck off the roll of netizens. Their fate illustrates the potential of ISPs and the vulnerability of their users. Many others may not even

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[488] *Id.* § 104(b)(4). An "internet-restricting country" is defined as a country designated under section 105 of the bill. *Id.* § 3(6). Section 105 allows the President to deem a country "Internet-restricting" if the government is "directly or indirectly responsible for a systematic pattern of substantial restrictions on Internet freedom" in the prior year. *Id.* § 105(a)(2).

[489] *Id.* § 201.

[490] *Id.* §§ 203, 204.

[491] *Id.* § 205.

[492] *Id.* § 202(a).

[493] *See id.* § 3(8).

[494] *Id.* § 202(c).

[495] For example, in November 2006, twenty-nine percent of Cisco System shareholders voted for a resolution calling the company to account for its activities in repressive countries. *See* Press Release, Office of U.S. Rep. Chris Smith, Smith Reintroduces the Global Online Freedom Act (Jan. 8, 2007), *available at* http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=55624.

know that they have been victims. Little do they realize that their account information or expressed opinions may one day become prized data for ISPs to maintain their business relations with the authorities. Equally, without realizing it, the information that they get may be filtered versions or they may have been redirected to other destinations in their search attempts. The depressing reality is "how freely one can speak is decided by large commercial service providers."[496] In addition, the whole censorship discussion could even extend to the root level at a later stage.

Under the current international human rights regime, one can only address states as direct violators, or one can hold them liable for failing to protect human rights violations committed by non-state actors. This framework is severely inadequate, rendering victims helpless when facing non-state actors collaborating with repressive regimes that tightly control the free flow of information. Clapham has asked for a reconfiguration of the human rights framework and for a paradigm shift in the age of globalization to reflect the threats that non-state actors pose to the enjoyment of various rights.[497]

This piece of advice rings true in the protection of freedom of expression in the Internet where ISPs play a significant and indispensable role in organizing and controlling our lives. The distinction between public nation-states and private transnational corporations may no longer stand when both actors have equal power to undermine the human rights enjoyed by individuals, in particular when they act together. In the cases discussed, censorship, regulation, and surveillance carried out by ISPs are closely attributable to nation-states. Though there is no established international legal norm that imposes human rights liability firmly onto TNCs, a set of soft law and international codes have emerged to recognize TNCs as potent actors on the international scene. A rationale behind these developments is that when an entity is "acting on the instructions of, or under the direction or control of, that state carrying out the conduct,"[498] its very nature and functions become part of the government itself. The American concept of aiding and abetting a state authority to commit international violations under the ATS corresponds to this international approach.

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[496] Irina Dmitrieva, *Will Tomorrow Be Free? Application of State Action Doctrine to Private Internet Providers*, *in* THE INTERNET UPHEAVAL (Ingo Vogelsang & Benjamin M. Compaine eds., 2000).

[497] CLAPHAM, *supra* note 91, at 1.

[498] ILC Draft Articles, *supra* note 129, art. 8.

Since there have been no cases in the United States ruling on the liability of ISPs and touching on freedom of expression violations under the ATS, *Wang* v. *Yahoo!* will be the pioneer case that bears special significance in this area. It represents a logical culmination in legal confrontation since there is neither international adjudication body for Internet users to seek redresses for freedom of expression violations nor any international body to govern ISPs' activities in this regard. The only option remaining is for the parties to take legal action in the ISP's home states. The United States naturally becomes an appropriate forum since it provides domiciles for many high-tech companies. The major obstacles remaining, though, lie within jurisdictional control to adjudicate and to enforce the judgments. This is a politically sensitive and delicate issue, since the court has to decide on the liability of ISPs, indirectly condemning the authorities of their host states, and forcing the U.S. government to exercise its inter-nation monitoring. Furthermore, many objections have been levied against the substantial influence of the United States on the Internet and its naming and numbering frameworks through the ICANN in particular, and they are demanding a more international internet governance mechanism. On this note, the U.S. rulings under the ATS may leave an unsatisfactory after-taste.

Regardless of the outcome, it is important to bear in mind that responsibility is imposed on ISPs not because they are merely doing business with the authorities, but because their participation constitutes wrongdoing under the accepted international human rights standards, regardless of the applicable state's national law. The relationship between the ISPs and the states is strongly intertwined, providing economic benefits for the one side and intensified control and power for the other. Therefore, the imposition of data delivery obligations should be put into the context of freedom of expression. Until the issues between Internet users, ISPs, and the authorities are satisfactorily resolved, our encounter with the Web will be governed by hidden orders between the authorities and ISPs. And the crude, cool spirit of *Yet Another Hierarchical Officious Oracle* will only be an ironical sting in the e-era.