



FRAMING THE INTERNATIONAL STANDARD ON THE GLOBAL FLOW OF INFORMATION ON THE INTERNET

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I. INTRODUCTION

Although Internet censorship was not on the agenda of the second phase of the United Nation's World Summit on Information Society (WSIS) in 2005, the uproar created by the selection of Tunisia, known for its stringent controls of the Internet, as the host country¹, certainly brought it to fore. It also highlighted the global disparity in the level of freedom of information on the Internet. Zine El Abidine Ben Ali, the President of Tunisia, initiated the Summit with an endorsement of freedom of information and also a call for "universal ethical standards that will stand as a rampart protecting our societies against negative uses of modern communication."² What "negative uses" means to Tunisia or China, however, is somewhat different than what it means in the United States (U.S.). Three months after the WSIS meeting, the U.S. Congress was admonishing its private corporations for "protecting" the Chinese citizens from what China deems as "negative uses" of Internet. The Chinese government has proven that even while extensively censoring the Internet, it can still utilize its benefits. As WSIS explores the idea of Internet governance and more autocratic regimes adopt China as a model for Internet censorship, calls for international standards on Internet content regulation may become stronger and more prevalent.

I.1 Purpose

The purpose of this paper is to examine the potential for a consensus among states that disagree on the basic idea of the free flow of information on the Internet. This paper will analyze the potential of an international agreement on a lowest common denominator of standard regarding Internet content within the purview of the international human rights regime. It will specifically attempt to determine whether or not the individual right to freedom of information when pursued in relation to Internet technology, overcomes the weaknesses within the international human rights regime that have failed to universally protect the freedom of information.

I.2 Framework

The major impediment to any agreement is gaining consensus among parties at the polar ends of the issue. Hence, the paper will limit its scope to evaluating the potential success of the U.S., a state that does not censor the Internet, in convincing an Internet-censoring state such as China to adopt a

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¹ *Internet Filtering in Tunisia in 2005: A Country Study*, OpenNet Initiative, 1 (2005), <http://www.opennetinitiative.net/tunisia>.

² Kevin Murphy, *UN Summit Debates Internet Openness*, COMPUTER BUSINESS REV. ONLINE, 17 November 2005, <http://www.cbronline.com/>.

standard for relatively free flow of information on the Internet based on the fundamental human right to freedom of information.

1.3 Structure

This paper will evaluate such an agreement in terms of the various international regime models used to examine the international human rights treaties. Section 2 of the paper will specify existing international law on Internet content, Section 3 will give a brief introduction to the international human rights regime and then analyze international regime models in the U.S.-China context of establishing a standard on the free flow of information on the Internet and Section 4 will provide concluding remarks on the prospects of convincing Internet-censoring states to adopt such a standard. The last section will explore an alternative framework for the proposed international standard.

II. EXISTING INTERNATIONAL LAW

Currently, there is no explicit international agreement on standards regarding Internet content. In arguing for the free flow of information on the Internet, states, activists and international organizations reference freedom of expression embodied in Article 19³ of the Universal Declaration of Human Rights (UDHR) and Articles 18⁴ of the International Covenant on Civil and Political Rights (ICCPR). ICCPR Article 19(2) restates UDHR Article 18 stating:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁵

However, the ICCPR also includes the following exceptions to this right: “(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”⁶

As media and intellectual property lawyer Kurt Wimmer points out, while human rights treaties universalize the right to freedom of information and expression, how states interpret the conditionality on this freedom and to what extent such a right should be adapted to the state’s own political and cultural environment is a matter of contention among states.⁷ For example, China’s interpretation of “national security” and “public order” has resulted in a highly regulated Internet while the greatest restrictions the U.S. has put in place are

³ ICCPR, *supra* note 3.

⁴ UDHR, *supra* note 2.

⁵ ICCPR, *supra* note 3.

⁶ *Id.*, at Art. 18.

⁷ Kurt Wimmer, *Toward a World Rule of Law: Freedom of Expression*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 203 (2006).

filters in schools with government funded Internet access.⁸ Although each state may have its own needs, interpretation of caveats to freedom of information must retain the intent of the right. Article 10 of the European Convention on Human Rights (ECHR), includes language similar to the ICCPR regarding freedom of expression and its exceptions but further expands the latter by stating that the exercise of the freedom is subject to restrictions “prescribed by law and are necessary in a democratic society.”⁹

Nonetheless, in May 2003 the Council of Europe, Europe’s oldest political organization conferred with the function of human rights monitoring and responsible for 199 legally binding European covenants, adopted a Declaration on freedom of communication on the Internet. The Declaration, although not legally binding, encourages states not to place regulations on Internet content that go beyond the regulation of other means of content delivery.¹⁰ In response to the potential for excess Internet controls, the Declaration attempted to strike a balance by stating that content regulation is necessary to protect minors yet acknowledging that prohibitions may exist for political reasons.¹¹ In April 2003, the UN Commission on Human Rights (UNCHR) issued Resolution 2003/42: “The right to freedom of opinion and expression.” The Resolution warned states against using the exceptions of ICCPR Article 19 for purposes other than intended by the Article. In attempting to give substance and clarity to this intent, it outlined specific areas on which states could not impose restrictions:

- (a) Discussion of government policies and political debate, reporting on human rights, government activities and corruption in government, engaging in peaceful demonstrations or political activities, including for peace and democracy, or expression of opinion and dissent, religion or belief;
- (b) The free flow of information and ideas, including practices such as the unjustifiable banning or closing of publications or other media and the abuse of administrative measures and censorship;
- (c) Access to or use of modern telecommunications technologies, including radio, television and the Internet¹²

⁸ Federal Communications Commission, Consumer & Government Affairs Bureau, *Children’s Internet Protection Act*, <http://www.fcc.gov/cgb/consumerfacts/cipa.html>.

⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms* (also known as the European Human Rights Convention), 13, 213 U.N.T.S. 221, E.T.S. 5 (1950), Art. 13, available at <http://www.hri.org/docs/ECHR50.html>.

¹⁰ *Declaration on Freedom of Communication on the Internet*, 1, 28 May 2003, available at <http://www.unesco.nl/images/freedcomminternet.pdf>.

¹¹ *New Council of Europe response to the regulatory challenges posed by the Internet*, Council of Europe, Committee of Ministers, 30 May 2003.

¹² *The right to freedom of opinion and expression, Commission on Human Rights resolution 2003/42*, United Nations High Commissioner for Human Rights 59th Meeting, 9, 23 April 2003, ch. XI, E/CN.4/2003/L.11/Add.4, available at:

(d) Journalists in situations of armed conflict;¹³

The same declaration also noted that new technologies such as the Internet should not be used for the “promotion by certain media of false images and negative stereotypes of vulnerable individuals or groups of individuals.”¹⁴

Thus while the right to freedom of information on the Internet is implicitly embodied in human rights treaties (specifically the ICCPR, Article 19), the ambiguity of relevant provisions warrants clarifications from human rights bodies. Of course, this ambiguity and the potential for misinterpretation apply to all media and not solely to the Internet. So why does the Internet need its own convention to clarify matters? As law professor Adeno Addis points out, the Internet is not the first medium that has been the object of transnational censorship: states have banned imports of foreign magazines and jammed radio signals.¹⁵ Yet Addis does recognize that the Internet poses a more profound risk.¹⁶ The Internet is designed to not only give users access to information but it provides the potential to control what, when and where they acquire and disseminate this information. The Internet also continues to consolidate within its scope all other types of means of communication, providing easier access to newspapers and magazines, podcasts, radio stations, and television shows. It has become a highly lucrative forum for business transactions. While the Internet provides access to information in a way that print or broadcast media never has; it also introduces sophisticated and unprecedented means to track and control what information people access.

As a norm of state-controlled Internet emerges in some countries, demand for international standards on Internet content regulation may become a higher priority for states that value the freedom of information. U.S. Law professor, John Palfrey notes that without action from the international community, the Internet will soon become a web of local networks, “each governed by local laws, technologies, markets, and norm” instead of a globally open and free environment.¹⁷ Palfrey proposes that states use the WSIS forum to discuss Internet filtering, a topic which has yet to make it on the WSIS agenda. This paper does not aim to evaluate the merits of an open and free Internet but rather examines the mechanism by which a global consensus on Internet regulation could be achieved using a human rights framework. The following section will discuss the potential of whether the free flow of information on the Internet framed as a human right can overcome the weaknesses of the existing human rights regime.

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.42.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.42.En?Opendocument).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 20, 1-84, N.1 (2004).

¹⁶ *Id.*, at 20.

¹⁷ John Palfrey, *Local Nets: Filtering and Internet Governance Problem*, Berkman Center for Internet and Society at Harvard University, 31 August 2005, available at <http://cyber.law.harvard.edu/home/uploads/502/13-LocalNetsFiltering.pdf>.

III. INTERNET IN THE INTERNATIONAL HUMAN RIGHTS REGIME

Jack Donnelly defines international regimes as agreed upon norms and decision-making procedures that regulate a specific issue area.¹⁸ Donnelly describes regime formation in three phases: beginning with states acknowledging that certain norms should be used as guidelines or the “declaratory” phase, moving to the “promotional” phase when states are ready to commit to the norms and finally to “implementation” when states actually comply and enforce the norms domestically.¹⁹ The international human rights regime, defined through the UDHR and its various issue-specific covenants, consists of states that ratify and aspire to comply, those that ratify with no intention to comply and those that refuse to ratify at all. Thus, Donnelly claims that the international human rights regime is stuck in the promotional phase because ultimately materialistic objectives rather than moral interdependence guide state policies.²⁰

The following section will: (1) describe the major models used to explain and predict the formation of international regimes and specifically noncompliance of states to human rights treaties and (2) examine whether the free flow of information on the Internet framed as a human right can overcome the weaknesses of the existing human rights regime. The paper will discuss two main groups of international regime theories: the rational actor and normative model. The rational actor theory includes the neorealist and institutionalism models while the normative theory includes the managerial, legitimate rule and transnational models.

3.1 Rational actor: Neorealist (Hegemony) Model

The neorealist theory assumes states act in their own interests and therefore the creation of international regimes is only possible when powerful or hegemonic states desire them. Although China is fast becoming an economic superpower and the superpower status of the U.S. is increasingly under serious doubt and debate²¹, for the purposes of this paper, the U.S. is designated as the hegemonic power based upon its established political, military, and economic presence in the international arena.

Hegemonic states have the material and ideological power to compel weaker states to comply as well as monitor and enforce international standards. Therefore, in terms of the neorealist approach, the U.S. would have to commit itself to persistently exerting both materialistic and ideological power to coerce China to comply with standards that mirror U.S. unregulated Internet content norms. Eric Neumayer, a professor of environment and development contends that the neorealist approach is not effective in establishing a human rights regime because even a powerful state that strongly promotes international human rights does not give them the highest priority over other national interests. Neumayer cites two reasons for this: (1) lack of market

¹⁸ Jack Donnelly, *International Human Rights: A Regime Analysis*, 40(3) INT’L ORG. 602, 599-642 (1986).

¹⁹ *Id.*, at 633.

²⁰ *Id.*, at 616.

²¹ Philip Stephens, *US intelligence report sees shift of power to east*, FINANCIAL TIMES, 21 November 2008, at 13.

forces and (2) no direct impact on its citizens.²² While Neumayer's analysis may be convincing in terms of the U.S.'s hegemonic pursuit of freedom of information, his analysis is worth evaluating in the context of freedom of information on the Internet.

3.1.1 *Lack of Market Forces*

While there may be a lack of market benefits in attempting to compel other states to adopt freedom of religion or laws against torture, there is a market value to the free flow of information on the Internet. It was the potential economic benefits of the Internet that persuaded China to allow the Internet in the country and subsequently opened up a huge market for U.S. Internet companies and e-commerce businesses. However, it is difficult to determine how much more profitable the Internet in China may be for U.S. entrepreneurs if it were not censored and subsequently if it would be a strong enough incentive for the U.S. to aggressively pursue universal free flow of information on the Internet.

The U.S. is also in the business of spreading democracy and the Internet was to be a valuable tool in furthering this goal. While China could regulate foreign publications from entering its territory, the Internet would be unstoppable. However, China's sophisticated Internet filtering system has severely hampered this goal. Other states such as Vietnam are also adopting China's model of Internet censorship to retain the political status quo and still reap the economic benefits of the Internet.²³ Former Congressman Christopher Cox called upon the U.S. to support a regime that would give people of all states unrestricted Internet access for the reason that the Internet has the power to expand the discourse of political communication and is a tool for advancing human freedom and knowledge.²⁴ Thus, although it is difficult to measure, there are certainly certain market (economic and political) benefits in attaining universal free flow of information of Internet.

3.1.2 *Impact on Citizens*

However, the strongest incentive for the U.S. to adopt a hegemonic policy regarding the free flow of information on the Internet is the impact China's Internet censorship is having on China's citizens. Neumayer asks us to consider why any state would care how another state treats its citizens. From the realistic perspective, a state would not, unless the policies regarding Chinese citizens begin to impact the actions of U.S. citizens in a way that was unacceptable to the U.S.

On February 15, 2006, Congress heard testimonies from Yahoo, Microsoft, Google, and Cisco, U.S. companies operating in China and adhering to its Internet censorship regulations. The impetus for the session was the reve-

²² Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights*, 49(6) *J. Conflict Resolution* 926, 925-953 (2005).

²³ *Regimes Copy China and Cuba to control the Internet*, SYDNEY MORNING HERALD, 10 February 2003.

²⁴ Christopher Cox, *Establishing Global Internet Freedom: Tear Down This Firewall*, in Adam Thierer et al. (eds.), *WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION* 11 (2003).

lation that Shi Tao, a Chinese journalist, was arrested after Yahoo handed over his account information to the Chinese government. Tao had sent details of a censorship order to the Asia Democracy Forum through his Yahoo email account. Google had also recently decided to abide by Chinese censorship laws in order to gain entry to the market. Congressman James Leach began the session with the statement, “to the extent that a company facilitates efforts by Chinese authorities to restrict such websites, that company undercuts our government’s efforts to promote freedom of information.”²⁵ Congressman Leach also seemed to be more concerned that the companies were actually self-censoring themselves in anticipation of actions taken against them by the Chinese government.²⁶ During the session, Yahoo said it would welcome U.S. government intervention in dealing with the Chinese government’s demands. However, the intervention that subsequently followed is probably not what Yahoo had in mind.

A day after the Congressional hearing, Congressman Christopher Smith introduced the Global Internet Freedom Act of 2006 which outlined the following actions:

Requires the President to establish an office that would assess the freedom of electronic information in every foreign state.

President would then designate “Internet-Restricting Countries”

U.S. companies would not be allowed to host email services or search engines in “Internet-Restricted Countries” or take any action in the country that result in them having to adhere to political censorship or infringe on individual privacy protection.²⁷

Around the same time the U.S. Department of State created a Global Internet Freedom Task Force (GIFT) to address the issues of states attempting to hinder the “independence of the Internet” by impeding the free flow of information and the impact on U.S. companies.²⁸ While the swift action by the Congressional and Executive branches shows a strong concern for the actions of the U.S. companies and the implications it has on U.S. reputation, the creation of a task force with a vague mandate indicates that the U.S. does not intend to take any powerful action against the Chinese government.

²⁵ Remarks of Rep. James A. Leach, Chairman, Subcommittee on Asia & the Pacific Hearing on The Internet in China: A Tool for Freedom of Suppression, House Committee on Foreign Affairs, 2, 14 February 2006, available at <http://www.kraak.info/yahoo/documents/leacho21506.pdf>.

²⁶ *Id.*, at 3.

²⁷ Christopher H. Smith, *Do no (Online) Evil*, WALL ST. J., 2 March 2006, available at http://www.house.gov/list/press/njo4_smith/opedgofa.html.

²⁸ Secretary of State Establishes New Global Internet Freedom Task Force, U.S. State Department, 14 February 2006, available at <http://www.state.gov/r/pa/prs/ps/2006/61156.htm>.

3.1.3 *Material Power*

U.S. actions do show that as opposed to the basic human right of freedom of information, freedom of information on the Internet is a much more tangible concern for the U.S. However, although the U.S. has considerable material power, the costs of imposing sanctions may be too great in an increasingly economically interdependent world. Even in the 1990s, when China was a fledgling economy, the U.S. did not employ consistent economic sanctions to compel China to change its human rights policies. Instead the Clinton administration adopted a policy of engagement with the philosophy that the more China interacted with the rest of the world, the greater its chances of becoming democratic and complying with international human rights standards. The soft policy tactic, which allowed the U.S. to develop economic relations with China, consisted of introducing resolutions against China in the UNCHR, creating a Congressional-Executive Commission on China to monitor its human rights as well as favoring China's entry in the World Trade Organization (WTO) and granting it Permanent Normal Trading Relations (PNTR) status.²⁹

Thus, if the potential of economic benefits outweighed pursuing international human rights such as freedom of information in the 1990s, today the growing interdependence of U.S. and Chinese economies makes it highly unlikely that the U.S. will impose material sanctions for a human rights issue. Freedom of information on the Internet presents tangible incentives for the U.S. to take action including potentially gaining a wider market for its e-commerce businesses, utilizing the Internet as a tool for spreading democracy and the reputation costs of U.S. Internet companies abiding by China's censorship laws. However, these factors still do not pose a cost that would warrant hegemonic action for pursuing freedom of information on the Internet.

3.1.4 *Ideological Power*

Donnelly also asserts that along with material power, "the effective exercise of hegemonic power requires...ideological justification sufficiently powerful to win at least acquiescence from nonhegemonic powers."³⁰ Therefore, the U.S. could more effectively leverage its material power if there already existed a widely accepted notion among most states that freedom of information on the Internet was an important individual right. However, the principle of free flow of information is complicated by the differences of what should or should not fall into the unrestricted content category, even among states that abide by the freedom of information principle. In a response to growing U.S. criticism over its censorship policies, Liu Zhengrong, a Chinese cabinet official, asserted that China blocks sites that it deems "illegal" or "harmful" just as other Western countries do.³¹ He stated, "Our practices are completely consistent with international practices."³² Hence due to the widespread variations

²⁹ Rosemary Foot, *Bush, China and Human Rights*, 45(2) SURVIVAL 175, 167-186 (2003).

³⁰ Donnelly, *supra* note 22, at 637.

³¹ Jason Dean, *Politics & Economics: Chinese Government Defends Its Restrictions on Internet Use*, WALL ST. J., 15 February 2006, at A4.

³² *Ibid.*

in exceptions to the freedom of information, the right does not have a strong ideological foundation.

Therefore, imposing an international standard on freedom of information on the Internet may not be easily within U.S. power nor does it provide enough gain for the U.S. to expend the energy in attempting to form such a hegemonic regime.

3.2 Institutionalism

Institutionalism is based on the assertion that states will enter into and comply with international agreements when they can gain more through cooperation than pursuing the objective unilaterally³³ or need other states to reach the objective.³⁴ While in the neorealist model, it is important to establish enough benefits for the hegemon in order to propel it to take action, in Institutionalism the noncompliant state must also gain some benefits. However, the concept of Institutionalism is not readily applicable to the international human rights regime. As Neumayer points out, it is difficult to see what mutual benefit states can gain from harmonizing how they treat their citizens.³⁵

Law professor, Tim Wu argues that within the Institutionalism model, the willingness to collaborate on Internet governance issues will depend on the level of abstraction. States will be more inclined to agree on technical matters such as domain names, less inclined on issues such as data encryption and least so on abstract areas such as freedom of information.³⁶ China has to some extent borne out Wu's prediction. For example, China has not sought to change TCP/IP protocol structure that transmits data packets across networks. It did attempt to impose a law that would require businesses using software encryption to disclose their keys to the government which would enable it to monitor communications more easily. However, the government repealed the law amidst complaints from foreign businesses.³⁷ Yet in September 2002, China did not even notify Google before blocking its website and re-routing users to a Chinese search engine.³⁸

Former Chinese President Jiang Zemin's directive regarding the Internet was "Develop it positively; Strengthen the management; Hasten the benefits while avoiding the harm; and Make it useful for us."³⁹ China has successfully adapted the Internet to its political system and managed to cultivate it for economic purposes. Statistics for 2002 showed that China had 20.8 million

³³ Neumayer, *supra* note 26, at 927.

³⁴ Oona A. Hathaway, *Do human rights treaties make a difference?* 111(8) YALE L.J. 1950, 1935-2042 (2002).

³⁵ Neumayer, *supra* note 26, at 927.

³⁶ Timothy S. Wu, *Cyberspace Sovereignty? The Internet and the International System*, 10(3) HARV. J.L. & TECH. 659, 647-666 (1997).

³⁷ Assafa Endeshaw, *Internet Regulation in China: The Never-ending Cat and Mouse Game*, 13(1) INFO. & COMMUNICATIONS TECH. L. 48, 41-57 (2004).

³⁸ Peter S. Goodman and Mike Musgrove, *China Blocks Web Search Engines; Country Fears Doors To Commerce Also Open Weak Spots*, WASH. POST, 12 September 2002, at E1.

³⁹ Charles Li, *Internet Content Control in China*, 8 INT'L J. COMMUNICATIONS L. & POLICY 6, 1-32 (2003/2004).

online computers and 371, 600 registered websites.⁴⁰ It has over 1,100 e-commerce websites and an estimated transaction volume from online shopping of 224 million yuan in 2000 (a 300 percent increase from the year before).⁴¹

Why would China then benefit from lowering its regulation to harmonize with international standards? The first part of the answer requires a cost-benefit analysis in absolute terms and the second in relative terms.

3.2.1 Absolute Cost-Benefit Analysis.

According to Wu, while a state may consider maintaining control of the Internet directly proportional to maintaining power, it is indirectly proportional to the other benefits of the Internet.⁴² Therefore, in the absence of any external forces, a state will consider lessening its control over the Internet only if its regulatory regime was hindering other benefits of the Internet which in China's case would be economic benefits.

Certain analysts do claim that China may limit its control of the Internet in order to attract foreign capital, technology, and knowledge.⁴³ Wong and Fah purport that the boom of domestic websites will soon lead to a bust due to competition and lack of financial backing.⁴⁴ In order to harness the potential of the Internet, China has begun a state program to advance scientific education; is encouraging Chinese nationals working in the IT industry abroad to return to China; and is providing incentives for foreign investment firms.⁴⁵

China can incur costs for censoring the Internet if foreign companies decide not to invest or base operations in China due to its Internet censorship laws. Yet, as evidence from Yahoo, Google, and Cisco activities in China has shown, major U.S. companies are willing to change their policies for access to China's market. However, speaking about East Asian states in general, Shalini Venturelli notes that technological diffusion and investment in hardware and infrastructure will not be enough for these states to become competitive in advanced information services, an area of weakness for these states.⁴⁶ Venturelli further claims that freedom of information is one of the preconditions for generating ideas and promoting innovation in the knowledge economy.⁴⁷ China still does not allow foreign investment in any aspect of providing do-

⁴⁰ Jack Linchuan Qiu, *The Internet in China: Data and Issues*, Working Paper Prepared for Annenberg Research Seminar on International Communication, 1 October 2003, available at http://arnic.info/Papers/JQ_China_and_Internet.pdf.

⁴¹ John Wong and Nah Seok Ling, CHINA'S EMERGING NEW ECONOMY: THE INTERNET AND E-COMMERCE 10 (2000).

⁴² Wu, *supra* note 40, at 660.

⁴³ Endeshaw, *supra* note 41, at 51.

⁴⁴ Wong & Ling, *supra* note 45, at 12.

⁴⁵ Wong & Ling, *supra* note 45, at 13.

⁴⁶ Shalini Venturelli, *Inventing E-Regulation in the US, EU and East Asia: Conflicting Social Visions of the Internet & Information Society*, 19 *TELEMATICS & INFORMATICS* 27, 69-90 (MAY 2002).

⁴⁷ *Id.*, at 23.

mestic Internet content.⁴⁸ Thus an indirect cost of censoring the Internet, China is lowering the playing field in the knowledge-economy for its citizens.

Another cost of Internet censorship is administration and enforcement. China's extensive censorship network includes a web of laws that are formulated in an ad hoc manner as situations arise; an administration system that must register Internet participants at all levels from Internet Service Providers (ISPs) to users and vigilant enforcement.⁴⁹ As well as the resource costs, the slow network speed can limit usage and the unpredictable nature of the regulation may in theory prove a disincentive for foreign investment.⁵⁰ The cost may especially become burdensome if censorship is not achieving its goals. While some analysts purport that Chinese users are able to find ways around the censors,⁵¹ others warn that China's censoring techniques are becoming more "refined, sophisticated and targeted."⁵² Those able to circumvent the censors may be isolated to those willing to spend the time and effort and/or the technically savvy citizens.

Therefore, Wu's indirect proportionality of more control will mean less benefits does not hold in some situations. China's censorship system does create additional jobs as well as opportunities for technology companies that provide censorship technologies.⁵³ And as Wu notes, the level of regulation will increase as regulation technology becomes more sophisticated.⁵⁴

It is difficult to hypothesize how great the cost of censoring, both of the indirect effects on the knowledge economy and actual administration of the censorship system, would have to become for the Chinese government to lessen regulation. However, it is clear that China has not yet reached the threshold.

3.2.2 *Relative Cost-Benefits.*

Lack of absolute costs does not mean that external forces cannot push China towards harmonizing its standards by offering either economic benefits or imposing sanctions. Discussion of the neorealist model indicated that the U.S. has tangible interests in creating an international standard that would allow the free flow of information on the Internet but does not want to engage in the high costs of imposing hegemonic material power in achieving such a regime. However, in the institutional model, sanctions do not have to be as severe as in the neorealist model for they are not used as a means of coercion but rather to tip the cost-benefit analysis of other states. States weigh the benefits of not joining a regime or of noncompliance in terms of material sanctions and reputation costs.⁵⁵ The U.S. can therefore employ sanctions to tip the costs of Internet censorship in China as well as the benefits to make harmonizing standards more attractive.

⁴⁸ Endeshaw, *supra* note 41, at 51.

⁴⁹ Qiu, *supra* note 44, at 6.

⁵⁰ *Id.*, at 6.

⁵¹ Endeshaw, *supra* note 41, at 50.

⁵² *Internet Filtering in China in 2004-2005: A Country Study*, OpenNet Initiative, 4, available at <http://www.opennetinitiative.net/studies/china/>.

⁵³ Qiu, *supra* note 44, at 6.

⁵⁴ Wu, *supra* note 40, at 660.

⁵⁵ Hathaway, *supra* note 38, at 1950.

In terms of sanctions, the proposed Global Internet Freedom Act may prove useful, as it would block access of foreign Internet companies to China. The Act could even restrict U.S. companies such as Cisco Systems and Nortel Networks from selling censorship technologies to China. Another potent sanction is utilizing the WTO. Wu and others point out that the General Agreement on Trade in Services (GATS) requires that state parties not limit market access to export services they have agreed to liberalize. It also stipulates non-discrimination between exporting countries and equal treatment of the local and competing importing services that state parties have agreed to liberalize. Since those involved in e-commerce are essentially importers and exporters of services, they fall under the purview of WTO regulations.⁵⁶ Wu argues that having agreed to the liberalization of “data processing services” through the Internet, China could be in violation of GATS when it filters or blocks Internet search engines.⁵⁷ Another possible GATS violation is cross-border supply of wholesale or retail trade services which China has also agreed to liberalize and thereby may have precluded itself from blocking or filtering foreign based online auction sites.⁵⁸

Wu also points out that this is uncharted territory in WTO law and in such cases the appellate body will have to decide whether the blocking or filtering falls under WTO jurisdiction and subsequently if it falls under the “protect public morals or maintain public order,”⁵⁹ exception that states in these cases will most likely attempt to use as a defense.⁶⁰ However, bringing a WTO case against China is a substantial threat and one that the U.S. may even wish to execute for solely economic purposes. As Wu points out, it is in the U.S. interest as the dominant Internet service exporter to force China to comply with GATS policies.⁶¹

In terms of benefits, the U.S. could offer the possibility of an international venue for the Internet Corporation for Assigned Names and Numbers (ICANN), something that China strongly desires. Although the U.S. claims no direct authority over ICANN, it still is under the legal jurisdiction of the U.S. (One of the major battles that delegates engaged in the second phase of WSIS was the contention by many states that the administration of the Internet domain name system and root servers should be transferred from non-profit private entity Internet Corporation for Assigned Names and Numbers (ICANN) based in the U.S. to an international body within the United Nations.)

There is potential success in employing the tactic of economic benefits to compel China to harmonize its Internet standards. However, Neumayer asserts that even if states are able to construct a human rights treaty created upon mutual benefits, the “depth” of the cooperation is questionable.⁶² Neumayer may be suggesting that a state could sign the treaty to gain the benefits but not domestically implement the human rights norm. Again the free flow

⁵⁶ Tim Wu, *The World Trade Law of Internet Filtering*, 2 (Social Science Research Network, Working Papers Series, 2006), available at <http://ssrn.com/abstract=882459>.

⁵⁷ *Id.*, at 17.

⁵⁸ *Id.*, at 18.

⁵⁹ *Id.*, at 9.

⁶⁰ *Id.*, at 16-18.

⁶¹ *Id.*, at 19.

⁶² Neumayer, *supra* note 26, at 927.

of information on the Internet mitigates this weakness to a certain extent because it would require specific physical actions for compliance and not just domestic legal action and enforcement. The agreement would most likely require the Chinese government to physically remove most of its censors and would no longer force Chinese as well as U.S. Internet companies to self-censor. Open Net Initiative, a joint collaborative project between the University of Toronto, Cambridge University, Oxford University, and Harvard Law School already monitors and reports on filtering activities of Internet-censoring states and would easily be able to determine if China is complying with the agreement. However, the Chinese government through active enforcement has embedded a norm of self-censorship within the Internet user community as well as within the Internet companies through both intimidation and favoritism.⁶³ China may continue to engage in such behavior in order to maintain the self-censorship within the community. While an international agreement may not effectively deal with self-censorship, it can help to counter the pervasiveness of this norm.

3.3 Normative Models and Rule-Based Compliance

Normative theories are based on the concept that international legal norms rather than sanctions or state interests can change state behavior. These include the Abraham and Antonia Chayes' managerial model, Thomas Franck's legitimate and fair rule assertion, and Harold Koh's transnational network theory. All three share the idea that the state would enter and comply with a human rights treaty due to the "persuasive power of normative beliefs regarding human rights."⁶⁴

Based on this assumption the managerial and rule legitimacy model are less relevant to the subject of this paper. For example, the managerial model asserts that states want to comply with international regimes but cannot due to vague rules and/or lack of capacity. This condition especially does not pose an issue for China since lowering its Internet regulation would mean freeing up administrative and enforcement resources and dismantling complex set of laws. However, clarifying the rules, although such an action would probably not lead to compliance, would clarify what type of censorship is allowable under national security and social order exceptions and subsequently establish if China is abiding by freedom of information standards as it claims.⁶⁵

Franck's legitimacy theory is also only partially instructive. He suggests that the "pull of compliance" will occur when rules are fair and legitimate, meaning international standards should have determinacy with transparent requirements; symbolic value in society; be coherent in treating similar cases in the same manner; and consistently follow secondary rules of international law in interpreting and applying the rules.⁶⁶

While symbolic value is definitely important to all states in the international human rights regime, the other three conditions may not be as relevant to the scenario examined in this paper. It seems implausible that China would agree to lower its Internet content regulation based on rules that are derived

⁶³ Li, *supra* note 43, at 31.

⁶⁴ Hathaway, *supra* note 38, at 1957.

⁶⁵ Dean, *supra* note 35, at A4.

⁶⁶ Hathaway, *supra* note 38, at 1959.

through a transparent and fair process and are applied in a coherent manner. Franck's theory would be valuable if the negotiations of standards on Internet content regulation were between states that accepted the superiority of the principle of freedom of information and the matter at hand was to decide what content was unacceptable. From the U.S. perspective content should not be deemed unacceptable because it is offensive to a certain group of people, while France may not agree with this criterion. However, if the U.S. understood France's justification for prohibiting hate speech and the states agreed on a common criterion for defining such content as well as jurisdictional implications, the U.S. may agree to compromise.

However, this paper is addressing the scenario where the negotiation is between two states at the polar ends of the basic concept of freedom of information on the Internet and the aim is to bring one closer to the other end as possible. With respect to this aim the communitarian component of the normative theories may be more useful.

3.4 Normative Models and the Communitarian Principle

Both the managerial and transnational models purport changing state preferences through social pressure: the managerial model at the international level while the transnational model at the state-to-state domestic level.

The managerial model asserts that by creating a norm of compliance within the international regime, states will be obliged to conform lest they be cast out. The assumption is that the state regards membership in the regime as essential to its other interests such as security and/or economic benefits.⁶⁷ China's continued participation in the UN Commission on Human Rights even as it defends its practices under constant criticism shows that China perceives disengagement from the international human rights regime as a greater disadvantage. It recognizes that by participating it has a voice and a forum to build its international status. Therefore, one of the strengths of the international human rights regime is that even under high scrutiny and resented interference, authoritarian states such as China prefer inclusion over isolation. Hence if the U.S., European Community, as well as like-minded Asian states created a treaty on Internet content regulation within the international human rights regime, they could establish a norm of compliance on the free flow of information on the Internet which China will be obliged to accept.

However, based on the fact that China signed the ICCPR in 1998 and still has not ratified it, indicates that it is unlikely that "peer" pressure will be effective. Yet the existence of such a treaty could bolster the application of Koh's transnational theory.

Koh's theory asserts that parallel to the "horizontal" negotiations between state governments, individual actors in intergovernmental (IGO), nongovernmental organizations (NGO), interest groups, business sector, etc should engage in discourse about the legal norm and why states should comply with it. The transnational interactions among groups will eventually lead to domestic internalization of the legal norm.⁶⁸ In this theory a state that does not agree and/or intend to comply with a legal norm can be persuaded to change its

⁶⁷ Hathaway, *supra* note 38, at 1957.

⁶⁸ Harold Hongju Koh, *How is International Human Rights Law Enforced?* 73 *IND. L.J.* 1406, 1397-1417 (1998).

preferences and hence behavior through the repeated transnational interactions among various domestic actors. Thus it in part shares the assumption of the rational actor liberalist theory that if domestic interest groups support an international law they can influence their state's compliance to it. Neumayer's interpretation of the transnational theory is that, "it is not so much persuasion—a form of rational acceptance—that matters but regular interactions lead to cognitive social pressures for state actors to conform with treaty norms."⁶⁹

The compliance of U.S. Internet companies to China's censorship may be counterproductive to the application of the transnational model in attaining agreement on free flow of information on the Internet. As a part of their defense, Google, Microsoft and Yahoo claimed that it is more beneficial for the Chinese citizens if they were in China than not.⁷⁰ Google's chief executive, Eric E. Schmidt announced that Google would not lobby the Chinese government to change its censorship law, stating it would be "arrogant" for Google "to walk into a country where we are just beginning operations and tell that country how to run itself" as well as pointing out that it had little leverage with the Chinese government.⁷¹ However, critics of this defense including human rights activists say that the companies are actually legitimizing China's norm of Internet censorship.⁷²

To a certain extent the Internet companies have a point. In the transnational model, the internalization of norms is carried out at the civil society level. Despite succumbing to China's censors, Internet companies such as Google do have a history of strong adherence to the Internet's openness principle and could still positively influence Chinese society. However, analysts have mixed views over the potential to mobilize the Chinese citizens to influence the government's censorship laws. Xia Qiang, Executive Director of Human Rights in China, asserts there are definite elements of dissent.⁷³ One example is the Declaration of Internet Citizens' Rights, published in July 2002 in protest of new regulations enforcing self-censorship among Internet publishers. The declaration insists on "freedom of expression, information, and association on the Internet" and also references the UDHR and ICCPR.⁷⁴ Charles Li, however, claims that most Chinese citizens put economic benefits above freedom of speech.

The U.S. approach of un-jamming blocked websites or providing anonymous software to circumvent censors may further characterize censorship as nuisance rather than an infringement on a human right. Shanthi Kalathil contends that the U.S. government, rather than "treating the Internet as an innately liberating tool" should promote openness in authoritarian states by facilitating e-government, e-commerce projects and ICT diffusion.⁷⁵ It is

⁶⁹ Neumayer, *supra* note 26, at 929-930.

⁷⁰ Steven Levy, *Google and the China Syndrome*, NEWSWEEK, 13 February 2006, at 14.

⁷¹ Jim Yardley, *Google Chief Rejects Putting Pressure on China*, N.Y. TIMES, 13 April 2006, at C7.

⁷² Levy, *supra* note 74, at 14.

⁷³ Xiao Qiang, *Cyber speech: catalyzing free expression and civil society*, 25(2) HARV. INT'L REV. 70, 70-76 (2003).

⁷⁴ *Ibid.*

⁷⁵ Shanthi Kalathil, *Dot.com for dictators*, FOREIGN POLICY, 48, 42-49 (March/April 2003).

unclear whether these measures would be possible in China but the point is that merely exposing citizens to the Internet will not foster the norm of free flow of information on the Internet. Li asserts that only when the Chinese citizens find the need to demand their right to free speech will there be a call to fight Internet censorship.⁷⁶

IV. CONCLUSION

Where does this hypothetical analysis of two polar ends, China and U.S. leave the prospect of convincing those states that heavily employ Internet censors to subscribe to the lowest-common denominator international standard based on the human right of freedom of information? In evaluating the issue in terms of the neorealist theory, it is clear that the Internet adds tangible value for a hegemonic power to coerce other states to comply with a human rights treaty. However, even if the U.S. were to find this value greater than the cost of imposing forceful sanctions, the issue itself lacks the ideological hegemony among states to compel China to respect its citizens' right to freedom of information on the Internet. According to Institutionalism, since currently China is not incurring significant economic costs to Internet censorship, the U.S. can only change China's preferences by providing a mix of carrots and sticks. The U.S. may be able to attain an agreement from China using this tactic and have the means to monitor and enforce the dismantling of the censorship system.

If a mutually cooperative agreement is not possible, the transnational model if applied appropriately may be able to assist in mobilizing Chinese citizens. In this respect, the U.S. should avoid the pitfall of assuming that the Internet itself will act as a tool of norm internalization: the exposure of the technology to Chinese citizens has not yet resulted in a pervasive call for freedom of information on the Internet. The transnational model may be resourceful even if China has entered an international agreement in order to assist in internalizing the norm of freedom of information on the Internet and replacing self-censorship. In fact it could lead to what Neumayer refers to as "deep cooperation", but the model is also one that is probably the most difficult to apply.

In attempting to persuade China to comply with international human rights in general, Koh recommends that the U.S. should use all international regime instruments: power, sanctions, self-interest —offering carrots and sticks, liberal theory -- in promoting democracy, communitarian values— within the international human rights regime, engaging the Chinese people, groups and civil society so they will internalize the norms of international human rights law.⁷⁷

As outlined above, some of the theories more than others have the potential to persuade China to sign on to an international standard that would extensively lower its Internet content regulation. In almost all cases the fact that this would be a standard for the free flow of information on the Internet as opposed to just freedom of information mitigates some of the inherent weaknesses in the international human rights regime. However, framing Internet

⁷⁶ Li, *supra* note 43, at 38.

⁷⁷ Koh, *supra* note 72, at 1406-1407.

content regulation as a human right still does not overcome the constraints of the international human rights regime to the extent that agreement and compliance from China would be assured in any one model or even a combination.

V. AN ALTERNATIVE FRAMEWORK: NETIQUETTE REGIME

The conclusion of this analysis does not rule out the international human rights regime as a means to pursue universal freedom of information on the Internet. It does merit revisiting the basic concept of Internet technology to explore possible alternative frameworks. John Perry Barlow's bold statement to the world, in his famous *A Declaration of the Independent of Cyberspace*, "You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear,"⁷⁸ may no longer hold true. However, the value of the open and independent nature of Internet technology has not diminished. The aim of this section is to briefly examine the utility of the inherent norms of Internet technology in implementing free flow of information at the international level and the role of law in such a framework.

The Internet has gone through a substantial transformation; from a tool built, used and enhanced by a small scientific research community to one that is continually modified by all types of businesses, users and governments across the world. However, Dan L. Burke asserts that though today's Internet users may have diverging ideas about what the Internet should be, "they necessarily share the goals and values designed into the network itself-whether they intend to or not."⁷⁹ These original goals and values upon which Internet technology was constructed or "netiquette" include "universalism, disinterestedness, resource sharing, interactive communication, virtual space, unrestricted information flows, non-hierarchical dissemination of information, remote access, openness, decentralization and anonymity."⁸⁰

According to Burke it is when the values of the Internet users conflicts with netiquette norms that society calls for both legal and technological controls. Burke further asserts that these controls are merely "local overlays" and they "remain prescriptively leaky, since the underlying characteristics of the network remain unchanged, facilitating circumvention of the local rule set."⁸¹ His position is that since the underlying network infrastructure is not easily changed, it will preserve the inherent norms of the Internet and conflicts between the users and this design will continue to manifest in superficial legal and technological controls.⁸²

According to this logic, one would conclude that no action is necessary in order to enable the free flow of information on the Internet at the state or international level. China's Internet censorship system is but an artificial covering and the infrastructure of the Internet will emerge if it does not already. Burke in fact suggests just that, "...ongoing legal controversies reflect the in-

⁷⁸ Wu, *supra* note 40, at 649.

⁷⁹ Dan L. Burk, *CYBERLAW AND THE NORMS OF SCIENCE* (1999), available at http://www.bc.edu/bc_org/avp/law/st_org/iprf/commentary/content/1999060502.htm.

⁸⁰ Li, *supra* note 43, at 7.

⁸¹ Burk, *supra* note 83.

⁸² *Ibid.*

ability of legal restrictions to effectively control content.⁸³ There is some credence to this assertion as Chinese citizens do find creative ways to circumvent Internet censorship such as using anti-filtering technology. However, one can argue that anti-filtering technology is also an artificial overlay on top of another overlay. The original Internet infrastructure may still exist, as Burke suggests, but the openness and independence is not very useful beneath the overlays and counter overlays.

Contrary to Burke, Lawrence Lessig asserts, that propelled by commercial interests, the netiquette is being changed and the law should counter the trend.⁸⁴ Jack Balkin also endorses an active role of law in digital technologies such as the Internet stating,

Laws affect how technology is designed, the degree of legal protection that a certain technology will enjoy, and whether still other technologies that modify or route around existing technological forms of distribution and control will be limited or forbidden.⁸⁵

In discussing specifically the protection and promotion of freedom of speech in technologies such as the Internet, Balkin asserts that while individual rights are an important element, the greater protection will come from legislation that focuses on preserving the norms embedded in the technological design⁸⁶, in the case of the Internet, the netiquette.

Balkin's analysis is focused at the domestic level where the state government is given the role of protecting and promoting the Internet culture. However, the essence of the Internet culture or netiquette is that it exists without adherence to who the Internet user is and in what state he or she is using the Internet. Further Burke, Lessig and Balkin all claim that the freedom that Internet users have and continue to enjoy is based on the value system on which the Internet was built. It is therefore useful to examine this founding Internet culture as the means of establishing an international standard on the free flow of information on the Internet.

The complexity of establishing such an international netiquette regime becomes clear as one attempts to answer the basic questions: Who should be the international guardian of the netiquette or rather the founding Internet norms? What would be the process of constructing standards? Why would states adhere to them?

The mandate of an international netiquette regime must be solely to protect, promote and enforce the inherent, founding values of the Internet culture and remain uninfluenced by all interests that may attempt to change it. However, practically, functioning within the interdependent global society, it will only be able to limit the contradictory effects of economic and political factors. As the WTO has found that it cannot solely deal with the "trade" aspect of an issue, an international netiquette regime will not be able to function

⁸³ *Ibid.*

⁸⁴ Lawrence Lessig, *The Death of Cyberspace*, 57(2) WASH. & LEE L. REV. 346-347, 337-346 (2000).

⁸⁵ Jack M. Balkin, *Digital Speech and Democratic Culture*, 79(1) N.Y.U. L. REV. 50 (2004).

⁸⁶ *Id.*, at 50.

in black and white terms of what conforms to the founding norms of the Internet and what does not.

At the domestic level, Balkin envisions that the formulation of such law will be a negotiation between legislators and private companies, where the government may offer incentives to private companies to design their technology in adherence to netiquette norms.⁸⁷ Would the international netiquette regime negotiate with China or Google or both and what could it provide as an incentive or disincentive for either?

At minimum, for such a regime to work, two necessary conditions are: (1) participants and decision-makers whose allegiance is foremost to the founding Internet culture and (2) strong enforcement mechanisms. The former may require participation not of states but individual experts in the field without any national allegiance. The latter would require a partnership with another international organization that does have enforcement powers such as the WTO, or other means of sanctioning such as prohibiting Internet companies in non-compliant states. All options are highly controversial and difficult to pursue, far less to attain at the international level. However, such a dire outlook is a result of only a cursory analysis and the concept warrants a more in depth evaluation.

Framed as an individual right, or as the right to preserve the values on which the technology was built, freedom of information on the Internet faces various challenges from the diverging political, economic, and cultural factors of states at the international level. Burke may thus offer the simplest solution, doing nothing: for the Internet does not need the law, freedom is inherent within its structure and the conflicts between what users want and what the original designers intended are evidence of this. However, even if one were to accept Burke's faith in the technology, the costs of the ongoing conflicts, free access to some and not others still warrant further exploration of an international legal framework that can effectively utilize an existing regime such as human rights or is able to create one that can harness the inherent values of Internet technology in its own self-preservation.

⁸⁷ *Id.*, at 51.