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- Freedom of Speech on the  
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# Summary

Freedom of speech is both a fundamental and an important right in the sense that this right is the key to fulfill other human rights. Without being able to seek information, a citizen cannot be aware of what rights he or she has. When a person lacks the ability to have an opinion and speak one's mind, a person cannot actively seek to protect his or her rights.

“The great firewall of China” refers to the official Chinese censorship of information between the global Internet and the Chinese Internet. Through this firewall, Chinese people can only access websites that their government has approved. China has strict rules on what information an Internet user can access while the Chinese Constitution explicitly protects the right to free speech.

The Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms protect freedom of speech. Furthermore, it is commonly accepted that the right is protected as international customary law.

Technology developed by multinational corporations is enabling the Chinese government to censor the Internet. The companies are assisting the Chinese government by complying with its censorship demands, and are facilitating the government's efforts to control the free flow of information. For example, in 2006, the American corporation Google became a participant and not just a victim of the Chinese state's censorship, when it launched a censored version of its search engine for the Chinese market. The search engine censors thousands of keywords and web addresses, which restricts Chinese people's ability to access information. The Internet companies that are acting according to the Chinese government's policy defend their behaviour by arguing that they are only acting in accordance with the local laws in China.

The purpose of this thesis is to analyze what international legal obligations China, as a state, has for ensuring freedom of speech on the Internet. In addition, the thesis examines the responsibilities multinational corporations have for not violating freedom of speech when operating in China.

First, the thesis provides a background of how Chinese censorship works, and what the multinational corporations are doing in order to comply with the Chinese regulations of the Internet market. Moreover, an explanation of international law relevant to the issue is given in the descriptive part of the thesis. Later, I analyze what international law demands of China, and of the multinational corporations, in order to ensure freedom of speech on the Internet in China.

# Preface

*“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.....it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.”*

European Court of Human Rights,  
*Handyside v. U.K (1976)*

# Abbreviations

ATCA	Alien Tort Claims Act
CCP	Chinese Communist Party
CNNIC	China Internet Network Information Centre
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
HRC	Human Rights Committee
IAP	Internet Access Provider
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IGF	Internet Governance Forum
ILO	International Labor Organization
IP Address	Internet Protocol Address
ISP	Internet Service Provider
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Norms	UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
US	United States
USFC	United States Federal Courts
VCLT	Vienna Convention on The law of Treaties
WTO	World Trade Organization
WWW	World Wide Web

# 1 Introduction

## 1.1 Purpose and Delimitation

Lately, massive criticism has been directed towards China and towards multinational corporations operating on the Chinese Internet market. The censorship, that is taking place on the Internet in China, is one of the strictest, if not the strictest, in the world. At the same time, freedom of speech is one of the basic, fundamental human rights protected in all the major international human rights treaties, declarations, and covenants. Furthermore, freedom of speech is a necessary right in order to have a democratic society, and it is key to the enjoyment of other human rights. Without being able to seek information, a citizen cannot protect or enjoy his or her other rights.

Non-governmental organizations, national governments, and international organizations have started to address the problem in China by writing reports, issuing resolutions, and by adopting laws. Likewise, there is an ongoing discussion on what responsibility multinational corporations have for upholding essential and important human rights when they are acting and operating in a repressive country as China.

The purpose of this thesis is to give a comprehensive analysis of what international obligations China have, as a state, for providing its citizens with an Internet without censure. In addition to this, the thesis examines multinational corporations' duty not to violate freedom of speech on the Chinese Internet market.

Freedom of speech is a vast subject. To analyze both China's and corporations' obligations initially appeared to be too broad a subject. However, the corporations on the Chinese Internet market are acting closely together with the Chinese government, and the state and the corporations are interdependent. Not writing about both China, as a state, and the corporations would not provide a complete view of the existing problem in China.

I have limited the examination to focus on the American corporations Google, Yahoo! and Microsoft. The reasons are that there is an ongoing discussion in the United States about the issue, and further, the United States has a special regulation for human rights violations, the Alien Tort Claims Act, which allows foreigner to bring a claim in the United States if there is a violation of the law of nations. There are other, non-American, corporations acting on the Chinese Internet market as well, but because of mentioned reasons, the analysis is limited to focus on the American corporations. However, most of the analysis applies to all multinational corporations acting in China.

This thesis focuses on the Chinese Internet market, and the right to seek and obtain information. It does not deal with censorship in other countries, nor does it deal with the question of broadcasting.

Further limitations are made regarding China's internal obligations. I do not focus on what responsibility China has for upholding its domestic laws that protect freedom of speech. Nevertheless, I do provide a background about Chinese censorship and Chinese regulations regarding Internet and its limitations.

Lastly, vast amount of guidelines exist and other non-binding documents about corporate responsibility for human rights. I have chosen to focus on the "*UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*" because the UN Norms are the most comprehensive attempt to articulate responsibility for multinational corporations. They also provide an enforcement mechanism. Moreover, once states start to adopt the UN Norms, they will be binding on corporations.

## **1.2 Method and Material**

The censorship of the Internet in China is a new phenomenon; given that, Internet itself has not been available for a very long time. The fact that both the degree and the enforcement of censorship are so strict has made many scholars and international human rights organizations notice the problem, and it has made them write about the issue. Therefore, there exists a vast number of law review, reports, surveys, and other articles regarding the censorship in China, which I have used as sources for the thesis. Because the matter is a new kind of problem in China, I have not found many books on the subject. Furthermore, the discussion on corporate responsibility for human rights is such a novel thing, that most of the material available on the subject can be found in articles and online, instead of in legal documents or in published books.

When writing the thesis, I have used a traditional legal method. First, I provide a descriptive background of the censorship on the Internet and of international human rights law on freedom of speech. After that, I analyze the descriptive facts by different means of interpretation. When doing this, I have looked to the text of legal documents that protect freedom of speech. I have analysed the issue by examining articles, preambles, and by looking to the object and purpose of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant for Civil and Political rights and the Universal Declaration for Human Rights. In addition, I have used case law in order to analyze the standard for freedom of speech, and to determine what lawful limitations a state can have.

I have compared case law from various courts: the European Court of Human Rights, the Human Rights Committee, the International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia, and from courts in the United States. There are no cases regarding the censorship in China. However, I have found many cases, which are important for the discussion on whether the censorship is legal. Furthermore, the different courts have ruled upon cases that are helpful in the determination of whether freedom of speech is international customary law, and whether a state can put lawful limitations on freedom of speech.

### **1.3 Outline**

Directly after this introduction follows a description of the Internet in China. It provides a background on of the Internet and it explains how the censorship works. Chapter 3 describes the Chinese laws and regulations of the Internet.

Chapter 4 discusses multinational corporations in general and American corporations in particular, that are helping the Chinese government to censor the Internet. These companies, Yahoo!, Google and Microsoft, are criticized for enabling the Chinese government to restrict freedom of speech on the Internet. The chapter gives examples of what actions the corporations have done and what consequences they have had on freedom of speech. It also provides answers and defence from the legal counsellors of those corporations.

Chapter 5 provides a brief description of international law, which is important and relevant for the censorship in China, and for the corporate responsibility on the same matter. After this follows chapter 6, which is an analysis of international law, and how it applies to China, and to the corporations operating on the Chinese Internet market. This chapter is the most important chapter because it examines what obligations China and the corporations have for ensuring freedom of speech to the Chinese citizens.

A chapter with my own thoughts on the issue is given after the analysis. This chapter includes a discussion of what impact the World Trade Organization, and the Olympic games that China is hosting in 2008, can have on the censorship. In addition to this, I talk about the Chinese mentality, and how the Chinese people, themselves, must want to change the system of censorship, if it is going to work. After this follows chapters 8 and 9, which are chapters with all the sources I have used for this thesis.

# 2 Internet in China

## 2.1 History of Internet in China

Internet did not become commercially available in China until 1995, but Internet use has grown enormously ever since then.<sup>1</sup> According to China Internet Network Information Centre<sup>2</sup> (“CNNIC”), there are 162 million Internet users in China today.<sup>3</sup> This is a huge increase compared to the 620,000 users that CNNIC first registered when they started to monitor the Internet users in 1997. A reason for this is that during Mao Zedong’s regime, China shut itself off economically from the rest of the world.<sup>4</sup> Not until his death in 1978 did China introduce an economic open-door policy. China introduced its first computer network in 1987.<sup>5</sup> However, since China is a one-party-system, it is important for the government to keep an ideological unanimity, and this implies a strict control over the information that flows in the country.<sup>6</sup>

With Internet, news reaches China from a multiplicity of sources, and people get to choose from which source they want to obtain information. They are able to form opinions and discuss new ideas on the Internet, in ways that was not possible before they started to use the Internet. Prior to 1995, the Chinese Communist Party (“CCP”) thought about not letting the Internet itself become lawful in China, but after realizing its economic benefits, they changed their minds. They thought they needed the Internet in order to continue its modernization and to become economically powerful.<sup>7</sup>

The massacre,<sup>8</sup> at Tiananmen Square in 1989, is an example of why the CCP wants to control Internet. During the Student Democratic Movement at the Tiananmen Square, the students communicated with the world outside by using facsimile (“fax”) machines, which was a new technology at that

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<sup>1</sup> Richard Cullen & D.W. Choy, *The Internet in China*, 13 COLUM. J.ASIAN L. 99, 103 (1999).

<sup>2</sup> A non-profit organization created under the initiative of China’s Ministry of information Industry.

<sup>3</sup> CHINA INTERNET NETWORK INFORMATION CENTRE, STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA (September 2007).  
<http://www.cnnic.net.cn/en/index/00/index.htm> (last visited September 18, 2007).

<sup>4</sup> Neil J. Conley, *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 Tort Claims Act*, 111 PENN ST. L. REV. 171, 174 (2006).

<sup>5</sup> *Id.* at 3.

<sup>6</sup> Trina K. Kissel, *License to Blog: Internet Regulation in the People’s Republic of China*, 17 IND. INT’L & COMP. L. REV. 229, 229 (2007).

<sup>7</sup> Neil J. Conley, *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 Tort Claims Act*, 111 PENN ST. L. REV. 171, 175 (2006).

<sup>8</sup> Students, who went to protest against the Chinese regime and gathered to urge for democracy, were killed and wounded by the Chinese Military.

time.<sup>9</sup> Internet is of course a much more powerful tool than fax machines since not only can users communicate with each other, but Internet also provides users with information. It can educate them and it can be used for coordinating protests against the CCP, which is why the Chinese government wants to control its use.<sup>10</sup>

With Tiananmen Square in mind, and the potential for the Internet to spread information, the authorities have now regulated the use of Internet.<sup>11</sup>

## 2.2 The Great Firewall

China is by no means the only country who censors the Internet. Most countries, even those with strong commitments to democracy and human rights, regulate the Internet to a certain extent.<sup>12</sup> For example, France has regulations<sup>13</sup> that prohibit the exhibition of Nazi paraphernalia for sale on the Internet. However, the difference in China is that the Internet is much more heavily regulated than in other countries.<sup>14</sup>

The regulation of the Internet takes place in two forms.<sup>15</sup> First, China relies on its monopoly over the network. Second, by having laws and regulations that enforce liability on providers and users, it assures self-censorship.

“The great firewall of China”<sup>16</sup> refers to the Chinese official censorship of information between the global Internet and the Chinese Internet. Through this firewall, which can be seen as a nationwide intranet, people can only get access to websites that the government has approved.<sup>17</sup> The term “the great firewall” is in a way a misnomer because the censorship is not taking place by using only a single filtering mechanism, but instead China is using various means in order to control what appears on the Internet. The censoring is done by filtering the Internet, by holding people liable for

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<sup>9</sup> Neil J. Conley, *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 Tort Claims Act*, 111 PENN ST. L. REV. 171, 175 (2006).

<sup>10</sup> Trina K. Kissel, *License to Blog: Internet Regulation in the People's Republic of China*, 17 IND. INT'L & COMP. L. REV. 229, 230 (2007).

<sup>11</sup> Jonathan Zittrain and Benjamin Edelman, *Empirical Analysis of Internet Filtering in China*, Berkman Center for Internet & Society Harvard Law School 1 (2006) [Http://cyber.law.harvard.edu/filtering/china](http://cyber.law.harvard.edu/filtering/china) (last visited October 15, 2007).

<sup>12</sup> Kristin Farrell, *The Big Mamas are Watching: China's Censorship of the Internet and the Strain on Freedom of Speech*, 15 MICH. ST. J. INT'L L. 577, 577 (2007).

<sup>13</sup> THE FRENCH PENAL CODE, C.PEN. Section R645-2.

<sup>14</sup> Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, COLUM. BUS. L REV. 505, 509 (2007).

<sup>15</sup> *Id.* at 509.

<sup>16</sup> HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM” CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 9 (Human Rights Watch 2006).

<sup>17</sup> Neil J. Conley, *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 Tort Claims Act*, 111 PENN ST. L. REV. 171, 175 (2006).

material they host, and by requiring people to register in order to operate legally on the Internet.

### 2.2.1 Internet Filtering

The censorship in China takes form in different ways. The first layer of censorship is being done through “Internet filtering”.<sup>18</sup> That is an umbrella term, which means that China is controlling what can and cannot be accessed on the Internet. Internet routers, that deliver data back and forth between networks, are an essential part of Internet networks. The routers allow network administrators to filter (censor) the data going through. This technology was initially intended to control viruses and spam.

All computers have an Internet protocol (“IP”) address, which means that every computer connected to the Internet has a number that is visible to other computers. In order for computers to identify each other and to find each other, they have their own number, which are IP addresses. This is a system to ensure that the information sent from one computer to another gets through to the right recipient. An IP addresses is difficult to remember so with the purpose of making it easier, a domain name is linked to the IP address. DNS, Domain Name System, enables the computer to translate the IP address to the domain name.<sup>19</sup>

Through the Chinese firewall, the government blocks specific IP addresses to prevent access to certain websites.<sup>20</sup>

When blocking at the router level, authorities have to choose between blocking a whole site or to allow everything on it. When blocking a certain IP address, an inclusion filter or an exclusion filter can be used.<sup>21</sup> Using an inclusion filter means that there is a “white” list with IP addresses that are permitted access. Using an exclusion filter, on the other hand, means that there is a “black list” with addresses that are prohibited access. All other IP addresses are permitted. Problems with the two methods are that they either over-block or under-block. The inclusion filters over-block because they cannot be expected to keep pace with the fast expansion of new websites. Thus, even websites with unobjectionable content are not accessible. The exclusion filters, by contrast, are seen to be under-blocking for the same reason as inclusion filters are seen as over-blocking. Thus, websites that China probably would want to filter are still accessible.

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<sup>18</sup> Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, Colum. BUS. L REV. 505, 509 (2007).

<sup>19</sup> SOU 2000:30 *Domännamnsutredningen: .se?*

<sup>20</sup> Greg Sinclair, *The Internet in China: Information Revolution or Authoritarian Solution?*, 4, (2007) [www.geocities.com/gelaige79/intchin.htm?200713](http://www.geocities.com/gelaige79/intchin.htm?200713) (last visited October 15, 2007).

<sup>21</sup> Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, Colum. BUS. L REV. 505, 509 (2007).

China is considered to over-block. The Chinese government prohibits access to whole websites, even when it is only parts of the site the government do not want people to access. An example is [www.mit.edu](http://www.mit.edu),<sup>22</sup> which is sometimes wholly inaccessible, even though most likely the government does not think the whole site is inappropriate for the Chinese people to access. Another URL that is often blocked is the United States Federal Courts (“USFC”), yet Westlaw and LexisNexis, where you can find mostly the same information as at the USFC’s websites, remain accessible. When doing like this, the censoring tends to lose its strength.<sup>23</sup>

Most of the sites that are blocked are foreign-based sites, like human rights groups websites such as Amnesty International and international news sites such as the BBC News. In 2002, China introduced a new system for censoring, a system based on an analysis of the content of the website.<sup>24</sup> When doing this, they started to block certain keywords, including “human rights,” “Tibet,” “Falun Gong,” and “democracy.” If a Chinese user types a word like this, on a website or in e-mails or on search engines, his or her browser will tell that person that the “page cannot be displayed”.<sup>25</sup> The person might also be redirected to a misleading site and their computer can be frozen for an unspecified time.<sup>26</sup> This system of content-based “packet-filtering” makes it possible for China to do a much more sophisticated filtering and prevent, in a way, both under-blocking and over-blocking. However, all three methods are in use at the same time so that the blocking of certain IP addresses is still in use.<sup>27</sup>

A 1995 study<sup>28</sup> shows that many more websites were accessible in 1995, compared to 1992. This is an obvious and a natural development in China since the use of Internet, and the creation of Internet websites, expanded enormously in China, and all over the world, at this time. However, the same study points out that, since the content based filtering was introduced in China, a narrower filtering is taking place. Websites that contained words like “Tiananmen event” were “consistently less accessible in 1995”

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<sup>22</sup> The website of the Massachusetts Institute of Technology (“MIT”), Boston.

<sup>23</sup> Jonathan Zittrain and Benjamin Edelman, *Empirical Analysis of Internet Filtering in China*, Berkman Center for Internet & Society Harvard Law School 4-6 (2006). [Http://cyber.law.harvard.edu/filtering/china](http://cyber.law.harvard.edu/filtering/china) (last visited October 15, 2007).

<sup>24</sup> THE INTERNET IN CHINA: A TOOL FOR FREEDOM OR SUPPRESSION: HEARING BEFORE THE SUBCOMM. ON AFRICA, GLOBAL HUMAN RIGHTS AND INT’L OPERATIONS, SUBCOMM. ON ASIA AND THE PACIFIC, COMM. ON INT’L RELATIONS. 3 (2006) (Statement of Hon. Christopher H. Smith, Chairman of the Subcomm. On Africa, Global Human Rights and Int’l Operations).

<sup>25</sup> AMNESTY INTERNATIONAL, PEOPLE’S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA 10 (Amnesty International 2004).

<sup>26</sup> THE INTERNET IN CHINA: A TOOL FOR FREEDOM OR SUPPRESSION: HEARING BEFORE THE SUBCOMM. ON AFRICA, GLOBAL HUMAN RIGHTS AND INT’L OPERATIONS, SUBCOMM. ON ASIA AND THE PACIFIC, COMM. ON INT’L RELATIONS. 3 (2006) (Statement of Hon. Christopher H. Smith, Chairman of the Subcomm. On Africa, Global Human Rights and Int’l Operations).

<sup>27</sup> Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, COLUM. BUS. L REV. 505, 510 (2007).

<sup>28</sup> OPENNET INITIATIVE, INTERNET FILTERING IN CHINA IN 2004-2005: A COUNTRY STUDY, (2005) <http://www.opennetinitiative.net/studies/china/> (last visited September 19, 2007).

compared to 1992. This means that even though more websites were accessible in 1995, websites with certain “dangerous” words were less accessible in 1995 compared to 1992.

The main reason why the filtering is so effective is because the process lacks transparency. If a citizen wants a website to be unblocked there is no way to appeal to have it open. The decision to make certain phrases blocked is not clear, and what words are blocked is not readily.<sup>29</sup>

### **2.2.2 Individual Liability**

The second layer of the censorship has to do with personal liability for the content that is published on the Internet.

The Ministry of Information Industry operates networks linked to the global Internet and it makes sure that government control is exercised at every juncture. A license is required for commercial providing of Internet usage, and registration with the Chinese authorities is required for private usage.<sup>30</sup>

State-licensed Internet access providers (“IAPs”) provide physical access to a foreign Internet backbone. The IAPs grant regional Internet Service Providers (“ISPs”) access to backbone connections. The ISP, who the individual user buys the access from, is liable for hosting politically objectionable content on the Internet, and can lose their business license and be arrested if they fail to comply with the regulations. They are obligated to keep record of their customers in the way that they are required to keep documentation of the customer’s IP address, phone number, and account number.<sup>31</sup> Furthermore, they must have detailed logs on the customers’ use of the Internet, meaning that they must keep records of what websites the customer are visiting, when and for how long. Because the ISPs can be held liable for their customers’ use of the Internet, they often have their own censorship systems.<sup>32</sup>

### **2.2.3 Internet Cafés**

Different regulations for Internet cafés, such as government checks and orders for filtering software to be installed, have been imposed throughout

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<sup>29</sup> AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF SPEECH IN CHINA – THE ROLE OF YAHOO!, MICROSOFT AND GOOGLE 16 (Amnesty International UK 2006).

<sup>30</sup> Christopher Stevenson, *Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Speech in a Connected World*, 30 B.C. INT’L & CORP. L. REV. 531, 535 (2007).

<sup>31</sup> Kristin Farrell, *The Big Mamas are Watching: China’s Censorship of the Internet and the Strain on Freedom of Speech*, 15 MICH. ST. J. INT’L L. 577, 582 (2007).

<sup>32</sup> *Id.* at 582.

China.<sup>33</sup> The software blocks 500,000 foreign websites that are considered reactionary or politically-sensitive.<sup>34</sup> If a user attempts to access one of the blocked sites, he or she will be automatically reported to the Public Security Bureau. All Internet cafes have to be officially registered to avoid being shut down or heavily fined, and they have to keep records of each user for 90 days.<sup>35</sup>

### 2.3 Circumventing the Firewall

Theoretically, it is a simple task to break through the firewall. Users can circumvent the censorship by the use of proxy servers. With a proxy server, a user can access other websites indirectly, so that the Internet Service Provider does not see your final destination. In this way, a user can access Internet via a proxy server located outside China, and the web surfing will be the same as someone outside China, but slower.<sup>36</sup> However, just as with addresses to websites, the IP address to a proxy server can also be blocked. It is known that the Chinese government has blocked websites of some companies that offered services to circumvent the firewalls and filters through proxy servers.<sup>37</sup>

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<sup>33</sup> *Id.* at 583.

<sup>34</sup> AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA 10 (Amnesty International 2004).

<sup>35</sup> Kristin Farrell, *The Big Mamas are Watching: China's Censorship of the Internet and the Strain on Freedom of Speech*, 15 MICH. ST. J. INT'L L. 577, 583 (2007).

<sup>36</sup> AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA 10 (Amnesty International 2004).

<sup>37</sup> *Id.* at 9.

# 3 Chinese Law

With the purpose of controlling peoples' Internet use, the Chinese government needs strict laws to regulate the use. Since Internet became commercialized in 1995, over sixty sets of regulations have been issued to control the content on the Internet.<sup>38</sup> Different Ministries, who are within the State Council,<sup>39</sup> are issuing regulations affecting the Internet. New organizations have been set up to control the use of the Internet. The rules are often broad and ill-defined and their implementation has often been harsh, with torture, heavy fines and imprisonment as results.<sup>40</sup> "State secrets" is one of the broad spechs existing in Chinese law.<sup>41</sup> Individuals who provide state secrets over the Internet can be sentenced to death.<sup>42</sup> Chapter 3.2 further discusses state secrets.

## 3.1 The Constitution

There are severe problems with the regulations of Internet in China. There are strict rules regarding how to censor the web while the Chinese Constitution, at the same time, explicitly protects the right to free speech in Article 35. The issue is that the Constitution itself is not enforceable, and therefore the laws that violate it can escape judicial scrutiny. Another problem is that the courts do not want to decide against local expectations since most courts in China receive their funding from the local government.<sup>43</sup>

Article 126 of the Chinese Constitution states:

*"The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals."*

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<sup>38</sup> Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, COLUM. BUS. L REV. 505, 511 (2007).

<sup>39</sup> The highest authority of state administration with the power to enact nationwide law, <http://www.china.org.cn/english/MATERIAL/28847.htm> (Last visited September 20, 2007).

<sup>40</sup> AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA, 5 (Amnesty International 2004).

<sup>41</sup> STATE SECRETS PROTECTION REGULATIONS FOR COMPUTER INFORMATION SYSTEMS ON THE INTERNET.

<sup>42</sup> AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA 5 (Amnesty International 2004).

<sup>43</sup> *External influence complicates court ruling*, CHINADAILY [http://www.chinadaily.com.cn/en/doc/2003-10/24/content\\_275179.htm](http://www.chinadaily.com.cn/en/doc/2003-10/24/content_275179.htm) (2003) (Last visited October 15, 2007).

Although the Constitution pledges an independent court, the courts lack judicial independency, because there is not really a separation of power in the way that other countries have. If the courts receive their funding from the local government, it means that the local government controls their budgets. For this reason, it is impossible to have independent courts in China. Furthermore, local governments appoint the judges, and not higher courts or higher levels of the government. The courts are subject to the Communist Party Authority, which limits the independence of the judge.<sup>44</sup>

### 3.2 Chinese Laws and Regulations

In 1997, the Ministry of Public Security issued a law called “*Computer Information Network and Internet Security, Protection and Management Regulations*,” and it was later approved by the State Council.<sup>45</sup> This law regulates the Internet Service Providers (“ISP”) and requires them to provide The Public Security Bureau with information about users and page views. They must also assist the Bureau in investigation of violations of the law.<sup>46</sup> The ISP risks penalties if illegal information is sent or received through him or her.<sup>47</sup> To comply with the law, many ISP have self-censorship, in the sense that they patrol chat rooms to ensure fulfilment of the obligations.<sup>48</sup>

In 2000, the Bureau for Protection of State Secrets issued “*State Secrets Protection Regulations for Computer Information Systems on the Internet*,” which prohibits all discussions of “state secrets” on the Internet. It does not define a state secret, but operators are obliged to report all violations perceived to the Public Security Bureau.<sup>49</sup> The rules apply to both individuals and entities,<sup>50</sup> and “whoever places materials on the Internet shall take responsibility.”<sup>51</sup> Users must accept inspections by the department and are obligated to cooperate with them.<sup>52</sup>

In 2002, the Ministry of Information Industry decided that ISPs are required to install software to ensure that all actions on the Internet can be saved. If

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<sup>44</sup> HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM” CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 23 (Human Rights Watch 2006).

<sup>45</sup> Christopher Stevenson, *Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Speech in a Connected World*, 30 B.C. INT’L & CORP. L. REV. 531, 535 (2007).

<sup>46</sup> COMPUTER INFORMATION NETWORK AND INTERNET SECURITY, PROTECTION AND MANAGEMENT REGULATIONS, Art 8.

<sup>47</sup> COMPUTER INFORMATION NETWORK AND INTERNET SECURITY, PROTECTION AND MANAGEMENT REGULATIONS, Art 9-10.

<sup>48</sup> AMNESTY INTERNATIONAL, PEOPLE’S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA 6 (Amnesty International 2004).

<sup>49</sup> STATE SECRETS PROTECTION REGULATIONS FOR COMPUTER INFORMATION SYSTEMS ON THE INTERNET, Art 16.

<sup>50</sup> *Id.* at Art 3.

<sup>51</sup> *Id.* at Art 8.

<sup>52</sup> *Id.* at Art 15.

someone violates the law, the ISPs must send a copy of the information they recorded to the Ministry of Information Industry, the Ministry of Public Security, and the Bureau for Protection of State Secrets. The owner of an Internet café must prevent users from accessing information that is considered “harmful to state security,” which means that they also are obliged to install software. No one less than 18 years old is allowed in internet cafés.<sup>53</sup>

The above mentioned regulations have forced Internet content providers and Internet cafés to set up their own rules, to prevent themselves from committing any possible illegality. Sohu.com is a Nasdaq registered portal in China that tells clients that want to use chat rooms to note that following issues are prohibited according to Chinese law:

1. *Criticism of the PRC Constitution*
2. *Topics that damage the reputation of the State*
3. *Spreading rumours that promotes disorder and social instability*

Many Internet cafés have employees that patrol the room and look at the users’ screens to make sure nothing illegal appears. At Feiyu Internet Café in Beijing, the personnel go around the café with 800 computers and read over the shoulders of the clients. They have notes that say “Please do not download web pages with illicit, violent or reactionary content.”<sup>54</sup>

In 2005, China issued new regulations called “*The Rules on the Administration of Internet News Information Services*.”<sup>55</sup> They are directed towards Internet news reports and the aim of the rules are to make sure news reports are “serving socialism,” “upholding the interest of the state” and “correctly guiding public opinion.”<sup>56</sup> With the purpose of upholding the rules, only news from official news sources are allowed to be taken and placed on a website. In order to register as a news organization, one must comply with different regulations. These include submitting to an onsite inspection, have \$1.2 million in capital, or maintaining a violation-free track record.<sup>57</sup> The term “Internet news report” is defined broadly and would also cover someone who posts non-approved information in a blog.<sup>58</sup>

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<sup>53</sup> AMNESTY INTERNATIONAL, PEOPLE’S REPUBLIC OF CHINA- STATE CONTROL OF THE INTERNET IN CHINA 8-9 (Amnesty International 2004).

<sup>54</sup> AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF SPEECH – THE ROLE OF YAHOO!, MICROSOFT AND GOOGLE 6-7 (Amnesty International UK 2006).

<sup>55</sup> Kristin Farrell, *The Big Mamas are Watching: China’s Censorship of the Internet and the Strain on Freedom of Speech*, 15 MICH. ST. J. INT’L L. 577, 583 (2007).

<sup>56</sup> *Id.* at 583.

<sup>57</sup> *Id.* at 583.

<sup>58</sup> Christopher Stevenson, *Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Speech in a Connected World*, 30 B.C. INT’L & CORP. L. REV. 531, 536 (2007).

# 4 Multinational Corporations in China

In recent years, China has taken huge steps towards becoming an economically developed country. Because international companies are attracted to the potential market and China as a source of cheap labour, China now attracts foreign investment more than ever.

Technology developed by multinational corporations enables the Chinese government to censor the Internet. Companies are assisting the Chinese government by complying with its censorship demands, and are viewed as facilitating the government's efforts to control the free flow of information. For example, Yahoo! provided the Chinese government with information about its users, including personal information about two journalists, who were later convicted for "divulging state secrets abroad".<sup>59</sup> This means that a multinational corporation provided information to Chinese authorities that helped restrict freedom of speech on the Internet.<sup>60</sup> It is not just Yahoo! who is serving the Chinese government; Google is also providing a censored version of its international search engine in China, and, by request from the Chinese government, Microsoft shut down a blog.<sup>61</sup>

## 4.1 Arguments from Multinational Internet Corporations

The Internet companies that are acting the way the Chinese government wants are defending their behaviour by arguing that they are only acting in accordance with the local laws in China. The problem with this argument is that Chinese laws are vague and often contradictory. The companies have not been willing to specify which laws they are following when they are censoring the Internet. They are also saying that if they did not offer their services, another company would.

The companies' main argument is that a censored Internet is better than no Internet at all in China. Perhaps censored information may be better than no information at all; however, the question remains whether the international corporations really need to choose? They are choosing not to challenge the Chinese regulations, and are therefore just taking a small step instead of a huge leap in providing the Chinese people with information. In fact, critics

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<sup>59</sup> HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM" CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 34 (Human Rights Watch 2006).

<sup>60</sup> THE INTERNET IN CHINA: A TOOL FOR FREEDOM OR SUPPRESSION: HEARING BEFORE THE SUBCOMM. ON AFRICA, GLOBAL HUMAN RIGHTS AND INT'L OPERATIONS, SUBCOMM. ON ASIA AND THE PACIFIC, COMM. ON INT'L RELATIONS. 214 (2006) (Statement of Mr. T. Kumar, Advocacy Director for Asia and the Pacific, Amnesty International USA).

<sup>61</sup> AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF SPEECH IN CHINA – THE ROLE OF YAHOO!, MICROSOFT AND GOOGLE 5 (Amnesty International UK 2006).

argue that presently they are not helping the Chinese people. It is not the foreign Internet corporations that are changing China in providing information – rather, it is China who is changing the corporations by making them act as the censoring party. Human rights groups insist that it is not valid to argue that a censored version is better than no version at all. If this was a good argument ten years ago, it no longer is.<sup>62</sup> Internet has been established in China since 1995, and will continue to exist - with or without Google, Yahoo! and Microsoft.

Amnesty International argues that the corporations are attempting to gain an increasing share of the market, and that their activities are facilitating the government censorship rather than challenging it. According to Amnesty International, the companies have been ready to accept the limitations imposed rather than exerting pressure for change.<sup>63</sup>

China is controlling its citizens at every level, from Internet cafés, blog managers to individual users. Despite technological filters, the system of censoring Internet rests on self-censorship, as companies and individuals seek to avoid punishment for crossing the line.<sup>64</sup> There are no public lists of what is and is not allowed, but reports show that there are clear consequences for what happens to a person or company that acts illegally.<sup>65</sup>

As mentioned earlier, Yahoo! and Google as well as Microsoft are operating in China, and their actions should be questioned. All three companies are American corporations acting differently in China than in the United States. This chapter will describe what actions the above-referenced corporations have taken in China. An examination of their obligations under international law will follow in the analysis in chapter 6.

## 4.2 Yahoo!

Yahoo! was established in China in 1999 and has a Chinese-language search engine. The company was criticized for giving information about a user, named Shi Tao to the Chinese authorities. Shi Tao, who is a Chinese citizen, used a Yahoo! email address to send materials to a person in the United States. The recipient was the editor of a democracy -promoting website in New York. Shi Tao sent information contained in a Chinese top-secret government document. The information pertained to the Communist Party's concern about a new demonstration on the fifteenth anniversary of the Tiananmen Square tragedy. In 2004, the Communist Party requested information about Shi Tao from Yahoo! and Yahoo! identified Shi Tao via

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<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 14.

<sup>65</sup> Jonathan Zittrain and Benjamin Edelman, *Empirical Analysis of Internet Filtering in China*, Berkman Center for Internet & Society Harvard Law School 2 (2006). [Http://cyber.law.harvard.edu/filtering/china](http://cyber.law.harvard.edu/filtering/china). (Last visited October 15, 2007).

his IP address. The Chinese government was therefore able to locate and arrest Shi Tao, who was found guilty of “divulging state secrets abroad” and sentenced to ten years imprisonment.<sup>66</sup>

Yahoo! defended its behaviour by saying that it was only following the local laws of China.<sup>67</sup> Yahoo! has not admitted that they were partially responsible for Shi Tao’s imprisonment; however, the Senior Vice President and General Counsel, Michael Gallahan, acknowledged that they were “very distressed” by it.<sup>68</sup>

In 2002, Yahoo! signed the “voluntary pledge,” which is a document given out by the Chinese government to make sure no politically objectionable content appears on the internet. Yahoo! was not obliged to sign the document, but it did so voluntarily. When they were later criticized for signing it, Yahoo! responded by saying that the pledge did not impose greater restrictions than already existed under the laws in China.<sup>69</sup> The court proceedings in *Shi Tao* were not open to the public and it is therefore hard to tell if the act of Yahoo! to signing the pledge was voluntary or if it was in response to a court order; an action motivated by economics or by legal compliance.

It is not a corporation’s concern to promote democracy in China, but neither should the corporation enable Chinese authorities to abuse human rights by collaborating with them.<sup>70</sup> When Yahoo! signed the voluntary pledge, one might think that they expressed their unwillingness to fight against the Chinese authorities.

Yahoo! Associate Senior Counsel, Greg Wrenn, defended the act by saying that it did not impose greater obligations on the company than already existed in China.<sup>71</sup> This may or may not be true. Since the laws regulating the Internet are vague, Yahoo! might have opted for a greater obligation then necessary, if it would have dared to challenge the Chinese system by questioning what obligations they, in fact, have. If this pledge does not give them a greater obligation, then it is still not a brilliant thing to sign, because

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<sup>66</sup> Trina K. Kissel, *License to Blog: Internet Regulation in the People’s Republic of China*, 17 IND. INT’L & COMP. L. REV. 229, 237 (2007).

<sup>67</sup> HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM” CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 32-34 (Human Rights Watch 2006).

<sup>68</sup> THE INTERNET IN CHINA: A TOOL FOR FREEDOM OR SUPPRESSION: HEARING BEFORE THE SUBCOMM. ON AFRICA, GLOBAL HUMAN RIGHTS AND INT’L OPERATIONS, SUBCOMM. ON ASIA AND THE PACIFIC, COMM. ON INT’L RELATIONS. 99 (2006) (Statement of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.)

<sup>69</sup> HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM” CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 30 (Human Rights Watch 2006).

<sup>70</sup> THE INTERNET IN CHINA: A TOOL FOR FREEDOM OR SUPPRESSION: HEARING BEFORE THE SUBCOMM. ON AFRICA, GLOBAL HUMAN RIGHTS AND INT’L OPERATIONS, SUBCOMM. ON ASIA AND THE PACIFIC, COMM. ON INT’L RELATIONS. 2 (2006) (Statement of Hon. Christopher H. Smith, Chairman of the Subcomm. On Africa, Global Human Rights and Int’l Operations).

<sup>71</sup> HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM” CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 30 (Human Rights Watch 2006).

it is comparable by saying that they in fact like the regulations so much that they might as well sign a document saying it is fine to violate freedom of speech.

Yahoo! has purchased 40 percent of a Chinese Internet company called Alibaba.com. When Financial Times asked Alibaba's CEO, Jack Ma, what he would have done in Shi Tao's case, he replied that he would have acted similarly. He continued, stating that nothing that is illegal in China would appear on the search engine. He pointed out that they are a business corporation and shareholders want to make money. He further argued that theirs is not a political responsibility.<sup>72</sup>

### 4.3 Microsoft

Since 2005, MSN Spaces<sup>73</sup> has been available in China. If a citizen, however, is trying to create a blog with certain words, including "human rights," the site is blocked. Microsoft claims that there is a difference between "blocking" and "filtering." They explain that blocking is when you cannot carry out searches, and filtering refers to results after a search. When you conduct a word search with the term "democracy" on Microsoft's China based search engine, you will be informed that certain content was removed from the result of the results page. By distinguishing blocking from filtering, Microsoft means they are filtering and not blocking. Amnesty International concludes that they are censoring the information. The reason for making this distinction is therefore unclear.<sup>74</sup>

When a popular blog was shut down in 2005, Microsoft encountered severe criticism from many people in the United States. The company responded by altering its Chinese blog censorship policy. Now, they claim that they will only remove access to a blog if it receives legally binding notice from the Chinese government that the material violates local laws. They also state that, if they have to block a blog in China, the rest of the world will still be allowed access. Finally, they state that when a user does not get access, he or she is informed that it is because of government restrictions.<sup>75</sup>

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<sup>72</sup> *Yahoo backed on helping China trace writer*, FINANCIAL TIMES (2005) <http://search.ft.com/ftArticle?queryText=jack+ma+shi+tao&aje=true&id=051110000366&ct=0> (Last visited October 15, 2007).

<sup>73</sup> Gives users the ability to publish a weblog.

<sup>74</sup> AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF SPEECH IN CHINA – THE ROLE OF YAHOO!, MICROSOFT AND GOOGLE 20 (Amnesty International UK 2006).

<sup>75</sup> THE INTERNET IN CHINA: A TOOL FOR FREEDOM OR SUPPRESSION: HEARING BEFORE THE SUBCOMM. ON AFRICA, GLOBAL HUMAN RIGHTS AND INT'L OPERATIONS, SUBCOMM. ON ASIA AND THE PACIFIC, COMM. ON INT'L RELATIONS. 64 (2006) (Statement of Mr. Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corporation).

## 4.4 Google

In 2006, Google became the censor and not just a victim of state censorship, when they launched a censored version of their search engine for the Chinese market. The search engine censors thousands of keywords and web addresses. The company created their own words with to censor, as the Chinese government did not provide such a list. They drafted the list based on what terms were words previously blocked by Chinese Internet Service Providers.

Google's Senior Policy Counsel, Andrew McLaughlin, says it is better for the Chinese people to have Google's censored service, than no Google service. He claims that filtering is against Google's mission, but not serving a fifth of the world's population would be even worse.<sup>76</sup>

Larry Page and Sergey Brin, two members of the Board of Directors, state in Google's annual report from 2005 that they think having a censored version of Google in China will eventually influence the Chinese market. They believe that it will increase their influence on market practices, but they do not say *how* it will eventually change the Chinese system of censorship.<sup>77</sup>

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<sup>76</sup> HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM" CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 55-57 (Human Rights Watch 2006).

<sup>77</sup> GOOGLE ANNUAL REPORT 2005, [investor.google.com/pdf/2005\\_Google\\_AnnualReport.pdf](http://investor.google.com/pdf/2005_Google_AnnualReport.pdf) (Last visited October 13, 2007).

# 5 International Law

A constitution is the fundamental law of a country and it is a mandatory standard, which everyone subjected to a country's jurisdiction must abide by. It stipulates the basic rights of the people, the basic obligations of the government, and the basic social order of a country. As previously described, the Chinese Constitution protects freedom of speech.

Article 35 of the Chinese Constitution states:

*“Citizens of the People's Republic of China enjoy **freedom of speech**, of the press, of assembly, of association, of procession and of demonstration.”*

Because of the courts' limited independence, there is very little space for judges to limit the impact of Chinese regulations that violate the rights expressed in the Constitution.<sup>78</sup>

China is a member of the United Nations and has signed the International Covenant on Civil and Political rights. China's position as a member state to the Covenant is supposed to create international obligations for China to respect the freedom of speech. The following chapter examines this.

## 5.1 International Law Applicable to China

### (a) The Universal Declaration of Human Rights

The United Nations General Assembly adopted the Universal Declaration of Human Rights (“UDHR”) in 1948. It does not need ratification and its influence reaches all states. It includes civil and political rights, and it addresses freedom of speech both in its preamble and in Article 19.

The status of the UDHR as international *law* is somewhat controversial. From the beginning, it did not have a clear normative character, but it is commonly accepted that at least some of the provisions are international customary law.<sup>79</sup> Chapter 6 will further discuss international customary law.

The preamble of the UDHR states:

*“Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy **freedom of speech** and*

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<sup>78</sup> RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW, 280-282, 298-316 (2002).

<sup>79</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 322 (1999).

*belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.”*

Article 19 of the UDHR states:

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

It is not an absolute right, since Article 29 (2) allows limitations<sup>80</sup> if they are determined by law and are just requirements of morality, public order and the general welfare in a democratic society.

### **(b) The International Covenant on Civil and Political rights**

After the UDHR was proclaimed states started to plan for another instrument that imposes legally binding rules; thus, the International Covenant on Civil and Political rights (“ICCPR”) was later created. The ICCPR requires implementation to be binding on states. The fact that Article 1-21 of the UDHR is included in the ICCPR (with minor differences) makes states obligated to follow the rights in it anyway because the UDHR is, at least partly, considered international customary law.<sup>81</sup>

Article 19 of the ICCPR states:

*“Everyone shall have the right to **freedom of speech**; 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 or his choice”.*

Article 19(2) permits restrictions of freedom of speech by law if it is necessary for the rights of others, or for the protection of national security, for public order or for public health or morals. According to article 4, derogation from the right to freedom of speech can be made if it is a national emergency that threatens the life of the nation.

China signed the ICCPR in 1998, but has not yet ratified it.<sup>82</sup> This means that the Covenant is not enforceable against China, but that China must act in accordance with its object and purpose.<sup>83</sup> China is going to host the Olympic Games in 2008, and many people hope this will force China to

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<sup>80</sup> “Derogation” means that you don’t apply a rule at all, which is different to a “limitation”. When you make a limitation, you only limit the application of that rule, but you still apply it.

<sup>81</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 321-323 (1999).

<sup>82</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ICCPR – STATUS OF RATIFICATION & RESERVATIONS. [www.ohchr.org/english/law/ccpr.htm](http://www.ohchr.org/english/law/ccpr.htm). (Last visited October 15, 2007)

<sup>83</sup> VIENNA CONVENTION ON THE LAW OF TREATIES, Art 18 and Art. 31.

take a step in the direction of complying with international law and, including ratification of the ICCPR.

### **(c) The European Convention for the Protection of Human Rights and Fundamental Freedoms**

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) was adopted in 1950 and all Council of Europe member states are party to the Convention. The ECHR established the European Court of Human Rights (“ECtHR”). Further, the ECHR gives a high level of protection to individuals because citizens in member states can bring a claim directly to the ECtHR.

Article 10 of the ECHR states:

*“Everyone has the right of **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.”*

Article 10(2) allows restriction if they are:

1. *Provided by law*
2. *Necessary in a democratic society*
3. *Protects one of the listed interests*  
(national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or the rights of others, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.)

The ECHR is central to the issue in China because it contributes to, and develops, international customary law.

### **(d) The Internet Governance Forum**

During two meetings, in Geneva 2003 and in Tunis 2005, the United Nations (“UN”) tried to develop a legal framework for global Internet governance, but failed to reach a binding agreement. In Tunis, the former U.N. Secretary General Kofi Annan said that:

*“The Information Society’s very life blood is freedom, and that without the right to seek information the information revolution will stall”.*<sup>84</sup>

As a result of the meeting in Tunis, the Internet Governance Forum (“IGF”) was created.<sup>85</sup> IGF is a worldwide organization that supports the United Nations with issues regarding Internet governance. They held a meeting in Athens in 2006, and another meeting will take place in Rio de Janeiro in November 2007. However, these meetings do not aim to create binding law since the IGF is not a decision-making body. Instead, the purpose of IGF is to be a discussion forum for facilitating dialogue between participants. The forum can be seen as the beginning of a dialogue between two different actors, on the one hand, the private sector, and on the other hand, the governments and the intergovernmental organizations.<sup>86</sup>

## **5.2 International law Applicable to the Corporations Acting in China**

Most international laws and regulations apply to states and not to individuals or corporations. When a treaty or international customary law applies to a state, the state may impose obligations to entities. The state is obligated to ensure that all persons and entities subjected to its jurisdiction are following the laws, both national and international, of the country.<sup>87</sup>

### **(a) The International Covenant on Civil and Political Rights & International Customary Law**

The International Covenant on Civil and Political Rights (“ICCPR”) states in its second article that states must respect and ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the treaty. Chapter 6.2 will further analyze what, if any, obligations the ICCPR, the Universal Declaration of Human Rights, and international customary law create for corporations.

In the last decades, the world has changed its economic-political-communications structures, and this has had a big impact on human rights. Today, 51 of the 100 largest economies are corporations, the others being

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<sup>84</sup> AMNESTY INTERNATIONAL, UNDERMINING FREEDOM OF SPEECH IN CHINA – THE ROLE OF YAHOO!, MICROSOFT AND GOOGLE 8-9 (Amnesty International UK 2006).

<sup>85</sup> U.N. Secretary General Establishes Advisory Group to Assist him in Convening Internet Governance Forum, United Nations <http://www.un.org/News/Press/docs/2006/sga1006.doc.htm> (Last visited September 26, 2007).

<sup>86</sup> *Global News Service & Press Release Distribution*, PRESSZOOM, [http://presszoom.com/story\\_120062.html](http://presszoom.com/story_120062.html) (Last visited September 26, 2007)

<sup>87</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 316-318 (1999).

countries.<sup>88</sup> International law generally applies to states. However, multinational companies are acting internationally and in fact influence people's lives in other countries than where they, in fact, are incorporated. There is a discussion whether increasing globalization and privatization expand international law to govern acts of corporations and therefore imposes obligations on corporations.<sup>89</sup>

### (b) Soft Law & Codes of Conducts

The foundation for corporate responsibility for human rights derives from the Universal Declaration of Human Rights ("UDHR"), which was created in 1948. The preamble states that the aim of the UDHR is to ensure that every organ of society respect human rights. The words "every organ of society" does not limit the covered organs to be states, but must include corporations as well.<sup>90</sup>

During the 1970s and 1980s, international organizations began to develop codifications for corporate responsibility.<sup>91</sup> The Organization for Economic Cooperation and Development ("OECD") developed *Guidelines for Multinational Enterprises* in 1976, and the International Labor Organization ("ILO") created *Tripartite Declaration of principles concerning Multinational Enterprises* in 1977. However, they are only voluntary principles, which are not binding on states or corporations.<sup>92</sup>

After this, in the 1980s and 1990s, many corporations issued voluntary, internal codes of conduct.<sup>93</sup> For instances, Google has created *Google Code of Conduct*, where it states that the company's goal is to have the "highest possible standard of ethical business conduct".<sup>94</sup> Also, Microsoft issued a *Code of Professional Conduct*, where they state that they shall adhere to principles of ethical business conduct and that they shall "comply with rules and regulations of federal, state, provincial, and local governments, and of other appropriate private and public regulatory agencies."<sup>95</sup> Yahoo! has a

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<sup>88</sup> TOP 200: THE RISE OF GLOBAL CORPORATE POWER, <http://www.corporations.org/system/top100.html> (2000) (Last visited September 26, 2007)

<sup>89</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 316-318 (1999).

<sup>90</sup> Annie Wallis, *Data Mining: Lessons from the Kimberly Process for the United Nations' development of human rights norms for transnational corporations*, 4 NW. U. J. INT'L HUM. RTS. 388, 388.

<sup>91</sup> *Id.* at 388.

<sup>92</sup> Rebecca Kathleen Atkins, *Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Responsibility*, 40 VAND. J. TRANSNAT'L L. 233, 233 (2007).

<sup>93</sup> Annie Wallis, *Data Mining: Lessons from the Kimberly Process for the United Nations' development of human rights norms for transnational corporations*, 4 NW. U. J. INT'L HUM. RTS. 388, 395 (2007).

<sup>94</sup> GOOGLE, CODE OF CONDUCT, <http://investor.google.com/conduct.html> (last visited October 18, 2007).

<sup>95</sup> MICROSOFT, MICROSOFT FINANCE CODE OF CONDUCT, <http://www.microsoft.com/msft/governance/financecode.mspx> (Last visited October 18, 2007).

*Code of Ethics*, where they say that they shall comply with laws and regulations, but they also explicitly state that the Code is a set of principles, and do not create any rules.<sup>96</sup>

Nevertheless, none of the corporations mention efforts to ensure human rights, or in particular, protecting freedom of speech.

In 2006, the European Parliament adopted a resolution on freedom of expression on the Internet.<sup>97</sup> In the Resolution, the Parliament noted the importance of freedom of speech and, in fact, lists China as an enemy of freedom of expression. The Parliament called upon the Commission and the Council to issue a voluntary code of conduct that would put limits on the activities of Internet companies operating in countries like China.

The United States Congress introduced a bill in 2006, *the Global On-line Freedom Act*, which aims at regulating American Internet corporations abroad.<sup>98</sup> This is a “bill,” which means that it is not yet adopted and therefore does not create binding law upon American corporations.

### **(c) The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights created “*The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*” (“UN Norms”). It was adopted 2004 by the Commission of Human Rights. The UN Norms is the most comprehensive attempt to articulate that corporations have the responsibility to protect human rights when doing businesses. However, it is not a formal treaty and does not have any legally binding effect since states have not yet ratified the treaty.<sup>99</sup>

The UN Norms does not take away the responsibility from states and put it on corporations; rather it simply says that transnational corporations are obliged to respect generally recognized responsibilities and norms in United Nations treaties such as the ICCPR. According to the Article 1 of the UN

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<sup>96</sup> YAHOO!, CODE OF ETHICS, [http://files.shareholder.com/downloads/YHOO/181116447x0x28875/13a997d9-2c51-457e-9892-e14de04705d4/YHOO\\_WebDoc\\_396.pdf](http://files.shareholder.com/downloads/YHOO/181116447x0x28875/13a997d9-2c51-457e-9892-e14de04705d4/YHOO_WebDoc_396.pdf) (Last visited October 18, 2007).

<sup>97</sup> EUR. PARL. ASS., FREEDOM OF EXPRESSION ON THE INTERNET, Plenary Sess., Res. No. 0324, ( July 6, 2006) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0324+0+DOC+XML+V0//EN&language=EN> (Last visited October 18, 2007).

<sup>98</sup> GOVTRACK.US. H.R. 4780--109TH CONGRESS (2006): GLOBAL ONLINE FREEDOM ACT OF 2006, *GovTrack.us (database of federal legislation)* <http://www.govtrack.us/congress/bill.xpd?tab=main&bill=h109-4780> (Last visited Oct 18, 2007).

<sup>99</sup> ALYSON WARHURST & CKATY COOPER, “THE UN HUMAN RIGHTS NORMS FOR BUSINESS” 6 (Amnesty International UK 2004).

Norms, corporations have obligations within their sphere of activity and influence, and shall refrain from supporting or encouraging states to abuse human rights. Article 12 states that “multinational corporations shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular...freedom of opinion and expression.”

There has been criticism against the UN Norms because opponents to the UN Norms think the norms replace government responsibility with corporate responsibility. After the request by the Office of the High Commissioner on Human Rights to the Government of the United States (“US”), the US wrote a statement in 2004, saying that they did not think the UN Norms is a proper tool because “where human rights abuses are widespread they are a result of either action or inaction of States, not generally by private enterprises.”<sup>100</sup> They also claimed that The UN Norms have “no basis in law.”<sup>101</sup>

Supporters of the norms deny this interpretation, insisting, that the responsibility is shared between the states and the corporations, depending on which party causing the harm to human rights. They argue that corporations need to take some responsibility when they exercise power and influence in the global economy.

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<sup>100</sup> AMNESTY INTERNATIONAL, UN NORMS FOR BUSINESS – TAKING CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS TO THE NEXT LEVEL 2  
[http://www.amnestyusa.org/business/un\\_norms.html](http://www.amnestyusa.org/business/un_norms.html). (Last visited October 15, 2007)

<sup>101</sup> *Id.* at 2.

## 6 Analysis

In recent years, China has become a new and lucrative market for all sorts of investments, and corporations from all around the world want to operate in China; to manufacture their products using cheap labour and to sell products to the Chinese population. This economic development and modernization is supposed to help China increase human rights protection, but unfortunately it has not been that way. Instead they have taken a step back, and freedom of speech has been limited. The rule of law is far behind the economic expansion, with the Communist Party controlling the judiciary and monopolizing the political power.<sup>102</sup> There have been studies indicting some improvements of human rights protection in China, but they have later been clouded by new restrictions and increased control over the society. When certain judicial and criminal justice reforms have been pursued by the Chinese government, they are subsequently followed by new detentions and state policies designed to protect the country and the Chinese Communist Party.<sup>103</sup>

It can be argued that China just needs time, because economic growth is supposed to expand the welfare in a country, which will lead to improvement in human rights protection. The fact that China recently became part to the World Trade Organization will likely increase their economic expansion. It is still important to keep in mind that the theory that economic development will lead to better protection of human rights, assumes that the Chinese government is not working against human rights protection. Chapter 7 further discusses this.

In this analysis, I will examine what international legal obligations China has to guarantee freedom of speech, and also what responsibility foreign corporations that operate in China have.

### 6.1 China's Obligations Under International Law

Freedom of speech is both a fundamental and an important right in the sense that this right is the key to fulfilling other human rights. Without being able to seek information, a citizen cannot be aware of what rights he or she has. An inability to have an opinion and speak one's mind prohibits a person from actively seeking to protect his or her rights.

The following analysis examines China's obligations under international law. Since China has not ratified the International Covenant on Civil and

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<sup>102</sup> HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM" CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 3 (Human Rights Watch 2006).

<sup>103</sup> WORLDWIDE RELIGIOUS NEWS, ASIA/PACIFIC – GOV. REPORTS (2005).

<http://www.wwrn.org/article.php?idd=19161&sec=58&cont=4>. (Last visited October 15, 2007).

Political rights, this Covenant does not create specific obligations for China. China has also not ratified other treaties that protect freedom of speech. However, international customary law creates obligations for countries even if they have not signed or ratified a certain treaty. The following text analyzes whether freedom of speech is considered international customary law.

### 6.1.1 International Customary Law

China's Constitution protects freedom of speech. In contrast, China has also enacted other laws and regulations that conflict with this right.<sup>104</sup> The question is if China has an obligation under international customary law to ensure freedom of speech.

The Universal Declarations of Human Rights ("UDHR") protects freedom of speech in its article 19. The UDHR does not require ratification because it is not a treaty. However, parts of the document are considered international customary law.<sup>105</sup>

*International customary law's* status as such, depends on state acceptance. It is law developed out of a practice by states of adhering to a particular custom due to a sense of legal obligation. There are two requirements for a norm to be considered international customary law. The norm must derive from the general practice of states because the norm is accepted as law. The belief that states act in a certain way because they are legally bound to do so is often referred to as *opinio juris*.<sup>106</sup>

States are bound by international customary law since it is a source of international law. This is set out in the Statute of the International Court of Justice, article 38, which states : "*The court shall apply international custom, as evidence of a general practice accepted as law*". However, only speculations of what international customary law is, is not sufficient enough to call it *law*. In *Paquete Habana*,<sup>107</sup> the court ruled that in order for a norm to be binding as international customary law, it must be established that states are following the norm because they considering it *law*. International customary law's status as such can be shown through historical practice, treaties, scholars, national law, and, or declarations by international organizations.

Both national and international courts and tribunals are applying international customary law in their decisions, which reflects the binding

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<sup>104</sup> For example: "Secrets Protection Regulations for Computer Information Systems on the Internet".

<sup>105</sup> SVENSKA HANDELSKOMMITTE'N FOR MANSKLIGA RATIGHETER, *HATETS SPRÅK – OM GRANSEN MELLAN HATPROPAGANDA OCH YTTRANDEFRIHET* 19 (2003) [www.levandehistoria.org/documents/hatetsprak1.pdf](http://www.levandehistoria.org/documents/hatetsprak1.pdf). (Last visited September 10, 2007).

<sup>106</sup> LOUIS HENKIN ET AL., *HUMAN RIGHTS* 297-99 (1999).

<sup>107</sup> *Paquete Habana*, 175 U.S. 677 (1900).

nature of this form of law.<sup>108</sup> There is an exception to international customary law and this is when a country makes a clear statement from the beginning, during the development of the law, that they will not be bound by the rule.<sup>109</sup>

A state's refusal to accept a norm does not mean that a customary law norm is obsolete. Just as with violations of other laws, a customary law norm can be violated. It is usually the condemnation of other states when a customary law norm is violated by one state that reinforces the existence of the customary law norm. Instead of weakening the norm in such cases; it gives it strength by showing that states do not approve of violations of the norm.<sup>110</sup>

### **(a) Protected in Major Human Rights Systems**

When deciding whether freedom of speech is considered international customary law, one must first examine whether the right is protected in the major human rights system in the world. This shows that state parties consider the right as important - something they feel obligated to adhere to. The three major regional human rights system, the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 10) the American Convention on Human Rights (article 13) and the African Charter on Human and Peoples' Rights (article 9) all protect freedom of speech.

To examine, if a certain right recognized in the UDHR is considered international customary law, it is helpful to determine if the same right is protected in The International Covenant on Civil and Political Rights ("ICCPR"). This is because the ICCPR requires ratification and if many countries have ratified the treaty, it is an indication that freedom of speech is international customary law.

Both the UDHR and the ICCPR are United Nations documents and are parts of the International Bill of Rights.<sup>111</sup> The ICCPR protects freedom of speech in article 19. The Covenant is also considered, in part, as international customary law. One hundred and fifty-seven countries have adopted the ICCPR, and only ten countries<sup>112</sup> have made reservations to article 19.<sup>113</sup>

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<sup>108</sup> The Supreme Court of the United States applied international customary law in *Paquete Habana*, 175 U.S. 677 (1900), and The International Criminal Court for the former Yugoslavia applied international customary law in *Prosecution v. Tadic* (Case No. IT-94-1-T).

<sup>109</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 297-99 (1999).

<sup>110</sup> INTERNATIONAL COMMITTEE OF RED CROSS, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: QUESTIONS & ANSWERS* (2005) <http://www.icrc.org/Web/eng/siteeng0.nsf/html/6BPK3X> (Last visited September 20, 2007).

<sup>111</sup> An informal name given to UDHR, ICCPR and the International Covenant on Economic, Social and Cultural Rights, which all three are U.N. bodies.

<sup>112</sup> Austria, Belgium, France, Germany, Ireland, Italy, Luxemburg, Malta, Monaco and the Netherlands.

All of these reserving countries are European countries. There have been very few cases involving human rights violations committed by these ten countries. Therefore, it suggests that these ten countries successfully adhere to international human rights law. Most of these ten countries make the reservations in order to license broadcasting enterprises. This is also an exception to freedom of speech as it is protected in The European Convention for the Protection of Human Rights and Fundamental Freedoms, article 10.

Although the United States usually makes multiple reservations before signing a treaty, they have not made a reservation to the provision on freedom of speech. It is not many countries who have made reservations to it, not even the United States. This is an argument for considering freedom of speech as international customary law.

China has ratified the Vienna Convention on the law of Treaties (“VCLT”). Even if China has not ratified the ICCPR, it is a signatory state. According to article 18 and article 31 of VCLT, China must refrain from acts which would defeat the object and the purpose of the treaty. The ICCPR does not expressly state what the object and purpose of the treaty is, but according to its preamble, it aims to promote universal respect for, and observance of, human rights. Freedom of speech is explicitly mentioned in article 19, and therefore must be considered as a human right and one of the treaty’s objectives. This includes online speeches, emails, and other internet usage.<sup>114</sup> Permissible limitations can be made according to article 19. Chapter 6.1.3 further addresses this.

### **(b) Important in International Law**

Freedom of speech is considered a particularly important freedom within the international society. The right is seen as a fundamental right. The United Nations General Assembly’s Resolution 59(1) from 1946 stated: “*Freedom of information is a fundamental human right and is the touchstone of all the freedoms which the United Nations is consecrated*”. It further states that the right includes a right both to gather information and to publish news anywhere and everywhere. Even though the Internet is a new form of media, it is still subject to human rights instruments.

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<sup>113</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ICCPR – STATUS OF RATIFICATION & RESERVATIONS. [www.ohchr.org/english/law/ccpr.htm](http://www.ohchr.org/english/law/ccpr.htm). (Last visited September 25, 2007).

<sup>114</sup> HUMAN RIGHTS WATCH, “RACE TO THE BOTTOM” CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 21-22 (Human Rights Watch 2006).

The U.N. Special Rapporteur<sup>115</sup> has several times talked about Internet as a system for enjoying freedom of speech. A comment in 1999 from a then-U.N. Special Rapporteur, Abid Hussein, shows that on-line speeches shall enjoy the same protection as other speech. This applies to electronics communication, and therefore the government may not interfere with email or internet usage.<sup>116</sup> In 2001, Mr. Hussein wrote that he would like states to understand the importance of Internet when exercising the right to freedom of speech.<sup>117</sup> Furthermore, today's Special Rapporteur, Ambeyi Ligabo, considers freedom of speech as a "fundamental and inalienable right" and he believes that Internet, as a tool for exercising freedom of speech, is a central challenge for the future.<sup>118</sup>

The European Parliament issued a resolution in 2006 where they stated that "freedom of expression is a key value shared by all EU countries and that they have to take concrete steps to defend it."<sup>119</sup> They articulate that Internet can contribute to and strengthen democracy and that "restricting access to Internet is incompatible with the right to freedom of expression".

ICCPR article 19, UDHR article 19 and ECHR article 10 all explicitly protect freedom of speech "regardless of frontiers," which is particularly relevant to the global Internet. The Resolution from 1946 shows the fundamental and important nature of freedom of speech. At the time the Resolution was issued, Internet was not yet invented. Neither was it invented when the ICCPR, UDHR, and ECHR were drafted. However, the right has been recognized for a very long time and the articles' text show that regardless of form, people shall always be entitled to freedom of speech. Countries have consistently recognized freedom of speech as a fundamental human right, which fulfills the criteria in article 38 of the Charter of the International Court of Justice ("Charter of ICJ"). States are therefore obligated to ensure freedom of speech to its citizens. The reason is that freedom of speech can be considered international customary law. Because international customary law is a source of international law according to article 38, Charter of ICJ, China is obligated to ensure freedom of speech.

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<sup>115</sup> Established by a Resolution of the UN Commission on Human Rights in 1993. The Special Rapporteur gathers information about peoples' exercising of freedom of speech and issues statements and declarations that set out authoritative interpretation of ICCPR and UDHR.

<sup>116</sup> REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND SPEECH TO THE U.N. COMMISSION ON HUMAN RIGHTS January 29, 1999, E/CN.4/1999/64.

<sup>117</sup> REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND SPEECH TO THE U.N. COMMISSION ON HUMAN RIGHTS, January 30, 2002, E/CN.4/2002/75.

<sup>118</sup> REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND SPEECH TO THE U.N. COMMISSION ON HUMAN RIGHTS, DECEMBER 17, 2004, E/CN.4/2005/64.

<sup>119</sup> EUR. PARL. ASS., FREEDOM OF EXPRESSION ON THE INTERNET, Plenary Sess., Res. No. 0324, ( July 6, 2006) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0324+0+DOC+XML+V0//EN&language=EN> (Last visited October 18, 2007).

China has not explicitly said that they do not want to be bound by freedom of speech. They have, for example, not ratified other treaties and in those treaties made a reservation to that treaty's freedom of speech provision. If they had, it would suggest that they were objecting to the obligation of ensuring freedom of speech, but they have not.

Even if freedom of speech is not considered international customary law, China would still be bound to follow the ICCPR's objectives and purpose since they are a signatory state.

The Optional Protocol to the ICCPR states that individuals can bring complaints to the Human Rights Committee.<sup>120</sup> If a member state has not ratified the Optional Protocol, only other states, and not individuals, can bring action against that state.<sup>121</sup> Since China has not ratified the ICCPR, the Optional Protocol is not the main problem in this case. Other states do not have standing to complain until China ratifies the ICCPR, and individuals do not have standing until China ratifies the Optional Protocol.

### **6.1.2 Derogations**

A state may suspend certain functions of the government if they declare a state of emergency. In a national emergency that threatens the life of the nation, according to ICCPR article 4, a state may derogate from the obligation to ensure freedom of speech.

Declarations of state of emergency are normally used during a period of civil unrest, during times of a natural disaster, or following a declaration of war. For example, the United States declared a state of emergency with regard to terrorism. They have an embargo on trade with "terrorists who threaten to disrupt the Middle East peace process."<sup>122</sup> It is clear that there is no national emergency of this calibre in China, and therefore derogations are not allowed.

### **6.1.3 Limitations**

According to the ICCPR article 19(3) and to the Universal Declaration of Human Rights ("UDHR") article 29(2), a state may limit the right if the limitation is:

- a) *provided by law, and*
- b) *promotes one of the legitimate interests listed (rights of others, for the protection of national security, for public order or for public health or morals), and*

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<sup>120</sup> ICCPR, OPTIONAL PROTOCOL Art. 1.

<sup>121</sup> ICCPR Art. 41.

<sup>122</sup> EXECUTIVE ORDER 12947.

c) *is necessary in a democratic society*

The European Convention for the Protection on Human Rights and Fundamental Freedoms, article 10, has a very similar regulation of freedom of speech, as described in chapter 5.

This means that not only must the law provide a limitation; it must also protect one of the listed interests, which is an exclusive list, to be legitimate. This is a strict three-part test. The last requirement, to be necessary in a democratic society, is the obstacle that most countries that want to limit freedom of speech fail to pass.<sup>123</sup>

#### **(a) Provided by Law**

The European Court of Justice (“ECtHR”) has said that the law that is limiting the right must be accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct”.<sup>124</sup> As described in chapter 3.2, China does fulfil the first condition because they are limiting freedom of speech in different laws and regulations.

#### **(b) To protect one of the Listed Interests**

The second condition, to fulfil one of the listed interests, is a harder criterion to fulfil. In *Faurisson v. France*,<sup>125</sup> the Human Rights Committee<sup>126</sup> (“HRC”) allowed limitations on freedom of speech due to the *rights of others*. The HRC ruled that France was allowed to charge a teacher for criminal acts, because he had, during a lecture, denied that the holocaust ever happened.

China might want to argue that they are limiting freedom of speech to protect *national security or public order*, but this argument is not compelling. National security has to do with China protecting its border from third countries, and public order has to do with the order within the country.

In the past, censorships have been disfavoured in international law and most legal systems prohibit censorship. For China to use censorship on the

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<sup>123</sup> UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION, LEGAL AND CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH, (1998) [www.unesco.org/op/eng/3may98/art-19.htm](http://www.unesco.org/op/eng/3may98/art-19.htm). (Last visited October 15, 2007).

<sup>124</sup> *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 13166/87, 2 EHRR 245, para. 49.

<sup>125</sup> *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

<sup>126</sup> The Committee has the competence to receive and consider communications when a state party to the ICCPR claims that another state party is violating a provision.

Internet, they are subject to the highest level of scrutiny, and have to show that the censorship averts the threat and that no less extreme measures are available.<sup>127</sup> China, however, does not satisfy this level of scrutiny; but instead they are censoring information that is not a threat to national security or public order. They are punishing online speakers that are exercising their right to freedom of speech. The Chinese government's policy is arbitrary and unpredictable.

The HRC have interpreted the right to privacy so that interference with it must be specified in detail, made under the law, and on a case-by-case basis.<sup>128</sup> When the Chinese government keep records of Internet users and what web pages they are visiting, they are infringing the right to privacy, since *all* users are subject to scrutiny instead of a particular determination.

In a seminal ruling, *Handyside v. United Kingdom*,<sup>129</sup> the ECtHR affirmed that freedom of speech is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population. Even if this is an interpretation of The European Convention for the Protection of Human Rights and Fundamental Freedoms by the ECtHR, and not by HRC on the ICCPR, its message is clear. I suppose that the HRC would decide a case in a similar way. This is, however, only important if China ratifies the ICCPR so that other states can bring claims against them. The rulings, and the reasoning, the ECtHR give are equally important for international customary law, as rulings from the HRC.

The point is that the Chinese government will not succeed by defending their behavior arguing that they want to, for example, have a uniform political opinion in the country, in order to keep *public order or moral*. Particularly because criticizing the state is a form of exercising freedom of speech.

International human rights law does not allow freedom of speech to be limited on the ground that the government wants to have homogenous opinions and unanimous thoughts among the population. It is a strict requirement that all the necessary conditions must be fulfilled. Furthermore, in a comment from the then-U.N. Special Rapporteur, Abid Hussain, one can see that limiting freedom of speech on the grounds to "preserve moral fabric and cultural identity of the society" is not legitimate.<sup>130</sup> He also stated that he dislikes rules limiting Internet content, and he urged states to avoid such adoptions.

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<sup>127</sup> HUMAN RIGHTS WATCH, "RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP 21-23 (Human Rights Watch 2006).

<sup>128</sup> *Id.* st 21-23.

<sup>129</sup> *Handyside v U.K* (No 24), 1976 Eur.Ct. H.R. para. 49.

<sup>130</sup> REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND SPEECH TO THE U.N. COMMISSION ON HUMAN RIGHTS, January 20, 2002, E/CN.4/2002/75.

Likewise, rulings from national courts are developing international customary alongside international courts.

The United States Supreme Court made a famous ruling on limitation of free speech as protected in the First Amendment<sup>131</sup> of the United States Constitution in 1969. In *Brandenburg v. Ohio*,<sup>132</sup> the Court said that hate speech can be limited only if it was "likely to incite imminent lawless action", and not for the reason that the speech as such might upset someone. In addition, in *Chaplinsky v. New Hampshire*<sup>133</sup>, the Supreme Court held that the First Amendment does not protect "fighting words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." In *R. A. V. v. City of St. Paul*<sup>134</sup>, teenagers had burned a cross inside the yard of an Afro-American family. The court said that the action contained a political message and therefore should be protected under the First Amendment. In *R. A. V. v. City of St. Paul*, the action was not likely to incite imminent lawless action or. In this case, the Court reasoned that hate speeches should be dealt with in another way than by limiting the freedom of speech as protected in the United States Constitution.

The way China is limiting freedom of speech, is not a legal way of doing it. Permissible limitations would be, for example, to have a law that prohibits child pornography on the Internet or hate speeches because both these fulfill the conditions in article 19(3) ICCPR, article 29(2) UDHR, and in article 10(2) ECHR.<sup>135</sup>

### **(c) Necessary in a Democratic Society**

When deciding the third condition, if a limitation is *necessary in a democratic society*, the ECtHR stated in *Lingens v. Austria*<sup>136</sup> that there must be a "pressing social need" for having the limitation. The restriction must be "relevant and sufficient" and "proportionate to the aim pursued".

The ECtHR has introduced a principle called "margin of appreciation" when determining whether the limitation is necessary in a democratic society.<sup>137</sup>

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<sup>131</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of , or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

<sup>132</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>133</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>134</sup> *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>135</sup> GENERAL ASSEMBLY, REVIEW OF REPORTS, STUDIES AND OTHER DOCUMENTATION FOR THE PREPARATORY COMMITTEE AND THE WORLD CONFERENCE, CONTRIBUTION OF THE SPECIAL RAPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF SPEECH.

[http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/00D640345F55DA5DC1256A5300383AFC/\\$File/G0112061.doc?OpenElement](http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/00D640345F55DA5DC1256A5300383AFC/$File/G0112061.doc?OpenElement) (Last visited October 6, 2007).

<sup>136</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, 8 EHRR 407, paras. 39-40.

<sup>137</sup> *Zana v. Turkey*, 1997- VII Eur. Ct. H.R.2533. No. 57, and other cases.

According to this principle, a state shall consider all the information in a case to determine whether a limitation is lawful. They must balance between protecting freedom of speech with protecting the rights of others. The idea of having this principle is that the state is in a better position to determine if a limitation is necessary when considering the local circumstances. Restrictions must be interpreted narrowly and it is the court's role to scrutinize the restriction.<sup>138</sup>

China would probably not succeed in claiming margin of appreciation. If doing a balance test between the interests of the Chinese government to limit the right to freedom of speech and the interests of enjoying the right to freedom of speech for the Chinese people, there will not be enough to consider the Chinese government's interest so big as to allow a limitation. The government is not protecting others by censoring the Internet. In addition, they are not looking to others then their own interests by imprisoning people that speak negatively about the regime in China.

Depriving a person freedom of speech has a huge impact on that person, and therefore, to do it, the Chinese government needs very strong reasons. The Chinese authorities' argument is not strong enough. According to margin of appreciation, it will be illegal to deprive individuals of the right to freedom of speech. Furthermore, they are not in a better position to consider the local circumstances, because what China needs is an outside observer helping the country be more democratic. China needs someone with their eyes opened, and with a legitimate interest in making China a better place to live for the people of China. Of course there is a problem doing this, because of the principle of non-intervention<sup>139</sup> and state sovereignty<sup>140</sup>, and it might be more of a political argument than a legal argument. Still it needs to be said.

To summarize the analysis of China's obligations under international law; it is clear that China has an obligation to ensure freedom of speech. No limitations or derogations can legally be made the way China is censoring the Internet today.

The situation in China is not consistent with international law. China is not just violating international laws; they are also denying the fact that they are doing it.

Liu Zhengrong, a deputy chief of the Internet Affairs Bureau of the State Council Information Office in China, said that no one has been arrested merely for writing online content. According to many Non Governmental

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<sup>138</sup>Sally Burnheim, *Case Law under European Convention of Human Rights*, DAILY STAR (The Daily Star Online Edition 2003).

<http://thedailystar.ws/law/200311/05/index.htm> (Last visited October 6, 2007).

<sup>139</sup> Non-intervention is the norm in international relations that one state cannot interfere in the internal politics of another state, based upon the principles of state sovereignty and self-determination.

<sup>140</sup> Sovereignty is the exclusive right to complete political (e.g. legislative, judicial, and/or executive) control over an area of governance, people, or oneself.

Organizations (“NGO’s”) and news organizations that is simply not true. Zhengrong says that China is no different from Western nations in the way they control the Internet. He also said that only a very few foreign websites are blocked, and that they are blocked because they contain pornography. At the same time as he said this, the BBC News was and continues to be blocked in China. Furthermore, four people were jailed for posting opinions on the internet calling for political change.<sup>141</sup>

## **6.2 Foreign Corporations’ Obligations under International Law**

In today’s business world, it is no longer China that solely censors the Internet; corporations also take actions to make it possible for the authorities to restrict the flow of information. Without them acting together, there is no way the censorship would work as effectively as it does. There is an obvious need to regulate corporations, but it is not clear if there are any existing international human rights obligations that apply to them. With the increasing globalization, it would be useful to have regulations that can impose sanctions on multinational companies when they are violating international human rights.

When China is violating human rights by censoring the Internet, multinational companies are helping China do it. Technology from foreign countries enables the Chinese regime to limit freedom of speech, and the question is what responsibility the foreign corporations have in this context.

The fact that corporations are involved in the ongoing censorship of Internet in China has made many different organs and states respond. The United States have had a Congressional hearing and introduced the Global Online Freedom Act. The European Parliament has issued a resolution where they condemn the Chinese censorship, and it explicitly mentions Yahoo!, Google, and Microsoft as facilitators of the Chinese censorship. Furthermore, Amnesty International and Human Rights Watch have released comprehensive reports on the issue.

The examination focuses mostly on the American corporations Google, Yahoo! and Microsoft. The reasons are that there is an ongoing discussion in the United States about the issue, and further, the United States has a special regulation for human rights violations, the Alien Tort Claims Act, which allows foreigner to bring a claim in the United States if there is a violation of the law of nations. There are other, non-American, corporations acting on the Chinese Internet market as well, but because of mentioned reasons, the analysis is limited to focus on the American corporations. However, most of the analysis applies to all multinational corporations acting in China.

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<sup>141</sup> *China Defends Internet Regulations*, BBC NEWS (BBC News 2006) <http://news.bbc.co.uk/1/hi/world/asia-pacific/4715044.stm>. (Last visited October 15, 2007).

The ICCPR does not explicitly direct obligations to entities, but there are discussions of whether the changed environment in the global economy has altered this. The International Covenant on Civil and Political Rights (“ICCPR”) imposes obligations on states to ensure that human rights are upheld *within its jurisdiction*. Furthermore, it imposes an obligation on the United States to make sure that the American corporations, *subjected to its jurisdiction*, respect the rights in the ICCPR.<sup>142</sup> This means that the United States has an obligation to ensure that American corporations do not violate freedom of speech in China. Chapter 6.2.2 further discusses this. In addition to this, chapter 6.2.3 discusses whether the American law *Alien Tort Claims Act* gives United States jurisdiction when American corporations are violating freedom of speech. Below follows an examination of legal impact of the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* on American multinational corporations.

### **6.2.1 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**

Even though the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (“UN Norms”) is not formally a treaty, it is more authoritative than many codes of conduct adopted by corporations and international organizations’ guidelines. Today, the UN Norms are not binding for states but it may have some legal effects if national and international tribunals and courts start making reference to it because it is a result of a formal, UN-authorized, process.<sup>143</sup>

The UN Norms show a new level of commitment by the United Nations. It shows that they want to move away from soft law, such as guidelines and corporations’ internal codes of conduct, and instead move to actionable, enforceable rules for ensuring that human rights are upheld by multinational corporations.<sup>144</sup>

The language of the UN Norms speaks directly to the corporations, but is still not considered binding for them. The UN Norms can become binding if states ratify the treaty. Furthermore, it can develop international customary law if more and more companies start acting in accordance with the rules, and consider the rules as binding. If it does, the UN norms will bind other countries too. However, the current situation in China is not solved by the

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<sup>142</sup> ICCPR Art. 2.

<sup>143</sup> AMNESTY INTERNATIONAL, *THE UN HUMAN RIGHTS NORMS FOR BUSINESS: TOWARDS LEGAL ACCOUNTABILITY* 6 (Amnesty International Publications 2004).

<sup>144</sup> Annie Wallis, *Data Mining: Lessons from the Kimberly Process for the United Nations’ development of human rights norms for transnational corporations*. 4 *NW. U. J. INT’L HUM. RTS.* 388, 388 (2007).

fact that corporations might change international law so that in the future, it will contain responsibility for multinational corporations.

### 6.2.2 Extraterritorial Application of the ICCPR

The only international regulation available today, is an interpretation of the ICCPR to include obligations for corporations. If it did, and the ICCPR's provision of freedom of speech is considered international customary law, Google, Yahoo! and Microsoft would be obligated to follow article 19. Therefore, they must uphold freedom of speech when acting in China. There is no way for them to have a censored version of their search engine, or to provide the Chinese authorities with information about private users, unless article 19 allows a limitation. As previously discussed, such a limitation cannot legally be invoked in China. This means that corporations would have to act differently than in the past, in order to comply with international human rights law.

However, regardless whether the ICCPR creates obligations for multinational corporations, article 2 of the ICCPR still creates obligations for states to ensure that corporations within its territory and subject to its jurisdiction comply with the Covenant.

Art. 2 of the ICCPR, states:

*“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”*

In *Burgos/Lopez v. Uruguay*,<sup>145</sup> a Uruguayan citizen, living in Argentina, was tortured by Uruguayan Security Forces in Argentina. In that case, the Human Rights Committee (“HRC”) held that the ICCPR has extraterritorial application, which means that their jurisdiction extends beyond its territory. The HRC ruled that it would be unconscionable to permit a state to violate the ICCPR on the territory of another state, when it cannot violate it on its own. In an Advisory Opinion<sup>146</sup> on *Legal Consequences on the Construction of a wall in the Occupied Palestinian Territory*,<sup>147</sup> the International Court of Justice opined that the ICCPR applied to Israel's performance in the Occupied Territories of Palestine, because the acts were committed in the exercise of Israel's jurisdiction. In *Cyprus v. Turkey*,<sup>148</sup> the European Court of Human Rights ruled that the European Convention for the Protection of

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<sup>145</sup> *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 at 88 (1984).

<sup>146</sup> The Security Council can ask for advisory opinion (ICJ Statute, Art 65 and UN statute, Art 96) if they need the opinion in order to do their tasks – A.O on Western Sahara.

<sup>147</sup> *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, 43 International Legal Materials 1009 (2004).

<sup>148</sup> *Cyprus v. Turkey*, Application no. 25781/94, Judgment, 10 May 2001.

Human Rights and Fundamental Freedoms applies extraterritorial when a state is exercising effective overall control of a territory beyond its border. Even more to the point, and more relevant for American corporations in China, is the case *Coard et al. v. the United States*.<sup>149</sup> In that case, US armed forces violated international human rights by detaining people in Grenada. The Inter-American Commission ruled that neither the geographic location nor the victim's nationality were crucial in determine the jurisdiction of the Commission.

This case law means that the United States must respect and ensure freedom of speech of individuals "within the US and *those otherwise subjects to its jurisdiction*".<sup>150</sup> Furthermore, the obligation for the United States to ensure freedom of speech applies to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.<sup>151</sup>

The HRC considers article 2 of the ICCPR to mean that the United States shall give attention to the position of aliens, and that they shall observe it both in their legislation and in actual practice.<sup>152</sup> The United States has an obligation to make sure that the American corporations, Google, Microsoft and Yahoo!, do not violate the freedom of speech of any individual within the United States or even subject to the jurisdiction of the United States. Therefore it is of essential importance that the American Internet companies do not violate freedom of speech in China.

If an interpretation of the ICCPR determines that the Covenant applies directly to corporation, the corporations themselves have to make sure they do not violate article 2, when reading it together with Art 19. Otherwise, the United States has to ensure that the corporations are not violating freedom of speech of any person in United State's territory or subject to its jurisdiction.

The argument, that there is no use for regulating multinational corporations because it is states that are violating human rights, is not persuasive. In *Walrave v. Association Union Cycliste Internationale*,<sup>153</sup> the European Court of Justice ("ECJ") interpreted a non-discrimination provision in the Treaty of Rome,<sup>154</sup> which prohibits *states* from discriminating based on nationality, to apply not only to states but also to private entities.

When interpreting the treaty, the Court looked to the purpose of the European Community and required private entities to follow the same provision although it did not explicitly apply to corporations. The Court's reasoning was that since corporations are carrying out such a substantial part

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<sup>149</sup> *Coard et al. v. the United States*, Case 10.951, Report No. 109/99, September 29, 1999.

<sup>150</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 323 (1999).

<sup>151</sup> Human Rights Committee, General Comment 15, paragraph 1.

<sup>152</sup> *Id.* at paragraph 4.

<sup>153</sup> Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405.

<sup>154</sup> The Treaty of Rome has been amended by the Maastricht Treaty to become the Treaty Establishing the European Community. Article 12 of the Treaty Establishing the European Community prohibits discrimination based on nationality.

of the economic activity in Europe, the provision should apply to them. If it did not, it would have been easy for states to circumvent the provision, by transferring the responsibility from public sectors to private bodies.<sup>155</sup>

The interpretation of the Court was overtly teleological, that the purpose of the treaty to not discriminate required not only states but also private entities to follow the provision. This is exactly why people argue that multinational corporations must be subjected to international human rights law. If they are not, the principle ideas of the laws cannot be fulfilled, since the object and purpose of the law can easily be corporate action.

As previously described, the European Court of Human Rights (“ECtHR”) established the principle “margin of appreciation” through case law. The principle has authority outside the ECtHR, and can be considered international customary law. A possibility is that since the ECtHR created this international customary law, the ECJ took a step towards creating international customary law for corporation to follow human rights when deciding a case<sup>156</sup> so that the Treaty of Rome imposes obligations for corporations even though it explicitly only reaches states. If one European court can create customary law, another can too. Thus, it is arguable that corporations acting in China have responsibility under international customary law for not violating human rights.

Even if multinational Internet corporations do not intend to violate freedom of speech, they are in fact making it impossible for the people to enjoy the right to freedom of speech. There is a need to protect those individuals, and that is the object and purpose of the ICCPR, just as one of the objectives of the Rome Treaty is to not discriminate. In order to secure the protection of individuals in China, there must be a way of imposing obligations to corporations. With the aim to fulfil the object and purpose of the ICCPR, an interpretation of the Covenant should include responsibility for companies. The reason is that the action of the corporations in China is such a big part of why the people are not enjoying their rights in the ICCPR.

### **6.2.3 Enforcement**

#### **(a) The International Covenant on Civil and Political Rights & International Customary Law**

If a result of an interpretation of international customary law will be that there are existing obligations for corporations to protect human rights, the problem is how to enforce it. Today, public shame is the only available remedy that exists, and I cannot see how it will make a huge different from today.

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<sup>155</sup> Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405.

<sup>156</sup> Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405.

If one interprets the ICCPR to create obligations not only for states, but also for companies, the issue is how the ICCPR should be enforced against a corporation. It is one thing to interpret the treaty provisions to obligate the corporations to ensure protected rights in the ICCPR, but it is another thing to interpret the treaty to be enforceable against them. For example, will the Optional Protocol be interpreted as being applicable to corporations, so that individuals can bring claims? This seems unlikely, since corporations have not agreed to it, and when states do not agree to be subjects to the Optional Protocol, they are not subject to it. So, if individuals cannot bring a claim against a corporation, can a state?

Article 41 of the ICCPR says that states can bring claims against other states, but it does not explicitly say that corporations can be brought to the Committee. However, even if article 41 also empowered the Committee to bring corporations before it, the power of the Committee is limited. The ICCPR is one of the most important human rights treaties, however it does not provide for sanctions. The Committee can bring a state before it, but all it can do is ask questions. I do not consider this as powerful as it needs to be, but instead I see the need for a completely new system with enforceable rules. Chapter 7 further discusses this.

My argument is that the ICCPR may impose obligations for corporations, but it is more difficult to claim that the treaty is enforceable against corporations. Again, the only remedy available today is public shame.

### **(b) UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**

The UN Norms, although not yet binding on corporations, do provide an enforcement mechanism. Article H.15 states that each corporation shall have internal rules of operation in compliance with the UN Norms. It also states that the corporations shall incorporate the UN Norms in “contracts or other arrangement and dealings”. Article H.16 declares that the UN periodically shall verify the application of the UN Norms. Furthermore, article H. 17 mandates that states shall implement legal frameworks for assuring that the UN Norms are implemented by corporations.

### **(c) The Universal Declaration of Human Rights**

The UDHR calls on “every individual and every organ of the society”<sup>157</sup> and according to Amnesty International that means corporations must be

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<sup>157</sup> Preamble, UDHR.

responsible under the UDHR.<sup>158</sup> Many corporations have observed their responsibility for human rights by adopting industry-based codes of conducts. Although neither Google, Microsoft, nor Yahoo! refer to the UDHR in their internal codes of conducts, over 40 other companies have expressed their policy commitments to it.<sup>159</sup>

Contrary to the standpoint made by Amnesty International, is the argument that UDHR is only a general guide. One can see the document as a document of international law that binds only governments, rather than multinational corporations. If the latter is correct, the multinational Internet corporations in China risk little when complying with domestic laws in China, instead of taking responsibility under UDHR.<sup>160</sup>

#### 6.2.4 Alien Tort Claims Act

The Alien Tort Claims Act (“ATCA”) is an American law that gives federal courts jurisdiction over any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States. Under this law, American judges have ruled on cases where multinational corporations have been found guilty of violating human rights that are international customary law, and are in that sense important to the American Internet corporations in China. Claims were brought against corporations for violating international customary law by torturing people<sup>161</sup> and by using forced labour.<sup>162</sup>

To apply the ATCA, it must be “a violation of the law of nations.” If considering freedom of speech international customary law, then this condition may be fulfilled. When Internet corporations are violating freedom of speech, they may thereby violate the law of nations.<sup>163</sup> However, recent case law has put a limitation on what kind of cases are considered “violations of the law of nations”. By that, they have put a limitation on what cases a plaintiff can bring under the ATCA.

The Supreme Court of the United States tightened the requirement for the violation to be a “violation of the law of nations” in *Sosa v. Alvarez-Machain*,<sup>164</sup> which will be discussed in 6.2.4 (b). Further, the case law on

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<sup>158</sup> AMNESTY INTERNATIONAL, PEOPLE’S REPUBLIC OF CHINA – STATE CONTROL OF THE INTERNET IN CHINA 13 (Amnesty International 2004).

<sup>159</sup> Rory Sullivan, *Do Companies Have Human Right Responsibility?* (OneWorld.net 2004). <http://www.oneworld.net/article/view/82972/1/>.

<sup>160</sup> Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 163 (1997).

<sup>161</sup> *Wiwa v. Royal Dutch Petroleum Co.* 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

<sup>162</sup> *Doe v. Unocal Corp.* 2002 WL 31063976 (9<sup>th</sup> Cir. Sept. 18, 2002).

<sup>163</sup> LOUIS HENKIN ET AL. HUMAN RIGHTS 165 (1999).

<sup>164</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

whether a corporation can be sued under ATCA is not consistent. It is not clear whether the American Internet corporations in China can be brought to American courts for violating ATCA. If they can, the requirements have lately been different in diverse cases, and therefore it is not apparent if the ATCA actually is applicable. An examination will follow below.

### **(a) Requirement of State Action**

*Kadic v. Karadzic*<sup>165</sup> was an important case in the sense that this case opened up the door for holding multinational corporations liable under ATCA. A condition for applying ATCA is that it the action of the corporations must be considered a “state action”. In *Kadic v. Karadzic*, the Court held that individuals can be liable for genocide and war crimes without showing state action. Other actions have to be considered state actions for the ATCA to be applicable, even though the language in the *Kadic v. Karadzic* does not foreclose the possibility that individuals can be held liable without a showing of state action.<sup>166</sup>

To determine if the Internet corporations can be considered state actors, the “colour of law” jurisprudence of section 1983 of the United States Code is helpful. The action of the corporations is considered state action if they have acted together with state officials or with significant state aid.<sup>167</sup>

To determine if the action is “state action”, one can do a “joint test,” which will find the action as state action if the Internet corporations have acted in co-operation with the state actors, so as the corporations have been wilful participants in joint action with the state in violating freedom of speech. In *Wiwa v. Royal Dutch Petroleum Co.*<sup>168</sup> providing financial assistance was considered a joint action.

In *Doe v. Unocal Corp.*<sup>169</sup> Unocal and the Myanmar government had an agreement to construct a pipeline between Myanmar and Thailand. Here, the Trial Court granted the defendant’s request for summary judgement<sup>170</sup> because the Court held that the defendant was not a state actor. The Court reasoned that the defendant was not aware of the human rights violation the Myanmar governments committed against the Burmese workers. They did not receive information about the Myanmar military using forced labour or that the workers were subject to murder, rape, and torture.<sup>171</sup> The Court said that “knowingly practical assistance or encouragement that has a substantial effect on the perpetration of the crime” is what constitutes aiding and

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<sup>165</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2<sup>nd</sup> Cir. 1996).

<sup>166</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 172 Supplement (2003).

<sup>167</sup> *Id.* at 167.

<sup>168</sup> *Wiwa v. Royal Dutch Petroleum Co.* 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

<sup>169</sup> *Doe v. Unocal Corp.* 2002 WL 31063976 (9<sup>th</sup> Cir. Sept. 18, 2002).

<sup>170</sup> The plaintiff has no case.

<sup>171</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 177 Supplement (2003).

abetting under ATCA.<sup>172</sup> The plaintiffs appealed the ruling but the Unocal Corporation reached a settlement with the Burmese workers before the court had to make a final ruling on whether or not the defendant was a state actor.<sup>173</sup>

The American Internet corporations can be seen as having aided and betted the Chinese government. For example, Microsoft gave information about their blog user Shi Tao to the Chinese government, which led to imprisonment for Shi Tao. Yahoo! supported the Chinese policy by signing the pledge. Furthermore, when Google is providing a censored version of their search engine, they must be considered acting on behalf and in cooperation with the Chinese government, even though the government did not explicitly tell Google to do it.

This means that the American law, ATCA, may give United States jurisdiction if a Chinese wants to go to court in America, to bring a civil action that he or she is not enjoying freedom of speech. This act does not impose penal sanctions but will grant the victim monetary compensation.

However, in a later ruling, *In re South African Apartheid Litigation*,<sup>174</sup> in 2004, the Court changed direction when examining whether corporations are state actors when aiding and abetting a state in its violations of human rights. The Court held that corporations could not be held liable under ATCA for aiding and abetting a state. The reasoning of the Court was that the ATCA does not explicitly provide for aider and abettor liability for corporations. They said there could only be aiding and abetting liability for *individuals* under the ATCA if they act under color of law, not for corporations. As a source for this, they used the *Kadic* case where the defendant was an individual and not a corporation.

*In re South African Apartheid Litigation* was a case decided by the District Court of New York, and does not have the same authority as cases judged by higher courts. It is not completely apparent today whether or not an American Internet corporation operating in China can be held liable as a state actor under ATCA.

### **(b) Only Specific Cases**

After the Supreme Court of the United States decided *Sosa v. Alvarez-Machain*<sup>175</sup> in 2004, the possible application of ATCA has become more limited. In 1980, the United States Court of Appeals for the Second Circuit

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<sup>172</sup> *Id.* at 181.

<sup>173</sup> *Unocal Plans to Settle Human Rights Suits Stemming From Pipeline Project in Burma*, [http://www.laborrights.org/press/Unocal/unocal\\_settle\\_BNA\\_1204.htm](http://www.laborrights.org/press/Unocal/unocal_settle_BNA_1204.htm) (oct 12, 07).

<sup>174</sup> *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

<sup>175</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

ruled another case, *Filártiga v. Peña-Irala*.<sup>176</sup> In the latter case, a Paraguayan citizen was charged in the United States for tortious acts committed outside the United States. The Court decided they had jurisdiction since the case involved a civil action, brought by an alien for a tort committed in violation of the law of nations.

However, in *Sosa v. Alvarez v. Machain*, in 2004, the Court limited the reach of ATCA and decided they did not have jurisdiction over the case. The case was about a Mexican national who brought a case against an agent of the United States, because he thought the agent had captured him in a way contrary to international human rights norm. The Court discussed what cases ATCA was supposed to cover, but did not reach a clear conclusion. The message from this case was that the Court wants to rule on international cases, and wants aliens to bring claims in the courts of the United States, but the Court does not want the US courts to be world courts.

The Court said that the ACTA is not purely jurisdictional but does not allow all cases. The Act only covers “similar specific cases recognized by the laws of nations”, which does not state exactly where the limit is and what cases can be brought under it. It includes some more cases than “the ancient crimes”; piracy, crimes against diplomacy and neutrality, but it does not create new causes of actions. To satisfy this standard, any claim based on the present-day law of nations must meet two requirements: the claim must “rest on a norm of international character accepted by the civilized world” and be “defined with specificity comparable to the features of the 18th-century paradigms we have recognized.”<sup>177</sup> The New York District Court dismissed a case on the ground that environmental pollution within a country’s borders does not violate the laws of nation.<sup>178</sup> In addition, the 5<sup>th</sup> Circuit Appeals Court, dismissed a case because the Court did not think violations of environmental treaties was a violation of the law of nations.<sup>179</sup>

In *Sosa*, the plaintiff argued that the abduction of Sosa was an “arbitrary arrest” according to the UDHR and the ICCPR. The Court examined both the UDHR and the ICCPR, but said that they did not establish international norms having the necessary specificity as it takes to bring a case under ATCA. The Court found that UDHR is not international law in the way that it imposes obligation as a matter of law, instead it sets forth a statement of principles.<sup>180</sup> Furthermore, when the United States ratified the ICCPR, they expressed an understanding that the Covenant was not self-executing.<sup>181</sup> This means that the United States did not want the ratification to mean that the Covenant created obligations that were to be enforceable in the courts of

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<sup>176</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>177</sup> *Sosa v. Alvarez-Machain*, 542 U.S. at 725.

<sup>178</sup> *Flores, et. al. v. Southern Peru Copper Corporation*, Case No: 00 Civ. 9812 (CSH) (S.D.N.Y. 2002).

<sup>179</sup> *Beanal, et. al. v. Freeport-McMoran, Inc., et. al.*, 197 F.3d 161 (5th Cir. 1999).

<sup>180</sup> The opinion of the United States Supreme Court in *Sosa* is contrary to the opinion of the known professor of international law, Louis Henkin, on whether or not the UDHR is binding. See page 17.

<sup>181</sup> 138 Cong. Rec. S4781-84 (1992).

the United States. Because of this, the Court found that the ICCPR as such does not bind the United States as a matter of international law.

This might restrict the applying of the ATCA for cases involving violations of freedom of speech, but no case have been heard on the subject. Anyhow, since there is a lot of evidence for considering freedom of speech as international customary law, the need to refer to ICCPR and UDHR as the source of the right, may not be necessary when bringing a claim against the American Internet corporations.

### **6.2.5 Summary for Corporate Responsibility**

It is uncertain whether there is an obligation for corporations to, by themselves, ensure human rights under international law, given that ATCA is American law. There is no doubt that states have to regulate the actions of corporations. At the first stage, China has to stop censoring the Internet, and additionally they have to ensure that multinational corporations are not doing it either. Again, the problem is the enforcement mechanism. There is no general, almighty court that will tell China to stop doing what they are doing. State sovereignty and the principle of non-intervention are strong principles under international law. The Security Council can impose economic sanctions and use force against China under Chapter 7 of the Charter of the United Nations, but only if there is a threat to international peace. This is not the situation in China. Political pressure is a way of demanding that China follow its obligations under international law.

Taking the pressure too far is not a good way of changing the Chinese system. The United States imposed an embargo against Cuba, and different human rights groups have not accepted actions like that as something workable and effective. It has the effect of cutting off contact between countries, and political dialogues are always better than political fights when wanting change.

The World Trade Organization is considered by some to be the right forum to not only regulate trade, but also for imposing human rights obligations on countries. It will be analysed more in chapter 7. Beside this, there is a chance that an interpretation of the ICCPR would result in including obligations for corporations. The environment in the global economy has changed, and it needs regulations for corporations, so that they do not violate fundamental human rights.

# 7 Concluding Thoughts

## 7.1 Corporations

Corporations are not helpless giants, as they sometimes pretend to be. They seem to be thinking in short term. The Chinese Communist Party will probably not last forever in China, so for keeping the good-will of the corporations, it is better to not cooperate with the governments more than what is legally required.

Since Google, Yahoo! and Microsoft have been hit by a reputation crisis; it is, in some way, natural for them to go through a phase of denial and defence. By becoming a target of public pressure, they will hopefully start to address the problem.

If the corporations begin to cooperate with each other, instead of with the Chinese governments, they would not lose market share as they seem to think now, and they would not have to violate human rights. They need to stop denying and instead acknowledge their responsibilities, and begin to focus on a solution.

It is not a task for corporations to take the responsibilities for human rights away from countries, but it is their obligation to not be complicit in human rights abuses. Instead of blame shifting, the corporations should start doing what they ought to do. They should not help the Chinese government to violate fundamental human rights, and they should not deny what they are doing.

Before there is a decision whether the International Covenant on Civil and Political Rights and The Universal Declaration of Human Rights are binding upon corporations, there are other actions corporations can take, to stop helping the Chinese government violate the international human rights. They can be transparent about the filtering process, and be open about what words they are censoring and why. Instead of claiming that different censorship laws in China are *the* law, and that they therefore have to follow them, they can instead challenge the Chinese legal system by complying with the Chinese Constitution, Alien Tort Claims Act, or international law. If the Chinese government respond by saying that the corporations have to follow other laws, the corporations ought to exhaust all judicial remedies and appeals in China and internationally before complying with the special laws. Another good thing would be to make public all agreements between the company and the Chinese government, to make people aware of what the Communist party is forcing upon the corporations. If for example Yahoo! would have been open about what pressure the Chinese government put on them, for them to sign the voluntary pledge, they might not have been so heavily criticised. At least if they had shown that they had no real

opportunity other than to sign the pledge, although it officially was voluntarily.

Google, Microsoft and Yahoo! can be the corporations that help the Chinese people to finally enjoy freedom of speech. Instead of defending themselves, the corporations would have so much to win from making an effort in promoting freedom of speech. If they have an obligation according to international law is not certain, but they would definitely have a profit from opposing the Chinese government and their demands according censorship. The international internet corporations acting in China would gain so much more than an increasing share of the Chinese market if they were helping the Chinese people to enjoy their fundamental right – the right to freedom of speech.

## **7.2 World Trade Organization**

The situation in China is not durable, something needs to be done. There is a hope that China will be better in its relation to its own people, because they have recently become a member of the World Trade Organization (“WTO”). The western world and its openness politically wise might help China respond better to their obligations under international law. It is always very important with discussion, and the more communication between China and countries that have a high standard of human rights protection, the better.

The WTO was from the beginning a system, which only object and purpose was to facilitate free trade between countries by opening the market, but has after the Uruguay Round in 1995, expanded to also consider things such as the environment and public health. When writing “consider” I do not mean that they care to protect health before trade, but instead that they are allowing limitations on states’ obligations when protecting certain objectives. In the WTO system, there is a hierarchy where trade principles trump most other values.<sup>182</sup> There are strict rules for when a country can derogate from the obligations, and the system shall not be seen as a system with an objective to mainly protect other things than trade.

The idea of the WTO is that the idea of “comparative advantage”, that trade will lead to welfare, and that welfare will lead to human rights protection. The WTO considers itself to only deal with the first, comparative advantage, and that for example the UN has to deal with the second, human rights protection. There is no provision that talks about a human rights exception or anything like that in the WTO/GATT law.

Clyde Summers<sup>183</sup> has written on the subject and argues that the WTO ought to have responsibility to protect internationally recognized human

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<sup>182</sup> SARA DILLON, INTERNATIONAL TRADE AND ECONOMIC LAW AND THE EUROPEAN UNION, 119 (2002).

<sup>183</sup> Professor emeritus at the University of Pennsylvania Law School.

values, and that the theory of comparative advantage shall not be taken too far. Summers points out that there is a problem with a state claiming comparative advantages when allowing for example forced labour, because economics do not tell us what shall be counted as a comparative advantages, they only tell us how the market works.<sup>184</sup>

The WTO has a lot of power, and has a big budget, which opening the question if they are the right forum for ensuring human rights protection. It is thinkable that they are more effective than for example the UN. The world needs an international system for protecting human rights, but the WTO is not unquestionably the right forum. Rather, a structure like the European Union's system is a better way of protecting those values.<sup>185</sup> The European Union is having a stage of different laws, where one part is free trade and another is human rights protection.

The WTO was not created for issues other than facilitating free trade, and would need a huge amendment if it shall be able to protect for example human rights. Such an amendment was not made during the Uruguay Round in 1995, since the limitations on trade benefits for protection of the environment is not at all the same as an explicit obligation to protect human rights. It is also arguable that such an amendment would be against the objectives of the WTO itself, which is an organization for trade and nothing else.

Clearly, there are needs for human rights protection, but a review of the UN system would be far better than changing the entire WTO. We need both the systems, for even if comparative advantage is not a measure of human rights protection, it is still a key to be able to fulfil human rights protection. A possible solution would be an interaction between the two organizations, to make the UN enforcement mechanism more effective.

### 7.3 The Olympic Games

China is going to host the Olympic Games in 2008, which means that the whole world is putting a lot of focus on China. At the first sight, it seems repelling that a country like China gets to host the Olympics. Some goes as far as saying that a boycott of Olympics would be a good thing. Thinking about it a little deeper, it is actually an opportunity for the rest of the world to put pressure on China, instead of just deciding not to be a part of the Olympics.

During the games, China is not going to be able to regulate all international journalists that are going to be in the country. China has issued new

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<sup>184</sup> Sara Dillon, *A Farewell to "Linkage" International Trade Law and Global Sustainability Indicators*, 127 RUTGERS L.REV, VOLUME 55, 2002.

<sup>185</sup> *Id.* at 128.

regulations<sup>186</sup> for journalists, allowing foreign reporters to travel throughout China and to interview people without prior official permission. The regulations will come into effect January 1, 2007 and expire on October 27, 2008. There is a good opportunity for the journalists to report about what is going on in China, from inside, in a way they were not able to do before.

#### 7.4 The Chinese Society

The Communist party has been ruling China for a long time, and of course it has had a huge impact on the mentality of the Chinese people. During a discussion<sup>187</sup> about the censorship in China, the founder of Boston's editions of The Epoch Times, John Jaw, explained the common Chinese way of thinking. He said that because the Chinese people have not been allowed to have an open mind and independent thoughts, he does not think they have an illumined view of the ongoing human rights abuses in China. A lot of people do not understand that there is something wrong in the way the Communist Party rules the country. From this, the conclusion is that the people must be informed about the abuses going on, and aware of what rights they actually have under international human rights laws.

A lasting solution must come from the Chinese people themselves; otherwise they might not want to change the system. Jin Wen, a Chinese Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia, has the same view of the problem. She is of the opinion that Chinese people do not want the western world to apply their moral standards and their view of what constitute a democratic state on China. She argues that the people in China needs to make the changes themselves, and that other states shall not try to press the Chinese government to rule China the same way as western governments rule their countries.

For decades, the Chinese people have not had an easy time. It is not until lately, along with the economical expansion, that more people have got a decent life. The middleclass have doubled their salary, and according to John Jaw they are often antidemocratic. They need to know that they deserve to have a decent life economically *and* a democratic government that ensures them freedom of speech. It is not a good solution if only people outside China shall change their system. This can be expressed by saying as Jaw said: "water can get a boat to float, but it can also overturn it"<sup>188</sup>.

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<sup>186</sup> REGULATIONS ON REPORTING ACTIVITIES IN CHINA BY FOREIGN JOURNALISTS DURING THE BEIJING OLYMPICS GAMES AND THE PREPARATORY PERIOD.

<sup>187</sup> FORD HALL FORUM, THE GREAT FIREWALL OF CHINA, RAYTHEON AMPHITHEATER, NORTHEASTERN UNIVERSITY, BOSTON (October 12, 2006).

<sup>188</sup> FORD HALL FORUM, THE GREAT FIREWALL OF CHINA, RAYTHEON AMPHITHEATER, NORTHEASTERN UNIVERSITY (October 12, 2006).

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