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Summer 2013

## The United Nations Human Rights Council's Resolution on Protection of Freedom of Expression on the Internet as a First Step in Protecting Human Rights Online

Susan Park

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### Recommended Citation

Susan Park, *The United Nations Human Rights Council's Resolution on Protection of Freedom of Expression on the Internet as a First Step in Protecting Human Rights Online*, 38 N.C. J. INT'L L. 1129 (2012).

Available at: <https://scholarship.law.unc.edu/ncilj/vol38/iss4/6>

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# The United Nations Human Rights Council's Resolution on Protection of Freedom of Expression on the Internet as a First Step in Protecting Human Rights Online

## Cover Page Footnote

International Law; Commercial Law; Law

# **The United Nations Human Rights Council’s Resolution on Protection of Freedom of Expression on the Internet as a First Step in Protecting Human Rights Online**

SUSAN PARK†

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## **I. Introduction**

On July 5, 2012, the United Nations Human Rights Council (“HRC”) adopted a resolution to protect human rights online.<sup>1</sup> This UN resolution, the first of its kind, was backed by more than seventy member and non-member states, including China.<sup>2</sup> The

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† B.A., International Comparative Studies, Duke University, 2011; J.D. Candidate, University of North Carolina School of Law, 2014. I would like to thank my family and friends for their support and my Note & Comment Editor Daniel Hinson for his editorial suggestions.

<sup>1</sup> Matthias Kettemann, *UN Human Rights Council Confirms that Human Rights Apply to the Internet*, EJIL: TALK! (July 23, 2012), <http://www.ejiltalk.org/un-human-rights-council-confirms-that-human-rights-apply-to-the-internet/>.

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

Resolution itself does not have any enforcement powers and cannot punish noncompliant countries.<sup>3</sup> Although many laud the resolution as “[a] [v]ictory for the Internet,”<sup>4</sup> it is merely the first step in upholding human rights on the Internet.<sup>5</sup>

The Internet has become an increasingly important means through which individuals receive and impart information.<sup>6</sup> However, the increasing importance and prevalence of Internet use has also spurred efforts to restrict the use of the Internet on grounds ranging from protecting children to preserving national security.<sup>7</sup> In some countries, the use of the Internet is restricted or censored through Internet filters to such a degree that fundamental freedoms, such as the freedom of expression and the freedom of information, may be curtailed.<sup>8</sup> The lack of protection for fundamental freedoms due to restriction of Internet use persists despite the recent HRC resolution.<sup>9</sup> These Internet-use freedoms are difficult to protect because content crosses boundaries, and the Internet is subject to different regulations in different countries.<sup>10</sup> As such, enforcing protection for fundamental rights relating to Internet use in more repressive regimes is difficult, because these regimes have their own way of dealing with such issues.<sup>11</sup>

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<sup>3</sup> See Human Rights Council Res. 20, The Promotion, Protection and Enjoyment of Human Rights on the Internet, 20th Sess., U.N. Doc. A/HRC/20/L.13 (June 29, 2012) [hereinafter H.R.C. Res. 20].

<sup>4</sup> Carl Bildt, Op-Ed., *A Victory for the Internet*, N.Y. TIMES, July 5, 2012, [http://www.nytimes.com/2012/07/06/opinion/carl-bildt-a-victory-for-the-internet.html?\\_r=2](http://www.nytimes.com/2012/07/06/opinion/carl-bildt-a-victory-for-the-internet.html?_r=2).

<sup>5</sup> See Kettemann, *supra* note 1.

<sup>6</sup> See UNESCO, FREEDOM OF CONNECTION, FREEDOM OF EXPRESSION: THE CHANGING LEGAL AND REGULATORY ECOLOGY SHAPING THE INTERNET, 8 (2011), available at <http://unesdoc.unesco.org/images/0019/001915/191594e.pdf>.

<sup>7</sup> See Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Report of the Special Rapporteur on Key Trends and Challenges to the Right of All Individuals to Seek, Receive and Impart Information and Ideas of All Kinds Through the Internet*, Human Rights Council, U.N. Doc. A/HRC/17/27, ¶ 25 (May 16, 2011) [hereinafter Special Rapporteur].

<sup>8</sup> See *id.* ¶ 26. For example, China filters and blocks access to Internet websites “containing key terms such as ‘democracy’ and ‘human rights.’” *Id.* ¶ 29.

<sup>9</sup> See Bildt, *supra* note 4.

<sup>10</sup> Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Resolution*, 6 COMM. L. & POL’Y 445, 447 (2001).

<sup>11</sup> See *id.* at 475-77 (describing the “gateway” model of Internet regulation that exists in more repressive regimes).

In order to combat the problem of enforcement, the HRC should look to the European Union's example in dealing with Internet freedom and Internet censorship within the framework of Harold Koh's "transnational legal process."<sup>12</sup> Koh, a renowned legal scholar, explained that transnational legal process and its associated five factors—"power; self-interest or rational choice; liberal explanations based on rule-legitimacy or political identity; communitarian explanations; and legal process explanations"<sup>13</sup>—help explain how and why nations obey international law.<sup>14</sup> Koh's transnational legal process is applicable to this discussion and will be examined further in this paper. Furthermore, the European Union's actions regarding Internet freedom, when considered within the framework of Koh's transnational legal process, may serve as a model for the HRC. By implementing some of the steps the European Union has taken or attempted, the HRC will move beyond the idealistic, albeit toothless, Resolution and take a major step forward in protecting fundamental human rights on the Internet.

## II. United Nations Human Rights Council's Resolution On Protecting Internet Freedom

According to United Nations Special Rapporteur Frank LaRue, the Internet is a "key means" through which individuals may exercise their freedom of expression.<sup>15</sup> The Internet not only enables individuals to "exercise their right to freedom of opinion and expression," but it also acts as an "enabler of other fundamental human rights," "such as the right to education [and] freedom of association and assembly[,]"<sup>16</sup> the right to cast informed votes and to "hold governments and other public institutions accountable."<sup>17</sup> In general, protecting freedom of expression is necessary because "the free flow of ideas is critical

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<sup>12</sup> Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399 (1999), available at [www.repository.law.indiana.edu/ilj/vol74/iss4/9/](http://www.repository.law.indiana.edu/ilj/vol74/iss4/9/).

<sup>13</sup> *Id.* at 1401 (emphasis removed).

<sup>14</sup> See *id.* at 1401-02; see also discussion *infra* Part III.B.

<sup>15</sup> Special Rapporteur, *supra* note 7, ¶ 20.

<sup>16</sup> *Id.* ¶ 22.

<sup>17</sup> UNESCO, *supra* note 6, at 10.

to democratic processes and institutions.”<sup>18</sup> Ensuring access to the Internet effectively protects the freedom of expression.<sup>19</sup> Moreover, the right to freedom of expression must not be restricted “other than to the extent permitted by Article 10 of the European Convention on Human Rights as interpreted by European Court of Human Rights.”<sup>20</sup> Thus, censoring the Internet could amount to prohibiting individuals who desire to inform and be informed from accessing the Internet, thereby violating the aforementioned rights and freedoms.

Prior to the adoption of the HRC’s recent resolution on protecting fundamental rights on the Internet, the UN had not explicitly linked the Internet to the notion of “human rights”<sup>21</sup> and had only implied that access to the Internet is a human right.<sup>22</sup>

<sup>18</sup> *Id.* Note that some censorship, such as censorship of child pornography, may be positive.

<sup>19</sup> See EUROPEAN AUDIOVISUAL OBSERVATORY, FREEDOM OF EXPRESSION AND THE MEDIA: STANDARD-SETTING BY THE COUNCIL OF EUROPE’S COMMITTEE OF MINISTERS 213 (Susanne Nikoltchev & Tarlach McGonagle eds., 2011), available at [http://www.obs.coe.int/oea\\_publ/legal/ebook\\_pace.pat.en](http://www.obs.coe.int/oea_publ/legal/ebook_pace.pat.en).

<sup>20</sup> *Id.*; European Convention on Human Rights art. 10, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221, available at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG\\_WEB.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG_WEB.pdf) [hereinafter European Convention] (“The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

<sup>21</sup> Kettemann, *supra* note 1 (“That the Internet, and the [information and communication technologies (“ICTs”)] more generally, are drivers of development has already been previously confirmed by the General Assembly. In its resolution on ICTs for development (U.N. Doc. A/RES/66/184), however, the General Assembly manages to not include a single reference to ‘human rights’ in over seven pages.”).

<sup>22</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 19, (Dec. 10, 1948) [hereinafter Universal Declaration] (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through *any media and regardless of frontiers*.”) (emphasis added); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . . through any . . . media of his choice.”).

Article 19 of the 1948 Universal Declaration of Human Rights (“Universal Declaration”) protects an individual’s right to “freedom of opinion and expression,” including the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers,” as a basic human right.<sup>23</sup> Even though this provision does not explicitly mention freedom of expression online,<sup>24</sup> the phrase “through any media” presumably “anticipated developments in information and communication technologies . . . and growing internationalization of content flows.”<sup>25</sup> Similarly, Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”) protects an individual’s “right to hold opinions without interference” and “right to freedom of expression,” including “freedom to seek, receive and impart information regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>26</sup> Unlike the Universal Declaration, however, Article 19 of the ICCPR limits the freedom of opinions and expression under certain circumstances, stating that such protections shall not extend beyond what is necessary “for the respect of the rights or reputations of others” and “for the protection of national security or of public order (*ordre public*), or of public health or morals.”<sup>27</sup> The ICCPR also requires that “any regulations passed that limit free speech must be (1) prescribed by law; (2) implemented in order to protect the rights or reputations of others or to safeguard national security; and (3) necessary to achieve that purpose.”<sup>28</sup> States generally agree that they are obliged to prohibit child pornography; materials that are discriminatory or hostile to certain nations, races, or religion; genocide-promoting materials; and terrorism-inciting materials.<sup>29</sup> However, because the “actual scope of the right is delineated by each nation, causing variations from

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<sup>23</sup> Universal Declaration, *supra* note 22., art. 19.

<sup>24</sup> *See id.*

<sup>25</sup> Kettemann, *supra* note 1.

<sup>26</sup> ICCPR, *supra* note 22, art. 19 ¶¶ 1-2.

<sup>27</sup> *Id.* art. 19 ¶ 3.

<sup>28</sup> Jessica Bauml, *It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship*, 63 FED. COMM. L.J. 697, 707 (2011).

<sup>29</sup> *See* Kettemann, *supra* note 1; *see also* Eko, *supra* note 10, at 458.

country to country,”<sup>30</sup> some states have interpreted this provision broadly to uphold their Internet censorship.<sup>31</sup>

Additionally, the UN International Telecommunication Union has implicitly accepted the right to freedom of expression on the Internet since 2003.<sup>32</sup> The UN Commission on Human Rights has also issued a resolution outlining instances in which a state is precluded from imposing restrictions on rights under ICCPR Article 19.<sup>33</sup> Governments are not permitted to restrict:

- (a) Discussion of government policies and political debate, reporting on human rights, government activities and corruption in government, engaging in peaceful demonstrations or political activities, including for peace and democracy, or expression of opinion and dissent, religion or belief;
- (b) The free flow of information and ideas, including practices such as the unjustifiable banning or closing of publications or other media and the abuse of administrative measures and censorship;
- (c) Access to or use of modern telecommunications technologies, including radio, television and the Internet;
- (d) Journalists in situations of armed conflict.<sup>34</sup>

However, the HRC's resolution is the first to expressly state that individuals have a right to freedom of expression on the Internet.<sup>35</sup> The real impetus for the Resolution was the UN Special Rapporteur Frank LaRue's aforementioned report on the protection of the freedom of expression on the Internet.<sup>36</sup> The report discussed the ways in which freedom of expression on the Internet was restricted, and called upon the states to ensure “as little restriction as possible to the flow of information via the

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<sup>30</sup> Bauml, *supra* note 28, at 707.

<sup>31</sup> See Aisha Husain, *Framing the International Standard for the Global Flow of Information on the Internet*, 3 INTERDISC. J. HUM. RTS. L. 35, 36-37 (2008-09) (providing that China has interpreted “national security” and “public order” broadly in order to highly regulate the Internet).

<sup>32</sup> See Special Rapporteur, *supra* note 7, ¶ 63.

<sup>33</sup> Commission on Human Rights Res. 2003/42, The Right to Freedom of Opinion and Expression, ¶ 9, U.N. Doc. E/CN.4/RES/2003/42, (Apr. 23, 2003), available at <http://www.unhcr.org/refworld/docid/43f31338c.html>.

<sup>34</sup> *Id.*

<sup>35</sup> See H.R.C. Res. 20, *supra* note 3.

<sup>36</sup> See Special Rapporteur, *supra* note 7.



Internet, except in few, exceptional, and limited circumstances prescribed by international human rights law.”<sup>37</sup> Taking LaRue’s discussion into account, the Resolution provides the following:

1. *Affirms* that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
2. *Recognizes* the global and open nature of the Internet as a driving force in accelerating progress towards development in its various forms;
3. *Calls upon* all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries;
4. *Encourages* special procedures to take these issues into account within their existing mandates, as applicable;
5. *Decides* to continue its consideration of the promotion, protection and enjoyment of human rights, including the right to freedom of expression, on the Internet and in other technologies, as well as of how the Internet can be an important tool for development and for exercising human rights, in accordance with its programme of work.<sup>38</sup>

Additionally, this report referenced the rights, especially the freedom of expression, which are also enumerated in the Universal Declaration, and “relevant international human rights treaties, including the International Covenant on Civil and Political Rights.”<sup>39</sup>

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<sup>37</sup> Jillian York, *U.N. Human Rights Council Resolution on Internet and Human Rights a Step in the Right Direction*, ELECTRONIC FRONTIER FOUNDATION (July 26, 2012), <https://www EFF.org/deeplinks/2012/07/un-human-rights-council-resolution-internet-and-human-rights-step-right-direction>.

<sup>38</sup> See H.R.C. Res. 20, *supra* note 3.

<sup>39</sup> *Id.*; see also Universal Declaration, *supra* note 22, art. 19 and accompanying text (“[The] freedom to hold opinions . . . receive and impart information and ideas through any media.”); see also ICCPR, *supra* note 22, art. 19 and accompanying text (“[The] right to hold opinions without interference . . . [and] freedom of expression, [including the] freedom to seek, receive, and impart information.”).

### III. When Considered Within the Framework of Harold Koh's Transnational Legal Process, May Serve as a Model for the Human Rights Council

#### A. Ineffectiveness of the Resolution by Itself

Although the Resolution is a positive first step towards ensuring the protection of freedom of expression on the Internet, it is nonetheless an ineffective measure because it is non-binding.<sup>40</sup> Universal human rights instruments, including “declarations, principles, guidelines, standard rules and recommendations,” are non-binding, but have “undeniable moral force and provide practical guidance to States in their conduct.”<sup>41</sup> Resolutions, however, generally refer to “*recommendations* and *decisions*, both of which have a vague and variable meaning in the Charter.”<sup>42</sup> The International Court of Justice typically uses the “expression ‘decision’ for binding resolutions and ‘recommendation’ for non-binding ones.”<sup>43</sup> Binding resolutions are “capable of creating obligations,” but declarations “in theory only interpret the Charter or assert the content of general international law” and arguably could constitute “a sub-category of recommendations.”<sup>44</sup> In general, however, resolutions are considered only recommendations, and thus, not legally binding.<sup>45</sup> Thus, because the Resolution at issue here is not binding, it cannot enforce its provisions when a state is noncompliant.<sup>46</sup> In fact, the HRC acknowledges that the Resolution merely recognizes a right.<sup>47</sup> As

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<sup>40</sup> Somini Sengupta, *U.N. Affirms Internet Freedom as a Basic Right*, N.Y. TIMES BITS (July 6, 2012, 8:30 AM), <http://bits.blogs.nytimes.com/2012/07/06/so-the-united-nations-affirms-internet-freedom-as-a-basic-right-now-what/>.

<sup>41</sup> *International Human Rights Law*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://kosovo.ohchr.org/?cid=2,11> (last visited Apr. 10, 2013).

<sup>42</sup> Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 880 (2006), available at <http://ejil.oxfordjournals.org/content/16/5/879.full#fn-2>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Robert Beckman & Dagmar Butte, *Introduction to International Law*, INTERNATIONAL LAW STUDENTS ASSOCIATION, 5, <http://www.ilsa.org/jessup/intlawintro.pdf> (last visited Apr. 15, 2013).

<sup>46</sup> See Sengupta, *supra* note 40.

<sup>47</sup> See Commission on Human Rights Res. 2003/42, *supra* note 33.

such, the HRC leaves the onus on individual states to protect the right to freedom of expression online.

Some argue that the Resolution may be effective for “public shaming” purposes because states want to maintain a “positive reputation for cooperation.”<sup>48</sup> The idea is that countries want to have a “positive reputation for cooperation” in the international community so as to bolster goodwill and have “a continuous and active voice in global policymaking.”<sup>49</sup> Notably, even powerful and repressive regimes like China buy into this notion to a certain degree.<sup>50</sup> However, some countries have less incentive to comply with non-binding international agreements and resolutions because they may not need a positive reputation for cooperation due to their economic and political strengths or their indifference to the international community.<sup>51</sup> Therefore, the Resolution, by itself, will likely be ineffective in upholding human rights on the Internet.

### *B. Harold Koh’s “Transnational Legal Process”*

Applying Harold Koh’s “transnational legal process” is particularly helpful to understanding how the protection for the fundamental rights relating to the Internet may be enforced. Although Koh acknowledges that the transnational legal process of enforcing international law may be imperfect, he also acknowledges that it “sometimes has [had] its successes, which gives us reason not to ignore that process, but to try to develop and nurture it.”<sup>52</sup> The transnational legal process involves: “the institutional *interaction* whereby global norms of international human rights law are debated, *interpreted*, and ultimately *internalized* by domestic legal systems.”<sup>53</sup> Stated differently, international human rights are enforced “through a transnational

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<sup>48</sup> Katherine Tsai, *How to Create International Law: The Case of Internet Freedom in China*, 21 DUKE J. COMP. & INT’L L. 401, 414 (2011).

<sup>49</sup> *Id.* at 415.

<sup>50</sup> *See id.* at 416 (“China has been ‘seeking to expand its influence’ in the international community by pursuing a ‘larger voice in international organizations . . . [such as] the International Monetary Fund . . . [and] has also begun to expand its international peacekeeping efforts.’”).

<sup>51</sup> *See id.*

<sup>52</sup> Koh, *supra* note 12, at 1399.

<sup>53</sup> *Id.*

legal process of institutional *interaction*, *interpretation* of legal norms, and attempts to *internalize* those norms into domestic legal systems."<sup>54</sup>

Koh begins by stating that the enforcement of international human rights law should be considered within the context of the broader question of why "nations obey international law of any kind . . . ."<sup>55</sup> He explores five rationales that together "help explain why nations obey international law"<sup>56</sup>—"power; *self-interest* or rational choice; *liberal explanations* based on rule-legitimacy or political identity; *communitarian explanations*; and *legal process explanations*."<sup>57</sup> The power rationale refers to the idea that nations only comply with international law because a more powerful nation coerced the weaker nation into compliance.<sup>58</sup> Under the self-interest rationale, nations decide to follow international law when it serves their self-interest.<sup>59</sup> Liberal theory based on rule-legitimacy refers to nations complying with international law because they feel that it is legitimate.<sup>60</sup> Liberal theory based on political identity refers to the idea that whether nations comply with international law depends on "the extent to which their political identity is based on liberal democracy."<sup>61</sup> Koh notes that some scholars look to European Union law as an example, arguing that the "European system of human rights works because it is largely composed of liberal democracies."<sup>62</sup> Under the communitarian rationale, nations obey international law because the law reflects the "values of the international society of which they are a part."<sup>63</sup> Koh discusses two types of legal process explanations—horizontal and vertical. The horizontal legal process deals with state level interaction,

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1401.

<sup>56</sup> *Id.* at 1407.

<sup>57</sup> *Id.* at 1401.

<sup>58</sup> See Koh, *supra* note 12, at 1402.

<sup>59</sup> *Id.* at 1402–03 (providing that states engage in a cost-benefit analysis in determining whether to comply with international law).

<sup>60</sup> *Id.* at 1404.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1405.

<sup>63</sup> *Id.* at 1406.

whereas the vertical explanation deals with interactions between “the international and domestic legal systems.”<sup>64</sup> Koh notes that by combining all five factors, “from power to legal process . . . we also move from external enforcement of legal rules to internal obedience with legal rules.”<sup>65</sup>

Taking the five explanations into account, international human rights are first enforced through the lens of the “‘vertical’ story of human rights enforcement.”<sup>66</sup> The vertical story of enforcement deals with “a transnational legal process that includes a different set of actors, fora, and transactions.”<sup>67</sup> The actors who are most relevant to the transnational legal process in terms of human rights are “transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, interpretive communities and law declaring fora, bureaucratic compliance procedures, and issue linkages among issue areas.”<sup>68</sup> Koh therefore shows that the process of internalizing human rights norms begins with the above actors, rather than with the individual states.<sup>69</sup> These non-state actors help establish “transnational issue networks” to spur discussion among similar actors at the “domestic, regional, and international levels.”<sup>70</sup> The actors, or “norm entrepreneurs,” then try to find allies among those in the bureaucracy who would act as their “governmental norm sponsors.”<sup>71</sup> Then, all of these actors seek fora “to declare both general norms of international law and specific interpretations of those norms in particular circumstances.”<sup>72</sup> Finally, the governments try to internalize interpretations of the norms iterated by the “global interpretative

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<sup>64</sup> Koh, *supra* note 12, at 1406.

<sup>65</sup> *Id.* at 1407.

<sup>66</sup> *Id.* at 1409.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (quoting Harold Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUSTON L. REV. 623, 647-70 (1998)).

<sup>69</sup> *See id.* at 1409-10 (noting prominent non-state actors, including the Dalai Lama and Aung Sang Suu Kyi).

<sup>70</sup> Koh, *supra* note 12, at 1410.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (providing that fora include “treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; international publicists; and nongovernmental organizations”).

community” into their internal structures.<sup>73</sup> Although this process is not foolproof, it helps explain why most nations comply with some of the international norms that exist today.

*C. European Union and the Freedom of Expression on the Internet*

The European Union has not fully established a specific set of guidelines with which to deal with restrictions on Internet use among member states and non-member states. However, the European Union has made concerted efforts to protect fundamental freedoms relating to the Internet, which, if viewed in the context of Harold Koh’s transnational legal process, hint at a positive, albeit gradual, progress in norm-internalization.

The European Union has acknowledged the nexus between the Internet and human rights on several occasions.<sup>74</sup> In 2005, the Committee of Ministers of the Council of Europe adopted the Declaration on Human Rights and the Rule of Law in the Information Society.<sup>75</sup> The Declaration recognized that “limited or no access” to the Internet could strip individuals of their human rights and that the “freedom of expression, information and communication” should be protected online and offline alike, except under the restrictions provided for in the European Covenant of Human Rights Article 10.<sup>76</sup> The Declaration further added that forms of censorship should be prohibited and that the “civil society, the private sector and other interested stakeholders” should cooperate.<sup>77</sup> Finally, the document referred to the various responsibilities of stakeholders to help regulate and deal with the development of the Internet.<sup>78</sup> Notably, the stakeholders may include “Council of Europe Member States; civil society; private sector actors and the Council of Europe.”<sup>79</sup>

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<sup>73</sup> *Id.* at 1411.

<sup>74</sup> See, e.g., *Declaration of the Committee of Ministers on Human Rights and the Rule of Law in the Information Society*, CM(2005)56 (May 13, 2005) [hereinafter *Declaration on the Rule of Law in the Information Society*], available at <https://wcd.coe.int/ViewDoc.jsp?id=849061>.

<sup>75</sup> *Declaration on Rule of Law in Information Society*, *supra* note 74.

<sup>76</sup> *Id.*; see also European Convention, *supra* note 20, art. 10.

<sup>77</sup> *Declaration of Rule of Law in Information Society*, *supra* note 74.

<sup>78</sup> See *id.*

<sup>79</sup> *Id.*

The Recommendation of the Committee of Ministers to member states on measures promoting respect for freedom of expression and information with regard to Internet filters also acknowledges certain fundamental rights regarding the Internet.<sup>80</sup> The Recommendation reaffirms a commitment to the “fundamental right to freedom of expression and to receive and impart information and ideas without” restriction.<sup>81</sup> The document also acknowledges that forbidding access to the Internet content “may constitute a restriction on freedom of expression and access to information” online and that these restrictions are subject to “Article 10, paragraph 2, of the European Convention of Human Rights and the relevant case law of the European Court of Human Rights.”<sup>82</sup> European Union member states are also reminded to develop measures to prevent censorship and encourage the “private sector and civil society” to develop standards “to promote transparency and the provision of information, . . . and services concerning . . . the blocking of access to and filtering of content and services with regard to the right to receive and impart information.”<sup>83</sup> This Recommendation focuses on bringing together “all relevant private and public sector stakeholders” to help implement the provisions set out in the Recommendation.<sup>84</sup>

On September 21, 2011, the Council of Europe issued the Declaration by the Committee of Ministers on Internet Governance Principles (“DCM”).<sup>85</sup> The DCM links “globality,

<sup>80</sup> See *Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regard to Internet Filters* (Mar. 26, 2008) [hereinafter *Recommendation to Promote Freedom of Expression*], available at [http://www.coe.int/t/dghl/standardsetting/t-cy/T-CY%20CMRec\(2008\)6%20E.pdf](http://www.coe.int/t/dghl/standardsetting/t-cy/T-CY%20CMRec(2008)6%20E.pdf).

<sup>81</sup> *Declaration Decl-20.02.2008/1 of the Committee of Ministers on Protecting the Dignity, Security and Privacy of Children on the Internet*, in *FREEDOM OF EXPRESSION AND THE MEDIA: STANDARD-SETTING BY THE COUNCIL OF EUROPE'S COMMITTEE OF MINISTERS 251* (Susanne Nikoltchev & Tarlach McGonagle eds., 2011), available at [http://www.obs.coe.int/oea\\_publ/legal/ebook\\_committeeministers-coe.pdf.en](http://www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en).

<sup>82</sup> See *Recommendation to Promote Freedom of Expression*, *supra* note 80, at 220.

<sup>83</sup> See *Recommendation CM/Rec(2007)11 of the Committee of Ministers to Member States on Promoting Freedom of Expression and Information in the New Information and Communications Environment* (Sept. 26, 2007), available at <https://wcd.coe.int/ViewDoc.jsp?id=1188541>.

<sup>84</sup> See *Recommendation to Promote Freedom of Expression*, *supra* note 80.

<sup>85</sup> See *Declaration on the Rule of Law in the Information Society*, *supra* note 74.

openness, and other architectural principles of the Internet and human rights.”<sup>86</sup> The DCM notes that the “global . . . nature of the Internet” is based upon the notion of “universal access.”<sup>87</sup> Furthermore, an “open Internet” includes “open standards and an open network.”<sup>88</sup> The “open standards” and the “open network” of the Internet are essentially “key architecture principles of the Internet that underlie the Human Rights Council’s commitments to its openness.”<sup>89</sup> While the DCM, under principle 7, acknowledges that the “day-to-day management . . . should remain decentralized,” it also notes that the “[t]raffic management measures which have an impact on the enjoyment of fundamental rights and freedoms . . . must meet the requirements of international law.”<sup>90</sup> Thus, the DCM lays out a link between the Internet and human rights.

Also on September 21, 2011, the Council of Europe adopted the Recommendation of the Committee of Ministers to member states on the protection and promotion of the universality, integrity, and openness of the Internet. Some notable provisions in the Recommendation provide that the right to freedom of expression “applies to both online and offline activities, regardless of frontiers,” and that “[i]n a Council of Europe context, its protection should be ensured in accordance with” the European Convention of Human Rights and the case law of the European Court of Human Rights.<sup>91</sup> Additionally, the Recommendation suggests that “states should, jointly, and in consultation with relevant stakeholders” formulate plans to respond to the interference with the Internet.<sup>92</sup> The Recommendation, thus, endorses a multi-stakeholder approach.<sup>93</sup> According to Jan Malinowski, the head of the Media and Information Society at the

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<sup>86</sup> Kettermann, *supra* note 1.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Declaration by the Committee of Ministers on Internet Governance Principles*, ¶¶ 7, 9, (Sep. 21, 2011), available at <https://wcd.coe.int/ViewDoc.jsp?id=1835773>.

<sup>91</sup> *Recommendation of the Committee of Ministers to Member States on the Protection and Promotion of the Universality, Integrity and Openness of the Internet*, CM/Rec(2011)8, (Sept. 21, 2011) [hereinafter *Recommendation on Openness*].

<sup>92</sup> *Id.* ¶ 1.2.

<sup>93</sup> *See id.*



Council of Europe, “this was the first time governments had acknowledged they had a legal responsibility to protect the [I]nternet—even beyond their own borders.”<sup>94</sup>

Most importantly, the language of Article 10 of the European Convention of Human Rights resembles that of Article 19 of the Universal Declaration and Article 19 of the ICCPR. Article 10 provides that the right to freedom of expression includes “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>95</sup> The Convention also permits limitations of this right:

[A]s are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>96</sup>

In determining whether limits on the exercise of the freedom of expression on the Internet are proper, the European Court of Human Rights considers three elements: (1) the restriction “must have a basis in the national law”; (2) “the law must be accessible”; and (3) a person should be able to understand and foresee the law’s consequences for him, and be “compatible with the rule of law.”<sup>97</sup> Furthermore, even if the restriction has a basis in the national law, the basis must be designed for one of the purposes specified in the Constitution and the European Covenant of Human Rights.<sup>98</sup> Thus, the European Union has acknowledged that freedom of expression on the Internet should be protected under its law, although it has failed to adopt comprehensive and

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<sup>94</sup> Mark Ballard, *Council of Europe Countries Agree to Protect Internet Freedom of Expression*, COMPUTER WEEKLY, Sep. 26, 2011, <http://www.computerweekly.com/news/2240105693/Council-of-Europe-countries-agree-to-protect-internet-freedom-of-expression>.

<sup>95</sup> European Convention, *supra* note 20, art. 10.

<sup>96</sup> *Id.*

<sup>97</sup> Yaman Akdeniz, *Report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, 25, available at <http://www.osce.org/fom/41091>.

<sup>98</sup> *See id.* at 26; *see also* European Convention, *supra* note 20, art. 10. and text accompanying note 95.

legally binding guidelines on how this should be accomplished.

The European Court of Human Rights recently issued a chamber judgment<sup>99</sup> on a complaint arising from restriction of access to the Internet, while another case *Jankovskis v. Lithuania* is still pending.<sup>100</sup> In *Yildirim v. Turkey*, Ahmet Yildirim, a Turkish citizen, sued Turkey on the ground that Turkey violated Article 10 of the European Convention on Human Rights when it blocked access to Yildirim's own website.<sup>101</sup> Turkey had blocked access to all Google sites in the context of criminal proceedings against another website owner, who had no connection to Yildirim or Yildirim's website.<sup>102</sup> Yildirim argued that Turkey's blocking order "infringed his right to freedom to receive and impart information and ideas."<sup>103</sup> In the Chamber judgment, the Court explained that the Internet is "one of the principal means of exercising the right to freedom of expression and information" and that the blocking of access to Google sites breached Yildirim's right to freedom of expression.<sup>104</sup> The Court found that, according to Article 10, the measure was not "prescribed by law," did not meet any "legitimate aims," and "was [not] necessary in a democratic society to achieve such aims."<sup>105</sup> Accordingly, the European Court of Human Rights concluded that Turkey had violated Article 10 of the European Convention.<sup>106</sup>

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<sup>99</sup> See Press Release, Ahmet Yildirim v. Turkey, App. No. 3111/10 Eur. Ct. H.R. 458 (2012), available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=003-4202780-4985142> (confirming that a chamber judgment is not a final judgment until a request to refer the case to the Grand Chamber of the Court is refused).

<sup>100</sup> *Factsheet- New Technologies*, May 2011, EUR. CT. H.R., available at [http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES\\_Nouvelles\\_technologies\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/CA9986C0-BF79-4E3D-9E36-DCCF1B622B62/0/FICHES_Nouvelles_technologies_EN.pdf) (discussing *Jankovskis v. Lithuania*, No. 21575/08, which dealt with the prison authorities refusal to give a convicted prisoner access to the Internet).

<sup>101</sup> See Press Release, *supra* note 99 (discussing *Yildirim v. Turkey*, No. 3111/10, which deals with the Turkish authorities blocking of Google sites).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (providing that neither the Google websites nor Mr. Yildirim's own website were the subject of the Denizli Criminal Court proceedings and that Turkey failed to consider "whether it had been necessary to block all access to Google Sites" and "whether a less far-reaching measure could have been taken," such as "block[ing] access specifically to the site in question").

<sup>106</sup> See *id.*

Other than *Yildirim*, however, there is a dearth of case law with regard to Internet access. Despite the lack of case law specifically addressing the right to Internet access, the European Union has taken at least some action that the HRC should look to as a model for enforcing the freedom of expression online.

One example illustrating how the European Union reacts to restrictions on Internet use in a member state concerns the French three-strikes law.<sup>107</sup> The three-strikes law is an anti-piracy measure that was proposed by former French president Nicolas Sarkozy, punishing individuals who illegally download music and film by disconnecting their access to the Internet “for up to a year.”<sup>108</sup> In response, the European Parliament adopted a resolution requiring member states to reject legislative measures “conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness.”<sup>109</sup> In supporting this view, the European Parliament concluded that “disconnecting alleged copyright infringers would violate the fundamental rights and freedoms of Internet users.”<sup>110</sup> Thereafter, the French Constitutional Council struck down the three-strikes law as a violation of the right to “free access to public communication services online,” which the Council deemed to be a human right.<sup>111</sup> The French legislature nonetheless passed an amended version of the three-strikes law, providing that a judge would oversee the process of issuing Internet disconnection orders.<sup>112</sup> The public has generally opposed the three-strikes law, but the amended three-strikes law continues in force today.<sup>113</sup>

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<sup>107</sup> *Top Legal Body Strikes Down Anti-Piracy Law*, France 24 (Nov. 23, 2009), <http://www.france24.com/en/20090610-top-legal-body-strikes-down-anti-piracy-law-hadopi-constitutional-council-internet-france>.

<sup>108</sup> *Id.*

<sup>109</sup> *European Parliament Rejects Graduated Response*, LA QUADRATURE DU NET (Apr. 10, 2008), <http://www.laquadrature.net/en/european-parliament-rejects-graduated-response>.

<sup>110</sup> *Legal Authority Kills French Three-Strikes Law*, TORRENTFREAK (June 10, 2009), <http://torrentfreak.com/legal-authority-kills-french-three-strikes-law-090610/>.

<sup>111</sup> *Top Legal Body Strikes Down Anti-Piracy Law*, *supra* note 107.

<sup>112</sup> Nate Anderson, *France Passes Harsh Anti-P2P Three-Strikes Law (Again)*, ARS TECHNICA (Sept. 15, 2009, 3:59 PM), <http://arstechnica.com/tech-policy/2009/09/france-passes-harsh-anti-p2p-three-strikes-law-again/>.

<sup>113</sup> *Legal Authority Kills French Three-Strikes Law*, *supra* note 110.

Current events suggest that the general distaste towards the three-strikes law because of interference with the right to freely use the Internet may ultimately dismantle the three-strikes law.<sup>114</sup> First, only one person has been convicted and fined after having ignored the three warnings, and even then, his Internet was not forcibly disconnected.<sup>115</sup> Second, Aurelie Filippetti, the French Minister of Culture, disparaged the three-strikes law for having failed to fulfill “its mission of developing legal content offerings,” for being too expensive in having to track down and warn violators, and for mandating a sanction—the “suspension of internet access”—that is “disproportionate . . . against the goal.”<sup>116</sup> Although, thus far, she has only committed to cut down on funding for the three-strikes law and its related government agency,<sup>117</sup> her response demonstrates a shift in the administration of French President Francoise Hollande against the three-strikes law.

Hollande himself has a history of opposing the three-strikes law. When the three-strikes law was circulating through the French Parliament prior to his presidency, Hollande, a member of parliament, voted against it and voiced his desire to repeal it.<sup>118</sup> Although Hollande’s stance on the issue during his presidential campaign implied something more along the lines of a “partial repeal,” his plan sought to “remove the threat of connections being cut off if people are accused several times of downloading copyrighted material.”<sup>119</sup> While Hollande was not elected as president solely on the basis of his vote against the three-strikes law, his position on this issue, along with his other views, have

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<sup>114</sup> See, e.g., Glenn Peoples, *France’s Hadopi: 2 Convictions, 1 Fine, 1.25 Million Warnings Since 2009*, Billboard Biz (Dec. 31, 2012, 1:52 PM), <http://www.billboard.com/biz/articles/news/1483616/frances-hadopi-2-convictions-1-fine-125-million-warnings-since-2009>.

<sup>115</sup> *Id.*

<sup>116</sup> Robert Andrews, *France Will Cut Funding to its Piracy Police*, PAIDCONTENT (Aug. 3, 2012, 7:00 AM), <http://paidcontent.org/2012/08/03/france-will-cut-funding-to-its-piracy-police/>.

<sup>117</sup> *Id.*

<sup>118</sup> Glyn Moody, *Leading French Presidential Candidate Would Repeal HADOPI But Keep Net Surveillance*, TECHDIRT (Oct. 26, 2011, 10:35 PM), <http://www.techdirt.com/articles/20111023/05483716480/leading-french-presidential-candidate-would-repeal-hadopi-keep-net-surveillance.shtml>.

<sup>119</sup> *Id.*

nonetheless made him popular among voters.<sup>120</sup>

Recently, a French Ministry of Culture commission on digital content and cultural policy released an interim report on the law, concluding that “[t]he efficiency of Hadopi is hard to evaluate precisely.”<sup>121</sup> The final report will not be released until March with the commission’s official recommendations but, importantly, the testimony gathered from consumer groups for the initial study was critical of the efficacy of the law.<sup>122</sup>

This example demonstrates how Koh’s vertical approach—as exemplified by the movement of the European Parliament, the French Constitutional Council, digital rights groups like La Quadrature du Net, and the public—may have contributed to the slow dismantling of the three-strikes law.<sup>123</sup> Time will tell whether the Hollande Administration will get rid of the three-strikes law altogether, or at least the aspect of the law that interferes with the freedom of Internet use. This example also demonstrates that internalizing an international norm into domestic law is a slow process. At the same time, the result is indicative of positive international steps towards upholding freedom of Internet use.

Additionally, the European Parliament has enacted resolutions to encourage participation from private companies in the promotion of Internet freedom.<sup>124</sup> For example, one such

<sup>120</sup> See Nick Farrell, *Sarkozy Rout Could Kill Three Strikes Law*, FUDZILLA (Apr. 23, 2012), <http://fudzilla.com/home/item/26891-sarkozy-rout-could-kill-three-strikes-law> (indicating that the three-strikes law may have contributed to Francois Hollande’s higher poll ratings to the detriment of Sarkozy’s ratings).

<sup>121</sup> Aymeric Pichevin, *Hadopi, France’s Anti-Piracy Law, Could Be In Jeopardy Following Commission Report*, BILLBOARD BIZ (Dec. 14, 2012, 3:03 PM), <http://www.billboard.com/biz/articles/news/1483889/hadopi-frances-anti-piracy-law-could-be-in-jeopardy-following-commission>.

<sup>122</sup> *Id.*

<sup>123</sup> Note that France recently made its first conviction under the three-strikes law. However, Jérémie Zimmerman, from the French digital rights organization La Quadrature du Net, indicated that this was an anomalous case such that “[i]f this guy hadn’t self-incriminated, he would have never been fined.” According to Zimmerman, “[t]he best remedy against Hadopi is to say, ‘I didn’t do it!’” Cyrus Farivar, *France Convicts First Person Under Anti-Piracy Law (Even Though He Didn’t Do It)*, ARS TECHNICA (Sept. 13, 2012, 1:50 PM), <http://arstechnica.com/tech-policy/2012/09/france-convicts-first-person-under-anti-piracy-law-even-though-he-didnt-do-it/>.

<sup>124</sup> European Parliament Resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union’s Policy on the Matter Including

resolution advocates for accountability from companies in the European Union that create products and services used in furtherance of Internet censorship.<sup>125</sup> This action is particularly important because along with North America, Europe “controls a substantial proportion of supply and demand in both telecommunications and Internet markets,” giving European policy “considerable leverage in the global telecommunications and Internet markets.”<sup>126</sup> In return, some of the large telecommunications operators in Europe have requested “timely advice and support” from European governments when faced with “external pressure to shut down or misuse communications networks” in other countries.<sup>127</sup> For example, European telecommunications operators in Cairo have said that their staffs were “threatened with military force” to comply with censorship.<sup>128</sup>

In 2008, the European Parliament passed the European Union Global Online Freedom Act (EU GOFA), which proposed to treat “[i]nternet censorship by national governments as a trade barrier.”<sup>129</sup> This may require American Internet companies, such as Google, and European Internet companies, such as France Telecom, to block their services in “authoritarian states.”<sup>130</sup> Additionally, if the Council of Europe adopts the measure, the European Union will have to “classify any Internet censorship as a barrier to trade, and would require that the issue be raised in any

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Implications for the EU’s Strategic Human Rights Policy, EUR. PARL. DOC. P7\_TA-PROV(2012)0126, ¶¶ 121-26.

<sup>125</sup> *Id.*

<sup>126</sup> Briefing Paper, Ben Wagner, Researcher, European University Institute, to Directorate-General For External Policies, European Parliament, *After the Arab Spring: New Paths for Human Rights and the Internet in European Foreign Policy*, ¶ 3.2, EXPO/B/DROI/2011/28 (July 4, 2012), available at <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=75431>.

<sup>127</sup> *Id.* ¶ 3.3.1.

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

<sup>129</sup> Sami Ben Gharbia, *EU: Towards a European Global Online Freedom Act*, GLOBAL VOICES ADVOCACY (Mar. 5, 2008), <http://advocacy.globalvoicesonline.org/2008/03/06/eu-towards-a-european-global-online-freedom-act/>.

<sup>130</sup> Eric Bangeman, *EU May Begin Treating ‘Net Censorship As a Trade Barrier*, ARS TECHNICA (Feb. 28, 2008, 12:07 AM), <http://arstechnica.com/tech-policy/2008/02/eu-may-begin-treating-net-censorship-as-a-trade-barrier/>.

trade negotiations.”<sup>131</sup> This proposal was one of the first to bind Internet censorship to trade.<sup>132</sup> While the Council of Europe has not yet adopted the EU GOFA,<sup>133</sup> various transnational actors continue to advocate for the measure.<sup>134</sup> It is, therefore, probable that protecting the freedom of expression on the Internet will one day be internalized within the legal structures of member states, and a measure similar to, if not the same as, the EU GOFA may be adopted.

Furthermore, the European Union has promoted dialogue and training on the issue of Internet freedom and Internet censorship for years.<sup>135</sup> For example, the European Union has planned to “participate in the training of bloggers, online journalists, and human rights activists on how to circumvent [I]nternet censorship and cyber-attacks” in 2012.<sup>136</sup>

*D. How the Efforts of the European Union May Translate to Uphold Human Rights Online in Countries that Censor or Restrict Internet Access*

Even though the European Union has not set up a comprehensive and effective mechanism to protect the fundamental rights relating to the Internet, its actions illustrate how the international community at large may protect Internet usage and enforce fundamental rights in noncompliant states.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Gharbia, *supra* note 129.

<sup>134</sup> See Karel Janssens & Thomas De Meese, *Towards a European Global Online Freedom Act*, CROWELL MORNING, Sep. 09, 2008, <http://www.crowell.com/NewsEvents/AlertsNewsletters/all/Electronic-Communications-IT> (explaining that EU GOFA was proposed by a “cross-party alliance of [the members of European Parliament]” including Jules Maaten, Chistofer Fjellner, Edward McMillan-Scott); see also Members of European Parliament Urged to Support Global Online Freedom Act’s European Version, REPORTERS WITHOUT BORDERS (July 16, 2008), <http://en.rsf.org/european-union-members-of-european-parliament-16-07-2008,27851.html> (explaining that Reporters Without Borders supports the EU GOFA).

<sup>135</sup> See generally Olaf Böhnke, *Europe’s Digital Foreign Policy*, European Council on Foreign Relations, 9 (Sept. 2012), available at [http://internethumanrights.org/wordpress/wp-content/uploads/2012/09/2012-09-11\\_ECFR\\_Digital-Foreign-Policy\\_Boehnke\\_engl\\_FINAL1.pdf](http://internethumanrights.org/wordpress/wp-content/uploads/2012/09/2012-09-11_ECFR_Digital-Foreign-Policy_Boehnke_engl_FINAL1.pdf) (noting European Union efforts to instruct media and activists concerning cyber security and Internet censorship).

<sup>136</sup> See *id.*

Many countries currently employ Internet censorship, thereby restricting Internet access within their countries.<sup>137</sup>

Turkey, as part of the Council of Europe, has been subject to the European Covenant of Human Rights and to the case law of the European Court of Human Rights when claims against it were brought on the grounds of Article 10 of the European Covenant of Human Rights.<sup>138</sup> One issue dealt with the Information and Communication Board of Turkey's (BTK) attempt to adopt a mandatory filtering system that purported to "protect families" from harmful content.<sup>139</sup> The filtering system originally required users to choose from four filtering profiles upon the purchase of the Internet service.<sup>140</sup> The BTK had broad discretion to "include on the black list any website that it believed to be harmful" and the filtering criteria was "arbitrary."<sup>141</sup> When the IPS Communication Foundation challenged the filtering system at the highest administrative court in Turkey and approximately 50,000 people protested against it in public, the BTK adopted the modified filtering system, which was optional, but not mandatory.<sup>142</sup> The modified filtering system, however, was still "arbitrary," with the "child filter" blocking "access to several websites advocating the theory of evolution as well as the website of Richard Dawkins . . . . [And blocking] access to Facebook and . . . YouTube, in addition to . . . the Armenian minorities' newspaper, *AGOS*."<sup>143</sup> Another complaint requested that the BTK filtering system be abolished on the grounds that it lacked legal basis.<sup>144</sup>

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<sup>137</sup> See, e.g., Bauml, *supra* note 28, at 705 (discussing that China has an "advanced and sophisticated system of censorship"); see also Alex Pearlman, *The World's 7 Worst Internet Censorship Offenders*, GLOBAL POST (Apr. 4, 2012) available at <http://www.globalpost.com/dispatches/globalpost-blogs/rights/the-worlds-7-worst-internet-censorship-offenders> (providing that as of 2012, countries like Iran, China, Cuba, Bahrain, Burma, Tunisia, Vietnam, and Estonia are arguably the worst internet censorship offenders).

<sup>138</sup> Freedom House, *Freedom on the Net 2012- Turkey*, 8, REF WORLD (Sept. 25, 2012), available at <http://www.unhcr.org/refworld/country,,,TUR,4562d8b62,5062e8961e,0.html>.

<sup>139</sup> *Id.* at 6.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Freedom House, *supra* note 138, at 6.



Although many sites continue to be blocked in Turkey, the Internet enables users to impart and receive information in ways that “avoid filters and blocking mechanisms.”<sup>145</sup> Thus, YouTube, despite having been blocked, “remained the eighth most-accessed site in Turkey.”<sup>146</sup> This widespread circumvention of website blocking gives credence to the belief that the normative behavior of Internet users may eventually urge the Turkish legal system to prohibit arbitrary website blocking and internalize these normative behaviors.<sup>147</sup>

Several prominent non-EU countries such as Iran and China also restrict human rights on the Internet.<sup>148</sup> For example, Iran has often slowed down the Internet connection speed by slowing down the bandwidth before and during demonstrations organized by the opposition.<sup>149</sup> Iran has also imprisoned Internet users, some of whom were sentenced to death.<sup>150</sup> In 2010, Iranian blogger Hossein Derakhshan was charged with “cooperation with hostile states, propagating against the regime, propagation in favor of anti-revolutionary groups, insulting sanctities, and implementation and management of obscene websites” and was sentenced to nineteen and a half years in prison.<sup>151</sup> Similarly, Egypt blocked Internet access for five days in 2011, resulting in an economic loss of over 90 million dollars.<sup>152</sup> China has a complex filtering system

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See generally Koh *supra* note 12, at 1400-01 (describing the process of developing internalized normative behaviors, which involves the adoption of “external norms” into an organization’s “internal value set”).

<sup>148</sup> See Nazila Fathi, *Iran Disrupts Internet Service Ahead of Protests*, N.Y. TIMES, Feb. 11, 2010, at A6; see also Bauml, *supra* note 28, at 705.

<sup>149</sup> See Fathi, *supra* note 148, at A6; see also Christopher Rhoads et al., *Iran Cracks Down on Internet Use*, FOREIGN MEDIA WALL ST. J. (June 17, 2009) available at <http://online.wsj.com/article/SB124519888117821213.html>.

<sup>150</sup> See *The New Media: Between Revolution and Repression—Net Solidarity Takes on Censorship*, REPORTERS WITHOUT BORDERS (Mar. 11, 2011), [http://en.rsf.org/the-new-media-between-revolution-11-03-2011\\_39764.html](http://en.rsf.org/the-new-media-between-revolution-11-03-2011_39764.html).

<sup>151</sup> *Hossein Derakhshan Returns to Evin Prison*, INTERNATIONAL CAMPAIGN FOR HUMAN RIGHTS IN IRAN (Dec. 12, 2010) (internal quotation marks omitted), <https://www.iranhumanrights.org/2010/12/hossein-derakhshan-returns-to-evin-prison/>.

<sup>152</sup> See *The New Media: Between Revolution and Repression—Net Solidarity Takes on Censorship*, *supra* note 150 (illustrating how important the Internet is to the global and national economy).

glibly called the "Great Firewall of China" that filters out specific keywords relating to "political ideologies and historical events that China has banned from discussion" in order to protect national security and promote unity.<sup>153</sup> China also has an Internet police force, numbered at approximately 40,000 people.<sup>154</sup> In April 2005, Shi Tao, a journalist, was sentenced to ten years in prison because Tao sent an email to an American journalist regarding the Chinese government's warning to journalists not to discuss the anniversary of the Tiananmen Square massacre.<sup>155</sup>

Although there is a discrepancy between Turkey and authoritarian regimes like China and Iran, Koh's transnational legal process identifies ingredients that may aid all of these regimes in internalizing freedom of expression on the Internet.<sup>156</sup> The European Union merely provides a model in which those ingredients are currently at work.

While sanctions, one of Koh's ingredients, are not guaranteed to succeed, if combined with other mechanisms, norm-internalization may occur in the future and enforcement may be achieved.<sup>157</sup> Sanctions may target either the technology-producing companies or non-compliant states.<sup>158</sup> As one enforcement mechanism, the international community can impose sanctions "against companies selling the worst of the worst technologies, such as those outlined by the White House for Iran and Syria in an Executive Order on April 23, 2012."<sup>159</sup> As a corollary, sanctions against the non-compliant states may also be a possible enforcement mechanism. For example, the United States and the EU member states have imposed economic sanctions against Iran

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<sup>153</sup> Kaydee Smith, *A Global First Amendment?*, 6 J. TELECOMM. & HIGH TECH. L. 509, 514, 517 (2007-2008); see also Bauml, *supra* note 28, at 705.

<sup>154</sup> See Nils Hedberg, *China: 40,000 Police Officers Monitor the Internet*, HJALMARSON FOUNDATION (Mar. 22, 2012), <http://www.hjalmarsonfoundation.se/2012/03/china-40-000-police-officers-monitor-the-internet/>.

<sup>155</sup> See Smith, *supra* note 153, at 514-17.

<sup>156</sup> See generally Koh, *supra* note 12, at 1400-08 (using the concept of internalized normative behavior to explain why any country follows international human rights law, or any international law for that matter).

<sup>157</sup> See *id.* at 1407-08.

<sup>158</sup> See generally *id.* (discussing the applicability of sanctions as a tool to encourage compliance with international human rights norms).

<sup>159</sup> Briefing Paper, *supra* note 126, at 19.

over its controversial nuclear program.<sup>160</sup> Recently, Iran's currency dropped significantly.<sup>161</sup> Although it is debatable whether the sanctions *caused* the Iranian currency to drop, they certainly played a role.<sup>162</sup> This rationale will be harder to apply to economically powerful countries like China, as influential companies like Yahoo, Google, and Microsoft want to tap into the Chinese market.<sup>163</sup> Therefore, the international community needs to ensure that these companies either have an incentive to withdraw from China until it complies with international norms or provide a disincentive to comply with the Chinese government's censorship demands. Moreover, while it is difficult to anticipate similar results in an economically powerful country like China, sanctions, combined with other factors that Koh describes, will increase the likelihood that even repressive regimes will internalize and enforce the right to the freedom of expression on the Internet.<sup>164</sup>

Moreover, even repressive regimes have an economic self-interest in maintaining the Internet. In fact, Singapore used to strictly control Internet content to preserve "the nation's political, cultural and moral values," but has since relaxed controls on

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<sup>160</sup> See Scott Tong, *EU, U.S. Announce Tougher Sanctions on Iran*, MARKETPLACE (Jan. 23, 2012), <http://www.marketplace.org/topics/sustainability/eu-us-announce-tougher-sanctions-iran>; see also Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 24, 2012) ("[Targeting persons who have operated] facilitates computer or network disruption, monitoring, or tracking that could assist in or enable serious human rights abuses.").

<sup>161</sup> See Benjamin Weinthal, *Analysis: Will New EU Sanctions on Iran Count?*, JERUSALEM POST (Oct. 14, 2012), <http://www.jpost.com/Iranian-Threat/news/Analysis-will-new-EU-sanctions-on-Iran-count>; see also Elad Benari, *U.S. Treasury: Sanctions Hurting Iran's Access to Global Capital*, ISRAEL NATIONAL NEWS (Feb. 8, 2013), <http://www.israelnationalnews.com/News/News.aspx/165020>.

<sup>162</sup> See Weinthal, *supra* note 161; see also Benari, *supra* note 161.

<sup>163</sup> See Doug MacMillan, *Google, Yahoo Criticized over Foreign Censorship*, BLOOMBERG BUSINESSWEEK (Mar. 13, 2009), [http://www.businessweek.com/technology/content/mar2009/tc20090312\\_381922.htm](http://www.businessweek.com/technology/content/mar2009/tc20090312_381922.htm) (explaining criticism of Google, Microsoft, and Yahoo for censoring Chinese sites in an effort to cater to the large, growing market).

<sup>164</sup> See Koh, *supra* note 12, at 1407-08 (describing five factors that contribute to a successful sanction: (1) application of external political sanctions; (2) development of incentives for compliance; (3) encouragement of liberal policy with regard to human rights; (4) encouragement of adopting and internalizing international norms; (5) and, finally, civil engagement on an international level to facilitate the internalization of norms).

Internet access due to its interest in e-commerce.<sup>165</sup> Even though China is an economically powerful country, China and its non-state actors still stand to benefit from the Internet.<sup>166</sup> For example, the fact that China hesitated to block Google completely after Google removed its Chinese domain, and rerouted it to its Hong Kong website indicates how much China wants internet service providers like Google operating within its markets.<sup>167</sup> Furthermore, because of the accessibility of software that bypasses government filtering systems, controlling the Internet is expensive and difficult.<sup>168</sup> Thus, it may be more economically advantageous for countries like China to instead use their resources to negotiate with foreign business actors in exchange for access to their market via the Internet.<sup>169</sup> Some analysts have also argued that China may decrease its control of the Internet "in order to attract foreign capital, technology, and knowledge."<sup>170</sup> Further, some have argued that due to the increasing number of domestic websites, "a bust due to competition and lack of financial backing" is probable.<sup>171</sup> Thus, China could "incur costs" if foreign investors do not invest in China because of its Internet censorship.<sup>172</sup> At a certain point, China could find that its interest in attracting foreign investors and foreign companies outweighs its interest in censorship.

Koh's liberty theory is the weakest rationale when applied to repressive regimes.<sup>173</sup> Repressive regimes are unlikely to comply under the liberty theory based on rule-legitimacy since repressive regimes, presumably, do not feel that freedom of expression on the Internet is a legitimate human rights issue.<sup>174</sup> Liberty theory based on political identity is also a weak rationale when dealing with repressive regimes. Unlike most of the European Union,

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<sup>165</sup> Eko, *supra* note 10, at 477.

<sup>166</sup> See Tsai, *supra* note 48, at 418.

<sup>167</sup> See Bauml, *supra* note 28, at 727-28.

<sup>168</sup> See Eko, *supra* note 10, at 483.

<sup>169</sup> See *id.*

<sup>170</sup> Husain, *supra* note 31, at 44.

<sup>171</sup> *Id.*

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

<sup>173</sup> See Koh, *supra* note 12, at 1401-02 (providing that states engage in a cost-benefit analysis whether to comply with international law).

<sup>174</sup> See *id.*

repressive regimes are unlikely to be liberal democracies.<sup>175</sup>

Regarding the communitarian rationale, economically powerful countries may ignore the value of the United Nations, of which they are a part.<sup>176</sup> However, states generally want to have “a positive reputation for cooperation” in order to gain goodwill and have a voice among the global policy-making body.<sup>177</sup> Again, although this rationale is weaker when dealing with repressive regimes, there is still a possibility that some states will support the freedom of expression on the Internet merely because the United Nations declares it a human right.

Finally, the vertical story of enforcement involves a variety of actors at the domestic and international level.<sup>178</sup> As illustrated in the example of the European Union, there are many state and non-state actors that advocate for the freedom of expression on the Internet as a human right within the international community.<sup>179</sup> Although these actors have more obstacles in voicing their opinions, they nonetheless may set into motion a process of internalizing the freedom of expression online.<sup>180</sup> For example, the media coverage of the imprisonment of individuals such as Hossein Derakhshan<sup>181</sup> and Shi Tao<sup>182</sup> has been sufficient to raise outrage among domestic and international communities, and among various actors including bureaucrats and non-state organizations.<sup>183</sup> Although outrage, in and of itself, cannot change norms in repressive regimes, outrage of actors at all levels may pressure those regimes to modify their institutions.<sup>184</sup> As Koh

<sup>175</sup> *See id.*

<sup>176</sup> *See id.* at 1406.

<sup>177</sup> Tsai, *supra* note 48, at 427-28; *see also supra* notes 48-51 and accompanying text.

<sup>178</sup> *See Koh, supra* note 12, at 1409-12.

<sup>179</sup> *See supra* Part III.D.

<sup>180</sup> *See generally Koh, supra* note 12, at 1400-01 (explaining the process of norm internalization).

<sup>181</sup> *See Hossein Derakhshan Returns to Evin Prison, supra* note 151.

<sup>182</sup> *See Smith, supra* note 153, at 514-17.

<sup>183</sup> *See Hossein Derakhshan Returns to Evin Prison, supra* note 151; *see also Smith, supra* note 153, at 514-17.

<sup>184</sup> Thomas Risse & Kathryn Sikkink, The Socialization of International Human Rights Norms into Domestic Practices: Introduction, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 18 (Thomas Risse et al. eds., 1999)

states, international human rights law is, after all, enforced “by people like us, by people with the courage and commitment to bring international human rights law home.”<sup>185</sup>

Taking Koh’s transnational legal process and its associated factors into account, and examining the ways in which these situations have played out within the European system as a model, it is certainly possible that even repressive regimes will internalize freedom of expression on the Internet sometime in the future. However, the important factors with regard to repressive regimes will be to focus on economic benefits and the desirability of maintaining a good reputation and presence within the international community.

One concern is that the United Nations may not be in the position to emulate the European Union.<sup>186</sup> The European Union receives “substantial powers from member states and is exclusively competent in certain areas, and is thus able to affect directly the lives of EU citizens.”<sup>187</sup> Furthermore, EU member states are less likely to be repressive regimes, that would be most affected by UN-backed protection of fundamental freedoms regarding the Internet. Despite these differences, the other rationales underlying the transnational legal process indicate that norm-internalization on an international level is possible.<sup>188</sup> Additionally, the United Nations is the appropriate party to guide this norm-internalization process because of its economic, social, and political influences in the international sphere.

#### IV. Conclusion

Even though EU member states have not fully internalized the fundamental freedoms relating to the Internet, the European Union has adopted resolutions and declarations that set out freedom of

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(discussing how various groups, such as domestic actors and organizations in a repressive regime, seek out international actors “to try to bring pressure on their states from outside”).

<sup>185</sup> Koh, *supra* note 12, at 1417.

<sup>186</sup> See Noelle Quenivet, *Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties*, 42 GEO. WASH. INT’L L. REV. 587, 619-20 (2010).

<sup>187</sup> *Id.*

<sup>188</sup> See generally Koh, *supra* note 12, at 1400-08 (explaining how internalized norms can be a factor in determining compliance with international law, including international human rights law).

expression on the Internet as human rights. The European Union has also proposed that violation of those rights may act as trade barriers, and has actively participated in ongoing discussion on enforcements mechanisms. Although blocking of certain sites and Internet censorship still exists to a limited degree in some EU member states, actions taken by digital rights groups, by individuals who file complaints with the European Court of Human Rights against offending states and the European Union itself have represented positive steps toward internalizing the protection of human rights on the Internet.

Although the HRC's recent Resolution is certainly one step towards norm internalization, it suffers from lack of an enforcement mechanism. Therefore, the HRC should look to the European Union's actions for alternative ways to put pressure on repressive regimes if the HRC hopes to enforce freedom of expression on the Internet against noncompliant states. Furthermore, the HRC should look at the European Union's actions within the framework of Harold Koh's transnational legal process theory because the transnational legal process better explains how fundamental freedoms relating to the Internet may be enforced. While the norm internalization process is gradual, the HRC will likely make positive progress towards norm internalization by looking to the European Union's actions within the framework of Koh's transnational legal process theory as a model.

