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## **Freedom of Expression on the Internet**

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## **Abstract**

The Internet for the first time entirely made possible the fulfillment of the Article 19 of the 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.”* On the Internet, everybody is, even unconsciously, sending or receiving information, sharing idea and changing views. However, at the same time it has again showed how diverse the world is and how cultural, political, religious and social differences make the universal dimension of freedom of expression difficult. The dissertation will show how complicated the issue of this freedom on the Internet is within existing mechanisms, national or international, state or self-regulatory. It aim to conclusion that ambiguous interpretation of freedom of expression and of the roles of key actors could only lead to further that it is necessary limitation of this invaluable virtue of democracy. Thus there is a need for better cooperation between namely the governments and other stakeholders, particularly Internet service providers. Fight for freedom of expression should never stop, as the moment we stop thinking of it, it may vanish without being noticed.

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In conducting their research on how the “Notice-Takedown” procedure is used by Internet service providers, Christian Ahlert, Chris Marsden and Chester Yung uploaded two sites – one on a USA and the other on a UK ISP displaying parts of John Stuart Mills’ essay “On Liberty” where he discussed freedom of the press and dangers of censorship. As a result of complaints on illegal content the “US ISP followed up on the dubious complaint with detailed questions” while the “UK ISP took the site down almost immediately effectively censoring (JS Mill “On Liberty”) legal content without investigation.” (Ahlert, C, Marsden, C. & Yung, C., 2004, p.3)

Although it cannot be generally concluded that ISPs always opt for taking down the sites whenever they receive a complaint, this example does illustrate the current situation regarding freedom of expression and its protection of the Internet. Moreover, it says that ambiguous definition and responsibility could only lead to restriction of free speech.

## 1. Introduction

The World is not uniformed, quite on the contrary, it is comprised of many countries, gathering under one umbrella all their histories and cultures, and indeed people, that have determined their societies. Though there are many of them of the same political systems, religion, and language, there are no two countries that are the same in every aspect. Even within one country there might and usually are differences either between the states or between its regions. Over the centuries the World has managed to keep the cultural, ethnical, language diversity, and it is its utmost value. It is due to this diversity, people have always a chance to share their ideas, but more importantly to be able to compare. It was also due to this diversity that countries were given an opportunity to improve their systems and even provoke positive changes in other countries.

However, there is another side of the coin. Diversity is not always welcomed in political or economic world as it is in culture or society. From the very beginning people were fighting for expansion either of their territorial borders or supremacy. It was then argued that it was because the other group was different – they were Catholics or Muslims, they were White or Black, they were royalist or radicals etc. The World has not changed much, though the number of wars, civil wars and other conflicts has increased. Besides great inventions in the 20<sup>th</sup> century, it will also be marked as the century of biological and nuclear weapon, terrorism and collateral damage calculated in human beings. This is, unfortunately, a starting point for any old but unsolved dilemma as wells the new ones, be it a human right or the Internet.

Human rights are universal, or to say, they *should* be universal. Many decades before the Second World War, some counties adopted their charters of human rights and liberties. However, it was after the War, the international community decided that protection of human rights should not depend on one country but of many, if not all. Therefore, it was

the momentum to an effort to codify human rights in international law and the Universal Declaration of Human Rights reflected that. However, even then it was clear to all that human rights issues would be long on the international agenda, as the Universal Declaration was not a binding document. Nevertheless, the step was made and it was important for the humankind. A major obstacle to international protection of human rights is the opposition of most countries to interference with their internal affairs, including questions of the rights of their own citizens. The countries sought to overcome the obstacle through regional arrangements and implementing bodies such as the Council of Europe and its Commission and the Inter-American Commission on Human Rights. (Encarta, 2004)

With such scene it is not surprising why the Internet still lacks proper approach. When it was developed, it was during the Cold War. Even more, the Cold War in a way triggered the mere initiative to work on connecting computers located in remote places. Additionally, it was structured in one country, others only followed, though took active part in further improvement thereof. However, such fact should not and cannot be avoided. Regardless of its history and the fact that it now in a way maintained by a nation based organisation, there is only *one* Internet. It does not recognise nor respect any border, nor does it aim to make them. Going back to the history of Internet and ideas of its engineers, the Internet is developed in order to ease communication firstly within one country and later world-wide, regardless of physical territories. What one can do in one country it can be accessible in another, what one says somewhere s/he says everywhere. And these matters are concerns to and one of the major challenges of the World.

Both phases of the World Summit on the Information Society (WSIS) showed the World was not prepared. Though both phases, including the preparatory work, were excellent opportunity to exchange ideas and policies, to advocate for and against some stands or proposals, the WSIS did not give the World solutions. It was the first time the international community realised the importance of the Internet, the importance of

Internet community, Internet service providers and civil society, and the importance of every attempt to jointly establish the future framework.<sup>1</sup>

The focus of the WSIS was information society governance. There are four possible models – non-regulation, state-regulation, co-regulation and self-regulation. While the first model no longer exists, since there is some sort of regulation of the Internet governance, the other models are still debated. Traditionally, state regulation as a model is approved by developing countries, in order to take part as a decision maker and those countries against existing role of private sector and the role of the United States. Co-regulation is a model promoted by the European Union, while self-regulation is disputed both by states and internet industry. Whatever model is chosen, it has to be uniform. As mentioned above, the exchange of information on the Internet does not correspond with territory, and addressing the Internet partially i.e. incompletely is not adequate enough.

To go back to the human rights and particularly freedom of expression, the Internet for the first time entirely implemented the Article 19 of the 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.”* Simultaneously it can be used for receiving an e-mail, or sending it, posting blog or even broadcast. It can be used for personal purposes, or it could be used for scientific or artistic work. It serves as a tool for governments, promotion of their policies and services or for any other politically involved group or individual. All kinds of communications traditionally used through different media can be exercised on the Internet. The functions of the Internet are constantly increasing. It gathers everyone in one space, as the World gathers nations and people that vary in every aspect. Actually, the Internet could be regarded as the mirror of the World, while the World is terrestrial, the Internet is extraterrestrial. Apart from that, and all the consequences of physical territory, everything else is the same (!)

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<sup>1</sup> The Information society, its governance as well as issue of freedom of information and expression were addressed by regional organisations before. However, the WSIS was the first time the whole international community jointly debated the information society.

Thus, being a forum of countless known and unknown transmitters and receivers, the Internet is at the same time a medium through which important interests or other human rights also inherited as the right to freedom of expression could be harmed. What can be legal in one country it may constitute severe criminal offense in the other. The dilemma how to solve such problem, either before or when, it occurs in the light of all above mentioned aspects is the dilemma of this dissertation.

### **1.1. Aim of dissertation**

The aim of the dissertation is to try to provide an answer to a question whether the right to freedom of expression enjoys the adequate protection on the Internet, and, if not, to which extent and by whom it is limited.

The answer would depend on the following questions:

- Who are the main actors enabled to establish rules, regulatory framework and mechanisms of protection of freedom of expression on the Internet?
- Does the existing regulation on freedom of expression on the Internet provide sufficient protection thereof?
- Which regulation is set by law and which is set by diplomacy and self-regulation?
- What is the level of protection of freedom of expression?
- Who is to be ultimately responsible for protection of the freedom?
- What are the limits of the freedom?
- What are the further steps society i.e. main actors have to envisage and take?

For the theoretical basis, the dissertation will draw on J.S. Mill's stand on freedom of thought and expression as the important value for self-expression of every individual, and on the other hand, his argument that justified limitation of expression must be based on adequate application of harm principle. Mill's theory will be used as a starting point that freedom of expression is a prerequisite for enjoyment of other human rights and that



limitation thereof are to be exceptional and justifiable not only by existing rules but by the freedom of expression principle.

For the legal basis, the dissertation relies on various international treaties as well as political agreements incorporated in different level documents. However, the principal documents are the United Nations Universal Declaration on Human Rights as the custom law applicable to all states and other actors, and the European Convention for Protection of Human Rights and Fundamental Freedoms and its Article 10.

The principle of freedom of expression will be drawn from the European Court on Human Rights' interpretation as given in the case *Handyside v. the United Kingdom* – “[the Article 10 (2) on restrictions of freedom of expression] 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.” (Handyside 1976: 49)

The dissertation will also use the existing self-regulatory mechanisms in order to estimate whether those mechanisms provide for farther limitation of free expression.

One of the arguments the dissertation will try to elaborate on is that the private sector cannot be held liable for the content and should not exercise the role of judiciary and law enforcement. The responsibility of protection and, when inevitable, limitation of freedom of expression is that responsibility of namely international community that needs to seek a world-wide i.e. an Internet-wide regulation as partial content control is unfeasible.

## 1.2. John Stuart Mill's Theory

In his essay "On Liberty" John Stuart Mill explores the nature and limits of the power that can be legitimately exercised by society over the individual and the liberty of thought and discussion.

Mills argues that every power aims in having more power. The evolution of society shifted the conflict between one ruler on one side and the people of the other, to the conflict between the people and their elected delegates, and finally to a democratic republic that "came to occupy a large portion of the earth's surface, and made itself felt as one of the most powerful members of the community of nations." However, the power of majority Mill regards as "the tyranny of the majority" arguing that even in a democratic society there is no true power of people over themselves.

The majority in the power is, according to Mill, nothing else but the group of those who managed to be accepted as the majority. The people, at least those who elected the government, do believe that rules are adopted by all members of the society and, therefore, all need to obey them. However, there are always individuals that do not accept those rules. On the other hand, there are not doubts that some rules of conduct must be imposed by law. These rules would vary from age to age, from society to society. Other rules imposed by society are incorporated in their custom. These rules Mills regards as even more dangerous due to their "magical influence", as, while the law needs justification, a custom does not. Mill believes that "[t]he practical principle which guides them [people] to their opinions on the regulation of human conduct, is the feeling in each person's mind that everybody should be required to act as he, and those with whom he sympathizes, would like them to act." This "likings and dislikings of society, or of some powerful portion of it," is the determination of rules that are to be commonly observed under the penalty of law or opinion.

Mill argues that everyone should be entitled to act, therefore, think as s/he wants, as long as his/her action does not cause harm to others. Only then, in order to prevent harm to others, society can involve. However, Mill does not give large space for such justified

practice of the society, as it cannot be taken in any case. There is an exception of the principle that everybody has a right to act upon his/her willing even though such act might hurt him/her. Mill does not apply his theory to children, as those who need to be taken care of by others, but “only to human beings in the maturity of their faculties”. Thus, children need more protection not only with regard to actions of others that might be harmful for them, but also protection from their own actions.

With regard to the interference of the society in one’s behaviour, Mill aims to estimate when the interference would be justified. Although he gives a general formula that interference could be justified in order to prevent person’s action harming others but may not interfere if the action harms only the person’s wellbeing, it not easy to estimate when an action may go beyond its creator’s realm and whether the possible harm is sufficient enough for society’s protection. Mill elaborates on several examples of justified and unjustified interference of the society giving the emphasis on freedom of thought and expression. This freedom corresponds with majority – minority conflict in every society and it can be applied to any community, regardless how small or big it is.

For Mill, freedom of thought is a precondition for any conclusion, stand and rightful or wrongful decision a person may take. He deems even false opinions valuable and essential for further discussions and improvements of ideas. A government, even being supported by each and every member of the community, that does not exert any “power of coercion unless in agreement with what it conceives to be their voice” cannot use that power as any other government, as according to Mill, “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.”

The main reason why censorship should not be practice is the mere fact that one is never absolutely sure that the opinion of other is a false one. As an example of interference in one’s actions and expression as false, Mill elaborates on Socrates, accused and sentenced to death for being “by his doctrines and instructions, a ‘corrupter of youth’”. Thus any opinion even the one that would be easily rejected afterwards deserves to be spoken, as it

may contribute to reaching an opinion that would be true. Questioning as an action of re-examining continuously one's opinion is always a fruitful action, as one cannot be certain that his/her opinion will be true eternally; there may always be some new elements that may twist the facts and therefore opinion. This ability Mill connects to any intellectual person, as one always in quest for the rightful opinion and therefore, always reconsidering his opinion.

### **1.3. How can Mill's theory be applied to the Internet?**

First of all, the theory of society can be applied on the Internet, as the unique form of a society – the information society. Any person, be it natural or legal, is a member of the society and therefore participates in the construction of its rules and customs. This dissertation will elaborate on existing rules, and more importantly customs incorporated in the self-regulation of private sectors i.e. Internet service providers.

Another point of departure is thus Mill's explanation of possible tyranny of majority over dissent opinions resulting consequently in suppressing the right to freedom of expression on the Internet. However, the suppression is not always of the governments, although they usually tempt to exercise their powers on limiting human rights in general. The suppression is sometimes caused by private sector in their aim to gain profit and collaborate with governments that by excessive penalties limit their citizens in their right to expression. Therefore, the focus of the dissertation is both national and international regulation and their effect on freedom of expression as well as mechanisms enforced by Internet service providers to block access to and filter content that majority deems harmful to other.

However, the dissertation, like Mill's theory, does not advocate for non-existence of any regulation. Quite the contrary, society needs to have the relations and conduct regulated, but the question is to what extent and whether such regulation is justified. This particularly refers to protection of children.

Finally, the dissertation entirely supports Mill's stand that even a false opinion has its value and therefore cannot be neglected, as, according to him "though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any object is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied."

Mill's theory could reach even further – to identify what are the rules set by law and what are the rules set by custom. Having in mind that the Internet is still 'young' in its development in terms of society and that it, at the same time, is a society, one could argue that the rules set by law still lack. It is the case because the community has not reached the consensus on its governance, it is still pending. On the other hand, national or regional legislation and even self-regulation and terms of reference of private sector as well as human rights civil society organisations could be regarded as customs. However, this might be an issue for another thesis.

## **2. Actors**

The way the Internet has developed changed the traditional primacy of states and their organisations in defining rules applicable to all. The key role of states in international relations has been positioned since 1648 and the Peace of Westphalia. However, in 19<sup>th</sup> century states started organising frequent meetings addressing issues of common – regional and global – concerns. The increasing need for these meetings resulted in establishing first international organisations. Thus, the part of the "competence" previously exclusively held for national states was transferred to a new actor – intergovernmental organisations. The relation between states and their organisations is very complex, as, though the foundation of organisations entirely depends on states, they continue functioning as a separate actor in international relations. Moreover, an

organisation does not necessarily reflect policy of all its members. Other important actors are national companies acting autonomously from their governments in accordance with their own interests in the country of origin and abroad, as well as trans-national corporations. Their influence in certain periods of history was so high and in not few cases their interests prevailed over the national interests of states of their businesses (Dimitrijevic, 1996). Civil society not only plays an important role on a national level but also on international, and this is very true for international non-governmental organisations promoting particular interests or human rights.

States, intergovernmental organisations, private sector and civil society organisations are the key actors in international relations during centuries. However, the balance between them has been transformed when the Internet is in question.

This chapter shall elaborate on most “powerful” actors and Internet and freedom of expression policy makers.

## **2.1. States**

Addressing the issues concerning the Internet indeed requires co-operation between nations, the international organisations, private and civil sector, i.e. a well-established multi-stakeholder approach. This approach was emphasised in official statements during both phases of the World Summit on the Information Society and preparations thereof, and it is set as the first key principle of the Geneva Declaration of Principles. The Geneva Plan of Action further defines the roles of all stakeholders distinguishing states from others. However, not all states and their politics have the same impact on the Internet and respect of freedom of expression. There are some that set the rules and others that follow those, as well as those promoting freedom of expression as an essential value to any society and those denying the freedom.

The Internet was developed in the **USA** within the Department of Defence, through the establishment of the Advanced Research Project Agency in 1957. The first network

between four sites was launched in July 1968, connecting the University of California at Los Angeles, the University of California at Santa Barbara, the Stanford Research Institute and the University of Utah. (Hafner, 1998:145) Later on, the ARPANET project started and more sites and institutions were connected not only in America. In 1998, the US Government forwarded the competence in regulating allocation of IP addresses, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions through memorandums of understanding to a non-governmental organization - ICANN. Internet at that time was a growing phenomenon and the US tried to keep its position on the Internet through ICANN. This history of early stages of the Internet is very important to comprehend stands of the US in the field of regulations. Their stands are to keep the private sector on the agenda and to encourage them to continue their work. Moreover, biggest companies – software companies, internet service providers, are founded in the US and even conduct their businesses under US laws.

With regard to freedom of expression, the USA position is strict – “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...” The First Amendment to the US Constitution is the ultimate rule. Because of this constitutional principle the US has refused to sign the Additional Protocol to the Council of Europe’s Cybercrime Convention. However, this does not necessarily mean that the US Government and/or the Congress of the Senate would refrain from passing regulation indeed abridging freedom of expression. In 1996, the Congress adopted the Communication Decency Act forbidding uploading indecent materials on the Internet, including web pages, newsgroups, chat rooms, or online discussion lists. Wide range individuals, professionals and association raised the issue of freedom of speech as protected under the First Amendment, challenging the Act before the Supreme Court that ruled that the Act was unconstitutional.

Moreover, after September 11, the US has strengthened its regime of data processing that indirectly reflected on freedom of expression in the country.

Like the USA, **China** is a strong actor though the origins and, particularly, politics of the two differ. However, its position would stand opposite from the US. With over 1.3 billion people and increasingly growing economy, China is a country which politics affect not only the Asian continent but also the whole world. Being successful on Chinese market is a tremendous income any company would desire. However, China was for long time away from international relations, focusing its diplomatic activities namely on bilateral negotiations and agreements. Starting with the end of last century, China began its integration into the global community starting with signing the two UN covenants (in 1997 and 1998) and accessing the WTO. (Nye & Donahue, 2000, p.209) Although the Covenant on Economic, Social, and Cultural Rights was ratified in 2001<sup>2</sup> and this news was captured by most media, the ratification document for the Covenant on Political and Civil Rights is still pending.

Addressing the First Phase of the WSIS, China emphasised co-operation of all stakeholders with the leading role of inter-governmental organisations. The statement referred to freedom of speech and the need for guarantees and responsibilities in the context of different social systems and cultural diversity. The same approach illustrated the statement at the Tunisia WSIS phase stressing that a balance should be set between freedom of expression and rule of law.<sup>3</sup> However, according to various surveys, China is a unique traditional system example of information flow control and very limited access to information, while the Internet is censored as it is all print media. (Ibid. p. 222) This policy resulted in blocking of search engines, closing Internet cafes and even arresting citizens.<sup>4</sup> With such policy there is a little space for respect of freedom of expression. Thus it is expected that China would enforce its policy to all companies, national and foreign, wishing to provide services in its territory.

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<sup>2</sup> For China's view on "merely three years and four months" that took for adoption of the Covenant, see <http://www.china.org.cn/english/2001/Mar/8285.htm>

<sup>3</sup> Both statements are available at <http://www.itu.int/wsis/index.html>

<sup>4</sup> As stressed in the Human Rights Watch's address to the UN Commission on Human Rights, see <http://www.hrw.org/un/chr59/china.htm>



## 2.2. Intergovernmental Organisations

Intergovernmental organisations are direct outcome of multilateral diplomacy. Both the capacity and competence of an international organisation is defined by member states in constitutional documents. This and other documents are to determine the policy, goals and objectives, scope of activities, structure etc. However, once formed, an international organisation continues to act as a separate actor. Nowadays, there is a great number of intergovernmental organisations that vary in their capacities, influence, competence and other. There are global and regional organisations, with broad and narrow scope of work, those that are closer to forums and those closer to confederations, those of remarkable influence to national policies and those without, etc.

Most of these organisations recognise the importance of collaboration with civil society and private sector, though not many would let go the leading role. Not only that these organisations should solve issues, dilemmas and problems individual nations cannot do by themselves, but there are always heading to future. On the other hand, the future of the World depends on, amongst other, development of technologies and science. Deployment of the Internet brought up many issues on the global agenda – digital divide, access to all, open source policy versus strict copyright protection, free software etc. It also raises issues of national policies, cultures, language and societies at large. The mere fact that the Internet overcomes any border and, therefore, national legislation, and problems that countries are trying to deal with, illustrates, once more, that the World is not uniformed place but comprises of differences and varieties in all aspect of life. This is the reason why most of international organisations have addressed the Internet and directly, or indirectly, freedom of expression.

Among wide range of intergovernmental organisations the **European Union** is indeed a unique one, being more supranational than international organisation, since member states have decided to transfer a large portion of their traditional competences to the Union. Thus, it more a confederation of states with unified policy on namely economic issues. With regards to the Internet and the Information Society, the EU has been actively involved promoting co-operation among all stakeholders and particularly the established

role of the ICANN. The EU position toward freedom of expression is defined in accordance with the European Convention and its Article 10 as a pillar of human rights protection policy. As a balance to freedom of expression, the EU has been calling for greater respect of rights of minors and others. However, it does not mean that all twenty-five, future twenty-seven Member States have entirely the same approach to legal and illegal content. Countries such as France and Germany, forbid racist and xenophobic speech and have a strict policy – such content should be banned both offline and online. This could lead to restrictions more than it is necessary, as filters used to prevent access to websites and/or web logs (blogs) transmitting such messages may filter access to those that are not. Similar rationale applies to the issue of protection of minors. Moreover, through E-commerce Directive, the EU has transferred the liability to Internet service providers. Choosing between freedom of expression and liability in those margin cases, reasonably ISPs would opt for taking-down a web site in question.

### **2.2.1. Global Intergovernmental organisations**

The **United Nations** is the most important intergovernmental organisation founded on 20 October 1945<sup>5</sup>, and it has been a forum of many conventions and other multilateral agreements. The UN is a unique organisation that after the Second World War gathered countries of entirely different politics. Human rights issues are the core issue of the UN, and the Universal Declaration of Human Rights is the pillar of international law of human rights and a basis for all later human rights documents. The UN System comprises of specialised agencies within which countries further address matters of global concerns.

With regard to the Internet, the leading specialised agency is the **International Telecommunication Union** under which auspices the WSIS was organised. The decision that ITU should organise the WSIS was adopted at the Plenipotentiary Conference in Minneapolis in 1998.<sup>6</sup> Prior to the WSIS and later on, ITU strongly advocated for its central position in regulating the Internet. It is not quite certain whether this was an

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<sup>5</sup> The UN Charter was signed on 26 June 1945 by fifty official state delegations in San Francisco.

<sup>6</sup> Resolution available at: <http://www.itu.int/wsis/docs/background/resolutions/73.html>

attempt by ITU itself of governments wishing to either take over or be more involved in the matter. The core issue of the Geneva Phase was the issue of Internet governance, a concept which was defined broadly by ITU as not only concerning those “pure technical aspects” such as IP number allocation but also security including spam. Like with any new term, definition of spam may be ambiguous and excuse for government to suppress freedoms.

As a specialised agency with a mandate to promote free flow of ideas by word and image, **UNESCO** focuses on the Internet - firstly, as it is a medium where these ideas are rapidly and easily exchanged, and secondly, as there is always a threat/possibility that such exchange could be censored by national government. Thus, UNESCO is always a part of negotiation processes, advocating, in accordance with its goals, for protection of freedom of expression.

Globalisation and demands of free trade policies in most issues including media industries is addressed by **WTO**, its regulations may indirectly influence freedom of media, thereby freedom of expression. On the other hand, the efforts of some countries to postpone free market in media industries, and also Internet, or even avoid such process are also some of the means of affecting freedom of expression.

### **2.2.2.. Regional Intergovernmental Organisations**

Among regional political intergovernmental organisations regarding human rights issues, the most developed is the **Council of Europe**. The Council of Europe has developed strong institutions and this particularly refers to the European Court of Human Rights. From the aspect of human rights and legally speaking, it is the supreme judicial authority in almost whole Europe. The Council mainly operates within territories of its member states, though its regulations – conventions, are not always restricted to members. The Cybercrime Convention and its Additional Protocol are some of the examples of such practice. The Council of Europe is not a strong international actor, as an individual one. This is mainly due to the powerful role of the European Union in the same region, now

having twenty-five members with a strong policy for non-member states as well. However, in a case of freedom of expression violation, an individual residing in an EU member would address the European Court of Human Rights in Strasbourg, not EU institutions, as the European Court developed strong practice. Therefore, the Council is important from a legal aspect – the Court decisions are binding to member states.

The **Organisation of American States** operates in thirty-four member states on the American continents focusing on co-operation between the members on promoting human rights, fighting poverty, corruption and other. However, unlike the Council of Europe, the OAS does not have such an important impact to their members; therefore, the impact to the policy of freedom of expression on the Internet is insignificant. Nevertheless, there are some efforts of the OAS addressing this issue. Thus, in December 2005, the OAS Special Rapporteur on Freedom of Expression jointly with the UN Special Rapporteur on Freedom of Opinion and Expression and the OSCE Representative on Freedom of the Media issued the Joint Declaration on International Mechanisms for Promoting Freedom of Expression.

The **Organisation for Co-operation and Security in Europe** and its Representative on Freedom of the Media advocate for respect of freedom of the media, i.e. freedom of expression in fifty-six member states. Since 2003, the Representative has been organising the Amsterdam Internet Conferences each focusing on important aspects of freedom of expression of the Internet, e.g. Internet governance, examples of policies limiting access to the Internet and free flow of information etc. The Representative has been active in other forums and events promoting more positive approach in fighting hate crime on the Internet.<sup>7</sup> With regard to national legislation, the OSCE and the Representative either through delegations in Vienna or field offices have regularly raised concerns about law or draft laws. Through internal and external expertise (both legal and political) they advocate for changes. This influence is very visible in Eastern European Countries and Caucuses, mainly due to the OSCE presence there and common expectations that these members often tend to limit access to the Internet, or freedom of the media in general.

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<sup>7</sup> The OSCE Meeting on the Relationship between Racist, Xenophobic and Anti-Semitic Propaganda on the Internet and Hate Crimes organised in June 2004 in Paris.

Regional organisations in Asia and Africa are not of high impact on freedom of expression on the Internet. Due to digital divide, African countries are mainly focused on bridging this divide and open source. On the other hand, majority of countries in Asia are still regimes of access control, and cultural diversity indeed determines acceptable political, social or cultural debate. China, as mentioned above, is one of the examples of such regimes.

### **2.3. Non-governmental organisations**

The role of non-state actors has been crucial for development of the Internet since early stages. From the beginning this role has been established on global level. However, there are many non-governmental organisations and, indeed their influence varies. On the other hand, the concept itself is wide – so many different entities fall into this concept, e.g. private sector – for-profit and not-for-profit, civil sector – ICT professional and human rights organisations, political groups etc. For all of them, in order to be regarded as an actor in international relation, it is important that they act not only in their countries (for those that are nation based) but on a global scene as well. Moreover, it is important that they act independently from other actors, particularly governments. The latter criterion is not always easily assessable.

Nevertheless, even accomplishing both preconditions is not necessarily a guarantee that an NGO would have immense influence on other actors, namely governments. There are many factors that determine the strength of an NGO in a society, i.e. in the information society - Internet.

As mentioned above, there are many different non-governmental organisations, and generally they are divided into private sector and civil society organisations.

Before elaborating on relevant Internet service providers and civil society organisations, one institution indeed requires to be differentiated from the others, and that is the Internet Corporation for Assigned Names and Numbers – **ICANN**. It is an internationally

organised non-profit corporation established and has been since 1988 a leading organisation, namely the only one, for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. This has been done through memorandums of understanding between ICANN and the US Government. In September 2006, ICANN sign the Joint Project Agreement with the Department of Commerce prolonging the ICANN's competence for another three years, until September 2009.<sup>8</sup>

The position of ICANN is more of, as it is always emphasised by ICANN itself and its supporters, rather of technical than of political nature. However, the Internet is definitely a space where these two natures cannot be easily distinct, as all technical measures have impacts on society and therefore politics and vice versa. Thus the role of ICANN is important, particularly with regard to its Whois database and possible effect to the issues of privacy, data protection and right to anonymity i.e. to freedom of expression. Another issue are more frequent demands in general and particular US government inquiries for personal data and retention thereof as a part of the fight against terrorism.

Private sector and particularly companies providing Internet services are very influential due to many reasons. One of them is certainly the way the Internet develops – most of the new possibilities, software, services are directly introduced by private sector. Additionally, in the lack of global regulations regarding numerous issues and, on the other hand, the global aspect of their work, these companies were in a way forced to think ahead and establish framework of, firstly, their own terms of operation and consequently they have set rules for individual users, later providers, states etc. Indeed these companies are usually founded within a legal system of one country, though they may open branch offices in other countries i.e. systems that differ. Another reason for their strong position is of financial sources and profit in general. Some of these companies earn more money than it is the GDP in numerous countries.

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<sup>8</sup> The Agreement is available at:  
[http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA\\_09292006.htm](http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/ICANNJPA_09292006.htm)

### 2.3.1. Private Sector

Among various **Internet service providers**, there are three companies which not only earn billions of dollars per year but, because of that, represent very strong counterpart of every country and therefore participate in the global promotion, protection, and even infringement of freedom of expression. Their impact on online culture, regulation and particular activities is immense. These are Google, Yahoo! and MSN. In comparison to the latter two, Google is the most used search engine with a 54% market share, while Yahoo! and MSN have 23% and 13%.<sup>9</sup>

**Google** was established in 1998 in the United States, i.e. under the US laws. First it was a classic search engine and through years it has grown and being providing variety of services to its users. In the recent financial release Google reported revenues of \$2.69 billion for the quarter ended on 30 September 2006.<sup>10</sup> It is often said that if a web page cannot be found on Google's search, it does not exist at all. Google is indeed the main and the most important Internet service provider. However, there are many controversies attached to Google and its business, usually linked with data protection, filters and cooperation with those governments promoting and enforcing some more strict rules regarding the content on the Internet.

Like Google, **Yahoo!** Inc. was established in the United States in 1994 and it also provides services worldwide regardless of frontiers. It has been the first ISP which services have been subjected to different, confronting regulations in terms of Internet content and the case opened the issue of enforcement of court decisions addressing freedom of expression. Not only related to that particular case, it has been widely exposed to criticisms by various human rights advocates and organisations.

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<sup>9</sup> <http://en.wikipedia.org/wiki/Google> last visited on 23 October 2006.

<sup>10</sup> [http://www.google.com/press/pressrel/revenues\\_q306.html](http://www.google.com/press/pressrel/revenues_q306.html)

**MSN** – Microsoft Network is founded by Microsoft and it as a network of Internet services. It was established in 1995, also in the US. The similar extent of criticism that is addressed to Google and Yahoo! is addressed to MSN as well.

These three corporations are the main competitors on the Internet scene without clear distinctions. They are all profit oriented. They are all founded in the US under the US laws, i.e. under the First Amendment in the atmosphere of freedom of expression as the utmost value. All of them work globally, there is no place on Earth one cannot use some of their services. They collect and maintain different information on their users and possess precious databases and archives. In some cases they may be only ones that could reveal some information that are essential for legal and legitimate investigations of “serious” criminal offences. However, it is due to these and other particularities that these companies are at the same time threat to an individual, his/her safety and his/her freedoms and rights. Great number of freedom of expression violation cases involves one of these three. The question is whether these companies, being private or public but not owned by any state, should take role of public service provider and should they bear liability of states in their obligations to protect fundamental freedoms? One the other hand, the fact that these companies and services they provide indeed enable millions of people to share, give and obtain information, therefore exercise their fundamental freedom, cannot be neglected. In many cases they help people free their opinion.

Besides these “big” Internet service providers, there are numerous and various companies and other entities offering their services online, connecting individuals to the Internet, and/or providing different tools of blocking some information, viruses or spam. Most of them are essential for an individual, as, for instance, they provide access to the Internet or provide software for blocking pornographic material or filtering the accessible material in general. However, if used more broadly, they may indeed go beyond appropriate freedom of expression limits. In some countries, there is a monopoly over the Internet access – those providers are usually state owned. In such cases, no one cannot be sure that some government eager not to have its policy scrutinised would not “protect its citizens from being confused or misled.” Whenever a provider has been empowered to have its rules that may infringe free expression applied on even those that would opt for different



service, however, with no such choice given, the provider not only can be a threat to freedom but, in this regard, an important actor in the international arena as well.

### **2.3.2. Civil Society**

**Civil Society organisations**, as in all human rights and freedoms issues, play a crucial role. It is mostly owing to them that human rights have become recognised worldwide, although the harmonisation is rather on the level of principles than of practice. Usually, they advocate for ideas their individual members deem important. Thus it is an individual concept becoming a global one that is if the organisation operates beyond the country of origin. However, the concept of human rights, particularly if solidly based with arguments, is easily acceptable either by other groups or governments, or both. The position in a society, national or international, would depend on idea they promote, activism and, indeed, funds. In countries of developed democracies, these organisations are very influential towards their governments and decision makers in general. Their influence in less developed countries, particularly in totalitarian, authoritarian regimes or dictatorships, has a little bit different path – they advocate for their principles through the governments of democratic systems and international organisations.

What civil society organisations can do is raising awareness about particular phenomena, politics or other. They do not have any authority to pass decisions. They only make other people, politicians and officials informed, aware about a situation calling for respect of human right and, in most cases, proposing a course of action. These organisations have helped many governments to adopt laws, policies and pass decisions favouring freedom of expression and acknowledging it as one of the pillars of every democratic society.

However, with regard to free expression, not all civil society/human rights organisations would advocate for freedom – there are many organisations lobbying for limiting this freedom in order to protect rights of others or other interests. These organisations vary in their field and scope of work from children rights protection to promotion of religious practice and tradition.

Additionally, there are organisations that by expressing their ideas may and sometimes do harm others. According to many, these organisations misuse and abuse the right to free expression. They, for example, promote hatred or even call for violence against a group due to the difference in heritage, culture, nationality, sexual orientation and other. To certain extent not only they are a threat to that particular group but to the society as well. They can as well be very influential as those.

An organisation such as the **Reporters without Frontiers (Reporters sans frontières - RSF)** is definitely one of the best examples how non-governmental organisation can promote effectively free speech and freedom of those who would dare to express opposing opinion. It was established in France, however, it is internationally recognised as the top non-governmental organisation advocating for press freedom and freedom of expression in general. Besides promoting free speech and reacting in cases this freedom is violated, the RSF particularly focuses on the Internet. Recently the organisation has organised a voting for i.e. against one of the thirteen countries labelled is the “Internet enemies”. During the two-day voting, anyone could have given his/her vote to for instance China or Tunisia. The aim of the activity was to make people aware of the fact that free access to the Internet, free flow of information and free opinion did not exist everywhere, but, moreover, in some parts of the globe they were abridged. Every year, the RSF publishes its annual report on press freedom worldwide. According to the RSF, 59 cyber-dissidents have been imprisoned, out of which 50 were imprisoned in China.<sup>11</sup> The RSF constant advocacy for free speech is argued with a stand that cases of abuse of that freedom are less important than cases of its absence, as the “attacks on the free flow of information are relative.”(Reporters Without Borders, 2003)

There are numerous organisations aiming to protect right of individuals who belonging to a particular group are often a target of other groups and/or individuals. With increasing deployment of the Internet, most of these organisations, namely those promoting their activities also abroad, have a special focus on the Internet. The **Anti-Defamation League (ADL)**, a non-governmental organisation founded in 1913 in the USA with the immediate objective “to stop, by appeals to reason and conscience and, if necessary, by

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<sup>11</sup> [http://www.rsf.org/rubrique.php3?id\\_rubrique=119](http://www.rsf.org/rubrique.php3?id_rubrique=119) visited on 1 December 2006.

appeals to law, the defamation of the Jewish people”<sup>12</sup>, is just one of the examples how an organisation although usually promoting a positive approach in fighting the hate crime on the Internet can provoke limiting the freedom of expression. In July 2006, the ADL “called on the U.S. Treasury Department to take action against any U.S. companies that provide Internet hosting to Al-Manar TV, the Lebanon-based satellite television station operated by the terrorist group Hezbollah.”<sup>13</sup>

Every country, organisation and individual pays a special attention to the protection of children and promotion of their well-being. While there is no consensus what the freedom of expression is and to what extent, for example, a disturbing opinion can be tolerated, with regard to child pornography all parties agree that it is intolerable activity on the Internet and as such it should be banned, prosecuted and punished. However, under the protection of children there are other issues that might be in conflict with ideal of free expression, and that is a harmful content on the Internet. The **INHOPE** Association<sup>14</sup> was founded in 1999 as a network of eight hotlines in Europe to prevent sexual abuse of children and exchange of child pornography on the Internet. The Association also aims at combating racist and xenophobic material on the Internet. By that activity, even not fully supporting that, they may cause the unnecessary limitation of the freedom of expression.

In the overview of cases worldwide showing the link between on-line hatred and call for violence on one hand and violence in real life on the other, the International Network against Cyber Hate (INACH) argued that growing number of websites promoting hatred initially started as forums and news groups. According to INACH, the Internet was seen as a tool for spreading of Neo-Nazi’s ideas in its early stages, using Bulleting Board Systems (BBS) since 1993. (INACH, 2004, p.4) Now banned but active in 2001 to 2003, a French network website (sos-racaille.org) consisting of 26 Internet sites in total was a meeting point for people that committed, both during the activity of the network and before, numerous criminal offences racially motivated – from slander to death threats and computer piracy. (Ibid, p.9)

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<sup>12</sup> [http://www.adl.org/main\\_about\\_adl.asp](http://www.adl.org/main_about_adl.asp)

<sup>13</sup> [http://www.adl.org/PresRele/Internet\\_75/4857\\_93.htm](http://www.adl.org/PresRele/Internet_75/4857_93.htm)

<sup>14</sup> <http://www.inhope.org/>

One of the most “famous” website that human rights advocates would often refer to as an example of hate on the Internet is White Pride World Wide, a forum promoting the race of white people. The number of organisations, movements or less formalised groups promoting hatred amongst nations, glorifying crimes or wars racially motivated, inciting racial or other hatred is vast. Not only that they can insult a person reading their opinion but they can cause a real action of violence. In that sense they are danger or to say they may present a danger to an individual i.e. to a society. The problem lies with the best approach in addressing such activities, as by fighting against such forums one may limit free speech even in those cases where such limitation is not justifiable. It is therefore important to balance in each and every case. With regard to relationship between the freedom of expression and the Internet, such websites cannot be regarded as actors but as a test for all other actors.

### **3. Regulating Freedom of Expression**

Freedom of expression is a fundamental human right enabling individuals to freely express their opinion and views, to take part in political or other debates opening the possibility to criticise old and propose new concepts. Freedom of expression is about ideas and information that might offend or shock or even disturb a state and society not only those favourable to existing situations. (*Handyside v UK* (1976) 1 EHRR 737, para. 49) It is not only about political expression as it is also a way of performing artistic and literal work and a precondition for exercise of other freedoms and human rights. (Nicol, 2001: 3) However, this freedom is not an absolute human right since it is determined by other fundamental human rights and legitimate public interests. Due to that reason, there is no formula that would enable defining the scope of freedom of expression and its limits. This has to be assessed in every individual case. Additionally, freedom of expression is not a ‘static category’ – it has been developing through history, and what is

now regarded as free speech it might have been regarded as calling for revolution centuries or even only few years ago, i.e. illegal activity.

One of the problems in determining freedom of expression is the existence of various interpretations worldwide – what may be appropriate in one country may not be in another. Members of the international community – states – have their own political systems and these also determine the scale of respect of freedom of expression. Therefore, although there are numerous attempts from international organisations, even intergovernmental, to decriminalise insult and libel, in many countries insulting and/or defaming someone would initiate criminal law procedures and liability and may lead to imprisonment. Thus, in some cases, a ‘breach’ of the right to freely express one’s opinion might have excessive consequences.

Moreover, a single definition of freedom of expression - its scope and limits - is hardly achievable on the Internet having in mind the global aspect thereof. Political system in a country is established by constitutional act/s, and such system provides bases for further regulation consisting of law, by-laws and others. Hence, the legal system depends on the political system. States have reserved their role in regulating human rights within their territories. Through national legislation they have framed freedom of expression (access to information and particularly freedom of media) stipulating at the same time duties and responsibilities, rights and liabilities. However, a usual national states approach is not sufficient enough for the Internet, since the application and enforcement of any rule involves more than legislation of one state. Taking into account the importance of freedom of expression and its universal value, states have gathered in various intergovernmental organisations and adopted documents addressing this freedom (and not only this freedom, as human rights are on the international community agenda for a long period of time, unfortunately due to severe violations during wars and other conflicts). All of these documents recognise freedom of expression belonging to all, regardless of territorial borders. On the other hand, handful of them, particularly binding conventions, deal with the aspect of freedom of expression and the Internet at the same time.

Additionally, the Internet has changed the profile of traditional legislators. The very first steps to regulate the Internet solely by the international community consisting of states have failed, as mainly private sector, either profit or non-profit institutions, has developed rules and practice. Therefore, since its beginning, the Internet has depended on individuals and private sector, existing far from states and their governments, with exception of the US Government. Current situation that reflects the unsolved issue of the Internet governance is also reflecting the position of governments toward freedom of expression as well, and even more, as this freedom relies on not only politics, but culture, heritage, language, awareness etc. as well. With regard to regulation of the Internet content, private sector namely Internet service providers (ISPs) have the leading role. Furthermore, ISPs are called and encouraged by national governments to take the position of judges and law enforcements units, and in some cases they are even obliged to act. This transfer of competence clearly indicates the weakness of national states to empower their rules on the Internet and dependence of their policies, therefore and diplomatic methods, in the issue.

Finally, the multi-stakeholder approach in regulating the Internet also provided the opportunity for civil sector organisations to give their contributions and to negotiate together with states and private sector. Amongst numerous civil sector organisations there are many of those promoting the freedom of expression principles and lobbying for its full respect. On the other hand, there are also organisations advocating for limiting this freedom in order to protect the rights of others. Even though for the moment the role of civil sector may not be of crucial importance, it is a strong actor and negotiator, particularly in developed democracies. Thus, their influence on respect of freedom of expression on the Internet should also be taken into account.

In order to illustrate a complex network of rules on the Internet regarding freedom of expression, this Chapter would elaborate on existing 'regulation', binding and non-binding international and regional documents, and 'self-regulatory' and civil sector mechanisms, dealing with freedom of expression on the Internet.

### **3.1.States and Their Organisations**

#### **3.1.1. United Nations**

On 10 December 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. The Article 19 of the Declaration stipulates that freedom of expression is not subjected to frontiers. The Universal Declaration is not the only one of the highest political/diplomatic documents but it is also a source of law – custom law source, since it is adopted by all member states and it is, in different ways, implemented in national legal systems. However, the Universal Declaration does not provide a key in various situations where it is necessary to balance between freedom of expression and its limits. It only promotes this freedom as a fundamental human right belonging to everybody. Nevertheless, it can be applied to freedom of expression on the Internet, since it clearly states that this freedom exists “through any media and regardless of frontiers.”

Another important document of the United Nations is the International Covenant on Civil and Political Rights, adopted on 16 December 1966, and came into force on 23 March 1976.

According to the Article 19:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain*

*restrictions, but these shall only be such as are provided by law and are necessary:*

- 1. For respect of the rights or reputations of others;*
- 2. For the protection of national security or of public order (ordre public), or of public health or morals.*

In comparison to the Universal Declaration the Covenant foresees certain restriction of freedom of expression not only in the Article above but also in the Article 20 – the Covenant calls for legal prohibition of war propaganda and propaganda of hatred on the ground of nationality, religion or race that provokes discrimination, hostility or violence. However, the Covenant leaves the regulation of restrictions to member states.

### **3.1.2. Council of Europe**

The pillar of the Council of Europe and the core document that enables the European Court of Human Rights to decide on individual cases of possible human rights violations is the European Convention for Protection of Human Rights and Fundamental Freedoms and its Article 10.

For the member states and for the Court, freedom of expression is not unlimited. States may require licenses for “broadcasting, television or cinema enterprises.” This condition may also be applied for internet services if these services could be defined as broadcasting.

According to paragraph 2 of the Article 10, exercise of freedom of expression may be subject to certain “formalities, conditions, restrictions or penalties” however, these measures must be in accordance with the three-part test. Firstly, restrictions must be prescribed by law, they have to be known and they should be precise. Secondly, any restriction must have its legitimate aim, an interest that is legitimate for protection. Legitimate interests are protection of national security, territorial integrity or public safety, or health or moral, or protection of the reputation or rights of others, or prevention



of disorder and crime, or the disclosure of confidential information, or impartiality of the judiciary or maintaining the authority thereof. Thus, even though the list of these aims is limited, there are broad definitions of each of them. Finally, the restriction must be “necessary in a democratic society”. The third part of the test is about a balance between a measure and its effect in a particular case.

Members of the European Convention are only the member states of the Council of Europe, and it regulates protection of human rights in the territories of the member states. It is a guarantee to everybody, natural or legal, domestic or foreign person, that his/her human rights shall be protected in any territory of any member states. Therefore, an applicant to the European Court may be anybody as long as the preconditions are fulfilled.<sup>15</sup> Forty-six member states of the Council of Europe do not have the same policy towards freedom of expression even though the European Convention is an integral part of their national legislation. The number of cases admitted at the European Court and cases where violation of Article 10 has been found illustrate treatment of freedom of expression and various interpretations of the three-part test.

On 23 November 2001, the Council of Europe adopted the Convention on Cybercrime. The Cybercrime Convention was a result of various attempts of organisations, national states and private sector to address the issue of the misuse of new technologies and the growing risk of criminal offences committed via computer networks. Following this treaty, on 28 January 2003, the Council of Europe adopted the Additional Protocol to the Convention, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems.

The Cybercrime Convention is a treaty open for the member states of the Council of Europe and “the non-member States which have participated in its elaboration and for accession by other non-member States.” It<sup>16</sup> was signed by thirty-eight member states and four non-member states – United States, Japan, Canada and South Africa and entered into force on 1 July 2004, more than three and a half years after the adoption. Being a treaty

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<sup>15</sup> In order to apply to the European Court, an applicant must first exhaust all domestic remedies and apply to the Court no later than six months after the final decision was given. (Article 35)

<sup>16</sup> Status as of 1 June 2006

depending on a convention, the Additional Protocol is open for all states that have signed the Cybercrime Convention. The Protocol came into force on 1 March 2006, after submission of five ratification documents. In comparison to the Convention, the situation regarding signatures with the Additional Protocol is more complicated – five member states of the Convention did not sign the Protocol, while only seven members ratified it.<sup>17</sup> The United States took part in the drafting process, however, according to the US Department of Justice, decided not to be a member state of the Protocol due to inconsistency of the final text and the US Constitution. (US DoJ, 2003)

The Convention does not address the issue of freedom of expression; it deals with acts such as intellectual property infringements, prohibition of child pornography, data interference, frauds etc. Nevertheless, the definitions given by the Convention are essential for understanding the scope of the Additional Protocol to the Convention.

According to the Article 1 (c) of the Cybercrime Convention:

*"service provider" means:*

- i any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and*
- ii any other entity that processes or stores computer data on behalf of such communication service or users of such service.*

The definition of service providers is very broad and anybody may be held liable for acts regulated by the Cybercrime Convention and the Additional Protocol.

The member states of the Additional Protocol agreed to adopt legal provisions/legislation and other measures and even foresee criminal liability in cases of dissemination of racist and xenophobic materials, racist and/or xenophobic motivated threats and insults, and denial, gross minimisation, approval or justification of genocide or crimes against humanity.

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<sup>17</sup> Status as of 1 June 2006

According to the Article 2,

*‘racist and xenophobic material’ means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.*

The Additional Protocol is a sole example of the international binding document that regulates freedom of expression on the Internet, i.e. through computer systems. In the first line, it indeed addresses racist and xenophobic materials as serious threats to any society but these materials are the products of one’s expression. Given the fact that the definition of hate speech is always subjected to wide range of criteria, e.g. circumstances in which it was produced, who uses it and whom it addresses etc. There is always a danger that the Protocol itself may be misused by some national states. Materials spreading racism or xenophobia are always potential threats to a community, particularly those of high tensions amongst groups. However, to address these phenomena in a way to even call for criminal penalties and at the same time to keep the same level of the protection of freedom of expression, since all member states have also adopted the European Convention, is a very difficult to balance.

Besides the conventions (on human rights and on cybercrime) and protocols thereof, the Council of Europe adopted numerous documents addressing directly or indirectly freedom of expression on the Internet. Although these documents are not of equal authority to the conventions, they also represent a strong source of standards with regard to new technologies and freedom of expression.

Among others, on 5 September 2001, the Committee of Ministers of the Council of Europe adopted the Recommendation (Rec(2001)8) on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection against Illegal or Harmful Content on New Communications and Information Services). The Recommendation does not provide definition of illegal and/or harmful content. It encourages the establishment of

self-regulatory organisations, such as Internet service providers, and establishment of the codes of conducts thereof. The Recommendation also calls for establishment of “content complaints systems”. According to Article 12, these systems, e.g. hotlines, should be established by Internet service providers, content providers, user associations or other institutions. Moreover, these entities, since their role is to copy, collect and forward “presumed illegal content to law enforcement authorities”, should be given certain privileges in their work. (Rec(2001)Art 14)

Another document further defining the role of private sector in terms of freedom of expression on the Internet is the Declaration on Freedom of Communication on the Internet that the Committee of Ministers adopted on 28 May 2003. The Declaration promotes, as one of the principles, self-regulatory/co-regulatory mechanisms regarding the dissemination of content on the Internet. Thus, it calls for internet service providers to adopt their rules within a framework established by national states. Although the general filtering or blocking measures should not be taken by any state, filters may be installed in order to protect minors “in particular places accessible to them”. (Principle 3) Notwithstanding the fact that the same article names, as examples, schools and libraries, the list of places accessible to children is not exhausted. In other words, this particular paragraph may encourage states to empower further restriction to freedom of expression. For example, such place could be an Internet café where mainly (though not only) children gather. Furthermore, by Principle 6(3), the Declaration calls for a high level of liability of Internet Service providers, holding them “co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, or facts or circumstances revealing the illegality of the activity or information.” Finally, one of the principles addresses the issue of anonymity and online surveillance emphasising at the same time the importance of the respect of one’s anonymity and legitimacy of measures taken in order to identify and trace perpetrators online. Having in mind that it would not be feasible without co-operation of service providers, providers should keep and track data about their clients/users.

Finally, the Committee of Ministers adopted the Declaration on Human Rights and the Rule of Law in the Information Society on 13 May 2005 (CM(2005)56). The first article is dedicated to freedom of expression. The very position of the article clearly speaks about importance of the respect of freedom of expression and its place in the human rights system of the Council of Europe. According to the Declaration, what is illegal offline it is illegal online as well, and the same three-part test of the European Convention should be applied to online content. Co-regulatory and self-regulatory mechanisms should at the same time prevent state and/or private censorship and prevent dissemination of racist and/or xenophobic materials as defined by the Additional Protocol. Promoting the multi-stakeholder approach, the Declaration also addresses the different roles of stakeholders. The role of civil society is, amongst other, to contribute to the future defining of measures regulating the exercise of human rights. With regard to measures aiming to uphold freedom of expression, the private sector should address “in a decisive manner”:

- “hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet;
- private censorship (hidden censorship) by Internet service providers, for example blocking or removing content, on their own initiative or upon the request of a third party;
- the difference between illegal content and harmful content. “ (Section II (3))

### **3.1.3. European Union**

The European Union addressed the issue of freedom of expression on the Internet in various documents aiming at enhancing standards on the Internet with particular focus on protection of minors from harmful content. Additionally, through these documents the EU called for self-regulatory framework and strong co-operation between the member states.

In this regard, in 1996, the European Commission prepared the Green Paper on Protection of Minors and Human Dignity in Audiovisual and Information Services (COM (96)483) and in 1997, the Communication on the follow-up to the Green Paper (COM (97)570). These documents expressed concerns towards the growing negative impact of the Internet content but called for respect of freedom of expression as “enshrined” in the European Convention. The documents promoted the adoption of the codes of conduct that would be implemented by service providers. In the Annex to the Communication, the Commission elaborated on self-regulatory framework consisting of “consultation and representativeness of the parties concerned; code(s) of conduct; national bodies facilitating cooperation at European Union level; national evaluation of self-regulation frameworks.” (COM (97)570) Amongst other, private sector should provide efficient hotlines for handling complaints and to maintain close co-operation with judicial and police authorities in cases of illegal content, however, respecting the principle of freedom of expression. (COM (97)570, 2.2.2.c)

The Parliament and the Council adopted the four-year Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks in 1999. The programme was renewed in 2005<sup>18</sup> for another four years, with aim to continue supporting projects combating illegal and harmful content of the Internet and promoting protection of minors, namely. According to the Action Plan, a safer environment on the Internet depends on combating “offences against children and trafficking in human beings or for the dissemination of racist and xenophobic ideas” (DEC 276/1999/EC, 3). Xenophobic or racist messages are thereby set at a high level of priorities. As most of EU documents, the Plan calls for codes of conduct and active involvement of ISPs.

One of the most important documents addressing the commercial activities on the Internet is the Directive on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, Directive on E-commerce,

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<sup>18</sup> The programme was adopted for 2005-2008 with €45 million of total budget. For more details see: [http://www.europa.eu.int/information\\_society/activities/sip/programme/index\\_en.htm](http://www.europa.eu.int/information_society/activities/sip/programme/index_en.htm)

adopted in 2000.<sup>19</sup> The Directive sets the EU policy of Internet service providers' liability and course of action in cases of "knowledge and awareness of illegal activities". Even though it is focused on electronic commerce, the Directive touches upon the right to free expression as well.

According to Article 46, a provider may limit its liability if, upon becoming aware of illegal activity, it acts "*expeditiously to remove or to disable access to information concerned*" and "*in the observance of the principle of freedom of expression and of procedures established for this purpose at national level...*"

### **3.1.4. Other organisations/documents**

Most governmental organisations have adopted political documents like recommendations, declarations or principles promoting the freedom of expression as one of the unique values of every society but also documents calling for accountability of those that violate other rights and values by abusing freedom of expression. The Joint Declaration on International Mechanisms for Promoting Freedom of Expression<sup>20</sup> by the United Nations', OSCE's and OAS' representatives and rapporteurs on freedom of expression not only contains declarations on importance of protection of freedom of expression on the Internet but gives guidelines to all stakeholders including individual users as well. The Declaration advocates for removing the liability for illegal content away from Internet service providers emphasising that "no one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content." Furthermore, the Declaration does not promote filtering unless it is end-user controlled and unless the user opting for such a tool is aware of the possibility of over-filtering.

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<sup>19</sup> Although the member states should have complied their legislation with the Directive before 17 January 2002, some of the members failed to do so.

[http://www.theregister.co.uk/2002/01/21/eu\\_ecommerce\\_directive\\_fails/](http://www.theregister.co.uk/2002/01/21/eu_ecommerce_directive_fails/)

<sup>20</sup> The Joint Declaration is adopted in December 2005 upon discussing the issue of free expression on the Internet with the Article 19. The full text is available at: <http://www.article19.org/pdfs/standards/three-mandates-dec-2005.pdf>

Special attention has been paid to anti-terrorism measures and possibility that the fight against terrorism might suppress freedom of expression. However, notwithstanding the fact that it is a strong political document due to organisations that adopted it, and an instrument that an individual or civil society group could use as a political argument in cases their freedom has been infringed, this Declaration is not binding.

### **3.2.Self-regulation**

Many documents promote and advocate for self-regulatory mechanisms in addressing the “illegal/harmful” content on the Internet. However, self-regulation of Internet service providers is a term that is hard to define, but also at the same time is a cause of professional, partial and even passionate discussions. Most of the industries in general have their own codes and self-regulatory mechanisms and these would, of course, vary.

Self-regulation is a mechanism of development and enforcement of rules by those whose conduct and services are to be governed. The aim of such rules is to improve the service that is offered to consumers. More importantly it is, as the very term implies, a mechanism that is to be defined, developed and enforced by those that have agreed upon it, i.e. it is binding only to those that voluntarily decided to comply with it. Thus, self-regulation in a way defines relationships among the industry and/profession, e.g. their relations with regard to competition, co-operation and joint ventures or unique policy with regard to certain issues. On the other hand, these rules inevitably affect consumers of those particular services and in by that self-regulation goes beyond “self” as it sets the rules for those that did not voluntarily agreed to obey.

Some forms of self-regulation go back into history and the early age of trade. One of the examples of how self-regulatory mechanism can evolve into international customs and even treaties is *Lex Mercatoria*, rules established by merchants in medieval Europe as a result of common need to solve arising disputes between them in more effective and productive manner than their country’s legal systems and judiciary could provide. There were also unwritten rules on trade respected by Arabic tribes during the 7<sup>th</sup> century.



Moreover, caravans were not to be attacked during the trading periods by any army and/or groups.

Self-regulation cannot be regulated by laws – all that is to be prescribed by states or their organisation is not self-regulation. These rules go into those issues that have not been addressed either at all or entirely by laws. However, they are not soft regulation in terms that there are no consequences in cases of breaches. The industry or profession itself also sets the “punishment” of those who disobeyed the rules they themselves have constructed. Such punishment could be warning or even fine but they can also be suspensions or in some cases a company or individual can be expelled from community (profession). Sometimes these punishments are harsher than those that could be imposed by law, as, at least for profit organisations, the membership in the industry is of immense importance and is a guarantee for business.

However, with regard to freedom of expression, self-regulation becomes a very sensitive issue and a controversial one. The reason lies in the mere fact that the right to freedom of expression is one of the fundamental human rights and as such belongs to everybody. As a human right it can be limited only in certain cases. Following the European Convention that indeed sets up the standards of possible limits of freedom of expression, the limitation can be justified only if there was clear limitation prescribed by law. In many non-English speaking countries, the term law refers only to laws applicable to all adopted by the country’s supreme legislative authority.<sup>21</sup> The limitation exists only in order to protect a legitimate interest which is defined by the European Convention. Finally, the measure of limiting freedom of expression has to be proportionate. This means that in any case an authority considers whether there has been violation of freedom of expression, it has to positively answer to three questions. At same time, the authority should bear in mind that freedom can be limited after the mentioned three-part test has been applied and the authority estimated the limitation was necessary in the society. On the other hand, if the authority first restricts the freedom and then examines all the facts of the particular case, it is most probably risking violating the freedom.

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<sup>21</sup> Countries such as former republics of Socialists Federal Republic of Yugoslavia i.e. Croatia, Macedonia, Montenegro, Serbia ...

Protection of human rights is always a responsibility of governments and their institutions and such task cannot be transferred to any other entity. Others may contribute to promotion of human rights or in raising awareness about possible and/or existing violations, but they cannot take any actions to limit any right nor to violate it. Indeed, human rights are infringed almost everyday and everywhere but the issue here is the reaction and liability of governments to condemn, prosecute cases of violation and culprits and to, at the same time, secure adequate protection for victims, e.g. access to justice if necessary. Internet service providers do not have nor should have the capacity to perform these duties.

On the other hand, ISPs cannot disregard some of the basic human rights principles. Most of these policies have been adopted under the pressure of influential actor and at same time a profitable counterpart. For example, data protection is a very sensitive issue in the European Union, and the EU regulation of protection of private data are more strict than those existing in the United States. In 1995 the European Parliament and the Council adopted the Directive on the Protection of Individuals With Regard To the Processing of Personal Data and on the Free Movement of Such Data - Directive on Data Protection - that prohibited the transfer of personal data to non-European Union nations that did not meet the European "adequacy" standard for privacy protection. Following that, in 2006, the US Government developed Safe Harbour framework in order to enable US companies to "to avoid experiencing interruptions in their business dealings with the EU or facing prosecution by European authorities under European privacy laws."<sup>22</sup> Hence in order to operate in Europe, any US based ISP has to join the "Safe Harbour".

Most of ISPs have their rules and any individual opting for a particular provider has to comply with these rules. These rules are in the form of contract, informing a consumer about general services, privacy protection, namely data protection, copyright infringement and jurisdiction in a case of dispute. Additionally, all of them contain disclaimer of warranties. According to Google's Terms of Service, "Google disclaims any and all responsibility or liability for the accuracy, content, completeness, legality,

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<sup>22</sup> All data on Safe Harbour can be found at Export.gov, a US resource for international trade established as one of Presidential E-Government Initiatives: [http://www.export.gov/safeharbor/SH\\_Overview.asp](http://www.export.gov/safeharbor/SH_Overview.asp)

reliability, or operability or availability of information or material displayed in the [Google Services] results.”<sup>23</sup> With regard to the issues of jurisdiction and competent court, the Google’s services are subjected to “the laws of the State of California, without giving effect to its conflict of laws provisions or [the consumer] actual state or country of residence.”

Yahoo!, as Google, has its own Terms of Service. There are more or less similar provisions. Even the jurisprudence of the courts in California is the same. Anybody wishing to use Yahoo! and its services has to agree not to use them to, among other:

*“a. upload, post, email, transmit or otherwise make available any Content that is unlawful, harmful, threatening, abusive, harassing, tortuous, defamatory, vulgar, obscene, libellous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable;*

*b. harm minors in any way; ...*

*e. upload, post, email, transmit or otherwise make available any unsolicited or unauthorized advertising, promotional materials, "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation, except in those areas (such as shopping) that are designated for such purpose ...*

*k. intentionally or unintentionally violate any applicable local, state, national or international law, including, but not limited to, regulations promulgated by the U.S. Securities and Exchange Commission, any rules of any national or other securities exchange, including, without limitation, the New York Stock Exchange, the American Stock Exchange or the NASDAQ, and any regulations having the force of law; ...*

*l. provide material support or resources (or to conceal or disguise the nature, location, source, or ownership of material support or resources) to any organization(s) designated by the United States government as a foreign terrorist*

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<sup>23</sup> Google Terms of Service available at: [http://www.google.com/intl/sr/terms\\_of\\_service.html](http://www.google.com/intl/sr/terms_of_service.html)

organization pursuant to section 219 of the Immigration and Nationality Act; ...”  
(Yahoo! ToS, Art.6)

According to the provisions, Yahoo! may pre-screen material available from its services and it can also remove any material violating the Terms of Services. It is up to the consumer to bear all risks regarding the content including its accuracy, completeness or its usefulness. These Terms are a solid waiver for Yahoo! while at the same time transfer the liability to the consumer.

Microsoft Service Agreement does not contain provisions on harmful or defamatory content. With regard to harmful content, it refers to it only in the sense of children protection and parental control. However, in comparison to the previous two ISPs, Microsoft has an interesting way of setting up the competence of courts – for North and South America it is the jurisprudence of the Washington State law; for Europe, Middle East and Africa – law of Luxembourg; for Japan – law of Japan; for Republic of Korea – its law, as it the case of Taiwan. However, for People’s Republic of China, all disputes are to be governed by law of Washington State. For the rest of countries, i.e. Australia, New Zealand, Australia, India, Hong Kong, Indonesia, Malaysia, Philippines, Singapore, Thailand, the governing law and the place of dispute is Singapore.

### **3.3. Civil Society**

Civil society organisations have an important role in a community; they would raise issues before being dealt by state institutions – promote new regulation, draft documents that are to be adopted by parliaments, provide courts with amicus curiae etc. Advocating for principles they can raise awareness not only in one country but to the society at large. Notwithstanding the fact that their influence can be immense, they cannot impose rules either to governments or business sector. However, they, particularly those promoting human rights, can and often do initiate new or empower existing regulation, policy or

other. There are various and numerous civil society organisations worldwide – regarding the issue of regulation of freedom of expression on the Internet, human rights organisations and their activities shall be a focus of the following paragraphs.

Having in mind the everyday growing importance of non-governmental non-profit organisations in taking part in decision making processes, particularly those affecting individuals and their rights, civil society became an inevitable counterpart of both governments and business sector. There are many reasons for that; one of the main is the fact that civil society organisations usually represent individuals more effectively than their governments or companies, as these organisations focus more on needs of people and, more importantly, on human rights principles applicable to each and every country.

As already mentioned, civil society is a general term for wide range of organisations and they do not necessarily coordinate their projects and activities. However, often they would come with similar if not even same comments, denunciation of unpopular action such as, for example, imprisonment of a journalist criticising some officials or their work. In such cases they publicly address authorities in the country in question, but also international community calling it to reiterate its main principles to the member country, i.e. promotion and respect of human rights in the World, and endorse its capacity. Not always would such efforts have positive results. Nevertheless, these voluntary watchdogs are essential as they keep reminding us of universal goals and ideas.

During the preparation of the World Summit on the Information Society the civil sector was largely recognised as one of the three stakeholders and a partner in negotiations as well as in implementation of the WSIS outcomes. Civil society adopted the Civil Society Declaration to the World Summit on the Information Society "Shaping Information Societies for Human Needs" For the Declaration freedom of expression is one part, together with the right to privacy, right to access to information, of information and communication processes which are basic human need and a foundation of all social organisations. Furthermore, the right to freedom of opinion and expression as it is defined by the Article 19 of the Universal Declaration "implies free circulation of ideas, pluralism of the sources of information and the media, press freedom, and availability of the tools

to access information and share knowledge.”(Civil Society Declaration, 2003, 2.2.1.) Furthermore, the civil society, at least those organisations standing behind the Declaration, is strict about limitation of freedom of expression – freedom of expression must be protected by law “rather than through self-regulation and codes of conduct. There must be no prior censorship, arbitrary control of, or constraints on, participants in the communication process or on the content, transmission and dissemination of information. Pluralism of the sources of information and the media must be safeguarded and promoted.”(Ibid.)

During both phases of the WSIS, several non-governmental organisations were raising awareness about Internet censorship, limited access to the Internet or excessive governmental measures against those who closely scrutinised the work of public institution. The Reporters without Borders condemned even the organisation of the second phase in Tunisia labelling the country as one continuously suppressing freedom of expression in general and limiting access to information via monopoly over Internet access.

On the other hand, while indeed promoting less liability of Internet service providers in cases they are called to limit freedom of expression, civil society also calls ISPs to take positive actions i.e. to protect freedom of expression from suppressive governments. On several organisations protested against main ISPs i.e. Google, Yahoo! and MSN when they enabled limited search results from Chinese domain. In June 2006, The Amnesty International UK and an Internet surveillance monitoring organisation claimed that several large technology companies were guilty of collaborating with "repressive" governmental regimes. According to Amnesty International, companies such as Microsoft, Google and Yahoo assisted governments in countries such as China and Iran. They also accused Cisco of helping China construct the Internet-filtering system which could prevent citizens from accessing certain sites. (Espiner, 2006)

## **4. Protection of Freedom Of Expression**

The protection of human rights and fundamental freedoms is, first, the responsibility of the state. In every case of an alleged human right violation, it is important to have a right to justice and fair trial. That means that an individual should be guaranteed legal remedies available in the country. According to the European Convention and the European Court practice as well as other international documents and institutions the state has, with regard to any human right, both negative and positive obligations. The negative obligation would refer to the prohibition of interference with the means of communication, while the positive obligation of the state is to make available those means of communication which are particularly important. Thus, the negative obligation of the state is defined by law, while the positive is usually in the sphere of state policy and often out of reach of binding provisions.

On the other hand, the growing importance of Internet service providers in regulating the Internet by co-regulation and self-regulation has put the focus on their role in protection of freedom of expression. Nowadays, companies wishing to make profits beyond the borders of their country bear in mind that neglecting human rights could have negative effects on their business. According to the Human Rights Watch World Report for 2006, a survey of 500 largest companies in the world showed that “more than a third of respondents reported that human rights concerns had caused them to drop a proposed investment, and nearly a fifth said they disinvested from a country for that reason.” (Human Rights Watch, 2006, p.45-46) Although this report refers to companies physically present on the territory of a foreign country, the same could be said for Internet companies.

Additionally, the protection of human rights and, therefore, the right to freedom of expression goes under the mandate of human rights non-governmental organisations. They advocate for changes of the existing laws, as in the case of the US Communications

Decency Act, protest against excessive penalties against alleged dissidents, as in the case of a blogger arrest by Egyptian authorities in November 2006, or other.

This Chapter will elaborate on existing legal, national and international, remedies and diplomatic activities aiming to protect the right to freedom of expression. It will also address the issue of corporate social responsibility and public demand that even private companies respect freedom of expression standards, i.e. self-regulation remedies.

#### **4.1. Legal remedies**

Legal remedies can be both national and international. National legal remedies are defined by domestic law, and in human right cases the law can be more or less favourable. That would depend on the state policy, i.e. its (non)-openness to human rights, which again depends on economic development, political system, culture, religion etc. On the Internet, there would rarely be cases involving only on state, and therefore, causing no problems in choosing the competent judicial institution and law that should be applied. In cases involving the parties of different nationalities, it will always be a matter of applicable law – both procedural and substantial. Thus it will be a matter of either domestic law with foreign element i.e. international private law or international business law. The first is regulated by states, through very detailed and sometimes complicated rules; the latter is mostly defined by the parties themselves.

Applying international private law provisions in every case involving Internet and freedom of expression can be problematic. First of all, a court has to decide whether it is competent in even hearing the case. Then it will decide which law to apply. Finally, there can be always an issue of enforcement of its decision as a foreign court decision, i.e. the issue of effectiveness. All of these elements were present in the Yahoo! case – Yahoo! Inc. argued that the French Court did not have any competence over a company mainly operating for US territory and citizens, since Yahoo! France already had obeyed the court orders. The Court applied French law regardless of entirely different provisions existing in the United States. However, once the court orders came into force, as Yahoo! Inc did



not file complaints<sup>24</sup>, Yahoo! Inc. initiated a court procedure in the US in order to confirm that the French orders were not enforceable there. Yahoo! was only seeking for a declaratory judgment, a confirmation that the orders could not be enforced in the US due to the First Amendment. Interestingly, the organisations that sued Yahoo! Inc. and Yahoo! France did not request the enforcement of the orders in the US, they were defendants before the US courts. Therefore, the First Amendment argument could have been heard by the US courts only in the case defendants had sought the enforcement of the orders. The case itself raised lot of concerns whether any country could claim universal competence in cases involving the Internet. Yahoo! case illustrates how complicated procedure may be and how the outcome would be uncertain.

This case as well as some others, marked the trend of rising pressure over ISPs to take the responsibility in commercial activities. According to the 9<sup>th</sup> District Court, “Yahoo! obtains commercial advantage from the fact that users located in France are able to access its website; in fact, the company displays advertising banners in French to those users whom it identifies as French. Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs.”<sup>25</sup> Thus it should be expected that a company, in order to gain profit, obeys domestic legislation.

Another legal mechanism available in every country relies on the maxim *lex superiori derogat lex inferiori*. According to it, in order to secure legal stability in the country any regulation has to be in compliance with the regulation of a higher rank. Thus, a person has a right to question the legality or constitutionality of the regulation that by his/her opinion derogates the higher principles. The example of such is the US Communications Decency Act of 1996 addressing the matter of online pornography and protection of minors. It was found unconstitutional first by the Pennsylvania Federal Court and than by the US Supreme Court in 1997.

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<sup>24</sup> Yahoo! Inc. was convinced that the French Court did not have the right to hear the case and moreover, it was convinced that such orders would fail in the US due to the First Amendment principle.

<sup>25</sup> US Court of Appeals for 9<sup>th</sup> Circuit no. 01-17424:  
<http://www.jonathanmitchell.info/uploads/0117424.pdf>

In order to be able to seek the international (legal) protection of freedom of expression, an individual has to exhaust all available domestic remedies. However, the international protection is not equally available, for some parts of the world there is not even a possibility for a person who deems his/her right being violated to address international institutions.

Through the European Convention and the European Court case law, the Council of Europe has the most developed system of international legal protection of the right of freedom of expression. The European Court has not had so far a chance to rule over a case involving the Internet and freedom of expression. The only case discussed by the Court was *Perrin v. the United Kingdom* whereby the Court found the application inadmissible. (Perrin, 2003) The Applicant argued the violation of his right to freedom of expression, however, the Court ruled that the issue “was purely commercial and there [wa]s no suggestion that it contributed to any public debate on a matter of public interest or that it was of any artistic merit: the applicant’s conviction cannot therefore be said to engender any obviously detrimental chilling effect.” Thus the material containing obscenity was not regarded as an exercise of freedom under the Article 10 of the European Convention at all.

However, there might be a Strasburg case that could be used by the Court as well as any Council of Europe’s Member State when deciding on a case of material illegal in one country but legal in another country – the *Observer and Guardian v. United Kingdom* case.<sup>26</sup> The Court held that an injunction to prevent the publication of the “*Spycatcher*” book was no longer necessary because the information was already available. This case could not be used for any aspect of freedom of expression on the Internet, as it does not refer for instance to hate speech. It could be used in those cases addressing the disclosure of state, official or other classified information, as protection of such information and

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<sup>26</sup> *Observer and Guardian v. the United Kingdom* - 13585/88 [1991] ECHR 49 (26 November 1991). The case referred to a publication of the book “*Spycatcher*” in the UK containing some classified information as in accordance with the UK law. However, the book was already published in the United States, and therefore, the Court ruled that there were not longer need to ban the book as the damage had already been made.

foreseen criminal liability in case of disclosure can produce a chilling effect for free speech.

Other international institutions empowered to question domestic courts decisions, such as the UN Human Rights Committee, the Inter-American Court or the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, have not had in their practice cases involving the Internet. Thus the arena for protection of freedom of expression is diplomacy.

#### **4.2. Diplomatic Remedies**

The term 'diplomatic remedy' is only given as a contrast to the term 'legal remedy'. While the legal remedy is a means by which a judicial authority enforces a right, imposes a penalty, or makes some other court order, the diplomatic remedy hereby applies to all activities aiming to enforce and/or acknowledge a right, impose a penalty i.e. cause consequences in cases of disobedience, or issue an 'order' contained in a declaration, recommendation, public statement etc. As the legal remedy is the result of legislative authority in the country, the diplomatic remedy may be a result of any diplomatic activity. However, diplomatic activity would not entirely fall under the definition of diplomacy given by G.R. Berridge that it is "an importance means by which *states* pursue their foreign policies" (Berridge, 2002, p. 3) and that it "consists of communication between *officials* designated to promote foreign policy either by formal agreement or tacit adjustment." (Ibid, p. 1) Here diplomatic activity also refers to actors other than states, although states still have the final decision.

In 2005, the OSCE Representative on Freedom of the Media and the Reporters without Borders jointly organised the Internet Conference in Amsterdam focusing on information and communication technologies in the Southern Caucasus and Central Asian regions.<sup>27</sup>

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<sup>27</sup> Since 2003, the OSCE Representative on Freedom of the Media has been organising the Internet conferences with the aim to promote freedom of expression on the Internet and address concerning issues of Internet filtering by states. The conferences were organised annually until 2005. One may think that that

The representatives from the Southern Caucasus countries presented case studies of Internet censorship. According to the Civil Initiative on Internet Policy of Kyrgyzstan, “even though there are 17 Internet Service Providers (ISPs) and more than 400,000 Internet users in Kyrgyzstan, governments are seeking to create informational borders in cyberspace and are using both technical and non-technical mechanisms to censor and control access to the Internet.”<sup>28</sup>

Particularly in the field of human rights, the NGOs are increasingly important. Nowadays it would be quite unusual for any international organisation to organise a discussion without involvement of civil society. Moreover, most of organisations regularly consult with civil society and maintain close co-operation. Their influence may not be crucial but their participation is unavoidable. What civil society can do is to advocate with governments either directly or through their organisations for changing their policy or orders that are restricting freedom of expression. For example, the Reporters without Borders organise petitions supporting individuals who by expressing their opinion were prosecuted and arrested by their or foreign country. They also maintain annual reports on Internet freedom, thus indirectly evoke more and more voices against repressive government provoking the positive reaction.

### **4.3. Self-regulatory Remedies**

The aforementioned regulations on self-regulation of ISPs call for adoption of mechanism respecting freedom of expression. Self-regulatory remedies with regard to the protection of freedom of expression are related to the issue of Corporate Social Responsibility (CSR). Due to the impact of globalisation and the fact that increasing number of companies operate beyond their own countries, which particularly refers to ISPs, these companies’ activities are both monitored by civil society organisations and scrutinised by news media. (HRW World Report 2006, p. 42) To make the pressure over

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after three years all issues have been successfully solved or there were no interests in further organising the conferences. Or, maliciously said, not all of the participating states of the OSCE are open for criticism.

<sup>28</sup> [http://www.osce.org/fom/item\\_2\\_15673.html](http://www.osce.org/fom/item_2_15673.html)

the ISPs, the Reporters without Borders addressed several investment funds as existing or potential shareholders in the companies such as Google, Yahoo!, Microsoft or Cisco, that in November 2005 adopted the Joint Statement on Freedom of Expression and the Internet. The signatories agreed to monitor the activities of Internet sector companies in repressive countries.<sup>29</sup>

The protection of human rights is not any longer only the responsibility of the governments. According to the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights adopted in August 2003 by the Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights, “*transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.*” (UN Norms, E(12)) Furthermore, not only that they are expected to respect human rights and contribute to realisation thereof, companies should ensure that their activities do neither directly nor indirectly contribute to human rights abuses and should refrain from activities that would undermine efforts aiming to promote and ensure respect of human rights. (UN Norms Commentary, 1(b))

Self-regulatory remedies would thus refer to, firstly, that ISPs and other Internet sectors companies have an obligation to respect and promote, therefore, enable the enjoyment of freedom of expression and, secondly, refrain from collaborating with (both in terms of “working with” and “supporting the enemy”) countries that limit access to the Internet and search results, collect data on Internet users, imprison and in other way punish freedom of expression dissidents, briefly said, with governments that do not protect nor

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<sup>29</sup> Currently there are 32 investors and research analysts that signed the Joint Statement. According to RSF, they manage around 24 billion dollars in assets. For further information see <http://www.rsf.org/fonds-investissement-en.php3>

respect freedom of expression. Ideally, an ISP would always opt for protection of human rights rather than expanding its business on a market regardless of the possible profit. Unfortunately, it is usually not the case. One cannot imagine that a company would say 'no' to a market such as China.

Nevertheless, the issues of responsibility of ISPs, and all companies in general, and their protection of human rights are getting increasing attention. However, one should also bear in mind that these companies would also need to have more independency from their own and other governments as usually they make pressures on companies. Nowadays, ISPs are often in between freedom of expression advocates and repressive governments.

## **5. Limitations of Freedom of Expression**

As emphasised above, the right to freedom of expression is not unlimited, it has certain restrictions. However, these restrictions have to be unambiguous, as their only purpose is to protect an interest which in a particular case prevails over the interest of free expression.

Speaking from the perspective of the European Convention and the European Court on Human Rights, every restriction has to be envisaged by law in order to protect a legitimate interest and it should be proportionate. The margin of appreciation would vary from case to case, and from country to country. However, these variations should not be remarkable, they should all fall under the same principle embedded in the Universal Declaration's Article 19.

Speaking from the perspective of Mill's essay "*On Liberty*", any individual can act (i.e. freely express his/her opinion) without any interference for the government or the society unless the act causes harm to others. Additionally, governments should refrain from

suppressing opinions about their work and should refrain from controlling media. In the sphere of the Internet, every website is a media.

This Chapter focuses on three possible restrictions – hate speech, protection of children and state control. However, the list of restrictions of freedom of expression has not been exhausted. There are other restrictions, such as the right to privacy, or data protection, law enforcement, fight against terrorism or organised crime but also self-censorship. The reason why only these three have been chosen is the following. Hate speech is often targeted to harm a group or its members, and thus it calls for protection from the society. On the other hand, hate speech is also a controversial restriction of freedom of expression and in some cases the restriction may be disproportionate. With regard to protection of children, Mill says that, due to their incapability to protect themselves even from the actions they themselves may take, society has to secure their wellbeing. Finally, state control over media and freedom of speech in general is never-ending problem. There has never been a government that has not taken any action against its opponents and critics and, therefore, free expression

### **5.1. Hate Speech v. Freedom of Expression**

As mentioned above, the right of freedom of expression needs to be subjected to certain limitations, and hate speech is one of them. Most countries forbid in one way or the other verbal assaults against an individual and/or a group of people solely based on a difference from the surrounding majority that could be innate. Such difference can be a race, ethnicity, national religion etc, or, in other case, political or other opinion, sexual orientation and other. According to the definition given by Wikipedia, “hate speech is a controversial term for speech intended to degrade, intimidate, or incite violence or prejudicial action against a person or group of people based on their race, gender, age, ethnicity, national origin, religion, sexual orientation, gender identity, disability, moral or political views, etc. The term covers written as well as oral communication.” Thus hate speech is on the other side of the coin.

After the Second World War, the international community was aware of how far extremists could use media and, in that sense, abuse freedom of expression by violating rights of other, even their right to life. According to Article 20 of the International Covenant on Civil and Political Rights, any propaganda for war as well as any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” are to be prohibited by law. Having the time distance from the WWII, it is evident that the Joseph Goebbels, the Ministry of Propaganda and numerous Nazis of the Third Reich advocated for war and against nations, namely Jewish people.

However, it is not always easy to draw the line between permitted and forbidden speech. Moreover, there is no single international regulation addressing hate speech and envisaging punitive measures. The Internet and its deployment further “complicate” the issue. How complex the problem could be is presented in the Yahoo! case, when in 2000, two civil society organisations – Ligue Contre la Racisme et l'Antisémitisme - LICRA and Union des Etudiants Juifs de France (UEJF) – filed a civil lawsuit against the Yahoo! France and Yahoo! Inc. due to the auctions of Nazi objects available on Yahoo! France.

In April 2000, LICRA and UEJF, discovering that they could access [www.yahoo.com](http://www.yahoo.com) in France and view Nazi materials, sent a letter to Yahoo! Inc. requesting to takedown Internet pages that displayed those materials. Since Yahoo! failed to comply with the requests, the organisations initiated litigation in France.

On 22 May 2000, the French Court passed an interim judgment confirming the illegal sale under French law. Yahoo! France, as a Yahoo! subsidiary operating in France, removed all Nazi material from its site as in compliance with French law, namely the French Criminal Code and the Nazi Symbol Act. However, Yahoo! Inc. argued that the French court did not have a jurisdiction in the case. In November same year, the court rendered an injunction. Yahoo! Inc. was ordered to take all measures that would “dissuade and render impossible all consultations on yahoo.com of the service of auctioning of Nazi objects as well as any other site or service which constitute an apology of Nazism or which contest the Nazi crimes”, The Yahoo! Inc. had to comply with the



decision within the three-month period. Although Yahoo! modified its hate-speech policy, it failed to entirely comply with the French orders.<sup>30</sup>

Arguing that the French court did not have jurisdiction and, more importantly, that French orders could not be enforced in the United States, Yahoo! did not complain in France but decided to seek for a decision on non-recognition of the French court's orders from the court in California. In 2001, Yahoo! Inc. won the case, as the Court found the decision inconsistent with the First Amendment, and therefore inapplicable in the United States. However, both French organisations appealed and on August 23, 2004, the Court of Appeals reversed the earlier finding, arguing that the defendants (LICRA and UEJF) had acted only with regard to transactions taking place in France as part of Yahoo!'s international business, and therefore subjected Yahoo! to French jurisdiction.<sup>31</sup>

The Yahoo! case raised several issues. First of all, it was the issue of jurisdiction, the possibility for any foreign jurisprudence to question the content of the Internet, as what was illegal in France was not in the United States. This was the first time the US Internet company's policy was questioned by a foreign country. Secondly, it also raised the issue of filtering and technical measures in blocking the access to certain Internet sites and pages. The French court examined the possibility of identifying the nationality of an Internet user through IP address and it was estimated "that more than 70% of IP addresses residing on French territory may be identified as French."<sup>32</sup> One of the expert opinions given to the French court was of Vinton Cerf who argued that identification of user's nationality could constitute the breach of privacy, particularly if it would refer to everybody – i.e. to those of other than French nationality. All experts agreed that no technical solution might guarantee a filtering at 100% reliability.

Finally, the Yahoo! case raised the issue of liability and responsibility of profit organisations on the Internet and compliance with all domestic laws. Many Internet service providers expressed their concerns over possible civil or even criminal lawsuits

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<sup>30</sup> Unofficial translation of the [Judgement of the Tribunal de Grande Instance de Paris](http://www.techlawjournal.com/topstories/2006/20060112.asp) by Daniel Lapres, accessed on 10 March 2006: <http://www.techlawjournal.com/topstories/2006/20060112.asp>

<sup>31</sup> US Court of Appeals for 9<sup>th</sup> Circuit no. 01-17424: <http://www.jonathanmitchell.info/uploads/0117424.pdf>

<sup>32</sup> <http://www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html>

against them due to inconsistency with domestic regulation. The outcome of the case was that ISPs reached consensus to “deal with offensive materials through a policy of ‘notice and take down’” (Menestral., Hunter. & Bettignies., 2002, p.2) This procedure is common in copyright disputes and it constitutes a very specific liability and at the same time burden to ISPs and to their staff that usually is not familiar with law and intellectual property.

The notice and take down procedure is stipulated by the U.S. Digital Millennium Copyright Act of 1998, in the Section 512 (“Limitations on liability relating to material online”) of 1976 Copyright Act. According to the Act, ISPs do not have vicarious liability if they have the control over the infringing content but do not have financial benefit directly attributed to the infringing activity. They would not be liable for the infringement if they did not have actual knowledge of infringing material or activity; or they could not have been aware of such activity or material. However, they will be liable if they do not act “expeditiously to remove, or disable access to” infringing material after being acknowledged of such material. (DMCA, c(1)(A)(iii)) Similar regulation of ISPs’ liability in cases of alleged copyright infringement is foreseen in the European Union by the E-Commerce Directive and in other countries. Having in mind that it would not always be feasible to react in each and every case promptly and without breaching rights of other, the procedure has been altered into notice-notice-takedown procedure, giving the other party opportunity to provide the response. Nevertheless, at the end, it is the liability of ISPs to decide whether there was a case of copyright use exceeding the fair use, and, if it was, to remove the exact material from its site.

The same procedure and liability of ISPs in cases involving human rights and freedom of expression is even more concerning. First of all, there is no single definition of what exactly the scope of free expression is. And secondly, although many countries proclaim this freedom as one of the values of their society, they also prohibit religiously or ethnically motivated crimes as well as hate speech. In some countries ban on disseminating hatred among people and groups is contained in a constitution. Therefore, it will be expected from a mainly technical legal entity registered in one country to provide definition that could be applied in every case, to identify in a timely manner any

websites supposedly containing hate speech and to estimate whether takedown procedure could be conducted and whether it would be proportionate. Moreover, if an ISP failed to do so, it might risk litigation, court orders, fines etc. In order to avoid that, the ISP could opt for removing any website that could not be easily labelled as exercise of freedom, and that would particularly refer to cases that are on the line between the two options – freedom of expression and hate speech.

On the other hand, hate crime indeed requires to be addressed in a sophisticated manner. The Internet has become a space for many insulting and disturbing materials and some of those materials cause criminal offences in the ‘offline’ world. The international community has been addressing these phenomena calling for co-operation between law enforcement and private sector, for more strict rules as well as positive approach in fighting against, racist, anti-Semitic and other forms of hate speech.

As mentioned above, in many countries hate speech is prohibited by law and France is not an exemption. Similar case in 2000 took place in Germany – it concerned the online booksellers in Germany and Amazon.com and sale of Adolf Hitler’s book Mein Kampf, which is forbidden in Germany. According to the Wikipedia, Incitement of hatred against a minority is “punishable in Germany even if committed abroad and even if committed by non-German citizens, if only the incitement of hatred takes effect within German territory, e.g. the seditious sentiment was expressed in German writ or speech and made accessible in Germany.”

Even in the US, there are some forms of hate speech that are proscribed by law, although the importance of the First Amendment is not disputed. One of the first cases tackling the issue of hate speech via e-mails was in the US, back in 1996, when a student at the University of California at Irvine sent a threatening hate message to 59 Asian students. Even though the perpetrator expressed that the e-mails were sent to those students because of their Asian origin, he was charged with "knowingly and without permission using computer services.”<sup>33</sup> Within the US there are states that do not have any statutory

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<sup>33</sup> Machado Case History:  
[http://computingcases.org/case\\_materials/machado/case\\_history/case\\_history.html](http://computingcases.org/case_materials/machado/case_history/case_history.html)

provisions regulating bias-motivated violence and intimidation or provisions on civil actions in cases of hate crimes based on gender, sexual orientation, race, religion, ethnicity and other. However, other states have provisions on hate crimes like the state of California, contrary to, for instance Wyoming as a state illustrating the previous example.(ADL, Hate Crimes Statutory Provisions )

The Council of Europe's Additional Protocol to the Cybercrime Convention is the only international treaty defining the liability of ISPs in cases of racist and xenophobic hate speech, however, with little impact for the moment. According to the Article 18 of the Cybercrime Convention, every country should "*adopt such legislative and other measures as may be necessary to empower its competent authorities to order: ...*

*b) a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control.....*

*3. The term "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:*

*a the type of communication service used, the technical provisions taken thereto and the period of service;*

*b the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;*

*c any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement. "*

Any ISP can offer its services "in the territory of the Party". By the Protocol, an ISP could be required to hold data on their users, and data retention and misuse thereof is

another possible violation of the right to freedom of expression as it breaches the right to privacy and right to be anonymous.

## **5.2. Protection of Children v. Freedom of Expression**

The Internet causes the most concerns to parents<sup>34</sup>, and in comparison to television, children more often use the Internet without parental control. This particularly refers to children age 14 to 16.<sup>35</sup> (PCMLP, 2004)

Protection of children has always been a focus of governmental and international policies. Any criminal offence committed against minors constitutes harsher penalty. The United Nations' Convention on the Rights of the Child 1989 is one of the core documents particularly dealing with the protection of children. The International Labour Organisation has adopted various conventions and recommendations aiming to protect children from working in unhealthy environment.

Mill sees the protection of children as an exemption from the principle that everybody is free to act upon his/her will even if the action could cause him/her harm as long as the action does not harm the others. According to Mill, the principle regards only mature persons. However, those who need to be taken care of by others – children, “or ... young persons below the age which the law may fix as that of manhood or womanhood” (Mill, 2004) – will not be free to act by themselves if that action can harm them. Thus, the need for protection exists even without children's consent i.e. even if they have voluntarily taken action that might harm them but not the others.

For example, child pornography is forbidden both offline and online, it is forbidden as such, though the age limit of childhood varies<sup>36</sup>, and in most countries it is one of the most severe criminal offences. Even in a case a child willingly, without being forced and

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<sup>34</sup> Internet (51%), television (31%), computer games (10%), teenage magazines (8%)

<sup>35</sup> Around two-thirds (63%) of them often used the Internet unsupervised

<sup>36</sup> In Europe, the age of consent to sexual activity varies from 13 (Spain) to 17 (Ireland) For more details see: INHOPE, <http://www.inhope.org/en/facts/age.html>

without participation of any adult person, take part in production of pornographic material, it will still be a matter of prohibition, i.e. the material, if made public, would be confiscated.

The protection of minors does not end in the prohibition of children pornography, it goes further to protection from any content that might be harmful in any aspect to them. It is also illegal to enable access for children to pornographic material. Most of countries have specific rules about material rating for different age of children and that is applicable both to print and broadcast media. However, the issue is to what extent this protection would be sufficient and in accordance with proportionate measures.

In 1996, the US Congress adopted the Communications Decency Act as a part of Telecommunications Act, regulating the issues of indecency and obscenity on the Internet. Immediately afterwards, the American Civil Liberties Union filed a lawsuit claiming the unconstitutionality of the Act and in February 1996, the Court in Pennsylvania gave the Temporary Restraining preventing the United States government from enforcing the "indecency" provisions of the CDA. (Cyber-Rights&Cyber-Liberties, 1997).

The Act criminalised, among others, "knowing transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication." (CDA 223(a)(1)(B)(ii)) Additionally, the Section 223(d) prohibited the knowingly sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." These were just couple of ambiguous provisions constituting the breach of the US First Amendment. On June 26, 1997, the US Supreme Court upheld the District Court decision that the statute abridged the freedom of speech. (1997, Reno et. Al v. ACLU et al. No. 96-511)

In 1998, Congress passed the Child Online Protection Act (COPA) establishing criminal penalties for any commercial distribution of material harmful to minors, however limited to commercial speech and affecting only US providers. As in the case regarding CDA, ACLU filed a lawsuit in order to strike down the Act. In February 1999, the federal district court in Philadelphia issued an injunction preventing the government from enforcing COPA, and the injunction was affirmed by the Third Circuit Court of Appeals. The US Supreme Court upon the US Department of Justice's petition asking to reverse the aforementioned decisions held that "content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." (2004, Ashcroft, Attorney General v. ACLU et al. No. 03–218) According to the Supreme Court, the Government has to provide arguments for any limitation of freedom of expression, thus, the burden of proof is on the Government. The injunction of the COPA is still pending.<sup>37</sup>

On 20 January 2006, the European Commission adopted the proposal for the Recommendation on the Protection of Minors and Human Dignity and on the Right of Reply. In September 2006, the European Council adopted the common position on the adoption of the Recommendation. Like most EU documents, the Recommendation call for adoption of self-regulatory mechanism and parental control over the content harmful to minors. With regard to content control, one of the possible scenarios is that Internet industry itself already maintains self-rating of available materials, or provide hotlines for end users and co-operate with law enforcement. Hotlines may be established also by non-

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<sup>37</sup> The Supreme Court held that important practical reasons supported the letting the injunction pending a full trial on the merits. "First the potential harms from reversal outweigh those of leaving the injunction in place by mistake. Extraordinary harm and a serious chill upon protected speech may result where, as here, a prosecution is a likely possibility but only an affirmative defense is available, so that speakers may self-censor rather than risk the perils of trial. Cf. *Playboy Entertainment Group, supra*, at 817. The harm done from letting the in-junction stand pending a trial on the merits, in contrast, will not be extensive. Second, there are substantial factual disputes remaining in the case, including a serious gap in the evidence as to the filtering software's effectiveness. By allowing the preliminary injunction to stand and remanding for trial, the Court requires the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so. Third, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet, which evolves at a rapid pace." (2004, Ashcroft, Attorney General v. ACLU et al. No. 03–218, b)

Internet industry, they would, upon knowledge of harmful content, contact law enforcement authorities who will then take appropriate actions. (PCMLP, 2004, p. 38)

There are many hotlines on the Internet monitoring the content themselves and acting upon complaint received from end users. Most of them operate in accordance with the 'notice and take-down' procedure in alerting a hosting service provider of criminal content found on its servers. According to the Internet Watch Foundation in first six months of 2006, there were 14,313 reports submitted to the organisation of which near 5,000 were found potentially illegal. Majority of child abuse content was found on US ISPs' servers. (IWF, 2006, p. 5-6)

Thus, the protection of minors is multi-layered and all the layers should not be addressed entirely through the same approach. With regard to abuse of children in pornographic materials all stakeholders agree that such material should be removed from the Internet. Moreover, there is a consensus that these acts should be prosecuted. With regard to adult pornography, which access to is permitted for adults but not for children, there is a difference between commercial and non-commercial websites. Commercial websites are easier to control as majority of them seek information on age prior allowing the access. Websites that do not have such preconditions should be handled through positive approach, such as parental filtering or blocking the access from computers used only by children. Other harmful content is the most difficult task to handle, as there is always a risk that blocking such content would go beyond the level of proportionality. Moreover, there is not clear line even in national legislation what is to be regarded as harmful and what not. The limit is always changing, as what was inappropriate ten years ago may not be now. Thus it is the issue that cannot be solve now and forever, but needs continuous rethinking.

### **5.3. State Control v. Freedom of Expression**

The vast majority of the OSCE Participating States have specific provisions protecting state, state symbols and government institutions in their criminal law. The penalties for



this offence vary from state to state and they could be fine or imprisonment, or both. (OSCE, 2005) Needless to say, just few of these countries are not at the same time members of the Council of Europe and the European Convention. Moreover, these are the countries that do not have criminal offence for damaging the reputation of state, state symbols and governmental institutions. What is even more concerning is that Europe, at least its Western part, is often deemed, together with the USA, safe place for anyone wishing to openly criticise the government, be it national or foreign or international.

Criticism is not only a benefit for the society but it also is its necessity. Every policy a government is implementing or is about to implement should be publicly discussed. Not because there is a need to make people think their voice is important, but because their voice *is* important. Every dissenting opinion may lead to either changing the previous stand as the opinion provides for arguments, or may lead to fostering the stand as opinion has strengthen the justification. Therefore, those who avoid any critique or political opponents show that even they doubt their own opinion.

Mill says: “THE time, it is to be hoped, is gone by when any defence would be necessary of the ‘liberty of the press’ as one of the securities against corrupt or tyrannical government.(...) Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst.” (Mills, 2004, Ch. II) According to him even if all people but one share the same opinion, and only one member has opponent opinion, all the people “would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” (Ibid.) Thus, for Mill every opinion however sole it may be is of equal value as the opinion of majority.

The European Court on Human Rights is also of the stand that freedom of expression means not only favourable opinion but also those that are not. In its decision in *Lingens v. Austria* (1986), the Court held that freedom of the press “affords the public one of the

best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.” (Ibid. para. 42)

However, numerous cases show that pluralism of thoughts and expressions is not regarded as a benefit but as a threat to the state and society. The pluralism of freedom of expression relies on freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. (UDHR, Art.19) The problem of state censorship over freedom of expression on the Internet is usually manifested in blocking access to the Internet in sense of limited search results and in prosecuting or even arresting people who wrote or posted material or sent email criticising governments or on other forbidden subjects.

### **5.3.1. Internet filtering**

With regard to access to the Internet, the restriction usually refers to state monopoly of the access and therefore filtering the search results. For instance, Tunisian Republic implements an Internet filtering regime targeted to blocking substantial on-line materials on, among other, political opposition and human rights. According to the OpenNet Initiative, Tunisia's filtering efforts are focused and effective. The software – SmartFilter software – was produced by the U.S. company Secure Computing, to target and prevent access to material such as: “political opposition to the ruling government, sites on human rights in Tunisia, tools that enable users to circumvent these controls, and pages containing pornography or other sexually explicit content.” (OpenNet Initiative, 2005 – Tunisia) For certain, this was one of the reasons why many civil society organisations were unpleasantly surprised with the mere idea to organise WSIS in Tunisia. North Korea is even more disturbing example, before the North Korean authorities announced the launch of a first local version of the Internet in mid-February 2004, the Internet was only

available to a handful of potential users. (RSF, 2004) Having in mind that even Sierra Leone, as ranked last on the UNDP list, has Internet access, the reason of North Korea is purely political.

The country known for being the most restrictive towards Internet access is definitely China, by using very sophisticated technology allowing the government to block and filter Internet content. This filtering includes words such as 'human rights', 'democracy' and 'freedom'. The software is, as in Tunisia's case designed by foreign companies. (Amnesty International, 2006, p. 10) In China every ISP upon obtain license has to maintain records on customers' account numbers, phone numbers and IP addresses. All ISPs that provide services like publication, operation of bulletin boards or that engage in journalists must keep copies of all materials. Above all they are responsible for the content they display. (OpenNet Initiative, 2005 – China)

Though one could claim that internet access is a matter of internal affairs it becomes international the moment other actors ignore such repression or even enable the enforcement of such repressive measures. The question, first, for international community and states, is whether something could be done in order to stop such repression and to prevent similar cases in future, as what one actor may do; it should be allowed to any government to filter internet content as it wants. The second question is should there be co-operation with such repressive policies in the sense that co-operation strengthens the content control. The first question is a matter of politics and diplomacy. Indeed it would be important to have governments being reminded of human rights principles and to call them for respect thereof. The second questions is addressed to Internet industry and Internet wide ISPs, namely Google, Yahoo! and Microsoft.

All three companies operate in China and have accepted China's policy on access restriction. Yahoo! was the first foreign operator in China. In 2005, it forwarded its shares in Yahoo! China to a Chinese company and became minority shareholder. This fact has been ever since used as a Yahoo!'s argument that it does not filter access in China. In the beginning of 2006, Google launched self-censoring search engine

Google.cn.<sup>38</sup> The actions Microsoft is taking with regarding to filtering are not quite certain. (Amnesty International, 2006, p. 17-23)

### **5.3.2. Prosecuting opponents**

As mentioned above, many countries criminalise criticism of its government and institutions. Some of the ways to suppress freedom of expression are criminal prosecutions and arrest.

Just as an example, in 2003 in Serbia, police arrested a professor who took extracts of various texts of one of the political parties and substituted the word “democrats” with “faggets”. He was required to give a password to takedown the texts posted on the US based content service provider and since he refused, he was kept in custody for 19 days. This was the first and, for the moment, only case in Serbia of prosecuting people for political content they posted on the Internet. (Cukic, 2003)

As in the case with the Internet filtering, China is a ‘leader’ in number of prosecuted, arrested, imprisoned individuals for posting or sending ‘non-favourable’ materials. The most disturbing case is 2001 arrest of Yang Zili who posted several article criticising lack of open political debate and government policy on Falungong movement. He was sentenced to eight-year imprisonment and is still serving the penalty. Many civil society organisations called for his release.<sup>39</sup> In April 2005, Chinese journalist Shi Tao was sentence to imprisonment for 10 years for disclosing state secrets in an e-mail. Allegedly, Yahoo! Hong Kong provided his account information that was used as evidence in the case against him. (Amnesty International, 2006, p. 15)

There are many examples of similar actions and China is not an exception. Several human rights NGOs maintain data on attacks and actions taken against journalists and

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<sup>38</sup> Google.com is available in China, however, inaccessible due to China’s firewall

<sup>39</sup> Petition may be signed on the Reporters without Borders’ website:  
[http://www.rsf.org/article.php3?id\\_article=11649](http://www.rsf.org/article.php3?id_article=11649)

other people dared to express their opinion. Amnesty International, Reporters without Borders and OpenNet Initiative are just few of them, though with major impact.

The problem of such illegitimate actions, though they are usually legal i.e. in accordance with national legislation, is even bigger when the ‘perpetrator’ posted material anonymously. In such case, state authorities have to identify the person first. However, right to be anonymous is an essential part of right to free expression. This problem grows when ISPs that are not of the country origin are required to provide information on the person, and do so. The mere fact that there is a possibility that someone, particularly the government one is criticising, could obtain information on his/her identity, home address and so forth has a chilling effect on freedom. In order to support people that would criticise their governments, or, in many cases simply wish not to reveal their identity, civil society organisations, like the Reporters without Borders and the Electronic Frontier Foundation, prepared guide tools on how to post blogs anonymously.

## **6. Conclusion**

As it was presented in the dissertation, there are numerous international, national and self-regulatory documents recognising the right to freedom of expression as a universal and fundamental human right. However, the interpretation thereof varies from country to country and from case to case. It is therefore, first important that this right is interpreted in an unambiguous manner.

This right, as many others, is not an absolute right and all possible restrictions, not only those elaborated on in the Chapter 5, need to be clarified, and more importantly, need to be harmonised among all stakeholders, particularly among states. In order to fulfil their task in protecting right to freedom of expression, states should be more active in

promoting the right not only within their territories, but globally as well. They should refrain from limiting any individual in exercising the right unless it is necessary in order to protect prevailing interest. Additionally, this interest has to be a legitimate interest important for every democratic society. In order to fulfil negative and positive obligations towards this human right, as defined by the European Convention, they also need to advocate for development and improvement of democratic institutions worldwide. They should be unanimous in the stand that freedom of expression is essential precondition for every open society.

Therefore, there is a need for the adoption of a binding international document that would secure the respect of the right and enable every individual to exercise it without illegitimate interference. The ongoing debate over the Internet governance should be accelerated and all stakeholders should come to an agreement regarding the governance of the Internet and immediately after all other issues (human rights in details, jurisdiction, liability etc.) should be addressed. The Internet cannot be self-developed in terms of rules and policies, as it has been shown in various individual cases, nor can it be dealt with nationally or partially, it required all members of community.

Internet industry, and particularly Internet service providers, should not be led solely by their economic interests, primarily because their services are of public importance. Thus, they should share the responsibility of protecting freedom of expression in order not to have more cases of filtering access like those already existing in China or Tunisia. On the other hand, they cannot be held accountable for every material they post or provide access to, and therefore, they should be given more precise guidelines on their

obligations, both negative and positive, from international community. Providing access to and hosting a material should not induce the same level of liability. ISPs should not implement mechanisms that filter access to the Internet, nor should they provide account holders' information, as Yahoo! did, unless it is required by authorised institutions and it is in accordance with the freedom of expression principle. Finally, they should develop self-regulatory mechanisms consistent with human rights goals.

Therefore, Internet service providers should be regarded as public service providers and they should accept all the benefits and duties a public service implies. In order to protect themselves from political pressures, they should establish rules and terms of business that would enable them to make profit but at the same time respect the principle of corporate social responsibility.

There should be no prior restriction of freedom of expression in terms of filtering or banning access to the Internet. Every restriction should be balanced in a particular case.

With regard to hate speech as one of the possible misuses of freedom of expression, countries have different legal provisions, what is illegal in France or Germany is legal in the USA. There is a need for better distinction between the speech that harms others and speech that is within the scope of the right to free expression. ISPs should be aware of illegal content provisions in country they operate. Countries should re-examine their legal provisions and seek for active rather than negative approach, since, as it is often the case, hate speech lacks reasoning and justification. States, and all other stakeholders, particularly human rights organisations, should take active role in raising public awareness of importance, benefit and beauty of diversity.

With regard to protection of children, all stakeholders should be undivided in providing the necessary protection. This particularly refers to abuse of children in pornography, and in these case, states, Internet industry and every other organisation should co-operate in order to prevent these materials being distributed and to find and prosecute criminals. Other materials regarding adult pornography or materials of harmful content should deal with by all members of society, in these matters, family and local communities play crucial role. However, any measure, as shown in the case of the US Communications Decency Act, should not cause limitation of access more than it is necessary. State should promote projects aiming to provide society (i.e. adults) with more information and skills on end-user filters' functioning.

With regard to the state control over the Internet, the Internet should be freed from such control. As it is often the case, in repressive countries such as China protection of state reputation and state secrets are unnecessary restrictions of the freedom. In every case of illegitimate interference by the state, international community should take action and use all diplomatic methods available. ISPs should not be always held responsible for collaborating with repressive governments, as they themselves cannot impose the rules to them. Therefore, all states tending to present themselves as democratic should protect not only, as mentioned above, freedom of citizens living in these countries, but ISPs as well.

Finally, freedom of expression does not enjoy the adequate protection on the Internet in all parts of the world. Due to the insufficient international protection, it is mostly limited by repressive governments, but also by ISPs due to non existent of adequate self-regulatory framework and inconsistent policy of both ISPs and governments.



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