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Piercing the veil of state sovereignty: How China's censorship regime into fragmented international law can lead to a butterfly effect

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Abstract: This article seeks to address China's entrenched censorship regime in the constitutionalist dimension of international law. First, the article probes into China's censorship regime and the way it is linked to the country's foreign policies. Second, the article explores the tension between China's national censorship regime and international law. Such tension is rendered sharper than ever in the context of fragmented international law, as exemplified by two UPRs of China and two WTO rulings. Finally, the article advances a constitutionalist premise that eventually China's self-motivated step into the fragmented domain of international law could boomerang against China's censorship regime. As the international standards of freedom of expression are evolving into a fundamental right with constitutional status, the functional interrelatedness between different subsystems of international law gives rise to the accountability of state actors, which in turn compels them to comply with universal rules.

Keywords: censorship; China; fragmentation of international law; global constitutionalism; state sovereignty

> 'So democracy and freedom of speech are inseparable. We shall take those democracies in advanced countries as our example.'
>
> — Xinhua Daily[1]
>
> 'Humanity and democracy were two principles essentially irrelevant to the original Westphalian order.'
>
> — Dr Javier Solana[2]
>
> 'You are my creator, but I am your master–Obey!'
>
> — Mary Shelley[3]

[1] Xinhua Daily, 19 April 1944.

[2] Dr J Solana, 'Securing Peace in Europe, Secretary General of North Atlantic Treaty Organization', Speech at the Symposium on the Political Relevance of the 1648 Peace of Westphalia (12 November 1998).

[3] MW Shelley, *Frankenstein or the Modern Prometheus: the Original Two-Volume Novel of 1816–1817 from the Bodleian Library Manuscripts* (Bodleian Library, Oxford, 2008) 190.

I. Introduction

The first excerpt above endorsing freedom of expression in the Western style comes from Xinhua Daily, the principal news organ of the Chinese Communist Party (CCP), prior to the founding of the People's Republic of China (PRC). Over 60 years later, reports about rampant suppression of freedom of expression in China never subside.[4] Recently, several major propaganda media of the CCP have continued to publish official opinions, arguing that constitutionalism, which encompasses freedom of the press, reflects a capitalist element, aims at the downfall of the CCP and cannot be shared by a socialist country like China.[5] It is also widely reported that the CCP has issued a 'No 9 Document' that listed 'seven perils' to its one-party rule including 'western-style constitutionalism', 'universal values' and 'freedom of the press'.[6] The CCP's recent policies on freedom of expression makes the conflicts between China's censorship regime and 'universal values' endorsed by global constitutionalism ever more conspicuous. Although the international community has long since started its conversation with China on freedom of expression, for a time China viewed any criticism on its domestic situations as confrontational and hostile.[7] In the past decade, however, the contours of such conflicts have become more visible in cases where China's censorship regime comes into systematic and regular contact with international law. Two scenarios illustrate this.

[4] For instance, these reports are often summarized in the legal documents of the United Nations Human Rights Council [UNHRC]. UNHRC, Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1, paras 27–29, UN Doc A/HRC/WG.6/4/CHN/2 (16 December 2008) [OHCHR Compilation I]; UNHRC, Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21, paras 34–42, UN Doc A/HRC/WG.6/17/CHN/2 (7 August 2013) [OHCHR Compilation II]; UNHRC, Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to Human Rights Council Resolution 5/1, paras 29–32, UN Doc A/HRC/WG.6/4/CHN/3 (5 January 2009) [OHCHR Summary I]. UNHRC, Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 16/21, paras 37–45, UN Doc A/HRC/WG.6/17/CHN/3 (30 July 2013) [OHCHR Summary II].

[5] XQ Yang, 'A Comparative Study of Constitutionalism and People's Democratic Dictatorship' (2013) 2013: 10 *Red Flag Essays*; 'Constitutionalism Denies China's Road of Development', *Global Times*, 12 May 2013; ZX Zheng, 'Recognizing the Essence of Constitutionalism', *Party Building*, 29 May 2013.

[6] C Buckley, 'China Takes Aim at Western Ideas', *New York Times*, 19 August 2013, available at <http://www.nytimes.com/2013/08/20/world/asia/chinas-new-leadership-takes-hard-line-in-secret-memo.html?_r=0> accessed 10 December 2013.

[7] S Sceats with S Breslin, *China and the International Human Rights System* (Chatham House, London, October 2012) 3–6.

Starting in 2009, the working group of the Universal Periodic Review (UPR) of the United Nations Human Rights Council (UNHRC) conduct regular reviews of China's human rights records every four years.[8] As of late 2013 two UPRs of China have been completed, and there have been increasingly critical recommendations that admonish China of the need to improve freedom of expression.[9] However, the Chinese delegation simply disavowed the existence of censorship, as the 2009 working group reported:

> On freedom of speech and expression, the delegation noted that China's laws provide complete guarantees. The Government encourages the media to play a watchdog role and there is no censorship in the country.[10]

The delegation went on to assert that speeches such as those amounting to 'subversion of government' would jeopardize the public order, and that, as a question of state sovereignty, states may impose restraints upon speeches, in full conformity with the International Covenant on Civil and Political Rights (ICCPR).[11] In the 2013 UPR, the Chinese delegation remarked that '[C]itizens fully enjoy the freedom of speech', but that '[I]t is the obligation of all governments to crack down cybercrimes of all types'.[12]

Further, as a Member of the World Trade Organization (WTO), China has been frequently engaged in the WTO dispute-settlement proceedings.[13] In 2009, a WTO Panel issued its ruling on the intellectual property (IP) dispute between China and the United States (US).[14] One of the allegations the US levelled against China was that Chinese copyright law did not cover enough types of works owing to its strict censorship system. The Panel finally decided in favour of the US regarding this allegation.[15] Several months later, another WTO Panel found that China's censorship measures

[8] UNHRC, Report of the Working Group on the Universal Periodic Review China, UN Doc A/HRC/11/25 (5 October 2009) [UPR China I]. UNHRC, Draft Report of the Working Group on the Universal Periodic Review China, UN Doc A/HRC/WG.6/17/L.3 (24 October 2013) [UPR China II].

[9] UPR I (n 8) paras 38, 82–84, 92. UPR China II (n 8) paras 98, 116, 119, 166, 168, 176.135–7, 176.150–6, 176.158–9, 176.176, 176.229.

[10] UPR I (n 8) para 71.

[11] International Covenant on Civil and Political Rights, adopted 16 December 1966, GA Res 2200 (XXI), UN GAOR, 21st Sess, Supp No 16, at 52, UN Doc A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976 [ICCPR].

[12] UPR China II (n 8) para 88.

[13] As of November 2013, China has had a profile of 11 cases as complainant, 31 cases as respondent, and 102 cases in which China is a third party. WTO, Disputes by country, available at <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> accessed 10 December 2013.

[14] WTO Panel Report, *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (26 January 2009) [*China–IPR*].

[15] Ibid paras 2.2–4.

prevented China from equally granting the trading rights regarding certain cultural products to business entities as it promised.[16] A WTO Appellate Body confirmed this finding subsequently.[17]

The scrutinization of China's censorship regime at the UNHRC and the WTO shows that China's censorship is no longer an entirely self-contained regime without any interaction with international law. In conducting censorship, China is fully aware of the need to address the prevailing universal values that endorse freedom of expression. However, China has often waged a self-contradictory policy relating to freedom of expression, as exemplified by the above two international cases. Such a policy envisages the extent of the 'fragmentation of international law': the international legal order is composed of different subsystems that focus on different values and seem to be independent of each other.[18] International law is thus seen as 'fragmented' and might allow for China's self-contradictory practice to go on in different international arenas. Indeed, the WTO Panels and the Appellate Body did not refer to the human rights obligations of WTO members, but remained silent on China's proposition that the Panel lacked jurisdiction to review its sovereign discretion to conduct censorship. In fact, despite its commitments to the universal values of human rights, China has continued to restrict political speeches in the Internet age, even though the widespread use of the Internet may encourage optimism about more freedom of speech in China.[19] In this connection, a question apparently persists: how does a fragmented international legal order define itself when faced with China's censorship regime?

According to Petersmann, WTO law is a leading international legal source that envisions a more dynamic global constitutional order,[20] facilitating the transformation of such an order based on international law from 'micro-constitutionalism' into 'macro-constitutionalism'.[21] In this constitutionalist

[16] WTO Panel Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (12 August 2009) [*China–Publications*].

[17] WTO Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) [AB Report].

[18] M Koskenniemi, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L. 682 (13 April 2006) 3–4.

[19] BL Liebman, 'Watchdog or Demagogue: The Media in the Chinese Legal System' (2005) 105 *Columbia Law Review* 1.

[20] E-U Petersmann, 'The WTO Constitution and Human Rights'; (2000) 3 *Journal of International Economic Law* 20.

[21] CEJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff, Leiden, 2011) 32–3.

view, protection of human rights becomes a kind of public good that stands at the heart of the entire structure of international law.[22] Basically, I share this constitutionalist mindset. WTO law is such a prominent source that might touch upon China's human rights policies.[23] But WTO law is not the *only* source. Rather, the fragmented international legal order, composed of diverse sources of norms and institutions, provides the constituent parts of a system of 'global governance'. Such global governance is characterized by concentration of power, a pluralistic administrative structure and geographical asymmetries.[24] This paradigm of global governance highlights not only the inconsistency between different subsystems of the fragmented international order, but, more fundamentally, the perplexing relationship between this fragmented international order and state sovereignty, as evidenced by China's censorship regime in the aforementioned scenarios.

Whereas most scholarship on China's censorship regime so far focuses on China's domestic contingencies, this article represents an effort to address China's censorship regime under global governance. As such, it aims to complement and enrich the former scholarship. I propose that a rejuvenated mentality of global constitutionalism, when tied to the seemingly fragmented international law, might contribute to reducing the severity of China's censorship regime and eventually changing it. It is the result of the 'butterfly effect' which begins with China's voluntary step into the international legal order and ends by subjecting its censorship regime to the fragmented but interconnected patchwork of international law: just as an innocuous event such as a butterfly flapping its wings can cause a storm on the other side of the world, so too could China's frequent conversations with different subsystems of international law such as the WTO law render the international human rights law (IHRL) on freedom of expression pertinent, and ultimately have enormous ramifications for a regime as remote and intransigent as China's censorship.

[22] JL Dunoff, 'Why Constitutionalism Now? Text, Context and Historical Contingency of Ideas' (2005) 1 *Journal of International Law and International Relations* 195.

[23] JY Qin, 'Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence—A Commentary on the China—Publications Case' (2011) 10 *Chinese Journal of International Law* 271; M Ting, 'The Role of the WTO in Limiting China's Censorship Policies' (2011) 41 *Hong Kong Law Journal* 285. C Wright, 'Censoring the Censors in the WTO: Reconciling the Communitarian and Human Rights Theories of International Law' (2010) 3 *Journal of International Media and Entertainment Law* 17; J Pauwelyn, 'Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China–Audiovisuals' (2010) 11 *Melbourne Journal of International Law* 119.

[24] D Chalmers, 'Administrative Globalization and Curbing the Excesses of the State' in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, Oxford, 2011) 351, 362–4.

Taking the two UPRs and the two WTO disputes as vivid examples of such global governance, I focus on how global constitutionalism might help facilitate the effect which international laws prescribing freedom of expression potentially can have on China's unprecedented censorship regime. This effect will be achieved through the interaction between China's censorship regime and different subsystems such as WTO law. In fact, while no constitutional authority in global governance can substantially alter China's uncompromising adherence to its censorship regime, fragmented international law does provide an opportunity to recalibrate this predicament. Whereas China has leaned on the move 'from territoriality to functionality',[25] a move in the reverse direction could eventually reinstate the constitutional dynamics of the international legal order: the evolving normativity of the constitutional status of freedom of expression trumps the fragmenting effects through the functional interrelatedness and triggers a development in the direction of the political accountability of state sovereignty. Essentially, regular and systematic exposure of the censorship regime to the conceptually fragmented patchwork of the international legal order could have a 'butterfly effect' on the domestic contours of China's censorship: the whole patchwork pierces the veil of China's ingrained mentality of 'maintaining the security' of state sovereignty that is used to legitimize the hegemonic rule of the CCP.

Accordingly, I attempt, in the following steps, to advance a premise about the repercussions of the global constitutional order on the censorship regime that overshadows freedom of expression in China. First, I explore China's regulatory framework of censorship that aims to consolidate the CCP's monopoly power with an absolutist doctrine of sovereignty. It is, however, no longer a self-contained regime, but subject to institutional externalities and nuanced enforcement approaches that may have an impact on China's foreign policies. Then I analyse, through the examples of the UPRs of China and the WTO disputes, how China's censorship regime is exposed to a patchwork of pluralistic global governance. Finally, I propose that the normative-functional-political chain of the fragmented international legal order may ultimately neutralize China's sovereignty-centred censorship regime.

II. The censorship regime under Chinese law and its potential link with China's sovereignty-centred foreign policies

China boasts of an unprecedented censorship regime. Be they explicit, tacit or hidden, censorship rules constitute influential regulatory sources in

[25] AL Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization' in IF Dekker and WG Werner (eds), *Governance and International Legal Theory* (Martinus Nijhoff, Leiden, 2004) 59.

daily life.[26] Essentially, China's censorship serves an authoritarian system ruled by one party, while the government often redefines freedom of expression in terms of the prevailing ideology of the CCP under the aegis of an absolutist doctrine of state sovereignty and traditional Chinese values.[27] Nonetheless, China's current censorship regime dwells on a highly developed body of laws and regulations. In the past decades China has made stunning progress in modernizing its legal system: China has explicitly undertaken to build a 'state of rule of law' under the influence of IHRL,[28] while respect and protection for human rights have been written into China's constitution.[29] Moreover, called on by the UN,[30] China has been releasing on a regular basis the National Human Rights Action Plans (NHRAP).[31] In practice, it is becoming increasingly difficult, costly and even self-contradictory to run the censorship regime while maintaining these commitments to universal values embraced by IHRL. If China's censorship regime used to be a self-contained domestic regime, it now has the potential of influencing China's foreign policies.

The eviscerated constitutional framework of freedom of expression

Freedom of expression is enshrined in the Constitution of the PRC.[32] However, the constitutional framework of fundamental rights is vulnerable to both legislative and judicative externalities and is eviscerated by an absolutist doctrine of sovereignty that underpins the CCP's monopoly of state power. Above all, the Constitution emphasizes the supremacy of sovereignty over civil rights. Entire bundles of civil liberties are subjugated to provisions that prevail where exercise of these rights is likely to jeopardize 'the interests of the state', or in case anyone fails to 'safeguard the unity of the country', 'observe public order' or proves a menace to 'the

[26] Liebman (n 19) 46–56. ASY Cheung, 'Exercising Freedom of Speech behind the Great Firewall: A Study of Judges' and Lawyers' Blogs in China' (2011) 52 *Harvard International Law Journal Online* 250, 262–5.

[27] R Peerenboom, 'Assessing Human Rights in China: Why the Double Standard?' (2005) 38 *Cornell International Law Journal* 71, 78–84, 113–14.

[28] The Constitution of the PRC, ch 1, art 5 (2004); M Wang, 'Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics' (2007) 29 *Human Rights Quarterly* 727, 733–8.

[29] Ibid art 33(3).

[30] OHCHR, *Handbook on National Human Rights Plans of Action* (2002) paras 3.1–2.

[31] Information Office of China's State Council (IOCSC), NHRAP, 13 April 2009 available at <http://www.npc.gov.cn/englishnpc/news/Focus/2009-04/14/content_1497609.htm> accessed 10 December 2013. IOCSC, NHRAP 2012–2015, 11 June 2012, available at <http://news.sina.com.cn/c/2012-06-11/152524573325.shtml> accessed 10 December 2013.

[32] The Constitution of the PRC (n 28) arts 35, 47.

security, honor and interests of the motherland'.[33] In addition, the panoply of the constitutional provisions is reined in by a flagrantly long and hortatory preambular text, which embraces the 'Four Cardinal Principles',[34] as well as a pot-pourri of political ideologies put forward by generations of charismatic Party leaders. Various rhetorical devices aim to 'harmonize' the whole nation with an ideology conducive to monolithic rule by the CCP.[35]

Meanwhile, the unreliable judicatory system projects a hazy prospect of constitutional protection of the fundamental rights in judicial practice. The Supreme People's Court (SPC) mandated,[36] first implicitly but later categorically, that constitutional rights could not be invoked in criminal or civil trials.[37] These rules were amended by recent legal practice in tandem with the radical economic reforms.[38] However, judgments on cases with any tint of political gravity are predetermined.[39] In fact, the SPC's impulse to interpret certain provisions in terms of the Chinese Constitution has been confined merely to cases involving economic and social rights.

These factors would serve the constitutional guarantee on freedom of expression at best as a 'window-dressing'.[40] In a vacuum of constitutional protection, administrative organs are endowed with legislative functions to formulate censorship regulations, decisions or orders.[41] While the Westphalian doctrine of state sovereignty conjures up in the Chinese mind an unbearable memory of humiliating diplomacy,[42] it now underpins China's one-party rule. Literally, an absolutist doctrine of sovereignty has been

[33] Ibid arts 51–54.

[34] The Four Cardinal Principles include the leadership of the CCP, the people's democratic dictatorship, the socialist road, the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the thought of 'Three Represents'. Ibid preamble para 7.

[35] SC Angle, 'Human Rights and Harmony' (2008) 30 *Human Rights Quarterly* 76.

[36] The SPC was authorized to issue judicial interpretations in legal practice. The Standing Committee of the People's Congress, Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law, June 10, 1981 at the nineteenth Meeting of the Standing Committee of the Fifth National People's Congress, art 2.

[37] The SPC made such opinions clear in two documents in 1955 and 1986. M Jihong, 'The Constitutional Law of the People's Republic of China and Its Development' 23 (2009) *Columbia Journal of Asian Law* 137, 174–5.

[38] TE Kellogg, 'Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China' (2009) 7 *International Journal of Constitutional Law* 215.

[39] OHCHR Compilation I (n 4) para 24; OHCHR Summary I (n 4) para 23. OHCHR Summary II (n 4) para 32.

[40] Cf C Tomuschat, *Human Rights between Idealism and Realism* (Oxford University Press [OUP], Oxford, 2008) 89.

[41] The Law of the PRC on Legislation, arts 56 and 71 (2000).

[42] Zhou Qi, 'Conflicts over Human Rights between China and the US' (2005) 27 *Human Rights Quarterly* 105, 118.

commonly venerated in all regulations regarding publications and other media.[43] Any expressive act will be banned if it contains either contents that militate against 'the fundamental principles established in the Constitution' or that may 'jeopardize the unification, sovereignty and territorial integrity of the state, or divulge state secrets, jeopardize security of the state, or impair the prestige and interests of the state'.[44]

A decentralized institutional framework of censorship

While no statutory law in China explicitly provides for a specific department or official to carry out the duty of censorship, there is a stringent hierarchy of institutional framework exercising the authority of censorship. Perched at the top of the pyramid, the Publicity Department of the Central Committee of the CCP (CPD) keeps a vigilant eye directly on the entire public.[45] The CPD and its subordinate departments can ultimately determine the substantive content of censorship and instruct relevant state organs to carry out censorship.[46] In fact, the CPD does not conduct censorship itself, but summons government and non-government organs to accept its 'brainwashing' preachings regularly and follow its guidelines strictly. Consequently, in most cases, the guidelines and orders are not directly enforced by Party functionaries from the publicity departments,[47] but through various state organs, especially those at lower levels, that are directly in charge of public media and private channels of expression.[48] In that connection, the institutional framework of censorship is being decentralized, which makes it possible for actors with different intents to carry out censorship in different ways.[49]

The central state organs that exercise censorship are the General Administration of Press and Publication (GAPP), the State Administration

[43] E.g., Regulations on the Administration of Movies, art 25 (2001) [RAM]; Regulations on Broadcasting and Television Administration, art 32 (1997) [RBTA]; Provisions for the Administration of Internet News Information Services, art 19 (2005) [PAINIS].

[44] Regulations on the Administration of Publication, art 26 (2011) [RAP].

[45] The complete statement of the functions of the Publicity Department is outlined on its homepage, see <http://cpc.people.com.cn/GB/64114/75332/5230610.html> accessed 10 December 2013.

[46] Liebman (n 19) 43–6.

[47] Committee to Protect Journalists, *Falling Short: As the 2008 Olympics Approach, China Falters on Press Freedom, A Special Report of the Committee to Protect Journalists* (New York, August 2007) 25.

[48] I Bennett, 'Media Censorship in China', *Council on Foreign Relations* (7 March 2010), available at <http://www.cfr.org/china/media-censorship-china/p11515> accessed 10 December 2013.

[49] G King, J Pan and M Roberts, 'How Censorship in China Allows Government Criticism but Silences Collective Expression' (2013) 107(2) *American Political Science Review* 326, 327.

of Radio Film and Television (SARFT) and the State Council Information Office (SCIO). The GAPP is the highest government authority for deciding whether to approve the establishment of any publishing entity and any piece of journalism on the basis of prerequisites that guarantee the government's control over the press.[50] While the SARFT assumes similar functions in administering traditional media facilities,[51] the SCIO presides over the administration of online news service entities.[52] Subordinate departments of these central organs exist at all government levels, each of which is empowered to issue and interpret their own censorship regulations.

Furthermore, various government departments cumulatively oversee and enforce censorship. For instance, while the departments responsible for the information industry provide basic technical licenses for Internet facilities,[53] the municipal departments of cultural administration decide on whether to approve the establishment of business sites for Internet access services as well as all other cultural entities.[54] However, it is the public security departments that play the key role in online content regulation.[55] Such a convoluted supervising network renders it difficult to interpret and enforce censorship in a coherent manner.

If foreign entities intend to be engaged in the cultural industry in China, they must be subject to censorship by different government institutions. While the Ministry of Foreign Affairs generally oversees the establishment and the activities of foreign news facilities,[56] establishment of any Internet news entities with foreign country involvement must be submitted to the SCIO for security assessment.[57] When it comes to China's major newspapers and periodicals such as those issued by the CCP, prior examination and approval by the State Council and the CPD are required.[58] Besides, foreign news entities are not allowed to set up wholly owned media facilities, but may invest in joint ventures subject to certain conditions on shareholdings,

[50] RAP (n 44) arts 9–19.

[51] RAM (n 43) arts 8–23; RBTA (n 43) arts 8–16.

[52] PAINIS (n 43) arts 4 and 5.

[53] Regulation on Internet Information Service, art 7 (2000) [RIIS].

[54] Regulations on the Administration of Business Sites of Internet Access Services, art 4 (2002) [RABSIAS].

[55] Measures for Security Protection Administration of the International Networking of Computer Information Networks, art 3 (1997) [MSPAINCIN].

[56] Regulation on News Coverage by Resident Offices of Foreign News Agencies and Foreign Correspondents, arts 5–10 (2008).

[57] PAINIS (n 43) art 9.

[58] Several Opinions of the Ministry of Culture, State Administration of Radio, Film and Television, General Administration of Press and Publication, National Development and Reform Commission and the Ministry of Commerce on Canvassing Foreign Investment into the Cultural Sector, art 10 (2005).

and set up offices licensed by the SARFT.[59] Such an institutional framework may decentralize the institutional framework of censorship further by allowing different censors to intervene at different stages.

A multidimensional process of enforcing censorship norms

As the normative contents of such censorship regulations are invariably vague, it is often up to individual censors to decide what kind of materials should be filtered on a case-by-case basis. Facing constant bottom-up struggle for freedom of expression at different levels, different censors must apply a nuanced control. Therefore, enforcing censorship norms becomes a multidimensional and dynamic process.

Controlling freedom of speech. While a multitude of censorship regulations have been formulated to ensure censorship on the Internet,[60] China's censorship has a dualistic structure in controlling freedom of speech by individuals,[61] which consists of both government censorship and self-censorship. Essentially, different government departments have built up a cumulative network of Internet censorship. For example, departments of industry and information technology supervise Internet services mainly on a technical basis,[62] whereas departments of state and public security may adopt a wide range of administrative measures to conduct direct content review.[63] Moreover, state organs also require Internet service providers (ISP) to help conduct censorship.[64] In censoring private emails, for instance, ISPs are often obliged to reveal necessary information about email users.[65] Thus, it is a common practice to require ISPs to conduct self-censorship: even Internet cafes are requested to register the information about its user.[66]

Self-censorship at lower levels is, however, a formidable task, though the Chinese government has invested heavily on diverse Internet censorship

[59] Provisional Regulation on Investment in Cinemas by Foreign Investors, arts 3 and 4 (2003); Provisions Regarding the Administration of the Establishment by Overseas Institutions of Administrative Offices for Radio and Television in China, arts 3 and 4 (2004).

[60] TK Kissel, 'License to Blog: Internet Regulation in the People's Republic of China' (2007) 17 *Indiana International and Comparative Law Review* 229, 233–45.

[61] C Stevenson, 'Breaching the Great Firewall: China's Internet Censorship and the Quest for Freedom of Expression in a Connected World' (2007) 30 *British Columbia International and Comparative Law Review* 531, 537–44.

[62] RIIS (n 53) arts 7–10, 18.

[63] MSPAINCIN (n 55) arts 15–19.

[64] S Deva, 'Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?' (2007) 39 *George Washington International Law Review* 255.

[65] Measures for the Administration of Internet E-mail Services, arts 6–11 (2006).

[66] RABSIAS (n 54) arts 14 and 23.

programmes. Apart from the 'Great Firewall' that aims at blocking 'hazardous websites',[67] the infrastructure of ISPs is technically manipulated to filter or block politically 'sensitive' keywords.[68] Further, ISPs of the Bulletin Board System (BBS), blogs or forums are required at any time to preview, correct, warn against or delete any comment that could be deemed deleterious.[69] Indeed, automatic blocking or filtering measures are often inefficient for clever netizens who use different Chinese characters to express the same idea so that manual work becomes necessary.[70] To fulfil the censoring task, a large number of Internet agents are hired to police individual Internet activities around the clock.[71] Nevertheless, even such an extensive programme has a limit, for the widespread use of digital technology makes it practically impossible to cut off every user from global information flow completely. A recent study led by King finds that China's contemporary censorship programme in social media websites aims to reduce the chance of collective action that might amount to protests, rather than to suppress criticism of the CCP and its government in individual cases.[72] Generally, exercising freedom of speech in private circles is more tolerable than doing so in the public.

Controlling freedom of the media. Freedom of the media is an extension of freedom of speech,[73] but it is also more likely to jeopardize the monopoly power of the CCP through the collective influence of the public media. Thus, the government imposes a more stringent dualistic censorship regime on the public media.[74] Relevant state organs remain alert within the whole censorship system. Once every year publishing entities are required to submit the plans of publications relating to national security or social stability for prior examination and approval.[75] Less frequent censorship gives some breathing room for a few publications, but the authors and editors have to bear responsibilities when retroactive censorship

[67] Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo!, Microsoft and Google* (AI Index POL 30/026/2006, July 2006) 26.

[68] Human Rights Watch, *Race to the Bottom: Corporate Complicity in Chinese Internet Censorship* (HRW Index No C 1808, 10 August 2006) 9–11.

[69] Ibid 12–13.

[70] King, Pan and Roberts (n 49) 328.

[71] JF Scotton and WA Hachten, *New Media for a New China* (Wiley-Blackwell, Oxford, 2010) 4.

[72] King, Pan and Roberts (n 49) 334–7.

[73] Cf M Land, 'Toward an International Law of the Internet' (2013) 54 *Harvard International Law Journal* 393, 396–407.

[74] ASY Cheung, 'Public Opinion Supervision: A Case Study of Media Freedom in China' (2007) 20 *Columbia Journal of Asian Law* 357, 380–4.

[75] RAP (n 44) art 20.

is conducted.[76] Films that have already undergone the prior censorship by relevant media must be submitted to the SARFT for further censorship,[77] whereupon the SARFT may decide to 'kill' a film or to allow it to survive.[78] The government also regularly tightens control in the domain of Internet news coverage. The SCIO and provincial authorities supervise news information and order them to be deleted,[79] where the reporting of important events must be preordained in accordance with the Party guidelines.[80] In addition, all press entities and their editors have the 'editors' responsibility' for conducting 'self-censorship'.[81] Film companies, radio and TV stations undertake self-censorship.[82] Internet news service entities must censor the content of the news and the information they transmit.[83]

Concerning China's foreign media policies, the dualistic censorship regime is applicable as well. While foreign publications are subject to prior censorship by provincial authorities, the GAPP can directly prohibit the import of any foreign publications.[84] Likewise, the SARFT is authorized to censor any foreign film, radio or TV programme directly.[85] Foreign news agencies that release news in China must also look to sovereignty-centred requirements,[86] for Xinhua News Agency is empowered to identify 'illegal' materials and delete them.[87]

Controlling the right to protest. The right to protest is a furtherance of freedom of speech to the extent that it allows expressive acts in the public and challenges the CCP's utmost concern with potential collective actions that might threaten its rule. The number of collective incidents that occur within a municipal region has even become an important criterion for evaluating the promotion or demotion of government

[76] J Yardley, 'Chinese Journal Closed by Censors Is to Reopen', *New York Times* (16 February 2006), available at <http://www.nytimes.com/2006/02/16/international/asia/16cnd-china.html?_r=2&oref=slogin> accessed 10 December 2013.

[77] RAM (n 43) art 27.

[78] RBTA (n 43) art 43.

[79] PAINIS (n 43) art 23.

[80] QL He, *The Fog of Censorship: Media Control in China* (Human Rights in China, New York, Hong Kong and Brussels, 2008) 29–31 and 33–6.

[81] RAP (n 44) art 25.

[82] RAM (n 43) art 26; RBTA (n 43) art 33.

[83] PAINIS (n 43) arts 3 and 20.

[84] RAP (n 44) art 44.

[85] RAM (n 43) art 31; RBTA (n 43) art 39.

[86] Measures for the Administration of Release of News and Information in China by Foreign News Agencies, art 11 (2006).

[87] Ibid art 12.

offcials.[88] Most recently, China's highest judicial authorities issued an interpretation that criminalizes certain expressive acts in the Internet. Expressive acts would be considered to seriously jeopardize 'social order and state interests' if they give rise to collective incidents, public disorder, or damage to the state's image or state interests.[89] The interpretation also describes 'international influences' as one of such 'state interests',[90] which suggests that China's censorship has an impact on its foreign policies in which the government must take the international influence of expressive acts into account.

In addition to this, a number of traditional channels for expressing opinions that might potentially give rise to collective actions continue to be blocked. Not only do human rights defenders face insurmountable obstacles in articulating their views,[91] but lawyers are often forced to practise in a prescribed and selective manner.[92] Assemblies, processions and demonstrations require prior applications that must be submitted to the competent authorities of public security for permission in terms of sovereignty-centred considerations.[93] Even complaint letters and visits of individuals or specific social groups, which aim at giving information, making comments or suggestions, or lodging complaints to the government, may allegedly threaten the 'state interests' and result in liabilities or penalties.[94]

III. China's censorship regime enters into the patchwork of pluralistic global governance

In 1979 China signed two bilateral investment treaties with the US.[95] Since then China has entered into international treaties more regularly and systematically.[96] China's accession to international human rights treaties

[88] J Song, 'Guangdong Examines Municipal Officials on the Basis of Mass Incidents of over 100,000 Particpants', *21st Century Economy Report* (18 July 2013), available at <http://news.qq.com/a/20130718/001171.htm> accessed 10 December 2013.

[89] Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Libels in Information Network, art 3 (6 September 2013).

[90] Ibid.

[91] E Pils, 'Asking the Tiger for His Skin: Rights Activism in China' (2007) 30 *Fordham International Law Journal* 1209.

[92] Y Ran, 'When Chinese Criminal Defense Lawyers Become the Criminals' (2009) 32 *Fordham International Law Journal* 988.

[93] Law of the PRC on Assemblies, Processions and Demonstrations, arts 7 and 12 (1989).

[94] Regulation on Complaint Letters and Visits, arts 20 and 47 (2005).

[95] *Sino-US Agreement on High Energy Physics*, 18 ILM 345 (1979). *Sino-US Agreement on Trade Relations*, 18 ILM 1041 (1979).

[96] E.g., J Zhao and T Webster, 'Taking Stock: China's First Decade of Free Trade' (2011) 33(1) *University of Pennsylvania Journal of International Law* 65, 66–8.

dated back to the early 1980s, but more meaningful contacts that would highlight the asymmetries between China's censorship policies and different branches of international law were yet to come. Unless such contacts take place in a specific, regular and systematic way, such asymmetries could be submersed in norm parallelism and regime pluralism. Milestone events for such a change came, for example, when China signed the ICCPR in 1998 (without ratification), became a Member of the WTO in 2001 or a Member of the UNHRC in 2009.

China's censorship regime makes a strategic move from 'territoriality to functionality', when it enters into the patchwork of pluralistic global governance emanating from the international legal order. In fact, China's step into the international law has been self-motivated after it adopted the policy of reforms and opening to the outside world. Aware of the need to be committed to international institutional linkages and economic interdependence,[97] China has constantly adjusted its foreign policies, which are diversified and cover a wide range of topics such as trade, IP, investment, environment. While China's entrenched censorship regime often assumes priority over its constitutional promises, it also underlies those laws and policies on foreign relations that are bound to interact with corresponding subsystems of international law. By contrast, the IHRL on freedom of expression often underlies those corresponding legal regimes that have different functionalities.[98] Consequently, the conflict between China's censorship regime and the IHRL on freedom of expression is inevitable, imminent and multi-faced.

International law has not only provided a normative framework that conceptualizes the relationship between freedom of expression and censorship, but also furnishes different institutional mechanisms to cope with challenges arising from state actors who assume impunity in disregarding the universal standards. For instance, whereas the UNHRC can address China's censorship directly, other separate areas of international law such as WTO law, IP law or investment law may also address freedom of expression, albeit in a more indirect fashion. In the latter case there has been either no explicit conflict between these other different subsystems of international law and China's censorship regime or a limit to capacity to address such conflicts. For example, the aforementioned two WTO Panels have had opportunities

[97] MV Suri, 'Conceptualizing China Within the Kantian Peace' (2013) 54 *Harvard International Law Journal* 219, 246–51.

[98] See, e.g., the Anti-Counterfeiting Trade Agreement, art 27(3), available at <http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf> accessed 10 December 2013; ZZ Chen, 'Exploring the Limits of Investment Treaty Arbitration in Protecting Investors' Speech-Related Rights: About Speech, about Business, or about the Business of Speech?' (2010) 7(4) *Transnational Dispute Management* 1.

to address the censorship rooted in the guardianship of the CCP and dismissed it as inconsistent with, if not deleterious to, the global trade system. In that sense, the WTO system, 'armed with teeth' as it might be, did lay these teeth into China's inexorably stubbon-minded cultural policy, even if this was done somewhat tentatively. But the multilateral trade system, born with a 'procedural deficiency',[99] does not provide an ultimate monitoring arena for non-trade issues. To defend its censorship laws and policies, China often avails itself of an absolutist doctrine of state sovereignty, which has paved the road of international law with thorns of normative fragmentation and institutional segmentation,[100] and capitalized on the pluralistic struture of global governance.

The IHRL standards for defining boundaries of freedom of expression

Freedom of expression has been embraced *qua* customary international law.[101] The classical mandates as encapsulated in Article 19 of the Universal Declaration of Human Rights (UDHR),[102] though not formally binding, are pivotal to the legitimacy of the political governance of a modern state. The 'hard law version' of freedom of expression is mirrored largely in the successive framework of Article 19 of ICCPR which also provides a list of permissible caveats for interference. While pre-censorship can be banned categorically,[103] censorship for the sake of protection of public interests is not prohibited in general. Thus, Article 19(3) of the ICCPR outlines three prerequisites for imposing restrictions on freedom of expression: i.e., such restrictions shall be 'provided by law' (legality), properly serve one of the 'listed purposes' (proportionality), and be 'necessary' for attaining the purpose (necessity).

[99] T Cottier and S Khorana, 'Linkages between Freedom of Expression and Unfair Competition Rules in International Trade: The Hertel Case and Beyond' in T Cottier, J Pauwelyn and E Bürgi (eds), *Human Rights and International Trade* (OUP, Oxford, 2005) 270.

[100] T Broude and Y Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford, 2011) 1, 9–13.

[101] C Harland, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through UN Human Rights Committee Documents' (2000) 22 *Human Rights Quarterly* 187.

[102] Universal Declaration of Human Rights, art 29(3), 10 December 1948, GA Res 217A (III), UN GAOR, 3rd Sess (Resolutions, part 1), at 71, UN Doc A/810 (1948) [UDHR].

[103] MJ Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Leiden, 1987) 398.

For a long time, 'national security' and '*ordre public*' represent ambiguous concepts that could be employed to restrict freedom of expression.[104] Thus, freedom of expression could fall prey to often far-fetched justifications for state interference.[105] In this regard, the difficulty lies in conceptualizing '*ordre public*' in 'institutional' and 'ideological' dimensions: whereas the former is worded more precisely under specific national laws, the latter is vulnerable to disruptive definitions in different political and social contexts.[106] For instance, arbitrary censorship over critical speeches against governments can be covered up by ideological vagueness pertaining to 'subversion' of the existing political system or 'anti-regime' crimes.[107] Besides, such restrictive measures often tend to be overly broad.[108] In this regard, Article 19(3) expels any 'chilling effect' of 'national security' or '*ordre public*' where merely peaceful criticisms of or actions against a government or political party are warranted, be they made by individuals,[109] or in public media.[110] In any event, restriction of freedom of expression can only be premised on a system that abides by, rather than jeopardizes, the respect for universally accepted values such as freedom of expression.[111]

In 2011 the Human Rights Committee issued its General Comment No 34 to clarify the interpretation of Article 19(3) after decades of its case-by-case rulings.[112] Specifically, the General Comment cautions against censorship of pure criticism of the political system or any public institution (such as the state, the government, army) and imposition of onerous licensing conditions on media facilities.[113] Moreover, the General Comment urges states to abandon 'monopoly control over' and 'promote plurality of the

[104] The other explicit restriction is respect for the rights or reputations of others. ICCPR (n 11) art 19(3).

[105] E.g., L Alexander, *Is There a Right of Freedom of Expression?* (CUP, Cambridge, 2005) 111.

[106] *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (*Netherlands v Sweden*), Separate Opinion of Judge Sir Hersch Lauterpacht, 1958 ICJ 79, 90 (November 28).

[107] Human Rights Committee, *Motta v Uruguay*, Communication No 11/1977, UN Doc CCPR/C/OP/1/11/1977 (1984) para 17.

[108] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, Kehl, 2005) 460.

[109] Human Rights Committee, *Mpaka-Nsusu v Zaire*, Communication No 157/1983, UN Doc Supp No 40 (A/41/40) at 142 (1986) para 10.

[110] Human Rights Committee, *De Morais v Angola*, Communication No 1128/2002, UN Doc CCPR/ C/83/D/1128/2002 (2005) para 6.8.

[111] Human Rights Committee, *Mukong v Cameroon*, Communication No 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994), paras 9.6–9.7.

[112] Human Rights Committee, General Comment No 34, UN Doc CCPR/C/GC/34, 12 September 2011.

[113] Ibid paras 38–39.

media' in publication, Internet and journalism.[114] In particular, the General Comment points out that penalizing 'expression of opinions about historical facts' or penalizing media facilities or journalists 'solely for criticizing the government or the political social system espoused by the government' is incompatible with Article 19(3).[115] Meanwhile, the 2011 report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression refers explicitly to the 'sophisticated' and 'multi-layered' Internet control and criminalization of legitimate expression in China,[116] and questions the compatibility of broad and ambiguous sovereignty-centred rules with the criteria under IHRL.[117] In a sense, the normative determinacy of UDHR and ICCPR has conceptually pierced the veil of China's censorship regime underpinned by an absolutist doctrine of state sovereignty that aims to legitimize the CCP's rule.

The UPRs of China: An example of addressing the censorship regime directly

The international community, fully aware of the seemingly impervious cornerstone of sovereignty as inscribed in Article 2(7) of the UN Charter, is confronted with the 'sovereign paradox' to admonish and convince national states 'to be sovereign' in meeting new standards of legitimizing state power.[118] Where human rights mandates run the risk of falling prey to the misuse of state power, all available mechanisms shall be employed to pierce the veil of state sovereignty.

A major example for addressing China's censorship directly is the UPR, which has been established as the most significant mechanism of the UNHRC. By providing a panoramic review of human rights situations in all countries in a four-year cycle,[119] the UPR 'shall complement and not duplicate the work of the treaty bodies'.[120] Since China has been desultory in ratifying the ICCPR, only the Charter-based bodies can exercise direct monitoring on China's censorship regime. Being essentially a political

[114] Ibid paras 39–40, 43–44.

[115] Ibid paras 42 and 49.

[116] UNHRC, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, UN Doc A/HRC/17/27, 16 May 2011, paras 29 and 35.

[117] Ibid paras 31, 34 and 36.

[118] D Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* 230 (OUP, Oxford, 2007).

[119] UNHRC, Resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007, Annex, paras 3–38 [Resolution 5/1].

[120] Ibid para 5(e).

mechanism that monitors the implementation of the entire pallet of human rights, the UPR could address human rights issues vis-à-vis the principle of state sovereignty.[121] Whereas in the first UPR of China only five countries referred to freedom of expression, the second UPR of China saw 21 countries suggesting improvements of freedom of expression. Three distinctive features of the UPR are noteworthy.

First, the UPR stresses equal treatment of the information sources concerning the human rights record of the country to be reviewed. It relies on almost all available sources, which fills certain lacunae caused by the brevity of a three-hour review process.[122] Thus, apart from a state report presented by China,[123] a compilation of information based on UN resources and a summary of information from other reliable sectors prepared by the Office of the High Commissioner for Human Rights (OHCHR) were available as documents for the UPR, both of which referred to concerns about China's censorship regime.[124] However, whether to adopt the views from these alternative sources is still largely up to the states themselves. During China's first UPR, the Chinese delegation insisted on the non-existence of censorship in China and the compliance of its domestic laws with the ICCPR, while declining any criticisms, advice and suggestions regarding freedom of expression.[125]

Second, the UDHR, the UN Charter, as well as state obligations in ratified treaties and commitments made by relevant countries, have been overwhelmingly affirmed as the fundamental yardsticks for measuring states' compliance with the IHRL.[126] In this sense, the framework of the UDHR as incorporated into the ICCPR,[127] together with China's commitment in the UPR to promoting human rights through its NHRAP,[128] shall serve as the applicable criteria of a UPR for China's censorship regime.[129]

[121] K Boyle, 'The United Nations Human Rights Council: Origins, Antecedents, and Prospects' in K Boyle (ed), *New Institutions for Human Rights Protection* [New Institutions] (OUP, Oxford, 2009) 11, 14.

[122] Resolution on the Human Rights Council, GA Res 60/251, UN GAOR, 60th Sess, UN Doc A/RES/60/251 (2006) [Resolution on HRC].

[123] UNHRC, National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1 China, UN Doc A/HRC/WG.6/4/CHN/1, 10 November 2008 [National Report I]. UNHRC, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 China, UN Doc A/HRC/WG.6/17/CHN/1, 5 August 2013 [National Report II].

[124] See n 4.

[125] UPR China I (n 8) para 117.

[126] Resolution 5/1 (n 119) para 1.

[127] UPR China I (n 8) para 71.

[128] National Report I (n 123) paras 90–91. National Report II (n 123) paras 11, 14, 19, 93.

[129] OHCHR Summary I (n 4) para 32. OHCHR Summary II (n 4) paras 6–8, 12.

Notwithstanding, there are well-founded doubts about the feasibility of prioritizing treaty obligations in the UPR.[130] The fact that the PRC remains the lone power in the world that has not ratified the ICCPR shows that the ICCPR constitutes merely a conceptual source for a universal review on China's censorship.

Third, as a cooperative mechanism the UPR aims to provide an interactive dialogue in a constructive way rather than in a confrontational way that might otherwise amount to 'politicization'.[131] Indeed, in monitoring intergovernmental cooperation, the UNHRC has improved its approach of organized discussions among the state members. Corresponding to China's claim that respect for different customs in different countries required a termination of confrontation,[132] the 2009 UPR was peppered with laudable comments on China's progress in freedom of expression,[133] though only 60 countries that queued up first were able to speak due to the time limit. By contrast, the 2013 UPR allowed each country only 50 seconds to speak and thus 137 countries made remarks on China's human rights record.[134]

The WTO rulings: An example of addressing China's censorship regime indirectly

The dispute settlement mechanism (DSM) of the WTO, which is generally considered a peremptory and powerful legal mechanism,[135] provides a prominent example for addressing China's censorship indirectly. As a Member of the WTO China is subject to the DSM under the global trade system where any trade disputes arise. Due to the significance of foreign trade, China has become increasingly active in using the DSM and compliant in enforcing the rulings. In both *China–IPR* and *China–Publications*, however, China's 'content review' system received more careful scrutiny,

[130] N Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism', in *New Institutions* (n 121) 75, 91.

[131] UN, A More Secure World: Our Shared Responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges, and Change, para 283, UN Doc A/59/565 (2004).

[132] Yang Jiechi, 'Work in Cooperation for A New Chapter in the Cause of International Human Rights', statement delivered during the High Level Segment at the 1st session of the Human Rights Council (20 June 2006), 3, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/china.pdf> accessed 10 December 2013.

[133] See, e.g., Zimbabwe's comments in UPR China I (n 8) para 73.

[134] See 'Looking for Universality at China's Second UPR', International Relations, 5 November 2013, available at <http://duihua.org/wp/?p=8569> accessed 10 December 2013.

[135] Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), art 17, Marrakesh, 15 April 1994, 33 ILM 1226 (1994).

where the laws and regulations that inherently form China's censorship regime aroused its trade partners' concern about whether and to what extent censorship would affect liberalization of global trade. While the Panels did not decide directly whether China's censorship was consistent with the IHRL, they did address the censorship regime and ruled that China's censorship was not appropriate for global trade. In this sense, both proceedings have further facilitated the WTO's expanding capacity of global governance.[136]

Reviewing China's censorship regime in China–IPR. In *China–IPR*, the US accused China of denying the 'publication or distribution' of the works of certain authors that have not passed the censorship,[137] which is inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – one of the WTO's major pillars.[138] In particular, the US argued that China derogates from certain substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works (BC),[139] which have been incorporated into TRIPS. The proceeding thus focused on China's censorship enshrined in Article 4 of the Chinese Copyright Law, the first sentence of which provides:

> Works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law.[140]

According to the US, this clause left certain copyrighted works of Chinese and foreign owners virtually unprotected, which could be published legally in other countries but were not allowed for publication in China. This was contradictory to the principles of national treatment and minimum standards for copyright protection as set forth in the BC and encompassed by TRIPS.[141] By contrast, China's philosophy was that works that did not live up to its censorship would be denied 'authority to publish',[142] while censorship was a necessary regime independent of copyright law. The Panel reviewed China's censorship regimes.[143] The Panel was convinced that if the censorship organ of the CCP did not uphold the content of a

[136] Cf Qin (n 23) 273.

[137] *China–IPR* (n 14) para 7.16.

[138] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh, 15 April 1994, 33 ILM 1197 (1994) [TRIPS].

[139] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as last revised at Paris on July 24, 1971, S Treaty Doc No 99–127 1161 UNTS 30 [the BC].

[140] The Copyright Law of the PRC (2001).

[141] TRIPS (n 138) art 9.1; the BC (n 139) art 5(1).

[142] *China–IPR* (n 14) paras 7.21 and 7.56.

[143] The regulations reviewed include RAP, RAM and RBTA. Ibid paras 7.72–103.

book in the political review, i.e., if such contents were deemed 'reactionary, pornographic or superstitious', then the book would 'not be protected' and 'all the presses shall neither publish nor disseminate it'.[144] The Panel then found that copyright law that is thus subjected to the censorship regime is antithetical to both the national treatment and the union treatment 'specially granted' by the BC.[145]

Consequently, China sought to defend its copyright policy and the legitimacy of censorship on the basis of Article 17 of the BC as incorporated into TRIPS,[146] which recognizes a state's right to 'permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary'.[147] China understood this provision as the legal basis for censorship in terms of a nation's public order, which should take precedence over any other provision.[148] Accordingly, the Chinese government was as much entitled as 'many other countries in the world' to ban the publication and dissemination of works that were found 'unconstitutional or immoral'.[149] Eventually, the Panel didn't question China's legitimacy to conduct censorship under the IHRL and the Panel finding does not prevent China from doing so.[150] Nevertheless, the Panel did clarify that Article 17 of the BC was not meant to disadvantage or bias copyright protection by virtue of public order or censorship.[151] In this sense, the Panel disagreed with China as to the predominance of its censorship regime over the trade regime.

Reviewing China's censorship regime in China–Publications. In *China–Publications*, the Panel reviewed China's censorship regime in a wider scope. In one of its allegations against China the US argued that China failed to comply with its WTO obligation to liberalize trading rights in different industries under the Protocol on the Accession of the PRC (Accession Protocol).[152] Notably, the Accession Protocol exempted China from granting trading rights regarding a number of important products,[153] but

[144] Ibid paras 7.51–7.
[145] Ibid para 7.107.
[146] Ibid paras 7.22 and 7.26.
[147] TRIPS (n 138) art 9.1; the BC (n 139) art 17.
[148] *China–IPR* (n 14) paras 7.18 and 7.120.
[149] Ibid para 7.17.
[150] Ibid para 7.144.
[151] Ibid paras 7.127 and 7.132.
[152] Protocol on the Accession of the PRC, WT/L/432, 10 November 2001.
[153] Ibid paras 5.1 and 5.2; WTO, Report of the Working Party on the Accession of China, WT/MIN(01)/3 (10 November 2001) paras 83 and 84.

somehow cultural products such as books and audio-visual products were not written into that accord. Obviously, the censorship regime, which allows the CCP to control those State-owned cultural and media entities easily by limiting the activities of non-State-owned entities, affected foreign entities that intended to import and distribute such cultural products. Therefore, the Panel did not have so much difficulty in finding that certain measures under China's censorship regime were inconsistent with China's commitments to the trading rights.[154] Just as in *China–IPR*, the really interesting point of *China–Publications* was the legal basis that China relied upon to justify its censorship regime.

China resorted to Article XX(a) of the General Agreement on Tariffs and Trade (GATT), which allows a member to take regulatory measures that it deems 'necessary to protect public morals'.[155] China argued that cultural products were closely related to public morals,[156] that strict control was necessary,[157] and, therefore, that the measures employed to restrict non-State-owned entities' right to import cultural products were legitimate because they could ensure the effective operation of its censorship regime.[158] Since there was no pre-existing WTO jurisprudence on Article XX(a) of the GATT relating to the public morals, the Panel had to borrow from previous approaches under other relevant provisions such as Article XX(b) of the GATT as applied by the Appellate Body.[159]

Thus, the Panel examined China's defence primarily on two grounds. First, the Panel evaluated the objective of the measures and assumed *arguendo* that the public morals that China pursued through its censorship regime were highly important.[160] While the Panel found China censored content that, e.g., 'injures the national glory' or 'destroys social stability',[161] neither the US nor the Panel/Appellate Body bothered to question whether such criteria were consistent with universal principles of freedom of expression.[162] Second, the Panel assessed the necessity of the measures in relation to the objective. The Panel rejected China's claim that only State-owned entities were suitable to conduct censorship and maintained

[154] *China–Publications* (n 16) para 7.907–13.

[155] GATT, art XX(a), 30 October 1947, in the version valid since 1 March 1969, UNTS 55, 94.

[156] *China–Publications* (n 16) para 4.108.

[157] Ibid para 4.114.

[158] Ibid para 4.107.

[159] Ibid para 7.746. Appellate Body Report, *Brazil–Measures Affecting Imports of Retreated Tyers*, WT/DS332/AB/R, 17 December 2007.

[160] *China–Publications* (n 16) paras 7.756, 7.762–3.

[161] Ibid para 7.760.

[162] Pauwelyn (n 23) 133.

that private entities could do so as well.[163] Besides, the Panel affirmed the alternative, as suggested by the US, that the Chinese government could alone take up the responsibility for conducting censorship,[164] which, surprisingly, seemed to imply that China could nationalize its decentralized censorship regime.[165] As China couldn't raise any convincing counter-arguments to such reasoning, the Panel concluded, as the Appellate Body later confirmed, that China's censorship measures were inconsistent with the WTO rules.[166]

The thorns of pluralistic global governance

China's strategy of divide et impera. It seems that neither the UPRs nor the WTO disputes have addressed China's censorship regime thoroughly in terms of the substantive rules of the IHRL. Instead, China was able to defend its censorship regime by rejecting criticism on it in the UPR and arguing for its legitimacy at the WTO. Indeed, the UPR is neither a tribunal,[167] nor a podium where states may judge themselves. Its purpose is to meet 'capacity building needs' by indicating 'ways to overcome a certain situation and to recommend … technical assistance or advisory services'.[168] In the first UPR, although the Chinese delegation promised that in the follow-up process China would create conditions for ratification of the ICCPR and continue cooperation with the special procedures and OHCHR,[169] it repudiated all recommendations concerning improvement of freedom of expression, and even endorsed Cuba's suggestion to maintain a ruthless control of human rights defenders who dare to 'attack the interests of the state'.[170] It would not be surprising if China rejects such recommendations in the second UPR. This is also a sign of the difficulties in developing customary rules on the basis of UPR recommendations so far.

By contrast, China's reaction to the two WTO Panel rulings were more compliant and prompt, as China quickly made revisions to its copyright

[163] *China–Publications* (n 16) para 7.858.

[164] Ibid para 7.899.

[165] See n 162.

[166] *China–Publications* (n 16) paras 7.886–909.

[167] Mohamed Bedjaoui (Algeria), statement delivered during the High Level Segment at the first session of the Human Rights Council (21 June 2006), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/statements/algeria.pdf> accessed 10 December 2013.

[168] FD Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109, 135.

[169] UPR China I (n 8) para 114, Nos 1, 10, 11.

[170] Ibid para 114, No 34.

law, as well as a series of regulations relating to publications. For instance, the amended Article 4 of the Copyright Law now reads:

> Copyright owners should not exercise their copyrights in a manner that violates the Constitution or relevant laws, or harms the public interests. The state will supervise publication and distribution of the works in accordance with law.

Literally, copyright protection is extended to all 'works', which complies with the Panel's finding. However, the amendments did not affect the existence of the censorship regime itself. Nor do they benefit copyright holders whose works are banned in China. Likewise, China amended its RAP in 2011 under the WTO ruling that the trading rights must be granted equally to all stakers. However, the RAP allows the importation of cultural products on the condition that the government approves such transactions and the importers must be capable of conducting self-censorship.[171] While both WTO rulings resulted in certain changes to the censorship regime, it is very unlikely that the WTO rulings can change China's censorship regime thoroughly. After all, censorship policies are guided by the publicity departments of various levels and implemented by corresponding administrative authorities.

Apparently, sovereign states agreed only condescendingly in the WTO to guarantee common standards of market access and competition rules. Where states apprehend or anticipate any usurpation of state authority by commercial force,[172] the indivisibility of sovereignty allows them to retrieve supremacy and curtail market power. The WTO's incompetence to address non-trade issues thoroughly is attributable to state members' reluctance to relinquish sovereignty over certain vital interests – such as those covered by China's censorship regime. The outcome of the UPRs of China manifests this feature and betrays China's strategy of '*divide et impera*'. In fact, this strategy is consonant with the pluralistic structure of global governance, which is characterized not only by uncompromising normative diversification but also by irrevocable institutional proliferation.[173] Such pluralism is formed and driven by the need to balance decentralized global governance against an incrementally interdependent world.[174]

[171] RAP (n 44) arts 41–43.

[172] A van Staden and H Vollaard, 'The Erosion of State Sovereignty: Towards a Post-Territorial World?' in G Kreijen *et al.* (eds), *Sovereignty, and International Governance* (OUP, Oxford, 2002) 165, 168.

[173] MA Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP, Cambridge, 2011) 9.

[174] T Franck, 'The Centripede and the Centrifuge: Principles for the Centralisation and Decentralisation of Governance' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law* [Allocation of Authority] (Hart, Oxford, 2008) 19, 20–3.

However, the fragmented international legal order is vulnerable to the manipulation of state sovereignty, where both a coherent horizontal heterarchy and an effective vertical hierarchy in international law are absent.

Fragmentation in default of coherent horizontal heterarchy. Fragmentation exists between rules of different treaties on the horizontal level. Attempts to interpret rules of separate branches of international law, such as the WTO law, in accordance with substantive constitutional mandates remain controversial both in discourse and in legal practice.[175] Further, it may seem too simplistic to hope that the whole pallet of international law can be enforced in the WTO scenario by postulating the moral ethics of states to commit themselves to an overall obligation under international law.[176] Certainly, 'general public international law' has an effect of 'gravitational pull' on WTO law once its Dispute Settlement Body (DSB) embarks on interpreting relevant norms,[177] and the *acquis* on treaty interpretation may presumably prevail.[178] But WTO legal practice frequently suggests that reference to extra-regime positive law merely serves peripheral functions.[179] In principle, where different authorities interpret the same rules, there is a higher risk of contradictory decisions.[180]

Moreover, an institutional arrangement that could remedy the normative inconsistency is also wanting. To maintain its supreme authority in a specific domain, the WTO has been prudent in sharing jurisdiction with alternative authorities over the same issue.[181] Certainly, it is untenable to assert that the WTO law is completely trade-biased and ignores non-trade values. But so far the DSB's potential mandate to deal with human rights issues is overshadowed by its institutional disposition in not providing an

[175] JL Dunoff, 'The Politics of International Constitutions' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* [Ruling the World] (CUP, Cambridge, 2009) 178, 185–92.

[176] J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge, 2008) 25.

[177] Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, art 3(2), 15 April 1994, ILM 33, 1226 (1994).

[178] Vienna Convention on the Law of Treaties, art 31, 23 May 1969, UN Doc A/CONF.39/27 (1969), 1155 UNTS 331 (27 January 1980), 8 ILM 679 (1969) [VCLT].

[179] WTO Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, para 129, WTO Doc WT/DS58/AB/R (12 October 1998).

[180] E.g., T Broude, 'Fragmentation of International Law: On Normative Integration as Authority Allocation' in *Allocation of Authority* (n 174) 99, 113.

[181] WTO Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, para 78, WT/DS308/AB/R (6 March 2006).

all-inclusive forum to balance 'trade values' against 'non-trade values',[182] despite the efforts to establish the pre-commitment of WTO law to the ethos of global constitutionalism.[183] If the WTO system were to encompass an extra-regime mandate, it would require a profound and *de facto* constitutional change, which is not possible in the foreseeable future.

In *China–IPR* and *China–Publications*, China was able to resort to the incoherent network of such a 'heterarchical' system in which different regulatory regimes have specific functions without interaction between or supremacy over one another.[184] It is true that different subsystems of international law often rely on the 'parasitic use' of the coercive capacities of each other, just as one may hope to materialize the core values of IHRL through the WTO DSM.[185] But the lack of such mandates within the WTO scenario hinders a direct and de-territorialized 'system of rule'.[186]

Fragmentation due to lack of effective vertical hierarchy. Fragmentation also extends to the inconsistency between national law and international law.[187] It reflects the difficulties in verticalizing the international legal order that presumes legitimacy and capacity in governing global issues. Such an approach to global governance derives from the Kelsenian monism of international law,[188] and envisions an embryonic form of a world government charted by the UN General Assembly, the Security Council and the International Court of Justice. However, international law can be a 'myth system' with official but often irrelevant codes that are overshadowed by international politics.[189] Specifically, efforts towards establishing a hierarchical order through international law-making activities

[182] A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307, 1337.

[183] Dunoff (n 175) 187.

[184] D Pulkowski, 'Structural Paradigms of International Law' in *Allocation of Authority* (n 174) 51, 72.

[185] E-U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621.

[186] S Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, New York and Chichester, 1996) 25.

[187] A Nollkaemper, *National Courts and the International Rule of Law* (OUP, Oxford, 2011) 222.

[188] H Kelsen, *Pure Theory of Law* (University of California Press, Berkeley and Los Angeles, 1967) 221–2, 337–8.

[189] WM Reisman, 'On the Causes of Uncertainty and Volatility in International Law' in *Allocation of Authority* (n 174) 33, 44.

are imbued either with a 'democratic deficit',[190] or with state-oriented request for reallocation of power.[191] Thus, a realistic global approach to decision making must always take local factors into account.[192]

Consequently, the prospect of applying substantive norms in a vertical order remains ambiguous. It is certainly a legal ideal to treat the UN Charter as a world constitution,[193] but it is not yet a constitution in the complete sense,[194] despite its laudable effects of conveying the idea of rule of law to governors around the world. Moreover, the non-derogable *jus cogens*,[195] which the ICJ defines as peremptory norms,[196] can be vulnerable to discursive and unpredictable law-making entities, since state actors may always give or withhold their consent to new interstate arrangements.[197] Therefore, the nature and effectiveness of substantive norms are subject to the interaction between the ideal law and the law in reality, which underlies the 'uncertainty and volatility of international law'.[198]

Apparently, in order to maintain its censorship regime, China has taken advantage of the vacuum of a vertical hierarchy in the international legal order: after China's first UPR an absolutist doctrine of sovereignty still overrides freedom of expression. If there were to be a truly binding normative hierarchy in international law,[199] then all state actors must defer to the institutional authority of such a hierarchy. However, such institutional authority can only be based on consistent and voluntary concession of state power.[200] As long as China does not ratify the ICCPR, such concession to IHRL on freedom of expression is not complete.

[190] E.g., JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, Oxford, 2005) 205.

[191] R Howse and K Nicolaïdis, 'Democracy without Sovereignty' in *Allocation of Authority* (n 174) 163, 164.

[192] Franck (n 174) 26.

[193] E.g., B Fassbender, 'The United Nations Charter as the Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529.

[194] MW Doyle, 'The UN Charter: A Global Constitution?' in *Ruling the World* (n 175) 113, 114.

[195] VCLT (n 178) art 53.

[196] *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*), Second Phase, 1970 ICJ 3, 32 (February 5).

[197] AL Paulus, 'The International Legal System as a Constitution', in *Ruling the World* (n 175) 69, 88–90 and 103.

[198] Reisman (n 189) 39–40 and 43.

[199] Pulkowski (n 184) 69–72.

[200] WP Nagan, and C Hammer, 'The Changing Character of Sovereignty in International Law and International Relations' (2004) 43 *Columbia Journal of Transnational Law* 141, 154.

IV. Towards the butterfly effect engendered by planting China's censorship regime into fragmented international law

In this era of globalization China's censorship regime remains a highly instructive phenomenon for understanding the frictions between national and international dimensions of constitutionalism. While any conflict between a fundamental right and the public interest could be solved in the national constitutional system, such recourse does not obtain in international law. It is true that even an authoritarian regime can sometimes relegate itself to render the concept of state sovereignty malleable and fluid enough in the global market economy so as to allow domestic regulation to be diluted by global governance. However, it is less likely that the regime will disregard the indivisibility of state sovereignty when its monopoly power is challenged or jeopardized directly. The examples above show that China can be more compliant with WTO Panel rulings than with the UPRs, both of which are related to freedom of expression. In view of such asymmetries in the effects of the same rules in different subsystems, recasting the relationship between IHRL on freedom of expression and national law such as China's censorship regime remains a daunting task for global constitutionalism, as China takes a voluntary step into international arenas such as the trade, IP, investment, etc with an ambivalent and opportunistic mask of foreign policies which impinge on matters relating to freedom of expression.

Evolving factors in a new constitutional mindset of international law

The reversionary attempt to counteract the adverse effects of national law on international law has been characterized as 'constitutionalization', an approach that rebukes any inconsistency with global constitutional mandates.[201] It seems that such efforts towards constitutionalization could not work effectively without an underlying authority to which different state actors wish to be subjected. But this is probably because one always starts with the presupposition that global constitutionalism borrows its cognitive framework from national constitutionalism. Conversely, if one takes a step back and makes a 'Copernican turn' that, according to Kumm, reverses this hypothesis of constitutionalism based on the 'statist paradigm', one can envisage a 'cosmopolitan paradigm', i.e., it is not national constitutionalism that lends its hue to global constitutionalism but '(C)osmopolitan constitutionalism' that 'establishes an integrative basic

[201] M Loughlin, 'What is Constitutionalisation?' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* [Twilight of Constitutionalism] (OUP, Oxford, 2010) 47, 63–8.

conceptual framework for a general theory of public law that integrates national and international law'.[202] In fact, without necessarily bringing a visible form of global governance into being, the evolving dispositions of international law give rise to a new constitutional mindset featuring a three-step chain.

First, global constitutionalism is predicated on the evolving normativity of customary international law that assumes a 'direct effect' and 'supremacy' just like EU law.[203] Global interdependence in economic and social development has long since necessitated the reconciliation of state sovereignty with human rights obligations under the motif of 'the shared responsibility to protect the welfare of its people'.[204] In an institutional perspective, promotion of human rights, being one of the *raisons d'être* of the United Nations Charter (UN Charter), requires the willingness of states to be engaged in international cooperation,[205] which amounts to a mandatory obligation.[206] In a normative perspective, the UDHR, also mandating the cooperation between nation states,[207] has fleshed out the human rights principle in the UN Charter with a concrete palette of rights as an authoritative interpretation.[208] In that sense, the embryonic normativity of global constitution has been established.[209]

Second, the fragmenting effects will not alter the 'universalist aspirations' of international law, but merely accentuate the context-specific nature of its materialization.[210] After all, the fragmenting effect applies to the relationship between norms and not to that between regimes.[211] In fact, the evolving interrelatedness between asymmetrical legal regimes highlights their symbiosis: certainly, the authority of different branches

[202] M Kumm, 'The Cosmopolitan Turn in Constitutionalism' in *Ruling the World* (n 175) 255, 263–4.

[203] Nollkaemper (n 187) 117–20.

[204] G Espiell, 'Sovereignty, Independence and Interdependence' in A Grahl-Madsen and J Toman (eds), *The Spirit of Uppsala, Proceedings of the Joint Unitar-Uppsala University Seminar on International Law and Organization for a New World Order* (de Gruyter, Berlin, 1984) 277, 286.

[205] United Nations Charter, arts 1(3), 55, 56, signed 26 June 1945, 59 Stat 1031, UNTS No 993, 3 Bevans 1153, entered into force 24 October 1945 [UN Charter].

[206] H Lauterpacht, *International Law and Human Rights* (Stevens, London, 1950) 148.

[207] UDHR (n 102) art 22.

[208] B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988–89) 12 *Australian Yearbook of International Law* 82, 90–3 and 100.

[209] L Ferrajoli, 'Beyond Sovereignty and Citizenship: A Global Constitutionalism' in R Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, Aldershot, 1996) 154.

[210] Nollkaemper (n 187) 222–4.

[211] M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, Oxford, 2011) 232–5.

of international law originates from different values pursued by sovereign states, but these values are inherently interconnected and constantly evolving under the influence of other legal regimes. Consequently, the preponderance of common interests and values is impelling the metamorphosis of a 'law of passive co-existence' into a 'law of cooperation',[212] whereupon international law is poised to encroach on arenas previously monopolized by nation states.[213] Such interests and values may be distinct from those that states seek to pursue in different subsystems of international law, but they develop and grow independent of states' consent.

Third, global constitutionalism depends on the dynamic process of state practice that reflects and facilitates a state's political accountability.[214] However, state accountability is also an evolving concept that intertwines legal principles with political and moral responsibilities under international law.[215] While legal principles of state accountability are still developing slowly, the political and legal pressure for finding legitimacy for state sovereignty looms large. Meanwhile, accountable behaviour is subject to 'the moral purpose of the state' aligned with the institutional rationality of sovereign states.[216] Ultimately, the interconnected functionality of different subsystems of international law requires political accountability of state actors and triggers a self-conscious reflection on the border of state sovereignty.

The potential of triggering a butterfly effect

Such can be the potential 'butterfly effect' resulting from China's voluntary step of planting its censorship regime into the fragmented international law: just as a stubborn-minded censorship regime transcends different branches of national law in the direction of the pluralistic global governance and confronts the international standards of the limits to freedom of expression, a chain reaction of international law proceeds in the *reverse* direction to homogenize the law of freedom of expression. It derives from the evolving normativity of IHRL, works through the functional

[212] ME Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP, Oxford, 2007) 21–5.

[213] C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours* 23, 63.

[214] L Yarwood, *State Accountability under International Law: Holding States Accountable for A Breach of Jus Cogens Norms* (Routledge, London, 2011) 57 and 158.

[215] Ibid 159.

[216] C Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton University Press, Princeton, NJ, 1999) 127–9 and 159–61.

interconnectedness between 'fragmented' regimes and reaches the political accountability of state sovereignty. Through this chain reaction, the self-perpetuating force of international law pertaining to freedom of expression can exert quasi-constitutional influence on the remote domain of censorship.

First, emphasizing the evolving normativity of the constitutional status of freedom of expression will reinforce the legitimacy of relevant subsystems of international law, such as trade, IP, investment, etc, which are often stigmatized by a democratic deficit and tendency towards fragmentation. By contrast, freedom of expression as a core human right conforms fully to the criteria for a global constitutional right premised on its normative hierarchy and institutional entrenchment.[217] Such is the constitutional status that freedom of expression has earned as a fundamental right that it will hover over any relevant subsystem of international law where state sovereignty still dominates. In this environment, the framework of IHRL advances a new historical phase of global constitutionalism by prescribing an external set of normative limits against those established by the states themselves.[218] These substantive standards demonstrate the need for verticalizing the relationship between the system of IHRL and the domestic system of civil liberties.

Second, even though the evolving normativity of such a fundamental right as freedom of expression may not directly overcome the fragmentation of international law, the functional interrelatedness between different regimes could serve as a breakthrough for freedom of expression to infiltrate into relevant subsystems. While the UPRs of China show that IHRL may be morally strong and institutionally fragile, international legal arrangements are treated as an all-binding network as a result of bargaining and consensus between charismatic state conglomerates.[219] Thus, it becomes common perception that the interrelatedness between different subsystems can underpin the effective implementation of the entire legal arrangements ultimately.[220] Any failure to defer to the functional interrelatedness will catalyse a new 'struggle for the right' ('Kampf ums Recht'),[221] and spur a new process of reallocation of authority in the entire legal fabric. For one thing, in its attempt to conduct a 'merger and acquisition' of human rights law by trade law, constitutionalism succeeds in 'hijacking' states for the

[217] S Gardbaum, 'Human Rights and International Constitutionalism' in *Ruling the World* (n 175) 233, 238–9.

[218] Ibid 254–5.

[219] Ibid 250; AK Woods, 'A Behavioral Approach to Human Rights' (2010) 51 *Harvard International Law Journal* 51, 100.

[220] Reisman (n 189) 37.

[221] This is the title of Rudolf von Jhering's famous lecture at Vienna University in 1868.

cause of attaining more respect for human rights.[222] As shown in *China–IPR and China–Publications*, the functional interrelatedness between WTO law and IHRL highlights the need to reassess the constitutional status of freedom of expression in international law.

Third, the political accountability of state sovereignty requires state actors to recognize such functional interrelatedness and reconsider the value of different subsystems of international law. Political accountability brings countries of different ideologies and political capacities together to articulate their standpoints and assess benefits from, or reservations against, the uniform implementation of freedom of expression. The aforementioned two factors, which help subjugate any opportunistic foreign policies to the global human rights standards, may at least activate China's political accountability to reassess its censorship regime. Just as political accountability enables states to chain different values into coherent global universal norms,[223] freedom of expression would appeal ultimately to the rationality of state sovereignty and urge states to defer to its unequivocal values in their foreign policies.

Piercing the veil of state sovereignty

The UPRs of China and the two WTO disputes are prominent examples that illustrate the butterfly effect created by planting China's domestic contours of censorship into fragmented international law. Once China's censorship regime enters into regular and systematic contact with international law, the constantly evolving normativity of IHRL on freedom of expression could pierce the veil of state sovereignty through the functional interrelatedness between different subsystems of international law, and activate the political accountability of China's state sovereingty.

The normativity of the constitutional status of freedom of expression. Throughout its evolutionary process, freedom of expression has served to provide an ideological basis for the fundamental right to approve or disapprove a government, and has played a pivotal role in taming the absolute state sovereignty into a rational and tractable one.[224] Certainly, premature obituaries of state sovereignty have often helped to bolster,

[222] P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815, 816.

[223] E de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611, 614–16.

[224] B von Albertini Mason, *The Case for Liberal Democracy in China: Basic Human Rights, Confucianism and the Asian Values Debate* (Schulthess, Zürich, 2005) 26.

rather than undermine, the significance of the 1648 Westphalian system in which the entrenched sovereign doctrine continued to flourish.[225] Yet the whole constellation of omnipotent state sovereignty has turned into 'organized hypocrisy'.[226] Indeed, the unrelentingly 'mythical' sovereignty,[227] once condensed into the so-called 'negative sovereignty' prior to the end of Cold War,[228] has been remoulded into 'positive sovereignty' with diversified conditionalities.[229] In this new paradigm the responsibility of state actors to legitimize their sovereignty[230] – either by endorsing a democratic mode of governance vis-à-vis the international community,[231] or by ensuring protection of core human rights of its citizens[232] – is accentuated not only in the *opinio juris* of the international community but also in the state practice during the past decades.[233]

The pursuit of and respect for universal human rights as the legitimate goal of all sovereign nations was first inscribed into the UN Charter,[234] and reinforced subsequently by the UDHR, which has assumed a certain nature of customary international law.[235] Thereafter, it took two decades to emolliate the absolutist doctrine of state sovereignty by justifying the predominance of human rights as customary international law.[236] Though sovereignty remains an inalienable tenet in the UN Charter,[237] the

[225] B Fassbender, 'Sovereignty and Constitutionalism in International Law' in N Walker *et al.* (eds), *Sovereignty in Transition* (Hart, Oxford, 2003) 115–24.

[226] SD Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, Princeton, NJ, 1999) 9 and 220.

[227] Sir R Jennings, 'Sovereignty and International Law'; in G Kreijen *et al.* (eds), *State, Sovereignty, and International Governance* (OUP, Oxford, 2002) 27, 31–2.

[228] RH Jackson, *Quasi-States, Sovereignty, International Relations and the Third World* (CUP, Cambridge, 1993) 27.

[229] Ibid 29.

[230] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre, Ottawa, December 2001) para 1.34.

[231] E.g., J Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (WW Norton & Co, New York, 2000).

[232] JS Barkin, 'The Evolution of the Constitution of Sovereignty and the Emergence of Human Rights Norms' (1998) 27(2) *Millennium* 229, 246.

[233] Zaum (n 118) 227–8.

[234] UN Charter (n 205) art 1(2) and (3).

[235] Vienna Declaration and Program of Action, pmbl paras 1(I), 3, 8, UN Doc A/CONF.157/23 (12 July 1993).

[236] *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*), Second Phase, 1970 ICJ 3, 47 (February 5); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion, 1971 ICJ 16, 46 (June 21); *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*), Merits, 1980 ICJ 3, 42 (May 24).

[237] UN Charter (n 205) art 2(7).

international community has managed to reach consensus on the existence of *jus cogens*,[238] which results in the 'erosion of sovereignty' and the imposition of the obligation to respect core human rights upon state actors without their prior consent.[239] Therefore, a hierarchical normative order determines the constitutional status of freedom of expression in taming state sovereignty.[240]

Where IHRL treaties cannot be applied directly in China, they must be transformed into concrete statutory laws, and often subject to inconsistent interpretations.[241] In civil and commercial fields, however, ratification and approval are not always the prerequisites for international instruments to be legally binding in China. Thus, for example, with broader discretionary leeway courts may interpret domestic civil and commercial laws in terms of customary international law.[242] Such court rulings would create potentials for interpreting freedom of expression as customary international law in the future.

The functional interrelatedness between trade and freedom of expression. In *China–IPR* and *China–Publications* China had the chance to learn the functional interrelatedness between trade and freedom of expression. Although the DSB did not adjudicate directly on China's censorship, similar issues may arise frequently in all stages of trade liberalization.[243] While the two WTO disputes required China to restructure its censorship regime only in a limited way, global trade liberalization process may transform 'conditionality-based' models of trade-related human rights measures into 'compliance-based' models,[244] facilitating the respect for and protection of freedom of expression in different settings.

Any legal realist may well ask the question: if a subsystem such as WTO law has no direct control on state members with regard to their human rights obligations, and IHRL cannot bind states with those obligations effectively, then 'Why Do Nations Obey International Law?'[245] This is

[238] VCLT (n 178) arts 53 and 64.

[239] van Staden and Vollaard (n 172) 171–2.

[240] Cf BO Bryde, 'International Democratic Constitutionalism' in RStJ Macdonald and DM Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, Leiden, 2005) 104.

[241] JZ Li and S Guo, 'China' in D Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP, Oxford, 2011) 158, 172–4.

[242] Ibid 182–6.

[243] J Harrison, *The Human Rights Impact of the World Trade Organization* (Hart, Oxford, 2007) 54–6.

[244] Ibid 61–4.

[245] HH Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

exactly what China shall learn about the functional interrelatedness between different subsystems of international law. Although neither the WTO rulings nor the UPRs went so far as to discuss whether China's censorship regimes are consistent with international law, the interaction between WTO law and IHRL cannot be ignored, as the proliferation of international forums demonstrates the need for state actors to reassess such functional interrelatedness.[246] In the examples above, both the WTO rulings and the UPRs have, conceptually, pushed China into the whirlpool of 'cosmopolitan constitutionalism' which is more attuned to 'hard law' than to 'an ideal'.[247]

In turn, a constitutional mindset of international law comes to light when China perceives that, once state sovereignty steps on board, the raft of internationalization of rule of law will 'unmoor[...] itself' from the 'anchor of state consent',[248] regardless of what cargo has been loaded. Admittedly, freedom of expression, which provides the necessary linkage to symmetrical information flow, is of fundamental importance to the proper functioning of free markets.[249] As a member of the global trade system, China can no longer ignore the fact that its long-cherished absolutist doctrine of state sovereignty is being exposed to, and challenged by, commonly accepted norms emanating from diverse precincts of international law.

The political accountability of state sovereignty. The effect of such functional interrelatedness works directly and appeals more profoundly to China's *complete* soul of political accountability. For one thing, member states of both the WTO and the UNHRC, even those widely deemed not to affirm liberal democracy, are 'accountable' enough to seek to legitimize their sovereignty by clinging to the membership of these two organizations. Global constitutionalism, in contrast to the Westphalian paradigm, dwells on the Leviathan's self-motivated and voluntary move into international law and its 'embedded rationality' which shapes the cognition and choice of 'how civilized states ought to conduct their affairs'.[250] The new paradigm exhorts policy makers to process socially relevant information 'through a cognitive function and return a rational, ergo human rights-sympathetic, response'.[251]

[246] S Ratner and J Abrams, *Accountability for Human Rights Atrocities in International Law* (OUP, Oxford, 2009) 16.
[247] Kumm (n 202) 311–3.
[248] Ibid 260.
[249] Cottier and Khorana (n 99) 247–55.
[250] Reus-Smit (n 216) 159–62.
[251] Woods (n 219) 77.

Meanwhile, this cosmopolitan constitutional mindset can be reinforced by the hard law nature of international law. First, disregard of IHRL on freedom of expression not only amounts to lack of legitimacy but may also provoke violation of different subsystems of international law, which then incurs sanctions or revenge in terms of relevant hard law.[252] Second, even if a state has not consented explicitly to certain international legal norms,[253] the existence of such norms, by providing 'model law' to domestic laws, prevents states from derogation. Finally, even in the absence of effective enforcement mechanism, IHRL has such a status that states would refrain from unilateral actions that could depreciate their reputation easily under institutional pressure.[254]

The prospects of the butterfly effect on China's censorship regime

This article does not deny that any fundamental change to the censorship regime might depend ultimately on China's domestic developments of liberal democratization. Rather, the butterfly effect culminating in a constitutionalist approach to China's censorship regime highlights the external pressure that may endorse, catalyse or accelerate China's evolutionary process. Indeed, sceptical commentators dismiss the role of international law in promoting China's progress towards liberal democracy and even propose that China's foreign policies would affect the international relations at large.[255] It is true that China's political accountability is still affected largely by the sovereignty-centred considerations, especially the absolutist doctrine of state sovereignty that seeks to legitimize the CCP's rule. However, a passive approach would neutralize the positive effects that global constitutionalism might have on China's censorship. Arguably, a consistent and permanent legal order that pierces the veil of state sovereignty could attenuate China's incentive to frame opportunistic policies and compel China to defer to the universal values of freedom of expression.

For instance, the Panel of *China–IPR* reviewed a number of laws and regulations concerning censorship in China and confirmed that any works could be prohibited in terms of various censorship criteria laid down by

[252] N Krisch, 'Global Administrative Law and the Constitutional Ambition' in *Twilight of Constitutionalism* (n 201) 245, 248–9.

[253] D Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in *Twilight of Constitutionalism* (n 201) 3, 14.

[254] R Brewster, 'Unpacking the State's Reputation' (2009) 50 *Harvard International Law Journal* 231.

[255] EA Posner and JC Yoo, 'International Law and the Rise of China' (2006) 7 *Chicago Journal of International Law* 1, 7–15.

the government.[256] From the cluster of censorship regulations in China, the Panel distilled ten categories of identical criteria in China for prohibition of publication of works:

(1) are against the fundamental principles established in the Constitution;
(2) jeopardize the unification, sovereignty and territorial integrity of the State;
(3) divulge State secrets, jeopardize security of the State, or impair the prestige and interests of the State;
……
(10) other contents banned by laws, administrative regulations and provisions of the State.[257]

When measured against IHRL, such broad criteria that define expressive acts as 'unconstitutional' or 'illegal' may nullify China's constitutional promises for freedom of expression.[258] While many criteria for such content review continue to be ideologically vague and controvertible, a catch-all provision could convey a sense of facultative or whimsical power manipulation that fall afoul of the principle of legality.

Moreover, the blurred criteria for imposing such content review give rise to questions about their necessity and proportionality. The Panel established that censorship conducted by relevant authorities could prevail over a decision by the GAPP, though it is presumably the competent state organ to decide whether Article 4(1) of the Copyright Law shall apply.[259] Meanwhile, the default of an independent judicial system demonstrates the democratic deficit in wielding discretionary power in a censorship regime led by the CPD. Such are the general difficulties in China's political accountability, which, even through the prism of the institutional linkage of the WTO, could prevent China from restructuring the legal boundaries of freedom of expression.

In this sense, China would have to reconsider the cost of its censorship regime if it really intends to be a responsible and respectable sovereign state. To legitimize its sovereignty, China will find it increasingly difficult to shirk from its responsibility to ensure freedom of expression, which is the precondition to a free market and a democratic society. Being a member of the HRC, China has joined other state communities in acknowledging that it 'shall uphold the highest standards in the promotion and protection

[256] *China–IPR* (n 14) paras 7.72–82.
[257] Ibid para 7.79.
[258] Ibid paras 7.134 and 7.137.
[259] Ibid para 7.86.

of human rights'.[260] In its systematic and regular contact with China's censorship regime, the joint effects of different subsystems of international law, such as those in the WTO disputes and the UPRs, could impose a constructivist view about the effects of the constitutional status of freedom of expression on China's sovereignty-centred considerations about its censorship regime. For instance, the WTO findings have triggered China's state accountability to restructure its IP/trade measures that restrict freedom of expression. It remains to be seen whether China's systematic and regular engagement in different subsystems of international law would provide China further opportunity to reassess its censorship regime in the light of what China openly prescribes as the 'complete guarantee' for freedom of expression.[261]

V. Conclusion

China's censorship regime has become an underlying part of its domestic laws that may have an impact on its sovereignty-centred foreign policies. It eviscerates the constitutional promises about freedom of expression and often relies on vague definitions of state sovereignty. But censorship is not a monolithic regime. It hinges on a decentralizing institutional framework and exists under a double-layered system in different dimensions of freedom of expression. In particular, the government tries to maintain tighter control on freedom of the media and the right to protest than freedom of speech in the private sphere.

However, when China takes a self-motivated step into international law, the pluralistic global governance arising from different subsystems of international law pierces the policy mask of state sovereignty that aims to legitimize the censorship regime. The recent two UPRs of China show that IHRL on freedom of expression addresses China's censorship regime regularly and systematically, but it may be difficult to make an authoritarian regime accountable for compliance. In contrast, China complied immediately with the two WTO rulings that found the inconsistency between China's censorship regime and the global trade system without addressing the legitimacy of censorship. Consequently, the absolutist doctrine of state sovereignty can exist in the seemingly fragmented international legal order that is characterized by a coherent horizontal heterarchy and an effective vertical hierarchy.

Although international law faces the quandary of a fragmenting structure, there is an increasing price for taking advantage of the quandary

[260] Resolution on HRC (n 122) para 9.
[261] UPR China I (n 8) para 71.

and wielding an opportunistic policy, when this occurs in the face of a resolute constitutionalist approach. Freedom of expression has evolved into a global value which illuminates the corners so far shrouded by state sovereignty and to which the Leviathan now, after descending from its altar, is forced to defer. While the interrelatedness between subsystems is likely to present a paradigm of constitutional interplay in the global governance, responsible states are expected to show rationality in fulfilling their commitments to IHRL standards.

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