

2014

Maintaining Control in China: What's the Big Deal with Pornographic Censorship on the Internet Anyway?

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Recommended Citation

Guo, Qing Hua, "Maintaining Control in China: What's the Big Deal with Pornographic Censorship on the Internet Anyway?" (2014).
Law School Student Scholarship. 616.
https://scholarship.shu.edu/student_scholarship/616

INTRODUCTION

Technological advances and the introduction of the Internet have expanded the ways in which people can connect, share information, and ultimately express their beliefs.¹ The power of the Internet rests in its ability to transcend linguistic, cultural, religious, and philosophical barriers.² One commentator noted that “[t]he rising popularity of the interactive new media³ has intensified social pressures to alter the relationship between the government, the traditional news media, and the public.”⁴ Thus, as a response, governments have developed legal and technical schemes to control the Internet.⁵ Some governments view the Internet as a threat to national security and cultural stability.⁶ A member of the Singaporean Parliament has gone as far as to state, “[j]ust as cars can knock down people, ideas can also be as dangerous ... ideas can kill.”⁷

¹ See generally, James Martin, *It's good, bad and ugly ... and unbeatable*, COMPUTER WKLY., July 23, 1998, at 20. (stating that the Internet consists of “millions of messages, millions of Web sites, and thousands of newsgroups.”); see also Kristina M. Reed, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce*, 13 TRANSNAT'L L. 451, 452 (2000) (citing Paul Jacobsen, *Net Law: How Lawyers Use the Internet* 223 (1997)) (“Contemporary thinkers label the Internet the most significant information breakthrough in history.”).

² See Kristina M. Reed, *From the Great Firewall of China to the Berlin Firewall: The Cost of Content Regulation on Internet Commerce*, 13 TRANSNAT'L LAW. 451, 452 (2000).

³ The interactive new media refers to the Internet.

⁴ Jianlan Zhu, *Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension*, 30 U. LA VERNE. L. REV. 404 (April 2009).

⁵ See generally Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation As the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 441 (2000).

⁶ See generally Michael Laris, *Internet Police on the Prowl in China; Free Flow of Ideas Worries Leaders*, WASH. POST, Oct. 24, 1998, at A12 (stating that the release of harmful information attacking China's territorial integrity, the socialist system, or China's independence on the Internet is not allowed); see also Amy Harmon, *Why the French Hate the Internet: They Are Wary of Being Wired Because of Fears of Cultural Pollution, A Strong Tradition of Centralization and Loyalty to an Earlier System Called Minitel*, L.A. TIMES, Jan. 27, 1997, at A1 (criticizing the Internet as a medium that will destroy the French language and culture because the majority of content on the Internet is in English, while only two percent is in French).

⁷ Jianlan Zhu, *Roadblock and Roadmap: Circumventing Press Censorship in China in the New Media Dimension*, 30 U. LA VERNE. L. REV. 404 (April 2009).

Some governments who are proponents of Internet regulation view the Internet as an abundant source of repugnant content,⁸ including obscenity⁹ and pornography.¹⁰ The fast dissemination of information via the Internet is problematic for authoritarian regimes, such as China.

China consists of a relatively young government with a rich imperial history stretching back thousands of years.¹¹ In order to maintain control of its vast population, the Chinese Communist Party (CCP or China) clings to the credence that the media should serve the Party's ultimate political, ideological, and societal ends.¹² In adherence with that principle, the diffusion of information to the public is traditionally reserved for the party state. One commentator noted that "[f]or the Party, control of the media is essential to stimulate the support for its policies and to deny its opponents any substantial platform for their views."¹³ General human rights principles of the freedom of expression are in direct contradiction to China's public media agenda.

⁸ See Jose I. Rojas, *Liability of ISPs, Content Providers and End-Users on the Internet*, 507 PLI/PAT 1009, 1011 (1998) (defining "content" as: text, such as e-mail messages, chat messages and other HTML text; graphics, including pictures and video; voice and sound recordings, such as music recordings and voice telephone; multimedia presentations that use video, sound, and graphics; and software, utilities, and regular commercial products).

⁹ Randall Mikkelsen, *Governments Wary of Internet Content*, DES MOINES REG., Feb. 20, 1996, at 6 (explaining that proponents of Internet regulation believe that regulation is necessary to protect children from obscenity).

¹⁰ See Isabelle Parenthoen, *Internet Grapples with Laws from Pornography to Property Rights*, AGENCE FRANCE-PRESSE, Dec. 16, 1996, (commenting that countries such as the United States, Singapore, China, and Germany are enacting laws that ban indecent material on the Internet).

¹¹ The People's Republic of China was founded in 1949 under the leadership of Mao Zedong, and the Chinese Communist Party assumed power at the same time. See generally, Susan V. Lawrence and Michael F. Martin, *Understanding China's Political System*, CONGRESSIONAL RESEARCH SERVICE (May 10, 2012), available at <http://www.fas.org/sgp/crs/row/R41007.pdf> (last visited Apr. 25, 2013).

¹² Willy Wo-Lap Lam, *China: State Power Versus the Internet*, LOSING CONTROL: FREEDOM OF THE PRESS IN ASIA 44-45 (Louise Williams & Roland Rich eds., Asia Pacific Press 2000).

¹³ Perry Keller, *Privilege and Punishment: Press Governance in China*, 21 CARDOZO ARTS & ENT. L.J. 87, 89 (2003)

This paper argues that China is using anti-pornographic laws to censor other types of material, and introduces an amendment to the criminal law. Part I examines the emergence of the Internet and its impact in China. This section will briefly explain the history of the Internet in Part I.A. Part I.B will illustrate how governments generally regulate the Internet.

Part II analyzes Internet censorship in China. Part II.A examines some of China's regulations and agencies that govern the Internet, while Part II.B looks specifically at China's anti-pornography law. Part II.C examines the various campaigns and crackdowns on Internet pornography since the emergence of the Internet. This part explains that, despite all these laws and regulations, pornography persists in China.

In Part III, this paper proposes that China is using the vagueness of the anti-pornography laws as a method to chill other types of speech. Part III.A enforces that theory with an example of a regulation that the CCP imposed on health-related websites. After examining some of the issues that are prevalent, Part III.B suggests amending the definition of "pornographic articles" under the criminal law so that it is clearer. So, the Internet is important, and the freedom of expression is important, but what's the big deal with pornography, anyway?

This paper concludes that the big deal with pornographic Internet censorship is the fact that the censorship method is so subtle. Netizens¹⁴ are less apt to react when materials are censored when it is labeled as pornographic in nature.

I. THE INTERNET AND ITS IMPACT IN CHINA

The Internet is a powerful tool in its ability to disseminate information with the press of a button, and simultaneously allowing people to obtain information without leaving their home.

¹⁴ This is a slang for Internet users.

With great power, comes great responsibility to the users and its government. This part of the Paper illustrates the historical emergence of the Internet, and then explains how the government can physically regulate the Internet.

A. WHAT IS THE INTERNET?

So, what exactly is the Internet? According to one commentator, “[t]he Internet is [] a set of communications protocols that allows information to flow among many different networks.”¹⁵ And what we know as the World Wide Web, where we access particular websites, is a “client-server software that permits machines linked to a network to share and work with information on any of the connected machines.”¹⁶ What we know today is that the Internet originated in the United States in 1958 when then President Dwight D. Eisenhower and the Department of Defense created the Advanced Research Projects Agency (ARPA).¹⁷ The purpose for the agency included: 1) uniting the United States’ highest levels of research, 2) protecting United States communications from nuclear attack, and 3) reducing computing costs.¹⁸ ARPA developed a “distributed network” model, which connected computers to its network, allowing multiple machines to be used as a group.¹⁹ That model was initially used solely to facilitate

¹⁵ M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335, 341 (1996).

¹⁶ M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335, 341 (1996).

¹⁷ See generally, Shamoil Shipchandler, *The Wild Wild Web: Non-Regulation As the Answer to the Regulatory Question*, 33 CORNELL INT’L L.J. 435, 437 (2000).

¹⁸ See *id.*

¹⁹ See *id.*

communication amongst researchers.²⁰ However, in 1972, the creation of the Transmission Control Protocol/Internet Protocol (TCP/IP) expanded the amount of information available on the ARPA's network.²¹ Further developments occurred, resulting in web browsers and what we know of today as the Internet, where information is literally right before our fingertips.²²

B. HOW A GOVERNMENT GENERALLY REGULATE THE INTERNET.

In a very bare bone, technical level, a government can regulate the actual content of the Internet. Governments have the ability to censor content through hardware regulation and software regulation.²³ Governments use hardware regulations as a means to control the physical tools that allow access to information on the internet.²⁴ These physical tools include the monitor, keyboard, servers, etc.²⁵ The easiest method of regulating the Internet is to not have it at all, although this sounds like a far-fetched notion, some regimes will do away with Internet altogether in order to have complete control of information to the public.²⁶ Another hardware method, governments use to regulate content is through a gateway, which forces information through a funnel before it can reach its citizens.²⁷

Software regulation, on the other hand, can be imposed at two stages: at the router level and at the end-user level.²⁸ The router level regulation usually consists of a firewall which filters unwanted sites and information.²⁹ While the end-user level requires a rating system, which screens out inappropriate sites based on rating.³⁰ An example of such a system is the Platform

²⁰ *See id.*

²¹ *See id.* at 438 (citing Barry M. Leiner et al., *All About the Internet: A Brief History of the Internet*, at ORIGINS OF THE INTERNET (last modified Feb. 20, 1998) <<http://www.isoc.org/internet/history/brief.html>>).

²² For a more nuanced development of the Internet progression, *see id.*

for Internet Content Selection.³¹ One commentator notes that regulation by content places the burden on the government to identify and filter information that its citizens should not see is too heavy-handed.³² He notes that instead of content regulation:

regulation by user activity allows the government to exercise power more judiciously. Instead of technological solutions, regulation by user activity involves punishing behavior. For example, instead of mandating that all browsers bar access to pornographic web sites, the nation could enact legislation criminalizing the creation and/or uploading³³ of such web sites.³³

The Internet era has allowed people to connect and share information like never before.

With the press of a button, information is transferred from one computer to another in the matter

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 440, n. 34.

²⁶ According to the Committee to Protect Journalists, the Internet and public news is most regulated in the following countries starting with the most regulated: Eritrea , North Korea, Syria, Iran, Equatorial Guinea, Uzbekistan, Myanmar (the article uses Burma), Saudi Arabia, Cuba, Uzbekistan, and Belarus. *See, Special Reports: 10 Most Censored Countries*, COMMITTEE TO PROTECT JOURNALISTS (May 02, 2012) available at <http://cpj.org/reports/2012/05/10-most-censored-countries.php> (last visited Apr. 20, 2013).

²⁷ “As information flows through the funnel, the government removes any information it does not want citizens to receive, which could include shutting off the flow of information entirely. Thus, information emerges regulated at the bottom of the funnel.” *See* Shipchandler *supra* note 22 at 463 note 38.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ The rating system is similar to the options on some television sets where you can set the levels as “adult” or “child-safe” and/or “give it separate ratings for violence, sex, nudity, and adult language.” Jonathan Weinberg, *Rating the Net*, 19 HASTINGS COMM. & ENT L.J. 453, 457 (1997).

³² *See* SHIPCHANDLER, *supra* note 22, at 442.

³³ *Id.*

of seconds. The speed at which this occurs has essentially forced governments to create systems and programs to limit information that can be shared. An authoritarian government, such as China, that has historically controlled the information the public receives, has even more reason to control the dissemination of information.

II. INTERNET CENSORSHIP IN CHINA

Freedom of expression³⁴ is guaranteed under the Chinese Constitution.³⁵ However, contradictions exist between the Constitution and lower-level regulations and policies. According to some commentators, this results in the “Constitution [being] put on the shelf while various arbitrary regulations control the press.”³⁶ Further muddling the constitutional guarantee of the freedom of expression is the CCP’s highly sophisticated censorship system, comprised of not only technological controls³⁷ but also administrative and legislative controls used to regulate the flow of information.³⁸ There are various laws that the CCP uses to justify its regulation of the Internet. The focus of this Paper will be on anti-pornography laws under China’s Criminal

³⁴ For purposes of this paper, “freedom of expression” will encompass the freedoms of speech and press.

³⁵ 中华人民共和国宪法 [People’s Republic of China Constitution] (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 04, 1982, amended by the Nat’l People’s Cong., Mar. 14, 2004, effective Dec. 04, 1982) art. 35 *translated in* CONGRESSIONAL – EXECUTIVE COMMISSION ON CHINA, *available at* <http://www.cecc.gov/pages/virtualAcad/exp/explaws.php> (last visited Apr. 25, 2013) (P.R.C.) [hereinafter PRC Constitution] (stating that “Citizens of the People’s Republic of China enjoy freedom of speech, publication, assembly, association, procession, and demonstration.”)

³⁶ Sun Xupei, *An Orchestra of Voices: Making the Argument for Greater Speech and Press Freedom in the People’s Republic of China* 92 (Elizabeth C. Michel Ed., Praeger 2001).

³⁷ *See supra* Part I.A-C.

³⁸ *See* Miriam D. D’Jaen, *Breaching the Great Firewall of China: Congress Overreaches in Attacking Chinese Internet Censorship*, 31 SEATTLE U. L. REV. 327, 327 (2008).

Code. This paper seeks to argue that these laws are one of the methods the CCP uses to justify censorship of other material on the Internet.³⁹

A. CHINA'S INTERNET CENSORSHIP

Internet censorship in China is very effective because censorship is built into its Internet infrastructure. China utilizes the content filtering of a firewall, often referred to as the "Great Firewall of China."⁴⁰ The Great Firewall of China is regulated by the Ministry of Information Industry.⁴¹ While, the policy about the substantive content to be censored is directed by the State Counsel Information Office and the CCP's Propaganda Department with consultation from other government and public security organs.⁴² Physical access to the Internet is provided by nine state-licensed Internet Access Providers (IAP).⁴³ The government can easily filter political, religious, and any other content that it deems fit by programming its Internet routers.⁴⁴ These routers were initially developed "so that Internet Service Providers could control viruses, worms⁴⁵, and spam."⁴⁶ However, now it has become an important tool in assisting the CCP in censoring Internet content.

In addition to the Great Firewall of China, the CCP issued a directive, named the "Green Dam Youth Project," in August 2009 that companies install filtering software on all new computers sold in China.⁴⁷ This "software monitors web sites visited and other activity on the computer and blocks adult content as well as politically sensitive material."⁴⁸ The content it

³⁹ Although the focus of this paper is on anti-pornographic laws, it by no means indicates that these are the only laws the CCP uses to censor Internet material. One of the reasons that this paper focus on anti-pornographic laws is because the author is intrigued by the fact that 1) pornography is illegal in China, 2) the CCP seems to have the available technology and manpower to shut down alleged pornographic websites, but they still persists, and 3) the vagueness of the anti-pornography laws seem to allow the CCP to limit and censor other content on the Internet that doesn't even seem pornographic in nature, at least according to the author.

filters includes images, texts, and URLs.⁴⁹ For example, when the software detects banned phrases this image pops up:

⁴⁰ To test whether a website is blocked in China, input the URL at <https://en.greatfire.org>. The website purports to “collect data about the great firewall of China and share real-time and historical information about blocked web sites and searches, with a particular focus on Google and Baidu.” F.A.Q., GREATFIRE.ORG, available at <https://en.greatfire.org/faq>.

⁴¹ See Eric Harwit and Duncan Clark, *Shaping the Internet in China: Evolution of Political Control Over Network Infrastructure and Content*, ASIAN SURVEY 41:3, 337-408 (May 2001); see also *Highlights of China's institutional restructuring plan*, PEOPLE'S DAILY ONLINE (Mar. 16, 2008), available at <http://english.peopledaily.com.cn/90001/90776/90785/6374104.html>.

⁴² See “Race to the Bottom” *Corporate Complicity in Chinese Internet Censorship*, HUMAN RIGHTS WATCH, vol. 18, no. 8, 9 (Aug. 2006) available at <http://www.hrw.org/sites/default/files/reports/china0806webwcover.pdf>.

⁴³ See *id.*

⁴⁴ See Steven Cherry, *The Net Effect*, IEEE SPECTRUM (June 2005) available at <http://spectrum.ieee.org/computing/networks/the-net-effect> (last visited Mar. 24, 2013); see also *supra* note 40, at 9 (defining Internet routers as “devices that deliver and direct packets of data back and forth between networks.”).

⁴⁵ A worm is defined as “a usually small self-contained and self-replicating computer program that invades computers on a network and usually performs a destructive action.” MERRIAM-WEBSTER DICTIONARY (2013), available at <http://www.merriam-webster.com/dictionary/worm>.

⁴⁶ *Supra*, note 40, at 9.

⁴⁷ See Austin Ramzy, *The Great Firewall: China's Web Users Battle Censorship*, TIME WORLD (Apr. 13, 2010), available at <http://www.time.com/time/world/article/0,8599,1981566,00.html>.

⁴⁸ Scott Wolchok, Randy Yao, and J. Alex Halderman, *Analysis of the Green Dam Censorship System*, COMPUTER SCIENCE AND ENGINEERING DIVISION OF THE UNIVERSITY OF MICHIGAN (June 11, 2009), available at <https://jhalderm.com/pub/gd/>.

⁴⁹ See *id.*



In addition to physically limiting access to certain Internet content, the CCP also controls the Internet through its laws and regulations.⁵¹ Beginning in 1996, the CCP enacted a series of regulations aimed at tightening its control over the Internet.⁵² Then Premier Li Peng imposed “a ban on transmission of states secrets, information harmful to state security, and

⁵⁰ *Id.* (The theme of pornographic censorship focuses on the health and well-being of families and children. For example, the first sentence roughly translated into English, “Caring about children’s health!”)

⁵¹ Not really discussed in this paper is the CCP’s Central Propaganda Department, an important sector within the Party. The Propaganda department sets media policies for all of China. It also supervises the implementation through national, regional, and local Party and state media authorities. China’s premier newspaper, Renmin Ribao (People’s Daily) and China’s Central Television (CCTV) are overseen by this department. See KELLER, *supra* note 13 (citing Yuezhi Zhao, *Media, Market and Democracy in China*, 19 (1998)).

⁵² *Interim Provisions Governing the Management of the Computer Information Networks in the People's Republic of China Connecting to the International Network* (promulgated by Decree No. 195 of the State Council of the People's Republic of China, Feb. 1, 1996, effective Feb. 1, 1996) (P.R.C.), available at <http://www.asianlii.org/cn/legis/cen/laws/ipgtmotcinitproccttin1488/> (“strengthening the control on the computer information networks connecting to the international network”); Jill R. Newbold, *Aiding the Enemy: Imposing Liability on U.S Corporations for Selling China Internet Tools to Restrict Human Rights*, U. ILL. J.L. TECH. & POL’Y 503, 510 (2003); *Administration of Internet News Information Services Provisions* (promulgated by the Press Office of the State Council and Ministry of Information Industry, Sep. 25, 2005, effective Sep. 25, 2005) (P.R.C.), available at <http://tradeinservices.mofcom.gov.cn/en/b/2005-09-25/18571.shtml> (“formulated in order to standardize internet news information services, satisfy the needs of the public for internet news information, safeguard national security and public interests, protect the lawful rights and interests of internet news information service units and promote the healthy and orderly development of internet news information services”).

pornography[.]”⁵³ Telecommunications Regulation was also promulgated, which states that “[n]o organization or individual shall use telecommunication networks to produce, copy, publicize, disseminate, the following information ... spreading obscenity, pornography.”⁵⁴ Furthermore, the Internet Service Providers, many of which are privately-held businesses, were held personally liable for hosting any politically objectionable content; therefore these companies had more incentive to censor politically sensitive information.⁵⁵

The China Internet Illegal Information Reporting Centre (CIIRC) was founded in 2004.⁵⁶ Although it is registered with the Ministry of Civil Affairs of China as a non-governmental organization, the organization is highly influenced by the strategic movements of the CCP.⁵⁷ According to its website, the “CIIRC is mainly focused on contents harmful⁵⁸ to the healthy growth of minors, such as obscenity and pornography, gambling, violence, criminal abetting, and contents that spread ethnic hatred, libeling and insulting, violating the others’ rights, and

⁵³ S. David Cooper, *The Dot.com(Munist) Revolution: Will the Internet Bring Democracy to China?*, 18 UCLA PAC. BASIN L.J. 98, 106 (2000) (citing Jeffrey Parker, *China and the Internet: Pushing the Limits of Tolerance*, <http://is.gseis.ucla.edu/impact/w96/News/News7/0221china.html> (Feb. 21, 1996)).

⁵⁴ *Telecommunications Regulations*, CONGRESSIONAL – EXECUTIVE COMMISSION ON CHINA (2000), available at <http://www.cecc.gov/pages/selectLaws/freeFlow/telcoRegs.php> (last visited Mar. 24, 2013).

⁵⁵ This phenomenon actually led to a self-censorship where the companies would censor and filter information that they thought were sensitive in order to comply with the CCP regulations.

⁵⁶ For more information, the website is available at <http://ciirc.china.cn/>. Note that the Chinese version of the website is actually located at http://net.china.cn/wlaq/node_533648.htm. The content and information on the Chinese language site is significantly different than the English version. There is more content that range from Internet safety pertaining to being aware of scams, viruses, and also the reporting of pornographic and vulgar content from app stores. See *Report App store pornographic or vulgar content announcement*,

⁵⁷ CIIRC is akin to the People’s Daily newspaper and CCTV in that it reflects material that the CCP deems relevant.

⁵⁸ For definition of harmful see *infra* note 53.

violating intellectual property rights.”⁵⁹ However, it also receives reports about “illegal and harmful” information.⁶⁰

According to its formal procedural process in assessing the citizens’ reports and complaints of the aforementioned material, the CIIRC classifies and verifies the information by the “hotline staff in accordance with Chinese laws and regulations.”⁶¹ Then the CIIRC notifies the websites directly to take down the harmful contents within a certain time-frame.⁶² However, when it comes to illegal information, the Ministry of Public Security will be alerted and the CIIRC will forward the relevant information to the Ministry.⁶³

With China’s Internet censorship system as a backdrop, the next part of this Paper introduces China’s anti-pornography laws⁶⁴ and argues that China has systematically used these laws in order to censor other material on the Internet.

⁵⁹ *Report*, CHINA INTERNET ILLEGAL INFORMATION REPORTING CENTRE, available at <http://ciirc.china.cn/> (last visited Mar. 25, 2013).

⁶⁰ Illegal and Harmful information is defined as:

Those against the basic principles of the constitution;
Those that hinders national security and national unity;
Those that instigates ethnic hatred and discrimination, and hinders ethnic unity and solidarity;
Those that spreads obscene and pornographic content, content of gambling, violence, murder, terror, or criminal abetting, those that insults or libels the others, and violates the rights of the others, etc[.]

Supra note 53, at *Illegal and Harmful Information*.

⁶¹ *Id.* at *Dealing Process*.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ There are other laws and methods that the CCP uses in its censorship, such as anti-defamation laws. However for the purposes of this paper the focus will be on anti-pornographic laws. For a brief glimpse of anti-defamation laws, it’s part of the CCP’s criminal code, specifically, Articles 105(2) and 246. Article 105(2) states in relevant part that:

B. CHINA'S ANTI-PORNOGRAPHY LAWS

In the United States, pornographic material is protected under the First Amendment of the United States Constitution.⁶⁵ Under the Criminal Law of the People's Republic of China, pornography is illegal. Article 363 states: "Whoever produces, duplicates, publishes, traffics in or disseminates pornographic articles for the purpose of making profits shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance, and concurrently be sentenced to a fine[.]"⁶⁶ "Pornographic articles" are defined as:

Use of rumor mongering or defamation or other means to incite subversion of the national regime or the overthrow of the socialist system shall be punished by a sentence of five years or less of imprisonment, criminal detention, supervision or deprivation of political rights. Criminal leaders or those whose crimes are particularly severe shall be punished by a sentence of five years or more of imprisonment.

中华人民共和国刑法 [People's Republic of China Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 105(2) Standing Comm. Nat'l People's Cong. Gaz. (P.R.C.) [hereinafter PRC Criminal Law]. While, Article 246 states that:

Use of violence or other methods to publicly humiliate a third party, or fabricating facts to defame a third party shall, where the circumstances are severe, be punished by a sentence of three years or less of imprisonment, criminal detention, supervision or deprivation of political rights. The aforementioned crime shall be prosecuted only if suit is filed, except where social order and national interest is severely disrupted.

Id. at art. 246.

⁶⁵ U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press[.]"); *see also Roth v. United States*, 354 U.S. 476, 487 (1957) (holding that pornographic material was constitutionally protected while "obscene" material was not); *see generally, Miller v. California*, 414 U.S. 15, 24 (1973) (where the Supreme Court announced a three-part test for obscenity: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

⁶⁶ 中华人民共和国刑法 [People's Republic of China Criminal Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 6, 1979, amended by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 363 Standing Comm. Nat'l People's Cong. Gaz. (P.R.C.) [hereinafter PRC Criminal Law]

sex-propagating books or periodicals, films, video-or-audio-tapes, pictures of other pornographic articles which concretely describe sexual acts or undisguisedly (sic) publicized sex. Scientific works concerning physiology of human body or medical knowledge shall not be pornographic articles. Literary or artistic works of artistic value which contain contents of sex shall no[t] be deemed as pornographic articles.⁶⁷

These anti-pornography laws are vague. As one scholar noted, “A small print run of mildly pornographic material may only merit an administrative sanction, but a major printing of highly pornographic material will incur criminal sanctions.”⁶⁸ Furthermore, the definition of pornographic article can even encompass what is considered to be art.⁶⁹ However, nude models displaying sexually explicit poses are not blocked. Zhang Xiaoyu, an art college graduate rose to Internet fame for her bold nude photos.⁷⁰ “She was the most searched for beauty on China’s search engine Baidu between 2007 and 2010.”⁷¹ This further muddles the interpretation and definition of what is deemed pornographic.

⁶⁷ *Id.* at art. 373.

⁶⁸ KELLER, *supra* note 13, at 104-05. The author also illustrates that “the courts apply the Criminal Law to individual conduct, while state media regulators impose administrative sanctions on publishing entities and their sponsoring organizations, and Party authorities discipline editors and other Party members.” However, all three organizations are inter-related. Specifically, the Keller touts that “The same security and media authorities guide the application of criminal and administrative offenses in conjunction with the Party’s internal disciplinary procedures. Established administrative precedents and practices, as a result, directly inform the application of criminal sanctions.” *Id.*

⁶⁹ Under the definition, the Statue of David can be considered pornographic since it “undisguisedly publicize sex” by portraying a sex organ.

⁷⁰ The model claims that she just wanted “to show off her beautiful sides, rather than gain overnight fame by taking off all her clothes. Zhang believes that the arts involving the human body are of a noble nature and she hopes that society can one day show a greater respect for nude models.” Junmian Zhang, *Top 10 nude models in China*, PEOPLE’S DAILY ONLINE (Sept. 28, 2012) available at <http://english.peopledaily.com.cn/102774/7964741.html> (last visited Apr. 25, 2013).

⁷¹ *Id.*

C. DESPITE THE CRIMINALIZATION OF PORNOGRAPHY, PORNOGRAPHY PERSISTS.

Pornography is criminalized in China, however, that does not mean that it is not available, or prevalent within the country. Throughout the years, the CCP has instituted various campaigns, as well as just general sporadic shutting down of pornographic websites on the Internet.

In 1983, the government started a campaign against “spiritual pollution.”⁷² Initially this began as a criticism of pornography and several theoretical, literary, and art critiques, however the Chinese Communist Party quickly expanded it to attack anything that shook its rule and foundation.⁷³ With the introduction of the Internet, the Ministry of Information Industry issued a guideline to ISPs to monitor all online activities of their customers, including the screening of private e-mails for specific material.⁷⁴ In 2002 they took it one step further and required that all Internet service providers remove all the prohibited contents, including pornography.⁷⁵ If the service providers fail to do so, then each provider would be personally responsible.⁷⁶ The providers would have to install security programs to screen and copy e-mail messages sent and received by users, and those containing sensitive information have to be turned over to the local authorities.⁷⁷

⁷² Thomas B. Gold, “Just In Time!” *China Battles Spiritual Pollution on the Eve of 1984*, ASIAN SURVEY, Vol. 24, No. 9 (Sept., 1984), pp. 947-974, available at <http://www.jstor.org/discover/10.2307/2644078?uid=3739832&uid=2&uid=4&uid=3739256&sid=21101922735551> (last visited Mar. 24, 2013).

⁷³ This also included Western hairstyles and movies. *See id.*

⁷⁴ *See China creates stern Internet, e-mail rules*, USA TODAY: TECH (Jan. 18, 2002) available at <http://usatoday30.usatoday.com/tech/news/2002/01/18/china-internet.htm>

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *China creates stern Internet, e-mail rules*, USA TODAY (Jan. 18, 2002), available at <http://usatoday30.usatoday.com/tech/news/2002/01/18/china-internet.htm> (last visited Mar. 24, 2013).

In 2004, it was reported that China shut down over seven hundred pornographic websites and arrested two hundred and twenty people that were linked to the website.⁷⁸ According to the Article 363 of the Criminal Law, the punishment for pornographic crimes includes fines, warnings, and prison term of no more than three years. However, in August 2004 a woman was sentence to jail for four years for operating a pornographic website that charged visitors to watch the woman's "lewd" strip shows via webcam each night.⁷⁹ The sentence for operating pornographic websites was even harsher for a twenty-eight man arrested in 2005 for operating the biggest pornographic site in China. The creator of China's largest porn website was sentenced to life imprisonment, while eight other organizers of the website were jailed for terms ranging from thirteen months to ten years.⁸⁰ According to China Daily, the twenty-eight-year-old Chen and "his accomplices started the Qingseliuyuetian (pornographic summer) website in 2004 and created three other porn websites, attracting more than 600,000 users."⁸¹ The Taiyuan Intermediate People's Court sentenced him to life in prison.⁸² In January 2009, in one week alone, the CCP blocked 244 new pornographic websites.⁸³ "The internet crackdown has been described by analysts as another step in the Communist Party's battle to stifle dissent in a year of

⁷⁸ See Tim Richardson, *China jails woman in porn crackdown*, THE REGISTER (Aug. 16, 2004), available at http://www.theregister.co.uk/2004/08/16/china_jail_XXX/.

⁷⁹ See *id.*

⁸⁰ See *Creator of China's largest porn website jailed for life*, CHINA DAILY (Nov. 22, 2006), http://www.chinadaily.com.cn/china/2006-11/22/content_740360.htm (last visited Mar. 24, 2013).

⁸¹ See *id.*

⁸² See *id.*

⁸³ See Emma Graham-Harrison, *China blocks 244 new websites in porn crackdown*, REUTERS (Jan. 20, 2009), available at <http://www.reuters.com/article/2009/01/20/us-china-internet-idUSTRE50F1MY20090120?feedType=RSS&feedName=technologyNews>.

sensitive anniversaries, including the 20th anniversary of the government's bloody crackdown on the pro-democracy Tiananmen Square protests in 1989.”⁸⁴

As an added incentive, the CCP sometimes offers monetary rewards for tips regarding Internet and even mobile sites that contain pornographic contents. For example, Xinhuanet, one of China's government news sites posted an article in 2009 titled, “Website porn tip-offs surge as China offers cash rewards to informers.”⁸⁵ Informers would be rewarded 10,000 yuan,⁸⁶ which at the time was valued at U.S. \$1,465. The tips would be called into the CIIRC, which would have the power and authority to shut the sites down.

The aforementioned crackdowns do not happen on a daily basis, and the material is still widely available in the local market. Enforcement by all levels of the government is irregular, and censors tend to be more relaxed in urban areas as compared with rural areas.⁸⁷ Furthermore, pornographic websites originate from urban areas. The image below depicts such geographic location.

⁸⁴ *Id.*

⁸⁵ Yan, *Website porn tip-offs surge as China offers cash rewards to informers*, XINHUANET (Dec. 6, 2009), http://news.xinhuanet.com/english/2009-12/06/content_12596866.htm (last visited Mar. 24, 2013).

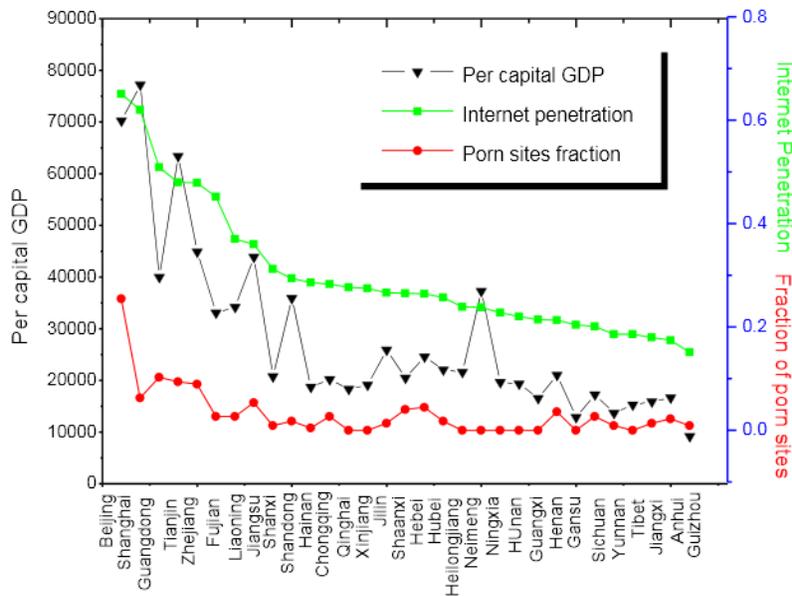
⁸⁶ *See id.*

⁸⁷ Data show that the proportion of pornographic websites, Internet access rate, and per capital GDP in each province is positively correlated. *See* Zhaohui Wu, Jiang lu, Zenhua Tian, etc., *A Peep at Pornography Web in China*, WEBSCI' 10: EXTENDING THE FRONTIERS OF SOCIETY ON-LINE (April 26-27, 2010), *available at* <http://journal.webscience.org/306/>.



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According to a study, the CCP's anti-pornography campaigns significantly influence Internet pornography.⁸⁹ The image below depicts the chart displaying pornographic websites, Internet penetration, and per capita GDP.



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⁸⁸ See Zhaohui Wu, *supra*, note 87.

⁸⁹ The study monitored network traffic in a portion of China from March 29, 2009 to January 25, 2010, where data was collected on 92950 Internet pornography web pages from 1826 pornographic websites. The researchers analyzed the dates of anti-pornography campaigns and found that “most of these dates have below-than-average daily online porn visits.” *Id.*

However, the rationale that pornographic content still exists is because new web sites emerge where old ones are shut down.⁹¹

The vagueness of the anti-pornography criminal statute, coupled with the irregular application of the statute, actually gives the CCP more leeway to decide what types of content to punish and/or censor when it deems fit.⁹² This leads to the next part of the paper, which argues that China is strategically using the vagueness of the anti-pornography laws.

III. CHINA IS USING THE VAGUENESS OF ANTI-PORNOGRAPHIC LAWS AS A MEANS TO AN END TO CHILL OTHER TYPES OF SPEECH.

China's anti-pornography laws are vague.⁹³ Its courts' application of the statute is irregular and is inconsistent with the law as written.⁹⁴ Its Internet censorship of pornography is an intermittent occurrence.⁹⁵ As one journalist noted, "The Chinese government has sought to portray its conflict with the Internet giant as a commercial dispute and a simple matter of law."⁹⁶ However, the reality is that the CCP is using various Internet content as excuses, more or less, enabling it to censor sensitive content. This paper seeks to add an additional layer to that

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² Seton Hall University School of Law Professor, Margaret Lewis, explains that one of the reasons that the CCP keeps its laws vague might be because of the concept of a "moving goalpost." This forces people to second-guess what is covered under the law and what is not, and may result in more self-censorship as a result.

⁹³ *See supra* Part II.B about anti-porn laws

⁹⁴ *See supra* Part II.C about court sentencing man to lifetime imprisonment, and a woman for four years term for having a nightly strip show on the Internet, while the anti-pornography law states "no more than three years."

⁹⁵ *See id.* about how the CCP has various campaigns to shut down web content.

⁹⁶ RAMZY, *supra* note 42

foundation; that the CCP is using the vagueness of its anti-pornography laws to censor Internet content, and that to some extent it has been effective. One of the intentions of the CCP, to purposely keeping the interpretation of the laws within its grasp, and largely the target isn't necessarily censoring pornographic material, but rather other Internet content. Then the paper seeks to present a more concise definition of "pornographic articles" that the CCP should adopt.

A. CHINA IS USING ANTI-PORNOGRAPHIC LAWS TO CENSOR AND CONTROL OTHER INTERNET EXPRESSION AND TO SOME EXTENT IT SEEMS EFFECTIVE.

China's anti-pornography criminal laws are vague. What is considered pornographic is not adequately defined. Unclear laws are problematic for citizens. Further problems arise when the interpretation of such laws is based largely on the whim of the courts that is based on the whim of the government that is based on the CCP leadership. The problem for its citizens lies largely in that the goal post is constantly moving, and thus keeps people guessing on what is legal and what activity is criminalized.

Although, pornography is a concern for China and the government has the tools to actually circumvent much of what is available on the Internet through the Great Firewall, the Green Dam Youth Project, and its criminal laws and regulations, China doesn't always use those tools to censor pornographic websites. Statistics show that those tools are effective; there is a direct correlation between Internet pornography traffic and the dates of Internet pornographic purge campaigns carried out by various organizations within the CCP.⁹⁷

⁹⁷ See *supra*, note – PORN STATS

According to Katrien Jacobs,⁹⁸ the reason that the CCP does not actually censor as much of pornographic material as it can on the Internet is because it doesn't care nor really need to.

She states that:

There are several statistics that show the net-porn industries are surviving and flourishing despite the ban. It seems indeed that porn cannot be banned and that the PRC government is perhaps even secretly letting it into the country. But besides their bombastic cleanup campaigns, they also censor web communities that stand for sexual freedom or queer identity. It seems as if sexual minorities, sex artists and activists are much more vulnerable than those involved in mainstream commercial porn, especially at this moment when film festivals are being shut down and human rights activist are being tortured and detained. These are the dark times of China's civil right and sexual creative outlet, but there is still so much porn and sex entertainment available that we can see it as safer outlet.⁹⁹

Jacobs' concerns are not without merit. For example, China's Ministry of Health published a new set of measures that would control health information available on the Internet, which became effective on July 2, 2009.¹⁰⁰ The rules seem to provide stringent controls over sites that provide information on sexual health. Moreover, there are a series of requirements that all Internet health information providers must satisfy.

⁹⁸ Associate Professor of Cultural Studies at Chinese University of Hong Kong.

⁹⁹ Josh Chin, *Sex Scholar: China Losing War on Porn*, THE WALL STREET JOURNAL: CHINA (Aug. 24, 2011) <http://blogs.wsj.com/chinarealtime/2011/08/24/sex-scholar-china-losing-war-on-porn/> (last visited Mar. 24, 2013)

¹⁰⁰ Sky Canaves, *A Look at China's New Online Health Information Rules*, WALL STREET JOURNAL: CHINA (June 26, 2009), available at <http://blogs.wsj.com/chinarealtime/tag/pornography/> (last visited Mar. 25, 2013).

According to the directive, first, all health-related sites will have to be licensed with the provincial-level health authorities.¹⁰¹ In order to be eligible, it must be an established health institution or social organization, with at least two staff members who have specialized knowledge of China's health laws and regulations.¹⁰² Furthermore, the license to provide information online must be renewed every two years.¹⁰³ Second, all information on the health sites must be "scientific and accurate," and the sites cannot provide medical advertising without prior consent.¹⁰⁴ Not only must the site preserve scientific and accurate information, but it is also responsible for any information contained in advertisements or linked sites.¹⁰⁵ Third, "[s]ites that provide research on sexual issues cannot be open to the general public and must use technical measures to limit access to professionals involved in related clinical and research work, their sponsoring institutions must have at least one qualified doctor on staff, and all content must be approved by a health expert who can vouch that it is scientific and accurate."¹⁰⁶

This paper suggests that the anti-pornography laws are one of the reasons why the Ministry of Health is able to impose these restrictions on health related websites. The purported objective is to prevent websites that contain pornographic content but contend to be health-related to skirt the criminal laws. However, this author believes that the CCP is using its

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

pornographic laws to restrict content that it deems to fit within the definition of pornographic articles, and the burden is on the site administrator to prove otherwise. That is one of the reasons why it is so important to have a more concise definition of “pornographic articles.”

B. “PORNOGRAPHIC ARTICLES” UNDER THE CRIMINAL LAW SHOULD BE RE-DEFINED

The CCP needs to be more accountable to its citizens by having a more concise definition of “pornographic articles” when the criminal law, and prison time is involved. As stated in Part II.B, Article 373 of China’s Criminal Law defines “pornographic articles” to include anything that is (1)sex-propagating, (2) describe sexual acts, and (3) undisguisedly publicize sex.” Although the law states that “[s]cientific works concerning physiology of human body or medical knowledge [and l]iterary or artistic works of artistic value which contain contents of sex shall no[t] be deemed as pornographic articles,”¹⁰⁷ the fact that pornographic articles is not properly defined leaves the definition too vague for interpretation. That definition can still encompass sex education and sexual health related information that is disseminated to the public since it is not necessarily a “scientific work.”¹⁰⁸

This paper proposes that the definition of “pornographic articles” be amended so it is not used arbitrarily, but actually reflect the reason anti-pornography laws exist.¹⁰⁹ Article 373 of China’s Criminal Law, “Pornographic articles” should be amended as follows: “any material that

¹⁰⁷ *Supra*, note 66.

¹⁰⁸ One thought that comes to mind is the various sexual performance medications that are prevalent in commercials in the United States, including Viagra and Cialis. Those would seemingly fall under the touted definition of “pornographic articles.”

¹⁰⁹ Some of the purported reasons by the CCP seem to reflect anti-pornography laws as a protection against the erosion of family integrity, and to maintain and foster the health and well-being of China’s children.

is intended to portray sexual acts for the sole purpose to incite sexual arousal.”¹¹⁰ The term “sexual arousal” is an important addition, because it helps to narrow and allow the advent of sexual education and sexual health-related information that seems otherwise criminalized if advertised on the Internet or even in print media.

CONCLUSION

The general consensus is that freedom of expression is a prerequisite for the functionality and health of a democratic society.¹¹¹ Freedom of expression is a fundamental right under the Universal Declaration of Human Rights.¹¹² It is also recognized in international human rights law under the International Covenant on Civil and Political Rights (ICCPR).¹¹³ Although China has not ratified the treaty, it is a signatory and thus should not violate the purpose of the

¹¹⁰ The author does not purport this to be a perfect definition but it is a starting block for amendment of China's vague criminal laws.

¹¹¹ See B.G. Verghese, *Freedom of Expression*, in WALKING THE TIGHTROPE: PRESS FREEDOM AND PROFESSIONAL STANDARDS IN ASIA 3, 31 (Asad Latif ed., Asian Media Info. and Comm'n Ctr. 1998) (“[F]reedom of expression is properly a human right because it is there, and not because it is enunciated in the Human Rights Charter in 1948 or in another instrument, national or international, either before or since.”); see also Danilo Arbilla, *A Non-Delegated Freedom*, in FREEDOM OF THE PRESS AND THE LAW: LAWS THAT AFFECT JOURNALISM IN THE AMERICAS 14, 15-16 (Ricardo Trotti ed., Inter-Am. Press Ass'n 1999 (summarizing two philosopher's press freedom); Sun Xupei, *An Orchestra of Voices: Making the Argument for Greater Speech and Press Freedom in the People's Republic of China* 79 (Elizabeth C. Michel Ed., Praeger 2001) (stating that it is essential to national unity “to promote information flow, we should progressively ease restrictions on news selection, decrease coverage of speeches, and raise the level of press freedom.”).

¹¹² See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 (1948), art. 19, available at <http://www.un.org/en/documents/udhr/> (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”).

¹¹³ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) art. 19, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (“2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”)

ICCPR.¹¹⁴ To China's credit though, the ICCPR acknowledges that the right to freely express oneself "carries with it special duties and responsibilities. ... [that] may therefore be subject to certain restrictions[.]"¹¹⁵ So, it seems that the ICCPR recognizes that the freedom of expression is not absolute, allowing countries some leniency to limit the freedom of expression.¹¹⁶ With the emergence of the Internet and the ways in which information can be disseminated at the click of a button, it seems logical that this is an area in which the ICCPR would be more lenient in allowing respective governments to decide what information is limited in their respective countries. The question remains of how far the CCP will test ICCPR's protections of expression, and how China's human rights activists respond to the infringements of expression under the CCP's use of anti-pornography laws.

This paper concludes that the CCP is using China's anti-pornography laws as one of the methods to chill other areas of expression and speech, and suggests that the Legislature should adopt a new definition of "pornographic articles" so that it is not so vague to be able to encompass all sex-related content or information. China's anti-pornography laws are being used to target recognized human rights under the Chinese Constitution, as well as various international treaties. Such rights include the recognized freedom of expression. The purpose of this paper is to bring awareness, particularly to human rights activists, to take a stand against the erosion of

¹¹⁴ See Vienna Convention on the Law of Treaties, art. 11 ("The consent of a State to be bound by a treaty may be expressed by signature[.]"), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹¹⁵ The ICCPR states that the restrictions "shall only be such as provided by law and are necessary: (a) [f]or respect of the rights or reputations of others; (b) [f]or the protection of national security of public order, or of public health or morals." *Supra*, note 16.

¹¹⁶ Many countries have signed the ICCPR, and China is amongst the signatories, however, it has not ratified the treaty. See *IFJ urges China Government to Ratify*, INTERNATIONAL FEDERATION OF JOURNALISTS (Mar. 25, 2013), available at, <http://asiapacific.ifj.org/en/articles/ifj-urges-chinese-government-to-ratify-iccpr> (last visited Apr. 25, 2013).

some of the freedoms of expression by the CCP. Furthermore, the paper suggests a definition for “pornographic articles” that the CCP should adopt, so that what is censored purportedly under the anti-pornography statute is clearer. Although this paper recognizes that it is unlikely the CCP will adopt such a definition, the overall goal is still to raise awareness that it should be considered. As a signatory of the ICCPR, China should not violate the purpose of the treaty,¹¹⁷ so the larger question remains of whether China’s limitation of the freedom of expression actually violates the purpose of the ICCPR.

¹¹⁷ See Vienna Convention on the Law of Treaties, art. 11 (“The consent of a State to be bound by a treaty may be expressed by signature[.]”), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.