*University of New South Wales*
University of New South Wales Faculty of Law Research Series
2008

*Year* 2008 *Paper* 57

# The China Dilemma: Internet Censorship and Corporate Responsibility

Justine Nolan*

*University of New South Wales

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps08/art57

Copyright ©2008 by the author.

Justine Nolan
Senior Lecturer
Deputy Director, Australian Human Rights Centre
UNSW
Faculty of Law
justine.nolan@unsw.edu.au

# The China Dilemma: Internet Censorship and Corporate Responsibility

## Abstract

The ever increasing nexus between human rights and business and the accompanying vagueness of concepts such as a company's 'sphere of influence or responsibility' for human rights can, and has, created anxiety amongst companies. Considerations of human rights traditionally take place in the context of a state-based system of global governance; however, the rise and rise of the corporation as a powerful non-state actor in recent decades has seen increased interest in understanding the emerging relationship between human rights and business and what if any, responsibility business should assume for protecting human rights. This article considers the role played by US technology companies such as Yahoo, Google and Microsoft in working with the Chinese government to censor Internet content and thus intrude on the human rights to freedom of expression and opinion and the right to privacy. It concludes by focusing on the practicalities of protection and how human rights responsibilities might be apportioned between states and business and if so, how, when and why such an obligation might ensue.

**Keywords**

Corporate responsibility, human rights, internet censorship, sphere of influence, sphere of responsibility, Yahoo, Google, Microsoft.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

# The China Dilemma: Internet Censorship and Corporate Responsibility*

## 1.0 Introduction

'While technologically and financially you are giants, morally you are pygmies"[1]

Traditionally, considerations of human rights take place in the context of a state-based system of global governance; however, the rise and rise of the corporation as a powerful non-state actor in recent decades has seen increased interest in understanding the emerging relationship between human rights and business and what if any, responsibility business should assume for protecting human rights. In February 2006 a very contemporary human rights dilemma rose to the forefront when companies such as Yahoo! Inc, Google Inc., Microsoft Corporation and Cisco Systems Inc.,[2] were called to a United States (U.S.) congressional hearing and subject to a public grilling about their cooperation with the Chinese government in censoring Internet content.[3] Questions arose as to who should or can assume the responsibility for protecting human rights such as freedom of expression and privacy that are placed in jeopardy by such censorship?

Instruments of public international law which enunciate human rights obligations are primarily directed towards states. It is commonly said that the main multilateral human rights instruments contain legal obligations only for states, and cannot be interpreted as implying human rights obligations for non-state actors.[4] In the 60 years since the drafting of the *Universal Declaration of Human Rights* (UDHR)[5] international human rights law has continued to emphasise the primary responsibility of states to protect human rights while remaining at least partially blind to the opportunity to speak more directly to powerful non-state actors such as corporations. However, more recent treaties, and occasionally now treaty bodies, have begun to

---

*Paper presented at the 5th Asian Law Institute Conference, National University of Singapore May 22-23 2008.

[1] California Democrat Tom Lantos, House Foreign Affairs Committee chairman November 2007 speaking to representatives of Yahoo! as quoted in the *San Francisco Chronicle*, Nov. 7 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/11/07/MN2NT7C99.DTL

[2] Hereafter Yahoo!, Google, Microsoft and Cisco.

[3] Tom Zeller Jr. Web Firms Are Grilled on Dealings in China, *New York Times,*Feb. 16 2006: http://www.nytimes.com/2006/02/16/technology/16online.html

[4] See for example John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97 (22 February 2006), ('Interim Report') especially paragraph 60. Contrast the United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) ('UN Norms'), the preamble to which recites: "Realizing that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments".

[5] UDHR, adopted 10 December 1948, GA Res 217 A (III), UN GAOR, 3rd sess, UN Doc A/810 (1948)

bepress Legal Repository

refer more directly to the role of states in specifically guarding against human rights abuses by corporations.[6] An alternative interpretation is that international human rights law establishes minimum standards for the treatment of all human beings, derived from the inherent dignity of the human person, which are to be adhered to by all – governments, individuals and all other entities in society, including corporations. On this view, the content of an obligation is separated out from the mechanisms for its enforcement. International human rights law contains standards that all elements of society are obliged to observe, but the capacity to enforce those standards will differ according to the character of the obligation-holder. While public international law has developed mechanisms for the enforcement of human rights obligations against states, it has been left to states to develop their own enforcement mechanisms as far as non-state actors, including individuals and corporations, are concerned and the realities of the multijurisdictional nature of multinational companies means that in many cases, there is an accountability gap for protecting human rights from corporate abuse.

The influence of business on the economic and political environments has, in most countries, increased greatly in recent decades[7] and so too have 'soft law' mechanisms, aimed at 'regulating' the impact of business on human rights in the form of codes of conduct, international guidelines and other devices. The emergence of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (U.N. Norms) in 2003 sparked intense debate about how responsibility for human rights might be apportioned between state and non state actors.[8] Which government has the primary responsibility to act to prevent corporate abuses of human rights– the host government (where the business activity is occurring) or the home government (where the business is based)? If a government is unwilling or unable to assume the mantle of responsibility for protecting rights, or is indeed a perpetrator of the offence, should some, any or all of the responsibility fall to business?

As the relationship between human rights and corporations continues to develop so too are legal (or perhaps pre-legal) concepts which attempt to more concretely tie human rights to corporate responsibility. This article begins by briefly describing the current state of play in China regarding internet censorship and some select activities of some of the U.S. technology companies which have raised concerns. Section 2.2 then examines the particular rights of freedom of expression and privacy that are at risk of abuse via censorship activities. Section 3 deals with the practicalities of protection and how human rights responsibilities might be apportioned between states and business and if so, how, when and why such an obligation might ensue.

## 2.0 Internet Censorship: A contemporary human rights dilemma

[6] See discussion below at Section 3.1
[7] Ruggie' Interim Report note 4 para 9-19.
[8] See generally Justine Nolan, 'With Power comes Responsibility: Human Rights and Corporate Accountability' *UNSWLJ* Vol 28 No 3 (2005) 581; David Kinley, Justine Nolan and Natalie Zerial: 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30.

The Berkeley Electronic Press Legal Repository

Hosted by The Berkeley Electronic Press

## 2.1 The great firewall of China: comply, resist or leave?[9]

Governments around the world have long censored access to information. The internet offers contemporary challenges to governments' intent on limiting access to information. The internet has the potential to empower and educate and provide individuals with a gateway to limitless information.[10] However, the internet also has the ability to "become a tool of repression...enhanc[ing] the ability of repressive governments to restrict the freedoms and basic human rights of their citizens".[11] As it does with offline media, the Chinese government seeks to limit online content including restricting access to information concerning human rights. The Chinese government has invested tens of millions of dollars on internet filtering and surveillance equipment in order to build a sophisticated firewall to limit and control the availability of online information in China. Reporters without Borders, a nongovernmental organization that fights against censorship, lists China among one of its top 13 internet enemies and describes a number of techniques used by the Chinese government to block and filter information ordinarily available via the internet.[12] The Chinese government's most recent foray in internet censorship hit the headlines when in March 2008, the government cut access to Google Inc.'s YouTube inside China after the Web site was flooded with graphic images from Tibet, including videos of burning trucks and monks being dragged through the streets by Chinese soldiers.[13]

Broadly speaking the Chinese response to increasing internet usage has been three-pronged: direct state surveillance and filtration of the content that goes through Internet Exchange Points (IXPs) at the country's borders and major IXPs within the country; state mandated third-party surveillance and filtration; and state-induced self-censorship.[14] Because not all of the Internet traffic in China goes through government-monitored IXPs, the Chinese government relies extensively on third parties to execute surveillance and filtering on its behalf. This affects every Internet-related company in China. China has sought and received the cooperation of global internet companies in limiting access to information. The Chinese government could not exercise the degree of control over this medium of communication without the cooperation of industry. However, the dilemmas such 'cooperation' raises are not

---

[9] Jim Heskett "The China Dilemma for U.S. Firms: Comply, Resist of Leave?" *Harvard Business School Working Knowledge,* March 6 2006.

[10] Amnesty International *Undermining Freedom of Expression in China; The role of Yahoo!, Microsoft and Google*, ('Undermining FOE in China')July 2006, p4. available at http://irrepressible.info/static/pdf/FOE-in-china-2006-lores.pdf

[11] Amnesty International 'Undermining FOE in China' note 10 p4. Also see; Human Rights Watch 'Race to the Bottom; Corporate Complicity in Chinese Internet Censorship' (August 2006) Vol.18 No. 8(c) available at h http://www.hrw.org/reports/2006/china0806/5.htm#_Toc142395828

[12] Reporters without Borders, http://www.rsf.org/article.php3?id_article=26134&Valider=OK. Others listed by Reporters without Borders include Belarus, Burma, Cuba, Egypt, Iran, Saudi Arabia, North Korea, Syria, Tunisia, Turkmenistan, Uzbekistan and Vietnam.

[13] Jane Spencer and Kevin J Delaney 'YouTube Unplugged As Foreign Governments Block Sensitive Content, Video Site Must Pick Between Bending to Censorship, Doing Business' *Wall Street Journal,* March 21, 2008; Page B1

[14] See generally Global Internet Liberty Campaign 'Regardless of Frontiers' available at http://www.cdt.org/gilc/report.html.

bepress Legal Repository

simple. Some, including the companies with a stake in the market, may argue that complying with government censorship or requests for user information, is the cost of doing business in China and corporate decisions – such as whether to remain in (and comply) or (resist) and leave the market - are primarily a concern for company shareholders. Human rights concerns, some might argue, are only a matter for governments.[15]

### 2.1.1 Contemporary examples of human rights abuses

Yahoo!, Microsoft, Google and Cisco are four U.S. based companies that have recently attracted criticism for censoring internet content with limited transparency.[16] In February 2006 a United States Congressional hearing examined representatives from these four companies regarding their operations in China.[17] In the same month, U.S. Representative Christopher Smith introduced the *Global Online Freedom Act of 2006*[18] which was replaced with an updated version in 2007[19] which seeks to "promote freedom of expression on the Internet, to protect United States businesses from coercion to participate in repression by authoritarian foreign governments and for other purposes."[20] If enacted, this would, among other things, require an increased degree of transparency from companies about how and what information they censor online and would also ban US companies from providing information enabling users to be identified, "except for legitimate foreign law enforcement purposes as determined by the Department of Justice".[21] Similarly, a proposal to establish a European Union Global Online Freedom Act was introduced into the European Parliament in mid 2008.[22]The European legislation aims to regulate European software and hardware exports and provide dedicated funds to support anti-censorship tools and services.[23] In addition the legislation proposes to increase transparency by requiring European businesses to provide copies of requests from foreign

---

[15] This paper is primarily addressing the issue of self censorship by U.S technology companies rather than that which also originates from Chinese based companies such as Baidu, China's leading domestic search engine and which some argue censors content more heavily that internationally based companies. See for example Human Rights Watch 'Race to the Bottom' note 11 at Section III Comparative Analysis of Search Engine Censorship.

[16] Human Rights Watch 'Race to the Bottom' note 12 p5. For Cisco see 'Critics squeeze Cisco over China' in *Wired Magazine* 29 July 2005 http://www.wired.com/techbiz/media/news/2005/07/68326

[17] See for example the testimony by Microsoft to US House of Representatives, Committee on International Relations - Joint Hearing of the Subcommittee on Africa, Global Human Rights & International Operations and the Subcommittee on Asia and the Pacific ( Jack Krumholtz, Associate General Counsel and Managing Director, Federal Government Affairs, Microsoft Dated: 15 Feb 2006 ) available at: http://www.microsoft.com/presspass/exec/krumholtz/02-15WrittenTestimony.mspx.

[18] H.R. 4780 [109th]: Global Online Freedom Act of 2006

[19] H.R. 275: Global Online Freedom Act of 2007

[20] Ibid preamble

[21] Ibid, see generally TITLE II--MINIMUM CORPORATE STANDARDS FOR ONLINE FREEDOM including sections 202, 203, and 204; http://www.govtrack.us/congress/billtext.xpd?bill=h110-275. For more information on this Act, see Surya Deva 'Corporate Complicity in Internet Censorship in China' *The George Washington International Law Review* Vol. 39 2007 255.

[22]Proposal for a Directive of the European Parliament and Council concerning the EU Global Online Freedom Act, (HR 4780) 2008 available at http://www.julesmaaten.eu/_uploads/EU%20GOFA.htm

[23] Ibid art. 8

Bepress Legal Repository

governments to engage in censorship activities.[24] The proposed legislation adds 'teeth' to the proposal by providing that European companies that store user information or disclose it to Internet restricting countries would be subject to criminal charges.[25] Such legislative proposals raise questions about who has or should exercise the responsibility to protect human rights that are in jeopardy and when such power may be legitimately exercised.

Public attention has most squarely focused on Yahoo! with little distinction being made (at least in the public eye) between Yahoo! and its subsidiaries Yahoo! China and Yahoo! (Holdings) Hong Kong. In mid 2002 Yahoo! signed China's 'Public Pledge on Self-discipline for the Chinese Internet Industry' (sponsored by the government affiliated Internet Society of China) which required Yahoo! to "refrain from producing, posting or disseminating harmful information that may jeopardize state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity" and that it "monitor the information publicized by users on websites according to law and remove the harmful information promptly".[26] The combination of vague instructions and associated harsh penalties often results in companies censoring even more aggressively than does the Chinese government. Most recently, Yahoo! has attracted intense criticism after it was revealed it played a role in identifying Chinese journalist Shi Tao to the government.[27] Shi had forwarded an email to an overseas human rights group in which the government had ordered journalists not to cover the 15th anniversary of the 1989 suppression of protestors in Tiananmen Square. Chinese authorities were able to trace the email back to Shi with the assistance of Yahoo! (Holdings) Hong Kong, which provided account holder information to the Chinese Government.[28] In April 2005 Shi received a ten-year prison term for attempting to exercise his right to freedom of expression.

In April 2007 the World Organization for Human Rights USA ('WOHR') filed an action in the District Court of California on behalf of Shi and pro-democracy advocate Wang Xiaoning and his wife Yu Ling.[29] The statement of claim alleged that Yahoo! wrongfully provided their user information to the Chinese Government, leading to

---

[24] Ibid art.13 The legislation defines 'European business' as : A) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that--(i) has its principal place of business in a Members State; or (ii) is organized under the laws of a Member State or a territory, possession, or commonwealth of a Member State;(B) any foreign subsidiary of an entity described in subparagraph (A) to the extent such entity--(i) controls the voting shares or other equities of the foreign subsidiary; or (ii) authorizes, directs, controls, or participates in acts carried out by the foreign subsidiary that are prohibited by this Directive.

[25] Ibid art. 15.

[26] Amnesty International 'Undermining FOE in China' note 10 p18

[27] For example see; 'Yahoo 'helped jail China writer' BBC News Sept. 7, 2005, http://news.bbc.co.uk/1/hi/world/asia-pacific/4221538.stm

[28] Ibid; Reporters sans frontieres, *Information supplied by Yahoo! helped journalist Shi Tao get 10 years in prison* (2005) <http://www.rsf.org/article.php3?id_article=14884>.

[29] *Wang Xiaoning v Yahoo! Inc*, No 07-cv- 2151 (Northern District of California) (9th Cir docketed April 18, 2007).

bepress Legal Repository

their arrest, long-term detention, abuse and torture.[30] WOHR claimed that Yahoo!'s conduct violated U.S. legislation such as the *Alien Torts Claims Act*[31] because the claimants' injuries 'resulted from violations of specific, universal and obligatory standards of international law'.[32] Yahoo!'s motion for early dismissal and case management application seeking a statement of opinion from the US Government was rejected by the District Court.[33] The case settled privately in November 2007 but again raises the issue of the amorphous boundaries of a corporation's sphere of responsibility including the 'necessary' relationship between a parent company and its subsidiaries or related companies, raising again, the vexed issue of where corporate responsibility begins and ends.

## 2.2 Rights in jeopardy

The conduct of the Chinese government and the cooperation of business in conducting internet censorship activities most obviously affect the human rights to free expression and privacy (among others). Both are protected in the UDHR and in treaty law.

Article 19 of the UDHR and article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) enshrine the right to freedom of opinion and expression; indeed, the protection of such a right is commonly seen as the cornerstone of a democratic society.[34] Freedom of opinion and expression can take many forms encompassing verbal, artistic, written and physical expression. It recognises the individual's right to seek, receive and impart information and ideas through any media, regardless of frontiers. While violations of the right are more traditionally associated with authoritarian states than corporations,[35] an increasing number of codes of conduct explicitly recognise the right and the need for its protection.[36] Due to the indivisibility of rights, freedom of opinion and expression is linked to a number of other rights, including the right to freedom of association and the right to privacy.

China voted for the UDHR in 1948 however, the UDHR is not a treaty. It was adopted by the United Nations General Assembly as a resolution and has no force of law on its

---

[30] World Organization for Human Rights USA, 'Complaint for Tort Damage lodged in the District Court of California on behalf of Wang Xiaoning, Yu Ling and additionally presently unnamed and to be identified individuals v Yahoo! Inc, Yahoo! Holdings (HK) Ltd, Alibaba.com, Inc' <http://www.humanrightsusa.org/> at 1 October 2007.

[31] 28 USC §1350 (1789)

[32] The statement of claim also alleges violations of Californian State law and contraventions of the *Electronic Communications Privacy Act* 18 USC 2510.

[33] United States District Court for the Northern District of California, 'Order Denying Defendant Yahoo!'s Motion for an Early Case Management Conference and Order' <http://www.humanrightsusa.org/modules.php?op=modload&name=UpDownload&file=index&req=viewdownload&cid=2> .

[34] UDHR, note 5 art 19; ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

[35] See generally Article 19: Global Campaign for Freedom of Expression <http://www.article19.org/> at 1 October 2007.

[36] See, for example; Nokia's Code of Conduct (2005) <http://www.nokia.com/NOKIA_COM_1/Corporate_Responsibility/Sidebars_new_concept/sb_Code_of_conduct/eng_code_of_conduct2005.pdf> at 1 October 2007.

Depress Legal Repository

own. Over time, as evidenced by the consensus of opinion and practice among states, some of its principles have become part of "customary international law," creating some obligations on nation states.[37] The 1968 United Nations International Conference on Human Rights stated that the Universal Declaration "constitutes an obligation for the members of the international community" but it is a matter of debate whether it can be argued that protection of the rights to privacy and freedom of opinion and expression are accepted as customary law and thus binding on states. China has signed the ICCPR indicating consent to its general principles however it has not ratified the treaty so is not formally bound by it.[38] In theory, freedom of speech is also provided for in Article 35 of the *Constitution of the People's Republic of China* which states that "Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration"[39]but such theoretical protection has not converted into actual practice.[40]

In interpreting both the breadth and limitations inherent in this international human right to freedom of opinion and expression guidance from the United Nations human rights treaty bodies is instructive. Both the UDHR and the ICCPR provide for circumstances in which the right to freedom of opinion and expression may be limited, particularly in relation to the rights or reputations of others, national security or public order and public health or morals. [41] The principal human rights body tasked with protecting this right, the UN Human Rights Committee, notes that it is the interplay between the principle of freedom of opinion and expression and any limitations and restrictions imposed which determines the scope of any individual's right.[42]

In assessing the legitimacy of restrictions placed on freedom of opinion and expression, the language of Article 19 and international jurisprudence makes it clear that any restrictions must meet a strict 3 part test. This test, which has been confirmed by the United Nations Human Rights Committee, requires that any restriction must:

---

[37] Although a particular state may not recognize the principle of free expression in its domestic law, it may be bound if it is considered to be an international norm that is "supported by patterns of generally shared legal expectation and generally conforming behavior." Jordan J. Paust, "The Complex Nature, Sources and Evidences of Customary Human Rights Law," 25 *Ga. J. Int'l & Comp. L.* 147, 151 (1996). See also Richard B. Lillich, *International Human Rights* 89, 127 (2d ed. 1991). Sources of international law include international conventions and treaties, international custom, and general principles of law recognized by civilized nations. Statute of the International Court of Justice, art. 38(1).

[38] Article 18 of the *Vienna Convention on the Law of Treaties*
1969 (entered into force on 27 January 1980). expands on a state's intention to comply:
*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*
*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:*
*(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.*

[39] Adopted on December 4, 1982

[40] Surya Deva note 22 at 262-265.

[41] UDHR note 5 art. 29(2) ICCPR note 34 art 19.3.

[42] U.N. Human Rights Committee, General Comment No 10 *Freedom of Expression (Art 19)* :
.29/06/83 [3].

bepress Legal Repository

be provided for by law; be required for the purpose of safeguarding one of the legitimate interests noted in Article 19(3); and be necessary to achieve this goal. [43]

The first part of the test means that state action restricting freedom of expression that is not specifically provided for by law is not acceptable. Restrictions must be accessible and foreseeable and "formulated with sufficient precision to enable the citizen to regulate his conduct". As a result, official measures which interfere with media freedom but are not specifically sanctioned by law, such as discretionary acts committed by the police or security forces, offend freedom of expression guarantees.

Second, only measures which seek to promote legitimate interests are acceptable. The list of legitimate interests contained in Article 19(3) is exclusive. Measures restricting freedom of expression which have been motivated by other interests, even if these measures are specifically provided for by law, are illegitimate.

Third, even measures which seek to achieve one of the legitimate goals listed must meet the requisite standard established by the term "necessity". Although absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient. The government, in protecting legitimate interests must restrict freedom of expression as little as possible. Thus vague or broadly defined restrictions, even if they satisfy the "prescribed by law" criterion, will generally be unacceptable because they go beyond what is strictly required to achieve the legitimate aim.[44]

While it is open to the Chinese authorities (or to any other government) to restrict freedom of expression when there are national security interests at stake (or one of the other legitimate interests), international law does not grant an unfettered discretion to states to define for themselves what constitutes an issue of national security. The UN Special Rapporteur on freedom of opinion and expression has stated in this respect that "for the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation."[45]

The right to privacy stipulates that no one should be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or to unlawful attacks on their honour or reputation.[46] A state is required to guarantee against all such interferences and attacks whether they emanate from state authorities or from

---

[43] For example in *Mukong v Cameroon* No. 458/1991 , views adopted 21 July 1994, 49 GAOR Supp. No. 40 UN Doc. A/49/40 para 9.7.

[44] See Article 19 *Memorandum by Article 19 International Centre Against Censorship on Algeria's proposed Organic Law on Information* p4 available at http://www.article19.org/pdfs/analysis/algeria-press-law.pdf

[45] Report of the U.N. Special Rapporteur, Mr Abid Hussein, pursuant to the Commission on Human Rights Resolution 1993/45". Reference E/CN.4/1995/32, 14 December 1995, para 48.

[46] UDHR, note 5 art 12; ICCPR, note 30 art 17; *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 14 December 1990) art 16.1. See also the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1981* <http://www.oecd.org/document/18/0,2340,en_2649_201185_1815186_1_1_1_1,00.html>.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

natural or legal persons, such as corporations.[47] The right to privacy is closely linked with the right to freedom of opinion and expression, making global internet usage one of the biggest challenges to these rights. In enabling information to be accessed, processed and disseminated at rates not previously anticipated, the internet provides possibly the greatest potential challenge to the protection of the rights to privacy and freedom of expression; corporations play a vital role in facilitating these rights.

Restrictions on Internet access and content are increasing worldwide, under all forms of government and some may argue that the Chinese limitations are no less legitimate than others. Governments around the world, claiming they want to protect children, thwart terrorists and silence racists and hate mongers, are rushing to eradicate freedom of expression on the Internet. However, the scope of freedom of expression in China and accompanying impacts on individuals' right to privacy with respect to internet usage is clearly restricted by vague laws that appear to impose penalties disproportionate to the alleged crime. The Special Rapporteur on freedom of opinion and expression has indicated that "the general rule is the protection of the freedom" and that restrictions not be applied in such a way that the expression of an opinion is merely suppressed.[48] In China, legislation restricting internet content and dictating surveillance activities of service providers has been used for precisely that purpose, in particular to imprison and intimidate human rights defenders and journalists and stifle attempts by citizens to participate in political debate. Clear determination of a violation of international law is difficult given China is not a party to the principal convention and the status of the rights as customary law is questionable however it is clear that the right as enshrined in the Chinese constitution is certainly not protected in practice and that the state's attempts to restrict this right are assisted by the cooperation of the private sector companies that are leaders in the industry. Who then should or can assume responsibility for protecting these rights?

## 3.0 The Practicalities of Protection

### 3.1 Sphere of responsibility for human rights: state responsibility

The traditional vision of international human rights law is that it focuses on and binds only states, as states have long been viewed as the principal protagonist in human rights abuses. However with the rise in number and power of corporations in recent decades,[49] fundamental questions are now legitimately being asked about how responsibility for the protection, promotion and fulfilment of human rights should be apportioned between state and non-state actors. Such dialogue calls into question traditional assumptions that government is the only actor of substance in this arena As noted previously, states have the primary responsibility under international human rights law to protect human rights recognised in international as well as national law.

---

[47] U.N. Human Rights Committee, General Comment No 16 *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Art 17) : . 08/04/88 [1].
[48] U.N. Special Rapporteur note 45 para. [xxx]
[49] Ruggie 'Interim Report' note 4, para 10-19.

bepress Legal Repository

While international law does not (or at least rarely) directly address corporations,[50] the state's duty to protect against non state (including by corporations) human rights abuses *within their jurisdiction* is firmly enshrined in international law.[51] However, the critical question is under what circumstances states may or should exercise extraterritorial jurisdiction to hold corporations (domiciled in their jurisdiction)[52] accountable for human rights abuses they commit overseas? The multijurisdictional nature of multinational corporations poses complex scenarios for regulating adherence to human rights standards. As noted by one commentator, it is a historically contentious issue as to whether 'international law prohibits the application of state law and the jurisdiction of state courts to persons, property or acts outside their territory or whether instead international law provides a wide measure of discretion which is only limited in certain cases by prohibitive rules'.[53] Generally, human rights and environmental standards of companies are traditionally regarded as matters for the host state (the state in which a particular investment is made or where the activities of the multinational take place). However, where the host state is unwilling or unable to react to corporate abuses of human rights, or assisting the perpetration of the offence, the home state (generally, the state of the incorporation of the parent company) may have an important role to play.

---

[50] Kinley D and Tadaki J, (2003–04) 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' 44 *Virginia Journal of International Law* 931 at 944-947.

[51] U.N. Human Rights Committee *General Comment No. 31* [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* : . 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comment) at para. 10. See also John Ruggie *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/4/035, 9 February 2007, Section I.

[52] See Sara L. Seck 'Home state obligations for the prevention and remediation of transnational harm: Canada, Global Mining and Local Communities' a dissertation submitted to the Faculty of Graduate Studies in partial fulfilment of the requirements of the degree of doctor of philosophy (Osgoode Hall Law School, York University) Dec. 2007 (copy on file with author) where she notes 'The place of incorporation is the dominant mode for determining corporate nationality in a large number of countries including... the United Kingdom and the United States (p.104). Determining corporate nationality is a state practice and Seck notes that 'state practice diverges, however, with common law countries tending to accord nationality on the basis of incorporation within their territory regardless of where the business management is carried out, while civil law countries confer nationality on the basis of where the company has its seat of management' (p.103). This article will rely on the traditionally accepted grounds for determining corporate nationality as the place of incorporation, registered main office or principal place of business. See Oliver De Schutter "Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability ofTransnational Corporations" (report prepared as a background paper for the legal experts meeting with John Ruggie in Brussels Nov. 3-4 2006, December 2006) available at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf Also see *Case concerning the Barcelona Traction, Light and Power Company Ltd* (Belgium v Spain) [1970] ICJ Rep 4 where the International Court of Justice found that the nationality of a corporation is to be determined by the state in which it is incorporated.

[53] Seck note 52 p.90 for her discussion of the *Lotus* case (*S.S. Lotus (France v. Turkey)* (1927) P.C.I.J. (Ser. A) No. 10.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

In a report[54] by the U.N. Special Representative of the Secretary-General on business and human rights (SRSG) submitted to the United Nations Human Rights Council in 2007, he suggests that international human rights law is more ambiguous in regard to home states employing such extraterritorial jurisdiction. The Report suggests that while human rights treaties do not *require* states to exercise extra territorial jurisdiction over corporate human rights abuses, nor do they *prohibit* a state from doing so.[55] For example, in interpreting a states' duty under article 2(1) of the ICCPR to respect and ensure the Covenant rights to all individuals within 'its territory and subject to its jurisdiction', the Human Rights Committee has interpreted this as applying to 'anyone within the power or effective control of that State Party even if not situated within the territory of the State Party'.[56] However the Human Rights Committee has not specifically considered this in the context of regulating extraterritorial corporate acts, the basis for exercising such jurisdiction or the nature of the subject matter which might justify such action. For example, is extraterritorial protection justified for all corporate human rights abuses or reserved for the most heinous? Thus the issue can be seen in two parts: (1) what is the jurisdictional basis of the home state for (over)reaching extraterritorially to protect, prevent or redress corporate human rights abuses; and (2) what types of human rights abuses will likely trigger such action?

### 3.1.1 Jurisdictional basis for extraterritorial protection

Traditionally, international law's jurisdictional principles are generally regarded as being designed to protect, not human rights, but the territorial sovereignty of the states.[57] Habitually, extraterritorial encroachments are justified by one or more of the established principles including but not limited to: the 'nationality' principle, the 'universality' principle or the 'effects' doctrine, none have been extensively examined from the viewpoint of justifying extraterritorial regulation of corporations.[58] Briefly, the nationality principle provides that states may regulate its nationals even as regards their conduct abroad. For example, the anti-bribery provisions of the United States *Foreign Corrupt Practices Act* of 1977[59] make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any

---

[54] John Ruggie *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts,* ('Business and Human Rights') A/HRC/4/035 9 February 2007 at http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf
See also, John Ruggie *State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations' core Human Rights Treaties* Individual report on the International Covenant on Civil and Political Rights Report No. III (June 2007) ('ICCPR Report') available at http://www.reports-and-materials.org/Ruggie-ICCPR-Jun-2007.pdf

[55] Ruggie 'Business and Human Rights' note 49 para. 15.

[56] U.N. Human Rights Committee *General Comment No. 31* [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* : . 26/05/2004. CCPR/C/21/Rev.1/Add.13. (General Comment) at para. 10.

[57] Jennifer Zerk *Multinationals and Corporate Social Responsibility; Limitations and Opportunities in International Law*, Cambridge University Press, 2007 p135.

[58] These principles are discussed only briefly here and a more detailed discussion can be found in Zerk note 57 pp104-113 and De Schutter note 52 pp22-29.

[59] 15 U.S.C. §§ 78dd-1.

bepress Legal Repository

person whether such action occurs within or outside of the United States. As will become apparent, such regulation might be justified as falling with the 'nationality' basis for extraterritorial regulation, but equally by another of the principles as well.

Under the principle of universality, States are seen to be acting under an obligation to exercise extraterritorial jurisdiction 'in order to contribute to the universal repression of certain international crimes'.[60] One might argue that the increasingly narrow extraterritorial reach of the U.S. Alien Torts Claims Act ('ATCA') (as interpreted by the U.S. Supreme Court in *Sosa v Alvarez-Machain*) reaffirms the employment of the universality exception for international crimes.[61] Despite the hype that surrounds ATCA its potential reach is seriously confined by both the connections of the company to the United States and the type of human rights violations that fall within it. It is a rarity among human rights tools and its effects should not be overstated.

The 'effects' doctrine whereby a State may seek to regulate extraterritorial activities which have a substantial, direct and foreseeable effect upon or in its national territory may be more controversially applied to offshore business activities.[62] Contentious because as noted by one commentator, 'economic effects can be remote and general, [and] an unlimited acceptance of extraterritorial jurisdiction based on economic effects could clearly lead to extensive interference in the internal affairs of other States'.[63] While the effects doctrine has been justified in terms of its application to competition law it is unlikely to be so accepted in relation to justifying extraterritorial regulation of all human rights standards.[64]

Each of these jurisdictional bases is sufficiently broad and arguably sufficiently ambiguous to at least justify extraterritorial regulation of business with respect to human rights. At a minimum, such extraterritorial jurisdiction should be exercised in a 'due diligence' manner, to prevent human rights abuses. While legally, acceptance of such extraterritorial encroachment might be justified, whether it will in fact be exercised is likely to be heavily influenced by the type of human rights abuses that are allegedly occurring which raises the question as to whether violations of the right to freedom of expression, opinion and privacy wrought via internet censorship are sufficiently 'heinous' to trigger extraterritorial protection?

### 3.1.2 What type of human rights abuses matter?

---

[60] de Schutter note 52, p24.

[61] The *Alien Tort Claims Act* 28 USC §1350 (1789) was passed as part of s 9 of *Judiciary Act* (1789). The Act in its entirety reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' For an overview of cases brought under ATCA with respect to corporate liability, see generally Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) Hart Publishing, UK. While the case of *Sosa v Alvarez-Machain* 542 US 2004 (Supreme Court) did not deal with corporate violations of human rights under ATCA it did provide a sense of a narrowing of the category of human rights violations that will be viewed as falling within the confines of the Act.

[62] See De Schutter's note 52 discussion on the recent history of the effects doctrine at p22.

[63] Comment by P.M Roth 'Reasonable Extraterritoriality" Correcting the 'Balance of Interests', 41 *I.C.L.Q.* 267 (1992) at 285 as quoted by De Schutter note 52 at p23.

[64] See Zerk's (note 52) discussion regarding the possible use of the effects doctrine to regulate labour standards in host states by arguing that the economic 'effects' of the migration of jobs and industry to countries with lower standards could impact local industry at p110.

The Berkeley Legal Repository

Hosted by The Berkeley Electronic Press

The degree to which extraterritorial regulation might be accepted or justified will, in practice, depend on the rights at issue. Extraterritorial regulation of corporate activities is most easily defended in respect of a state acting to combat particularly heinous crimes such as genocide, war crimes, crimes against humanity and torture. Breaches of international human rights law that are considered violations of international criminal law may attract universal jurisdiction. Many states are already under obligations to act to combat such crimes on the basis of international treaties or arguably all states on the basis of customary international law.[65] However such obligation is generally directed toward holding individuals and not corporations accountable. While the current prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo has indicated that officials of corporations could be held accountable before the ICC for directly or indirectly facilitating conduct that leads to violations of international law, the Court's jurisdiction does not yet extend to corporations themselves.[66] The seriousness of the violation is directly connected to the likelihood of states' acting to protect potential victims and recognizing the role corporations can play in human rights abuses. For example, in July 2002 Australia amended its Criminal Code[67] to allow for prosecution of genocide, crimes against humanity and war crimes and the jurisdiction of Australian courts for these crimes extends not only to individuals but also to corporations.[68] The involvement of corporations in such crimes is most likely to occur in an 'accomplice' role, whereby the corporation might be judged complicit in the occurrence of the violation.[69]

However, in a world of over 75,000 multinational corporations,[70] while involvement in such heinous human rights violations (amounting to international crimes) clearly does occur it remains relatively uncommon as compared to the number of corporations in existence. However, corporate involvement or complicity in human rights abuses that do not amount to international crimes is more common and therein lays the problem. As noted by De Schutter, there exists no general obligation imposed on States, under international human rights law, to exercise extraterritorial jurisdiction to protect and promote internationally recognized human rights outside their national

---

[65] Seck note 57 p118

[66] M Chertoff, 'Justice Denied', *The Weekly Standard* (Washington), 12 April 2004, 28 The ICC is a permanent tribunal that investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity, and war crimes. Regarding the failure of the ICC to include corporations within its jurisdiction, see A. Clapham *Human Rights Obligations of Non State Actors,* Oxford University Press, 2006, pp244-246.

[67] *Criminal Code* 1995 (Cth). Division 268 enacts within Australian federal criminal legislation the crimes of genocide, crimes against humanity and war crimes. Section 12.1 of the Code provides that "This Code applies to bodies corporate in the same way as it applies to individuals."

[68] Allens Arthur Robinson law firm 'Corporate Culture' as a Basis for the Criminal Liability of Corporations" , Feb 2008 available at http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf

[69] For further discussion on defining corporate complicity in human rights violations see Andrew Clapham and Scott Jerbi, 'Categories Of Corporate Complicity In Human Rights Abuses' (2000–01) 24 *Hastings International and Comparative Law Review* 339. Also regarding the Australian provisions see *Joanna Kyriakakis 'Australian Prosecution of Corporations for International Crimes; The potential of the* Commonwealth Criminal Code' *Journal of International Criminal Justice*, Vol,. 5 No.4 Sept. 2007 809. Also, for an analysis of the possible application of the Australian legislation to corporate behaviour, see Adam McBeth 'Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' *Yale Human Rights and Development Law Journal* Vol. 11 2008 (forthcoming).

[70] Ruggie, 'Interim Report' note 4 para. 9

bepress Legal Repository

territory.[71] Despite the rhetoric and the vehement theoretical claims to the contrary, it appears that the international community has not yet heeded the call to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."[72] Are the rights to privacy and freedom of expression and opinion two of those worthy of extraterritorial protection to prevent or protect them from corporate abuse? Recent attempts in the United States and Europe to pass a *Global Online Freedom Act* suggest that at least to some, the protection of these rights may justify extraterritorial encroachment.

While states are not prohibited from exercising such jurisdiction over violations of international human rights standards that do not amount to international crimes, it appears they will continue to require reminding that silence in the face of human rights abuses can indeed be interpreted as acquiescence and should be actively encouraged via United Nations treaty bodies and through the universal periodic review conducted by the United Nations Human Rights Council to act to protect, prevent and provide redress for any human rights violations. Where the political will to act is present, states must balance a number of factors in assessing whether exercising such extraterritorial jurisdiction is reasonable. One of the factors will inevitably be the particular right at issue. Taking into account that the exercise of such jurisdiction is as much a political as a legal act, other issues to consider may include: the importance of the right to the home state and whether the right is universally protected by all states and the importance of preserving and protecting the right to the international human rights system. Overriding this is obviously the relationship - past, present and future - between the home and host states and what the exercise of extraterritorial jurisdiction will do to relations between the states.

## 3.2 Sphere of responsibility for human rights: corporate responsibility

Given the limited likelihood of states embarking on a widespread programme of extraterritorial protection of human rights, the question has arisen as to whether corporations should step into the void to assume any level of responsibility for protecting human rights with which they have a particular and relevant relationship? While it is not reasonable or feasible to assume corporations have responsibility for the litany of rights set out in the UDHR , there is an argument that non state actors, such as corporations, have some level of responsibility for rights that have a strong nexus with their operations. The UN Global Compact asks business to 'support and respect the protection of internationally proclaimed human rights' within their sphere of influence.[73] The UN Norms note that states have the primary responsibility to protect rights but that corporations also have a protection obligation "within their respective spheres of activity and influence". [74]

[71] De Schutter note 52 at p18.
[72] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, para 5 which begins by arguing that ´All human rights are universal, indivisible and interdependent and interrelated'.
[73] www.unglobalcompact.org
[74] UN Norms, note 4 at para.A, 1.

Business Legal Repository

Hosted by The Berkeley Electronic Press

The concept – of corporations' assuming a sphere of responsibility for certain human rights - while not explicitly named predates these two initiatives in a practical sense as some companies, under public pressure, have gradually begun to accept a more encompassing view of the human rights within their purview. In 1996 when the U.S. television network, CBS' 48 Hours program broke news alleging sweatshop conditions in Nike's contracted factories in Vietnam,[75] the company's first reaction was to deflect and resist any attempts to directly hold it responsibile for conditions in a factory that it did not own and for workers that were not direct employees of Nike. However the publicity backlash that ensued soon ensured Nike's acceptance of a broader sphere of influence or responsibility for itself than would otherwise flow from legal liability.[76] In 1995 when Ken Saro-Wiwa and eight others were executed in Nigeria - after a trial that violated international fair trial standards and dealt with alleged offences arising out of their campaign against environmental damage by oil companies, including Shell – Shell refused to criticise the trial. A Shell executive commented at the time, 'Nigeria makes its rules and it is not for private companies like us to comment on such processes.'[77] The public criticism that followed subsequently resulted in Shell embarking on developing new human rights policies that embraced a much broader notion of what human rights issues it might assume some level of responsibility for.

In 2000, Amnesty International's publication 'Is it any of your business?'[78] implicitly introduced the concept of sphere of influence to the business and human rights agenda in the form of popular concentric circles illustrating the nexus between a company and its contractors, the community and society generally. The codes of conduct which were developed , by companies, multistakeholder groups and industry associations, in a consistent flow since the mid 1990s are illustrative of the gradual acceptance of a broader practical notion of how and when a company might use its influence to protect human rights and implicit acceptance that business owes broader duties that extend beyond its immediate employees.[79] The Business Leaders Initiative on Human Rights (BLIHR) has been proactive in pursuing practical efforts to test the confines of a company's sphere of influence and responsibility by accepting a broader notion of corporate responsibility than pure legal analysis might discover.[80]

Precisely what falls within the sphere of influence of a corporation is debatable and may be influenced by both moral and legal responsibilities that will help determine if

---

[75] CBS News 48 Hours, October 17, 1996, see http://www.saigon.com/~nike/48hrfmt.htm

[76] Amnesty International *Business and Human Rights in a time of change* February 2000, 65 which discusses the likely initial reaction of companies being to first deny the allegations, seek to blame others ,then enter into damage control before embarking on the road to compliance.

[77] Ibid at 1.

[78] Amnesty International and Prince of Wales Business Leaders Forum 'Is is any of your business?' April 2000, available at http://www.iblf.org/docs/IsItYourBusiness.pdf

[79] See for example the code of the Fair Labour Association which states 'Any Company that determines to adopt the Workplace Code of Conduct also shall require its licensees and contractors and, in the case of a retailer, its suppliers to comply with applicable local laws and with this Code in accordance with the Principles of Monitoring and to apply the higher standard in cases of differences or conflicts.' Which explicitly acknowledges a broad sphere of corporate influence. Available at http://www.fairlabor.org/all/code/index.html

[80] http://www.blihr.org/Pdfs/BLIHR%20Report%202004.pdf

Bepress Legal Repository

a company is complicit in human rights violations.[81] As argued by Lehr and Jenkins, the notion of influence is broad and does not provide a clear basis for attributing human rights responsibilities to companies. [82] In attempting to more firmly confine the concept and perhaps redefine it as a corporation's 'sphere of responsibility' for human rights, the nature of the obligation should be considered (is it simply a duty to refrain from abuse or should it involve positive obligations?), along with the question of to who that obligation is owed and when it is owed.

### 3.2.1 The nature of the obligation

In a report, examining the obligations of state parties under the ICCPR to "respect and ensure" the rights in the Covenant to "all individuals within [their] territories and subject to [their] jurisdiction." (ICCPR, Art. 2(1) the SRSG observed that the Human Rights Committee, the group of independent experts that monitors implementation of the ICCPR, considers that the Covenant "requires States Parties to protect against violations by both State agents and private parties or entities."[83] In examining the "duty to protect" and its meaning for private enterprises, the SRSG observes that the Human Rights Committee is "clear that it considers States parties to have a duty to act with due diligence to prevent, punish, investigate, and redress private abuse of all rights capable of being violated by private actors."[84] However, exactly what this 'duty to protect' entails is unclear for states, let alone corporations exercising the 'duty' within their 'sphere of responsibility'. Is it a responsibility only to take "reasonable steps" to protect rights or is more required? In his 2008 report to the Human Rights Council, the SRSG sets up a framework that distinguishes between a state's duty to protect and a corporation's (implied lesser) responsibility to respect. [85] However - whether through the drama of a new paradigm in international law that directly places responsibility on corporations[86] or through a renewed approach to emphasize corporate responsibility that continues to indirectly target business via state responsibilities (the seemingly preferred approach of the SRSG) - it is not clear to this writer why business cannot also assume the higher level responsibility to protect.

For example, the obligations that the Norms attempted to place on business were to 'promote, secure the fulfilment of, respect, ensure respect of and protect human

---

[81] International Council on Human Rights Policy ('ICHRP'), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies Main Report* (2002) 99–102 http://www.ichrp.org/index.html?project=107 at 136.

[82] Amy Lehr and Beth Jenkins "Business and human rights – Beyond corporate spheres of influence", 12 Nov 2007 available at http://www.ethicalcorp.com/content.asp?ContentID=5504

[83] Ruggie 'ICCPR Report' note 54 at p.4 para.1.

[84] Ibid

[85] John Ruggie 'Protect, Respect and Remedy: a Framework for Business and Human Rights' Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008.

[86] While the notion of direct responsibility being placed on corporations appears radical, it is not the first time duties have been placed on them in international law. Kinley and Tadaki note that TNCs have direct duties under some multilateral conventions. For example, both the *International Convention on Civil Liability for Oil Pollution Damage* and the *Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment* directly impose liability on legal persons including corporations. David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2003–04) 44 *Virginia Journal Of International Law* 931, 944–7.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

rights'. The terminology used suggests that business is seen as having an obligation to do more than simply refrain from acting in a way that constitutes a violation of rights: they are also seen as having a positive duty to prevent violations of rights and to play a proactive role in promoting the specified rights. That is, they are an active duty holder with respect to certain human rights. Traditional interpretations of human rights emphasize only the state as a duty holder despite the reality that the rights of individuals give 'rise to not only a variety of duties but also a variety of duty holders'.[87] However, surely human rights law does not preclude an evolving list of duty holders? As argued by Joseph Raz "one may know of the existence of a right…without knowing who is bound by the duties based on it or what precisely are those duties."[88] To accept such flexibility in the law is to acknowledge the developing nexus between business and human rights and understand and accept that changing circumstances and the ever increasing role of corporations in all aspects of our lives, permit or even require a departure from the state centric view of the state as the only duty holder with respect to human rights. It does not follow that by assigning a portion of responsibility to corporations with respect to human rights results in a corresponding reduction of the State's obligations to protect such rights. The obligations of companies should supplement and not replace State obligations but both can and should assume a responsibility to proactively protect human rights.

### 3.2.2 To who is the obligation owed?

The question of who or what falls within the sphere of responsibility of a corporation, that is, to which stakeholders the obligations to protect, promote, respect and secure the fulfilment of human rights are owed, may not turn on restrictive legal principles alone. A legalistic interpretation could limit a company's sphere of responsibility to those with whom it has a direct relationship, such as employees and shareholders. However, a more contemporary view may be to look beyond a company's contractual relationships in defining its stakeholders and consider those with whom it has a particular political, economic, geographical *or* contractual relationship – it is this broader relationship which is already acknowledged by some companies via their code of conduct or indeed emerging in some jurisdiction's company law reform packages.[89] One of the key considerations is to determine the *proximity* of the company to the individual whose right has been violated. Establishing proximity may involve geographical considerations (particularly relevant for pollution) but may also give rise to relationship proximity questions. For example, Chinese internet users affected by American company censorship tactics are far distant from the company's immediate operations but still fall within its sphere of responsibility.

Taking a 'bottom up' approach, a strong case could be made for a relevant connection existing between a company and its workers (not just direct employees, but including workers in its supply chain who may have no direct contractual relationship to the

---

[87] Ratner S, (2001) 'Corporations and Human Rights: A Theory of Legal Responsibility?' 111(2) *Yale Law Journal* 44 at 468.

[88] Joseph Raz *The Morality of Freedom* (1986) 171 as quoted by Ratner note 87 at 468.

[89] See generally Nolan note 8 and see for example s172 of the *Companies Act* U.K. (2006) which imposes a new potentially broad duty on company directors to have regard to the impact of a company on the community and the environment.

bepress Legal Repository

company), consumers and its host community (those who live near, or are directly impacted by, its operations, such as those living downstream from a mining operation). Looking at it from the 'top down', a company could also have a relevant connection (based on political, economic, geographical or contractual factors) with business partners (including, but not limited to, its contractors, subcontractors, suppliers, licensees and distributors), the company's host or home government or with armed militia who exert control over the territory in which they operate.[90] Clearly there is a sliding, and at this point in time still largely undefined, scale of responsibility between a company and the victim or violator of the human rights abuses. The more direct the connection, the greater the responsibility placed on the company to prevent and protect from such abuse.

### 3.2.3 When is the obligation owed?

This final question involves an examination of similar factors that States may bear in mind when considering when to act to prevent third party human rights violations. From the perspective of providing guidance in establishing a corporate sphere of responsibility for human rights, relevant factors to consider are: (i) *type* - the type of human rights abuse alleged and (ii) *causation* - the role of the company in causing the violation including which company committed or was complicit in the commission of abuse. This will necessarily involve examining the control framework of the company.

As to the type of violation that matters, much of the same rhetoric can be expected regarding the universality and importance of defending all human rights, but the reality is that not all rights are, or will ever be protected equally. Corporations cannot assume responsibility for the entire sum of human rights set out in the UDHR and it is reasonable to restrict a corporation's sphere of responsibility to those rights most relevant to its activities. Who determines such relevance? In the absence of the jurisprudence of an international human rights body dictating a relevant list of rights, the market place will inevitably hold some sway. The greater the shame and media attention that can be brought to bear exposing particular human rights abuses, the more likely it is to attract the immediate attention of a company to willingly embrace it within its sphere of responsibility. Underpinning such marketplace publicity is the basic issue of the nexus between the specific right and the company – an apparel company is more likely to and should embrace responsibility for labour rights because of the direct connection with its product. A resource company may affirm its connection with environmental rights but be reluctant to act to protect freedom of speech.[91] The difficulty lies, as always, in the inextricability of human rights. If one supports the view of the inherent interconnectedness of rights then how to legitimately assign different levels of responsibility for their protection? As a practical matter, identifying tiers of corporate responsibility for protecting human rights beginning with those rights that have the most immediate connection with the corporation's activities may be one way to provide greater clarity to corporations interested in at least attempting to provide a framework of protection.

bepress Legal Repository

[90] ICHRP note 81 at 139.
[91] See discussion accompanying note 77.

Hosted by The Berkeley Electronic Press

Causation is a key issue in determining corporate responsibility for human rights abuses but it is often unclear or indirect for reasons of the violation occurring within the company's supply chain, or perhaps because the company is accused of being complicit rather than directly engaged in the violation. While there is no definitive judicial definition of what amounts to complicity in such a case, the *Unocal* test of 'knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime' is perhaps the closest to it.[92] Causation involves examining the impact of the company on the enjoyment of particular rights and leads into the final question of control.

Key to establishing the issue of causation is determining which company can be said to have committed the offence? Most of the current litigation arising out of the United States Aliens Torts Claims Act attempting to hold corporations accountable for human rights violations focuses on trying to attribute blame to the corporate parent for the actions of its subsidiary or even an agent in a developing country.[93] The parent company is eager to claim a lack of control over its subsidiary or agent and thus a lack of liability for the violation. In order to track liability for the violation to the parent company, it may require a 'piercing of the corporate veil' which serves to establish a separate juridical personality for a corporation and protect shareholders from liability.[94] Courts may be more willing to piece the corporate veil where the parent company can be seen to exercise a strong or 'extreme' degree of control over its subsidiary or agent though to date there is no consistent cases between jurisdictions for when the veil will be pierced.[95]Internet censorship allegations raise not only complicated questions of which company is responsible but where the censorship activities can be said to be taking place?[96] However, as illustrated by the recent focus on Yahoo's! censorship activities in China and the provision of user information to Chinese government officials, the court of public opinion is less concerned with the artificial legal distinction between a parent companies and its subsidiaries.

## 3.3 Is another code the answer?

For the last 18 months, Google, Yahoo! and Microsoft and others, have been working with human-rights groups, academics and socially responsible investors to develop a code of conduct for operating in countries that limit free expression and individual privacy.[97] The process of drafting such a code and a governance framework to regulate adherence to the code in a multistakeholder environment is complex, but not

---

[92] *Doe I* v. *Unocal Corp*., US Court of Appeals for the Ninth Circuit, filed 18 September 2002, Opinion. This case was eventually settled in 2005 and the decision vacated. The later decision of *Church of Sudan et al.* v. *Talisman Energy Inc., and Republic of Sudan,* US District Court Southern District of New York, 01 Civ 9882 (DLC), Opinion and Order (12 September 2006) raises some points of difference with the Unocal test.
[93] See generally Sarah Joseph note 61 at pp129-143.
[94] Ibid p129.
[95] Ibid p130.
[96] For example, Yahoo! China's website operates Chinese language portal services. In October 2005, Alibaba Group acquired Yahoo! China in a transaction whereby Yahoo! became a substantial shareholder of Alibaba Group. In connection with this transaction, Yahoo! agreed to grant to Alibaba Group the exclusive rights to use in China the "Yahoo!" name and certain technologies owned by Yahoo!, as well as the right to sub-license these rights to other members of Alibaba Group. Yahoo! China is headquartered in Beijing. See: http://www.alibaba.com/aboutalibaba/aligroup/index.html#Yahoo!China
[97] http://cyber.law.harvard.edu/research/principles/participatingorganizations

bepress Legal Repository

revolutionary. The idea of developing a code as a substitute accountability mechanism for protecting human rights is one that has been taken up with a vengeance in the last decade or so. Whether a code of conduct is the answer for redressing the legal vacuum for protecting corporate abuse of human rights remains ambiguous but may certainly assist, particularly where states are reluctant to act. Voluntary codes of conduct that aim to delineate corporate responsibility for human rights can aid protection of such rights but cannot alone ensure uniform protection. Since the early 1990s there has been a vast increase in the number of codes of conduct developed by companies, trade organisations, non-governmental organisations ('NGOs') and multi-stakeholder bodies. Levi Strauss & Co was one of the early adopters in 1991 with the development of its ethical code, and was followed soon after by a raft of companies such as Gap Inc., Nike, Shell and BP Amoco, notably, these companies were principally representative of the apparel and footwear sectors, and extractive industries.[98] The push to develop a code for technology companies that focuses on the rights to free expression and privacy represents a new frontier in efforts to protect human rights.

Codes of conduct can assume many forms and roles[99] but one function is in simply setting a standard to which companies publicly commit. Codes of conduct are generally regarded as part of the 'soft law' paradigm for protecting human rights. Nevertheless, there are emerging arguments questioning whether their generally 'normative' effect – that is, the development of broadly accepted standards for corporate conduct through the aggregation of individual codes of conduct – may transform into a legal effect.[100] For example, the standards enumerated in a particular code may be incorporated into an employment, supplier or agency contract. The standards may also be given legal effect if adopted by a regulatory agency as a mandatory disclosure requirement for corporate public reporting.[101] In the seminal case of *Kasky v Nike* an action was brought against Nike in California under consumer protection legislation, whereby Nike was accused of misleading and deceptive practices in denying human rights abuses within its supply chains. [102] *Kasky*, though of greater importance in terms of its potential impact on corporate adherence to codes of conduct than its substantive legal finding that Nike's public statements were 'commercial speech' for the purposes of unfair competition laws, illustrates how codes might be used to prevent misleading conduct by corporations with respect to specific standards. At the very least, codes are backed by the reputation of the company that adopts them, supported by the ever-present threat of media exposure.

---

[98]See Levi Strauss & Co, *Social Responsibility/Sourcing Guidelines* (2005) <http://www.levistrauss.com/ responsibility/conduct/index.htm>.

[99]Kathryn Gordon and Maiko Miyake, 'Deciphering Codes of Corporate Conduct: A Review of their Contents', Working Paper No 1999/2 (2000) 12 <http://www.oecd.org/dataoecd/23/19/2508552.pdf> . This OECD study was the result of an investigation of 246 voluntary codes collected 'from business and non-business contacts which OECD Member governments helped identify': 8. Out of this set of codes, Gordon and Miyake found that 118, or 49 per cent, were issued by individual companies (mostly multinationals); 34 per cent were industry and trade association codes; two per cent were codes issued by an international organisation; and 15 per cent were codes issued by a partnership of stakeholders (mainly NGOs and unions):.

[100] See Halina Ward, *Legal Issues in Corporate Citizenship*, Report prepared for the Swedish Partnership for Global Responsibility (2003) 6-7 <http://www.iied.org/pubs/pdf/full/16000IIED.pdf>.

[101] For example, the Johannesburg Securities Exchange adopted a 'Code of Corporate Practices and Conduct' that requires all publicly listed companies to disclose non-financial information in accordance with the Global Reporting Initiative: ibid 3-5.

[102] 539 US 654 (2003).

Berkeley Legal Repository

Hosted by The Berkeley Electronic Press

As such, codes have tended to be adopted more quickly by those companies that rely heavily on the value of their brand to sell their product. Protecting their brand name is critical to them, and as consumers in the United States and European markets, and elsewhere, become better informed about human rights issues, this creates opportunities to hold these companies accountable for activities of their subsidiaries, business partners and throughout their entire supply chain.[103]

Codes of conduct vary from company to company and amongst industries. Specific issues may have found their way into a code as a direct result of public criticism of a company's practices.[104] This new working group aimed at establishing the 'Global Principles on Freedom of Expression and Privacy' is no different having been undertaken in the same period that these technology companies were being publicly criticised for their cooperation in censoring access to the internet in China and handing over private user information to government.[105] Reactive codes such as this, most commonly reflect issues that companies, consumers, workers and others are motivated to address in a very public manner and are naturally self selecting in the issues they focus on. While the proliferation of codes of conduct – whether company specific or as part of a multi-stakeholder initiative – in the last decade or so has meant that hundreds of companies have now publicly committed to upholding basic human rights, the challenge is to ensure the standards espoused in codes or guidelines adopted by business are consistent, comprehensive and implemented. The cacophony of opportunistic standard setting that has so far marked the code of conduct debate and worked to confound consensus building on human rights issues has limited the effectiveness of this corporate accountability tool.

The focus on codes of conduct and their enforcement (largely through non-governmental monitoring schemes) has firmly taken root in global business over the last 20 years, though the concept remains subject to severe limitations. As the working group continues the process to develop its 'Global Principles on Freedom of Expression and Privacy', its credibility and integrity will be affected by two main factors: the substantive content of the code itself and the implementation process for ensuring corporate adherence to the code including the degree of transparency of that process. While governments have the primary obligation to respect, protect and fulfil human rights and ensure that national laws, regulations and policies are consistent with international human rights laws and standards on freedom of expression and privacy, to what extent will the Global Principles acknowledge the supplementary 'responsibility' of technology companies to ensure they are not complicit in the abuse of such rights? To what extent will participating companies be required to ensure their subsidiaries, business partners and participants in their supply chain adhere to the code? How will the code be monitored – by monitors who operate independently of the companies? How will the monitors be paid? How frequently will they monitor the code and how will the monitored activities be chosen – by the corporation or by an

[103]For further discussion on the value of codes of conduct and their form see Michael Posner and Justine Nolan, 'Codes of Conduct and Workers Rights' in Robert Flanagan and William Gould IV (eds), *International Labor Standards: Globalisation, Trade And Public Policy* (2003) 207–26.
[104]For example, the reaction of Nike in 1997 to the leaked report on one of their supplier factories by Ernst & Young. See Dara O'Rourke, *Smoke From A Hired Gun: A Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young*, Transnational Resource and Action Center Report, 10 November 1997 <http://corpwatch.org/article.php?id=966>.
[105] See generally Amnesty International 'Undermining FOE in China' note 10 and Human Rights Watch 'Race to the Bottom' note 11.

bepress Legal Repository

independent group? These are all questions other industries, such as the apparel industry before it, have grappled with, with a mixed degree of success.[106]

## 4.0 Conclusion

There is no doubt that the ever increasing nexus between human rights and business and the accompanying vagueness of such concepts as a company's 'sphere of influence or responsibility' can, and has, created anxiety amongst companies.[107] The public criticism that Yahoo, Google, Microsoft and Cisco have attracted in recent years is evidence of the reality that a sphere of responsibility for certain human rights is being thrust upon companies even though it is not much more than an embryonic concept at present. The principle of assuming a company has a sphere of responsibility for human rights is - non legal at this stage, though perhaps it should be more accurately termed pre legal - which needs to be nurtured and developed in parallel with efforts to further clarify the limits of a states' jurisdictional protection of human rights. The very contemporary concerns that are raised by companies cooperating, or some might say, colluding, with government to limit rights is a fundamental issue that cannot be pushed aside. There is no doubt that the inability of the international legal framework to keep pace with the rise of the corporation as a significant non state actor has resulted in the emergence of an accountability gap for corporate human rights abuses. This particular example of a state and companies acting to prevent exercise of the rights to free expression and privacy is but one example of that accountability gap that allows corporate abuse of human rights. The many and varied voluntary frameworks, such as codes of conduct, that have arisen to affirm the human rights responsibilities of companies are useful but insufficient to protect human rights that are continuing to be placed in jeopardy. Voluntarism has its limits and the failure of international law to keep pace with public expectations that corporations should have some responsibility for human rights[108]is an indictment on a system that needs to be aware and accept that it can and indeed should embrace responsibility for non state actors such as corporations either within its traditional state based system of responsibility or more radically step outside the box and consider an international legal mechanism that, despite and indeed in spite of, the legal complexities that may arise on this particular chosen path imposes direct responsibility on corporations for violations of human rights. It is perhaps time to acknowledge that the 60 year old state based mechanisms for protecting human rights are no longer sufficient to protect individuals from human rights abuses deriving from non state actors such as corporations.

---

[106] See for example the Fair Labor Association and its ongoing effort to improve working conditions via adherence to its code; www.fairlabor.org.

[107] Kinley, Nolan & Zerial note 8 at 37.

[108] See for example the special report in *The Economist* 'Just Good Business' Jan. 17 2008 ' which discusses corporate social responsibility as a mainstream issue and widely accepted. Available at http://www.economist.com/specialreports/displaystory.cfm?story_id=10491077

Bepress Legal Repository

Hosted by The Berkeley Electronic Press