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Corporate Cyber-Censorship: The Problems with Freedom of Expression Online

Max Rothschild*

I. CONCEPTUALIZING CYBERSPACE

. . . the Street does not really exist — it's just a computer-graphics protocol written down on a piece of paper somewhere — none of these things is being physically built. They are, rather, pieces of software, made available to the public over the world-wide fiber-optics network. When Hiro goes into the Metaverse and looks down the Street and sees buildings and electric signs stretching off into the darkness, disappearing over the curve of the globe, he is actually staring at the graphic representations — the user interfaces — of a myriad of different pieces of software that have been engineered by major corporations. In order to place these things on the Street, they have had to get approval from the Global Multimedia Protocol Group, have had to buy frontage on the Street, get zoning approval, obtain permits, bribe inspectors, the whole bit.

— Neal Stephenson, *Snow Crash*¹

The Internet is widely conceived of as being a public “space” or a medium for public discourse.² However, this understanding is misleading in that it obscures the multi-faceted layering of private agreements that in fact constitutes the infrastructure of the Internet.

In order to get onto the Internet, users first have to make arrangements with companies that provide access. Private companies facilitate admission to the online space by acting as Internet Service Providers. Moreover, the content and services that users can access once online exist by virtue of owners who host these elements for “public” use. Companies like Google, Amazon, PayPal, Facebook, and Twitter (to name but a few) provide content and services to Internet users as a form of business. Although users are not always required to pay when they use these online tools, they are nevertheless at all times engaged in business transactions. These are regulated by private contractual agreements that users enter into — often implicitly — in order to use services that are easily taken for granted.

* Max Rothschild, JD, 2013, Schulich School of Law at Dalhousie University. He holds a BA from McGill University where he studied English Literature, Cultural Studies, and European History. The contents of this article are current to April 2012.

¹Neal Stephenson, *Snow Crash* (New York, NY: Bantam Dell, 1992) at 25.

² Hillary Clinton called the Internet the “public space of the twenty-first century” during a speech in February 2011; Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (New York, NY: Basic Books, 2012) at 3074 [MacKinnon]; similarly, David Bollier argues that “People who contribute to the digital commons . . . are engaging in a form of citizenship” and are called “netizens,” *ibid.* at 628.

In this sense, the Internet is more accurately understood as a communication tool that individuals access via a constantly-multiplying set of layered agreements with corporations. Whether using a service like Facebook or Gmail or blithely accessing content hosted on a server, it is nearly impossible to use the Internet without entering into relationships with corporate entities. These arrangements are private and are on non-negotiable terms set by the owners.³ It is in this context that users become vulnerable to abuse by the powerful corporations they have become involved with as a necessary function of using the online world.

In the offline world we have become accustomed to enjoying various social norms. Laws have regulated our relationships with the people around us such that we have certain expectations about the quality of public life. Moreover, if others fail to meet these expectations then we have the ability to enforce our rights.

Private contractual relationships are different in that they call for parties to agree how they will treat one another. While social norms establish the parameters of our public relationships, in private there is an extent to which we are able to decide what rules we want to apply or not. This is important to keep in mind when considering relationships with businesses since they are not obliged to agree to many norms we take for granted.

When we enter into agreements with companies via our online conduct we do so at their pleasure. Terms of service agreements are designed to limit liability and maximize potential profit, and in almost every case these are non-negotiable. If you want to use Facebook as a social networking platform then you have to agree to Facebook's terms of service.

Although there are many aspects of this one-sided negotiation that are disturbing, of particular concern is the fact that these private contractual agreements are outside the scope of international human rights law. Corporate entities as a whole are free from the application of international human rights law as it currently exists, and this problem has increasingly vexed scholars and activists for decades.⁴ As Surya Deva writes: "The era of legally binding corporate human rights obligations has not even properly begun."⁵

The growth of the Internet's presence in society in recent years has highlighted the problem with the applicability of human rights law. This area of law was designed to regulate the activity of state actors' control of their jurisdictional

³ "Uninformed Consent? Your Agreements with Flickr, Facebook, etc." Interview of Michael Geist by Bruce Ladan, (19 March 2012) on *Quirks and Quarks*, CBC Toronto, online: CBC <<http://www.cbc.ca/news/technology/story/2012/03/19/technology-audio-user-agreements.html>>.

⁴ Peter Mulchinski, "Corporate Social Responsibility and International Law: The Case of Human Rights and Multinational Corporations" in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law*, (New York: Cambridge University Press, 2007) at 436-439 [Mulchinski]; see also the Business & Human Rights Resource Centre's online archive of known human rights abuses by businesses, online: <<http://www.business-humanrights.org/Categories/Issues/Abuses>>.

⁵ Surya Deva, "Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact of the *Global Online Freedom Act*?" (2007) 39 *Geo Wash Int'l L Rev* 255 at 319 [Deva].

spaces; however, the growing importance of the Internet as a public “space” has emphasized the fact that it is privately owned and operates within the confines of private contractual law. In this context the corporate entities that enable us to use the Internet are also largely unaccountable via their one-sided mandatory contracts with users. These corporations not only hold all the power in allowing us access to the Internet, our relationships with them exist in a space that makes them essentially beyond reproach if they act in unacceptable ways.⁶

II. HUMANIZING THE DIGITAL

This article will explore the problem of the applicability of human rights law to the corporate entities that own and enable the operation of the Internet. The focus will be the status of the right to freedom of expression online, and the different possibilities that have been suggested in order to ensure that users have and are able to exercise this right. As the Internet is a communicative tool that allows for an unprecedented global discourse, freedom of expression is naturally of primary importance in the online context.⁷

The scope of freedom of expression is still evolving within international human rights law⁸ and thus it is not easy to identify exactly what the right means. For the purposes of this article freedom of expression (FOE) will be understood as it is defined in the *International Bill of Human Rights (IBHR)*, specifically two of the constituting documents thereof: the *Universal Declaration of Human Rights*⁹ (*UDHR*) and the *International Covenant on Civil and Political Rights*¹⁰ (*ICCPR*). Freedom of Expression is provided for under Article 19 of the *UDHR*, which reads that “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.”¹¹ That

⁶ Indeed, as Andrew Clapham has explored, “increases in the power of non-state actors like multinational enterprises ha[ve] problematized the conception of corporations as having no social/public obligations; these private entities should be subject to HR responsibilities, notwithstanding their status as creatures of private law, since human dignity must be protected in every circumstance”: see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) at 137-138 and 147; see also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 544–548.

⁷ Wolfgang Benedek, “Internet Governance and Human Rights” in *Internet Governance and the Information Society* (Portland, OR: Eleven International Publishing, 2008) at 36 [Benedek].

⁸ Rhona Smith, *Textbook on International Human Rights* (New York, NY: Oxford University Press, 2010) at 36 [Smith].

⁹ *Universal Declaration of Human Rights*, CA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN doc A/810 (1948) [*UDHR*].

¹⁰ *International Covenant on Civil and Political Rights*, CA Res 2200A (XXI), UNGAOR, Supp No 16, UN Doc A/6316 (1966) at 52 [*ICCPR*].

¹¹ *UDHR*, *supra* note 9, art 19.

principle is given a more formal and practicable legal framework in Article 19 of the *ICCPR*, which provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.¹²

The *ICCPR* and the *UDHR* provide a good basis for defining international human rights laws such as FOE because, “As of now, the [two documents are] widely accepted as the ‘consensus of global opinion on fundamental rights’, and as such, are therefore highly reflective of customary international law.”¹³ Furthermore, although the *UDHR* is not technically a formal treaty and as such is not legally binding,¹⁴ the *ICCPR* is a treaty that theoretically commits its parties to be “legally as well as morally bound” by the articles of the treaty¹⁵ (subject to any stated reservations or interpretative declarations).¹⁶ As such, the framework provided in the *ICCPR* is a good indication of how the international community envisages FOE. More broadly, the *IBHR* indicates both the underlying goals of human rights law with regards to the freedom of expression, as well as the method by which to implement this right.

This article will explore various methods that have attempted to bring the conduct of multinational corporations in line with international human rights norms, with specific focus on FOE in the online context. It will be argued that despite

¹² *ICCPR*, *supra* note 10, art 19.

¹³ Michael Koebele, *Corporate Responsibility Under the Alien Tort Statute* (Boston, MA: Martinus Nijhoff Publishers, 2009) at 89 [Koebele].

¹⁴ Smith, *supra* note 8 at 37-38, in which she notes that the *UDHR* is sometimes called “the conscience of the world” and describes its status as “variable.” Smith notes that the *UDHR* “is not, by definition, legally binding,” but has arguably become “so widely accepted that they form part of the general principles of law, although they may not have crystallized into customary international law.” Moreover “not all rights in the Universal declaration have crystallized into custom.” This is particularly true of FOE, the scope of which varies dramatically from state to state, as will be mentioned throughout this article.

¹⁵ *Ibid.* at 48-49; Smith also notes at 48 that despite the *ICCPR*’s widespread acceptance, the rights enshrined “are still regularly violated worldwide.”

¹⁶ “U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights,” 138 Cong Rec S4781-01, online: University of Minnesota <<http://www1.umn.edu/humanrts/usdocs/civilres.html>>.

significant resistance to the idea of instituting legal requirements at the international level, there continue to be encouraging developments in the private sector and in the domestic law of a few important jurisdictions.

It should be noted at this point that any discussion of international human rights law and implementation thereof will be restricted to that which is aimed at private business entities. Although the actual implementation of current human rights law is only applicable to state actors, this article does not seek to evaluate or problematize these applications outside of their relationship to private corporations.

III. ANARCHY ONLINE

The serious problems posed by inconsistent corporate behaviour in the matter of FOE online will become clear over the course of a few illustrative examples. This section will detail two sets of events that demonstrate the unaccountability of multinational corporations who determine that is within their interests to engage in Internet censorship. First, a timeline will be presented detailing the abandonment of WikiLeaks by many of its corporate partners in 2010, as well as an examination of the resultant legal consequences for WikiLeaks, its (former) corporate allies, and the US government. Second, China's censorship regime will be described and the complicity of a number of multinational corporations in that regime will be detailed.

(a) The Attempted Censorship of WikiLeaks

WikiLeaks is a not-for-profit media organization that exists “to bring important news and information to the public . . . so readers and historians alike can see evidence of the truth.”¹⁷ Since launching in 2007, WikiLeaks has exposed numerous confidential documents to the public including bank records, government cables, and videos of military operations. The organization has attracted international attention for testing the limits of freedom of expression.

In November 2010, WikiLeaks organized a coordinated international publication of classified documents detailing hundreds of correspondences between the United States (US) State Department and its diplomatic missions around the world.¹⁸ The reaction from American politicians was vitriolic,¹⁹ and included Vice President Joe Biden labeling WikiLeaks' founder Julian Assange a “high tech terrorist”²⁰ and Hilary Clinton calling the disclosure “an attack on the international

¹⁷ Wikileaks, “About”, online: WikiLeaks.org <<http://wikileaks.org/About.html>>.

¹⁸ Angela Daly, “Private Power and New Media: The Case of the Corporate Suppression of WikiLeaks and its Implications for the Exercise of Fundamental Rights on the Internet,” (Ph. D Thesis, 2012) online: <<http://ssrn.com/abstract=1772663>> at 1 [Daly]; Yochai Benkler, “A Free Irresponsible Press: Wikileaks and the Battler over the Soul of the Networked Fourth Estate” (2011) 46 Harv CR-CLL Rev 311 at 312 [Benkler].

¹⁹ Daly, *supra* note 18 at 6; Toby Harnden, “WikiLeaks: US Senators Call for WikiLeaks to Face Charges” *The Telegraph* (28 November 2010) online: <<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8166607/WikiLeaks-US-Senators-call-for-WikiLeaks-to-face-criminal-charges.html>>.

²⁰ Benkler, *supra* note 18 at 313.

community.”²¹ Senator Joe Lieberman, the chairman of the Senate Homeland Security Committee, launched a campaign against WikiLeaks’ “attack on the national security of the United States.”²² Senator Lieberman had members of his staff contact various corporations that provided services to WikiLeaks, including Amazon and Tableau Software, in order to make inquiries as to whether or not they would be terminating their relationship with the media organization.²³

Beginning in early December 2010, numerous corporate entities ceased to provide services to WikiLeaks. In addition to Amazon and Tableau Software, Apple, Bank of America, EveryDNS, MasterCard, and PayPal all formally ended their relationships with the embattled organization. Despite this widespread termination of services, WikiLeaks received support from a number of international organizations that allowed it to continue hosting its website and receiving donations.²⁴

Some of the companies that ceased to support WikiLeaks gave reasons for their actions, and many stated that WikiLeaks had violated their terms of services via its alleged engagement in or encouragement of illegal activity.²⁵ Most of these corporations did not identify the US government as having influenced their decisions to cut ties with WikiLeaks and Amazon explicitly denied such allegations.²⁶ However, Tableau Software did state that it was prompted at least in part by Senator Lieberman’s public request for organizations hosting WikiLeaks to terminate their relationships with the site.²⁷ Likewise, PayPal’s VP of Platform, Mobile and New Ventures later acknowledged that the actions of the US State Department played a role in the company’s blocking of WikiLeaks’ account.²⁸

²¹ David Jackson, “Obama Aides Condemn WikiLikes; Obama Orders Review”, *USA Today* (29 November 2010) online: <<http://content.usatoday.com/communities/the-oval/post/2010/11/obamas-team-faces-sensitive-diplomacy-over-wikileaks/1#.T2jA32JWoyc>>.

²² “Lieberman Condemns New WikiLeaks Disclosure”, *United States Senate* (28 November 2010) online: <<http://lieberman.senate.gov/index.cfm/news-events/news/2010/11/lieberman-condemns-new-wikileaks-disclosures>>.

²³ Rachel Slajda, “How Lieberman Got Amazon to Drop WikiLeaks”, *Talking Points Memo* (1 December 2010) online: <http://tpmmuckraker.talkingpointsmemo.com/2010/12/how_lieberman_got_amazon_to_drop_wikileaks.php>; Daly, *supra* note 18 at 4.

²⁴ WikiLeaks, “Donate”, online: WikiLeaks.org <<http://shop.wikileaks.org/donate>>; WikiLeaks, “Banking Blocade”, online: WikiLeaks.org <<http://wikileaks.org/Banking-Blockade.html>>; Charles Arthur, “WikiLeaks Under Attack: The Definitive Timeline”, *The Guardian* (8 January 2010), online: <<http://www.guardian.co.uk/media/2010/dec/07/wikileaks-under-attack-definitive-timeline?intcmp=239>>.

²⁵ Daly, *supra* note 18 at 2–4.

²⁶ Amazon Web Services, “Message”, Amazon.com (3 December 2010), online: <<http://aws.amazon.com/message/65348/>>.

²⁷ Elissa Fink, “Why we removed the WikiLeaks visualization”, *Tableau Software* (2 December 2010), online: <<http://www.tableausoftware.com/about/blog/2010/12/why-we-removed-wikileaks-visualizations>>.

²⁸ Bianca Bosker, “PayPal Admits State Department Pressure Caused it to Block WikiLeaks”, *The Huffington Post* (8 December 2010), online:

Many scholars and political commentators have critiqued the various corporate entities that terminated services to WikiLeaks, as well as the US government for its role in influencing those companies. Some have likened Senator Lieberman's "thuggish" exertion of influence over private actors to that of an authoritarian regime,²⁹ while others have been more critical of the role played by the corporate entities themselves.³⁰ The UN High Commissioner for Human Rights, Navi Pillay, voiced concerns over the termination of support for WikiLeaks, stating:

While it is unclear whether these individual measures taken by private actors directly infringe on States human rights obligations to ensure respect of the right to freedom of expression, taken as a whole they could be interpreted as an attempt to censor the publication of information thus potentially violating WikiLeaks right to freedom of expression.³¹

Despite these criticisms and concerns about the violation of WikiLeaks' rights, the legal consequences of these events have been minimal. In terms of WikiLeaks conduct, despite vague allegations that the website's mere possession of leaked documents violated US law,³² it does not appear that the publication of the leaked documents was illegal. As Yochai Benkler has argued, the US government has no case against WikiLeaks unless it can prove that the organization was directly involved in the actual leak of the documents³³ because the publication thereof is protected domestically by the First Amendment.³⁴ The US government has yet to bring forward any charges against WikiLeaks or Julian Assange, and unless the United States Supreme Court is prepared to dramatically reinterpret the relationship between the *Espionage Act* and the First Amendment³⁵ it does not appear that WikiLeaks is guilty of any misconduct in the United States.

<http://www.huffingtonpost.com/2010/12/08/paypal-admits-us-state-de_n_793708.html>.

²⁹ Glenn Greenwald, "Joe Lieberman Emulates Chinese Dictators", *Salon* (2 December 2010), online: *Salon* <http://www.salon.com/2010/12/02/lieberman_55>.

³⁰ Daly, *supra* note 18 at 7-8; Michael D Birnhack & Niva Elkin-Koren, "The Invisible Handshake: The Reemergence of the State in the Digital Environment", (2003) 8 *Va JL & Tech* at 8 [Birnhack]; see also MacKinnon, *supra* note 2 at 1484: "The response to WikiLeaks' release of classified cables is a troubling example of private companies' unaccountable power over citizens' political speech, and of how government can manipulate that power in informal and thus unaccountable ways."

³¹ United Nations, "UN High Commissioner for Human Rights Navi Pillay voices concern at reports of presume being exerted on private companies to halt financial or internet services for WikiLeaks", *United Nations News and Media* (9 December 2010), online: UN <<http://www.unmultimedia.org/tv/unifeed/d/16541.html>>.

³² Harold Koh, "Text of State Department Letter to WikiLeaks", *Reuters* (27 November 2010), online: *Reuters* <<http://www.reuters.com/article/2010/11/28/us-wikileaks-usa-letter-idUSTRE6AR1E420101128>>.

³³ MacKinnon, *supra* note 2 at 1490.

³⁴ As demonstrated by the decision in *New York Times v. United States*, 403 U.S. 713 (1971) at 730; Benkler, *supra* note 18 at 352.

³⁵ Rick Stengel, "WikiLeaks' Julian Assange Speaks with TIME," *TIME Special Reports* podcast, December 1 2010, available on the Apple iTunes Store, Julian Assange at

If the allegations of illegal conduct are indeed false then the question becomes whether or not WikiLeaks' FOE was directly violated by either the US government or unduly constrained by the corporations that terminated their services to the media organization. Unfortunately the answer to both these questions appears to be no, as there is no evidence that the US government acted to directly censor WikiLeaks and the corporate entities were acting under the protection of private contractual law. The US government's actions appear to have been an "extralegal private-public partnership"³⁶ that Birnhack and Koren have termed "The Invisible Handshake," whereby the State and the private sector collaborate in ways that are beyond the reach of judicial review.³⁷ In this case the US government's actions were purely political in nature, and did not reach the level of an official exercise of state authority.³⁸ Meanwhile, the corporations that terminated their services to WikiLeaks "were within their legal contractual rights to drop any customer for any reason" and so do not appear to have violated any US or international public law.³⁹

Thus WikiLeaks largely seems to be without legal recourse — or the financial wherewithal to litigate against these companies — despite the fact that the actions of the US government and numerous corporate entities appear to have constituted an indirect attempt to suppress freedom of expression online.

(b) Multinational Corporations Operating in China

Further evidence of the unaccountability of corporate entities for actions inconsistent with human rights norms can be seen by examining the actions of a number of US-based multinational corporations in China. Specifically, this article will focus on the compliance of Google Inc., Yahoo! Inc., and Microsoft Corporation in China's Internet censorship regime.

Censorship in China is pervasive, despite the fact that the country's constitution guarantees both freedom of speech and of the press and that the country has signed (although not ratified) the *ICCPR*.⁴⁰ China's censorship of the Internet is an enormous and multifaceted enterprise that operates on many levels. The first is

00:09:25: "When you talk about the law, what's very important to remember is the law is not what, not simply what, powerful people would want others to believe . . . *the law rather is what the Supreme Court in the land in the end says it is* . . . Now whether the Supreme Court makeup now is such that it keeps to those traditions, or it proposes a radical reassessment of the First Amendment and the US Constitution remains to be seen" (emphasis added).

³⁶ Benkler, *supra* note 18 at 314.

³⁷ Birnhack, *supra* note 30 at 3.

³⁸ As such the state neither engaged in illegal censorship nor restricted FOE due to necessity and by law.

³⁹ MacKinnon, *supra* note 2 at 1466; however, it is possible that WikiLeaks could pursue private legal remedies for breach of contract depending on the specific terms of their agreements. As many of the corporations claimed that their terms of service agreements had been violated based on WikiLeaks' illegal conduct, it is possible that the media organization could pursue private legal remedies by demonstrating such claims to be false.

⁴⁰ Deva, *supra* note 5 at 262.

commonly known as the Great Firewall of China, and consists of a complex system of both hardware and software measures. These measures control what data flows from outside China to its Internet Access Providers, then to local Internet Service Providers, and finally to Chinese users. Blocking and filtration at both the access and service provision levels allows the Chinese government to control what content is available within national borders.

However, another major branch of this censorship regime involves the coerced self-regulation of Internet Content Providers (ICPs). China requires all ICPs to register for a license in order to operate in the country, and ICPs are expected to sign a “Public Pledge on Self-discipline for the Chinese Internet Industry” (the Pledge).⁴¹ This Pledge requires that they refrain “from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability.” The result is that ICPs are themselves “direct participants in censoring Chinese citizens,” and moreover they often engage in “overcensoring” since the government’s guidelines do not make clear what constitutes acceptable content.⁴² This complex layering of corporate self-censorship with the Great Firewall makes China “a world leader in Internet censorship.”⁴³

Various multinational corporations have attempted to do business in China as ICPs, and have complied in the scheme described above. Yahoo! was the first to do so when it set up the Yahoo! China search engine in 1999, with Microsoft and Google following suit in 2005 and 2006 respectively. By complying with China’s censorship regime, these multinational corporations ensured that they would not be blocked by the Great Firewall.⁴⁴ However, the degrees of their compliance have varied notably. Microsoft, for example, shut down a Chinese political blog in 2005 “despite the fact that it was ‘hosted on servers located’ in the United States which meant that Microsoft was not legally or morally bound to adhere to the request of the Chinese government.”⁴⁵ Yahoo! complied even further when it “provided electronic details and information about cyber-dissidents to the Chinese authorities,”

⁴¹ Human Rights Watch, “‘Race to the Bottom’ Corporate Complicity in Chinese Internet Censorship,” (2006) 18:8 Human Rights Watch at 12, online: <<http://www.hrw.org/reports/2006/08/09/race-bottom>> [HRW].

⁴² Jessica Bauml, “It’s a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship,” (2010-11) 63 Fed Comm LJ 697 at 705-706 [Bauml]; MacKinnon, *supra* note 2 at 807, where she gives examples of vague directives such as “On topics related to Google, carefully manage the information in exchanges, comments and other interactive sessions.”

⁴³ “China: World Leader of Internet Censorship”, *Human Rights Watch* (3 June 2011) online: HRW <<http://www.hrw.org/news/2011/06/03/china-world-leader-internet-censorship>>.

⁴⁴ MacKinnon, *supra* note 2 at 779.

⁴⁵ Deva, *supra* note 5 at 270.

resulting in numerous arrests and incarcerations.⁴⁶ It should also be noted that, to date, Yahoo! is the only western company known to have signed the Pledge.⁴⁷

Google, conversely, confronted the Chinese government over the issue of censorship.⁴⁸ Following a cyber-attack in December 2009,⁴⁹ in March of 2010 Google began rerouting Chinese visitors to an uncensored version of the site. The Chinese government made no significant response to this act until June, when it threatened to revoke Google's license if the company continued to redirect users. Although Google's license was eventually renewed, since July 2010 the service has only offered extremely limited results to Chinese users in order to avoid having to censor search results.⁵⁰

Each of these multinational corporations chose to comply with China's online censorship regime because of "the commercial opportunity offered by the Chinese market."⁵¹ Regardless of the varying degrees of complicity or the fact that Google for one has since challenged China's authority, each of these corporations saw engagement in censorship as being within their business interests for years. Their resultant actions as ICPs in China — as well as those of local corporate entities such as Baidu⁵² — are not only inconsistent with FOE as it is defined in the *IBHR* but also fall outside the permissible limitations established in the *ICCP*. ICPs operating in China admit that they "over-block content which does not clearly violate any specific law or regulation"⁵³ in order to appease government authorities and thereby not jeopardize their licenses. However, since these are private corporations engaging in censorship as a business practice, their conduct falls outside the reach of international human rights law. It is this problem of corporate unaccountability that this article seeks to address.

⁴⁶ Bauml, *supra* note 42 at 709; Deva, *supra* note 5 at 267; see also sections 4(b)(i) and 4(b)(ii) of this article for further discussion of the legal ramifications of this type of conduct by Yahoo!.

⁴⁷ HRW, *supra* note 41 at 12.

⁴⁸ Austin Ramzy, "Google Ends Policy of Self-Censorship in China", *TIME* (13 January 2010) online: Time <<http://www.time.com/time/world/article/0,8599,1953248,00.html>>.

⁴⁹ Google blamed the Chinese government for the attack, and claimed that "a primary goal of the attackers was accessing the Gmail accounts of Chinese human rights activists": David Drummond, "A new approach to China," *Google Official Blog* (12 January 2010) online: Google <<http://googleblog.blogspot.ca/2010/01/new-approach-to-china.html>>; ironically, cables released by WikiLeaks later proved that China was indeed behind the attack: Scott Shane & Andrew Lehren, "Leaked Cables Offer Raw Look at US Diplomacy", *The New York Times* (28 November 2010) online: New York Times <http://www.nytimes.com/2010/11/29/world/29cables.html?_r=2>.

⁵⁰ Bauml, *supra* note 42 at 728; Juan Perez, "Restored Google China search Site very limited in features", *Computer World* (9 July 2010) online: Computer World <http://www.computerworld.com/s/article/9179060/Restored_Google_China_search_site_very_limited_in_features>.

⁵¹ Deva, *supra* note 5 at 261.

⁵² See Bauml, *supra* note 42 at 726.

⁵³ HRW, *supra* note 41 at 14.

(c) The Role of Government?

It should be noted that while these examples show corporations acting to censor their online users, there is also a common thread of governmental involvement in each scenario. With regards to China, the government's role in the aforementioned acts of corporate censorship is explicit.⁵⁴ Contrastingly, the US government's role in the attempted censorship of WikiLeaks is indirect to the point of deniability, although the evidence does show that high level officials made no secret of their dissatisfaction with the leaks; in particular the acknowledged impact⁵⁵ of Senator Liberman's actions⁵⁶ demonstrates the relationship between government aims and corporate censorship online.

Much has been made of this correlation in critical writings on the Internet, FOE, general human rights, and international law alike. Many scholars have focused their efforts on critiquing the role of governments in these types of human rights suppressions. However, while the American and Chinese governments undoubtedly played a role in these examples of censorship, the ultimate responsibility is that of the corporate entities involved. In both China and the US, the corporate actors involved decided that it was in the best interests of their business to engage in censorship, as encouraged — though not explicitly required — by local government. As MacKinnon has argued, the situation in “China is kind of exhibit A of what happens when you get unaccountable companies *combined with* unaccountable governments in the Internet age” (emphasis added).⁵⁷ By comparison, WikiLeaks is what Birnhack, Koren, and Benkler argue happens when accountable governments take advantage of the unaccountability of corporations.

Although there is undeniably a significant degree to which the questionable actions and agendas of governments were involved in the examples listed above, the focus of this article will be on the unaccountability of the corporations involved. It is these entities that have traditionally been regulated by states but are now challenging this paradigm as a result of legally problematic contemporary realities like globalization and the Internet. The necessary result of this challenge is a reevaluation of how to achieve the aims of international human rights law in the evolving new context of the Internet.

⁵⁴ Albeit technically indirect by virtue of how the Chinese Internet Provider licensing system engenders censorship by private entities.

⁵⁵ Daly, *supra* note 18 at 5.

⁵⁶ Ewen MacAskill, “WikiLeaks Website Pulled by Amazon after US Political Pressure”, *The Guardian* (1 December 2010) online: The Guardian <<http://www.guardian.co.uk/media/2010/dec/01/wikileaks-website-cables-servers-amazon/print>>.

⁵⁷ Berkman Center for Internet & Society at Harvard Law School, “Rebecca MacKinnon on The Worldwide Struggle for Internet Freedom”, *Berkman Center for Internet and Society: Audio Fishbowl* (3 February 2012) at 00:21:01 [Berkman]; Birnhack, *supra* note 30 at 3: “Whether the Big Brother we distrust is government and its agencies, or multinational corporations, the emerging collaboration between the two in the online environment produces the ultimate threat.” This article will focus on the role played by multinational corporations.

IV. “MAGNA CARTA” MOMENTS?⁵⁸

This section will canvas a variety of proposed and explored methods by which to curtail undue corporate constraint of FOE on the Internet. First, there will be a discussion of a proposed addition to international human rights law called The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms). This will be followed by an examination of two US legislative initiatives that have sought to enforce international norms at the domestic level: the proposed *Global Online Freedom Act* and the *Alien Torts Statute (ATS)*. Finally, the focus will turn to a pair of political initiatives advocating voluntary corporate social responsibility models: the UN Global Compact (the Compact) and the Global Network Initiative (GNI).

(a) International Legal Mechanisms

(i) *The UN Norms*

Advocates of applying international human rights laws to private entities often point to the extreme powers held by transnational corporations. Amy Sinden, for example, has argued that “if TNCs are really as powerful — or more powerful — than many states, does it make sense to put them on the private side of the [public-private] divide? . . . would it not make more sense . . . to treat them as duty-holders vis-a-vis the human rights claims of individuals just as states are?”⁵⁹ While this account of the power dynamic between state actors and private corporations is somewhat debatable, in the context of the Internet it is undeniable that corporate owners hold unprecedented control over online spaces used by the global public. With this in mind, the application of international laws such as human rights to private corporations seems like a natural answer. However, proposed realizations of this possible solution have proved to be divisive within the international community.

Discussion about expanding international human rights law to apply directly to corporate actors has tended to be split between two possible methods of implementation: the creation of an international tribunal, comparable to the International Criminal Court, or else a system that relies on regulation by state actors in a way that is consistent with international standards. The former method has been advo-

⁵⁸ Berkman, *supra* note 57 at 00:29:30; MacKinnon describes how the signing of the Magna Carta “was the first manifestation that there might be some other way of organizing power and governance,” and further urges for a contemporary “Magna Carta moment” when the governing power over the Internet is dramatically reformulated in favour of netizens as opposed to the corporate and governmental powers-that-be.

⁵⁹ Amy Sinden, “Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs” in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (New York: Cambridge University Press, 2007) at 520–523 [Sinden].

cated by human rights scholars and political activists but has not garnered much support from the international community.⁶⁰

However, the second proposed method, which calls on participating states to enforce international values, has gained momentum at the UN a number of times. In the mid-1970s a code of conduct for corporations acting outside their home country was proposed, and the UN Centre for Transnational Corporations was established to produce a draft. Although this was completed in 1983, the end of the Cold War prompted foreign investment and a move towards deregulation, and the Code was ultimately abandoned in 1990.⁶¹ In 1998, however, the UN Sub-Commission on the Promotion and Protection of Human Rights established a sessional working group on multinational corporations and in 2003 this group submitted a draft document known as “The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (the Norms)⁶² to the UN Human Rights Commission (the Commission).⁶³

The Norms outlined a global standard for corporate behaviour to be imposed via binding legal obligations on both state and private actors. Drawing from existing international human rights documents such as the *IBHR*, the Norms specifically identified which rights were most likely to be impacted by corporate conduct and proposed corresponding obligations on corporate entities to ensure that these vulnerable rights be respected and protected. These duties included the requirement for transnational corporations to “adopt, disseminate and implement internal operational rules in compliance with the Norms and also to incorporate the Norms in contracts with other parties.”⁶⁴ A number of frameworks for monitoring implementation of the Norms were also suggested, but state actors were given primary responsibility to supervise corporate entities based within their borders. Any breach of the Norms was to be remedied via the contravening business’ payment of reparations to affected parties.

⁶⁰ *Ibid.*, at 523–526; David Kinley, Justine Nolan & Natalie Zerial, “‘The Norms are Dead! Long Live the Norms!’ The Politics Behind the UN Human Rights Norms for Corporations,” in Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds, *The New Corporate Accountability: Corporate Social Responsibility and the Law*, (New York: Cambridge University Press, 2007) at 467–468 [Kinley Nolan Zerial]; see also “Developments — International Criminal Law,” (2001) 114 *Harvard Law Review* 1943 at 2031–2032.

⁶¹ David Kinley & Rachel Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law,” (2006) 2 *Human Rights Law Review*, online: <<http://ssrn.com/abstract=44153>> [Kinley Chambers]; see also Steven Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility” (2001) 111 *Yale Law Journal* 443 at 457.

⁶² United Nations Economic and Social Council Commission on Human Rights Sub-Commission on the Protection and Promotion of Human Rights, “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” (26 August 2003) online: UNHCHR <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En)>.

⁶³ Kinley Chambers, *supra* note 61; Kinley Nolan Zerial, *supra* note 60.

⁶⁴ Kinley Chambers, *supra* note 61 at 7.

When the Commission first considered the Norms in 2004, it did so under the shadow of polarized opinion. Various business groups vehemently opposed the idea of binding international human rights standards for corporate entities, while academics, non-governmental organizations, and activists supported the expansion of human rights laws to private actors. Eventually it was decided that the Office of the UN High Commissioner on Human Rights (the OHCHR) would hold further consultations with relevant stakeholders and make a full report on the Norms, which would then be reconsidered by the Commission. Subsequent debate in 2005 prompted official recognition of the fact that transnational corporations can contribute to the enjoyment of human rights, and the appointment of Professor John Ruggie as the Special Representative to the UN Secretary General on the issue of human rights and business (SRSG). In 2006 the SRSG filed an Interim Report in which he acknowledged the Norms' positive contributions to the debate about the impact of transnational corporate conduct on human rights, but critiqued such imprecise expansion of international laws.⁶⁵ The SRSG concluded that "the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights,"⁶⁶ and consequently the Norms were abandoned.

The point of the Norms was not for the document that was submitted to the Commission to be written into international law, but rather to initiate a process that would culminate in some form of change to the scope of international human rights law. Although the proposed framework had problematic elements,⁶⁷ it was merely a draft intended to begin debate amongst the UN members and be subsequently amended accordingly to group consensus.⁶⁸ Instead the document became symbolic of the sheer possibility for international human rights law to evolve so as to become applicable to private entities. The UN's abandonment of this path demonstrates that the use of traditional public law mechanisms to control private conduct does not appeal to the various stakeholders involved — or at least most substantially represented — in the debate over the Norms.⁶⁹

However, this setback has not concluded the debate about the accountability of private international entities. The Norms were meant to begin a dialogue over the unaccountability of corporate entities and potential solutions, and in that sense they achieved their purpose. Unabated by the failure of the Norms, the movement

⁶⁵ *Ibid.* at 14.

⁶⁶ Commission on Human Rights, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNESCOR, 62nd Sess, UN Doc E/CN.4/2006/97 (22 February 2006) at para. 69.

⁶⁷ Deva, *supra* note 5 at 298.

⁶⁸ Kinley Nolan Zerial, *supra* note 60 at 464-465.

⁶⁹ *Ibid.* at 459: "The debate surrounding the Norms epitomizes the increasing pervasiveness of the influence of non-state actors at the international level."

for improving corporate conduct standards continues via both new and familiar methods.⁷⁰

(b) State-based Initiatives

Another possible method by which to protect free expression online is to enact domestic legislation that ensures the protection of international human rights law, or at least freedom of expression. Although the examples described in section 3 of this article show the State playing a role in various forms of corporate censorship, this unfortunate reality does not mean that domestic government is incapable of acting in the service of freedom of expression. As Smith notes, “freedom of expression operates at both horizontal and vertical levels. *The right is designed to protect the individual against arbitrary interference . . . by both the State and other private individuals.* States are obligated to ensure that national law protects the freedom of expressions at both levels, providing appropriate safeguards and remedies in the event of infringement” (emphasis added).⁷¹ Indeed, numerous recent US legal ini-

⁷⁰ The Internet Governance Forum (IGF) is an unprecedented new avenue for change at the international level that arose at the same time as the Norms’ demise. Convened by the UN Secretary-General, the IGF seeks to draw multi-stakeholders together (including governments, private corporations, and activist groups) to engage in non-binding discussions. The goal is to bring about change indirectly by facilitating better-informed policy decisions by all members in support of a more equal and open Internet. Although this is a novel approach with laudable objectives, in practice the IGF has proven less inspiring. It is by definition difficult to point to tangible positive achievements resulting from the IGF, and indeed its formulation has been critiqued as making it “difficult to imagine [the IGF] having anything more than ‘soft governance power.’” Additionally, the initiative has failed to attract or hold the interests of governments and corporations from North America, one of the most important jurisdictions in terms of being home to many powerful corporate Internet companies like those discussed in this article. Most distressingly, however, recent events have indicated that some currently involved government actors are disinterested in participating on equal footing with non-governmental stakeholders. At an IGF meeting in September 2011, China, Russia, and other nations asserted that “policy authority for Internet-related public issues is the sovereign right of states.” Google’s Vint Cerf has critiqued this attitude as “interfering with what would otherwise be thought to be freedom of expression.” As of this writing the impacts of the IGF are difficult if not impossible to discern, while its participants have openly engaged in political struggles that detract from the initiative’s goals. It is at best uncertain whether the IGF can achieve what it set out to do, and moreover it appears that the IGF has not been able to positively impact FOE online thus far. For more information on the IGF please see: John Mathiason, *Internet Governance: The New Frontier of Global Institutions* (New York: Routledge, 2009); Chengetai Masango, “The Internet Governance Forum: Its Development, Function and Future” in Wolfgang Benedek, ed, *Internet Governance and the Information Society*, (Portland, OR: Eleven International Publishing, 2008); Wolfgang Kleinwächter, “Multi-Stakeholder Internet Governance: the Role of Governments” in Wolfgang Benedek, ed, *Internet Governance and the Information Society*, (Portland, OR: Eleven International Publishing, 2008); MacKinnon, *supra* note 2 at 3266–3298; Benedek, *supra* note 7.

⁷¹ Smith, *supra* note 8 at 292; Jeffrey Bone, “Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?” (2011) 24 Can JL & Jur 277–304 at

tiatives have shown that domestic legislative action is nevertheless a viable mechanism for responding to these types of human rights violations.

The focus in this section will be on a number of US legislative initiatives, namely the *Global Online Freedom Act (GOFA)* and the *Alien Torts Statute (ATS)*. There are a variety of reasons behind this analytical focus, the most basic of which is that this type of legislative initiative is relatively unique to the US. *GOFA* and *ATS* are novel and dubious initiatives that have each raised significant concerns about extraterritoriality. This quality may prove to be the death knell for these laws, and it leaves them largely without comparison internationally. Additionally, it has already been noted that FOE is an internationally recognized human right that nevertheless varies in scope from state to state. However, the US enjoys some of the most extensive FOE worldwide, and as such it is not entirely surprising that there are unique legislative initiatives from that country seeking to promote FOE internationally. Another factor driving the focus on US legislation is the fact that so many of the most powerful and influential companies in the online sphere originate or at least operate within the US. Finally, at the most basic level and as a result of the reasons listed above, the literature in this area is predominantly focused on these two initiatives.^{72,73}

(i) *The Global Online Freedom Act*

The *Global Online Freedom Act (GOFA)* is a legislative initiative aimed specifically at promoting FOE online via regulation of the global conduct of American Internet companies. The bill's origins are rooted in the conduct of US multinational corporations operating in China. Senator Christopher Smith has specifically cited

47: "there is a role for public regulation of corporations to ensure that the public trust is not abused by corporate power" [Bone].

72 It should also be noted that it is outside the scope of this article to evaluate individual legislative initiatives to regulate corporate activity at the domestic level. This includes acts like the *Canada Business Corporations Act*, which sets the law governing the operations of corporations operating within Canada. These types of legal mechanisms are inherently limited by jurisdictional restrictions, and hence can only apply to private entities based or operating within national borders. The foreign conduct of multinational corporations can often frustrate domestic legal regimes and place impugned activities in a sort of "legal vacuum." This is doubly true in the context of the Internet, the alleged "borderlessness" of which can make domestic enforcement unviable if not impossible. More fundamentally, however, purely domestic regulation schemes are shaped by local concerns and values and as such often feature unique permutations of international laws and norms. This is especially true in the case of FOE since that right's scope varies so wildly internationally. The purpose of this article is to evaluate different methods that have been proposed to regulate corporate activity — specifically that in the online context — in accordance with the aims of international human rights laws — and specifically those relating to FOE. As such, the legislative initiatives discussed below will be restricted to those seeking to apply international human rights laws and norms to private entities at a domestic level.

73 For more information on the legal "borderlessness" of the Internet, see Andrea Slane, "Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet" (2008) 71 *Law & Contemp Probs* 129.

Yahoo!'s identification of dissident bloggers to the Chinese government as the type of occurrence motivating the bill.⁷⁴ The bill proposes to respond to the failure of companies like Yahoo! "to develop standards by which they can conduct business with authoritarian foreign governments while protecting human rights to freedom of speech and freedom of expression."⁷⁵ First introduced in the House of Representatives in 2006, *GOPA* has seen numerous revisions; the latest version of the bill was introduced on December 8, 2011,⁷⁶ and was approved by the Africa, Global Health and Human Rights Subcommittee of the House Foreign Affairs Committee on March 27, 2012.⁷⁷ The bill will now proceed to the entire House of Representatives for further review.

The latest version of the bill proposes to institute an extensive regime by which to monitor and promote FOE online worldwide.⁷⁸ Specifically, the bill expands existing "annual country reports on human rights practices" to include assessments of freedom of electronic information.⁷⁹ Based on these expanded reports, the US State Department would be required to produce an annual list of "Internet-restricting countries."⁸⁰ Any public "Internet communications service company" operating within such Internet-restricting countries would then be required to submit annual reports to the Securities and Exchange Commission (SEC). These re-

⁷⁴ Bauml, *supra* note 42 at 712; Deva, *supra* note 5 at 289; Thomas DeNae, "Xiaoning v. Yahoo! Inc.'s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle" (2008) 11 Vanderbilt Journal Of Environment and Tech Law 211 at 216 [Thomas]; Sarah Stirland, "House Subcommittee Approves *Global Online Freedom Act*" *Tech President* (27 March 2012) online: Tech President <<http://techpresident.com/news/21976/house-subcommittee-approves-global-online-freedom-act>> [Stirland]. See the section below on the *Alien Torts Statute* for further discussion of the legal ramifications of Yahoo!'s conduct.

⁷⁵ The latest version of *GOPA* is identified as HR 3605, and its progress can be tracked at <<http://www.govtrack.us/congress/bills/112/hr3605>>.

⁷⁶ Christopher Smith, "Amendment In the Nature of a Substitute to HR 3605" (8 December 2011) online: <http://chrissmith.house.gov/UploadedFiles/HR_3605_ANS.pdf> [*GOPA*].

⁷⁷ Juliana Gruenwald, "Panel Back Bill Targetting Internet Censorship Abroad", *National Journal* (27 March 2012) online: Tech Daily Dose <<http://techdailydose.nationaljournal.com/2012/03/panel-backs-bill-targeting-int.php>>; Stirland, *supra* note 74.

⁷⁸ The latest version of *GOPA* (*supra* note 76) also includes provisions prohibiting the exportation of technologies that primarily facilitate surveillance or censorship to Internet-restricting countries. These provisions could undoubtedly have an impact on global FOE online, such as by preventing the establishment of institutions similar to the aforementioned Great Firewall of China. These provisions only indirectly impact multinational corporations and FOE online, and as such are beyond the scope of this article and will not be explored. However, it should be noted that many critiques of the latest version of *GOPA* have to do with the fact that its anti-trade provisions may indirectly prevent dissidents in Internet-restricting countries from accessing the technologies necessary to resist their governments.

⁷⁹ Deva, *supra* note 5 at 312.

⁸⁰ *GOPA*, *supra* note 76 s. 104(1).

ports must document each company's internal policies and actions pertaining to human rights,⁸¹ requests from Internet-restricting governments for information disclosure, and transparency where such governments have required them to engage in censorship. These reports would then be made available to the public so as to facilitate greater awareness of each company's policies and actions pertaining to worldwide FOE online. Failure to submit a report could result in a company's securities registration being revoked.

However, an interesting new aspect of the latest revision of *GOFA* is its "Safe Harbor" provisions that encourage participation in multi-stakeholder initiatives. Any business entities covered by the act that are certified by such initiatives are not required to submit annual reports containing the information detailed above. These companies are thus given the option of either complying with the US State Department or else with a multi-stakeholder initiative. This new aspect to *GOFA* has potentially far reaching and beneficial consequences that will be explored in greater detail below.⁸²

GOFA has been revised numerous times since its initial introduction in 2006, and the latest version includes substantial changes to how the bill proposes to achieve its aims. As a result of these changes, much of the literature pertaining to the bill has become outdated. However, some previous appraisals are still pertinent. *GOFA* would allow the US "to enforce internationally recognized human rights obligations on the overseas activity of national corporations and their subsidiaries."⁸³ More specifically the bill would create an anti-censorship regime in the furtherance of FOE online with economic enforcement mechanisms — albeit indirect ones.⁸⁴ This would give corporate entities — though only ones substantively based in America — a tangible and lawful motivation to be transparent and avoid actions that would stifle FOE.

Despite this, there are criticisms that have been levelled against previous incarnations of *GOFA* that remain applicable. Some scholars have noted inherent problems with seeking to regulate corporate conduct via legislative means, arguing that "legislation appears much too late in corporate innovation and business cycles. Legislation does nothing to help companies anticipate problems that their business or design choices might create — before they implement them."⁸⁵ However, the

⁸¹ *Ibid.*, s. 201(a). The bill would require businesses to institute (and give evidence of) policies that are consistent with the human rights related provisions of the OECD Guidelines for Multinational Enterprises. The most recent version of those guidelines indicates that multinational enterprises should respect and avoid abuse of human rights, and specifically encourages the support of Internet freedom and FOE. The OECD Guidelines are available at <<http://www.oecd.org/dataoecd/43/29/48004323.pdf>>.

⁸² The bill specifically identifies the Global Network Initiative (GNI) as an example of the type of multi-stakeholder initiative that would be permissible under *GOFA*. See the section below on the GNI for an evaluation of it, and multi-stakeholder initiatives more broadly, as a potential method by which to curtail corporate FOE violations. These types of initiatives will be discussed in greater detail in the next section of this article.

⁸³ Deva, *supra* note 5 at 311.

⁸⁴ *GOFA*, *supra* note 76 s. 201, which amends section 13 of the *Securities Exchange Act of 1934* (15 USC 78m).

⁸⁵ MacKinnon, *supra* note 2 at 2749.

latest version of *GOPA* does not seek to sanction businesses for previous misconduct as much as it does to encourage future good conduct via enforceable standards. As such it gives corporate entities the responsibility to heed human rights norms in all of their commercial enterprises, but does not punish businesses for the unforeseeable consequences of their actions. Additionally, the variety offered by the choice between the State Department's standards and those available under the Safe Harbor provisions effectively curtails the earlier critique that it is "impossible to adopt an effective one-size-fits-all legislative approach without becoming so broad as to be meaningless — or so restrictive as to make it impossible for US technology companies to do business in many countries."⁸⁶

Most fundamentally, earlier versions of the bill were criticised for exporting US law by imposing civil and criminal sanctions on corporate entities for activities that occurred outside US borders. The current form of the bill would not impose sanctions for international conduct but would instead set domestic requirements and expectations, and failure to meet them could result in domestic economic penalties. Although the goal is substantively the same, the new formulation of the bill's enforcement mechanism avoids the extraterritorial quality that was so vehemently opposed in previous drafts. Moreover, this change could mean that *GOPA* might actually stand a chance of being passed into law. Previously *GOPA* had been largely discounted by legal scholars specifically because the bill laid down domestic civil and criminal penalties for extraterritorial activity. Due to the fact that the US has historically followed a presumption against extraterritoriality⁸⁷ (as compared to China, Australia, etc.) most academics assumed that *GOPA* would never become law. However the latest version's retooling of the enforcement mechanism may avoid this concern altogether.

It remains to be seen whether or not the current — or even a future form of — *GOPA* will ultimately become US law. Although the substantive elimination of the extraterritoriality problems associated with earlier drafts has inspired hope for the latest bill,⁸⁸ it is nevertheless still a complex law that many are uncomfortable with. Regardless, *GOPA*'s continuing evolution is itself a positive sign that lawmakers are treating online censorship seriously. The latest version of the bill is by all accounts the best attempt yet to impose legally binding standards on corporations to respect FOE online.

(ii) *The Alien Torts Statute*

The *Alien Torts Statute* (*ATS*) is a curious example of the lengths to which advocates of corporate liability for human rights violations have gone in support of their cause. Enacted as a part of the US *Judiciary Act of 1789*, *ATS* gives US district courts "original jurisdiction of any civil action by an alien for a tort only,

⁸⁶ *Ibid.*

⁸⁷ Bauml, *supra* note 42 at 713; see also the decision in *Morrison v. National Australia Bank, Ltd.*, which says that "When a statute gives no clear indication of an extraterritorial application, it has none" at 2878.

⁸⁸ Andrew Feinberg, "House committee okays latest version of *GOPA*", *The Hill* (27 March 2012), online: <<http://thehill.com/blogs/hillicon-valley/technology/218571-house-committee-okays-latest-version-of-gofa>>.

committed in violation of the law of nations or a treaty of the United States.”⁸⁹ The origins behind the statute are unclear, although scholars have suggested that it was designed as a means of both fighting piracy and also allowing foreign diplomats to bring forward actions in tort against domestic assailants.⁹⁰ Whatever the reasons for its enactment, the statute sat mostly dormant for almost 200 years before being revived in 1980 by the US Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*.⁹¹ In a landmark decision the Court stated that *ATS* provides federal jurisdiction “whenever an alleged [violator of universally accepted norms of the international law of human rights] is found and served with process within [US] borders.”⁹² The decision opened up an entire new avenue to pursue legal action for contraventions of international law, and it was not long before complaints against corporate entities for violations of human rights began to come forward under *ATS*.⁹³

The act allows US district courts to “enforce internationally recognized human rights obligations on the overseas activities of national corporations and their subsidiaries.”⁹⁴ Indeed, it has seen use in the aforementioned context of the dissident bloggers that Yahoo! identified to the Chinese government. Yahoo! settled an *ATS* lawsuit brought forward by Human Rights USA over the company’s role in the arrest and imprisonment of Chinese journalists.⁹⁵

In theory, then, *ATS* provides a mechanism by which to set corporate human rights obligations such as FOE via enforceable economic penalties.⁹⁶ However, in practice the power of the act is significantly less far-reaching. The statute is limited to those entities that can be and are served within the United States, and although

⁸⁹ 28 U.S.C. s. 1350 [*ATS*].

⁹⁰ Douglas Branson, “Holding Multinational Corporations Accountable? Achilles’ Heels in *Alien Tort Claims Act* Litigation” (2011) 9 *Santa Clara Journal of International Law* 251 at 230 [Branson]; Colin Kearney, “Corporate Liability Claims Not Actionable Under the Alien Tort Statute — *Kiobel v. Royal Dutch Petroleum Co.*,” 621 F.3d 111 (2d Cir., 2010)” (2011) 34 *Suffolk Transnational Law Review* 263, at 264 [Kearney].

⁹¹ 630 F.2d 876 (2d Cir., 1980) [*Filártiga*]; the case involved a civil suit by a Paraguayan national for the wrongful death by torture of her brother at the hands of a police official from Asunción, Paraguay, who was living illegally in the United States.

⁹² Branson, *supra* note 90 at 227; *Filártiga*, *supra* note 91.

⁹³ *Ibid.* at 228; Bauml, *supra* note 42 at 710-11; Donald Kochan, “Legal Mechanization of Corporate Social Responsibility Through Alien Tort Statute Litigation — A Response to Professor Branson with some Supplemental Thoughts” (2011) 9 *Santa Clara Journal of International Law* 251 at 253 [Kochan].

⁹⁴ Deva, *supra* note 5 at 311.

⁹⁵ Bauml, *supra* note 42 at 712; Thomas, *supra* note 74 at 213; see also World Organization for Human Rights USA, “Who We’ve Helped: Families of Shi Tao and Wang Xiaoning”, online: <<http://www.humanrightsvsusa.org/index.php?option=comcontent&task=view&id=15&Itemid=35>>.

⁹⁶ Kochan, *supra* note 93 at 257: “The *ATS* is arguably the most important tool under the coercion-induced/involuntary category. It provides a means for reaching states, individuals, and corporations, and holding them to legally enforceable standards. Thus, how the *ATS* develops is pivotal to the most powerful mechanization opportunity for corporate social responsibility ideals.”

this requirement has at times been fully embraced to its literal meaning⁹⁷ it nevertheless limits *ATS*'s applicability. The act also only allows for claims to be brought forward by non-US entities, thus limiting the range of potential claimants and creating potential difficulties for violations committed within the United States.

Most seriously, however, *ATS* is limited in its ability to only apply customary international law. Following the decision of the Supreme Court of the United States in *Sosa v. Alvarez-Machain*,⁹⁸ "for a violation of a norm of international law to be actionable under *ATS*, universal consensus of States on the point and an elevated specificity are required."⁹⁹ In other words, *ATS* can only be used to enforce customary international law — definable, obligatory, and universally accepted international norms.¹⁰⁰ The problem with this narrowing of scope is two-fold. In terms of FOE specifically, following the decision in *Sosa* the *ATS* is no longer a viable mechanism for seeking redress for censorship. Freedom of Expression is a complex and problematic human right in that it exists in varying degrees throughout the world. Free expression standards diverge dramatically from country to country, with even the United States and Canada enjoying vastly different levels of speech protection. These kinds of differences are even more striking when North American standards are compared to those of some European countries¹⁰¹ and China. As a result of this disparity no one definition of FOE is sufficiently accepted enough to meet the *Sosa* requirement for claims actionable under *ATS*.¹⁰²

However, even if one definition of FOE were to become universally accepted enough to meet the *Sosa* requirement, it is not certain that claims against corporate entities are themselves actionable under *ATS*. In the decades since the revival of the statute in *Filártiga* many claims against corporations have been launched but few have been reviewed by the higher level US courts as most have been settled.¹⁰³ However, a recent corporate human rights violations case called *Kiobel v. Royal Dutch Petroleum*¹⁰⁴ advanced to the Court of Appeals for the Second Circuit where it was decided that "corporate liability is not a norm that [can be] recognize[d] and appl[ied] in actions *under the ATS* because the customary international law of

⁹⁷ See *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir., 1995), in which the defendant was served with summons and complaint during a transfer at New York's Kennedy Airport; Branson, *supra* note 90 at 227.

⁹⁸ 542 U.S. 692 (2004) [*Sosa*].

⁹⁹ Koebele, *supra* note 13 at 50; see also *Sosa*, *supra* note 98 at 2765: "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATS] was enacted."

¹⁰⁰ Koebele, *supra* note 13 at 50-51.

¹⁰¹ See for example *Yahoo! Inc. v. La Ligue Contra Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1184-1185 (N.D. Cal., 2001).

¹⁰² Koebele, *supra* note 13 at 116-121.

¹⁰³ Kearney, *supra* note 90 at 266; Susan Simpson, "Alien Tort Statute Cases Resulting in Plaintiff Victories," *The View from LL2* (28 December 2010), online: <<http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories>>.

¹⁰⁴ 621 F.3d 111 (2d Cir., 2010), 120 [*Kiobel*].

human rights does not impose *any* form of liability on corporations.”¹⁰⁵ As Justice Leval noted in his concurring judgment, “The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights.”¹⁰⁶ Admittedly the decision in *Kiobel* has not definitively concluded the issue of corporate liability under the *ATS*,¹⁰⁷ and the US Supreme Court is currently reviewing Second Circuit Court of Appeals’ decision in that case. However, on March 5, 2012, the Supreme Court announced that it would hear additional arguments and called for the parties to the litigation to prepare new briefs on whether or not the *ATS* allows US courts to act extraterritorially.¹⁰⁸ The fact that the Supreme Court has focused their analysis on this issue does not bode well for the claim-

¹⁰⁵ *Kiobel*, *supra* note 104 at 45, emphasis in original. As the court noted at 13, “customary international law has steadfastly rejected the notion of corporate liability for international crimes,” and although not directly cited the divisive debate and subsequent abandonment of the UN Norms in 2006 certainly mirrors this observation. The court’s decision in *Kiobel* thus reflects the aforementioned global resistance of government and business stakeholders to the application of traditional public law mechanisms to private entities at the international level. It should also be noted that many critics of *Kiobel* have pointed out the irony that the decision allows corporations to escape liability in the US for human rights violations despite the fact that these private entities increasingly enjoy human rights protections under *Citizens United v. Federal Elections Commission*, 558 U.S. 08-205 (2010); Mulchinski, *supra* note 4 at 437; Mike Sacks, “Corporate Personhood Case Forces Supreme Court to Hack New Path”, *The Huffington Post* (27 February 2012), online: <http://www.huffingtonpost.com/2012/02/27/corporate-personhood-supreme-court-alien-tort-statute_n_1305226.html>.

¹⁰⁶ *Kiobel*, *supra* note 104 at 49; Branson, *supra* note 88 at 234 labels the majority’s decision the “death knell” of *ATS*’s scope for imposing corporate liability for contraventions of international human rights.

¹⁰⁷ See also *Flomo v. Firestone National Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011), 1021; Xiomara Angulo, “International Law: New Civil Liability for Corporations: The Seventh Circuit Takes a Stand on the Alien Tort Statute” (2011) 7 *Seventh Circuit Review* 28 at 28 [Angulo]; Marco Simons, “*Kiobel*’s First Victim: *Flomo v. Firestone*”, *Earth Rights International* (5 October 2010), online: <<http://www.earthrights.org/blog/kiobels-first-victim-flomo-v-firestone>>.

¹⁰⁸ Supreme Court of the United States, “An order in pending case 10-1491 *Kiobel, Esther, et al. v. Royal Dutch Petroleum, et al.*” *Supreme Court of the United States* (5 March 2012), online: <<http://www.supremecourt.gov/orders/courtorders/030512zr.pdf>>; Lyle Denniston, “*Kiobel* to be expanded and reargued”, *SCOTUS Blog* (5 March 2012), online: <<http://www.scotusblog.com/2012/03/kiobel-to-be-reargued>>.

ants¹⁰⁹ given the US's aforementioned hesitancy towards extraterritoriality.¹¹⁰ If the Supreme Court upholds the earlier decision in *Kiobel*, or else rules against the use of the *ATS* to pursue legal action for "violations of the law of nations occurring within the territory of a sovereign other than the United States,"¹¹¹ it will put an end to one of the most valuable means for discouraging corporate entities from engaging in activities that violate international human rights.^{112, 113}

Given the uncertainty over whether any form of *GOFA* will ever become law and the still-developing case law surrounding *ATS*, it is not clear whether domestic legislative initiatives are a viable avenue for enforcing FOE on corporate entities in the online sphere. The dramatic variances in how FOE is framed make it a particu-

¹⁰⁹ "Could anything be worse for alien tort claimants than arguing before a hostile U.S. Supreme Court on corporate liability, as the plaintiffs in *Kiobel v. Royal Dutch Shell* did last month? Yes: arguing before a hostile Supreme Court on extraterritoriality, as those plaintiffs will have to do next term, thanks to a surprise procedural order on March 5" in Michael D Goldhaber, "The Global Lawyer: Human Rights Plaintiffs Can't Even Pick Their Own Poison", *The AM Law Daily* (19 March 2012), online: <<http://amlawdaily.typepad.com/amlawdaily/2012/03/the-global-lawyer-human-rights-plaintiffs-cant-even-pick-their-poison.html>>; likewise see comments by the defence following the Supreme Court's announcement: Sue Reisinger, "The Impact of Corporate Amicus Briefs on the Supreme Court in *Kiobel*", *Law.com* (8 March 2012), online: <<http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202544756870>>.

¹¹⁰ Bauml, *supra* note 42 at 713.

¹¹¹ See the US Supreme Court's order from 5 March 2012, *supra* note 108.

¹¹² Branson, *supra* note 90 at 249.

¹¹³ It should also be noted that the evolution of *ATS* could also potentially impact a similar legislative initiative in Canada. Bill C-323, also known as *An Act to Amend the Federal Courts Act (international promotion and protection of human rights)*. This proposed legislative amendment seeks to give federal courts original jurisdiction over civil cases brought forward by non-Canadian citizens for violations of international law that occurred outside of Canada. The amendment is extremely similar to *ATS* albeit more specifically geared towards international human rights than the American statute. Due to this close resemblance between the two pieces of legislation, it is highly likely that US case law surrounding the use of *ATS* to curtail human rights violations would be influential on judicial interpretations of Bill C-323 if it ever passed into law. The US Supreme Court's decision in *Kiobel* could therefore significantly impact Canadian courts' abilities to target corporate entities under Bill C-323. Additionally, although the *Act* does not set limits to the jurisdiction it establishes for federal courts, it does specifically list a number of actions that would be captured under its purview. This non-exhaustive list includes crimes like genocide, slavery, and torture, but notably does not specifically identify FOE among the types of conduct actionable under Bill C-323. Based on how *Sosa* limited the scope of *ATS* to customary international law, it is possible that Bill C-323 would be similarly restricted such that FOE would not be protected. However, the extraterritoriality issue at least might not be as much of a problem for litigation under Bill C-323 since the amendment specifically gives federal courts jurisdiction over acts that occurred outside Canada. For more information on Bill C-323 please visit: online: <<http://parl.gc.ca/HousePublications/Publication.aspx?Docid=5160018&file=4>>; <<http://this.org/blog/2011/11/01/corporate-accountability-bill-c-323>>; and <<http://openparliament.ca/bills/41-1/C-323>>.

larly difficult right to enforce at an international level, but even more universally accepted human rights have proven difficult to enforce via domestic legislation. The problems with this approach are also not specific to the US, but rather have to do with the inherent difficulties associated with extraterritorialism¹¹⁴ and the fact that customary international law does not clearly recognize either FOE or corporate liability for human rights violations. Without a substantial change in international law¹¹⁵ these difficulties will remain significant hurdles for any domestic legislative initiatives seeking to address the problems identified in this article.

With the significant uncertainty about whether international or domestic law are capable of establishing a reliable mechanism for opposing corporate human rights violations — either online or otherwise — the last avenue this article will explore for changing corporate activity is private action. Specifically, this means initiatives to encourage rather than compel good corporate conduct via political force, such as movements behind voluntary codes of conduct for businesses.

(c) Multi-stakeholder Initiatives

Parallel to these international and domestic legal attempts to bring corporate activity in line with global human rights standards, scholars and activists have championed a multitude of corporate social responsibility models. Broadly speaking, corporate social responsibility (CSR) theories assert that businesses have obligations beyond profit. These theories call for companies to integrate concern for social, environmental, and political realities into their behaviour. CSR “conceives of a corporation as a community of constituencies with directors owing duties to all stakeholders,”¹¹⁶ and proposes that companies reflect this in their operational models.

Advocates of CSR have tried to encourage corporations to adopt more socially responsible company policies. The international and domestic legislative initiatives described in previous sections were products of such efforts, and demonstrate the growing prevalence of CSR theories. However, these movements have not been entirely successful for the reasons detailed above, many of which relate to the inflexibility of legal frameworks and governance. As such, many advocates have pursued private initiatives to encourage CSR, such as voluntary codes of conduct or non-governmental coalitions.

Efforts in this context lose both the symbolic and practical force of law by which to establish and enforce standards. At the same time, however, private movements are freer to pursue idealistic goals than the officials behind the aforementioned international and domestic legal efforts.¹¹⁷ Private endeavours are con-

¹¹⁴ Teresa Scassa & Robert Currie, “New First Principles? Assessing the Internet’s Challenges to Jurisdiction” (2011) 42 *Geo J Int’l L* 1017.

¹¹⁵ Such as a clear international initiative to hold corporate entities accountable for violations of human rights, much like that proposed by the UN Norms.

¹¹⁶ Bone, *supra* note 71 at 43.

¹¹⁷ It is this freedom that allows them to be innovative; Mulchinski, *supra* note 4 argues at 457: “to dismiss voluntary sources of international or national CSR standards as irrelevant seems to fail to appreciate how formal rules and principles of law emerge. The very fact that an increasing number of non-binding codes are being drafted and adopted

strained only by the necessity to be widely accepted in order to even hope to effect change, although this popularity requirement points to a broad difficulty for private initiatives: they must compete with one another. Just as with any political subject, opinions vary on what constitutes good corporate conduct and as such there are innumerable movements advocating for largely the same goal: greater respect for human rights by corporate entities. Each of these initiatives competes with one another — as well as opposition — to achieve popular support in order to instill change.

This article will focus on two such initiatives: the UN Global Compact (the Compact) and the Global Network Initiative (the GNI). The reason for this focus is that these two initiatives demonstrate how both governmental and private forces are pursuing efforts of this kind. Additionally, it will be made clear below that many of the strengths and weaknesses associated with these two initiatives are commonplace if not inherent to this general type of political act; as such a lengthy cataloguing of all similar movements worldwide and their individual variances would not be particularly helpful. Finally, the fact that the UN and some of the most powerful corporate entities in the online sphere support the Compact and the GNI sets them apart from other similar efforts, and makes these particular initiatives the most relevant to corporate violations of human rights online.

(i) *The United Nations Global Compact*¹¹⁸

The Compact is a policy initiative for businesses to voluntarily adopt and implement in order to demonstrate their commitment to social responsibility. Launched in 2000, the Compact brings together private entities in order to set conduct standards that maintain international human rights law norms.¹¹⁹ These standards have been — and continue to be — designed after much discussion between the Compact's UN directors and various stakeholders including corporations, governments, and other UN agencies. The Compact seeks to achieve its two overall objectives¹²⁰ via a combination of “leadership, dialogues, learning, and networking.”¹²¹ With “over 8700 corporate participants” from around the world, the Com-

in this area suggests a growing interest among important groups and organizations . . . and is leading to the establishment of a rich set of sources from which new binding standards can emerge.”

¹¹⁸ For more information see: <<http://www.unglobalcompact.org>>.

¹¹⁹ As the SRSJ John Ruggie has stated, the Compact “is intended to identify, disseminate and promote good practices based on universal principles.” John Gerard Ruggie, Symposium: Trade, Sustainability and Global Governance, 27 Colum J Envtl L 297 at 301 (2002).

¹²⁰ These goals are to “Mainstream the ten principles in business activities around the world” and to “Catalyze actions in support of broader UN goals, including the Millennium Development Goals (MDGs).” See online: <<http://unglobalcompact.org/AboutTheGC/index.html>>.

¹²¹ Deva, *supra* note 5 at 293.

compact has a strong global representation and is “the largest voluntary corporate responsibility initiative in the world.”¹²²

The Compact presents a framework for good corporate conduct via a list of ten guiding principles. These principles are explicitly drawn from international law instruments such as the *UDHR*,¹²³ and cover human rights, labour standards, and environmental and anti-corruption concerns. Specifically, the first and second principles address human rights and identify FOE as a freedom that should be supported and respected by businesses.¹²⁴ Each participant in the Compact is asked to embrace and promote these principles in all of their undertakings worldwide. Moreover, the Compact tasks each participant with providing an annual report known as a Communication on Progress (COP) on how it has implemented the ten principles.

The Compact has attracted significant criticism from scholars and activists for the ways it seeks to change corporate activity.¹²⁵ For example, the Compact does not regulate or even benchmark its participants. All that is required for participation is the annual submission of a COP, and failures to comply with the ten principles are met with few, if arguably any, practical consequences. For example, as of March 2012 the Compact has expelled 3,290 former participants for failing to submit a COP for over two years.¹²⁶ This represents the strongest form of reproach possible for companies that fail to live up to the Compact’s values.¹²⁷ Moreover, the significant number of companies that have failed to meet the Compact’s (not particularly onerous) standards has led some to see participation as a mere public relations stunt for businesses.¹²⁸ Despite its admittedly strong international support, if participants do not meet the Compact’s standards then it has not achieved its purpose.

Additionally, the ten principles have been critiqued for being so vague as to be meaningless, with the second principle tasking Compact participants with making “sure that they are not complicit in human rights abuses.”¹²⁹ This lack of specificity has been criticized as being “counter-productive” to the achievement of the

¹²² See online: <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>>.

¹²³ See online: <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>.

¹²⁴ See online: <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/humanRights.html>>.

¹²⁵ For example, the Global Compact Critics blog is entirely dedicated to collecting and sharing “opinions, news items and background information” from “organizations and people with concerns about the UN Global Compact.” See online: <<http://globalcompactcritics.blogspot.ca>>.

¹²⁶ See online: <http://unglobalcompact.org/COP/analyzing_progress/expelled_participants.html>; see also <<http://www.environmentalleader.com/2012/03/28/un-global-compact-to-shake-out-more-free-riders-from-membership-ranks>>.

¹²⁷ Deva, *supra* note 5 at 293; Bauml, *supra* note 42 at 722.

¹²⁸ Deva, *supra* note 5 at 298.

¹²⁹ See online: <<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>. As will be seen below in the section on the GNI, vague standards are a common critique of these type of initiatives.

Compact's goals.¹³⁰ The principles do not sufficiently indicate how they can be implemented by businesses with good aspirations,¹³¹ and can also "be manipulated to include or exclude anything at the convenience of an individual corporate actor."¹³² In order to positively affect corporate conduct surrounding human rights issues, specificity is required as to the rights affected and the type(s) of conduct desired.¹³³

(ii) *The Global Network Initiative*¹³⁴

The GNI is a multi-stakeholder initiative to improve the conduct of corporate entities in the Internet and telecommunications sector regarding Internet users' FOE and privacy. Founded in 2008, the GNI is the result of collaboration between aforementioned corporate giants like Google, Yahoo!, and Microsoft, and human rights groups, academics, and various other stakeholders.¹³⁵ The GNI outlines a set of principles that are "intended to have global application and are grounded in international human rights laws and standards."¹³⁶ Participants pledge to "respect and protect the freedom of expression rights of their users" and the GNI also provides implementation guidelines to ensure the pledge is meaningfully and consistently fulfilled,¹³⁷ and the initiative employs a governing body that tracks and regularly assesses participants' progress and commitment to the initiative's principles.¹³⁸ This body is explicitly designed to work directly with participants to ensure complicity and continued improvement of business practices worldwide.¹³⁹

The GNI is an innovative method by which the activities of international corporate entities can be positively influenced in relation to FOE online. As with the Compact, the fact that the GNI's principles are based on established international law documents like the *UDHR* and *ICCPR* ensures that participating businesses will honour identifiable and universally accepted conceptions of FOE and privacy. Additionally, the fact that the GNI provides implementation guidelines and then tasks its members ensures that implementation of the initiative's principles will occur in a reliable and uniform way. Moreover, this assessment mechanism guarantees that the GNI will not suffer the same fate as the Compact and become "an

¹³⁰ Deva, *supra* note 5 at 296.

¹³¹ Bauml, *supra* note 42 at 722.

¹³² Deva, *supra* note 5 at 296.

¹³³ Sinden, *supra* note 59 at 505.

¹³⁴ See online: <<https://globalnetworkinitiative.org>>.

¹³⁵ MacKinnon, *supra* note 2 at 2253.

¹³⁶ See online: <<https://www.globalnetworkinitiative.org/corecommitments/index.php>>.

¹³⁷ See online: <<https://www.globalnetworkinitiative.org/implementationguidelines/index.php>>; Bauml, *supra* note 42 at 718.

¹³⁸ See online: <<https://www.globalnetworkinitiative.org/governanceframework/index.php>>. MacKinnon, *supra* note 2 at 2873 describes this as a "rigorous external assessment process — call it a 'human rights audit' — that aims to determine the extent to which companies are actually upholding their commitments and to identify areas that need improvement."

¹³⁹ MacKinnon, *supra* note 2 at 2870.

empty public relations ploy.”¹⁴⁰ Most advantageous, though, is the fact that the GNI’s founding members include Google, Yahoo!, and Microsoft. These three corporate giants dominate the Internet and telecommunications sector, and their mere participation would garner the GNI significant credibility; the fact that these companies helped shape the GNI demonstrates a fundamental understanding of businesses’ perspective and endows the initiative with unmatched authority.

However, the GNI is not without problems and critics. In contrast to the Compact, the GNI has not garnered significant support and as of April 2012 has only 32 participants; moreover, although the initiative purports to be an international one its participants are primarily American.¹⁴¹ The GNI also has failed to attract any major corporate participants beyond the aforementioned founding three, and has specifically been unable to “gain commitments from Internet giants like Twitter, Facebook, Amazon.com, and Skype.”¹⁴² Without more support, both internationally and from the business sector, the GNI will be reduced to merely an aspirational set of policies enacted by three of the largest American Internet companies.

More unsettlingly, however, human rights organizations like Reporters Without Borders have also refused to support the GNI. Indeed, Amnesty International participated in the formation of the GNI, but ultimately declined to participate, saying that the initiative’s accountability measures were too weak.¹⁴³ These types of groups have distanced themselves from the GNI because it does not sufficiently prohibit its participants from engaging in human rights violations. The language of the implementation guidelines does not forbid participants from violating Internet users’ FOE or privacy rights but rather asks them to avoid or minimize restrictions “except in narrowly defined circumstances based on internationally recognized laws or standards.”¹⁴⁴ Although the GNI will advertise non-compliant companies there are no real legal or economic penalties.¹⁴⁵ Without more “teeth” the GNI will fail both at effectively achieving its aims and attracting more support from the international and human rights communities.

V. THE STATE OF THE DIGITAL NATION

(a) The Problems with Traditional CSR Implementation Models

Donald Kochan describes three broad categories of regulatory frameworks by which CSR goals can be achieved: a) internally-induced, profit-driven/voluntary; b)

¹⁴⁰ MacKinnon, *supra* note 2 at 2874.

¹⁴¹ See <<https://www.globalnetworkinitiative.org/participants/index.php>>.

¹⁴² Bauml, *supra* note 42 at 719; Evgeny Morozov, “Wiki Rehab: How to Save Julian Assange’s Movement from Itself”, *New Republic* (7 January 2011), online: <<http://www.tnr.com/article/politics/81017/wikileaks-internet-pirate-party-save>>.

¹⁴³ Bobbie Johnson, “Amnesty criticises Global Network Initiative for online freedom of speech”, *The Guardian* (30 October 2008), online: <<http://www.guardian.co.uk/technology/2008/oct/30/amnesty-global-network-initiative>>.

¹⁴⁴ MacKinnon, *supra* note 2 at 2855. *Global Network Initiative Principles of Freedom of Expression and Privacy* — Freedom of Expression, online: <https://www.globalnetworkinitiative.org/cms/uploads/1/GNI_-_Principles_1_.pdf>.

¹⁴⁵ Bauml, *supra* note 42 at 720.

non-coercive, pressure-induced/quasi-voluntary; and c) coercion-induced/involuntary.¹⁴⁶ The first category pertains to social responsibility initiatives that corporations take on without external pressures. There is evidence of this amongst the Internet corporate giants described in this article, such as Google's "Don't Be Evil" philosophy.¹⁴⁷ However, this framework implies a complete lack of external regulatory elements and so business decisions are predominantly driven by the self-interested desire to "maximize profits within the constraints of the law."¹⁴⁸ Although CSR is possible within this framework it is subject to such aims presenting an at least viable business opportunity. It would be fallacious to argue that CSR could become standardized within this model¹⁴⁹ and so it is insufficient to address human rights concerns.¹⁵⁰

The second category refers to responses to external impetus that falls short of tangible force. Most contemporary CSR movements fall into this category, including both the GNI and the Compact.¹⁵¹ These initiatives set voluntary aspirational standards that corporate entities adopt for "protection and maintenance of the[ir] brand or reputation" and in response "to public campaigns, boycotts, shaming techniques, shakedowns, and other pressure tactics."¹⁵² However, despite these tangible motivations, CSR-oriented policies are not legally required under this framework, and so corporate compliance is still fundamentally optional.

The problem with a framework that relies completely on voluntary CSR initiatives is that such enterprises can be ignored. Participation is not mandatory; therefore, if an initiative sets requirements that are too arduous — such as the implementation guidelines and regular assessments of the GNI — then it will fail to attract members. Conversely, if the requirements for participants are not taxing enough then the initiative risks becoming a mere bid for good publicity — as has been demonstrated by the significant numbers of non-compliant Compact participants. In either case the result is that voluntary CSR movements are ignored and fail to achieve their purpose.

Moreover, since voluntary enterprises are not legal constructs they necessarily lack traditional enforcement mechanisms. Because participation is voluntary under

¹⁴⁶ Kochan, *supra* note 93 at 255–257.

¹⁴⁷ See Google's "Don't Be Evil" philosophy, as described in their Corporate Code of Conduct, online: <<http://investor.google.com/corporate/code-of-conduct.html>> and Company Philosophy, online: <<http://www.google.com/about/company/tenthings.html>>.

¹⁴⁸ Kochan, *supra* note 93 at 255.

¹⁴⁹ Even if all established corporate entities began operating in a CSR-oriented way, startups would always see an opportunity to compete by engaging in less desirable — but unprohibited — business practices.

¹⁵⁰ Clapham, *supra* note 6: "human dignity must be protected in every circumstance."

¹⁵¹ It should be noted that participation in efforts like the GNI and the Compact can in theory be purely self-motivated and thereby fall into Kochan's first category. However, the prior conduct of GNI founders Google, Microsoft, and Yahoo! as described in section 3 of this article, as well as the general failure of the Compact to influence members to consistently participate, indicates that this is often not the case.

¹⁵² Kochan, *supra* note 93 at 256.

this framework, CSR organizations typically do not impose punishments as a method of attracting members. So most initiatives do not have “teeth” to actually enact change and can only really engage in dialogue with their participants and with the public. Participant businesses can be encouraged to meet the initiative’s standards and misconduct can be reported in the hope that external parties will respond. Although this kind of reporting is certainly productive, its practical consequences are debateable.¹⁵³ Both the GNI and the Compact have been criticised for not going far enough to impose substantive requirements on their participants. However, without the abilities to both force businesses to participate and also penalize them for misconduct, CSR initiatives are powerless to do any more.

Interestingly, “the threat of litigation may be the type of pressure imposed” under Kochan’s second category of CSR-oriented frameworks.¹⁵⁴ This means that human rights suits under the *ATS* would also qualify as non-coercive external pressure. However, whether or not corporate entities can be held accountable for human rights infringements will depend on the US Supreme Court’s final decision in *Kiobel*. Even if the *ATS* is capable of such use, it remains incapable of protecting free expression on the Internet due to the problems associated with defining FOE in the international law context. As a result of these caveats, the *ATS* proves insufficient to address this article’s concerns with corporate censorship online.

The third category of involuntary, coercion-induced CSR implementation presents a few immediate difficulties, namely deciding what standards to implement and determining how to enforce them. The vast multitude of different initiatives seeking to encourage varying standards — including both the Compact and the GNI — shows how difficult it is to select any one formulation of CSR values. The fact that most frameworks are based on international human rights law standards at least indicates a singular common impetus. However, there is still no one definitive conception of how to apply such aims to private entities.

The larger problem of how to implement binding mechanisms for CSR oriented goals has been discussed throughout this article. Attempts at the international level, such as the Norms, have faced resistance from governmental and private entities alike. Additionally, the application of international law to private entities would require a dramatic evolution of current international law. Implementing human rights oriented CSR mechanisms at the domestic level would require a less progressive approach to existing legal frameworks. However, this type of mechanism comes with its own difficulties.

In addition to the problems associated with using the *ATS* for these types of purposes, previous versions of *GOFA* were critiqued for the more fundamental issue of giving too much power to state actors. As the examples in this article have shown, even governments as protective of free speech as the US have engaged — albeit indirectly — in the suppression of free speech online. In this context it becomes “difficult to expect that any government — no matter how democratic or well intentioned it claims to be — can be fully trusted to prevent the violation of

¹⁵³ See Cherie Metcalf, “Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information” (2010-2011) 28 *Pace Environmental Law Review* 145; see also Mulchinski, *supra* note 4.

¹⁵⁴ Kochan, *supra* note 93 at 256.

citizens' rights caused by companies' unaccountable and opaque compliance with government demands."¹⁵⁵ There are good reasons to be suspicious of unilateral domestic legislative initiatives that impose state-authorized CSR standards, and so traditional endeavours in this vein — such as *GOFA* — have prompted at least as much wariness as optimism.¹⁵⁶

(b) A New Hope?

The latest version of *GOFA* addresses many of these concerns and presents the best model yet for an enforceable CSR-oriented framework to protect FOE online. As an American legislative initiative, *GOFA* hopes to set binding standards for all businesses that operate publicly in the US. While this is clearly an involuntary, coercion-induced framework, *GOFA* has been designed to flexibly incorporate voluntary, non-governmental CSR models like the GNI. The new “Safe Harbor” provisions allow *GOFA* to both sets its own standards¹⁵⁷ and also turn to third parties to influence corporate conduct. This design addresses some of the key problems with inherently voluntary frameworks like the GNI by indirectly giving them legal “teeth.” Additionally, businesses are incentivised to adopt these voluntary models as an alternative to government standards, which in turn removes some of the pressure on multi-stakeholder initiatives to tailor their requirements so as to attract participation.

GOFA's new design also addresses some of the major problems associated with involuntary frameworks. Instead of compelling businesses to meet a single, government-set CSR standard, the proposed legislation explicitly allows the same requirement to be fulfilled by participation in approved multi-stakeholder initiatives. In addition to accommodating a theoretically infinite range of perspectives on CSR goals, this also reduces the government's control over the achievement of such objectives. The fact that *GOFA* gives businesses the option to participate in third party initiatives substantially reduces the degree to which the bill expands the US government's authority over how CSR should be implemented, as compared to previous versions of *GOFA* and other similar initiatives. In theory this quality should lessen the risk of government-corporate collaborations¹⁵⁸ and allow governmental and private entities to cooperate in limiting corporate accountability.

Moreover, the latest version of *GOFA* seeks to achieve its goals by taking advantage of a well-established enforcement regime — the SEC. By integrating CSR-oriented requirements into the presently existing regulatory framework for businesses, *GOFA* extends rather than transforms domestic legislation. This design has the intertwined effects of better accommodating the current business law frameworks and increasing the likelihood that *GOFA* could actually become law.

¹⁵⁵ MacKinnon, *supra* note 2 at 2764.

¹⁵⁶ *Ibid.*: “Because government is often part of the problem even in democracies, corporate collusion in government surveillance and censorship is unlikely to be solved by the passage and enforcement of laws, even by the most well-intentioned and democratic of governments.”

¹⁵⁷ See *GOFA*, *supra* note 76.

¹⁵⁸ Birnhack, *supra* note 30.

However, these advantages should not be celebrated without consideration of the problems still facing the latest version of *GOFA*. The fact that *GOFA* only applies to businesses that operate in countries that the US State Department has designated as “Internet Restricting” remains a continuing problem from earlier drafts of the bill. Many have asked how well this design responds to political realities, as well as the specific context of the Internet, given how quickly standards and values can change.¹⁵⁹ Moreover, this points to the larger problem of the State Department’s continued authority over *GOFA*’s scope, since the government branch indirectly decides which corporations must be subject to the bill’s binding legal implications.

Most fundamentally, however, *GOFA* remains a domestic US legal initiative and so its applicability is restricted to those companies that have a presence in the US. Although this limited scope will give the bill authority over a substantial number of important Internet service and content providers, it is nonetheless a serious limitation. Moreover it could pose future problems if impacted companies found it was in their best interests to simply relocate their bases of operations in order to escape *GOFA*’s scope. This kind of danger is increased by the fact that *GOFA* only impacts companies that are *publicly* traded within the US. As such it sets up a divide between public and private companies that could in theory encourage more corporations to remain private in order to avoid the bill’s CSR requirements. This problem is especially significant when one considers that not all Internet giants are publicly traded even today, with Facebook’s initial public offering still forthcoming as of this writing.

Finally, the fact that *GOFA* specifically incorporates the GNI in its “Safe Harbor” provisions has a dimension that could prove detrimental to both the proposed law and the multi-stakeholder initiative. Being limited to North America in scope is a problem that is both inherently true of *GOFA* and, as described above, has been levelled as a critique against the GNI. In comparing the initiative to an earlier version of *GOFA*, Bauml writes: “The GNI also needs more international presence than it currently has, in order to avoid looking merely like *GOFA* in disguise rather than a global code of conduct for companies.”¹⁶⁰ Although the GNI could still achieve such international support, its embrace in *GOFA* does emphasize the North American focus that currently plagues the initiative. As such, although the “Safe Harbor” provision does give legislative encouragement to multi-stakeholder initiatives, it could also serve to further isolate and “American-ize” the GNI contrary to its goals.

These issues with *GOFA* may well be addressed in a future revision to the bill, or they may remain inherent limitations to the bill whether it ends up as law or not. At this point both the proposed legislation and the GNI, as well as their underlying goals, would be furthered by a few alterations to the existing bill. First, it would help if the bill was less specifically geared towards so-called “Internet restricting”

¹⁵⁹ MacKinnon, *supra* note 2 at 2763: “What happens in cases where, for example, a country was democratic last week, then experienced a coup and suddenly became a military dictatorship overnight? Since that country would not be on the State Department’s list, companies would not be held legally accountable for behavior there.”

¹⁶⁰ Bauml, *supra* note 42 at 720.

countries and more focused on all companies that provide Internet related services. This would give it a broader scope in protecting FOE online internationally, and would deemphasize the role of the US State Department. Additionally, *GOFA* would be more capable of achieving its goals if it were bindingly applicable to non-publicly traded companies. However, given the benefits associated with incorporating the SEC as an enforcement mechanism, it is not clear how such an objective could be fulfilled without taking away from what is currently one of *GOFA*'s greatest assets. Finally, it would greatly help both *GOFA* and the GNI for the former to incorporate explicit mention of at least one more initiative that stands as an example of the type of multi-stakeholder approach advocated by the bill. This would help *GOFA* by further demonstrating the kind of corporate standards it calls for, and it would likewise help the GNI by less directly aligning it with the US domestic law. However, it is not immediately apparent which multi-stakeholder initiative should or even could be added to *GOFA*, as the implementation guidelines that make the GNI an ideal model also set it apart from most comparable endeavours.

However, even without these changes, the current model of *GOFA* is a significant positive step for FOE online and CSR initiatives. If nothing else it represents a historic evolution of existing CSR implementation frameworks, and shows that there are still creative energies focused on solving the problematic unaccountability of the corporate owners of the Internet.

(c) If Not The Right Solution Then At Least The Right Direction

Kinley, Nolan and Zerial argue that before the UN Norms were drafted, any discussion of corporations and human rights law was “stalled and largely focused on the pros and cons of establishing and monitoring codes of conduct.”¹⁶¹ Based on the historical development of the UN Norms described above, the conversation appears to have come full circle: international discourse about corporations and human rights law is once again focused on voluntary codes for corporate social responsibility. There has been consistent and widespread resistance — from corporate entities and governments alike — to the concept of binding international law obligations for private actors. This was the fundamental reason behind the failure of the Norms¹⁶² and likewise this hesitancy has contributed to and been echoed by the development of the case law surrounding the *ATS*.

The main advantage of the Norms would have been the establishment of an international law precedent for holding corporate entities accountable for human rights violations. Regardless of how effective they may have proven in terms of acceptance or implementation by the international community, their adoption in any form would have been a positive acknowledgement that corporate entities should and *can* be expected to follow international human rights law standards. This would have been an important step forward in holding such entities accountable in any forum, and would likely have influenced the development of the *ATS*. Even if only symbolic in nature, the Norms would have declared that the “con-

¹⁶¹ Kinley Nolan Zerial, *supra* note 60 at 460.

¹⁶² *Ibid.* at 462: “One of the reasons the Norms have engendered such controversy . . . is that they . . . posit a system whereby international law responds directly and forcefully to corporate action that violates [human rights].”

science of the world”¹⁶³ abhors violations of human rights by any party, including private actors. As it stands not even such a figurative victory can be claimed.

However, the latest version of *GOFA* seems poised to move the conversation forward once again into unfamiliar — though perhaps more viable — territory. Although the failure of the Norms indicates a distressingly broad resistance to any expansion of international human rights law to apply to private entities, the increasing potential of *GOFA* shows that hope yet remains for the legal institutionalization of human rights oriented models for regulating corporate activity. The growing recognition and respect for, and consequently power of, private multi-stakeholder initiatives like the GNI shows that corporate social responsibility is gaining legal traction in spite of international hesitancy. No longer existing merely in a liminal space between policy and law on the periphery of politics, the GNI’s inclusion in *GOFA* demonstrates that private initiatives could attain mandatory and tangible legal effect, at least at a domestic level. Although the GNI and *GOFA* must continue to exist parallel to one another in order to maintain both their individual and collective strengths, this convergence of voluntary and legally enforceable CSR implementation mechanisms is an innovative evolution of existing legal frameworks.

It is still too soon to say whether or not this tentative step towards embracing online speech-oriented CSR as binding will ultimately prove to be a positive development — or even whether it will actually happen. However, what can be ascertained is that this new avenue for influencing corporate attitudes is a positive — and potentially monumental — development for human rights, and particularly for FOE online.

VI. A PEOPLE’S REVOLUTION?

In addition to this ongoing discourse, there are also other forces outside the legal community pushing for increased corporate accountability in accordance with international human rights norms. For example, the positive work being done by multinational Internet corporations themselves should not be ignored. As Bauml argues, “while it is important to ensure that these ICPs are not adding to the problem, what we really need to be concerned with is achieving change in the long term.”¹⁶⁴ Numerous corporations have been doing just that, even without the binding legal impetus that *GOFA* or the Norms would provide. For example, Google’s presence in China has significantly improved FOE in that country, as their transparency policies and mid-2010 rejection of self-censorship have tested the Chinese government’s willingness to sacrifice lucrative western business for the sake of the Great Firewall.¹⁶⁵ Similarly, Twitter also recently implemented a transparency policy that has been hailed¹⁶⁶ for demonstrating that the company respects and is will-

¹⁶³ Smith, *supra* note 8 at 38.

¹⁶⁴ Bauml, *supra* note 42 at 730.

¹⁶⁵ *Ibid.* at 732.

¹⁶⁶ Josh Catone, “Relax: Twitter’s New Censorship Policy is Actually Good for Activists”, *Mashable* (27 January 2012), online: <<http://mashable.com/2012/01/27/twitter-censorship-activism>>; Craig Blaha, “Twitter’s Country Specific Censorship May be Good for Human Rights”, *Technorati* (30 January 2012), online: <<http://technorati.com/social-media/article/twitters-country-specific-censorship-may-be>>.

ing to defend FOE online.¹⁶⁷ Furthermore, the GNI was itself founded as a result of initiative from Google, Yahoo!, and Microsoft, and this article has explored how that initiative is among the most important global political and legal projects to improve corporate accountability online. Regardless of their previous conduct, corporate entities like these ones are nevertheless proving to be an instrumental positive force in protecting FOE on the Internet.

Moreover there are also signs of resistance against corporate and governmental control from the netizens themselves: the worldwide users of the Internet. The Arab Spring is a groundbreaking example of how global citizens can challenge oppression at large, both on and via the Internet. In a similar vein, the success of the protests on January 12, 2012, against the proposed *Stop Online Piracy Act (SOPA)* and *PROTECT IP Act (PIPA)* demonstrates both the collective strength of the online community and the willingness of corporate actors to support them. Opposition for the two bills began on social websites like reddit and Tumblr and grew to encompass corporate entities such as Google and Wikipedia, and ultimately the protests changed the minds of US Senators and brought and end to the proposed laws.¹⁶⁸

MacKinnon describes her “Magna Carta moment” as merely the first step in a long process, ultimately culminating in an “American Revolution”-style break from the Internet governance status quo.¹⁶⁹ Although she says such developments are still a long way off, corporate and common citizens alike have demonstrated that the energy and desire for a revolution in Internet governance already exists. What is needed now is an amalgamation of these popular and progressive forces with the authority of sovereign power. The “Safe Harbor” provisions in the latest version of *GOPA* are the best tangible realization of such a union that has been proposed, and demonstrate that there is a real possibility for change on the horizon. However, it remains to be seen whether the combined strength of *GOPA*’s legislative supporters, companies like Google and Twitter, and netizens can overcome the corporate and governmental conservatism that defeated the Norms. Only a global reassessment of the mutually constitutive power dynamics between citizens, states, and private corporate owners can facilitate the realization of rights like freedom of expression in the online “public space.”

¹⁶⁷ @twitter, “Tweets must still flow”, *twitter blog* (26 January 2012), online: <<http://blog.twitter.com/2012/01/tweets-still-must-flow.html>>.

¹⁶⁸ Jenna Wortham, “Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling”, *The New York Times* (20 January 2012), online: <http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?_r=1&ref=technology&pagewanted=all>.

¹⁶⁹ Berkman, *supra* note 57 at 00:41:36.