



THE APPLICABILITY OF HUMAN RIGHTS STANDARDS TO NON-STATE ACTORS

A New Frontier In Human Rights Protection: Human Rights, NGOs And Business

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Introduction

Traditionally, considerations of human rights take place in the context of a state-based system of global governance; however, the rise and rise of the corporation as a powerful non-state actor in recent decades has seen increased interest in understanding the emerging relationship between human rights and business and what if any, responsibility business should assume for protecting human rights. This discussion has been led, guided and pushed by non-governmental organisations (NGOs) intent on exposing and closing the accountability gap for corporate initiated human rights abuses. Beginning in the early to mid 1990s, Human Rights First¹ (HRF) began to more publicly engage in the struggle to develop clarity and consistency around human rights standards that might be applicable to companies and develop potential accountability mechanisms to ensure such standards are reflected in their business operations. HRF's work in teaming up with other groups to found the Fair Labor Association was a crucial step in the development of an innovative collaborative mechanism that involves companies and NGOs working together to protect workers' rights. More recently, HRF has been working with a diverse group of stakeholders that includes NGOs and U.S. based technology companies such as Yahoo! Inc, Google Inc. and Microsoft Corporation to limit and 'regulate' corporate involvement in internet censorship activities in China.

Human rights and business – an accountability gap

Instruments of public international law which enunciate human rights obligations are primarily directed towards states. It is commonly said that the main multilateral human rights instruments contain legal obligations only for states, and cannot be interpreted as implying human rights obligations for non-state actors.¹ In the 60 years since the drafting of the *Universal Declaration of Human Rights* (UDHR)¹ international human rights law has continued to emphasise the primary responsibility of states to protect human rights while remaining at least partially blind to the opportunity to speak more directly to powerful non-state actors such as corporations. An alternative interpretation is that international human rights law establishes minimum standards for the treatment of all human beings, derived from the inherent dignity of the human person, which are to be adhered to by all – governments, individuals and all other entities in society, including corporations. International human rights law contains standards that all elements of society are obliged to observe, but the capacity to enforce those standards will differ according to the character of the obligation-holder. While public international law has developed mechanisms for the enforcement of human rights obligations against states, it has been left to states to develop their own enforcement mechanisms as far as non-state actors, including individuals and corporations, are concerned and the realities of the multijurisdictional nature of multinational companies means that in many cases, there is an accountability gap for protecting human rights from corporate abuse.



The influence of business on the economic and political environments has, in most countries, increased greatly in recent decades and so too have 'soft law' mechanisms, aimed at 'regulating' the impact of business on human rights in the form of codes of conduct, international guidelines and other devices. The emergence of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights in 2003 sparked intense debate about how responsibility for human rights might be apportioned between state and non state actors. With many states unwilling or unable to assume the mantle of responsibility for protecting rights from corporate abuse, NGOs in particular have been asking long and hard, whether some, any or all of such responsibility should fall to business?

WORKERS RIGHTS IN THE APPAREL AND FOOTWEAR INDUSTRY

In the mid 1990s increased NGO and media attention focusing on the 'sweatshop' conditions in which consumer goods, bound primarily for the U.S and European markets, were being produced led to a rash of initiatives aimed at curbing abuses of workers' rights around the globe. The argument was advanced that in the rush to find cheaper and quicker ways to produce shoes, apparel, and other labour-intensive goods for the global marketplace, multinational corporations were moving much of their manufacturing to countries where basic legal protections for workers were non-existent and union organizing is prohibited or discouraged. Substandard working conditions ranging from inadequate wages to inhumane hours to life-threatening hazards in the workplace were exposed and

Gap were forced to defend their supply chain practices. Workers are largely unprotected from these abuses by either their own governments or the international system. Though the International Labour Organization has articulated labour rights standards for nearly 90 years, these assume that national governments will enforce them. Unfortunately, many governments lack the capacity and often the will to do so.

Human Rights First's own commitment to pursue labour rights as human rights was a response to these developments. In 1996 HRF joined with a unique new coalition of apparel and footwear companies, human rights, labour rights, and consumer advocates to draft a blueprint for the new, non-profit Fair Labor Association (FLA). The challenge was and is to create accountability— independent, transparent, and enforceable mechanisms for ensuring that human rights standards protect ordinary people. Officially incorporated in May 1999, the non-profit organization continues to be a collaboration of companies, NGOs, and colleges and universities. It engages in review and monitoring to assess whether companies are in compliance with FLA standards and requirements and reports the results of independent external monitoring and issues annual reports on participating companies and college and university licensees as part of its commitment to transparency. The challenge to protect workers' rights from corporate abuse is ongoing and multifaceted but this NGO led initiative has provided greater transparency in supply chain production of those companies who have taken up the challenge to protect human rights.



INTERNET CENSORSHIP: CORPORATE COLLUSION IN VIOLATING HUMAN RIGHTS



In February 2006 a very contemporary human rights dilemma rose to the forefront when companies such as Yahoo, Google and Microsoft, were called to a United States congressional hearing and subjected to a very public grilling about their cooperation with the Chinese government in censoring Internet content.¹ In mid 2002 Yahoo signed China's 'Public Pledge on Self-discipline for the Chinese Internet Industry' (sponsored by the government affiliated Internet Society of China) which required Yahoo to "refrain from producing, posting or disseminating harmful information that may jeopardize state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity" and that it "monitor the information publicized by users on websites according to law and remove the harmful information promptly".¹ The combination of vague instructions and associated harsh penalties often results in companies censoring even more aggressively than does the Chinese government. Most recently, Yahoo has attracted intense criticism after it was revealed it played a role in identifying Chinese journalist Shi Tao to the government.¹ Shi had forwarded an email to an overseas human rights group in which the government had ordered journalists not to cover the 15th anniversary of the 1989 suppression of protestors in Tiananmen Square. Chinese authorities were able to trace the email back to Shi with the assistance of Yahoo! Holdings (Hong Kong), which provided account holder information to the Chinese Government.¹ In April 2005 Shi received a ten-year prison term for attempting to

expression. Google and Microsoft have also come under criticism for their role in censoring internet content and initially at least, providing limited transparency to users about such censorship. Questions have arisen as to who should or can assume the responsibility for protecting human rights such as freedom of expression and privacy that are placed in jeopardy by such censorship?

For the last 18 months, these companies along with human-rights groups including HRF, academics and socially responsible investors have been working to develop a code of conduct for operating in countries that limit free expression and individual privacy.¹ The process of drafting such a code and a governance framework to regulate adherence to the code in a multistakeholder environment is complex, but not revolutionary. As the working group continues the process to develop its 'Global Principles on Freedom of Expression and Privacy', its credibility and integrity will be affected by two main factors: the substantive content of the code itself and the implementation process for ensuring corporate adherence to the code including the degree of transparency of that process. While governments continue to have the primary obligation to protect human rights the 'supplementary responsibility' of technology companies to ensure they are not complicit in the abuse of such rights remains

The strength of the Principles will be impacted by such issues as the extent to which participating companies are required to ensure their subsidiaries, business partners and participants in their supply chain adhere to the principles? How will the code be monitored? How will the monitors be paid? How frequently will they monitor adherence to the principles and how will the monitored activities be chosen – by the corporation or by an independent group? These are all questions other industries, such as the apparel industry before it, have grappled with, with a mixed degree of success. The focus on technology companies and their role in protecting human rights is but the latest frontier for action being pursued by NGOs such as HRF.

Conclusion

The drive by NGOs, such as HRF, to apply human rights protection principles to business has contributed to the growing 'corporate responsibility' movement that asks corporations to operate in a manner that takes into account the human rights of all those they encounter.

While the proliferation of codes of conduct and innovate litigious techniques applied by NGOs in the last two decades has meant that hundreds of companies have now publicly committed to upholding basic human rights, the challenge is to ensure the standards espoused in codes or guidelines adopted by business are consistent, comprehensive and implemented.

