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## Filtering and the International System: A Question of Commitment

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### Introduction

This book reflects a certain skepticism about filtering trends. Behind this skepticism is both an acceptance that freedom of expression (including the right to seek, receive, and impart information and ideas) is a basic human right under international law, and a sense that many governments' filtering practices represent an obstruction of this right. To ground these assumptions, this chapter seeks first to set out generally what constitutes international law, to whom it applies, and in what contexts, and second to consider how these concepts relate to filtering. At the heart of the matter is the question of if and how legal means can be used to regulate Internet filtering at an international level to protect freedom of expression.

This chapter introduces several elements in considering filtering from a human rights perspective—including international law as commitments among state actors, the setting out of human rights in international law, and filtering as a potential obstruction of the human right to freedom of expression. This chapter finds that international human rights agreements provide a valuable framework for determining what constitutes permissible and impermissible filtering, but that these instruments fall short on the enforcement end due to widespread filtering and states' apparent reluctance to take action against one another. The chapter then turns to consider domestic approaches for holding private actors accountable internationally, but notes that these approaches are inadequate on their own. Finally, the chapter points to the promise of international standards for enabling nonstate actors to prevent broadscale filtering and thereby facilitate the exercise of freedom of expression.

### The Backdrop

The modern international system dates from the Peace of Westphalia (1648),<sup>1</sup> which established the principles of 1) state sovereignty<sup>2</sup> and the right of self-determination; 2) legal equality among states; and 3) nonintervention of states in one another's internal affairs. In this system, states are the actors, giving life to international law as they create it together and agree to be mutually bound by it. As such, international law rests on the consent of sovereign states.

### **States as Intermediaries**

Since nonstate actors in current international law are understood to fall under the jurisdiction of states, it is states that have the authority to spell out rules and to bind both themselves and these subordinate actors. If states want international law to apply directly to nonstate actors such as citizens or businesses, they may commit to creating common obligations within their respective jurisdictions; they may also establish international rules and designate bodies to deal directly with nonstate actors.

For the most part<sup>3</sup> states have not created obligations that bind nonstate actors at the international level. Instead, states have been intermediaries between citizens and the international system.

### **Trend toward Disintermediation**

A certain disintermediation may be taking place as international bodies are increasingly dealing directly with citizens. As discussed in some depth here, the primary international treaty addressing civil and political rights carries with it an optional instrument that states may sign onto if they wish to allow private parties to bring complaints to an international body. In addition to that avenue, the Internet may be ushering in a new trend whereby individuals enjoy recognition at the international level. Just as the Internet has reduced the role of middlemen in many areas of e-commerce, so it may be allowing citizens of the world's diverse jurisdictions to interact directly with international institutions. For example, the World Intellectual Property Organization (WIPO) has established an Arbitration and Mediation Center<sup>4</sup> to resolve Internet domain name disputes. Here, individuals are recognized as having *standing*, or the right to bring a case to the tribunal, and so do not have to rely on national governments to do so.<sup>5</sup> By providing a similar type of process that an agency at the national level would, mechanisms for Internet governance are spurring international integration.

Reflecting changing attitudes toward the role of nonstate actors in the global Information Society, forums have been established under the United Nations to foster dialogue among a full range of "stakeholders" on issues relating to the Information Society. The World Summit on the Information Society represented an extensive effort along this line, bringing together thousands of stakeholders for meetings in Geneva (2003) and Tunis (2005).<sup>6</sup> As a result of the Geneva meeting, the U.N.'s Secretary-General convened a Working Group on Internet Governance to feed analysis into the Tunis meeting.<sup>7</sup> While the Working Group was composed of a limited number of individuals from government, the private sector, and civil society, it held open consultations to hear views from a full range of stakeholders. Among issues studied by this group were the roles of all actors in the Information Society.

Continuing in this vein, the U.N.'s Internet Governance Forum, a product of the Tunis meeting, now takes submissions from any contributor and offers an open forum for multistakeholder discussion on matters relating to Internet governance. While this body has not been endowed with decision-making power, it nonetheless can be seen as representing new attempts to factor views of nonstate actors directly into international policy-making.

Despite these signs of nonstate actors' gaining recognition at the international level, formally the international system still treats states as the relevant actors, and others enjoy status only to the limited degree to which states choose to confer it upon them.

### **Empowering International Institutions**

When states consider the prospect of empowering an international agency to serve as a forum for setting and administering global rules, they face the danger that they will create an institution that will eventually gain enough credibility that it in effect becomes freestanding. As that new authority amasses influence at the international level, its authority is no longer consciously considered to derive from the agreement of the individual member states that comprise it, and instead this authority is simply presumed to accompany the institution. At this stage, the authority of the member states themselves may even be questioned if their direction deviates from the central institution's course.<sup>8</sup> Indeed, this tendency is apparent in many people's conceptions today, where international law is perceived to have moral authority due to its international quality. It is no wonder, then, that a state may be wary of assigning powers to an international institution in the first place.

### **Public International Law and Modern Human Rights**

Human rights law in large part concerns the relationship of the individual and groups of individuals to the state. At a fundamental level, it carries questions concerning the source of rights. For example, some people contend that human rights are "natural rights" that are universal as part of the world's inherent nature, or that derive from higher, religious authority and do not stem from mere human beliefs or actions; people subscribing to this view tend to believe that natural rights exist regardless of what a government or society might establish and enforce. Others, such as utilitarian thinker Jeremy Bentham, have categorically rejected the notion of natural rights.<sup>9</sup>

Debates on the source of human rights multiply when considering the application of these rights in an international context. International legal instruments relating to civil and political rights were heavily influenced by the West in the midtwentieth century and reflect a Judeo-Christian heritage. As such, human rights were presented as stemming from the fact that all people have been created by God, and hence all should be on equal footing. Because other regions (e.g., Asia) have not historically had this orientation, there has been an ongoing debate as to whether the rights are truly "universal" at all.

In essence, this international twist is a variation of the question of whether human rights stem from natural rights or from positive acknowledgment of them by the state. If human rights are thought to stem only from their recognition by the state, international human rights are just a matter of negotiation among states as to what they deem priorities to be in light of state interests. On the other hand, if human rights are thought to exist independently of the state, they have a place of their own in the international system and therefore should not be subject to horse trading.

### **Global Citizens**

Some people might argue that society is already so integrated internationally that the relationship between a state and citizens is no longer hierarchical; rather, the relationship is seen as transformed to one of overlap, where a state is ascribed with authority over those “global citizens” who happen to fall within its territorial jurisdiction. Given the amorphous boundaries of cyberspace, this territorial distinction begins to appear murky.

Meanwhile, the Internet lends support to newly emerging forms of transnational, “post-sovereign” political communities. Such groups, including diaspora and aboriginal communities, fit poorly within either a state or a global citizen network framework. Demands for increased autonomy and self-determination by such communities defy the old paradigm of state sovereignty, while particularistic claims challenge the paradigm of universal human rights. Although such communities may have existed previously, the Internet has given them new political life as they can more rapidly create transnational polities that exercise relatively substantial influence. How these new forms of political interaction interrelate with human rights in general, and freedom of expression in particular, is a complex matter.<sup>10</sup>

### **Quasigovernmental Private Action**

In the midst of these ambiguities, additional quandaries arise when the behavior of private, nonstate actors resembles state action. Private actors such as corporations may provide services that people usually conceive of as the state’s responsibility. For example, a private actor might build infrastructure (providing water, electricity, roads, or, arguably, an Internet infrastructure). When private actors take on governmental functions—either through direct delegation or mandate by government or as a result of government simply allowing them to carry out activities—should they be considered agents of the state, bound by the same obligations to which the state is bound?

Of course, if a private actor were performing governmental functions across jurisdictions, it could prove challenging to assess on whose behalf it was acting as a state agent. For the sake of maintaining accountability to the public, the international system may need to find a way to hold private actors to a similar standard as states when they act internationally in governmental capacities.

### **Practical Implications**

The questions presented here are not merely esoteric. Rather, their answers very well may determine the kind of regulatory regimes that the Information Society puts in place. More fundamentally, the questions go to the heart of relationships among individuals, states, overlapping polities, multinational enterprises, the international system, and the Information Society as a whole.

The subject of filtering demonstrates some very practical implications of these theoretical issues. For example, filtering poses problems in that a state may claim a sovereign right to

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determine what constitutes acceptable content that people within its jurisdiction may seek, receive, or impart, whereas the international system may assert a role in overseeing the exercise of human rights, including freedom of expression. Similarly, filtering exemplifies the definitional challenge that presents itself when private action amounts to state action. If a corporation has an effective monopoly on the supply of an Internet service, is it assuming a governmental function if it controls access to information according to what it determines to be acceptable content? Does it matter whether the corporation is doing so of its own accord or whether it is doing so in response to a government mandate? Should such corporations be considered agents of the state, bound by the same freedom of expression obligations to which the state is bound? What responsibilities does a state have for filtering by private actors operating within its jurisdiction? What rights does a person or a group of people have in this mix? How should jurisdiction for filtering be determined in cyberspace?

Before such questions can be approached, it is helpful first to consider the current international legal landscape.

### **Key International Legal Instruments**

Since the end of World War II, “human rights” in the international arena have moved from being largely a tool of political rhetoric to a substantive set of concrete legal obligations among states. The most obvious evidence of this development is the enshrining of rights in a number of binding international documents. At the regional level, countries within several geographical areas have grouped together to form human rights institutions and to create human rights obligations applicable within these areas. Alongside these formations has been the development of a truly international set of human rights, established under the United Nations framework. These rights find form in a set of treaties creating legal obligations on states to do, or to refrain from doing, certain activities. Because these international instruments offer a global approach and enjoy wide ratification in a way that maps well to the Internet’s international nature, they are the basis of discussion in this chapter.

The applicability of pre-existing legal instruments to the realm of the Internet has been affirmed by international bodies. The World Summit on the Information Society (referenced earlier) endorsed a Declaration of Principles that, among other things, proclaims that freedom of expression in an Internet context is indeed protected by pre-existing instruments. The question then becomes precisely what do these instruments provide, and are they appropriate for the regulation of filtering in this “new” medium?

### **Universal Declaration of Human Rights**

The starting point for this consideration is the Universal Declaration of Human Rights (the UDHR), which was adopted by the United Nations General Assembly in 1948. Passed in the shadow of World War II, the Declaration is not a treaty, but rather an authoritative

statement by the international community of certain values that are said to be so universal in character as to qualify as “human rights”—rights all humans, irrespective of their geographical locations, are said to possess. The preamble entreats all individuals and organs of society to “strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”<sup>11</sup>

Article 19 of this seminal document contains the broadly worded statement 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.”<sup>12</sup>

This statement’s significance should be understood in the wider context of the importance that the UDHR itself has been accorded across all spheres of human activity. While the UDHR has not been without controversy, today, almost sixty years after its adoption, it is still cited and relied upon on a daily basis by individuals, organizations, and governments across the globe. At the very least it has been used as a firm touchstone by which to measure the morality of individual and governmental action.

The inclusion of a broad, unfettered guarantee of freedom of expression in such a weighty document is a clear statement of international acknowledgment of such a right. The U.S. Restatement (Third) of Foreign Relations Law goes as far as to say that a breach of the UDHR may actually amount to a breach of the United Nations Charter, meaning that the protection of the right to freedom of expression may be a legal obligation on *all states*, irrespective of whether they have ratified any of the international human rights treaties described below.

### **The International Covenant on Civil and Political Rights**

Most of the rights enumerated in the UDHR have now received concrete legal form in a series of treaties created, monitored, and enforced under the auspices of the United Nations. Preeminent among these instruments is the International Covenant on Civil and Political Rights (ICCPR), which provides in part the following:

#### Article 19

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.

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Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>13</sup>

The ICCPR was adopted by the General Assembly of the United Nations in 1966 and entered into force a decade later. As a treaty, its provisions have direct legal application only in those countries that have voluntarily opted to become parties. This ratification has been extensive. According to the Office of the United Nations High Commissioner for Human Rights, 160 states are party to the ICCPR.<sup>14</sup> Among them are the following countries whose filtering practices are covered in studies by the OpenNet Initiative: Afghanistan, Algeria, Azerbaijan, Bahrain, Belarus, Egypt, Eritrea, Ethiopia, India, Iran, Iraq, Israel, Jordan, Kazakhstan, Kyrgyzstan, Libya, Moldova, Morocco, Nepal, North Korea, the Russian Federation, South Korea, Sudan, Syria, Tajikistan, Thailand, Tunisia, Turkmenistan, Ukraine, Uzbekistan, Venezuela, Vietnam, Yemen, and Zimbabwe.<sup>15</sup>

As with the declaration, the ICCPR is significant as a statement of a fundamental, minimum set of conditions for the observance of human rights. The legitimacy of the ICCPR in this regard can be seen not only in its widespread ratification, but also in the myriad bodies that refer to it. A number of domestic courts, legislatures, nongovernmental organizations (NGOs), and international bodies frequently refer to the ICCPR directly when making decisions in which the rights are implicated.

It is important, then, that the ICCPR also contains a broad, unquibbling guarantee of freedom of expression. Its provisions guarantee, subject to certain limits (discussed later), the “freedom to seek, receive and impart information and ideas of all kinds.”

The breadth of this conception is best appreciated by making comparisons to the way similar rights are framed in other documents and interpretations. Many domestic constitutions draw distinctions, for example, between different forms of speech, and afford varying levels of protection depending on the nature of the content. The U.S. Supreme Court, for example, once considered that advertising was outside the scope of constitutional protection accorded to freedom of speech. While the Court has now softened that absolutist position, advertising is still not entitled to the same protection under the U.S. Constitution as other forms of expression. A similar stance has been articulated with regard to “obscene” speech. This tapered rendition of freedom of expression differs from the conception in the ICCPR; indeed, the very words with which the ICCPR right is expressed precludes such a narrow interpretation and demands an expansive understanding of the right.

This broad reading has been confirmed by the United Nations Human Rights Committee (UNHRC), a body of experts established under the ICCPR to scrutinize state compliance with the ICCPR. In considering a challenge to laws restricting commercial advertising, the UNHRC held that the right “must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others . . . [including] news and information, of commercial

expression, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression.”<sup>16</sup> Further, the Committee did not agree that different kinds of expression can be subjected to greater restrictions than others.

However, the rights elaborated in the ICCPR are expressed as being held by natural persons—that is, they pertain to individual human beings rather than explicitly extending as well to legal, or juridical, persons (e.g., corporations). The UNHRC has avoided any difficulties in the freedom of expression context by stating that the right is by its nature “inalienably linked to the person,” and that individuals enjoy freedom of expression with respect to their businesses, for example, having a right to use the language of their choice. As such, an individual person’s right to freedom of expression should hold even if the primary purpose of the expression is to promote a company.

Article 19 also provides that this right is to apply “regardless of frontiers and through any media.” This express lack of qualification is particularly important as it underscores the fact that the right extends across a wide variety of media.<sup>17</sup> As such, arguments that the Internet is somehow different in nature, and immune from scrutiny, should fail.

As a document of some decades’ standing, the ICCPR has seen many changes in the structure and organization of the mass media, and its machinery has responded accordingly. The UNHRC has noted that a completely state-controlled media is inconsistent with the right, as are restrictive licensing regimes for television and radio stations.<sup>18</sup> Given the medium-neutral nature of the right, the ICCPR would also be likely to prohibit a similarly restrictive system of state registration for Internet publishers—for example, a system requiring video bloggers to submit to an unduly rigorous licensing regime.

The right to freedom of expression as articulated in these international documents is extremely broad and was intended to be applicable to all types of media—existing now or in the future. Hence, any state restrictions on the distribution of information via the Internet would seem to constitute a restriction (although not necessarily a breach) of the right to freedom of expression under the ICCPR.

### **Limitations on the Right**

The right to freedom of expression as set out in the ICCPR is not absolute, however. The text of Article 19 states that the exercise of the right carries with it “special duties and responsibilities” and that it “may therefore be subject to certain restrictions.” While critics of the ICCPR may argue that the exceptions to the right are so broadly drawn as to render the right meaningless, this characterization is not accurate. The permissible scope of such restrictions is in fact narrow.

Article 20 of the ICCPR spells out the most straightforward cases in which restrictions are appropriate; indeed, the language even creates a positive obligation on states to restrict expression in relation to war propaganda and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. States are obliged to prohibit these in their domestic legal systems. In other words, filtering of this form of information would not only be permitted but arguably required by the ICCPR.

Another positive obligation to restrict expression appears in Article 17(2), which obliges states to protect individuals from intentional interference with their honor and reputation.<sup>19</sup>

These Articles cover affirmative requirements to restrict freedom of expression. Outside such cases, it falls to individual states to determine which restrictions they wish to place on the right. The ICCPR does curb the exercise of this power by states by providing in Article 19(3) that such restrictions must be 1) provided by law and 2) necessary for ensuring the respect of the rights or reputations of others, or for the protection of national security, public order, public health, or public morals. It should be emphasized that this is an exhaustive list of the situations in which restrictions are allowed—there are no other grounds on which limitations on freedom of expression are permissible, and states are not permitted to invent further grounds. Similarly, a state cannot cite inconsistent domestic laws as a reason for noncompliance with the human rights provisions of the ICCPR.

*The requirement that any limitation must have its basis in law* means that there must be some affirmative lawful basis for filtering (whether it be a clearly worded statute, or a similarly clear judicial decision or series of decisions). Vaguely worded statutes will not suffice, nor will the vague exercise of administrative discretion. This precision is important as it allows individuals to understand the restrictions to which their expression may be subject.

*The requirement that restrictions must be shown as necessary for a legitimate purpose* triggers an inquiry into the proportionality between the extent of the interference with freedom of expression and the importance of the purpose of the restriction. It is not sufficient for a state to make a bare assertion that its actions are necessary to achieve the purpose.

A review of the situations under which the UNHRC has upheld restrictions on freedom of expression, as well as general guidance issued by U.N. bodies, reveal a number of principles that can guide states in determining whether a proposed action meets the ICCPR necessity test.

First, the application of restrictions is to be narrow. This narrowness requirement is particularly important where justifications for restrictions are offered on the basis of alleged national security or public order imperatives. The UNHRC has noted that justifications on these grounds are the most frequently abused by invocation to protect the position of the government of the day, rather than truly to protect citizens' rights.<sup>20</sup> In the filtering context, if a state were to block all political Web sites during an election in the name of public order, it is dubious whether the restrictions would meet the standard of necessity.

Limitations on the freedom of expression in the name of public morals raise similar concerns. The UNHRC initially suggested that states possessed a certain "margin of appreciation" with respect to what was necessary to protect "public morals" in any given jurisdiction.<sup>21</sup> However, the concept of such a margin was expressly rejected by the Committee in a subsequent case concerning other rights.<sup>22</sup> This would tend to suggest that states cannot rely on such a margin when considering their obligations under the ICCPR.

Second, the necessity of restrictions must be convincingly established by the state. In addition to narrowly tailoring exceptions, a state must provide adequate justification for restrictions

it imposes. This second principle in showing necessity is generally applicable to all instances where states seek to justify limitations on rights. A state limiting the freedom of expression has a duty to demonstrate convincingly that the measures taken are necessary and proportionate in pursuing legitimate aims.<sup>23</sup> In this regard, the UNHRC has pronounced that “the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.”<sup>24</sup>

The UNHRC has clearly stated that any restrictions must “not put in jeopardy the right itself.”<sup>25</sup> In other words, a total clampdown on freedom of expression—even if imposed in the name of ensuring the respect of the rights or reputations of others, or protecting national security, public order, public health, or public morals—would never be deemed justifiable.

### **Reservations**

A final word is warranted before leaving the general subject of limitations. As international law is based on the consent of sovereign states, it is possible for a state to place *reservations* on international treaties it ratifies in some circumstances. These reservations will limit the extent of the reserving state's obligations under the relevant treaty. It is beyond the scope of this chapter to undertake a review of such reservations in the context of the ICCPR, but one salient point is worth noting: A number of states specifically made a reservation to Article 19 to the effect that they retained the power to regulate radio and television broadcasts. These states became parties to the ICCPR before mass communication via the Internet emerged. According to the UNHRC, states will not be permitted to extend a specific reservation to provide a more general exception from the ICCPR rights.<sup>26</sup> Thus, it would be highly unlikely that the UNHRC would accept that a state's reservation with regard to radio and television broadcasts permitted it, by analogy, to regulate the Internet in a similar fashion.

### **Applying International Law to Filtering**

In light of the provisions spelled out above, the vast majority of current filtering practices would seem to fall short of the requirements of international law since 1) most filtering measures are not specifically provided by law, and 2) it is unlikely that these measures would meet the ICCPR necessity test.

Nevertheless, to give some concrete examples of how filtering practices might comply with certain ICCPR provisions procedurally or substantively, this section refers to some specific practices by states.

### **Measures Provided in Law**

With respect to ICCPR requirements that any limitations on the freedom of expression be expressly “provided in law,” a state might establish procedures for making its filtering practices open and transparent. Disclosing that such filtering practices are in effect, according to a

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specific law or court order, is a step in the right direction. An example in this regard is the way that Iran has created a Committee in Charge of Determining Unauthorized Sites, which is legally empowered to identify sites containing prohibited content. To meet the ICCPR standard, the law under which the filtering is carried out should be clear and nonarbitrary.

Ironically, a state can use procedures to impose content restrictions, and these procedures (again, if sufficiently clear and nonarbitrary) can help that state comport with ICCPR obligations to specify policies in precise law. A state may impose licensing requirements—for example, the way Uzbekistan requires cybercafes to comply with a “standardization procedure” carried out by a government agency before starting operation. A state also may enact registration requirements—for example, the way South Korea requires bloggers and Web content developers, or even cybercafes and end users, to associate their online activities with their real-world identities. In addition, a state may assign liability to Internet service providers (ISPs) for content that is delivered to users—for example, the way Iran holds ISPs criminally liable for content. Self-monitoring requirements are another form of procedures that a state can use to restrict activity—for example, the way China drills the message that “the Internet is a public space” to warn people to check their own behavior. In each of these procedural moves, if specific laws are set out, states may in fact be complying with one of the ICCPR’s conditions for limitations—even as they erect filtering mechanisms.

Complying with the requirement that restrictions be provided in law does not guarantee that the processes as a whole are compatible with the ICCPR; rather, in imposing the restrictions, states still must comply with the requirement that restrictions be necessary.

### **Measures Necessary**

With respect to the requirement that limitations on the freedom of expression be “necessary,” states also can use procedures to target filtering for specific objectives, so that the scope of the filtering is not too broad. Procedures that allow public oversight and accountability act in this vein. For example, Pakistan has established a Deregulation Facilitation Unit to redress grievances in the event of errors or overblocking.

Seeking to comply with the ICCPR requirement that limitations on freedom of expression be justified as necessary, states naturally emphasize the substance of filtering measures, or what they are targeting. States sometimes assert that measures are undertaken for the purpose of respecting the rights or reputations of others (one of the permitted grounds for limitation). For example, China partially justifies its use of rights management tools by saying this filtering helps to enforce intellectual property rights. Similarly, Malaysia’s Internet regulatory authority explicitly targets abusive or harassing content.

So, too, states justify limitations as being necessary for the purpose of protecting national security, public order, public health, or public morals. For example, United Arab Emirates cites these goals in justifying its legislation on hacking, the accessing of illegal sites, and the use of digital signatures.

Text box 4.1 breaks this process down into basic elements so as to offer guidance for how a filtering state might avoid violating international law even as it limits freedom of expression. It is important to remember, however, that a state's compliance with these requirements is necessary, but not in itself sufficient, to satisfy the state's obligations. To be compliant, the measures must be *actually* necessary for the purposes the state asserts that they are necessary for—the state's bare assertion that this is the case will not be sufficient.

None of the filtering regimes covered in studies by the OpenNet Initiative appear to have been crafted to meet international commitments on freedom of expression. As states grow more aware of their obligations, it will be interesting to see whether they modify their filtering practices to honor these commitments. In the meantime, it seems the international system is struggling with extensive filtering habits that are out of proportion with legitimate objectives.

When considered in light of technology's tendency to act as a sort of "law" that can govern society,<sup>27</sup> requirements that filtering be provided in law and be necessary are marked with an extra nuance. Surely the idea behind these requirements is to promote precision, to allow people to know what measures apply, and to promote government accountability to the public. Does it not follow that the technologies used in filtering should be precise, transparent, and justifiable as well?

### **Problem of Enforcement**

Having examined obligations that states have agreed upon at the international level, and having briefly explored how these obligations mesh with filtering practices, it is logical next to examine the machinery by which these obligations can be enforced. It is here that the weaknesses of the international system become apparent.

The international human rights instruments rely largely on states themselves to implement their commitments at a domestic level. International enforcement also falls on states themselves. To this end, the ICCPR contains express obligations on states to ensure that this occurs (Article 2).

However, due to political realities, such guarantees are of little use unless they are accompanied by sanctions for violations. It is here that the UNHRC has the potential to play a critical role.

### **Monitoring under the ICCPR**

The ICCPR requires states, upon request by the UNHRC, to provide a report on their compliance with obligations under the treaty. According to the rules of the Committee, a state must prepare a written report, which the UNHRC then examines. State representatives are usually present to answer questions, and the UNHRC also hears from relevant NGOs and other civil society organizations. At the conclusion of the process, the UNHRC issues a report containing

**Box 4.1**

An unofficial guide to filtering legally

To filter in a way that honors international human rights commitments on freedom of expression, a government can use the following as an unofficial guide:

1. PURPOSE

The state believes restrictions on freedom of expression are necessary to \_\_\_\_.

[*Example:* . . . prevent people from using the Internet to stir up violence against a particular ethnic group.]

2. STATEMENT OF WHAT NEEDS TO BE DONE

Therefore, the government decides to pass a law to \_\_\_\_.

[*Example:* . . . limit hate speech.]

3. SPECIFIC EXPLANATION OF HOW FILTERING WILL BE CARRIED OUT

To ensure that people can understand the law and can check to see that its application is not arbitrary, the government spells out \_\_\_\_.

[*Example:* . . . what exactly is beyond the limits of acceptable speech and how it will be filtered.]

4. PERMITTED LIMITATION AS LISTED IN ICCPR ARTICLE 19 OR 20

In grounding this action in a justification acceptable by international law, the government indicates that this restriction is necessary \_\_\_\_.

[*Check all that apply:*]

- for respect of the rights or reputations of others;
- for the protection of national security;
- for the protection of public order;
- for the protection of public health;
- for the protection of morals;
- for the prohibition of propaganda for war;
- for the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.

5. PROCESS TO TELL PEOPLE WHAT IS HAPPENING AND CORRECT ANY PROBLEMS

To help ensure that the law is not implemented in an arbitrary or overly broad manner, the state provides a mechanism whereby \_\_\_\_.

[*Example:* . . . if a Web site is blocked, Internet users receive a message 1) indicating why this filtering has occurred, according to what specific law, and 2) telling them how they can report a problem and receive a response.]

“concluding observations” on the state’s compliance including areas of concern and recommendations for action.

The effectiveness of this process is contingent on cooperation by states. Noncooperation has been a frequent problem with the system, and one which the UNHRC is taking an increasingly active role in monitoring. However, the presence of NGOs provides a very real opportunity for the human rights issues experienced in a given jurisdiction to be identified, thereby reducing the ability of a state to subvert the process by providing inaccurate information.

That said, the UNHRC’s recommendations under this procedure are simply that—recommendations—and are not binding. Additionally, the institutional constraints and chronic underresourcing endemic within the U.N. system limit the ability of the Committee to conduct searching and comprehensive analysis of the situations within states.<sup>28</sup>

This reporting process is the only supervisory mechanism that applies automatically under the ICCPR. Article 41 of the treaty provides that states may take complaints against other states to the UNHRC if both states have previously agreed that the UNHRC has jurisdiction to do so. Perhaps unsurprisingly, this procedure has never been utilized.

### **Complaints from Individuals**

A potentially more effective procedure is one that allows individuals to make complaints to the UNHRC about a state’s failure to secure their rights under the ICCPR. The process is significant because it gives direct enforcement rights to affected people. This standing is in marked contrast to the traditional model of international law, which recognizes only states as actors. Of course, this process is only available if the state concerned has previously become a party to the First Optional Protocol to the ICCPR (Optional Protocol), a separate treaty that provides jurisdiction for this process.

In this Optional Protocol process, the UNHRC begins by determining if the complaint is admissible. This essentially involves a determination of whether the complaint is from a victim of an alleged violation of rights in the ICCPR, whether the individual has exhausted all available domestic remedies, and whether the state concerned is a party to the Optional Protocol.

If a complaint is admissible, the merits are then considered, and the Committee subsequently issues its “views.” The use of the term *views* is significant: the UNHRC’s role in adjudicating such complaints is to ensure consistency with the ICCPR, and the body is not intended to function as an international court. As a consequence of this arrangement, its decisions are not binding and have normative status only. History has shown that in many cases a state party against whom there has been a ruling *will* comply with the Committee’s recommendations—whether that compliance entails offering recompense to an affected individual or repealing an inconsistent piece of legislation.<sup>29</sup>

A starting point when examining the effectiveness of the Optional Protocol mechanism is to examine which states are even party to this supplemental instrument. To date, there are some 109 state parties.<sup>30</sup> Among countries whose filtering practices are studied by the OpenNet Ini-

tiative, the following are party to the Optional Protocol: Algeria, Azerbaijan, Belarus, Kyrgyzstan, Libya, Moldova, Nepal, the Russian Federation, South Korea, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Venezuela.

While the number of state parties may give the impression of a large degree of support for the Optional Protocol, and while in many cases state parties comply with recommendations, Committee views that are issued under this instrument are often outright ignored by errant states. Two states (Jamaica and Trinidad and Tobago) that have frequently found themselves on the receiving end of adverse views from the UNHRC have denounced the Optional Protocol altogether.<sup>31</sup> In the absence of stronger enforcement powers, a decision to flout the views issued by the UNHRC may simply be a political calculation.

Moreover, the Optional Protocol expressly requires that a complaint come from an individual victim. This limits the ability of NGOs or other representative groups to challenge state practices in the abstract. It would not be possible, therefore, for a group such as Amnesty International to challenge a state's filtering practices before the Committee—the challenge would have to come from an affected individual. This requirement poses problems, especially in light of the fact that in several documented cases individual petitioners faced further persecution from their governments for having exercised their right to petition.<sup>32</sup>

Finally, the limitations of the U.N. system already noted have a constraining effect on the ability of the Committee to conduct thorough analyses of claims brought under the Optional Protocol.

Overall, then, the Optional Protocol mechanism provides a good way for individuals to hold *some* states to account for incursions on the right to freedom of expression. For Internet filtering policies, it is theoretically possible for provisions of the ICCPR and the Optional Protocol to have significant effect. However, given the practical difficulties mentioned here, it is doubtful that this treaty represents an adequate means for deterring and punishing states that oppressively filter Internet content.

### **The Overall Ineffectiveness of International Law**

To summarize: States cannot claim that their obligations under international law surrounding Internet filtering are unclear. To the contrary, the obligations are quite clear. Comprehensive filtering of Internet content amounts to a violation of the broadly conceived right to freedom of expression. For filtering to be permissible under the ICCPR, measures must be grounded in specific law and necessary. However, state compliance remains difficult to secure. The UNHRC affords some possibility for redress, but correction relies to a large extent on the goodwill and political situation of the state that has violated its commitments. While many states may refrain from filtering in order to honor freedom of expression (either because they value this right or because they wish to avoid domestic and international pressure), for errant states, there is little incentive to comply with international law in this area. In short, the weak enforcement capabilities of international human-rights institutions send a message that the

international system will tolerate flagrant filtering abuses and fail to defend freedom of expression.

### **Filtering Curbs through Trade Policy**

Taking as a given the notion that freedom of expression is desirable and deserving of protection, but questioning the ability of the international system to enforce commitments under the ICCPR in a meaningful way, one might look to other avenues for enforcement. Because agreements under the World Trade Organization (WTO) include the possibility for dispute settlement backed by economic remedies, it has been suggested that one way to enforce freedom of expression would be to cast it as a market access issue and to seek redress by bringing a case before a WTO panel.<sup>33</sup>

In a nutshell, the theory of such a case would be as follows: If a member had committed to giving market access for the production, distribution, marketing, sale, or delivery of content, but nonetheless was filtering in a way that obstructed this trade, another member whose economy had suffered from the action would request the WTO to establish a panel to hear the case.

The case would not necessarily be clear-cut, however. Similar to the way that the ICCPR allows limitations, Article XIV of the WTO's General Agreement on Trade in Services (GATS) permits members to make exceptions to their market-access commitments if taking measures necessary to protect public morals, health, or safety; to maintain public order; or to bolster consumer protection. Article XIVbis extends these exceptions to include measures in the interest of security.

The WTO case *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*<sup>34</sup> brought by Antigua and Barbuda against the United States demonstrates how these provisions would be understood to interact with market access commitments. In this challenge, the United States relied in part on GATS Article XIV in defending restrictions on the supply of gambling and betting services via the Internet.<sup>35</sup> In determining whether the measures were necessary, the Appellate Body indicated:

The standard of "necessity" provided for in the general exceptions provision is an objective standard. To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach—as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials—will be relevant in determining whether the measure is, objectively, "necessary."

A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the "necessity" of the measure before it.<sup>36</sup>

The Appellate Body then explained how it applies this standard:

The process begins with an assessment of the "relative importance" of the interests or values furthered by the challenged measure. Having ascertained the importance of the

particular interests at stake, a panel should then turn to the other factors that are to be “weighed and balanced.”

A panel then considers two main factors as it continues in its determination of a measure’s necessity: “One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce.”<sup>37</sup>

According to this interpretation, it is the WTO panel itself that is to determine whether a member’s exceptions are justified. Although a panel pays deference to a member’s decision to invoke Article XIV,<sup>38</sup> the panel makes its own assessment of the importance of the objective and evaluates the measure’s effectiveness in accomplishing that objective when balanced against the measure’s restrictive effect on trade.<sup>39</sup>

Extrapolated, the implication is that future trade panels could rule illegal a member’s filtering practices if the measures conflicted with another member’s trade interest. So, for example, China’s use of filters to prevent its citizens from accessing Web sites displaying the word *democracy* could be struck down if a panel did not find the purpose of the measure compelling, or if it found the approach too heavy-handed given the negative effects on trade.

In light of these WTO provisions, one could argue that the multilateral trading system supports freedom of expression. While a nice effect, it is important to bear in mind that the WTO’s competence is in the area of market access. In this particular international context, the value that governments have embraced and empowered panels to adjudicate concerns open trade, and the effects on freedom of expression are mere offshoots.

To the degree that the institution and its members’ acting through it delve into these social questions, they do so reluctantly. For one reason, the WTO Dispute Settlement Body has as its purpose to handle disputes relating to market access; a member is not supposed to bring a claim for the sake of protecting human rights, and indeed government agencies responsible for conducting trade policy are typically focused on economic relationships.

Practically speaking, for a filtering case to come to the WTO, a company would need to lobby by its *home* government to bring the case on the basis that another government’s measures were hurting the home country’s economic interests.<sup>40</sup> However, if a company were hurt economically by the host country’s measures, that economic harm might be due to damage suffered from bad public relations in another market. It would be challenging for a home-country government to argue that the host government’s measures directly caused these side effects, and it would be difficult to prove the amount of injury in monetary terms.<sup>41</sup> Moreover, the home-country government might not wish to spend its international negotiating capital and dispute settlement resources on such a case.

Although a government might not be inclined to bring such a case before the WTO Dispute Settlement Body, it is feasible that in the future such a hearing might not be so dependent on a government’s decision to bring it. For several years now experts have argued that private parties deserve to have standing before tribunals for WTO-related matters.<sup>42</sup> Such an arrangement could result in a deluge of dispute settlement cases, as states would no longer

select which disputes to bring according to overall political or economic importance for their economy. Indeed, if states ceased to play this intermediary role, WTO agreements would result in a very extensive regulatory framework for the Information Society.<sup>43</sup>

Viewing this scenario as a matter of using international trade law to enforce human rights, one might ask if the concern were for freedom of expression, or for market access. If it were for market access but the effect were that freedom of expression enjoyed protection, would that be sufficient for those people desiring to see enforcement of human rights by the international system? No doubt privacy advocates would be chagrined at the prospect of the same logic requiring a striking down of limitations designed to protect privacy, with market access in that case hurting the cause of civil liberties.

All in all, dispute settlement in the trade context appears a rather blunt and indirect instrument for enforcing freedom of expression among states. Although the WTO offers an interesting example of enforcement capabilities at the international level, the system has been designed for promoting commerce rather than for protecting human rights. A liberalized trading system may promote the exercise of freedom of expression, but relying on trade policy to protect this fundamental human right could send a message that freedoms are subordinate to trade.

More systemically, integration may eventually bring such issues to a head as value systems are forced to reconcile. By making it possible for people in different places to interact with one another and spurring common institutional approaches, the Internet is causing integration to occur at a pace more rapid than ever experienced. As the distinction between cyberspace and the real world fades with technology's incorporation into nearly all facets of life, this integration arguably will be a fact. In this sense, institutions at the center of interactions over the Internet—including the WTO—may experience a sort of triumph as states become dependent on them instead of granting them piecemeal authority.<sup>44</sup>

### **The Need for a Different Approach**

Reinforcing human rights by targeting states is often unsuccessful because the international system lacks effective enforcement mechanisms.<sup>45</sup> Meanwhile, with respect to freedom of expression in particular, empirical studies by the OpenNet Initiative have shown that the practice of government filtering is on the rise globally, and, as discussed earlier, it is questionable whether such filtering comports with the requirements of the ICCPR. As more and more governments adopt such practices, it seems that countries may be legitimizing these standard (and arguably unlawful) measures and letting them become part of accepted international practice. Should the international system instead move toward penalizing filtering practices that do not fit within the permissible limitations of the ICCPR?

Fundamentally, states' commitments to enforce protections for human rights are weak because there are still relatively few economic drivers and other factors of state interest. States see little reason to raise state-to-state conflict over the issue of freedom of expression. When it

comes to the question of doing so in a neutral, international body designed for this purpose, states do not wish to give up sovereignty by setting up a solid international regime, even if enforcement of human rights is faltering.

Assuming that states consciously are refraining from pushing for stronger international human rights protections, one might ask if there is a tension between the rights of people and the interests of the state.<sup>46</sup>

But is this the end of the story? Might private actors be brought into the equation?

### **Shifting the Emphasis to Private Actors**

Again, in the traditional international system, states have not wanted to negotiate treaty terms to hold companies and other private actors accountable for human rights violations. Generally speaking, states see a sovereign interest in mediating between persons under their jurisdiction and persons elsewhere (including juridical persons). In the filtering context, the home government does not want to pressure its own citizens or companies, even if the state generally favors freedom of expression; meanwhile, the host government often is trying to compel companies to repress freedom of expression (or simply withdraw from its market). Under these conditions, there is little to bring such states to the negotiating table in the name of freedom of expression.

Given the increasingly governmental role played by private actors—for example, providing the means for Internet filtering, or carrying out such filtering themselves—many groups are now seeking ways to hold these private actors accountable. The possibility, in some jurisdictions, of bringing entities before domestic courts for involvement in human rights violations in a third country has received significant attention as a potential tool for protecting the right to freedom of expression in the face of restrictive filtering practices.

### **The United States' Alien Tort Claims Act**

Usually domestic courts will concern themselves only with the application of domestic law and will not consider cases that allege violations of international law. Despite this predominant practice, some countries have adopted legislation to allow domestic courts to consider cases arising under international law. Legal systems that do so to a greater or lesser degree incorporate international law into domestic law. Perhaps the best example of such a process is the United States' Alien Tort Claims Act (ATCA). Passed in 1789, ATCA provides U.S. federal courts with jurisdiction to award damages where an alien sues for a tort (i.e., a civil wrong) committed in violation of "the law of nations" or "a treaty of the United States"—even if the wrong occurred outside the United States.

While the ATCA has been on the statute books for more than two centuries, it is only in the past twenty-five years that it has sprung to life.<sup>47</sup> This vitalization occurred largely as a result of a 1980 Federal Appeals Court decision that held that the "law of nations" included

“established norms of the international law of human rights,” and that such *norms* could therefore form the basis of an ATCA claim.<sup>48</sup> Since then, the ATCA has led to some sizeable awards against perpetrators of human rights abuses. Awards typically have been in the millions of dollars.<sup>49</sup>

Whereas international law treats *states* as actors, a development in the ATCA has been the extension of liability to *private actors* who have been responsible for assisting with violations.<sup>50</sup> In the domestic context, states themselves are immune from liability under the ATCA.<sup>51</sup>

These developments—targeting nonstate actors in the enforcement of international norms—have prompted academic discussion of the possibility of using the ATCA as a tool for punishing corporations who assist states with Internet filtering; attention has focused in particular on U.S. corporations’ involvement with Internet filtering in China.<sup>52</sup> While this prospect is interesting theoretically, it should be noted that any such claims would face several significant hurdles.

At the outset, it would first be necessary to convince a federal court that the right to freedom of expression is actionable under the ATCA. Making this argument would be complicated given the conclusions of the U.S. Supreme Court in its first judgment concerning the ATCA in 2004: the Court concluded that while caution was necessary, claims for breaches of rights were possible, provided that they were defined with specificity as were the limited number of international law rules in the late eighteenth century (when the ATCA was passed), and that they were based “on a norm of international character accepted by the civilized world.”<sup>53</sup>

This double hurdle need not be insurmountable. Regarding specificity, freedom of expression in an international context is clearly defined and admits only limited exceptions. While there is room for debate about some borderline cases, the existence of a breach should be clear where a state has a legal culture of wholesale filtering. However, the Supreme Court was skeptical as to whether the UDHR and the ICCPR had achieved sufficient acceptance to allow actionable claims under the ATCA. Such a precedent would inform the deliberations of a court considering a claim that a nonstate actor who had engaged in filtering violated the right to freedom of expression. The court would have the responsibility of determining whether the requisite standard of clarity and acceptance was met in the freedom of expression provisions of the UDHR and the ICCPR. It would seem that a convincing argument could be made that freedom of expression is indeed actionable under the ATCA.<sup>54</sup>

Next the defendant would have to establish the connection between the activities of the corporation and the breach of the right. There has been considerable debate over what standard of involvement is appropriate, and it is not entirely clear what test would be applied by a court adjudicating a potential claim.<sup>55</sup> However, the present leading authority is a 2002 federal Court of Appeals decision, which rejected an argument that it was necessary to show that the company in question was an active participant in the abuse for liability to occur under the ATCA, and which instead held that it was only necessary for the company to give “knowing practical assistance or encouragement” that had “a substantial effect” on the perpetration of

the abuse.<sup>56</sup> One leading commentator has suggested that this looser standard is only appropriate where the conduct amounts to a violation of international *criminal* law (such as torture), rather than international *human rights* law (such as a violation of the right to freedom of expression).<sup>57</sup>

The standard that is ultimately applied by a court will have a significant impact on the scope of behavior that is potentially captured by the ATCA. It has been suggested that corporations that facilitate state Internet filtering by providing the required software or hardware may be liable,<sup>58</sup> or that liability may occur where an Internet content provider transfers to a repressive regime information that allows the regime to punish individuals for statements they have made on the Internet.<sup>59</sup> In the latter situation, the connection between the company's actions and the repressive act by the state is clear. However, if the company's actions were more passive—say, agreeing to filter results according to certain government criteria—meeting the test of a connection between the company's activities and the breach may be more difficult.

All in all, there is a very real possibility that this process could be used to enforce the right to freedom of expression by giving individuals standing, and holding companies liable, under the ATCA for their involvement in Internet filtering.

In addition to the ATCA in the United States, there are signs that similar enforcement techniques are being developed in other major jurisdictions—notably within the European Union (EU). In this regard, Professor Dinah Shelton has noted a 1999 resolution of the European Parliament “on EU standards for European enterprises operating in developing countries,” which refers to a European Community law that provides that “a corporate decision or policy causing harm abroad may permit tort suits in EU courts against the parent company or branch of the company responsible for the decision.”<sup>60</sup> This resolution is significant in that it raises the possibility of ATCA-style claims within the EU system.

In terms of what impact such suits may have, the prospects for successful claims may not be as important as the existence of a formal venue for laying bare the extent of corporate cooperation in filtering activities. It has been suggested that the value of these processes lies not so much in the way the suits award vast damages, but rather in the way they generate sufficient adverse publicity so as to force corporations to cease the impugned activities.<sup>61</sup> As with state actors under the UNHRC process, some companies will be more susceptible to this pressure than others.

These examples may point to a new trend of countries creating mechanisms whereby international law can be enforced domestically, thereby enabling private actors to be subject to claims or to bring them. These approaches may be the most immediate way of accounting for private actions and giving persons a mechanism for seeking redress. Moreover, given the reluctance of states to hold each other to agreed-upon standards, the best hope of reinforcing international human rights may be to make private actors accountable. Nonetheless, these domestic approaches still leave gaps in that they are limited jurisdictionally and cannot afford equal treatment to all people around the world.

Indeed, the ATCA approach is far from the ideal of human rights standards applying equally to all persons around the world. After all, why should today's global citizens suffer disparate enforcement of their rights, with redress available only in limited jurisdictions that in any event are applying a variant of law originally designed to address actions of different (i.e., state) actors?

Corporations could ask similar questions: Why should competing companies be held to different standards, with those having ties to jurisdictions that value freedoms confronting costs that others do not, and with a state applying standards to them that it has failed to require the intended subjects (i.e., its treaty partners) to follow?

### **International Antibribery Conventions**

Of course, the idea of holding corporations to account in one jurisdiction for actions done elsewhere is not new, and valuable lessons for the filtering context can be learned in particular from past attempts to promote ethical behavior among corporations acting internationally. In particular, a hybrid process involving both domestic and international enforcement has developed in recent years in another area pertaining to ethical behavior of private actors, namely, in the area of bribery. Antibribery conventions represent the one area where *binding* rules have been put in place by states acting jointly to regulate responsibilities of transnational corporations and related business enterprises with regard to human rights.<sup>62</sup>

The fight against bribery stands out for its lessons on the futility of single-country attempts to hold companies accountable at the domestic level for their international activities, on the one hand, and the success of broader-based efforts to do so in multiple jurisdictions acting in concert, on the other hand. In 1977 the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA) to make it a crime for U.S. corporations to offer bribes for international contracts. While the FCPA may have given a company a credible reason to refuse to comply with a foreign official's demand for a bribe, that company ended up losing contracts to foreign competitors who not only were permitted to pay this extra expense but also were allowed to take a tax deduction for it. Simply stated, the FCPA put U.S. companies at a tremendous disadvantage vis-à-vis others in their global activities involving foreign direct investment.

At the time, most foreign direct investment was flowing from countries that were members of the Organisation for Economic Co-operation and Development (OECD). As corporations began to be plagued by international corruption scandals and increasingly large bribery demands in the 1980s and early 1990s, there was a political willingness in the OECD to join the United States in standing against corruption. The OECD and five nonmember countries<sup>63</sup> adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) in 1997.<sup>64</sup> By doing so together, these countries agreed to hold their companies to a common standard and so helped to level the playing field for more ethical conduct. They also adopted the Revised Recommendations of the Council on

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Combating Bribery in International Business Transactions to flesh out details in the following areas: international cooperation; the non-tax-deductibility of bribes; accounting, auditing, and public procurement; and measures to deter, prevent, and combat bribery.<sup>65</sup>

Once this critical mass was met in the foreign direct investment community, introducing the idea into an even wider, multilateral setting became quite feasible, and proponents were able to achieve the adoption of the United Nations Convention against Corruption (U.N. Convention) in 2005. By July 2006, the U.N. Convention had 140 signatories and 60 ratifications or accessions.<sup>66</sup>

Beyond addressing the problem of questionable corporate conduct in foreign jurisdictions, the antibribery conventions also suggest a shifting identity of the state in the international system. The arrangements under both the OECD and the U.N. entail similar components including the following:

- Harmonizing domestic law in states that are party to the convention.
- Tailoring domestic law to criminalize undesirable activities on the part of private actors operating abroad.
- Involving civil society to help bring violations to the attention of state parties.
- Establishing transparency and accountability mechanisms for questionable activities of private actors operating abroad.
- Giving international processes central oversight over convention implementation (i.e., prevention, investigation, and prosecution of crimes), with a monitoring of state parties' enforcement of the convention in their respective jurisdictions to ensure rigor.
- Setting out a process whereby state parties may sort out disputes among themselves and bring them before an international body should they not be able to settle the matter.
- Allowing additional mechanisms to be created for further international cooperation under the convention.

Through this international cooperation, states are more able to govern entities under their jurisdiction by holding them to ethical standards while not disadvantaging them *vis-à-vis* competitors in markets around the world; however, states do so at a price—that is, they are pooling power in a joint body to avoid a race to the bottom. Arguably they are upholding their societies' ethical standards for the sake of their own citizens, but at the same time they may be diluting the relative political power of citizens within their polity as degrees of sovereignty are conceded. As such, perhaps states are giving credit to the concept of global citizenship in the Information Society.

The experience with antibribery conventions suggests international cooperation can help overcome the difficulty that a state faces in holding companies to ethical standards when other markets are governed by different rules. Companies had a tough time under one country's law requiring higher ethical standards until their counterparts elsewhere in the world—that is, the main companies they had to compete against—became subject to similar standards. Once a critical mass of states agreed to a common approach, companies were

able to refuse to give in to corruption pressure elsewhere, and they saw their public images and profit margins improve.

This model could provide a viable avenue forward for the area of filtering. In particular, it offers hope that states can cooperate in developing international standards for private actors in the area of freedom of expression, especially as private actors feel pressured to submit to host-country government demands to carry out filtering programs.

Might states cooperate in this way to hold private actors accountable for operations affecting freedom of expression?

### **The Promise of International Standards**

This chapter suggests that international legal instruments designed to protect human rights by holding states accountable have been norm-setting but toothless. The prospects for change in these instruments are not strong because it is difficult for states acting collectively through the international system to establish effective remedies for violations by states. Given this lack of enforceability, the cause of international human rights suffers from a chronic legal deficiency.

Because international law generally does not directly bind private actors, companies today can violate international human rights standards with relative assurance that they will not face charges in an international tribunal. Nonetheless, this apparent impunity may work against those that wish to comply with international human rights standards when governments try to compel companies to restrict freedom of expression through techniques like filtering.

Companies complain they are stuck between Scylla and Charybdis in cases where a host-country government requires a breach of international law by imposing broad filtering mandates that contradict international standards for freedom of expression. Naturally, a company must comply with the laws of the different jurisdictions where it operates, and it is not for the company to decide what the law should be or to straighten out the failures of international law. Rather, the decision for the company to make is whether or not to do business in a given market. However, given the competitive economic pressures brought by globalization, a company may in fact need to do business in certain markets if it is to survive.

Guiding a company's decisions on whether to do business in a market are factors such as the company's charter or management and the potential for profits, though these factors are not rigid. If the company's charter or management calls for certain ethical conduct, and if the jurisdiction where it would like to operate has lower standards, the company might nevertheless choose to do business there in hopes of making a positive difference. If the company's charter or management does not itself call for certain ethical conduct, the company might nevertheless choose to follow higher standards in response to loud calls issued by groups trying to affect company behavior, even if those calls hail from another market altogether. (For example, outcries by loud individuals in the west in 2006 affected the course of western

Internet-related companies operating in China.) In this sense, a company's commitment to higher standards might be displayed for public relations purposes with a view to preserving the company's image (even to stave off negative public relations in other markets), or it could be shown as a manifestation of that company's sincere desire to protect human rights.<sup>67</sup>

While international law as agreed among sovereigns may protect human rights by setting norms only, there may be an additional route to bolstering freedom of expression; that is, states may be willing to draw up a new treaty to apply standards to private actors, and private actors meanwhile could proactively pledge themselves through commitments that they take on voluntarily.

Drawing on the ATCA and antibribery examples, an effective enforcement mechanism could prompt companies to follow international legal standards for the sake of limiting their own liability and exposure to adverse publicity; companies could cite the threat of liability as an excuse when they wished to refuse to comply with mandates to repress freedom of expression. If such an approach were applied on a global level (as in the case of the U.N. Convention against Corruption), it could help avoid the clash of conflicting legal regimes and instead provide companies with a global standard they could say they were obliged to follow.

In this regard, states could begin negotiating a binding treaty complete with domestic harmonization requirements and international cooperation in prevention, investigation, and enforcement. While they do so (a process that will take considerable time), corporations could develop their own codes of ethical conduct for freedom of expression. Such voluntary commitments would allow companies to align themselves in support of human rights and equip themselves with a valid response when asked by repressive regimes to suppress communications; the force of a treaty reinforcing these obligations through legal harmonization and international cooperation would send an added signal to those regimes.

In this sense, then, international law could provide a set of internationally recognized minimum standards that would help reconcile tensions. Since international human rights principles already have been agreed upon and have enjoyed a transnational stamp of legitimacy over the years, these same principles could provide a minimum standard for corporate responsibility. Because additional commitments to follow these standards would be voluntary, they would allow companies to choose to bind themselves in taking an even stronger stand against repressive practices.

Given the tendency of the Internet to push global rules, and given the expectation that the distinction between the real and virtual worlds will fade, a good starting point perhaps would be to pare down the ambition to Internet-related practices. Efforts are already underway in this regard. For example, one of the outcomes of the World Summit on the Information Society was the tasking of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) with facilitating work on "ethical dimensions of the Information Society." This mandate was spelled out in the *Geneva Declaration of Principles and Plan of Action* and elaborated

in the *Tunis Agenda*. Under the framework of this mandate, UNESCO has begun developing a code of ethics. Interestingly, the first draft of what they are calling a “Code of Ethics for the Information Society” envisions a reporting mechanism, similar to the OECD’s Anti-Bribery Convention and the U.N. Convention against Corruption. In addition, the draft instrument affords a mechanism whereby additional, voluntary “Specific Ethical Commitments” may be offered by private actors, who may join states in signing onto the general document.

While this effort is going on in that forum, another process stemming out of the World Summit on the Information Society—that is, the Internet Governance Forum—affords the opportunity for all stakeholders to consider freedom of expression in the Information Society and possibly to articulate shared values. A “Dynamic Coalition on Freedom of Expression” has spontaneously formed following the first meeting of the Internet Governance Forum (Athens, autumn 2006).

By working through state-established intergovernmental organizations, the approaches would avoid chipping away at the institutional groundwork already laid for the international protection of human rights, and instead would enable future human rights endeavors to build upon this foundation. Meanwhile, by paving avenues for nonstate actors to have a meaningful voice in the development and implementation of these protections, the approaches would help operationalize the *Geneva Declaration of Principles*, which called for technical and public policy issues of Internet management to “involve all stakeholders and relevant intergovernmental and international organizations” and to be handled in a way that is “multilateral, transparent and democratic.”<sup>68</sup>

Such simultaneous approaches offer the hope of allowing citizens of the world to experience equal human rights in the global Information Society.

## Notes

1. The Peace of Westphalia entailed a set of treaties ending the Thirty Years War and the Eighty Years War in Europe.
2. As elaborated in the Montevideo Convention on the Rights and Duties of States (1933), qualities of a sovereign state include a permanent population; a select territory; government (e.g., legislative, judicial, and executive); and the ability to conduct relations with other states.
3. The International Criminal Court, established in 2002, may be viewed as an example where states have allowed prosecution of individuals for genocide, crimes against humanity, war crimes, and the crime of aggression. Article 17 of its founding treaty, the Rome Statute of the International Criminal Court, indicates how the court is designed to complement national judicial systems.
4. This process was established in accordance with the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation of Assigned Names and Numbers (ICANN). See <http://www.wipo.int/amc/en/index.html>.
5. See “WIPO’s Domain Name Dispute Resolution Service,” Net Dialogue, <http://www.netdialogue.org/initiatives/wipodndrs/>. Still, as Net Dialogue notes, the WIPO process is linked to domestic processes since disputing parties may submit a dispute to a traditional court for resolution.
6. Pursuant to United Nations General Assembly Resolution 56/183, the World Summit on the Information Society took place in two phases, the first being in Geneva, Switzerland (2003), and the second in Tunis, Tunisia (2005).
7. The parameters for the Working Group were set out in the WSIS Declaration of Principles (WSIS-03/GENEVA/DOC/0004) and the WSIS Plan of Action (WSIS-03/GENEVA/DOC/0005).

8. This dynamic is common among federations—for example, with the “Commerce Clause” in the United States Constitution being interpreted during the twentieth century to give the U.S. federal government much greater authority over states than originally anticipated by the early American states forming the union, or, more recently, with European Union member states finding themselves much more integrated than the original members of the European Economic Community would have agreed to just a few decades ago.
9. In this regard, Bentham is often quoted as having said that natural rights are “nonsense upon stilts.”
10. See Ronald Deibert, *Parchment, Printing, and Hypermedia* (New York: Columbia University Press: 1997) and Ronald Deibert, “Network Power,” in Richard Stubbs and Geoffrey Underhill, (eds.) *Political Economy and the Changing Global Order*, 2nd edition (New York: Oxford University Press, 1999).
11. *Universal Declaration of Human Rights*, adopted and proclaimed by U.N. General Assembly resolution 217A(III) of 10 December 1948.
12. *Ibid.*
13. *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification, and accession by U.N. General Assembly resolution 2200A(XXI) of 16 December 1966 (entry into force 23 March 1976, in accordance with Article 49).
14. As reflected on the Web site of the High Commissioner for Human Rights, updated December 6, 2006, <http://www.ohchr.org/english/countries/ratification/4.htm>.
15. Among other countries studied, Cuba, Malaysia, Myanmar, Oman, Pakistan, Saudi Arabia, Singapore, and United Arab Emirates have not signed the ICCPR. The government of China contends: “The signature that the Taiwan authorities affixed, by usurping the name of ‘China’, to the [Convention] on 5 October 1967, is illegal and null and void” (ICCPR Declarations and Reservations, available at [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm)).
16. *McIntyre v. Canada*, U.N. Doc. CCPR/C/47/D/359/1989 (1993).
17. In other contexts, this principle is sometimes referred to as that of “technological neutrality.”
18. Concluding observations: Guyana, 2000; Concluding observations: Lebanon, 1997. The UNHRC has also taken a strong stand against state media monopolies, stating that “because of the development of the modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression” (General Comment 10, 1983).
19. See United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, U.N. Doc E/CN.4/1984/4 (1984).
20. See Joseph, Schultz, Castan, *The International Covenant on Civil and Political Rights*, 2nd ed. (New York: Oxford University Press, 2004); see also the Siracusa Principles, *supra*, which note that these grounds “cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.”
21. *Hertzberg v. Finland*, U.N. Doc CCPR/C/15/D/61/1979 (1982). This concept, which is prominent in the jurisprudence of the European Court of Human Rights, has not subsequently been referred to by the Human Rights Committee (see Joseph, Schultz, Castan, *The International Covenant on Civil and Political Rights*, 2nd ed.).
22. See *Lämsman et al. v. Finland*, U.N. Doc CCPR/C/58/D/671/1995 (1996), which refers to the right of a member of a minority to enjoy his or her culture; see generally Eyal Benvenisti “Margin of Appreciation, Consensus, and Universal Standards” 31 NYU J. Int’l L. & Pol. 843 (1999).
23. United Nations Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc CCPR/C/21/Rev.1/Add.13 (2004).
24. *Mukong v. Cameroon*, U.N. Doc CCPR/C/51/D/458/1991 (1994).
25. United Nations Human Rights Committee, General Comment No. 10: Freedom of Expression (29 June 1983).
26. See the Human Rights Committee’s General Comment 24, where the limited scope of reservations are discussed.
27. Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).
28. See P. Alston and J. Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).

29. See P. R. Ghandhi, *The Human Rights Committee and the Right of Individual. Communication: Law and Practice* (Dartmouth: Ashgate, 1998).
30. As reflected on the Web site of the High Commissioner for Human Rights (updated December 6, 2006), <http://www.ohchr.org/english/countries/ratification/5.htm>.
31. See "Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights" 92 Am. J. Int'l L. 563 (1998); Trinidad and Tobago subsequently re-acceded with a reservation limiting the UNHRC's power to determine complaints regarding death-row inmates, the subject matter of most communications it faced—see <http://www.ohchr.org/english/countries/ratification/5.htm>.
32. See P. R. Ghandhi, *The Human Rights Committee and the Right of Individual. Communication: Law and Practice* (Dartmouth: Ashgate, 1998).
33. For a more thorough description of these issues, see Tim Wu, "The World Trade Law of Internet Filtering" (May 3, 2006), available at SSRN: <http://ssrn.com/abstract=882459>. For an additional perspective on how countries have inadvertently opened the floodgates of trade, see Mary C. Rundle, "Beyond Internet Governance: The Emerging International Framework for Governing the Networked World", Berkman Center Research Publication No. 2005-16 (December 13, 2005), available at SSRN: <http://ssrn.com/abstract=870059>.
34. WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Body Report (WT/DS285/AB/R) of 7 April 2005.
35. With respect to this particular issue, the Appellate Body held that the measures imposed by the United States fell within the scope of GATS Article XIV.
36. *Ibid.*, para. 304.
37. *Ibid.*, para. 306.
38. This approach loosely embraces the principle of subsidiarity (i.e., governance at the most local level practicable) as the panel checks that the member applying an exception has itself used a process to determine that the interests or values that the measure is protecting are important.
39. This test bears some resemblance to that of necessity under the ICCPR.
40. GATS categorizes the different means by which services are supplied according to different *modes*. Because GATS binds WTO members only where they have specifically agreed to grant market access, and because they may specify these commitments according to the different modes of supply, a panel would need first to determine if the member against whom a claim was brought had even agreed to guarantee market access for that type of service in that particular mode. Of course, for the panel to be applying analysis under GATS, the claimant would need to have cast the activity as a "service."
41. If a case were brought, a panel might defer to ICCPR provisions regarding permissible limitations, but when it would then turn to analyze whether the filtering were done in the least trade-restrictive manner, most likely the answer would be no. In that case, the remedy would be to tell the host government to change its measures or suffer economic sanctions roughly equivalent to the damage the home country had faced.
42. See, e.g., Frieder Roessler, "The Constitutional Function of the Multilateral Trade Order," in Frieder Roessler, ed., *The Legal Structure, Functions and Limits of the World Trade Order: A Collection of Essays* (London: Cameron May, 2000), 109.
43. Wu asserts that the WTO already constitutes a sweeping regulatory regime, despite the more limited intentions of the signatories to its agreements. Rundle sets out a similar argument that countries have established a loose framework for international Net governance through numerous initiatives in intergovernmental organizations—with this Net regulation then driving integration further and ultimately leading to international federalism. (See note 33.)
44. *Ibid.*
45. This "failure" of international law stands in contrast to relatively strong regional systems, such as the European Convention on Human Rights, which affords enforceability and, in practice, is binding against the state.
46. Of course, it should be remembered that the state may also be mediating between competing liberties that people have. By way of example, a state may be reconciling freedom of expression and freedom from the discrimination that is brought on by hate speech. This mediating role is particularly important in societies that think in terms of group rights as well as individual rights.

47. See Beth Stevens and Michael Ratner, *International Human Rights Litigation in U.S. Courts* (New York: Transnational Publishers, 1996).
48. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
49. Professor Dinah Shelton of the George Washington University Law School has surveyed the cases taken to date under the ATCA and concluded that, where successful, awards in the \$1–10-million range were usually made. Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (New York: Oxford University Press, 2005).
50. See *Kadic v. Karadzic*, 70 F. 3rd 232 (2nd Cir. 1995); *John Doe v. Unocal Corporation*, 395 F.3d 932 (9th Cir. 2002).
51. This is due to the doctrine of sovereign immunity—see *Argentine Republic v. Amerada Hess Shipping Co*, 488 U.S. 428 (1989).
52. See Neil J. Conley, “The Chinese Communist Party’s New Comrade,” 111 Penn St. L. Rev. 171 (2006); Jill R. Newbold, “Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights,” U. Ill. J.L. Tech. & Pol’y 503 (2003).
53. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).
54. Conley, “The Chinese Communist Party’s New Comrade,” 200–201.
55. See Olivia De Schutter, ed., *Transnational Corporations and Human Rights* (Oxford: Hart, 2006), 59ff.
56. *John Doe v. Unocal Corporation*, 395 F.3d 932 (9th Cir. 2002).
57. Andrew Clapham, *Human Rights Obligations of Non-State Actors* (New York: Oxford University Press, 2006), 266.
58. Jill R. Newbold, “Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights,” U. Ill. J.L. Tech. & Pol’y 503 (2003).
59. Conley, “The Chinese Communist Party’s New Comrade.”
60. Shelton, *Remedies in International Human Rights Law*, 172–173.
61. See Olivia De Schutter, ed., *Transnational Corporations and Human Rights* (Oxford: Hart, 2006).
62. See UN Economic and Social Council, Report of the Sub-Commission on the Promotion and Protection of Human Rights: Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights (E/CN.4/2005/91), February 15, 2005, available at <http://www.globalpolicy.org/socecon/tncs/2005/0215untncreport.pdf>.
63. Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic joined the thirty OECD members in this effort. (For a list of OECD members, see [http://www.oecd.org/document/58/0,2340,en\\_2649\\_201185\\_1889402\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html).)
64. See “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,” Organisation for Economic Co-operation and Development,” [http://www.oecd.org/document/21/0,2340,en\\_2649\\_201185\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html).
65. See “1997 Reused Recommendation of the Council on Combating Bribery in International Business Transactions,” Organisation for Economic Co-operation and Development,” [http://www.oecd.org/document/32/0,2340,en\\_2649\\_201185\\_2048160\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/32/0,2340,en_2649_201185_2048160_1_1_1_1,00.html).
66. See “United Nations Convention against Corruption,” United Nations Office on Drugs and Crime, [http://www.unodc.org/unodc/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/crime_convention_corruption.html).
67. Do companies’ motivations matter when the community opposed to illegal filtering practices is considering what approach to take? It could be that the distinction in motivations is not so important, and that what matters is simply the result—that is, that decision-makers for the company ensure that company policies support freedom of expression. Still, true convictions would seem to matter for the sake of maintaining social values in favor of freedom of expression.
68. Geneva Declaration of Principles, paras. 48 and 49.

