

Section 4.3

The Global Network Initiative: how can companies in the information and communications technology industry respect human rights?

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1 Introduction

Over the past two decades, companies in the information and communications technology (ICT) sector have designed, developed and distributed online tools that have allowed citizens across the globe to share information and communicate in unprecedented and extraordinary ways. At the same time, governments around the world have developed increasingly effective methods for filtering information and monitoring users' online habits and communications. These sometimes competing and sometimes complementary forces often threaten the internationally recognized rights to free expression and privacy.

While the duty to protect these rights for citizens rests squarely on the shoulders of governments, ICT companies are increasingly at risk of becoming complicit in government efforts to censor information and disclose online user activity, in particular in places where the rule of law is weak. This chapter considers the emergence of the Global Network Initiative (GNI) as a multi-stakeholder response to evolving threats to freedom of expression and privacy in the ICT industry and as an initiative designed to encourage responsible company decision-making through developing standards, creating an evaluation and learning process and serving as a platform for collective advocacy.

2 Origins of the Global Network Initiative

Rapid global expansion by ICT companies headquartered in the United States (US) in the early 2000s led to conflicts between US law, other countries' domestic laws and practices, and international laws and norms. Though business and policy challenges from these conflicts arose across the world for the ICT industry – including in places like France,¹ Australia,² Turkey,³ Argentina,⁴ Russia⁵ and Thailand⁶ – the issues for this sector were most acute, and most heavily studied and reported, in China.⁷

China was undergoing significant economic transformation, integrating more deeply with the global system of trade and witnessing the rise of a large class of citizens with easy and inexpensive access to technology, the Internet and accompanying information and communications opportunities. During this period, the Chinese government developed a technologically sophisticated and multi-layered system known as the Golden Shield, which employed technology, manpower and

political and legal pressure to censor online information.⁸ Using traditional legal and regulatory systems of compelled information disclosure as well as an evermore sophisticated technical capacity for intercepting electronic information, the Chinese government, in similar ways to governments across the globe, grew increasingly capable of following its citizens' activities online. Although a number of Western technology companies had operated in China over the previous decade, the human and machine architecture in China built into and around the Internet created new intersection points between business and human rights – in particular around the rights to freedom of expression and privacy.

A number of incidents in China involving American corporations helped galvanize global public opinion on issues of online censorship and surveillance and possible corporate complicity in the actions of governments against their own citizens.⁹ Microsoft's decision, at the behest of the Chinese government, to remove from its local service the blog of Chinese political journalist Michael Anti in late 2005 led to significant public criticism of Microsoft.¹⁰ Google's decision to enter the Chinese market and offer its search services in early 2006, with its announcement that it would limit the display of certain search results based on Chinese censorship requirements, led to similar criticism from media, civil society and the US Congress, among others.¹¹ Human rights organizations and journalists also noted publicly that technology hardware manufacturer Cisco – notwithstanding its defence that it was providing an off-the-shelf product permissible under US export regulations – was supplying sophisticated network management equipment to the Chinese government, which in turn was using the technology as part of an elaborate programme of domestic censorship and surveillance inside China.¹²

The issue that might have been a tipping point for public concern over the Internet and risks of corporate complicity was the case of Chinese journalist Shi Tao.¹³ In 2004, Yahoo!'s corporate subsidiary in Beijing complied with a valid Chinese law-enforcement demand for user account data, which ultimately led the Chinese police to Shi Tao, a journalist who was accused of disclosing state secrets by sending to a US-run website his notes regarding official Chinese press coverage rules distributed by the Chinese government on the 15th anniversary of the tragic events in Tiananmen Square. Mr Shi was arrested and sentenced to 10 years in prison. When his trial documents were discovered, translated and released in autumn 2005, Shi Tao's case gave a name, face and personal tragedy to the argument that US technology companies were complicit in certain governments' failure to protect the rights of their own citizens.

Each American high-tech company operating in China felt pressures from users, employees, the public, civil society and socially responsible investors, as well as from legislators in the US and Europe. The US House of Representatives held a hearing in February 2006 in which executives from Cisco, Google, Microsoft and Yahoo! were excoriated for being complicit in the Chinese government's unjust online censorship and surveillance.¹⁴ Congressman Chris Smith (R-NJ) and others proposed draft legislation to regulate American companies doing business in so-called Internet-restricting countries.¹⁵ The US Department of State, under then Secretary of State Condoleezza Rice, created the Global Internet Freedom Taskforce in the State Department's Bureau of Democracy, Human Rights and Labor to address challenges around the globe to freedom of expression and the free flow of information on the Internet.¹⁶

International stakeholders across civil society, investors, academics and some governments were increasingly convinced that there was a growing governance gap globally (not just in China) between corporate practices and international and national human rights laws and norms regarding freedom of expression and privacy in the ICT sector that certain governments were not upholding. These stakeholders believed that existing regulatory frameworks, at least as applied and enforced, were not holding companies accountable for their actions and that those companies could be considered complicit in various governments' restrictions of their own citizens' fundamental human rights.

By early 2006, three separate and loosely organized groups – one principally composed of ICT companies and two others comprising a mix of human rights groups, academics and investors – had formed to assess, and try to address, these issues. These groupings of stakeholders generally paralleled the participant groups found in multi-stakeholder initiatives (MSIs) addressing human rights issues in other industries. Although the participants were not in consensus on developing a code of conduct or MSI, each group understood that the meetings were intended to develop mechanisms – whether voluntary practices, industry standards or legislation – to address the issue of corporate complicity in violations of the rights to freedom of expression and privacy. By summer 2006, the three groups, in recognition of the common human rights concerns, growing public awareness of the issues and a belief in the strength of diversity and collective work, agreed to work together in a multi-stakeholder dialogue, with the various constituencies on equal footing. A number of the key participants in the new coalition brought extensive experience from involvement in other MSIs, including the Fair Labor Association, the Voluntary Principles on Security and Human Rights, and the Extractive Industries Transparency Initiative.

The parties agreed that the dialogue would be co-facilitated by the San Francisco-based consultancy Business for Social Responsibility and the Washington, DC-based civil liberties group Center for Democracy & Technology. The Berkman Center for Internet & Society at Harvard University, a co-founding participant in the dialogue as an academic stakeholder, also played a quasi-official and critical facilitating role throughout the new multi-stakeholder dialogue. Not only did the newly formed group have to overcome the traditional distrust between human rights groups and companies, it also had to contend with deep distrust between companies themselves in a fiercely competitive and often-secretive industry.

The new unified group faced difficult decisions around what specific sectors within the rapidly evolving technology industry to include as part of the scope of the discussions. The group generally agreed to consider three broadly defined sectors – Internet, telecommunications and hardware. In addition to the involvement of Google, Microsoft and Yahoo! from the beginning of the discussions, four European telecommunications companies joined the dialogue and remained involved for nearly two years before concluding that the multi-stakeholder dialogue was not in their companies' best interests, leading them to withdraw before the GNI's formal launch in autumn 2008. Despite requests to join the discussion and pressure from civil society and US lawmakers, hardware manufacturers like Cisco did not participate in the dialogue and did not join the GNI, noting the fundamental differences in their business models from the other participants as well as their existing internal and external commitments to human rights including free expression and privacy.¹⁷

Unlike in some other multi-stakeholder dialogues, all parties in the unified dialogue process agreed that governments should not be participants. This view was taken principally because the participants believed that governments, through weak rule of law in particular, created the environment that led to violations of rights to freedom of expression and privacy and put companies at risk of complicity in those human rights violations.

During the period between 2006 and 2008 – a period that included three US Congressional hearings on the subject of Internet freedom, threatened US Congressional legislation, European Union hearings, an unsolicited bid by one participant company (Microsoft) to take over another (Yahoo!) and deep scepticism among civil society and other stakeholders – the participants continued to negotiate intensively until they finally reached agreement in 2008 on a set of principles, implementation guidelines and a governance, accountability and shared learning framework. The Global Network Initiative launched publicly in October 2008.¹⁸

Snapshot

GNI membership

The GNI's membership is as follows:

- Companies: Facebook, Google, LinkedIn, Microsoft, Procera Networks and Yahoo!
- Civil society organizations: Bolo Bhi, Center for Democracy & Technology, Center for Internet & Society, Committee to Protect Journalists, Human Rights First, Human Rights in China, Human Rights Watch, Index on Censorship, Institute for Reporters' Freedom and Safety, International Media Support, Internews and PEN American Center.
- Socially responsible investors: Boston Common Asset Management, Calvert Group, Church of Sweden, Domini Social Investments, EIRIS Conflict Risk Network, F&C Asset Management, Folksam, Trillium Asset Management and Walden Asset Management.
- Academic institutions: Berkman Center for Internet & Society at Harvard University; Center for Business and Human Rights at New York University's Stern School of Business; Centro de Estudios en Libertad de Expresion, Universidad de Palermo; George Washington University Law School; Nexa Center for Internet & Society, Politecnico di Torino; Research Center for Information Law, University of St Gallen; and University of California, Berkeley School of Information.
- Individual experts: Christine Bader, Philip Howard, Rebecca MacKinnon and Ernest Wilson.

3 How the GNI developed industry standards

The GNI framework was developed through lengthy and good faith negotiations, which included the inevitable ebb and flow of tense and heated debate and near break-ups. Although all participants agreed to make it their common cause to protect

user rights globally, each stakeholder constituency faced both internal and external pressures regarding the shape of the discussions and, in many cases, around continued involvement itself in the multi-stakeholder dialogue. This was the case inside both companies and civil society groups and is a tension that exists up to the present. Given the rapidly evolving nature of technology and online tools, growing threats to freedom of expression and privacy, diversity and difference of opinions of stakeholders, and the geographic reach of the companies' products and services, the GNI's 2008 launch was an important milestone in recognizing and collectively working to protect the rights of citizens around the world using the Internet.

The Preamble to the GNI Principles explains the initiative's foundation in international laws and norms including the Universal Declaration of Human Rights¹⁹ and its two implementing treaties, the International Covenant on Civil and Political Rights²⁰ and the International Covenant on Economic, Social and Cultural Rights.²¹ Though the United Nations Guiding Principles on Business and Human Rights²² (Guiding Principles) were not released until 2011, the GNI framework was influenced by the work that served as the foundation for the Guiding Principles.²³ The Preamble to the GNI Principles states:

The duty of governments to respect, protect, promise and fulfill human rights is the foundation of this human rights framework. That duty includes ensuring that national laws, regulations and policies are consistent with international human rights law and standards on freedom of expression and privacy.²⁴

The GNI Principles further articulate that ICT 'companies have the responsibility to respect and protect the freedom of expression and privacy rights of their users'.²⁵ The GNI Principles and Implementation Guidelines take as their starting point international laws; however, they are specifically directed towards the ICT industry and have become standards referenced by international organizations²⁶ as well as by other initiatives regarding the protection of these particular rights.²⁷

Snapshot

GNI Principles excerpts

Preamble

The duty of governments to respect, protect, promote and fulfill human rights is the foundation of this human rights framework. That duty includes ensuring that national laws, regulations and policies are consistent with international human rights laws and standards on freedom of expression and privacy.

Information and Communications Technology (ICT) companies have the responsibility to respect and protect the freedom of expression and privacy rights of their users. ICT has the potential to enable the exchange of ideas and access to information in a way that supports economic opportunity, advances knowledge and improves quality of life...

Freedom of Expression

Freedom of opinion and expression is a human right and guarantor of human dignity. The right to freedom of opinion and expression includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers...

Participating companies will respect and protect the freedom of expression of their users by seeking to avoid or minimize the impact of government restrictions on freedom of expression, including restrictions on the information available to users and the opportunities for users to create and communicate ideas and information, regardless of frontiers or media of communication.

Participating companies will respect and protect the freedom of expression rights of their users when confronted with government demands, laws and regulations to suppress freedom of expression, remove content or otherwise limit access to information and ideas in a manner inconsistent with internationally recognized laws and standards.

Privacy

Privacy is a human right and guarantor of human dignity. Privacy is important to maintaining personal security, protecting identity and promoting freedom of expression in the digital age.

Everyone should be free from illegal or arbitrary interference with the right to privacy and should have the right to the protection of the law against such interference or attacks...

Participating companies will employ protections with respect to personal information in all countries where they operate in order to protect the privacy rights of users.

Participating companies will respect and protect the privacy rights of users when confronted with government demands, laws or regulations that compromise privacy in a manner inconsistent with internationally recognized laws and standards.

The GNI Principles work in tandem with the GNI Implementation Guidelines²⁸ and are divided into five broad sections, each with subcategories of obligations for companies to uphold. While the Principles cover general obligations and also comprise the standards by which companies are evaluated by GNI accredited and independent assessors, the Implementation Guidelines lay out clear steps that companies should take to fulfil their obligations under the Principles. Set out below are those broad categories, with a brief description of some of the areas covered by the Implementation Guidelines.

- The *Freedom of Expression* guidelines cover: (a) company obligations for careful scrutiny of, and a willingness to challenge, government demands to limit content; and (b) a commitment by companies to transparent communication with users on freedom of expression risks and company practices.
- The *Privacy* guidelines cover: (a) company obligations around the collection of user data; (b) company obligations for careful scrutiny of, and a willingness to challenge, certain governments' demands to disclose user data; and (c) a commitment by companies to transparent communication with users on privacy risks and company practices.
- The *Responsible Company Decision Making* guidelines cover: (a) requirements for board oversight and leadership; (b) obligations to conduct human rights impact assessments; (c) partner, supplier and distributor responsibilities; and (d) obligations to integrate human rights responsibilities into business operations.

- The *Multi-Stakeholder Collaboration* guidelines cover: (a) a commitment to engage in public policy work advocating for freedom of expression and privacy; (b) the requirements to engage with a multi-stakeholder advisory forum on global decisions around freedom of expression and privacy; and (c) a commitment to engage in external multi-stakeholder learning forums.
- *Governance, Accountability and Transparency* guidelines cover: (a) the commitment to further develop an effective system of governance for the initiative; (b) company and GNI transparency and reporting obligations on implementation of the Principles; and (c) the requirements and process for independent assessment and evaluation in order to hold companies accountable.

The GNI Principles and Implementation Guidelines were ultimately developed in a multi-stakeholder setting with a focus on the companies that remained at the table through the GNI's launch in 2008. Although the GNI Principles also apply generally to telecommunications companies and technology hardware manufacturers, the fact that those two sectors either did not participate at all or did not ultimately join the initiative meant that the participants understood that the GNI Implementation Guidelines might need to be supplemented for more specific application to these types of companies in the future. While each company that did not participate in meetings or join the GNI likely had its own reasons for doing so – ranging from confidence in their existing human rights policies to a desire to maintain a low-profile position outside of the public eye on human rights issues – the principal reason seemed to be rejection of the type of framework ultimately agreed across diverse stakeholders for independent and external assessment of the company's policies, practices and results.

Several telecommunications companies, including four European companies who were involved in the early stages of the multi-stakeholder dialogue that became the GNI, as well as four other telecommunications companies, are currently participating in a Telecommunications Industry Dialogue on Freedom of Expression and Privacy launched in March 2013 and is affiliated with the GNI.²⁹ In February 2016, seven of the eight members of this Industry Dialogue joined the GNI as official observers with the agreed aim that in March 2017 the seven companies would become full GNI members.

4 How the GNI ensures accountability

The most contentious aspect of the GNI negotiations – perhaps the case in most MSIs – involved agreeing and structuring periodic and independent evaluation of company processes and practices, including review of case outcomes, as measured against a set of ICT industry standards. The coalition of diverse stakeholders looked to the monitoring and auditing models employed in other MSIs, like the Fair Labor Association³⁰ and the Voluntary Principles on Security and Human Rights.³¹ However, the independent review process that would form the core of the accountability process and be used to assess freedom of expression and privacy in the ICT industry was, in many ways, a distinct field given the novelty, complexity and global scale of the technology sector.

Issues in the negotiations ranged from who would select the assessors, to what company information the assessors would be permitted to review, to who would make the determination of company compliance or non-compliance and how accountability reports would be communicated publicly. Finding effective mechanisms to review a selection of specific cases, among a universe of hundreds of millions or even billions of users, also presented the group with unique challenges in the field of company assessment. While companies were concerned about the nature of any outside assessment, including of their free expression policies, practices and outcomes, the companies were most concerned about potentially intrusive assessment processes, particularly with respect to companies' privacy practices and outcomes, given the highly sensitive nature of government requests for individual user data from companies.

Ultimately, the participants agreed that an important goal of the accountability mechanism would be to provide practical feedback and guidance to the companies on the most effective practices employed to protect the free expression and privacy rights of the companies' users in the face of threats from governments – instead of serving as an investigative effort focused on exposing missteps by the companies. All stakeholders that remained participants through the GNI's launch in 2008 agreed the process would not be a so-called 'gotcha' or 'name and shame' exercise.

Civil society and investor groups in the dialogue emphasized that a credible accountability process required tangible consequences for companies that did not achieve compliance with the standards over time. A determination of non-compliance can eventually lead to a company's removal from GNI and criticism from internal and external stakeholders at the company's failure to satisfy its obligations to its users as set out in the GNI Principles. Conversely, a determination of compliance with the GNI Principles would provide to the public, and in particular to a company's users, a strong sense that a company is making substantial and effective efforts to protect the free expression and privacy rights of its users.

Transparency is a central feature of the GNI multi-stakeholder framework, including in the following ways, among others: (a) standards that require company transparency with users when content is restricted or data is disclosed; (b) company transparency to the public with respect to law-enforcement demands or content-removal requests; or (c) transparency around public disclosure by GNI of findings based on independent evaluations of the companies. All participants agreed on the importance of assuring the public that company assessments are independent, expert, credible and focused on a meaningful examination of company policy, practice and the outcomes of company decisions. Another area of tension between the companies and other participants was the level of detailed reporting that would be made available to the public regarding the assessment results.

The most sensitive area from the companies' perspective continued to be privacy and the practices and outcomes with respect to government demands for user data. In 2009, Google issued the ICT industry's first-ever transparency report, detailing information about the number of government demands for user data and demands to remove content. Each of the GNI companies now also issues transparency reports – as do dozens of other ICT companies. While a tension remains among GNI participants on how the GNI assessments themselves are reported to the public, the transparency-reporting process spear-headed by Google is now becoming the industry norm.

The assessment process, as set out when the GNI launched in 2008, was divided into three phases:

- 1 *Capacity building*: In this phase, each founding company put in place internal policies and procedures necessary to implement the GNI Principles over a two-year period, reporting annually to the GNI on its progress.
- 2 *Independent process review*: In this second phase, the independent assessors reviewed each company's policies and procedures for implementing the GNI Principles. The GNI executive director, with input from the GNI Board, then issued a report on the findings of the assessors. Learning from the first and second phases, the company participants incorporated lessons in order to develop clear, achievable guidelines for the third phase of the assessment process.
- 3 *Independent process and case review*: The third phase involved an evaluation of specific cases and government demands that implicate freedom of expression or privacy and the effectiveness of the company's response in relation to the GNI Principles. The assessors prepared detailed evaluation reports based on their independent review, and the GNI Board determined that each of the founding GNI companies – Google, Microsoft and Yahoo! – was in compliance with the GNI Principles. This determination and the details behind this first complete cycle of GNI independent assessments were made public in a January 2014 report issued by the GNI.³²

5 The GNI's strategic review³³

In 2014, the GNI Board³⁴ undertook a strategic review of the initiative to evaluate progress and explore ways to enhance the GNI's effectiveness. The review came on the completion of the first full cycle of assessments of the three founding companies (Google, Microsoft and Yahoo!), the addition of three new member companies (Facebook, LinkedIn and Procera Networks), the intense global focus on surveillance issues prompted principally by the Edward Snowden revelations, and the increasing global threats to freedom of expression and privacy.

The strategic review focused on four themes:

- *Organizational capacity and fundraising*: The Board recognized, as a high priority, the need to grow the GNI's resources to give it more institutional capacity to pursue its many objectives, in particular in the policy, learning and communications areas. As one response, the Board developed a new policy³⁵ aimed at increasing and diversifying the GNI's funding sources, the vast majority of which comes from company contributions. Diversifying the funding base means soliciting private funding from individuals and foundations; there is also the possibility of receiving government funding under certain conditions.
- *Learning and policy*: The Board agreed to redouble GNI efforts as an organization committed to learning and policy advocacy, building on its prior success and focusing on advancing concrete public policy approaches where the collective strength of the GNI will be most effective.

- *Communications:* The Board agreed to a strategic communications plan focused on advancing the global adoption of the GNI Principles and influencing government policy around the world to create an environment in which ICT companies are able to successfully implement the GNI Principles.
- *Accountability and assessment:* In reviewing the accountability process, the Board agreed that the assessment process should be more efficient, effective and transparent and should also be a process that feeds learning among the GNI's stakeholders. The revised assessment process now combines process and case review into a single assessment that occurs every other year. Companies will also report publicly on the assessment.

To concretely reflect the strategic review recommendations agreed in 2014, the Board approved revisions in early 2015 to the Governance Charter and Accountability, Learning and Policy Framework.

6 The GNI moving forward

As the GNI approaches the end of 2015 – a decade since many of the current participant organizations began meeting in small groups to find ways to collectively address the challenging global issues of censorship and surveillance – it faces internal and external challenges. At the same time, and often for the same reasons, the GNI is presented with promising opportunities to make a meaningful and sustainable impact on responsible ICT company decision-making on free expression and privacy issues around the globe.

While an ongoing and even healthy tension exists across and sometimes between stakeholder groups inside the GNI, the collective trust built over nearly a decade of engagement on difficult legal, policy and human rights issues has helped the GNI make meaningful progress on encouraging, shaping and assessing responsible company decision-making for the member companies. One of the GNI's principal challenges continues to be attracting additional companies as members. While only six companies have joined the GNI as full members as of January 2016, the collective user base of these six is in the billions and their coverage spans the globe. Although the GNI has many international participants, each current full-member company is a US-headquartered business. The GNI's efforts in bringing onboard – in each case as official observers for a one-year period – Change.org in September 2015 and seven Industry Dialogue companies from Europe in February 2016 has helped diversify the GNI's membership. Nevertheless, in order to make its message of responsible company decision-making more global, regional and local, the GNI still needs to bring on board more companies, more types of ICT companies, earlier stage companies and more companies from outside the US.

The GNI, like other MSIs, must also develop a more secure, sustainable, diverse and robust funding base. While the companies themselves are likely to remain the principal financial contributors to the organization for the foreseeable future, the GNI's ability to influence company and government decisions on free expression and privacy depends on it building and sustaining the human, capital and organizational resources to staff and finance its core functions. In short, the GNI needs additional resources. It needs a larger staff – currently there is an executive director, a policy and communications

director and a graduate student intern – with more funds to attract and retain top talent in the field and to equip itself to shape company decision-making and government policy.

The GNI must also continue to explore ways to make independent evaluation of the companies both efficient and meaningful. The GNI must contain the costs associated with assessment and increase its value through a continued commitment to transparency and an emphasis on learning, teaching, sharing and advocating collectively on the issues that most deeply and directly impact the free expression and privacy rights of users online. The GNI must create a virtuous cycle where assessment feeds learning, innovation and problem-solving and provides a foundation for collective advocacy. Each of these areas must in turn inform the independent assessment process.

Notwithstanding the formidable global challenges to free expression and privacy, as well as the GNI's own current organizational constraints, the GNI has become a leading MSI by increasing awareness of the issues at stake and by promoting meaningful improvements to companies' practices on human rights issues globally. Companies in the ICT sector remain outside the GNI at their own, and their users', peril.

Notes

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