B-Tech Project Session on "Building Blocks for Tech Regulation"

Forum on Business and Human Rights, 20 November 2021

Summary note[1]

As regulatory efforts to require technology companies to respect human rights intensify worldwide, B-Tech is consulting on the idea of a tool to inform engagement with policy makers, with the aim to guide the legislative process and inform the design of tech regulation to foster rights-respecting regulatory frameworks.

The key objectives of the session were set out to 1) explore the regulatory landscape: approaches by States aiming at protecting human rights in the context of digital technologies and with regard to business conduct and 2) consult on the drafting of building blocks for regulatory options for States to incentivize the tech sector to fulfill their responsibility to respect human rights in line with the UN Guiding Principles on Business and Human Rights (UNGPs).

Anita Ramasastry, UN Working Group on Business and Human Rights, highlighted how the UNGPs can inform regulatory processes. As demonstrated through the work of the UN Special Procedures (the Working Group being one of the thematic Special Procedures), the impact of the deployment and use of new technologies on human rights is a key area of focus for the human rights mechanisms and the OHCHR. She emphasized the need to focus on Pillar 1 of the UNGPs and the obligations of States given the impact of digital transformation in the world. The perceived potential trade-offs between regulation and innovation require a strategic approach. Also the discourse between ethics and technology requires attention. The third strand to look at is the role that governments should play in their use of technology as end users, for example whether impact assessments should be conducted by states when they use technology, if there is a specific model of due diligence to be adopted that is sector specific and what meaningful rights holders consultation in deployment of technology look like. The challenge is that there are hidden human rights harms which transparency would help with. States could help rights holders understand better the reasoning behind a decision if they mandated transparency.

Diana Vlad Calcic, European Commission, presented insights about the thinking behind the drafting process of the European Union's Digital Services Act (DSA)[2], proposed by the European Commission and currently under discussion by the co-legislators, and how it was informed by the UNGPs. She stated that the main focus of the DSA was determining the right balance in regulating online platforms in general and intermediaries in particular. She agreed with the previous speaker about the existence of a perceived trade-off and the need for balance. The DSA attempts to set a regulatory foundation for responsible innovation. This required conducting a detailed impact assessment[3] by the European Commission ahead of the legal proposal, including as regards impacts on fundamental rights, to determine the types

[1] This is a summary note of a publicy recorded session, for further information watch the session here.
[2] The Digital Services Act: ensuring a safe and accountable online environment | European Commission (europa.eu)
[3] Digital Services Act – deepening the internal market and clarifying responsibilities for digital services (europa.eu)

of measures to recommend. The focus was to identify those human rights at stake. Subsequently, the perspective of proportionality was employed to determine the level of obligation of the actor contingent on their impact. In particular, very large online platforms are requested to conduct themselves risk assessments for how their services influence certain

societal risks, not least as regards negative effects on the most impacted human rights. She further elaborated on the importance of transparency and accountability in risk management and linked to it an enforcement mechanism which creates a single market space with the relevant mechanism and capability.

Owen Benett, Mozilla, provided perspectives on why the UNGPs were welcomed by the tech business. Mozilla as a company is unique and not extremely representative since they are both a Not-for-profit-company and a foundation. There are ten principles that the company uses on what the internet is and what the internet should be to direct the conduct of the company, with a focus on the human rights implications of their corporate behaviour[4]. The importance to business: In the digital transformation, the human rights concerns have been underappreciated in the past. Now there is progress in translating the Universal Declaration of Human Rights for the online sector. An important workstream is the application of the UNGPs into the work of the tech sector which was previously based on endpoints. The focus previously was not on the intermediaries or the background platforms and their obligations. Recently, the company realised that to consider those actors passive was untenable as their behaviour and interaction with the ecosystem of tech had impact. B-Tech has provided a framework to unpack these obligations. According to Owen, applying the UNGPs to the tech sector is a challenge and needs to meet a nuanced approach. Factors to be considered: 1. Risk of privatised enforcement unless it is monitored. This could engender more violations. 2. Risk management: there is a difference between risk management and human rights. Risk management is a techno-scientific concept unlike human rights which is legal in its nature. To ensure that their combination is complementary is essential. Also, the fact that the companies conducting the risk assessment may not be representative in their analysis is something to be conscious of. 3. Sub-threshold issue in the EU context: Addressing the risk to human rights and individuals are spoken about, yet many of the discussed issues do not meet the threshold of risk or illegality which are nonetheless significant. The B-Tech project and its aim to translate the UNGPs to the tech sector is crucial in this regard. Law makers in many jurisdictions are critical of technological deployment as the scale of innovations are becoming more predictable and this lends regulatory certainty specially in the EU. There is a threat from powerful multinational companies who push back against regulations. This highlights the need for multilateralism so that states can bulwark against regulatory arbitrage.

Abdul Z. Abdulrahim, Stears & University of Oxford, Deptarment of Computer Science, provided insight on the experience engaging with companies in the African and Sub-Saharan context. There was research done on how digital and human rights translate in the Nigerian context and the gaps that need to be covered. There was found to be a misalignment in implementing digital protection in Nigeria specifically since the incentive was driven by the desire to obtain funding by the World Bank rather than Human Rights protection. Hence, the threshold was low. The key manifestation was that a lot of violations come from governments.

[4] https://www.mozilla.org/en-US/about/manifesto/details/

This raises concerns for the private companies that the regulations are not implemented in the right manner. Example: Cyber Crimes Act- Most prosecutions are against journalists who speak against the governments. There were violations within the private sector as well- financial sector specially. There is a need of effective bodies to preserve the spirit of legislations while not dampening the drive of the tech sector.

Sebastian Smart, National Human Rights Institute (NHRI) of Chile, spoke of the efforts in Chile to implement the UNGPs. The state regulation in Chile attempts to strike a balance

between legislations or regulations to facilitate rather than undermine human rights while at the same time facilitating innovation. Examples provided: Chile is developing a second NAP which includes a focus on the digital environment and has better provisions for consultations. The criticism it has faced is regarding a limitation on the freedom of expression. Chile is going through a constitutional reform as well. The UNGPs provide a framework for addressing protection gaps in digital technologies that are in a constant state of evolution. States are incentivised to ensure policy coherence, capacity and ability to address human rights violations - NHRIs should add to this.

Imane Bello, Lawyer at the Paris Bar & Lecturer at Sciences Po, reflected on emerging case law in the implementation of the UNGPs and courses of actions. She highlighted three litigations trends: 1. Statements from businesses are challenged by NGOs in order to hold businesses accountable for their conduct. There is an increase in litigation in this regard. 2. Legal challenges have been issued to businesses to provide their background documents to demonstrate the means used to conduct their work. 3. Challenges by NGOs against impact assessments which did not embed technological risks in their human-rights assessments. Demonstration of the effective implementation of the UNGPs obligations in business practices and conduct is the key trend observed in human rights risk litigation today. She concluded stating that there is a movement where all human rights violations are taken into account when analysing technological impacts. Transparency is vital since it enhances accountability in a business relationship. Laws that encourage or mandate publication of internal documents aid both scrutiny and the business relationship in the end.

Giovanni De Gregorio, University of Oxford, Faculty of Law, underlined that the approach of Business and Human Rights is connected to state governance and constitutional rights. A fundamental aspect which makes the framework of Business and Human Rights effective in the framework of constitutional democracy is the openness of States to the framework of international law. There is an intersection between Business and Human Rights and constitutional rights. Platform governance is an example of such an intersection. This is applicable to other sectors as well. Since the regulation of the technology sector is not confined to national space alone, the internal dimensions of States are not the only considerations that have to be factored in. The focus should also be about how the private sector could implement safeguards. State actors or the addressees of international law would require an approach which would facilitate the constitutionalisation of international law.