



**B-Tech Session on “Mandating Responsible Business Conduct in the Technology Sector – Advancing the UNGPs in Regulatory Debates”
11th UN Forum on Business and Human Rights, 29 November 2022**

Summary Note

Over the past years, there has been an increasing focus on the interrelationship between human rights and technology. An increasing number of States are elaborating policy frameworks at the national and multilateral level regarding the development and use of digital technologies. In order to provide enhanced clarity on regulatory proposals regarding business conduct in the technology sector, the OHCHR B-Tech Project is developing a “UNGPs compass” tool that would allow policy makers and other stakeholders to assess whether regulatory or incentive-based initiatives directed at tech align with the UN Guiding Principles on Business and Human Rights (UNGPs).

The key objectives of this [session](#) were three-fold: 1) to discuss the human rights risks associated with the tech sector and how they are currently being addressed; 2) to discuss implications from existing tech and business & human rights regulation and identify lessons learnt; and 3) to present and discuss the proposed building blocks of a “UNGPs compass” guidance tool for policy makers.

Lene Wendland, Business and Human Rights, OHCHR, kicked off the session by providing an update on the B-Tech Project’s research cooperation with the University of Oxford’s Bonavero Institute for Human Rights to produce the “UNGPs compass”, a draft guidance document for policymakers to understand and embed the core elements of the UNGPs when engaging in regulatory and standard setting processes. Today, there are a number of regulatory proposals targeting technology company conduct that are in the drafting or more advanced stages. However, these proposals refer to very different standards when it comes to the expectations that businesses have to meet. Her contribution emphasized that we do not have to re-invent the wheel for the tech sector, but rather make the existing standards, in particular human rights standards, applicable and relevant in their role as global standards. To that end, the “UNGPs compass” aims to provide practical human rights and technology-specific guidance to policymakers and lawmakers and help them deliver greater value to affected stakeholders. To achieve these goals, the “UNGPs compass” builds on four elements: 1) *Scoping and identification of objective*: scoping and identifying the “problem” in the technology sector concerning human rights before policymakers and lawmakers undertake to adopt regulatory measures; 2) *Regulatory gap analysis*: analysing the regulatory gap before considering further regulatory measures on technology company conduct; 3) *Identification of avenues for regulation*: depending

on the findings in steps 1 and 2, identifying the avenues for regulation, including voluntary measures available; and 4) *Monitoring and assessment*: designing good and responsive regulations that include stakeholder engagement and consultation, information gathering, impact assessments, revision and built-in trials.

Lisa Ko-En Hsin, University of Oxford, shared the empirical evidence gathered in cooperation with OHCHR B-Tech that informed the draft “UNGP’s compass” document. First, she highlighted that it is important to understand that technology is infrastructure and widely embedded in our society. Every company is now a tech company since everyone uses tech, even if they don’t produce it. This means the net is cast wide and the scope of the definition of “tech company” is potentially limitless. The second empirical starting point is that regulation requires harnessing technology for information. An ‘information asymmetry’ currently exists, where tech companies gather enormous amounts of data about citizens, policymakers, and societies, while most people have no access to such data. Therefore, without state mandated regulation, there will never be any evidence, which makes it very difficult to make evidence-based policy. Third, a carefully considered balance should be struck before enacting further measures to regulate technology – we need to consider both the usefulness of existing law and start to identify the areas of conflict between existing legal concepts and the reality of today. Her contribution concluded by highlighting the need to move away from the ‘product and service’ approach to conceptualising tech towards measures that address the reality of the impact and control of tech on society. The UNGP’s require states to deploy a ‘smart mix’ strategy and new regulation is just one option of many in a toolbox of regulatory techniques along with a rethinking of existing law. Approaches to tech regulation must be iterative, enabling, and penetrating; they must be responsive to people, place, and circumstances, and move tech companies to re-examine their own policies and approaches.

Diana Vlad-Calcić, European Commission, presented key regulatory developments in the European Union (EU), with an emphasis on the new Digital Services Act (DSA). The DSA, which became applicable in the EU from 16 November 2022, has two major objectives: 1) to create a safe digital space in which the fundamental rights of all users of digital services are protected; and 2) to establish a level playing field to foster innovation, growth, and competitiveness, both within the internal European market and the global market. The DSA aims to place fundamental rights at the core by establishing obligations around due diligence, such as requiring certain companies to conduct supervised risk assessments to identify which fundamental rights are being threatened, and embedding international human rights principles into content moderation. Other provisions in the DSA seek to enhance transparency, regulate advertising systems, preserve the core principles of intermediate liability, and ensure company responses to risks are proportionate and effective. The DSA was developed with the participation of various stakeholders, including civil society organizations, trade unions, industry, and regulators. Her

contribution highlighted that from proposal to adoption, the intention was to have a protective approach to technology regulation from states. Therefore, the DSA builds in independent supervision of the application of DSA rules to ensure accountability.

Ncumisa Willie, MTN, spoke on the efforts of MTN – one of the largest mobile network operators in Africa – to implement human rights processes and the ways in which regulation can impact company behaviour. One of the key lessons learnt for MTN is that Human Rights Due Diligence (HRDD) is not a “one size fits all” and should be tailored to fit each market. HRDD is about identifying and mitigating risks to people while taking into account the nature and context in which the business operates. Her contribution emphasised that while regulation is a good first step to getting companies to invest in human rights processes, companies need to go beyond regulation to embedding a culture of human rights. Regulation can be helpful by providing legal certainty and clear guidelines of expectations for business. However, issues arise when there is a conflict of laws, such as where the national regulations operate against international human rights laws. Furthermore, MTN operates in various markets across Africa and each market has different regulatory and policy frameworks. Thus, there is a need for harmonization of legislative instruments. For MTN, the UNGPs set a principled approach that can be applied regardless of the market or local context in which they operate. They provide MTN with the ability to continuously scan their engagement with human rights in order to proactively deal with potential and actual human rights risks. In this way, the UNGPs assist the company to move beyond legal compliance to address impact in a meaningful way.

Gayatri Khandhadai, Business and Human Rights Resource Centre, reflected on the State duty to protect human rights, which includes developing, updating, and enforcing laws that ensure tech companies respect human rights. She noted that as a first step, broad labour and corporate governance legislation, as well as jurisprudence, must be extended and fully applied to the tech sector. Intermediary liability laws and other ICT regulation aimed at addressing specificities of the tech industry, especially in the global south, has often been reactive and protectionist. This needs to shift to a holistic approach that is rooted in rights and with the aim of protecting people, and not the power of states. Furthermore, these laws need to be brought in line with the UNGPs to ensure there is policy coherence among the different pieces of regulation. Tech regulation must also be future ready, given the evolving nature of this industry, while remaining clear, precise and predictable. Beyond providing a list of forbidden acts and consequences for non-compliance, regulating the tech industry needs strong human rights and environmental due diligence requirements across the full value chain, especially on downstream and end-use. Gayarati concluded that the process of developing, reviewing, monitoring and enforcing these regulations must be inclusive with adequate stakeholder engagement throughout, including consultations with human rights defenders, digital rights experts, affected communities, and groups in situation of vulnerability.

Clara Iglesias Keller, WZB Berlin Social Sciences Center and member of the Federal Brazilian Legal Commission for the Regulation of AI , provided perspectives on the ongoing processes of Artificial Intelligence (AI) regulation in Brazil. She highlighted the body of literature dedicated to the specific challenges that technologies impose on regulators. Some of these elements include: 1) the requirement that policies do not curtail innovation; 2) uncertainty of the risks posed by new technology and the difficulty of timely regulation once tech is absorbed into social life; and 3) having the necessary expertise in the technology that is being regulated. Her contribution highlighted that these challenges have contributed to the decentralising of regulation away from the state and into the capacities of private businesses. Notably, Brazil’s draft AI bill – which is not yet finalized – is oriented towards codes of conduct and market self-regulation. Thus, it appears that the draft bill also reflects this “decentered” regulation mindset. Her contribution demonstrated that there are particularities in this moment that may be contributing to the AI debate surrounding Brazil’s regulatory efforts, including the severe public scrutiny of the untamed political and economic power of companies, the European shift from liability to responsibility, and the eagerness of companies to de-regulate. That said, the change of government in Brazil might impact how the proposed AI regulation unfolds.

[A recording of the session is available here](#) (at 6h40 min)