Building Blocks for Tech Regulation –
Limitations and Advantages of a Business & Human Rights Approach

On 21 October 2022, the UN Human Rights B-Tech Project and the University of Oxford's Bonavero Institute for Human Rights organized an expert consultation to explore the issue of technology and human rights governance, including a discussion on the implications of existing technology and business and human rights regulations and building blocks that can be used to inform future policy options and instruments. In addition to identifying lessons learned from existing tech regulation, this expert consultation aimed to discuss the proposed building blocks of a "UNGPs compass".

The B-Tech Project seeks to develop a guidance tool, conceptualized as a "UNGPs compass", that would allow policy-makers and other stakeholders to assess whether regulatory or incentive-based initiatives directed at technology company conduct align with the UN Guiding Principles on Business and Human Rights (UNGPs). The aim of "UNGPs compass" will be to offer a set of core elements and a roadmap that can serve as the analytical grid for developing and implementing regulation relevant to tech/tech companies' operations, products, and services. The key messages and features of the "UNGPs compass" will aim to foster a Business & Human Rights angle in tech and advocate for it.

An increasing number of States are elaborating policy frameworks at the national and multilateral level regarding the development and use of digital technologies such as those based on Big Data, Machine Learning and Artificial Intelligence (AI). Other regulatory developments, such as those related to Mandatory Human Rights Due Diligence requirements for companies, may also have implications for how technology companies design, develop, and sell products and services. Against the backdrop of these developments, the experts on the panel sought to explore the following questions:

- What are key issues to consider when undertaking Human Rights Due Diligence in relation to technology?
- How do existing regulations address human rights risks arising from the design, development, sale, and use of technology products and services?
- What are the building blocks for developing and implementing rights-respecting technology regulations that align with the UNGPs?

Human Rights Due Diligence in Relation to Technology

The technology sector raises many new Human Rights Due Diligence (HRDD) challenges. Speakers noted that the tech industry is central to structuring and constituting good HRDD practices, which includes engaging in HRDD continually from conceptualization to development to envisaging the end-use of technology products and services. Ashley Nancy Reynolds (International Committee of the Red Cross) emphasized that human rights impact assessments must be contextual, and special attention must be paid by technology companies operating out of or providing products and services in conflict-affected areas. Technology companies should not seek to only comply with the law when conducting HRDD but go beyond the law when regulatory systems are slow to catch up to tech innovation.

Dr. Steve New (University of Oxford) and Dr. Irene Pietropaoli (British Institute of International Comparative Law) both presented insights on the rapidly changing business environment for technology. The categorization of a company as a "tech company" is increasingly nebulous and business models in the sector are complex and opaque, both of which raise new issues. Cloud computing, for example, can encompass a hidden supply chain of entities providing services and collecting data. Consumers are often unaware of what information is being collected, who is collecting the information, and how the information is being used. Moreover, the complexity of the business model and value chain make it difficult to distinguish the buyers from the suppliers.

These challenges are further complicated in the context of public-private partnerships. Professor Roger Brownsword (King's College London) reflected on the use of technology in the course of governance. He noted that governments are not only using new technology, but they are employing it as part of their options to chose from the regularly repertoire, but also companies themselves are using technology to detect non-compliance with laws e.g. in the area of Intellectual Property. In these circumstances, the question becomes less about the effectiveness of regulation and more about the legitimacy of government actions. Public-private partnerships can lead to competing interests, in which case the "smart mix" of measures will lack legitimacy. The goal of good governance is a key consideration when evaluating government use of technology, and protection of human rights is the gold standard in achieving that goal.

Existing Technology and Business and Human Rights Regulation

Dr. Halefom Abraha (University of Oxford) presented his reflections on the increasing appetite for tech regulation. There is a growing consensus about the need for specific, new regulatory

developments in relation to the tech sector and many policymakers recognize that self-regulation has outlived its usefulness. Existing laws are inadequate to address the human rights issues raised by new technology. For example, gig economy companies have revealed design flaws in existing laws that govern employment relationships and protect workers' rights. Technology has introduced new ways of working that have diminished the effectiveness of labour rights, including the ability to organize, and further increased the asymmetry of power between employers and employees. Some of the most sophisticated automated monitoring and decision-making technologies deployed in the workplace are often provided and controlled by third-party suppliers, which are operating in a regulatory vacuum where labour laws do not apply.

Other speakers, Diana Vlad Calcic (European Commission), Kathryn Doyle (Global Partners Digital), and Elonnai Hickok (Global Network Initiative), provided insights on existing and proposed laws, regulations, and policies dealing with technology. These include: the EU Digital Services Act, which will require platforms to conduct supervised risk assessments; the EU Artificial Intelligence Act, which among other things, will provide methods for identifying and mitigating risks for high-risk AI systems; the US Algorithmic Accountability Act, which will require companies to conduct impact assessments for augmented critical decision-making processes; and Canada's algorithmic risk assessment tool for AI used in the public sector.

Despite the growing list of tech regulations, the speakers noted that it remains yet to be determined how the due diligence obligations under the EU Digital Services Act will be implemented across and within member states. Furthermore, details regarding the risk assessment requirements in the other aforementioned regulations remain unclear including, among other things, how the risk assessments will be carried out, who will carry them out, and what the scope will contain. In light of the scattered and fragmented landscape of tech regulation around the world, speakers highlighted the need **to ensure that international human rights standards are the running theme** through all of them. Tech companies should recognize and comply with existing human rights standards, as well as adapt the UNGPs to achieve harmony as they operate in multiple jurisdictions. The UNGPs can operate as a common thread for companies across borders to provide some level legal certainty while also leaving room for companies to prioritize saliency of human rights issues in line with their business models and local contexts.

Building Blocks for Future Regulation

The lessons learned from both fields of existing mandatory human rights due diligence regulation as well as various approaches to tech company regulation can be used as building blocks for

developing and implementing future rights-respecting regulations aimed at technology company conduct that align with the UNGPs. Dr. Joris van Hoboken (University of Amsterdam) provided insight on the difference between rights-based and risk-based approaches to business and human rights. Rights-based approaches focus on rule of law, fundamental rights, and access to justice. Risk-based approaches tend to be connected to the risk to business and looks at the tech reality of operations and statistical systems. The challenge is to keep these approaches connected instead of seeing them as conflicting.

Dr. Sebastian Smart (Universidad Austral de Chile) added that the question now is less about whether to regulate technologies, and more about how to regulate them – specifically how to differentiate good regulation from bad regulation. What may seem like good regulation at a global scale, may lead to poor consequences locally. Furthermore, States need to set an example when they are deploying digital technology. States can do this by conducting timely HRDD and by incorporating timely, meaningful and transparent multi-stakeholder consultations. Procedure matters greatly, as States should look at processes previously developed and think about process formation, including considerations about the importance of the tech sector, the scale of human rights risks, and the complexities and diversity of potential impacts. States should not only think about human rights impacts on individuals and groups, but on society as a whole. This knowledge in turn can inform regulatory developments.

Asha Allen (Centre for Democracy & Technology Europe) and Isedua Oribhabor (AccessNow) offered insights on specific issues to consider when using the UNGPs to inform future tech regulation. Ms. Obharibor noted that "one size [of regulation] does not fit all" and that both the size and dominance of a company can play factors in the company's level of impact. For example, large internet service providers and platforms carry the power to disconnect and de-platform individuals and societies, while small players, like digital spyware companies, can also have great impact through products and services they provide. Furthermore, value chain assessments can look different for different technology companies and in some cases, assessments will need to take into account not only users but bystanders as well. Necessity and proportionality of technology use are also important considerations, as some technologies are used far beyond their initial design. Finally, companies must go beyond checking off procedural boxes and pay attention to the substance of what the assessments reveal, including the revelation that some kinds of technologies simply cannot be brought in line with human rights.