



## UN Human Rights Business and Human Rights in Technology Project (B-Tech)

Applying the *UN Guiding Principles on Business and Human Rights* to digital technologies

### Draft Scoping Paper for Consultation

30 July 2019

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During **May and June 2019**, UN Human Rights consulted informally with a range of actors from civil society, business, States, and other experts about the scope of its forthcoming project on Business and Human Rights in Technology (hereinafter “the B-Tech Project”). The proposed focus areas for the B-Tech Project set out in this paper reflect these internal and external discussions and consultations. **UN Human Rights is inviting written submissions from all stakeholders on the proposed focus areas by 2 September 2019.**

## I. Introduction

The past decade has seen many examples of the positive social, economic and political impact of the internet, social media, mobile technologies, automation, artificial intelligence and other new digital technologies. These positive impacts include empowering civil and human rights activism, healthcare breakthroughs, making transport and logistics more environmentally sustainable, to name but a few. But more recently, the shadow sides of these very same innovations have come sharply into focus, including infringements on privacy, contributing to exacerbating ethnic conflict and dissemination of hate speech, undermining democratic processes, enhancing state surveillance, putting children at risk, facilitating live-streaming of abhorrent acts like the Christchurch terrorist attack, online violence against women and LGBTI persons and others, and “algorithmic discrimination” (whether in the job market, the criminal justice system or in access to public services).

These challenges are increasingly seen through the lens of human rights risks, not just ethical dilemmas. The lens has widened to bring into view issues related to corporate responsibility and accountability and associated questions of governance and public policy.

Understandable public concern has led to calls on both policy makers and tech companies to take effective action to prevent and address harm, resulting in a broad range of regulatory and policy initiatives. However, as such demands for regulation and other interventions in the digital space grow, public and private responses risk being ad hoc, fragmented and not aligned with international standards.

It is in this context that UN Human Rights is launching the Business and Human Rights in Technology Project (hereinafter “the B-Tech Project”). **The B-Tech Project will contribute to addressing the urgent need voiced by companies, civil society and policy makers to find principled and pragmatic ways to prevent and address human rights harms connected with the development of digital technologies and their use by corporate, government and non-governmental actors, including individual users.**

The *UN Guiding Principles on Business and Human Rights (UNGPs)* provide a comprehensive and authoritative framework that can inform efforts by a range of actors, including governments and companies, to identify, prevent, mitigate and remedy human rights harm related to digital technologies.

The central role of the UNGPs and the need for guidance on their application in the context of digital technologies were recognized in the report by the UN Secretary-General’s High Level Panel Report on Digital Cooperation<sup>1</sup>:

“The roles of government and business are described in the 2011 UN Guiding Principles on Business and Human Rights. Though not binding, they were unanimously endorsed by the Human Rights Council and the UN General Assembly. They affirm that while states have the duty to protect rights and provide remedies, businesses also have a responsibility to respect human rights, evaluate risk and assess the human rights impact of their actions. *There is now a critical need for clearer guidance about what should be expected on human rights from private companies as they develop and deploy digital technologies.*” (emphasis added)

The premise of the B-Tech Project is that using the lens of all three pillars – Protect, Respect, Remedy - of the UNGPs can help clarify the respective roles and responsibilities of States and the private sector in relation to specific issues, as well as offering road maps to:

- Guide what responsible business conduct looks like in practice regarding the development, application, sale and use of digital technologies;

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<sup>1</sup> <https://digitalcooperation.org/wp-content/uploads/2019/06/DigitalCooperation-report-web-FINAL-1.pdf> , p. 24

- Guide policy makers in applying a smart mix of regulation, incentives and public policy tools - providing human rights safeguards and accountability without hampering the potential of digital technologies to address social, ecological and other challenges; and
- Develop workable models for remedy and accountability when harm has occurred.

A further value-add of the UNGPs is that business respect for human rights is interwoven with the realization of the SDGs. On the one hand, preventing negative human rights impacts of digital technology will regularly involve companies taking actions that contribute to the SDGs. On the other hand, building trust and a strong social license for new technologies is important to realize the potential of technology to aid in the realization of the SDGs.

Given the scale of human rights-related challenges that are associated with digital technologies, no single project or process can meaningfully aim to address them all. **Prioritization** of the issues to the B-Tech Project, based on input from experts and all stakeholders - is therefore necessary to limit the scope of the Project to a manageable size that also corresponds to available resources and capacity of UN Human Rights.<sup>2</sup>

**This paper sets out the proposed scope of the B-Tech Project.** More specifically, it proposes to organize the work of the project around four inter-related and complementary priority themes for efficiency, clarity of purpose and convenience.

**The initial projections for the life-span of the Project is that it will run until the end of 2021.** Beyond that point, we will evaluate the need for further work by UN Human Rights in this area, especially considering the evolving nature of the human rights-related issues and challenges arising from new technologies, and subject to available resources.

## II. What will the Project deliver?

Through an **inclusive process of consultation and research**, and building upon existing initiatives, emerging good practice and expertise, the B-Tech Project will aim to enhance the understanding of the UNGPs in the context of new technologies and to work with relevant stakeholders to develop relevant conceptual and practical information, guidance and recommendations for business and States on approaches to prevent and address human rights risks related to the application and governance of digital technologies in line with the UNGPs.

**The Project's process will be dynamic**, with outputs made available on an ongoing basis during the lifespan of the Project. The different deliverables will mostly be short and action-oriented, with a focus on policy as well as practical applications, and be applicable across different technologies and companies. The Project consultations, research and outputs will incorporate a focus on specific, real-world practices, issues and incidents. Yet, the overall objective is to provide broadly applicable roadmaps and principled guidance that can inform responses to a range of challenges and dilemmas across different technology companies and rights.

The Project outputs will include:

- A series of short authoritative “**foundational papers**” setting out the relevance and practical implications of key UNGPs concepts to frame the work on the project's strategic focus areas (as set out in Section V below);
- **Guidance materials focused on the project's strategic focus areas** that can include case studies, insights and policy/practice recommendations about specific issues. We are particularly interested to explore examples where:
  - The human rights risks associated with a particular technology and its application are severe (judged by their scale, scope and irremediable character);
  - Good practice is emerging where a UN Human Rights-led process can add value/elevate broad stakeholder support and understanding.

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<sup>2</sup> UN Human Rights is currently engaged in fundraising to support the implementation of the B-Tech Project.

UN Human Rights recognizes that different stakeholders will have different levels of interest in each focus area set out below. While the B-Tech Project will involve all relevant stakeholders (notably States, business, civil society, national human rights institutions, academics and other experts) **the target audience and format of deliverables will vary** according to the specific work streams undertaken under the different focus areas.

### III. Why UN Human Rights?

UN Human Rights can play a unique role in **initiating, hosting and stewarding the development of pragmatic approaches**. We bring to this project:

- A neutral platform based on universally-recognized values and principles to convene leaders and decision-makers from across business, civil society, and government, *as well as* to engage the expertise and interests of diverse groups in a non-competitive space;
- An authoritative voice on the interpretation of international human rights standards, including the UNGPs;
- A demonstrated commitment to find principled, yet pragmatic solutions to complex societal and legal challenges in the business and human rights space that start, and end, with a commitment to international human rights norms; and
- Strong connections to the technology industry by virtue of frequent, constructive interaction with major tech companies.

### IV. How will the project work?

In implementing the Project we will engage with partners such as universities, civil society organisations, national human rights institutions, multi-stakeholder initiatives and other experts in **conducting research**. We will **convene multi-stakeholder consultations** (including alongside major events/forums such as RightsCon, the UN Annual Forum on Business and Human Rights and the Internet Governance Forum) **and stakeholder-specific sessions** such as business-oriented workshops focused on real-life scenarios with which leading companies are currently dealing, and meetings involving only civil society and/or affected stakeholders. We will also seek to use existing inter-governmental / UN meetings to provide, test and refine policy recommendations.

UN Human Rights recognizes and welcomes the recent growth of initiatives and research about the societal impacts of digital technologies. The Project will build upon, and not duplicate this work. The intent is to draw on available knowledge and expertise from all relevant actors and initiatives as we seek to explore the specific value-added of the UNGPs to policy and practice.

UN Human Rights has created a dedicated **online Portal<sup>3</sup> for outputs of the B-Tech Project to aid transparency and to communicate about engagement opportunity**. This Portal will also sign-post to complementary initiatives and guidance addressing the application of rights-based approaches in the context of digital technologies.

### V. What are the proposed focus areas for the Project?

This section proposes **four *inter-related* focus areas** for the B-Tech Project. In identifying these areas, UN Human Rights have considered where a UN-led multi-stakeholder process can support alignment of UNGPs interpretation and approaches in relation to strategic issues/questions that seem to be recurring regardless of the specific technological application, and where the practical guidance and insights developed by the Project can add substantial value, including by leveraging other efforts.

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<sup>3</sup> <https://www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx>

Furthermore, the focus areas below span **all three pillars** of the UN Guiding Principles on Business and Human Rights (UNGPs). This is critical given the central role that State interests play in creating the context for the development of digital technologies – whether as end-users of technologies, as regulators, or when incentivizing investment and commercial innovation.

### ***Focus Area 1: Addressing Human Rights Risks in Business Models***

A central premise of the UNGPs is that companies should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The focus is on the way companies may harm people, not what they do on the non-commercial periphery to contribute to societal good (e.g. via philanthropy).

The UNGPs state that a company’s commitment to respect human rights should “be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.” The idea is that respect for human rights becomes part of the DNA of doing business. This means embedding responsibility for human rights due diligence, i.e. the identification, assessment, response, tracking and communication of risks to people, within relevant business processes and functions such as human resources, procurement, marketing, operations, and community engagement.

Effectively embedding the responsibility to respect human rights extends to addressing risks to people that arise as a consequence of the very essence of how companies generate revenue, compete and increase their attractiveness to investors. In the context of digital technologies this means assessing and addressing the risks of business models that involve for example:

- Gathering large volumes of personal data (whether to train algorithms or sell insights to third parties);
- Selling products to governments seeking to use new technologies for State functions that could disproportionately put vulnerable populations at risks;
- The promise of hyper-personalization in human resources or marketing decision which could lead to discrimination;
- Using “algorithmic bosses” to mediate the relationship between workers and firms that generate business value from the offline work being done, while limiting labour protections for those workers.
- Providing a technology which allows vast numbers of small and medium enterprises, or individuals to conduct activities that may result in harm to people, but where control over their activities might be limited; and
- Models that are informed by, or inform, the personal choices and behaviours of populations without their knowledge and consent.

When it comes to a company’s commitment to respect human rights, it may be the case that competitive pressures – including from investors seeking high returns or signals of future earning potential – disincentivize human rights scrutiny on core business models, i.e. there is an increased chance that risks to people will be treated as secondary to business risks/opportunities. But not addressing the human rights risk of these fundamental business model paradigms can lead to respect for human rights being a marginal activity. And over time – as societal and regulatory pressure focuses on the essence of how the technology industry does business – those companies that have mitigated human right impacts will benefit from fewer social license, operational, reputational and legal risks.

Key questions to explore through this workstream include:

- *To what extent are the business models’ underlying technological development and sales generating human rights risks? What are some examples of this phenomenon?*
- *What should human rights due diligence in relation to business models and competitive strategies look like in practice?*
- *What are the implication for thinking about what good practice looks like when business models are designed around a technological innovation, not vice-versa?*
- *How do we navigate situations where some sections of the population gain from business models that provide them access to technological benefit, while others are put at risk by those same business models?*

As UN Human Rights designs and implements the specific objectives and work plan for this focus areas it is likely that a key focus will be on how to engage senior business leaders (including CEOs, the board and founders), investors and regulators in consultations and the development of deliverables.

## ***Focus Area 2: Human Rights Due Diligence and End-Use***

According to the UNGPs, companies should undertake human rights due diligence across its activities and business relationships to identify, prevent, mitigate and account for how they address the actual and potential adverse human rights impacts. The human rights due diligence requirement extends to a company's *products and services*, and not focus just to its sites, factories, supply chains, or corporate offices.

This is highly relevant when considering the impacts of digital technologies, as it is mostly in their *use* that human rights harms will manifest. Customers might misuse a product to commit human rights abuses (consider, for example, an employer using social networking tools to surveil and intimidate employees, or a state using technology for extra-judicial surveillance). Customers, including states, might also use a product as intended but unintentionally discriminate against customers or citizens simply because the underlying dataset is biased. In some instances, activities that cause severe adverse human rights impacts might be perpetrated by users who may have no formal commercial transaction with the company (consider online hate speech, or the use of bots or deepfakes to disrupt political processes). The deployment of privately-developed technological solutions by the State to support the delivery of public services and goods, such as in the areas of law enforcement, criminal sentencing, smart cities, access to health, allocation of funding in the public education system, intelligence gathering, and defense, may also increase the risk that vulnerable populations (for example due to ethnicity, gender, sexual orientation, economic status, religion and political opinion) are further marginalized.

Regardless of the scenario, technology companies will have to do a number of things to effectively meet their responsibility to respect human rights. As the UNGPs note, “[h]uman rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.” But this cannot be a one-off exercise. The UNGPs go on to say that human rights due diligence “[s]hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.” This all has clear implications for the conceptualization, design and testing phases of new products – as well as the underlying datasets and algorithms that support them. They should all be subject to proactive human rights due diligence.

Another key element of implementing human rights due diligence is the integration of rights-holder perspectives and experiences into the process. If new digital technologies are to fulfill their potential while mitigating accompanying risks, it is essential that companies meaningfully engage civil society, rights-holders, and vulnerable populations in their due diligence.

In order to prevent and mitigate adverse human rights impacts related to end-use of their products or services, companies should take appropriate action, which includes, among other things, establishing and exercising leverage over those individuals and entities that cause or contribute to the harm. This might be done in a number of ways including: within the bilateral relationships with a customer; by setting norms and expectation of behaviors for users; through establishing industry standards and good practices; or by engaging constructively with regulatory and public policy efforts to prevent harm.

Key questions to explore through this workstream include:

- *How can companies understand the potential and actual impacts of their products early and on an ongoing basis?*
- *How can companies engage external experts and affected stakeholders?*
- *How can companies developing and selling technologies establish and exercise leverage to prevent and mitigate harm associated with the use of their products?*

- *How can technology companies reflect – in their own human rights due diligence – the critical importance of responsible use of their products and services to their contribution to sustainable development?*
- *To what extent can insights from other sectors (such as pharmaceuticals/drug safety, mobile medical equipment, agricultural products, finance and logistics/shipping) about the corporate responsibility to respect vis-a-vis the impacts of products and services be applied to the tech sector?*
- *How can companies individually or collectively exercise leverage to seek to prevent and mitigate the harms that may arise through States using technologies in ways that violate human rights?*
- *What are the implications for the human rights due diligence process of the particular structure of digital technology value chains, taking into account that: a) It can often be end-users beyond the technology sector that are (in the language of the UNGPs) causing adverse human rights impacts; and b) Small and Medium technology companies might bring to market a specific technological application, piece of code or number of users that have impacts on people that are disproportional to the number of employees in their organization?*
- *What does responsible transparency and effective communication about potential and actual harms related to end-use look like in practice?*
- *What can we learn from the existing models – such as the Global Network Initiative – about good practice when it comes to multi-stakeholder and multi-lateral standard setting to address challenges arising from risk to human rights arising from State use of technologies?*

### ***Focus Area 3: Accountability and Remedy***

The UNGPs are divided into three complementary “pillars”, the third of which being concerned with the duties of States and the responsibilities of business enterprises to ensure that there is access to effective remedy in cases of business-related human rights harms. Pillar III of the UNGPs describes how, although effective judicial mechanisms (i.e. courts) are “at the core of ensuring access to remedy”, other kinds of State-based mechanisms, such as administrative, legislative and other non-judicial mechanisms “play an essential role in complementing and supplementing judicial mechanisms” and in filling potential “gaps” in the provision of remedy. Moreover, the UNGPs recognize that such State institutions “should form the foundation of a wider system of remedy”, within which non-State-based mechanisms (such as operational-level grievance mechanisms and collaborative initiatives) can play an important role.

The UNGPs also state that where business enterprises identify that they have caused or contributed to adverse impacts, they should “provide for or cooperate in their remediation through legitimate processes”. This can involve a number of approaches depending on the prevailing legal and operational context, including cooperation with State-based processes and mechanisms (including law enforcement agencies and courts) and providing private remediation through company-based mechanisms. Where an enterprise has not caused or contributed to adverse impacts, but such impacts are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require the enterprise itself to provide for remediation, though it may take a role in doing so.

Delivering on access to remedy – regardless of the mechanism - can be challenging no matter the industry or operating context. When it comes to the development and use of digital technologies, certain seemingly unique issues will need to be addressed such as guaranteeing remedy when abuses result from decisions made by machines and algorithms, rather than humans; providing effective operational-level grievance mechanisms when there may be hundreds or millions of adversely affected rights-holders; and safeguarding access to remedy when dozens of companies, rather than a single corporate actor, are linked to a human rights abuse via the interaction of different technology products and services.

Key questions to explore through this workstream include:

- *To what extent are technology companies presently making use of company-based grievance mechanisms to resolve instances in which they are alleged to have caused or contributed to human rights abuses of individuals, or where adverse impacts are alleged to be directly linked to their operations, products or services by a business relationships? What challenges have been encountered thus far and how have they been addressed in practice? How may technology companies play a role in enabling access to remedy in situations where they are only directly linked to a harm? If so, what might enabling remedy look like in practice?*

- *What is the interplay between mechanisms created to enable users to flag harmful content or practices through technologies (for example discriminatory content targeted at identified groups), and mechanisms created to provide remedy for individual victims who have suffered harm as a result of such content or practices?*
- *If necessary, how can companies prioritize among hundreds of thousands, or even multiple millions, of potentially impacted individuals and human rights issues if they are to establish genuinely effective remedy mechanisms? In a given geography, might different actors that make up the technology sector (e.g. ISPs, Telcos, social media platforms, researchers) need to establish some form of joint grievance mechanism, and collaboration on remedy?*
- *Do conflicting regulatory requirements in different jurisdiction pose problems for accountability and remedy pursued through company-level grievance mechanisms? If so, how can these be resolved?*
- *What are the responsibilities of corporate providers of digital technologies regarding the provision of effective remedies in cases of misuse of their products or services by individual users – versus public or private entities? What bearing does the guidance in the UNGPs have on the analysis by companies of their responsibilities for remediation? What is the role of State regulation in supporting remedial efforts by technology companies? What can we learn from recent developments such as the EU General Data Protection Regulation’s “right to explanation” for machine-based decision-making?*

#### ***Focus Area 4: “A Smart Mix of Measures”: Exploring regulatory and policy responses to human rights challenges linked to digital technologies***

There is growing recognition of the need for governments to develop regulatory responses to the societal risks associated with digital technologies. For example, an increasing number of States (including local governments in the United States) are elaborating their own policy frameworks regarding the development and use of artificial intelligence. While these are promising developments in many ways, the likelihood that such developments will be driven by individual State interests and priorities creates the risk of overlapping and possibly conflicting regulatory requirements for business and other actors to navigate.

From a human rights perspective, ensuring alignment between regulation of digital companies and State’s human rights obligations, and ensuring that human rights are appropriately reflected in regulatory regimes will be key. However, recent research raises questions as to whether human rights considerations are properly taken into account and reflected in new regimes, with some indicating that very few national strategies explicitly address human rights or prioritize the safety of AI systems.

The UNGPs call on States to consider a “smart mix of measures” – national and international, mandatory and voluntary – to foster business respect for human rights. The Project will explore what that “smart mix” can look like in the context of digital technologies, and particularly what the UNGPs can add to the formulation of regulatory solutions. This includes the proposition that the *Corporate Responsibility to Respect Human Rights* should be the touchstone for national and regional standard-setting regarding the conduct of companies developing and using digital technologies. The UNGPs also call on States to use various levers at their disposal to promote and incentivize responsible conduct by firms, including export credit, investment guarantees, public procurement, and trade facilitation. The Project will explore what regulatory and policy implications this might have in the area of digital technologies.

Key questions to explore through this workstream include:

- *To what extent do regulatory regimes presently address the risk of human rights harms associated with the design or use of digital technologies?*
- *What issues do legislators need to be aware of when designing regulatory regimes? How might these regimes interconnect with other regimes relevant to business respect for human rights (e.g. privacy, data protection, freedom of expression etc.)? What tensions exist between different human rights (and how are these resolved in practice)?*
- *How can States incentivize greater respect for human rights by digital companies (e.g. export credit, investment guarantees, public procurement, and trade facilitation)?*



- *What is the relevance of human rights due diligence in regulatory regimes relating to digital companies? How might human rights due diligence (as defined in the UNGPs) be better promoted and incentivized within the context of regulatory regimes?*
- *What cross-border and multi-lateral arrangements are needed to make law enforcement (including through private law actions) more effective? Is there potential for new multi-lateral initiatives for effective prevention and remediation of human rights abuses connected with the design, provision and use of digital technologies? If so, what models should be looked to for inspiration (e.g. OECD's Going Digital Project)?*

## **VI. Key Questions for Consultation**

### **Key Points for Discussion**

UN Human Rights seeks feedback from stakeholders and practitioners on the following points in particular:

- Do you agree with the proposed focus areas set out in section V of this paper? Are these the areas around which the application of the UNGPs require more clarity and urgent attention? Are there challenges or issues not addressed in the paper that should be included?
- For each of the four focus areas set out in section V:
  - What feedback, questions or concerns do you have about the initial framing and sub-issues?
  - What existing research, resources and good practices should we build on?
  - What specific tech applications which have or might lead to negative impacts or ongoing dilemmas should we consider?
  - Do you or does your organization have interest in offering inputs as the work progresses?
- With regards to project consultations, research, deliverables and overall impact:
  - What recommendations do you have?
  - What pitfalls should we avoid?
- In relation to the landscape to which the project seeks to contribute to:
  - Which organizations promoting a rights-based approach to development, use and governance of digital technology should we seek to work with?
  - Which practitioner organisations and industry bodies are likely to be of particular importance to the project from the perspective of partnering and/or mobilising stakeholders and/or stakeholder consultation?