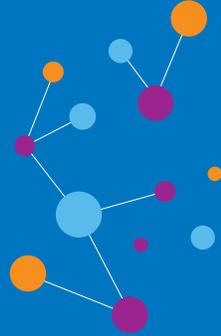


# Access to remedy and the technology sector: a “remedy ecosystem” approach

## A B-Tech Foundational Paper



## OVERVIEW

At its most fundamental level, business and human rights is a systems change project. The *UN Guiding Principles on Business and Human Rights* (UNGPs) provide a framework for identifying the legal, policy, governance and management changes needed to ensure that dignity and respect for all is placed at the core of how business gets done.

Access to effective remedy for human rights harms is a core component of the UNGPs. The “remedy ecosystem” approach recognises that there are many points of interconnection between different laws, policies, institutions, mechanisms and actors that are relevant to whether or not people will receive remedies for harm. It focuses on the way the system as a whole operates to deliver remedies to affected people rather than on the roles, attributes and mechanics of *individual* mechanisms.<sup>1</sup>

Well-functioning remedy ecosystems depend, for their existence and development, on a diverse range of actors. As the ultimate guarantor and protector of human rights, States clearly play a pivotal role. However, the manner in which technology companies implement their “corporate responsibility to respect human rights”<sup>2</sup> can also have a considerable bearing on the way a remedy ecosystem performs in practice. Other important actors include regulators, equality bodies, data protection bodies, national human rights institutions, various complaints handling, mediation and dispute resolution bodies (e.g. ombudsperson services and national contact points under the OECD Guidelines for Multinational Enterprises) and civil society organisations.

A “remedy eco-system” approach encourages all actors (whether public or private) to:

- **Understand and take account of the interactions between different kinds of remedial mechanisms in the way these mechanisms<sup>3</sup> are designed, operated and used;**

<sup>1</sup> For a helpful discussion of aims and potential benefits of a ‘remedy ecosystem’ approach, albeit within a different sector, see <https://shiftproject.org/rethinking-remedy-and-responsibility-in-the-financial-sector/>.

<sup>2</sup> See further B-Tech foundational paper ‘[Key Characteristics of Business Respect for Human Rights](#)’.

<sup>3</sup> See further B-Tech foundational paper ‘[Access to remedy and the technology sector: basic concepts and principles](#)’ (esp. “Box 1”).

- **Strive for a more coherent, less fragmented, and more easily navigable remedy landscape;** and
- **Consider the contributions they can make**—individually and collectively—to address gaps in, and generally, to enhance the functioning of, the remedy ecosystem in which they operate.

## ABOUT THIS PAPER

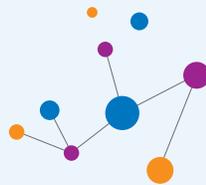
This paper is part of the UN Human Rights [B-Tech Project](#) foundational paper series. The B-Tech Project foundational papers have been developed to launch and frame subsequent B-Tech Project activities involving diverse stakeholders as part of a global process to produce guidance, tools and practical recommendations to advance implementation of the [UN Guiding Principles on Business and Human Rights](#) in the technology sector.

This paper focuses on the third pillar of the UNGPs: **the need for there to be effective remedies for business-related human rights harms**. It has been written to reinforce the importance of joined up and coherent approaches to delivering remedy for the human rights harms that may be associated with technology products and services.

This paper should be read in conjunction with the other foundational papers in this B-Tech series, in particular [The UN Guiding Principles in the Age of Technology](#), and the following three additional papers focused on “access to remedy”:

- [Access to remedy and the technology sector: basic concepts and principles](#);
- [Designing and implementing effective company-based grievance mechanisms](#); and
- [Access to remedy and the technology sector: understanding the perspectives and needs of affected people and groups](#).

*The aim of this series of foundational papers on access to remedy is not to provide a detailed “how to” guide for all situations; rather to provide an overview of the broad legal, structural and policy background—and the key concepts and frameworks relevant to access to remedy in the technology sector—as a solid foundation for future, more context-specific discussions and work.*



## HEADLINES

1. States should adopt a holistic and “systems-based” approach to the design and evaluation of relevant legal regimes, institutions and remedial mechanisms.
2. Effective judicial mechanisms are a critical element of any well-functioning remedy ecosystem.
3. Technology companies have an important and multi-faceted role to play in the maintenance and development of well-functioning remedy ecosystems.
4. More creativity, innovation and collaboration is needed from State agencies and technology companies to respond to human rights challenges raised by the “borderless” online world that technologies have helped to bring about.

## States should adopt a holistic and “systems-based” approach to the design and evaluation of relevant legal regimes, institutions and remedial mechanisms.

The technology sector is presently subject to regulation by **an increasingly complex array of laws and standards**, which can vary greatly in terms of their geographical scope (see further ‘FOUR’ below). The “issues-focused” and “incident-driven” nature of much of this regulation<sup>4</sup> is giving rise to remedy ecosystems that are increasingly fragmented and difficult for rights-holders to navigate.

The picture is complicated further by the number of **background legal regimes**, which may not necessarily be framed or understood in human rights terms, or which may have relevance to a broad range of business sectors (i.e. beyond the technology sector), but which are all potentially relevant to the likelihood of an effective remedy being delivered in specific cases (see further Box 1 below).



### EXPLAINER BOX 1

#### What kinds of background legal regimes might be relevant to “remedy ecosystems” for the technology sector?

For the technology sector, domestic legal regimes on of the following matters are all potentially relevant to whether effective remedies for human rights harms can be obtained in practice:

- non-discrimination;
- freedom of expression (including libel and defamation);
- anti-terrorism and anti-extremism;
- “hate speech”;
- intellectual property;
- transparency;
- access to services (especially as regards essential services and utilities);
- competition;
- privacy;
- data protection;
- protection from the infliction of physical and mental harm;
- fraud;
- whistle-blower protection;
- labour law;
- environmental law;
- consumer protection; and
- how technologies may be used in different contexts, such as law enforcement, and the media.

This is because any of these may be relevant to the ease with which affected people can

- identify a suitable course of action for remedying the harm they have suffered; and
- engage with relevant processes and mechanisms.

<sup>4</sup> See further OECD, ‘Digitalisation and Responsible Business Conduct: Stocktaking of policies and initiatives’, (2020), <http://mneguidelines.oecd.org/Digitalisation-and-responsible-business-conduct.pdf>.

As such, they all contribute, in different and sometimes inter-connected ways, to the legal, social and economic background against which different remediation mechanisms are used, grievances are resolved and disputes are decided.

**Different types of remediation mechanisms have their own distinctive contributions to make to delivering remedies, and hence the “remedy ecosystem”.**<sup>5</sup> **Well-functioning remedy ecosystems will allow different types of mechanisms (judicial and non-judicial; State-based and non-State-based) to play to their strengths;** recognising and appropriately leveraging the fundamental, anchoring role of robust law enforcement and judicial processes (see “TWO” below). Well-functioning remedy ecosystems will also provide **clarity as regards the human rights imperatives that will apply in different cases** (e.g. the appropriate balance between the need for speedy restitution via a truncated process versus the need to work more closely with users of mechanisms to achieve a fair result), and **the ways in which potentially competing human rights principles are to be balanced.** For the time being, however, remedy ecosystems for the technology sector appear to be falling short in both of these respects.

To help address these problems, **greater attention needs to be given to the ways in which different remediation mechanisms and processes interact, in order to highlight areas where greater coherence and inter-operability** between different types of processes (e.g. judicial and non-judicial) may serve to enhance access to remedies by affected people and groups. Greater inter-operability and coherence may be able to be achieved, for instance, by providing **more and clearer opportunities for referral and escalation** of grievances, or for pursuing remedies for different aspects of more complex grievances through **parallel proceedings**. Recent legal cases in the EU on the “right be to forgotten” serve to highlight some of the **inter-dependencies** that can exist in a technology sector remedy ecosystem. In this context, company-based grievance mechanisms can supply a key means through which technology companies meet their statutory obligations, and judicial mechanisms can clarify, when needed, the principles which govern the way those company-based grievance processes should operate in practice.

Given the speed with which new technologies are developing, and the novel human rights-related challenges posed (which do not always readily fit into well-established legal categories and for which there is often no readily identifiable path to an effective remedy),<sup>6</sup> the need for **greater legal and policy innovation** to address these issues is becoming ever more urgent.

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<sup>5</sup> See further B-Tech foundational paper ‘[Access to remedy and the technology sector: basic concepts and principles](#)’ (esp. “TWO”).

<sup>6</sup> See further B-Tech foundational paper ‘[Access to remedy and the technology sector: understanding the perspectives and needs of affected people and groups](#)’, (especially headline “FIVE”).

## Effective judicial mechanisms are a critical element of any well-functioning remedy ecosystem.

The key characteristics of a well-functioning remedy ecosystem are explored and explained in the UNGPs. A fundamental principle, and an important starting point for any discussion about remedy ecosystems for the technology sector, is that **effective judicial mechanisms are always at the core of ensuring access to remedy**.<sup>7</sup> While non-judicial grievance mechanisms (whether operated by public or private actors) can play an important role in enhancing access to remedy,<sup>8</sup> there are limits to the extent to which they can deliver effective remedies in every case. This is particularly so in cases where a judicial remedy (such as incarceration of offenders, substantial monetary fines or injunctions) are an essential part of delivering an “effective remedy”.<sup>9</sup> At a more fundamental level, the practical effectiveness of company-based remediation mechanisms will often depend, to a large extent, on the existence of strong judicial and law enforcement processes in the background (e.g. as a potential avenue for appeal).

As noted above (see ‘ONE’), different types of remediation mechanisms have different contributions to make to remedying human rights harms.<sup>10</sup> The consequence of this is that **affected people and groups may need to use a combination of approaches—both judicial and non-judicial—to meet their particular needs as regards remediation**. Well-functioning remedy ecosystems preserve and enhance the options open to people in need of a remedy, rather than limit or shut them down.<sup>11</sup> For their part, technology companies “should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes” (see Guiding Principle 11, Commentary).

Regardless of the mechanisms (or combination of mechanisms) chosen, it is important that people have realistic and readily-identifiable pathways to an effective remedy, which need not (and in many cases should not) confine affected people or communities to a specific route (whether State-based or private; judicial or non-judicial). Rather, policy-makers should anticipate the possibility that rights-holders may wish to transfer or escalate a grievance from one type of mechanism to another—from a company-based remediation mechanism to judicial processes for example—and enable this to take place in a secure and rights-respecting manner.<sup>12</sup>

<sup>7</sup> Guiding Principle 26, Commentary.

<sup>8</sup> Guiding Principles 27-31.

<sup>9</sup> See ARP III report, A/HRC/44/32, Annex, 1.3 which reminds States of the importance of ensuring that ‘laws, policies and processes relevant to the establishment and effective functioning of non-State-based grievance mechanisms are informed by a clear delineation between the roles and responsibilities of non-State-based grievance mechanisms and State-based mechanisms (judicial and non-judicial)’ which is “appropriate to the type, nature and severity of different business-related human rights harms, and recognizes that effective judicial mechanisms are at the core of ensuring access to remedy.’

<sup>10</sup> See further B-Tech foundational paper ‘[Access to remedy and the technology sector: basic concepts and principles](#)’ (“TWO”).

<sup>11</sup> See further ‘[Access to remedy and the technology sector: basic concepts and principles](#)’ (“THREE”).

<sup>12</sup> See ARP III report, A/HRC/44/32, Annex, 3.1.

## The remedy ecosystem for harms associated with technology products and services is a particularly challenging one for affected people and groups to navigate.

Well-informed regulators—with a proper understanding of technology companies (including their business models), the technologies they develop and use, and how these relate to different areas of regulatory oversight—are an essential element of a well-functioning remedy ecosystem. However, maintaining effective regulatory oversight can be a significant challenge, as **the implications of technological innovations (including the human rights ramifications) can take time to identify and properly address.**

By working constructively with regulatory institutions to help bridge gaps in knowledge and understanding between public and private actors, technology companies can help to “future proof” regulatory policy as far as the regulation of human rights-related aspects of their business activities is concerned, as well as reduce the commercial risks to themselves of wasteful or misdirected rules or regulatory tactics.

Technology companies can further enhance the functioning of remedy ecosystems by **empowering affected people** and groups and their representatives. In addition to ensuring that people have the information needed to be able to defend their rights, technology companies can have a significant positive impact on the functioning of remedy ecosystems by **raising awareness about the ways that different technologies are used, so that people are in a better position to understand how their rights might be affected** (e.g. as a result of how their data is being processed or when algorithms are being used to make decisions affecting them).

Greater transparency is needed to help correct the **information imbalances** that exist between technology companies and affected people (e.g. workers subject to covert monitoring, or communities discriminated against as a result of automated decision-making tools) about the **design features that underpin the way these products and services function and the decision-making processes underlying those design choices.**<sup>13</sup> As the UNGPs make clear, where business enterprises identify they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.<sup>14</sup> Although the UNGPs do not provide a detailed discussion of all the forms this cooperation could potentially take, **the standard called for in the UNGPs of “active engagement in remediation”<sup>15</sup> conveys an expectation that technology companies will be open with people about the human rights implications of different design features, and not withhold information from affected people and groups about how their human rights may have been adversely impacted.**

<sup>13</sup> See further B-Tech foundational paper ‘[Access to remedy and the technology sector: understanding the needs and perspectives of affected people and groups](#)’ (esp. “THREE”, “FOUR” and “SEVEN”).

<sup>14</sup> Guiding Principle 22. See further B-Tech foundational papers ‘[Taking action to address human rights risks related to end use](#)’ (esp. “TWO”) and ‘[Access to remedy and the technology sector: basic concepts and principles](#)’ (esp. “FIVE”).

<sup>15</sup> Guiding Principle 22, Commentary.

Finally, technology companies can complement the State-based aspects of regulatory ecosystems through their own arrangements for **direct remediation**. The UNGPs urge all companies, including technology companies, to establish or participate in effective **operational-level grievance mechanisms** for individuals and communities who may be adversely impacted by their activities.<sup>16</sup> Further discussion of the issues that should be taken into account by technology companies when establishing in-house grievance mechanisms can be found in B-Tech foundational papers "[Designing and implementing company-based grievance mechanisms](#)" and "[Access to remedy and the technology sector: understanding the perspectives and needs of affected people and groups](#)".

## FOUR

**More creativity, innovation and collaboration is needed from State agencies and technology companies to respond to human rights challenges raised by the "borderless" online world that technologies have helped to bring about.**

Digital technologies and online platforms facilitate interactions between people, and between people and organisations, on a **global scale**. The obvious consequence of this is that **adverse human rights impacts may not be limited to any one jurisdiction or region, or readily attributable to business activities taking place in a single State**. Within a well-functioning regulatory ecosystem, relevant actors (both public and private) will anticipate this reality, seeking out and facilitating opportunities for constructive and collaborative approaches (including sector-level approaches, or within value chains) which have the potential to enhance access to remedy for people, regardless of where in the world they may live.

The rapid growth in **international and regional initiatives**<sup>17</sup> aimed at fostering greater cross-border cooperation in response to "hate speech" and publication of violent and extremist content, in particular, suggests widespread and **growing recognition of limitations of unilateral efforts** in this regard. **Multi-stakeholder initiatives** are playing an increasingly important role in this regard, particularly as regards the clarifying and subsequent "operationalisation" of key principles.<sup>18</sup> The [Christchurch Call](#), made in the aftermath of the terrorist attacks on the Muslim Community of Christchurch, New Zealand on 15 March 2019, contains commitments from governments and online service providers to "work collectively to ensure appropriate **cooperation with and among law enforcement agencies** for the purposes of investigating and prosecuting illegal online activity" relating to terrorist or violent extremist content "consistent with rule of law and human rights protections". For their own part, technology company signatories to the *Christchurch Call* make a number of commitments relevant to strengthening remediation mechanisms and processes, and promise to "work together to ensure cross-industry efforts are coordinated and robust", including through relevant international forums.

<sup>16</sup> Guiding Principle 29. On the different ways in which companies may fulfil this requirement in practice, see further B-Tech foundational paper "[Access to remedy and the technology sector: basic concepts and principles](#)".

<sup>17</sup> See further OECD, '[Digitalisation and Responsible Business Conduct: Stocktaking of policies and initiatives](#)', (2020), chapter 2.

<sup>18</sup> Ibid, p. 13.

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While it is too early for an assessment of the impact of very recent initiatives such as the *Christchurch Call*, the case for **strengthened engagement and cooperation** between public and private actors to help address challenges securing remedies for adverse human rights impacts of technologies now seems overwhelming. **A re-doubling of effort is needed, from technology companies and governments alike, to work together across national boundaries to overcome disjointed approaches, to address gaps in coverage of different mechanisms, to promote greater coherence and inter-operability of different regimes and processes (including in a cross-border context) and to address flaws in background regimes that may be exacerbating barriers to remedy.**

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UN Human Rights invites engagement from all stakeholders across all focus areas of the [B-Tech Project](#). For more information please see the project [Scoping Paper](#). Please contact us if you would like to engage with our work, including if you have recommendations for practical tools, case studies and guidance that will advance company, investor and State implementation of the *UN Guiding Principles on Business and Human Rights* in the business of technology.



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