

Submission by the Human Rights, Big Data and Technology Project ('HRBDT') and the Essex Business and Human Rights Project ('EBHR') to the UN Working Group on Business and Human Rights ('UNWG') for the consultation process to inform its 2018 Report to the UN General Assembly

Executive Summary - What key messages would it be useful for the UNWG to highlight?

1. In this submission we wish to highlight the importance of due diligence and duty of care for businesses operating in an online environment. We wish to draw attention to the insufficient guidance for businesses particularly in regard to collecting, processing, storing, selling and repurposing data.
2. A special focus is needed on online business models, including platforms and intermediaries, and especially those whose business model revolves around collecting, analysing, selling, storing and repurposing data. Business models that override or limit particular human rights in the interest of commercial gains should be subject to strict requirements of necessity and proportionality and in some circumstances should not be seen as legitimate.
3. Human Rights due diligence appears to be lacking by businesses operating in the online space, much of which is due to the uncertain grey areas of regulation, but also because of the nature of data and particularly big data in which aggregation and repurposing can lead to unknown risks originally unknown to the business collecting the data. The precautionary principle must be introduced as part of the duty of care in regard to businesses functioning in an online space and collecting, analysing, repurposing and storing data. This principle calls for protective measures to be taken if the cause and effect relationship is not fully established. Through the precautionary principle companies would owe a duty of care to users to ensure that through the collection, retention, analysis and storage and repurposing of the users' data, no human rights harms would be suffered.
4. An investigation into additional responsibilities, beyond the UN Guiding Principles on Business and Human Rights ('UNGPs') to respect and remedy human rights abuses, may be necessary considering the integral part that businesses play in regulating and securing the space in which millions of people share and expose their data. We invite the UNWG to question, whether the existing human rights framework set out in various international, regional and national regimes, which were mostly written before the digital age, are sufficient to dealing with the challenges this new online space provides.

Introduction

5. This submission is made by the Human Rights, Big Data and Technology Project ('HRBDT') and the Essex Business and Human Rights Project ('EBHR') housed at the University of Essex.

6. The Human Rights, Big Data and Technology Project, funded by the Economic and Social Research Council and based at the University of Essex's Human Rights Centre, analyses the challenges and opportunities presented by the use of big data and associated technologies from a human rights perspective. Drawing on the wide range of expertise of its interdisciplinary researchers and partner organisations, the Project considers whether fundamental human rights concepts and approaches need to be adapted to meet the rapidly evolving technological landscape. The work also brings together practitioners, States, industry, and United Nations' officials, and academics in the fields of human rights, big data and associated technologies to assess existing regulatory responses and whether reforms are needed in order to maximise effective human rights protection.
7. The Essex Business and Human Rights (EBHR) project is also housed at the University of Essex Human Rights Centre and encourages dialogue across these disciplines and among actors from a broad range of backgrounds. Its aim is to foster research and to bring the results of that research to bear on practical problems, working on national and international issues and collaborating with partners across the world.
8. The Project is grateful for the opportunity to present this submission to the UN Working Group on Business and Human Rights for the consultation process to inform its 2018 report to the UN General Assembly. The submission is drawn from the work EBHR has done on improving paths to accountability for human rights abuses in the global supply chain as well as work on corporate due diligence and duty of care. It also draws on the work done by HRBDT on understanding the role and responsibilities of businesses in the digital age in relation to big data and new technologies. Within this submission, we focus on the importance of defining the role of businesses in the digital world and the importance of specific guidance being given for a variety of businesses operating in the online world to ensure associated human rights harms are mitigated.

The Problem- Understanding the progress to date, challenges and remaining gaps

9. The human rights protections set out in various international, regional and national regimes were mostly written before the digital world was central to individuals every day lives. The working environment for business has changed significantly since then, raising numerous challenges for regulation and, correspondingly, accountability.
10. The global rise of the Internet has increased connectivity and introduced a new space for social interaction. Technology, big data and the Internet of Things are revolutionising both our home lives and city planning, increasing ease and convenience, and promoting efficiency.¹ They also provide opportunities for the protection and promotion of human rights, but come along with a high set of risks and challenges that have been inadequately addressed affecting directly individuals right to privacy and expression and having serious consequences that could lead to violations of the right to adequate standard of living, right to work, right of association, right to freedom and liberty and many others.

¹ "Human Rights in the Digital Age: The Perils of Big Data and Technology", can be found at <https://www.hrbdt.ac.uk/human-rights-in-the-digital-age-the-perils-of-big-data-and-technology-part-ii/>

11. Today's globalised and technological lifestyles transcend state boundaries, the traditional regulatory demarcation. Communications are transmitted across the world and data is transferred to other countries for storage or processing.² Additionally, interferences with communications and communications data no longer just involve a single national intelligence agency – nowadays, multiple states³ collaborate to share intelligence information. The fact that states can interfere with the human rights of those who are not within their territory raises questions around the scope of extraterritorial human rights obligations⁴. As the success of covert surveillance is argued to rest on its secrecy, relying on intelligence agencies to self-regulate does not seem to be a promising tool for accountability.⁵
12. The prominent role of corporations in the 21st Century challenges the efficacy of existing regulatory responses. States have traditionally been the duty-bearers of human rights. However, given the evolving and increasingly significant role that businesses play in the realisation of human rights, there is increasing recognition and acceptance that businesses also have human rights obligations.⁶ The accountability of corporations needs serious consideration as their compliance or complicity with government demands in the context of surveillance or other activities has profound implications on human rights. The cooperation and involvement of businesses in the development of standards is important not only to ensure that new standards are implementable and adaptable for different sectors, but also in fostering consumer trust – a particularly critical element for the success of business-client relationships in this big data era.⁷
13. There are three main areas in which ICT and big data can act as gateways to violations of human rights if adequate safeguards do not exist. Firstly, the collection, storage, sharing, and repurposing of personal data may infringe the right to privacy.⁸ Privacy is not the only gateway to the human rights needing respect and protection: rights to freedom of association, freedom of expression, and equal treatment are all at stake directly or indirectly.
14. Secondly, issues of consent and re-purposing arise when data is used for a purpose for which the individual that agreed to its disclosure did not originally consent. These gateways can arise in the context of state surveillance or near ubiquitous non-state 'soft surveillance', whereby monitoring of social media, consumer activity and smartphones' location occurs on a routine, daily basis.

² "European Commission launches EU-U.S. Privacy Shield: stronger protection for transatlantic data flows", found at: http://europa.eu/rapid/press-release_IP-16-2461_en.htm

³ "Privacy International Launches International Campaign For Greater Transparency Around Secretive Intelligence Sharing Activities Between Governments", found at <https://www.privacyinternational.org/press-release/51/privacy-international-launches-international-campaign-greater-transparency-around>

⁴ "Extraterritorial Human Rights Obligations in the Context of State Surveillance Activities?" found at <https://hrcess.wordpress.com/2016/08/02/extraterritorial-human-rights-obligations-in-the-context-of-state-surveillance-activities/>

⁵ "Human Rights in the Digital Age: The Perils of Big Data and Technology (Part II)" found at <https://www.hrbdt.ac.uk/human-rights-in-the-digital-age-the-perils-of-big-data-and-technology-part-ii/>

⁶ Guiding Principles on Business and Human Rights. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁷ "Human Rights in the Digital Age: The Perils of Big Data and Technology (Part II)" found at <https://www.hrbdt.ac.uk/human-rights-in-the-digital-age-the-perils-of-big-data-and-technology-part-ii/>

⁸ UNGA's Overall Review of the Implementation of WSIS Outcomes. Zero Draft (9 October 2015) para. 43

15. Third, elaborating on para 13 above, in an Information Society in which the use of data can affect all aspects of daily life, decisions made on the basis of data analysis can have significant human rights' implications. For example, predictive analytics may be utilised to identify 'high risk' and therefore high cost individuals, affecting their access to health care or the affordability of health insurance⁹, while decisions made on the basis of data analysis may equally affect individuals' access to employment,¹⁰ or credit.¹¹ This may result in direct discrimination. Discrimination may also be indirect, and unintentional. Indirect discrimination occurs when apparently neutral laws or policies lead to consequences that, without justification, disproportionately affect individuals who share particular protected characteristics. For example, predictive analytics may be used to determine individuals' suitability for a particular health care intervention. If the underlying algorithm does not incorporate human rights requirements, this may result in indirect discrimination. An ostensibly neutral algorithm may disproportionately affect individuals from a particular socioeconomic background, thereby further disadvantaging the disadvantaged.¹² To avoid such indirect discrimination, decision making processes must take human rights obligations into account.

The current state of play of business implementation of due diligence in the online world

16. Current human rights due diligence by businesses managing personal data of individuals is to obtain their consent for the use their data for particular purposes.
17. The EU General Data Protection Regulation (GDPR) for example, in an effort to protect the data of individuals and to give individuals the control of what data they chose to give to a company, should have an impact on the practices of social media sites such as Facebook using consent as a means of legitimising the use of personal data by the company. The emphasis on consent is one of the main features of the GDPR and even when possibly efficient, from a human rights perspective it may still prove to be inadequate. Rather than placing the burden on the company to ensure there is no misuse of the data, the individual has to carry the burden to be extremely knowledgeable and informed if he or she is to bear the risks that come with agreeing to the terms of service a certain platform provides.
18. Because data analysis, storage, aggregation, and selling is seen as "business as usual", the legitimacy of this business model is not questioned. We invite the UNWG to question this business model and call for human rights due diligence to become an integral part of doing business in the data supply chain.

⁹ Charles Nyce, 'Predictive Analytics White Paper' (2007) American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, p. 1.

¹⁰ Natalie Burg, 'Your Company Can See the Future with Predictive Analytics (Forbes, 26 March 2014)

¹¹ Seeta P Gangadharan. 'The Dangers of High-Tech Profiling, Using Big Data' (Forbes, 7 August 2014) available at: ; Charles Nyce, 'Predictive Analytics White Paper' (2007) American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, p. 1.

¹² For an example of this issue in the context of access for the least well-off to water, please see: Special Rapporteur on the Right to Safe Drinking Water and Sanitation. An Open Letter from the United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (21 July 2015). See also the strategies described in: GSMA Mobile-Enabled Community Services. 'New Report on Sizing the Opportunity of Mobile to Support Energy and Water Access (3 December 2013).

Filling the Gaps

19. The need for transnational and international coordination of policies and laws. To quote from a previous HRBDT submission, “The rise in global communications and trans border data transfers, resulting in increased potential for extraterritorial human rights violations, and the prominence of corporations challenge the development of a comprehensive regulatory system. How can transnational regulation of multiple states and businesses be connected within a human rights framework that is used to dealing with single state responsibility? These unprecedented developments require a collaborative effort from various stakeholders, including states, businesses, international organisations, civil society, and academia, to create a stable environment where international, regional and national regulatory efforts interact, adapt and innovate in pace with technological and commercial change in order to effectively respect, protect and fulfil human rights in the digital age.”¹³
20. “The development and utilisation of ICT and big data should be guided and regulated by international human rights law in order to facilitate the realisation of human rights, while avoiding negative human rights consequences, whether intentional or unintentional. Internet governance should be framed around fundamental human rights principles, in particular transparency, openness, inclusivity, non-discrimination and equality.¹⁴ Transparency and accountability are central to good governance, with the former being a necessary precondition for the latter. In relation to transparency in particular, the re-purposing of data poses a real threat to human rights and should be specifically addressed. It is essential that these fundamental human rights principles be respected by commercial enterprises as much as by States.”¹⁵
21. Understanding data supply chains is essential to understanding how due diligence can be practiced by business in the online space. Because of the nature of big data, with its vast volumes and potential for aggregation that can be used for a multitude of purposes it is uncertain how far the personal quality of data reaches and to what use it will be put. In order to understand the responsibilities and duties that companies may incur as a result of selling and repurposing of data, an understanding of the data supply chain is needed.
22. In order to allocate responsibilities among the companies and other entities within the data supply chain, arising from the sale and repurposing of data, it is essential to have an understanding of the data supply chain. Data sharing can occur in a variety of formats and includes a variety of actors, including (1) product innovators, (2) system innovators, (3) data providers, (4) data brokers, (5) value chain integrators and (6) delivery network collaborators. These actors all operate at one or several stages of the data value chain from (1) data generation to (2) data storage, to (3) data analytics to (4) data

¹³ Submission by the ‘Human Rights and Information Technology in an Era of Big Data, to UN General Assembly’s Overall Review of the Implementation of the Outcomes of the World Summit on the Information Society

¹⁴ International Covenant on Civil and Political Rights (1966) Article 2(1); International Covenant on Economic, Social and Cultural Rights (1966), Article 2(2).

¹⁵ Office of the High Commissioner for Human Rights. Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011).

usage.¹⁶ Understanding how, when and why data is shared among different actors in the value chain could lead to better understanding of the duties and responsibility of different actors and understanding how they best practice due diligence to avoid human rights harms.

23. Understanding the role of businesses in the digital context and placing respective responsibility onto businesses, and states for regulating these businesses, would alleviate individuals of the burden to secure their inalienable human rights.

Further Information

24. The HRBDT Team is currently working specifically on the issue of corporate duty of care in a digital world emphasizing the importance of understanding the data supply chain and various actors responsibilities in relation to big data and technology. The work will draw links to the published work of EBHR on “Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains.”¹⁷
25. Additionally the HRBDT Project is working on assessing the Guiding Principles on Business and Human Rights in the age of big data, AI and new technologies, aiming to understand whether the Ruggie Principles provide sufficient guidance to businesses operating in these areas.
26. We are happy to share our detailed findings of these reports with you in the coming months in preparation for the report to the General Assembly.

¹⁶ Deloitte, “New Business models with data”, found at:

https://ec.europa.eu/futurium/sites/futurium/files/deloitte_pov_-_new_business_models_with_data.pdf

¹⁷ “Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains”

<https://www1.essex.ac.uk/ebhr/documents/Improving-Paths-to-Accountability-for-Human%20Rights-Abuses-in-the-Global-Supply-chains-A-Legal-Guide.pdf>.