



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

February 4, 2016

Mr. David Kaye
Special Rapporteur on the promotion
and protection of the right to freedom
of opinion and expression,
Geneva, Switzerland

OHCHR REGISTRY

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Recipients : SPB
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Dear Mr. Kaye:

The United States commends your initiative to focus the global community's attention on the pressing issues related to the responsibilities of the Information and Communication Technology (ICT) sector to respect the right to freedom of opinion and expression. We appreciate the opportunity to offer comments for consideration as you refine the project. The following submission, while not exhaustive, is intended to draw attention to areas that the United States views as critical to the success of this endeavor.

While the duty to protect human rights rests with States, the United States has championed efforts at the UN, the OECD, and in other multilateral and multi-stakeholder fora to discuss the responsibilities of corporate actors to respect internationally-recognized human rights, as defined in the UN Guiding Principles on Business and Human Rights (UNGPs). In line with this position, President Obama announced in September 2014 that the United States would develop a National Action Plan (NAP) on Responsible Business Conduct, consistent with the UNGPs and the OECD Guidelines on Multinational Enterprises (OECD Guidelines). As part of the NAP process, the Administration issued an open call for submissions from external actors and launched a series of meetings to consult with stakeholders across the country. Officials made specific efforts to engage ICT companies in the process, fielding numerous submissions that addressed the human rights impacts of the ICT sector, and participating in one set of consultations in the California Bay Area, near the technology hub of Silicon Valley. The U.S. NAP is scheduled to be released this year and will be forwarded for consideration.

You may wish to examine the benefits and limitations of existing efforts to apply the UNGPs, the OECD Guidelines, and other related principles within the ICT sector, including, among others: government NAPs that address ICT issues; examples of human rights impact assessments or human rights due diligence conducted by ICT companies; indices that measure ICT companies' adherence to performance indicators based on these principles; and multi-stakeholder groups formed to foster transparency and accountability with respect to these principles. Your efforts to map this field are timely and useful as they will help avoid duplication of existing work, provide a clearinghouse

of practical resources, evaluate the effectiveness of these efforts, and identify gaps and overlaps.

This initiative has particular relevance and urgency in light of the recent surge in attacks targeting civilians in Paris, Istanbul, San Bernardino, Jakarta, and elsewhere. These horrific events have intensified concerns regarding: (1) the use of the Internet and mobile tools to promote radical views, violence, and terrorist acts; (2) governmental capabilities to track such activities and respond with coordinated actions; and (3) the role of private companies that develop and deploy these technologies in combatting violent extremism. To address these concerns and others, such as cybercrime and cyberbullying, some ICT companies are working to develop policies and procedures to identify and address—in ways that respect and reinforce fundamental freedoms such as the freedom of expression—certain uses of their platforms that are illegal and/or in violation of their respective terms of service and community standards. Given the intensification of this discussion, you may wish to address this context directly in your work plan as companies struggle with these challenges. Recommendations from past reports issued by previous mandate holders may contain fresh meaning today when re-examined in this context.

There is a wide range of ICT companies, products, and services, each of which can create different opportunities and/or risks related to the freedom of opinion and expression. The United States views the effort to develop this taxonomy as useful and would suggest the following additions to the list of actors, products, and services set out in the call for submissions: cloud data services, big data analytics, and digital forensics. In addition, we would recommend further distinction within categories, such as “telecommunication” and “surveillance and cybersecurity,” to identify relevant subcategories (e.g., mobile providers, Voice over Internet Protocol [VoIP] services, penetration testing, deep packet inspection, and DDoS-mitigation). More fine-tuned categories will help to better identify these related risks and opportunities

In addition to the list of legal and policy matters identified in the call for submissions, we would also suggest that you consider the following topics: the impact of business and policy decisions by cloud providers that span diverse legal jurisdictions; the role of contract law in assigning responsibilities between relevant entities; the implications of advertising-based business models; and the reliance on users to flag content that violates terms of service. Furthermore, efforts within the private sector to address the legal and policy challenges of dual-use technologies also merit consideration, along with an analysis of the potential positive and negative effects these technologies have on the freedom of opinion and expression.

In addition to mapping the categories of actors in the ICT sector whose activities may implicate the right to freedom of opinion and expression, as well as the main legal issues raised, you may wish to include as part of this study an analysis of the ways that the right to freedom of opinion and expression online might be advanced through private sector engagement with civil society actors. For example, it may be prudent to better understand the importance of venues and mechanisms that foster dialogue and trust among ICT companies and other stakeholders, including governments, civil society, academics, and others, for helping the private sector understand the potential human rights impacts of their business operations. You may wish to consider examining the

varied spaces available for such multi-stakeholder engagement, particularly between companies and civil society—such as the Internet Governance Forum at the global, regional, and national levels, the Freedom Online Coalition multi-stakeholder working groups, and the Global Network Initiative, to name just a few—and highlight examples of how stakeholders have leveraged these venues and mechanisms to identify ICT-related human rights risks and work to mitigate their adverse impacts.

Sincerely,

A handwritten signature in black ink, appearing to read "Pamela Hamamoto", with a long horizontal flourish extending to the right.

Pamela K. Hamamoto
Ambassador