

**Submission to the UN High
Commissioner for Human Rights on
the Practical Application of the
Guiding Principles on Business and
Human Rights to the Activities of
Technology Companies**

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Theme 1: The Obligation of States to Ensure Respect for Human Rights by Technology Companies

The Guiding Principles on Business and Human Rights (Guiding Principles) are formally non-binding although they point to the human rights responsibilities of private companies. However, States have binding obligations under international human rights law to regulate the actions of private actors, including technology companies, where this is necessary to protect human rights. International standards governing freedom of expression set clear standards for States' both positive and negative obligations towards private actors. The application of the Guiding Principles must take these formal State obligations into account.

This Submission briefly outlines relevant freedom of expression standards governing State actions towards private tech companies, with the goal of helping to define the contours of the scope of the Guiding Principles. It focuses on freedom of expression but the Centre for Law and Democracy notes that other rights, particularly the right to privacy, are also very relevant here.

Negative Obligations vis-à-vis Legal Persons

States must not interfere with freedom of expression except in strict accordance with the three-part test outlined in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR). Under this test, any restriction on freedom of expression or access to information must be: 1) provided by law; 2) to protect a legitimate interest, namely the rights or reputations of others, national security, public order, public health or public morals; and 3) necessary to protect that interest.

Even where legal persons are not protected by human rights systems, certain such persons, for example media outlets and Internet access providers, play such a crucial role in enabling the free circulation of information in society that restrictions on them will also amount to a

violation of the freedom of expression rights of individuals. As such, restrictions on actors like Internet access providers, search engines and social media platforms will only be legitimate if they comply with the Article 19(3) test.¹ It flows from this that States should not compel tech companies to restrict freedom of expression beyond what is permitted according to the three-part test. These standards have been elaborated in a few specific areas.

State requirements to block content are legitimate only in limited circumstances, namely where this applies only to content which it is legitimate to prohibit (such as explicit images of children) and involves appropriate process protections, such as that decisions about what content is covered are made by an independent, authoritative body, such as a court.² Filtering systems are inherently problematical due to their imprecision, such that State imposed content filtering systems which are not controlled by the end user are not legitimate.³

State orders which require Internet access providers to close down general access to the Internet (Internet shutdowns), whether for all or part of the population, are clearly abusive. Internet shutdowns are always invalid according to the three-part test because they always have disproportionate impacts on freedom of expression as well as other rights.⁴ Even in times of emergency, the costs of denying whole segments of the population access to the Internet, which also applies to access to emergency services and other crucial information, outweigh any benefits from limiting the spread of dangerous information.

Similarly, the imposition of surveillance requirements on digital service providers, such as by requiring them to install surveillance software or to share users' personal data, also carry a very heavy burden of justification.⁵ Although such actions raise primary privacy concerns, they also negatively impact freedom of expression by creating a chilling effect on free speech online through enabling States to take retaliatory action against speakers.

States should also protect intermediaries against liability for content posted by third parties. Such protection should be broad for companies which do not engage with content (for example by collating or manipulating it) or merely facilitate Internet access ("mere

¹ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, para. 43.

² OAS Special Rapporteur on Freedom of Expression, *Freedom of Expression and the Internet*, 31 December 2013, para. 85, http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20web.pdf; International Mandates on Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, 12 December 2011, para. 3(a), <http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf>; and *Yildirim v. Turkey*, 18 December 2012, Application No. 3111/10 (European Court of Human Rights).

³ 2011 Joint Declaration, note 2, para. 3(b); and OAS Special Rapporteur on Freedom of Expression, note 2, para. 85.

⁴ 2011 Joint Declaration, note 2, para. 1(b).

⁵ See UN General Assembly Resolution 68/267, 18 December 2013, para. 4; and UN Special Rapporteur on Freedom of Expression, *Report on the promotion and protection of the right to freedom of opinion and expression*, 11 May 2016, A/HRC/32/38, paras. 56-57.

conduits”).⁶ A failure to shield these intermediaries from such liability places an impossible burden on them to screen out all illegal speech and creates an incentive for them to engage in overly broad censorship so as to avoid liability. Liability should only apply when an intermediary refuses to respect an authoritative order, for example by a court, to remove illegal content.⁷

For other intermediaries, such as social media companies and others who more actively curate content via algorithms, the situation is more complex and rapidly evolving (discussed in more detail below). However, such intermediaries should not be directly liable for third party content. Notice and takedown systems, whereby intermediaries are liable if they fail to take down illegal content after being notified of its existence, are also problematical since they again create incentives to overly censor content, at least unless they are subject to appropriate safeguards, including independent oversight. Notice and notice systems, which require intermediaries to notify users of claims that content is illegal, following which they can either defend it or have it taken down, are preferable.

While, generally, international law does not require States to ban speech, it does impose limited obligations on them to restrict particularly harmful forms of speech. For example, in both the offline and online context, States are required to ban hate speech, incitement to genocide and child pornography.⁸ All such restrictions are required to respect the three-part test established under Article 19(3) of the ICCPR. Generally, the scope of such restrictions online should be the same as it is offline.⁹ That being said, there are cases where the speed and scale with which harmful speech spreads online, and the public nature of the online space, render certain types of speech more harmful online than offline. An example of this which some States have taken measures to address is the non-consensual sharing of intimate images (“revenge porn”).

Positive Obligations to Regulate Legal Persons

The ICCPR also places an obligation on States to take action to ensure freedom of expression is respected – so-called “positive obligations” – including where necessary to prevent against harm by private actors. Generally, States have an obligation to take appropriate measures or to “exercise due diligence to prevent, punish, investigate or redress” harm caused by private

⁶ 2011 Joint Declaration, note 2, para. 2(a).

⁷ *Ibid.*, para. 2(b).

⁸ Article 20 of the ICCPR; *Convention on the Prevention and Punishment of the Crime of Genocide*, Article III(c); and *Convention on the Rights of the Child*, Article 34.

⁹ Human Rights Council Resolution 38/7 on the promotion, protection and enjoyment of human rights on the Internet, 5 July 2018, para. 1.

entities.¹⁰ This language is affirmed as a foundational principle in the Guiding Principles themselves.

These obligations often arise in response to specific harmful acts by third parties. Thus, States have an obligation to take action to prevent, protect against and investigate and prosecute attacks by private actors on journalists or others for exercising their right to freedom of expression. But positive obligations may also require States to regulate private actors in order to protect human rights. For example, States have obligations to regulate private actors in order to prevent undue concentration of media ownership and to promote media diversity, especially in relation to broadcasting.¹¹

The advent of digital communications has brought about profound changes to the way we communicate and obtain information. Many State interventions in this area have been characterised primarily by their tendency to unduly limit freedom of expression, leading many advocates to campaign against any type of State regulation of online actors. However, there is increasing recognition that States have some positive regulatory responsibilities in order to promote ensure freedom of expression online. At a basic level, States have an obligation to take steps to facilitate access to the Internet, given the extent to which the Internet is now a practical necessity for the effective enjoyment of freedom of expression and access to information.¹²

Another area where States have positive responsibilities is in relation to the principle of net neutrality, with human rights authorities increasingly calling upon States to protect net neutrality by law and to regulate against discriminatory treatment of Internet traffic. The same principle also means that States should require intermediaries to be transparent regarding their information and traffic management practices.¹³

Questions also arise regarding the extent to which States have responsibilities to regulate social media companies and tech giants which have amassed significant control of the online information space. Where tech companies have enough control of an online space or activity that they are able to behave in a monopolistic manner, States may have positive obligations to put in place measures to promote diversity in that online space. However, this is a newly

¹⁰ Human Rights Committee, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 8.

¹¹ International Mandates on Freedom of Expression, Joint Declaration on Diversity in Broadcasting, 12 December 2007, <https://www.osce.org/fom/66176?page=1>; and European Court of Human Rights, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 7 June 2012, Application No 38433/09, paras. 130-134.

¹² General Comment No. 34, note 1, para. 15; UN Human Rights Council Resolution 44/12, 16 July 2020, para. 8(g); and 2011 Joint Declaration, note 2, para. 6(a).

¹³ 2011 Joint Declaration, note 2, para. 5(b). On net neutrality, see also Council of Europe, Committee of Ministers, Declaration on Network Neutrality, 29 September 2010, <http://archive1.diplomacy.edu/pool/fileInline.php?IDPool=1204>; and OAS Special Rapporteur on Freedom of Expression, note 2, paras. 30-32.

emerging and contentious issue, and great care is needed to ensure that any such measures are carefully designed so as to promote diversity and avoid monopolistic behaviour, and not have other, harmful impacts on freedom of expression online.

Guidance for States Seeking to Apply the Guiding Principles

States are increasingly seeking to regulate tech companies. The OHCHR noted in July 2021 that roughly 40 social media laws had been adopted globally in the previous two years, with another 30 being under consideration.¹⁴ Most of these efforts raise concerns from a freedom of expression standpoint. For example, the Human Rights Committee expressed concern with Germany's NetzDG law, which targeted various forms of illegal online speech, for creating "broad powers" to remove content, assigning responsibility for such removal to social media companies and not subjecting such removal to judicial oversight.¹⁵

Many of these laws respond to genuine concerns about harmful speech online and the dominant role played by a few tech companies. While States may have some obligations to respond to these challenges, any steps to regulate tech companies should be taken with extreme care. Some principles can assist States in navigating these challenges:

- The Guiding Principles can inspire States to take action to encourage or, in limited circumstances, require legal persons to respect human rights. However, any such action should be in strict compliance with freedom of expression standards, including the three-part test for restrictions.
- States should take great care in encouraging content moderation by intermediaries and "avoid delegating responsibility to companies as adjudicators of content".¹⁶ In particular, States should, in promoting or supporting content moderation by intermediaries, take great care to avoid pressuring intermediaries to engage in content moderation which international law prohibits States from engaging in directly.¹⁷
- Any formal requirements on intermediaries to remove content, whether direct or indirect, such as through imposing liability for a failure to remove that content, should be subject to independent oversight, such as by the courts or an independent

¹⁴ OHCHR, "Moderating Online Content: Fighting Harm or Silencing Dissent?", 23 July 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/Online-content-regulation.aspx>.

¹⁵ Human Rights Committee, Concluding Observations on the seventh periodic report of Germany, 11 November 2021, paras. 46-47, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/DEU/CCPR_C_DEU_CO_7_47161_E.pdf.

¹⁶ UN Special Rapporteur on Freedom of Expression, *Report on the promotion and protection of the right to freedom of opinion and expression*, 6 April 2018, A/HRC/38/3.

¹⁷ See UN Special Rapporteur on Freedom of Expression, note 5, para. 85.

regulator.¹⁸ The scope of such requirements should be strictly limited to clearly defined categories of speech which it is legitimate to prohibit in accordance with the three-part test. While this is a developing area, with different States putting forward a range of regulatory frameworks and options here, any such effort should be undertaken with great care and attention to international standards. Notice and takedown systems should generally be avoided, unless they build in appropriate safeguards, which most current models do not.

- While many efforts by States in the area of online content focus on removal or blocking of access to content, which often fail to respect the three-part test for restrictions, another important area for States to consider is regulating the manner in which intermediaries conduct content moderation processes.¹⁹ For example, States should consider requiring greater transparency from intermediaries regarding how content is addressed in their systems, including the promotion and profiling of content, as well as appropriate due process guarantees at least in relation to content takedowns or demotion. These goals could be achieved either working with companies or, if necessary, imposing requirements on intermediaries in relation to the design of automated processes that promote harmful speech.²⁰ Other initiatives, such as media and information literacy programmes, should also be considered.
- States should focus greater attention on their obligations to promote information diversity online given the dominance of a few key players in the market and the prevalence of automated processes which act to counter this. Where these features undermine diversity, States should consider responding appropriately to ensure the realisation of freedom of expression online.

¹⁸ See *Ibid.*

¹⁹ OHCHR, note 14.

²⁰ For a more in-depth discussion of this, see our submission to the UN Special Rapporteur on Freedom of Expression for her 2021 annual report, <https://www.ohchr.org/Documents/Issues/Expression/disinformation/2-Civil-society-organisations/UN-SR-on-FOE-CLD-Submission-Disinformation-Mar21-final.pdf>.