

Submission in response to the Call for input to the High Commissioner report on the practical application of the United Nations Guiding Principles on Business and Human Rights to the activities of technology companies

JOINT NHRI STATEMENT

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The National Human Rights Institutions (NHRIs) of Chile, Denmark, France, Peru, Portugal and The Philippines, welcome the call for input to the High Commissioner report on the practical application of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) to the activities of technology companies. We also commend OHCHR's Business and Human Rights in Technology Project ("B-Tech Project"), which has helped States, businesses and other stakeholders to strengthen their implementation and application of the UN Guiding Principles in relation to the development and use of digital technologies.

As state-mandated bodies, independent of government, with a broad human rights mandate, effective, pluralist, and independent NHRIs are among the pillars of protection of and respect for human rights. With their mandates, NHRIs play vital roles in complementing, supporting, or drawing attention to States' actions or policies affecting human rights, as well as monitoring the activities and operations of businesses.

This submission comes in response to the UN High Commissioner for Human Rights' call for input, with the aim to inform the High Commissioner's report on the practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies which will be presented at the 50th session of the Human Rights Council in June 2022.

I. Cross-cutting comments

We remind States and other stakeholders that NHRIs have the mandate to

1. provide support and advice to governments to identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced;

2. monitor, investigate into, and report on the impact of business activities on human rights;
3. provide information and advise on how corporations operate their business with due regard to the potential impacts of their operations to human rights;
4. assist victims of corporate abuses or human rights violations by serving as bridge, facilitator and mediator between the State, rights holders and business enterprises, as well as support victims' access to justice, remedies and reparations;
5. conduct research or documentation of good practices and challenges in relation to business and human rights, which will inform stakeholders and influence reforms towards application of rights-based legislation and policies on business and human rights.

Keeping NHRIs independent, functional and accessible to all creates an enabling environment where NHRIs can facilitate dialogue among duty-bearers, rights holders, business enterprises and civil society, and recommend access to justice, effective remedies and reparations for business-related human rights abuses, including in relation to abuses related to use or application of digital technologies.

We remain concerned, by the failure or lack of capacity of some States to promptly act on the findings on human rights abuses involving transnational technology companies.

We will be recommending the High Commissioner's report on the practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies to NHRIs in all regions, and look forward to promoting an increased focus on technology companies, their human rights impacts, and the role of States to protect rights holders from digital technology-related harms, in collaboration with all stakeholders at global and local levels alike.

II. Theme-specific comments

In the following, we comment on the specific themes for consultation on March 7-8, 2022.

A. Addressing human rights risks in business models

We are concerned by the various business models in the digital ecosystem that are seemingly in direct conflict with the corporate responsibility to respect human rights. This includes examples such as social media, free-to-play video games, and online search engines, with business models that depend on limited privacy protections to facilitate and support their advertising practices. It also includes examples of different kinds of applications of automated decision-making systems that in the search for efficiency depend on algorithms and/or stereotyping with potentially discriminatory outcomes. These practices can impact civil and political rights such as freedom of expression or freedom of communication, as well as creating discriminatory decision to access socio-economic rights such as access to work or housing. In conclusion, technology has the potential to impact all human rights.

As NHRIs working on business and human rights, we call on States to develop policy frameworks and support regulations that include due diligence obligations for businesses in the digital ecosystem that are aligned with the UN Guiding Principles.

By conducting research and documenting challenges related to the business models of technology companies, NHRIs can play an important role in highlighting the potential issues and systemic risks that business should look out for in their due diligence practices. To do so, we call on States to ensure that NHRIS, governmental agencies and departments, have sufficient means to obtain and maintain the appropriate level of knowledge and expertise

B. Human rights due diligence and end-use

In order to be able to identify and assess the human rights impacts related to the end-use of digital technologies, it is essential to first understand how the digital ecosystem functions. This is essential not only for NHRIs and policymakers, but also for businesses. By increasing the digital technology expertise among NHRIs and policymakers, it will be possible to set clearer and more

specific expectations on what it means for businesses in the digital ecosystem to conduct human rights due diligence. We therefore call on States to provide NHRIS, and government agencies and departments, with sufficient human and financial resources, so that the appropriate level of knowledge and expertise can be obtained and maintained. Doing so will support in the development of specific and coherent human rights due diligence requirements across the digital ecosystem and will promote improved human rights due diligence practices on behalf of technology companies. We welcome the development, in many countries and regional organizations, of regulations on social media companies and their practices. We call on States to ensure that these regulations, which include various forms of due diligence requirements, are coherent and aligned with the UN Guiding Principles.

By gaining a better understanding of the digital ecosystem it will be possible to illustrate the many different actors, businesses and other entities, that have to conduct human rights due diligence with a look at the end-use of the digital technology in question. A developer of automated decision-making systems must, as part of its human rights due diligence process, understand how the system is meant to be used and its own involvement in the end-use of the system. Once the intended end-use of the system is clear, it will be increasingly possible to assess the human rights risks related to that end-use as well as the measures the developer could take to eliminate, mitigate or minimise those risks. With this in mind, we strongly encourage the High Commissioner for Human Rights to clearly illustrate in the upcoming report the multitude of actors that are involved in the digital ecosystem, the tools of prevention and mitigation that they have at their disposal, and their respective responsibilities to respect human rights.

C. Accountability and remedy

The mandate and role of NHRIs in facilitating remedy, are identified explicitly in the UN Guiding Principles. NHRIs are instrumental in bridging and mediating concerns over human rights violations involving businesses, and it is essential that NHRIs increasingly play this role in relation to human rights violations and abuse related to the use and application of digital technologies.

Depending on their mandate, NHRIs can facilitate remedy through state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance

mechanisms. Also, there are numerous examples on how NHRIs can use different pathways to do so. Those pathways can be (I) foundational (raise awareness, conduct research, recommend legal reforms, among others); (II) indirect (providing legal assistance, capacity or monitoring companies grievance mechanisms, among others); and (III) direct (Investigate abuses, conduct public enquiries, order compensation, among others).

For example, NHRIs can play an important role in the relationships with other State-based mechanisms such as domestic courts and regional human rights courts, by developing resources and knowledge on how the development and use of digital technologies impact human rights. The bridging role of NHRIs is an important tool or mechanism by which concerns of business-related human rights violations, not least with regard to digital technology-related harms, are brought to the attention of these actors.

We currently see three main obstacles to providing access to remedy. First, rights holders who have had their human rights violated or otherwise negatively impacted must be aware of the violation or impact taking place in order to be able to even raise a complaint. An individual that has been discriminated against through the use of an automated decision-making system used in a recruitment process, or someone who has had personal data shared without consent, may never be aware of the impact they have suffered.

Second, where an individual has been negatively impacted and is aware of the impact, it must be clear to the individual what mechanisms are available to raise the grievance. If laws, policies and regulations are not clearly aimed at addressing the kind of human rights violations that can take place within the digital ecosystem, the rights holder may not identify any possible recourse for the complaint.

Third, when an individual has been the subject of a negative human rights impact and has identified the possibility to raise the grievance through a State-based mechanism, the mechanism and its staff must have the knowledge, capacity and expertise to assess and address the grievance. With regard to the digital ecosystem, which is complex and dynamic, this will require dedicated funding and targeted efforts, aimed at ensuring an adequate level of knowledge and capacity as well as coordination and collaboration among a wide range of State-

based grievance mechanisms. We call on States to develop clear plans on how adequate knowledge and capacity will be ensured and to allocate sufficient funding towards those efforts. Further, we call on States to implement the recommendations of the various Special Rapporteurs that have analysed a range of harms related to the digital ecosystem [see end-note]. We call on States to adopt or update national action plans for the implementation of the Guiding Principles with due attention to both the digital ecosystem and its related human rights risks, as well as to Pillar III of the UN Guiding Principles. In doing so, we specially call on States to clearly define human rights violations through technology; which is necessary for remedies to be accessible and effective.

D. State's duty to protect, or regulatory and policy responses

Policy coherence

NHRIs have a central role to play in ensuring policy coherence in the regulation of the digital ecosystem, particularly with regard to safeguarding human rights in the data economy and in relation to the use of digital technologies. Ensuring policy coherence is ever more relevant as States and regional organisations are beginning to regulate the digital ecosystem, with regard to e.g. data protection and privacy, the development and use of artificial intelligence, and the role of social media companies. As outlined in a blog-post written by the former Chair of the GANHRI BHR WG,¹ without policy coherence (including when the State acts as an economic actor) government expectations towards technology companies may lack consistency and this may cause confusion among companies and stakeholders. As an example, government may seek to attract foreign investments from technology companies without distinguishing between companies that have -and do not have-, robust human rights policies and due diligence processes in place. While the very same companies may ignore regulatory requirements or

¹ Deniz Utlu, written during his time as Chair of the Global Alliance of National Human Rights Institutions' working group on Business and Human Right: Public policy and digital technologies: The role of National Human Rights Institutions in achieving policy coherence: <https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-blog-policy-coherence-nhris-tech.pdf>

guidance of another state agency to promote respect for human rights. To be effective, efforts to ensure policy coherence require that policies of different State entities are conceptualized as an integrated approach, meaning that activities of different state agencies all together sum up to a government action headed towards safeguarding human rights.

If NHRIs receive enough resources, they can help their respective governments achieve policy coherence. The UNGPs recognize the pivotal role of NHRIs when it comes to achieving policy coherence. For instance, the commentary to the UNGP Principles 3 states that NHRIs should help states identify whether relevant laws are aligned with their human rights obligations and if they are effectively enforced. Most NHRIs need additional resources and capacity in order to fulfil their mandate in this area. Therefore, strengthening the ability of NHRIs with regard to human rights and digital technologies should be part of the adoption and revision of NAPs as well as other State efforts to strengthen the work of NHRIs and advance responsible business conduct. We encourage the High Commissioner for Human Rights as well as States to emphasise and support the role of NHRIs in ensuring policy coherence.

Public procurement

One important lever that States have at their disposal in relation to promoting and protecting human rights in relation to digital technologies is human rights-respecting public procurement practices. States, government agencies and departments, municipalities, and other public bodies, all procure digital products and services. This includes facial recognition systems for surveillance purposes, online education services during the COVID-19 pandemic, automated decision-making systems to support unemployment agencies to prioritise interventions, and smart scheduling systems at universities meant for efficient use of lecture halls. Public procurement of such digital technologies should be conducted with human rights due diligence, and should also include clear expectations on the developers to have robust human rights due diligence processes in place. Indeed, this will both help create a 'race to the top' among the tenderers, as well as raise the minimum expectations on companies overall.

ANNEX 1 - NHRI examples of advancing the implementation of the UN Guiding Principles in the technology sector

NHRIs globally have initiated a multitude of actions connected to the activities of technology companies. These have ranged from investigations of the human rights impacts related to different kinds of digital technologies to the development of guidance and tools for businesses, governments, rights holders and other stakeholders.

Examples to include:

- European Network of National Human Rights Institutions:
 - ENNHRI contribution to EU whitepaper on AI²
 - ENNHRI, capacity-building through AI webinars (planned for 2022).
- Australian Human Rights Commission project on new and emerging technologies, including artificial intelligence. The Report reflects the Commission's extensive public consultation regarding the impact of new technologies on human rights.³
 - The Danish Institute for Human Rights works to ensure that governments, businesses and financial actors respect and support human rights when using technology through a number of activities in Denmark and Internationally.⁴ DIHR is also facilitating a number of activities under the Tech for Democracy Initiative.⁵ Together with B-Tech, Global Networking Initiative, Business for Social Responsibility and other participant the DIHR is facilitating the Action Coalition on Responsible Technology.⁶ The DIHR is also facilitating a NHRI Digital Rights Alliance.

² <https://ennhri.org/news-and-blog/european-nhris-make-submission-on-fundamental-rights-implications-of-artificial-intelligence/>

³ [Downloads | Human Rights and Technology](#)

⁴ [Technology and human rights | The Danish Institute for Human Rights](#)

⁵ [Frontpage - Tech for Democracy](#)

⁶ [Action coalition on responsible technology | The Danish Institute for Human Rights](#)

- German Institute for Human Rights has conducted a mapping and research study on Business and Human Rights in the Data Economy.⁷
- Chilean NHRI has since 2013 worked on Issues related to digital technologies and human rights⁸ and has published special chapters of it's annual report on data protection and new technologies.⁹
- Kenya NHRC Involvement in strategic litigation on digital ID¹⁰ and Chilean NHRI involvement in strategic litigation on surveillance.¹¹
- The Commission on Human Rights of the Philippines has developed multistakeholder consultation and HRDD training sessions Including technology companies. In order to generate internal capacity, the Commission provided data privacy training for its employees and officials. Also, the Commission, together with the Roman Catholic Archdiocese of Manila (RCAM) worked together in training modules for the youth to develop concrete actions in combating technological abuse and ecological crisis that links to human rights.
- The French National Consultative Commission on Human Rights has published an opinion in 2021 on the fight against online speech, which advocates for an enhancement of the role of the State and the creation of new obligations for online platforms¹² ; and is currently working on the challenges posed to human rights by artificial intelligence and the necessity to adopt a framework-convention to guarantee that the use of AI by public and private entities is respectful of human rights.

⁷ [Business and Human Rights in the Data Economy | Deutsches Institut für Menschenrechte \(institut-fuer-menschenrechte.de\)](https://www.dshg.de/en/our-work/business-and-human-rights-in-the-data-economy)

⁸ <https://bibliotecadigital.indh.cl/bitstream/handle/123456789/627/cuadernillo?sequence=1>

⁹ <https://www.indh.cl/destacados/informe-anual-2018/> (see chapter 8)

¹⁰ <https://www.nytimes.com/2020/01/31/world/africa/kenya-biometric-ID-registry.html>

¹¹ <https://www.indh.cl/indh-presenta-informe-sobre-globos-de-vigilancia-ante-la-corte-de-apelaciones/>

¹² CNCDH, [avis sur la lutte contre la haine en ligne, 8 July 2021](https://www.cncdh.fr/sites/default/files/a_-_2021_-_9_-_lutte_contre_la_haine_en_ligne_juillet_2021.pdf), available at [https://www.cncdh.fr/sites/default/files/a - 2021 - 9 - lutte contre la haine en ligne juillet 2021.pdf](https://www.cncdh.fr/sites/default/files/a_-_2021_-_9_-_lutte_contre_la_haine_en_ligne_juillet_2021.pdf)