

RESEARCH BRIEF

REGULATING BUSINESS CONDUCT IN THE TECHNOLOGY SECTOR: GAPS AND WAYS FORWARD IN APPLYING THE UNGPs

KEY MESSAGES

- The UNGPs can provide important guidance to policymakers on ensuring that their regulatory efforts align with a human rights-based approach when requiring technology companies to respect human rights.
- The UNGPs have already set the standard on appropriate measures in respecting human rights in the corporate context for the past 10 years, in particular for large multinational companies.
- Existing regulatory efforts on technology company conduct show a mixed picture with regard to UNGPs alignment and this paper depicts key alignment issues.
- For improving UNGPs alignment of regulatory efforts aiming at technology company conduct, this research brief explores a structure for a guidance tool for policymakers.
- A UNGPs-based approach would allow for the development of a coherent regulatory landscape aligned with international standards.

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INTRODUCTION

Fast-paced technological advances, including in artificial intelligence (AI), are increasingly disrupting and transforming our world. Digital technologies pose significant societal challenges, notably regarding human rights. For example, the use of such technologies can contribute to exacerbating ethnic conflict, fuelling hate speech, undermining democratic processes, facilitating mass surveillance, and perpetuating discriminatory narratives and practices.¹ At the same time, technological innovation also promises to support the promotion and protection of human rights, notably as means to achieving the Sustainable Development Goals.²

The role of the private sector in fostering technological innovation is the key driving force of today's data-driven economy. In 2020, the UN Secretary-General called on States 'to place human rights at the centre of regulatory frameworks and legislation on the development and use of digital technologies.'³ Since then, a variety of regulatory initiatives at domestic and regional levels have been put forward to tackle different aspects concerning rights-respecting business conduct in the technology sector. That is, for instance, the regulation of AI technologies⁴ and that of online harms.⁵

At the same time, but often perceived as a parallel

discourse, non-sector specific regulation is on the rise regarding business responsibilities towards human rights.⁶ Such regulatory developments on Mandatory Human Rights Due Diligence requirements for companies may also have implications for how technology companies design, develop, and sell products and services. For example, they may mandate greater transparency over technology companies' decision-making. Mandatory human rights due diligence may also require that these companies put in place appropriate safeguards and oversight mechanisms to ensure a rights-respecting approach.

Furthermore, voluntary policy responses to human rights risks related to digital technologies are beginning to be considered and reflected across many jurisdictions, such as, among others, improved access to export credits for companies that demonstrate rights-respecting conduct.⁷

Yet, as emphasized by the Human Rights Council, a 'holistic, inclusive and comprehensive approach' for addressing the impact of digital technologies on human rights is needed.⁸ Therefore, it is crucial to identify ways of placing human rights and, particularly, the UN Guiding Principles on Business and Human Rights (UNGPs)⁹ at the heart of regulatory and policy frameworks concerning digital technologies. The UNGPs can indeed play a crucial role in providing a normative framework for fostering respect for human rights in the context of digital technologies. Still, a coherent roadmap aligned with international standards for how to do so precisely for the technology sector is lacking today.

The foundational paper of the United Nations Office

1 Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Surveillance and human rights' (2019) UN Doc A/HRC/41/35; UN High Commissioner for Human Rights Michelle Bachelet, 'Use of spyware to surveil journalists and human rights defenders. Statement by UN High Commissioner for Human Rights Michelle Bachelet', (19 July 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27326&LangID=E>> accessed 18 February 2022; UNGA, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' (2020) UN Doc A/75/590; UN Secretary General's High-level Panel on Digital Cooperation, 'The age of digital interdependence' (2019) <<https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>> accessed 18 February 2022.

2 Human Rights Council, 'Resolution No 47/23 on New and emerging digital technologies and human rights' (2021) UN Doc A/HRC/RES/47/23

3 UN Secretary General, 'Report of the Secretary-General Roadmap for Digital Cooperation' (2020) <https://www.un.org/en/content/digital-cooperation-roadmap/assets/pdf/Roadmap_for_Digital_Cooperation_EN.pdf> accessed 18 February 2022.

4 See for example, European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final [hereinafter 'AI Act']; Council of Europe, Ad Hoc Committee on Artificial Intelligence <<https://www.coe.int/en/web/artificial-intelligence/cahai>> accessed 18 February 2022

5 See for example, European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final* [hereinafter 'DSA']; European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, COM/2020/842 final [hereinafter 'DMA']; Draft Online Safety Bill Presented to Parliament by the Minister of State for Digital and Culture by Command of Her Majesty, May 2021, CP 405 [Hereinafter 'Draft Online Safety Bill'].

6 See Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre JORF 74 (28 mars 2017) (French Duty of Vigilance Law - on parent companies' and donor companies' duty of vigilance); Kamerstukken I, 2016/17, 34 506, A (Dutch law concerning child labour due diligence only); Federal Ministry of Labour and Social Affairs, Due Diligence Act <<https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html>> accessed 18 February 2022 (German legislation); Business and Human Rights Resource Centre, 'Norwegian parliament adopts the Transparency Act' (14 June 2021) <<https://www.business-humanrights.org/en/latest-news/norwegian-parliament-adopts-the-transparency-act/>> accessed 18 February 2022 (about the Norwegian new legislation). See also, European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (including a draft Directive of the European Parliament and of the Council on Corporate Due Diligence and Corporate Accountability) (2020/2129(INL)) (the directive is still to be proposed by the European Commission).

7 See for example the Human Rights Due Diligence Framework of the Canadian Export Credit Agency: <<https://www.edc.ca/content/dam/edc/en/corporate/corporate-social-responsibility/environment-people/human-rights-framework.pdf>> (accessed 18 February 2022)

8 Human Rights Council, above n(2) at para. 1.

9 UN Human Rights Council, 'Report of The Special Representative of The Secretary-General on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (21 March 2011) UN Doc A/HRC/17/31 (UNGPs).

of the High Commissioner's (OHCHR) B-Tech Project articulates how the UNGPs can serve as a roadmap for bridging governance gaps in the age of technology and highlights the duty of States to adopt a 'Smart Mix' of voluntary and mandatory measures requiring technology companies to respect human rights.¹⁰

Against this backdrop, this research brief evaluates how regulatory approaches to business conduct in the technology sector could be better aligned with the UNGPs. The analysis draws on research carried out at the Geneva Academy of International Humanitarian Law and Human Rights as part of the project Disruptive Technologies and Rights-based Resilience – funded by the Geneva Science-Policy Interface and conducted in partnership with the Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR) B-Tech Project.¹¹

After briefly presenting the human rights framework and the UNGPs (section 1), the analysis identifies the prominent gaps in UNGPs alignment in regulatory efforts and their subsequent risks for human rights (section 3), followed by recommendations on how regulatory processes could be better aligned with the UNGPs (section 4) and sketches the essential building blocks for policymakers when regulating technology company conduct.

THE HUMAN RIGHTS FRAMEWORK AND THE UNGPS

It is generally accepted that International Human Rights Law (IHRL) applies in the digital space and that 'the same rights that people have offline must also be protected online.'¹² In this regard, and due to the impact of digital technologies on human rights, IHRL should also inform any regional or national regulatory developments of digital technologies and technology companies' conduct.

The international human rights framework is composite, comprising instruments adopted by States at both the universal (UN) and regional levels. At the UN level, the Universal Declaration on Human Rights and the two

International Covenants adopted in 1966 (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) form the so-called International Bill of Human Rights.¹³ These are complemented by seven core specific international human rights treaties.¹⁴ Together they form the legal framework of reference for human rights at the UN level. At the regional level, human rights treaties such as the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights establish specific legal regimes applicable to State-parties to these regional human rights treaties.¹⁵

The UNGPs complement this overall framework, reflecting internationally agreed norms applicable to States and businesses as a soft law instrument. The UNGPs have an authoritative and 'intrinsic persuasive power.'¹⁶ That is notably due to their uptake by key stakeholders across a variety of sectors, including business, government, and civil society.

The UNGPs are structured into three pillars. The first pillar reaffirms the State duty to protect human rights. The second pillar introduces the corporate responsibility to respect human rights. The third pillar sets forth the principles on access to remedy for victims of business-related human rights abuses. These sets of principles apply to all States and all businesses enterprises, including

¹⁰ United Nations Office of the High Commissioner's B-Tech Project (2021): Bridging Governance Gaps in the Age of Technology via <https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-foundational-paper-state-duty-to-protect.pdf>

¹¹ See Geneva Academy of International Humanitarian Law and Human Rights <<https://www.geneva-academy.ch/research/our-clusters/digitalization-and-new-technologies/detail/82-disruptive-technologies-and-rights-based-resilience> accessed 29 November 2021> accessed 18 February 2022.

¹² UNGA Res 68/167, 21 January 2014, §2; See also Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' UN Doc A/HRC/20/L.13, 29 June 2012; Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' UN Doc A/HRC/32/L.20, 27 June 2016; M. N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 179.

¹³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Convention on the Rights of the Child (adopted 7 March 1990, entered into force 2 September 1990) E/CN.4/RES/1990/74 (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158 (CMW); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) A/72/280 (CPED); Convention on the Rights of Persons with Disabilities Disappearance (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953, as amended) (ECHR); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (African Charter). See notably Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3rd ed, CUP 2019) (for a general overview and analysis of the different regional instruments and their relationship with human rights treaties adopted at UN level).

¹⁶ John Gerard Ruggie, Caroline Rees and Rachel Davis, 'Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations' (2021) *Business & Human Rights Journal* 1-19 at 2.

technology companies — thus going beyond the remit of international treaty law, which creates obligations towards States primarily.¹⁷ Current practice in the technology sector demonstrates that the UNGPs have become a popular point of reference in public policy, with a set of technology companies setting out their commitments to human rights in line with the UNGPs.¹⁸

According to pillar 1 of the UNGPs, States have a duty to protect against human rights abuses by ‘taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’¹⁹ They should also set out clear expectations about business’ respect for human rights.²⁰ In this regard, States are invited to adopt a ‘smart mix’ of measures — national and international, mandatory and voluntary, to support and further the implementation of the UNGPs.²¹

This ‘smart mix’ consists of enforcing relevant laws centering on the expectations towards businesses to uphold their corporate responsibility to respect human rights, providing guidance to businesses, including supporting business respect for human rights in conflict-affected areas (UNGP7), and implementing transparency measures. States are encouraged to enforce laws that are aimed at, or have the effect of, requiring technology companies to respect human rights, and periodically assess the adequacy of such laws and address any gaps.

The mix between mandatory and voluntary measures is crucial in the technology sector. That is because the adoption of mandatory measures, such as laws, alone might not be sufficient – these are often not apt to provide robust enforcement and monitoring mechanisms. They may also not be adequate instruments to keep pace with the fast advances in technology. Yet, relying solely on corporate self-regulation is not enough to promote respect for human rights – notably if these mechanisms are not supported by a robust normative framework.²²

17 But see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006).

18 See for example Cloudflare (2022): <https://blog.cloudflare.com/cloudflare-human-rights-commitments/>; Facebook (2022): <https://about.fb.com/news/2021/03/our-commitment-to-human-rights/>; Google (2022): <https://about.google/human-rights/>; Telefonica (2022): <https://www.telefonica.com/en/sustainability-innovation/society/human-rights/>; Telia (2022): <https://www.teliacompany.com/en/sustainability/responsible-business/human-rights/>

19 UN Guiding Principle 1.

20 UN Guiding Principle 2.

21 UN Guiding Principle 3, Commentary.

22 See concerning the analysis of examples of self-regulation building lacking robust normative frameworks and making weak pledges of respect for human rights Karen Yeung, Andrew Howes and Ganna Pogrebna, ‘AI Governance by Human Rights-Centred Design, Deliberation and Oversight: An End to Ethics Washing’ in Markus D.

Accordingly, a well-balanced combination of mandatory and voluntary measures aimed at regulating business conduct in the technology sector could lead to a better ecosystem of protection and respect for human rights in the digital space. The ongoing regulatory debates often focus on the design, development and use of technologies concerning specific areas such as ethical AI, privacy or content moderation. Rather than creating a more fragmented regulatory landscape, by applying a UNGPs-based approach policymakers could ensure compliance with human rights standards as a whole.

CURRENT GAPS AND POTENTIAL RISKS FOR HUMAN RIGHTS

In recent years, a variety of stakeholders have increasingly voiced the need for more robust regulatory frameworks for the technology sector, particularly regarding the development and the uses of AI technologies.²³ As a result, some States and international organizations have started implementing regulatory and policy frameworks on digital technologies. For instance, the Brazilian ‘Internet Freedom, Responsibility, and Transparency Bill’ was proposed in 2020,²⁴ and the European Commission has proposed a regulation on AI in 2021.²⁵ More recently, the Council of Europe’s Ad Hoc Committee on Artificial Intelligence has explored the feasibility of a European legal framework on AI. This study has also explored the role of the UNGPs and human rights due diligence in identifying, addressing and mitigating human rights impacts stemming from technology companies more broadly.²⁶

Similarly, a variety of States and the EU have sought to propose instruments for the regulation of online harms.

Dubber, Frank Pasquale, and Sunit Das (eds.) *The Oxford Handbook of Ethics of AI* (OUP 2019) 77-106; Elettra Bietti, ‘From Ethics Washing to Ethics Bashing: A View on Tech Ethics from Within Moral Philosophy’ (2020) Proceedings to the ACM FAT Conference, Barcelona < <https://ssrn.com/abstract=3914119> > accessed 18 February 2022; Lilian Edwards (ed), *Law, Policy and the Internet* (Hart 2018).

23 Philip Pulella and Jeffrey Dastin, ‘Vatican joins IBM, Microsoft to call for facial recognition regulation’ *Reuters* (London, 28 February 2020); Kate Crawford, ‘Time to regulate AI that interprets human emotions’ (2021) 593 *Nature* 167; Business & Human Rights Resource Centre, ‘Tech companies call for govt. regulation of artificial intelligence’ (2021) < <https://www.business-humanrights.org/en/latest-news/tech-companies-call-for-govt-regulation-of-artificial-intelligence/> > accessed 18 February 2022.

24 Projeto de Lei nº 2630/2020. *Institui a Lei Brasileira de Liberdade, Responsabilidade e Transparência na Internet* [Internet Freedom, Responsibility, and Transparency Bill] PL 2630/2020.

25 European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final [hereinafter ‘AI Act’].

26 Council of Europe, Ad Hoc Committee on Artificial Intelligence, Feasibility Study < <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-1680a0c6da> > accessed 18 February 2022.

COMPARISON OF THE UNGPS AND APPROACHES IN EXISTING TECH REGULATION: STAKEHOLDER REFLECTIONS ABOUT PROMINENT GAPS (NON-EXHAUSTIVE),



FAVOURABLE FROM A UNGPS PERSPECTIVE	DRAWBACKS FROM A UNGPS PERSPECTIVE
Broad view on human rights	Narrow view on human rights
Consistent application of the human rights due diligence terminology	Inconsistent use of human rights due diligence terminology
Value chain focus across the full business sphere	Narrow scope on a tier in the value chain
Accompanying measures and proper enforcement	Lack of accompanying measures and enforcement mechanisms
Process-oriented character of the legislation relating to the expectations towards business to meet	Prescriptive list of non-permissible activities or a focus on protected artifacts
Genuine stakeholder engagement	No “balancing test”/ appropriateness
Clear provisions for Access to Remedy	Lack of clear provisions for Access to Remedy

For instance, recent developments include the European Commission’s Digital Services Act and the Digital Market Act proposals,²⁷ the UK Online Safety Bill²⁸,²⁹ and proposals from Bangladesh, Brazil, Canada, Chile, India, Indonesia, Kazakhstan, and Singapore.³⁰

Building on previous research carried out in the context of the project on Disruptive Technologies and Rights-based

Resilience,³¹ and informed by inputs from five multi-stakeholder consultations spanning from February 2021 to March 2022,³² this research paper identifies the following

²⁷ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, COM/2020/825 final [hereinafter ‘DSA’]; European Commission, *Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)*, COM/2020/842 final [hereinafter ‘DMA’].

²⁸ Draft Online Safety Bill Presented to Parliament by the Minister of State for Digital and Culture by Command of Her Majesty, May 2021, CP 405 [Hereinafter ‘Draft Online Safety Bill’].

²⁹ Draft Online Safety Bill Presented to Parliament by the Minister of State for Digital and Culture by Command of Her Majesty, May 2021, CP 405 [Hereinafter ‘Draft Online Safety Bill’].

³⁰ See for a general overview of these proposals: Global Network Initiative, *Intermediary Liability & Content Regulation*, available at <https://globalnetworkinitiative.org/policy-issues/intermediary-liability-content-regulation/>.

³¹ See Ana Beduschi and Isabel Ebert, ‘The Relevance of the Smart Mix of Measures for Artificial Intelligence - Assessing the Role of Regulation and the Need for Stronger Policy Coherence’ (2021) *Geneva Academy of International Humanitarian Law and Human Rights, Working Paper Series*, 1-16; Ana Beduschi, ‘Regulatory Approaches to Online Harms and Human Rights: Three Case Studies’ (2022) *Geneva Academy of International Humanitarian Law and Human Rights, Working Paper Series*, 1-15; above n(9).

³² Multi-stakeholder consultation on the State Duty to Protect in the Age of Technology organized by OHCHR B-Tech and Geneva Academy, February 2021: <https://www.geneva-academy.ch/news/detail/426-bridging-governance-gaps-in-the-age-of-technology-a-discussion-on-the-state-duty-to-protect>; Multi-stakeholder consultation on ‘Engaging Policy Makers on Tech Regulation using the UNGPs’, organized by the UN Human Rights B-Tech Project, the Centre for Democracy & Technology’s Europe Office and the Geneva Academy, September 2021 <https://www.ohchr.org/sites/default/files/2022-02/CDT-B-Tech-CDT-GA-UNGPs-DSA-Consultation-14-Sept.docx>; UN Business and Human Rights Forum session November 2021 ‘Building Blocks for tech regulation’, November 2021 https://www.ohchr.org/sites/default/files/2022-02/B-Tech_BHR_Forum_Building_Blocks.pdf; Multi-stakeholder consultation on gaps and ways forward on aligning tech regulation with the UNGPs, February 2022 <https://www.geneva-academy.ch/news/detail/517-placing-human-rights-at-the-centre-of-new-tech-regulations>; OHCHR consultation on the practical application of the United Nations Guiding Principles on Business and Human Rights to the activities of technology companies, March 2022 <https://www.ohchr.org/en/events/consultations/2022/ohchr-consultation-and-call-submission-practical-application-united>

non-exhaustive prominent gaps regarding the alignment of existing regulatory efforts with the UNGPs in the technology sector.

1. BROAD VIEW ON HUMAN RIGHTS

Tech-related policies or regulation should reflect the expectation that technology companies should prioritize preventing and mitigating the most salient human rights risks, while still reflecting the fact that the responsibility to respect applies across all internationally recognised human rights. Reducing the scope of the responsibility to a subset of rights is one of the key points of concern from stakeholders regarding existing tech company conduct legislation. Stakeholder voices mirrored the view that a full range of human rights is a preferable scope as opposed to a narrow focus on a set of human rights, nevertheless it depends on the regulatory objective. Generally, the focus should be on the broad range of human rights impacts of companies' products and services and how those can be prevented and mitigated. At the same time, policymakers should expect companies to prioritize actions: In the actual business reality, a human rights due diligence process would require the company to assess adverse impacts also by the saliency of the impact, and then prioritize action to address the most salient risks first, and cascade down to addressing the less salient. A subset of human rights risks can be in focus if it is tied precisely of the regulatory objective that policy makers want to achieve by a deep and specific approach.

2. CONSISTENT APPLICATION OF THE HUMAN RIGHTS DUE DILIGENCE TERMINOLOGY

Another point of concern raised in the consultations was an inconsistent use of human rights due diligence terminology, which results in a vast interpretative scope of the actions required by companies in the technology space. Regulatory regimes should refer to 'human rights due diligence' rather than 'due diligence' generically (i.e., India Intermediary Guidelines) or 'risk assessment (i.e., EU DSA).

The UNGPs terminology clearly expects companies, as part of their human rights due diligence, to identify, address and mitigate adverse impacts stemming from or being linked to their activities, also applying to technology company conduct. The stages of this process can be broadly structured along four steps: 1. Identifying and Assessing Impacts to gauge the nature and extent of human rights risks; 2. Acting to prevent and mitigate risks to people, including via integration within internal functions and processes; 3. Tracking of effectiveness of risk mitigation responses over time; and 4. Appropriate communication

of performance with respect to addressing human rights impacts.

A lack of clarity and non-alignment in terminology bears the risks that companies will have to create new internal structures and/or auditing procedures, which do not align with existing processes and mechanisms, and this will likely lead to them having overlapping/confusing/redundant processes, or even abandoning existing efforts in favor of what is required under law, which may actually be less robust. This will also have impacts on non-company actors trying to track and influence corporate human rights due diligence. Such risks are exacerbated if multiple, distinct due diligence requirements emerge in different jurisdictions, and possibly create conflicts of law. Finally, the confusion and costs this would create will also be a barrier to competition. This is yet another reason why having such efforts grounded on IHRL and in particular the language used in the UNGPs make sense, as these allow for diverse national approaches that should nevertheless be fundamentally aligned and compatible.

The OHCHR B-Tech Project has published guidance to how technology companies should carry out human rights due diligence.³³ Regarding Step 1, human rights impact assessment are one possible way among others to identify risks to people associated with business activities, in line with the UNGPs. To avoid diluting the key message of human rights due diligence as an on-going process centred on identifying, addressing and mitigating the risks to people (rather than risk to business), regulatory efforts need to follow the terminology used by the UNGPs in a consistent manner. This should equally be mirrored in the transparency and reporting requirements for companies regarding their human rights due diligence practices.

3. VALUE CHAIN FOCUS ACROSS THE FULL BUSINESS SPHERE

Participants in the consultations also raised the issue of existing regulatory efforts applying a narrow scope on a tier in the value chain focus, neglecting the fact that in a digital ecosystem, harms can easily cascade down or up the value chain of a business. Therefore, it is of vital importance to apply a value chain lens to the full business sphere, while, as mentioned above, prioritization to address the most severe harm first, is expected from business when taking action.

4. ACCOMPANYING MEASURES AND PROPER ENFORCEMENT

Another key point of concern from stakeholders

³³ OHCHR B-Tech Project, Key Characteristics of Business Respect, September 2020: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/key-characteristics-business-respect.pdf>

emerged as being a lack of robust enforcement and support mechanisms. This can lead to confusion regarding the level of rigour and quality of business respect for human rights and might make business action prone to ‘human rights washing’ when laggards cannot sufficiently be differentiated from leaders in the field. Proper flanking and enforcement measures ensure a fair and equal treatment of business subject to legislation and assist in establishing a level-playing field of good corporate practice in the technology sector regarding human rights protection.

5. PROCESS-ORIENTED CHARACTER OF THE LEGISLATION RELATING TO THE EXPECTATIONS TOWARDS BUSINESS TO MEET

The character and spirit of the UNGPs focus on addressing and taking action on risks to people or rights-holders stemming from or being linked to business activities. In order to do so, any regulatory provisions regarding business conduct specifically designed for the technology sector needs to correspond to the fast and evolving nature of the technology development. Suppose a regulatory approach follows a prescriptive list of non-permissible activities, or focuses on protected artifacts, rather than identifying and taking action, and ideally mitigating/remediating harms. In that case, it cannot respond appropriately to newly emerging challenges for the rights of users and affected stakeholders. An additional risk is a lack of future-proofing regulation against new technological advances when providing a static list of non-permissible outcomes. Conversely, a process-oriented approach allows a steady re-identification and re-assessment of organizational and technological challenges in capturing the risk to people and responding to those risks.

6. GENUINE STAKEHOLDER ENGAGEMENT

A strong concern from the stakeholders consulted related to the concept of stakeholder engagement. Several participants in the consultations voiced demands for future regulatory efforts to ensure more transparency about how frequently stakeholders had been engaged, and how stakeholder selections were made, which of their inputs were taken up and why. Similar concerns were also raised on the need for stronger commitment by policymakers to ensure stakeholder engagement channels are open and inclusive to genuinely capture the needs of affected people and groups, as well as civil society, academic experts, business representatives, National Human Rights Institutions, international expert organizations and many more.

7. CLEAR PROVISIONS FOR ACCESS TO REMEDY

As policy-makers and legislators begin to pay greater attention to the adverse human rights impacts occasioned by the collective and societal effects of the business activities of technology companies, remedy for affected rights holders is key to remediate adverse impacts, which in many cases are not confined to domestic borders and may be global in reach. Nevertheless, existing tech regulation is characterized by a lack of precision on how affected stakeholders can seek Access to Remedy and how the burden of proof can be lowered when rightsholders are confronted with opaque algorithmic systems. Policy makers therefore need to review barriers in access to judicial remedy in cases involving harm by technology companies and take effective measures to address such barriers. Policymakers should also strengthen the oversight and enforcement capacity of administrative regulatory bodies relevant to piece of regulation debated.

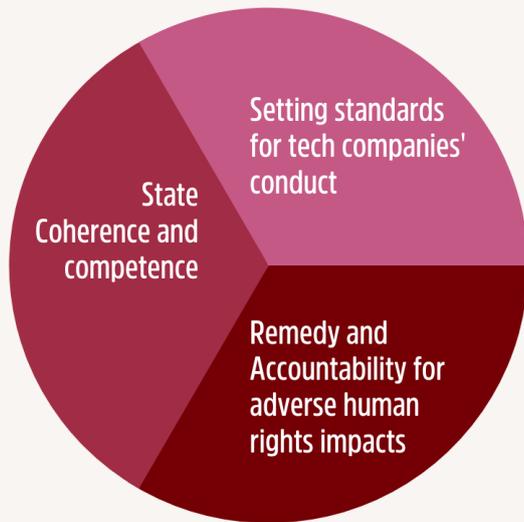
POLICY GUIDANCE FOR ALIGNING REGULATORY AND POLICY PROCESSES TO THE UNGPS

In order to inform the increasing number of States which are elaborating or examining regulatory frameworks at the national and multilateral levels regarding the development and use of digital technologies, the OHCHR B-Tech Project is currently developing a guidance tool to inform policymakers on the policy and design choices when regulating technology company conduct in a manner which is consistent with the UNGPs.

This guidance tool is also designed to support the strong need for alignment at the regional and global levels to avoid any further fragmented regulatory and policy approaches. The goal is to provide enhanced clarity for policymakers and other key stakeholders working on regulatory proposals on what a UNGPs aligned business conduct in the technology sector should look like.

The guidance tool will allow policymakers and other stakeholders to assess whether regulatory or incentive-based initiatives directed at the technology sector align with the UNGPs. It will inform the choice of design and policy options and instruments for draft legislation and incentive-based initiatives aiming at rights-respecting conduct of technology companies.

THE UNGPS CHECK IS CHARACTERIZED BY THREE OVERARCHING FEATURES:



1. SETTING STANDARDS FOR TECHNOLOGY COMPANIES' CONDUCT

Expectations towards the technology sector corresponding to Pillar II of the UNGPs (Corporate Responsibility to Respect Human Rights), and regulatory elements that the State should require for companies to comply with these expectations (e.g. building on aspects of signals of seriousness), including specific elements for high-risk types of technology or contexts of usage.

2. REMEDY AND ACCOUNTABILITY

Clarifying the role of the State in providing effective remedies for human rights harm to affected people and communities stemming from, or being linked to technology company conduct, in line with the recommendations by the OHCHR Accountability and Remedy Project on improving accountability and access to remedy in cases of business involvement in human rights abuses, and the tech-specific B-Tech guidance on Access to Remedy in its foundational papers.

3. STATE COHERENCE AND COMPETENCE

Achieving policy coherence with regard to the requirements set out in a planned piece of regulation makes it necessary that policymakers cross-check that there are no other policy measures that will undermine the objectives of that particular effort in already existing legislation or parallel legislative debates.

Ensuring coherence on subject matters related to

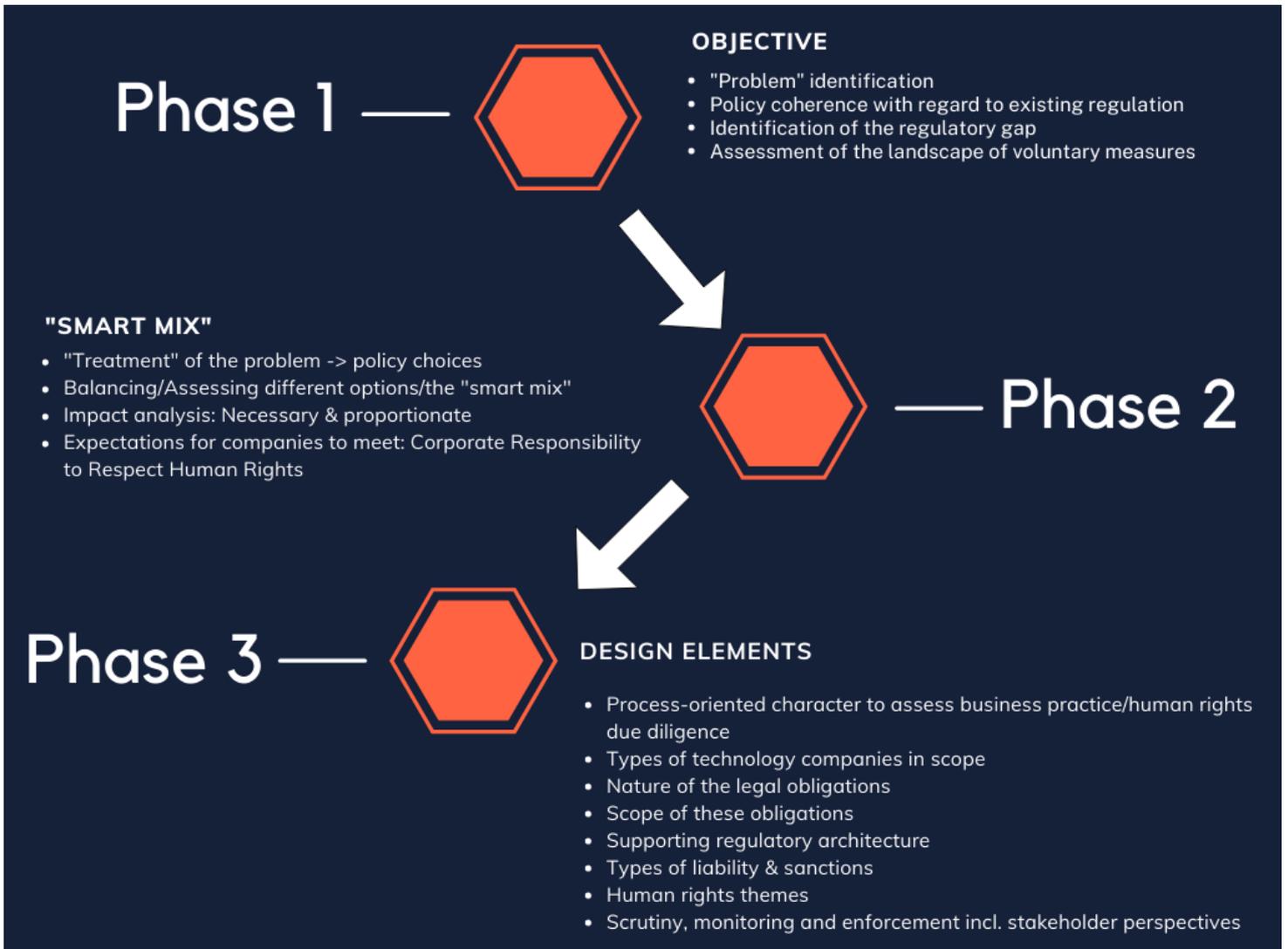
the adverse impacts of digital technologies as well as responsible business conduct regulation across government departments, agencies and state-based institutions, both on a national and subnational level; and when States participate in multilateral institutions and enter into trade and investment agreements is important. Being aware of the wider regulatory context of a regulatory proposal will sharpen the regulatory objective and ensure coherence with regard to already existing regulation.

Underpinning and vital to the success of the process is a strong stakeholder engagement along all stages of the regulatory development process. The following three phases have been discussed as important building blocks for UNGPs-aligned regulation.

Phase 1) consists of defining the 'objective' by a sound identification of the 'problem' that the deliberated regulatory effort is trying to solve and what constitutes the regulatory gap. Policymakers will be wary of upholding policy coherence with regard to existing regulation and not to create overlapping areas of regulation (e.g. between mandatory human rights due diligence legislation in a sector-overarching manner and technology-specific regulation). This phase also includes an assessment of the landscape of voluntary measures along with possible regulatory ones, as regulation is not always the silver bullet and/or might be best combined with accompanying voluntary measures to enhance efficacy.

Phase 2) entails discussing and weighing the possible policy choices, bearing in mind the earlier mentioned mix of regulatory and voluntary measures available. Such a 'smart mix' of measures as put forward by the UNGPs aims at the 'treatment' of the problem by policy makers making certain policy choices. It is vital to balance and assess different options against others, and choose wisely based on an impact analysis regarding necessary and proportionate options for expectations for companies to meet when it comes to their corporate responsibility to respect human rights linked to their business activities, digital products and services.

Phase 3) transposes the decisions made in phase 2 into design elements. Supporting a process-oriented character to assess business practice and require human rights due diligence should be the primary goal. This phase will have to determine which types of technology companies are in scope of the deliberated regulatory effort, what will be the nature of the legal obligations and their scope, along with the supporting regulatory architecture. Furthermore, this phase consists of defining the types of liability and sanctions companies may face in case of non-compliance



with the regulation. The phase further elaborates the human rights themes covered and why (see also the gap section and why a holistic approach is desirable). In order to ensure tech companies covered by the regulation are treated fair and equal, robust scrutiny, monitoring and enforcement measures based on stakeholder perspectives require spelling out in this phase.

Further consultations and academic expert meetings will hone out the more detailed nature of these phases during the course of the coming months.

THE GENEVA ACADEMY

The Geneva Academy provides post-graduate education, conducts academic legal research and policy studies, and organizes training courses and expert meetings. We concentrate on branches of international law that relate to situations of armed conflict, protracted violence, and protection of human rights.

THE B-TECH PROJECT

The B-Tech Project of the Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR) provides authoritative guidance and resources for implementing the UN Guiding Principles on Business and Human rights (UNGPs) in the technology space. In 2019, UN Human Rights launched the project after consultations with civil society, business, States, and other experts about the scope of the B-Tech Project.

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