

UN Human Rights Business and Human Rights in Technology Project (B-Tech)

Response to the public consultation - by Derechos Digitales - América Latina

About Derechos Digitales

Derechos Digitales is an independent non-governmental organisation, founded in 2005, with main offices in Santiago de Chile. Our aim is the defense and promotion of fundamental rights in the digital environment in Latin America using advocacy tools among policymakers, private companies and the general public, to promote a social change around the respect and dignity of people.

I. Introduction

- The Office of the High Commissioner for Human Rights of the United Nations has been conducting informal consultations to kickstart the Business and Human Rights in Technology Project ("the B-Tech Project"), aiming to provide "principled and pragmatic ways to prevent and address human rights harms connected with the development of digital technologies and their use by corporate, government and non-governmental actors, including individual users". Within the context of this process, a public consultation on a Draft Scoping Paper was launched in August 2019.
- The discussion is very welcomed, given the relevance it has for current and future issues arising from the need to protect human rights, especially in developing countries. As the Draft Scoping Paper recognises, this is not restricted to technology companies' behaviour with regards to its internal relations, or direct relation with their customers, but also with regards to the implementation and use of their products and the impacts individual and collective of the use of them. Chains of production of physical goods, employment by technology companies, field of deployment of technology, but also internal processes of companies that lead to create new product, services and business models need urgent review according human rights standards.
- It is, therefore, a discussion of the utmost importance for Latin America. While big technology companies continue to implement and deploy their business model over the region, which has become a particularly attractive market by the eagerness of private and public actors to adopt new technologies, countries in the region are trying to keep up by facilitating the rise of their own companies to compete in the global digital economy and acquiring massively for State performance improvement many of these technologies with the promise to solve social justice structural problems still pending in the region. Many of those implementation are sponsored and promoted by international investment bank through development projects that lack of human rights impact assessments. The negative impacts that these deployments may have over the populations appear as secondary concern against

the will to participate in the digital economy and not lag behind developed countries any further. Concrete guidance is necessary, both for global technology companies and local ones, and to improve public policies in the implementation and use of technologies by all actors.

II. General considerations

- Derechos Digitales salutes the effort of UN Human Rights to conduct the project. As a regional organisation focused on the protection and promotion of human rights in the use of technology, we acknowledge the need for such an effort, especially in a way that recognises the many differences that exist not only between regions, but also between countries and communities within each region. Proper implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) is currently a missing piece in the discussion of human rights and technology in the Latin American region.
- However, we regret that the discussions up until this point in time have happened without proper inclusion of a more balanced geographic representation of the consulted actors. It is disappointing not to have found ourselves, nor dozens of other civil society organisations and public interest group from the global south, let alone Latin America, properly represented in the consultations so far. Not one single representative from Latin America was found in the consultation during RightsCon, even though dozens of Latin American organisations were present in the conference itself. As an initial step to find the pressure points where affected or potentially affected communities and populations may need a voice that absence of representation can lead to skewed results ever since the inception of the project.
- Derechos Digitales remains committed to participate meaningfully in any such processes conducted by international organisations. It is our hope that this response to the consultation is but one initial point to an ongoing relationship in the discussion and execution of the B-Tech Project.

III. Response to the consultation

1. Do you agree with the proposed focus areas set out in section V of this paper? Are these the areas around which the application of the UNGPs require more clarity and urgent attention? Are there challenges or issues not addressed in the paper that should be included?

- The proposed focus areas are appropriate. It represents a proper approach, that includes the three pillars of the UNGPs, and it properly recognises how inter-related they are, as well as the cross-cutting nature of the fourth focus area.
- The discussion and proposed key questions in each focus area are also properly aligned with current concerns about human rights in practice. Efforts to make human rights a practical

matter by technology companies (as well as States and other end-users of technology) are very welcome. However, there must still be further guidance in basic conceptual challenges with regards to human rights, including the content of, and intent behind, the UNGPs, especially for relevant stakeholders in developing countries.

2. For each of the four focus areas set out in section V:

- *What feedback, questions or concerns do you have about the initial framing and sub-issues?*
- *What existing research, resources and good practices should we build on?*
- *What specific tech applications which have or might lead to negative impacts or ongoing dilemmas should we consider?*
- *Do you or does your organization have interest in offering inputs as the work progresses?*

For all focus areas

- Existing resources and good practices can be found in many organisations already linked to the B-Tech Project, including BSR, the Global Network Initiative, the Business and Human Rights Resources Center, and others. Ongoing research is conducted by the AI Now centre, as well as media such as Decode.net.
- Across the board, tech applications demanding extra consideration include: the development, sale and deployment of bodily surveillance technology, especially to states and governments, including biometric technology; the use of algorithmic bosses (as identified in the scoping paper) in places with limited or ineffective rules protecting workers; the development of software systems to assign credit scoring or social welfare benefits and their use; the deployment of all manners of technology under the umbrella of "smart city" initiatives in developing countries, among others.
- Derechos Digitales is interested in offering inputs in all focus areas as the work progresses, linked to our mission statement and our ongoing policy research, technology analysis, and policy advocacy work.

Focus area 1: assessing Human Rights risks in business models

- The Scoping Paper adequately considers the UNGPs as guiding the commitment to respect human rights from the top of an enterprise, through all its functions. It properly identifies some of the risks of specific business models, as well as the competitive pressures that may lead to de-emphasise human rights concerns in favour of profits.
- However, business models fostering conditions may arise from structural considerations that are somewhat beyond the scope of the project, but which need to be addressed. Among those considerations, which should be part of the key questions to explore, we can include:
 - Company ownership structures, which derive their value from gain to shareholders and not all stakeholders. Without rethinking basic tenants of "value", human rights impacts will remain a secondary concern.

- Regulatory incentives to predatory or damaging business practices, including the efforts by companies to take advantage of such schemes to maintain market power not by innovation or service but by using antiquated or imbalanced rules. This includes, for instance, business models based on exploitation of anachronistic intellectual property law or the advantage acquired by massive personal data collection previous to data protection regulation be in place.
- Allocation of value in companies, especially in the form of data sets, can often be based on assumptions on data ownership that disregards ownership by individuals and communities whose data is being appropriated. The continuing understanding of data as an asset of companies must be put into question. Deeper consideration should start to be given to the collective impacts of collection and use of big data and how the communities from where that data is extracted should receive a fair benefit of the economic value derived from that data, beyond the individual considerations linked to data protection issues.
- In the case of technology companies whose products are specifically aimed towards deployment by states (surveillance, smart cities, biometrics), with states as "clients", there must be special exploration of their incentives.
- In the same lines, it should be more deeply explored the role of international cooperation that provides economic support to the development of ICT's solutions to solve wide range of systemic issues that are confronted by specific States or groups of population. That economic support should be tied to the commitment with total fulfillment of UNGPs. Guidelines could be developed to clarify the principles applicable to cooperation to establish proper human rights impact assessments processes as part of the funded development projects.
- In more general terms, issues arising from business models must be explored not from the perspective of companies as isolated entities, but from the global technology industries in general.

Focus area 2: Human Rights due diligence and end-use

- The Scoping Paper properly recognises the human rights due diligence requirement as extending to products and services as well as their own production and management operations. It also gives deserved emphasis to the need for broad engagement in due diligence processes, including for deployment of technologies by states. Additionally, issues to consider are:
- Creation of supply chains that exploit jurisdictional differences are a key component of value chains throughout technology companies. Not only in the case of physical labour in the construction of physical goods, but also for other forms of labour (such as client interaction or content moderation) located abroad in jurisdictions with lower financial and regulatory costs, can and does lead to diverse human rights impacts.

- There is a responsibility by larger companies not only to conduct ongoing human rights due diligence with regards to their own activity, but also to spend resources in funding external research to explore areas of human rights potential and actual impacts of their technologies, not necessarily covered by their due diligence, linked with the expanded life of their products and services once they interact with third actors.
- In line with the commitment to respect human rights, special emphasis must be given to the prevention of harms in all due diligence processes, but especially before any such process begins. In that sense, it will be useful reinforce that the due diligence should be applied to the internal processes that are followed by companies for the creation of new products, services or business models, including particularly the development of customized experiences or personalized marketing that can lead to discrimination or other forms of social fragmentation in the access to technology and information.

Focus area 3: accountability and remedy

- The Scoping Paper addresses most of the key issues arising from the need for remedy, including the limitations of state-based mechanisms, and the role of companies to provide for remediation even if impacts are not being directly caused by companies but linked to their operations. Additional issues to explore include:
- The need for mechanisms to provide remedy not just to individuals but collectively, either for all people affected, or for certain communities particularly affected.
- In those lines, it will be useful that the intended work expand on the idea of participatory processes for developing companies accountability that provide a stronger participatory component of communities that will be impacted by the technologies that are intended to be developed. Moving from user-based considerations that tend to be a more individualistic approach to measure potential harm to a more collective dimension of technology impacts, and consequently, moving to the adoption of broader participatory processes of the type developed for environmental assessments.
- The need to extend measures of remedy beyond the territory of jurisdictions where state institutions may have forced companies to provide such remedy. In other words, if an adverse impact has been identified in a certain territory, its remediation must extend to all possibly affected users. Clear guidelines should be provided for companies to apply this principle beyond legal local commitments.
- The need to explore responsibility and liability schemes with regards to misuse of technologies whose adverse impact might be inherent to the technology itself (as is the case with surveillance technology, or data processing systems aimed at optimising discrimination, or large databases including sensitive information).

Focus area 4: regulatory and policy responses to human rights challenges linked to digital technologies

- The Scoping Paper correctly outlines the challenges of providing a "smart mix" of measures, given the many options on the table to foster behaviour by technology companies. Additional issues to explore include:
- The need to include human rights impact assessments at the policy level, including in the creation of rules that can provide incentives for business models and practices that can affect human rights.
- The need to include human rights impact assessments at the policy level in international cooperation coming from development projects of international investment banks and other similar institutions.
- The need to provide guidance to governments in implementing recommendations regarding how to deal with technology human rights impact assessments as part of the national human rights and business plans that many State are starting to implement.
- The need to address regulatory shortcomings, which depending on territory may lead to different business models in different jurisdictions, amplifying human rights risks when not limited by rules or oversight, and more importantly, leading to a political push to protect business models instead of human rights. A commitment to human rights from a public facing perspective should not be opposite from lobbying efforts at the national or regional level.
- International cooperation to obtain remedy, especially from large technology companies, in the case of adverse human rights impacts of their products or operations.

3. *With regards to project consultations, research, deliverables and overall impact:*

- *What recommendations do you have?*
- *What pitfalls should we avoid?*

- Inclusion of civil society organisations dedicated to digital rights is necessary not only in developed countries. The same applies to business leaders, academic centres and think tanks. Meaningful representation of global south institutions is necessary to properly assess the proposed scope of the project.
- It is necessary to reach out to other UN initiatives, dealing with economic, social, cultural and environmental rights, as well as discrimination and children's rights. UN special rapporteurs are a key resource in this regard. Relevant input can be derived from the report of the High Level Panel on Digital Cooperation.
- Conducting consultations at the local and/or regional level is necessary, reaching out to groups representing a broad range of human rights advocacy at the national level. Opportunities for engagement may otherwise be severely restricted.
- The project should not underestimate the workload of some of the key stakeholders that can provide expert insight from local and regional perspectives, especially in the global south.
- The project should be wary of self-selecting panels, which may limit a broader view of relevant stakeholders.

4. *In relation to the landscape to which the project seeks to contribute to:*

- *Which organizations promoting a rights-based approach to development, use and governance of digital technology should we seek to work with?*

- *Which practitioner organisations and industry bodies are likely to be of particular importance to the project from the perspective of partnering and/ or mobilising stakeholders and/ or stakeholder consultation?*

- Apart from expert organisations already involved with the project, organisations that are part of the Berkman-Klein Center's Network of Centers are a good place to start searching for groups with expertise from all over the world.
- Consumer organisations as Consumer International has started to actively engage in digital consumer issues linked with the approaches proposed by the project.

The Network of Fourth Industrial Revolution Councils –a multistakeholder initiative to address critical policy issues that could help mitigate risks and unlock societal benefits of Fourth Industrial Revolution technologies on artificial intelligence (AI), autonomous and urban mobility, blockchain, drones, internet of things (IoT) and precision medicine- created recently by the Centre for the Fourth Industrial Revolution of the World Economic Forum.

- The Al Sur coalition, a network of civil society organisations from Latin America, includes many experts in human rights as applied to technology and public policy. Derechos Digitales takes part of this coalition along with: ADC (Argentina), CELE (Argentina), InternetLab (Brazil), Idec (Brazil), Fundación Karisma (Colombia), R3D (Mexico), Ipandetec (Panamá), TEDIC (Paraguay) and Hiperderecho (Peru).

In case the Office of the High Commissioner for Human Rights of the United Nations should want to expand in any of the aforementioned points, please reach us at mariapaz@derechosdigitales.org or juancarlos@derechosdigitales.org

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