



APC ISSUE PAPERS

BUSINESS AND DIGITAL RIGHTS: TAKING STOCK OF THE UN GUIDING PRINCIPLES FOR BUSINESS AND HUMAN RIGHTS IN THE ICT SECTOR

By David Sullivan

SUMMARY¹

In the five years since the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights (hereafter the Guiding Principles), human rights scrutiny of information and communications technology (ICT) companies has escalated significantly.² Government action – from censorship to surveillance – and companies' own commercial considerations have major human rights implications that frequently generate headlines worldwide.

In this context, the debate on whether the Guiding Principles provide adequate accountability for human rights abuses continues. In 2014, the Human Rights Council established an intergovernmental working group to discuss the creation of a legally binding treaty to regulate transnational companies under human rights law.³ Civil society organisations must consider whether a global treaty process will contribute to other efforts to protect and respect the rights of users.

1 The full issue paper is available here: <https://www.apc.org/en/node/21736>

2 United Nations. (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*. www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

3 A/HRC/RES/26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Resolution adopted by the Human Rights Council, 14 July 2014.

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This issue paper examines the implementation of the Guiding Principles in the ICT sector, exploring implementation gaps and emerging best practices through the state responsibility to protect human rights, the corporate responsibility to respect rights, and the need for access to effective remedy when rights have been violated. The report concludes with recommendations to move ICT sector risks and opportunities to the centre of the business and human rights debate.

Emerging best practices in relation to the challenges of crafting laws and regulations on the internet include the development of National Action Plans (NAPs), with 41 countries having published or in the process of publishing a NAP either officially or informally. However, in these NAPs, there is a lack of attention to ICTs despite their cross-cutting impact on human rights. This reflects the compartmentalisation of business and human rights policies on one hand and technology policy on the other. Other positive innovations are non-financial reporting requirements, which can cover environment, human rights and other factors; and diplomatic cooperation, for example working through the Human Rights Council or the Freedom Online Coalition (FOC). Nonetheless, these are confronted with significant gaps, such as the lack of transparency and oversight relating to surveillance, and legislative backsliding, even in countries that have committed to promoting and protecting human rights online.

The next section of the paper looks at the positive corporate responsibility to protect human rights, as encapsulated in the Guiding Principles. A key issue here is the need to build human rights compliance into even tiny start-up companies, which can morph into multinational behemoths in a short time. Doing this could help avoid the costly retrofitting of human rights standards. There is a growing body of guidance for ICT companies seeking to implement human rights policies, such as the Global Network Initiative (GNI) Principles and Guidelines, the Telecommunications Industry Dialogue, and the EU ICT Sector Guide on Implementing the UN Guiding Principles. While these often offer recommendations on how to conduct due diligence, detail is lacking. The actual conduct of due diligence, including human rights impact assessments, is often obscured by the speed and secrecy driving business decisions. Another area of positive change is transparency reporting, with more companies reporting government requests for information, and providing technical solutions to privacy violations. However, companies are less willing to release information on how they violate privacy or engage in surveillance when enforcing terms of service. Other changes include civil society rankings; increasing pressure for ICT companies to engage in socially responsible lobbying; and, as noted, engineering rights protection into the design of new technologies. Other gaps include the lack of a formal commitment to human

rights and the reliance on unrepresentative “advisory groups” to advise on human rights policy.⁴

Lastly, the paper looks at the third pillar of the Guiding Principles, the right to remedy, which remains underdeveloped in the ICT sector. Occasional violations have successfully been prosecuted in domestic courts, primarily through legal challenges by companies against governments, rather than challenges against companies for their own offences. Regional human rights courts have begun to shape jurisprudence for the ICT sector, though not always in favour of greater human rights protections. Further, state and non-state-based non-judicial mechanisms are beginning to impact the ICT sector. These include mechanisms through the OECD, the accountability mechanisms of international financial institutions, industry and multistakeholder initiatives, and company grievance mechanisms. While industry associations and multistakeholder institutions could also provide remedy, there is a lot of progress yet to be made in this area. Even those ICT companies that have explicitly adopted the Guiding Principles are early in the process of developing grievance mechanisms that meet the Principles’ effectiveness criteria.

Nonetheless, the same rights that people enjoy offline apply online. Thus, the paper concludes with the following recommendations:

FOR GOVERNMENTS

- Refrain from compelling companies to violate human rights. Any restrictions on rights that involve private companies should be justified as necessary and proportionate under international human rights law.
- Formalise commitment to the responsibility to respect human rights through national action plans that specifically address ICT sector policies and initiatives.
- Make company human rights due diligence mandatory. There are myriad ways to implement mandatory due diligence, from the creation of non-financial reporting requirements as in the EU, requiring companies to conduct human rights due diligence and impact assessments, or developing issue-specific requirements.
- Review legal requirements for grievance mechanisms for ICT companies and consider explicit human rights requirements for grievance mechanisms in line with the right to remedy under the Guiding Principles.

⁴ Athar, R. (2015). *From impunity to justice: Improving corporate policies to end technology-related violence against women*. APC. www.genderit.org/sites/default/upload/flow_corporate_policies_formatted_final.pdf

- OECD National Contact Points (NCPs) should engage in joint peer learning focused on responsible business conduct in the ICT sector, which could be used to consolidate and update sector-specific guidance for company due diligence.
- Non-OECD states should sign up to the OECD Declaration on International Investment and Multinational Enterprises and establish NCPs.

FOR INTERGOVERNMENTAL INSTITUTIONS AND INITIATIVES

- The Human Rights Council should define the scope of the open-ended intergovernmental working group on a legally binding instrument, including a review process following the elaboration of elements of the draft treaty. This should be presented for consultation at the Forum on Business and Human Rights, providing a robust opportunity for stakeholders to weigh in on how the treaty process should proceed.
- The UN Working Group on Business and Human Rights should be tasked with preparing a report assessing implementation of the Guiding Principles during its mandate and with recommendations for the treaty process, soliciting input from diverse stakeholders, including the ICT sector.
- The Freedom Online Coalition should adopt a peer review process that monitors member governments' track record, and involves external stakeholders.

FOR NATIONAL HUMAN RIGHTS INSTITUTIONS

- Engage with the private sector, civil society and the government to strengthen the online and offline protection and promotion of human rights impacted by the ICT sector.
- Consider ICTs as a cross-cutting issue that should be incorporated across efforts to promote and protect human rights.
- Invest in technology. Very few national human rights institutions employ basic digital security such as encrypted websites, end-to-end encrypted email, and other information security tools and resources.

FOR COMPANIES

- Formalise policies that commit to respect for all human rights, consistent with the Guiding Principles. They should broaden their analysis of what are the most salient human rights issues, those that pose the greatest risk

to people, rather than risks to the company. Although freedom of expression and privacy continue to be critical issues for the ICT sector, companies should broaden their analysis to include other salient rights, and incorporate existing resources, tools and reporting into a human rights framework compliant with the guiding principles.

- Company and industry advisory initiatives should incorporate emergent best practices for multistakeholder inclusion, increase transparency about their activities and work to increase their diversity. The establishment of regional or national level advisory groups could help to ensure greater global participation in such initiatives.
- Increase their engagement on public policy in support of human rights, and cease lobbying activities and affiliations that may be at odds with their human rights policies.
- Incorporate explicit human rights components into existing customer service and ethics-related grievance mechanisms, such as hotlines that are accessible to users, so that they meet the effectiveness criteria in the Guiding Principles.

FOR CIVIL SOCIETY

- Digital rights and free expression organisations should continue their dialogue with organisations working to combat technology-related violence, especially against women, and hate speech. Building off the Manila Principles on Intermediary Liability, these organisations should work together to develop implementation guidance for regulators and companies that helps address harassment. The checklist developed by APC for intermediaries to address violence against women in compliance with the Guiding Principles could provide a starting point for this effort.⁵
- Explore national level advocacy campaigns targeting companies who are lagging behind industry standards on human rights. This could build upon the global advocacy that organisations like Access Now are undertaking using the Ranking Digital Rights 2015 Corporate Accountability Index.
- Consider principled engagement with companies. This should entail working together with companies through structures like the GNI and other multi-stakeholder advocacy and learning, while continuing to speak out against ICT company actions that negatively impact human rights.

⁵ Athar, R. (2015). Op. cit.



Internet and ICTs for social justice and development

APC is an international network of civil society organisations founded in 1990 dedicated to empowering and supporting people working for peace, human rights, development and protection of the environment, through the strategic use of information and communication technologies (ICTs).

We work to build a world in which all people have easy, equal and affordable access to the creative potential of ICTs to improve their lives and create more democratic and egalitarian societies.

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