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A Compass for Policymakers to Align Tech Regulation with the UNGPs

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ABSTRACT

This paper has been written to inform the UN Human Rights B-Tech Project and has benefitted from expansive engagement with various stakeholders. I am very grateful to those individuals who volunteered their time and expertise to feed into the development of the UNGPs compass. I would especially like to express my gratitude to Lisa Hsin for her contributions to the expert focus groups and analytical reflections in autumn 2023, as well as to the B-Tech Project team from the UN Human Rights Office (OHCHR). In particular, I would like to thank Lene Wendland and Nathalie Stadelmann at the B-Tech Project for their comments and support, and Florian Wettstein and Isabelle Wildhaber for their academic guidance. Special thanks also to Mathias Risse, Sushma Raman, and Laryssa da Silveira.

1. Introduction

The speed and scale of AI development is a source of innovation, but also disruption for society. Use of advanced digital technologies has the potential to challenge the regulatory and normative cornerstones of global governance.[1] Many aspects of business and society, as well as individual lives have been increasingly turned into data points and subjected to "self-tracking" for more than a decade.[2] Yet the recent leap in AI development towards Generative AI, which is capable of independently producing text, speech, and images with a simple prompt, has added additional scale and speed to these trends. How a business develops, deploys, or uses digital technology, such as AI, may profoundly affect people's lives on various levels and in a wide range of contexts. While acknowledging that it can have a positive impact on society, there is not yet a global consensus on how to address AI's potentially negative impacts on people, particularly Generative AI. The expansion of the Internet and AI-powered services across borders, in combination with accelerating datafication, requires us to re-visit and re-evaluate whether the current global and national governance frameworks can sufficiently address and account for potentially novel risks to people.

The intensifying momentum around Generative AI innovations is sparking key debates on what constitutes responsible business conduct in the technology sector.[3] Several international organizations such as the UN and OECD, as well as individual governments, companies, and investors are increasingly raising concerns related to how Generative AI is being developed, deployed, and used. Among the most prominent voices, the UN Secretary General has called for guardrails to ensure AI governance is grounded in human rights, transparency, and accountability.[4] Such statements demonstrate how the universal human rights framework can be an important source for ground rules on governing AI including Generative AI.

2. Existing Frameworks and Approaches to Govern Responsible Business Conduct in the Technology Sector

The ability of the global tech industry to drive AI and tech development, more broadly, arguably goes beyond a single nation state's capacity to manage any adverse impact and ensure accountability for harm. Companies are making everyday business decisions about prioritizing certain tech developments over others and determining the thresholds for risk when deciding whether to move forward with strategic advancements in the field of AI. This effectively gives the tech sector a leading role in the governance of AI and beyond, including when it comes to preventing and mitigating human rights risks. From a public policy perspective, this can present a governance gap in society's ability to provide effective oversight and accountability for the development and deployment of AI.

Companies are making everyday business decisions about prioritizing certain tech developments over others and determining the thresholds for risk [with regard to] AI ... This effectively gives the tech sector a leading role in the governance of AI and beyond, including when it comes to preventing and mitigating human rights risks.

[1] Kenneth Cukier and Victor Mayer-Schoenberger, "The Rise of Big Data: How it's Changing the Way We Think About the World," *Foreign Affairs* 92 (2013): 27-40; Philip N. Howard, *Pax Technica: How the Internet of Things May Set Us Free or Lock Us Up* (New Haven: Yale University Press, 2015); Shoshana Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilization," *Journal of Information Technology* 30, no. 1 (2015): 75-89. https://doi.org/10.1057/jit.2015.5; Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for the Future at the New Frontier of Power* (New York: Public Affairs, 2019).

[2] Gina Neff, et al., "Affordances, Technical Agency, and the Politics of Technologies of Cultural Production," *Journal of Broadcasting & Electronic Media* 56, no. 2 (2012): 299-313; Gina Neff and Dawn Nafus, *Self-Tracking* (Cambridge, MA: MIT Press, 2016).

[3] B-Tech, "The Development, Deployment, and Regulation of Generative AI Must Be Anchored in Human Rights: The UN Guiding Principles on Business and Human Rights Provide a Framework for Guiding Responsible Business Conduct," *OHCHR B-Tech Note Regarding the United Nations' Plan Towards AI Governance at the UN General Assembly* 78, September 2023.

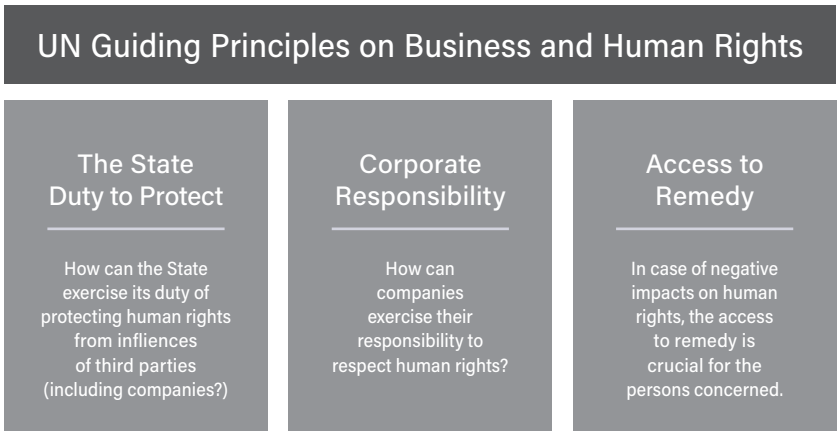
[4] United Nations, "UN Chief Says Regulation Needed for AI to 'Benefit Everyone,'" UN News July 6, 2023, https://news.un.org/en/story/2023/07/1138397.

The UN Guiding Principles on Business and Human Rights (UNGPs) were developed to address the gap between the increasingly globalized reach of business activities from any sector and the ability of society to manage any adverse consequences.[5] The UNGPs are therefore well placed to inform the creation of robust AI governance frameworks currently emerging on a global, regional, and national level. Endorsed by the UN Human Rights Council in 2011, with strong support by global businesses and civil society alike, the UNGPs have emerged as the authoritative global normative framework for responsible business conduct. They are structured into three pillars that provide a framework for governments to protect and businesses to respect human rights: 1) the state duty to protect human rights; 2) the corporate responsibility to respect human rights; and 3) access to remedy.

The United Nations Office of the High Commissioner for Human Rights' (OHCHR) B-Tech Project was launched in 2019 as a project of the OHCHR with the goal of promoting the uptake of the UNGPs in the technology sector.[6] Tech companies increasingly use the UNGPs to identify, assess, and mitigate downstream human rights impacts with regard to a range of AI's maturity stages. Equally, the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct (MNE Guidelines) also apply to technology companies. The MNE Guidelines are aligned with the UNGPs and were last updated in June 2023, resulting in an expanded chapter on science, technology, and innovation with expectations that technology companies conduct risks-based due diligence.[7]

These broad frameworks are complemented and deepened by tech sector-specific principles and initiatives, such as the multi-stakeholder platform Global Network Initiative and its Principles on Freedom of Expression & Privacy.[8] The Principles on Freedom of Expression and Privacy inform responsible business conduct on privacy and freedom of expression, as well as human rights more broadly, in earlier iterations of AI as well as conduct in the telecommunications sector. Also, the Institute of Electrical and Electronics Engineers (IEEE), an important body representing technologists, has been issuing policy documents with a human rights framing lately, referencing the UNGPs.[9]

While at the time of writing there is a dominant public discourse around AI, this paper can also speak to other types of digital technology governance and its implications for responsible business conduct. This is because the UNGPs' process-based due diligence character is technology-agnostic in the sense that human rights due diligence would analyze each technology within the business context from the vantage point of the risk to people.



3. How a Business and Human Rights Lens Is Already Used to Govern Digital Technology

There are examples of some technology companies taking up the UNGPs in recent years in their public policy documents, ex

[5] Office of the High Commissioner Human Rights, "UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework," United Nations, 2011, https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[6] Office of the High Commissioner for Human Rights, "Business and Human Rights in Technology Project ('B-Tech Project'): Applying the UN Guiding Principles on Business and Human Rights to Digital Technologies," United Nations, 2019, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/BTechprojectoverview.pdf.

[7] Organisation for Economic Co-Operation and Development, "OECD Guidelines for Multinational Enterprises on Responsible Business Conduct," June 8, 2023, https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htm.

[8] Global Network Initiative, "GNI Principles on Freedom of Expression and Privacy," accessed December 13, 2023, https://globalnetworkinitiative.org/wp-content/uploads/2018/04/GNI-Principles-on-Freedom-of-Expression-and-Privacy.pdf; Global Network Initiative, "The GNI Principles at Work: Public Report on the Third Cycle of Independent Assessments of GNI Company Members 2018/2019," accessed December 13, 2023, https://globalnetworkinitiative.org/wp-content/uploads/2020/04/2018-2019-PAR.pdf.; Michael A. Samway, "The Global Network Initiative: How Can Companies in the Information and Communications Technology Industry Respect Human Rights," in *Business and Human Rights: From Principles to Practice*, edited by Dorothee Baumann-Pauly and Justine Nolan, 136-146 (New York: Routledge, 2016).

[9] Institute of Electrical and Electronics Engineers, "General Principles," accessed December 14, 2023, https://standards.ieee.org/wp-content/uploads/import/documents/other/ead1e_general_principles.pdf.

pressing commitments to respect human rights. Similarly, there are examples of how the UNGPs have informed technological developments, for example conducting human rights due diligence with regard to the development, deployment, and end-use of digital products and services. Examples include the Google Celebrity Recognition API Human Rights Assessment[10] embedded in Google's broader human rights policy anchored in the UNGPs.[11] Also, Microsoft recently commissioned a UNGPs-framed assessment of its Enterprise Cloud and AI Technologies,[12] grounded in its UNGPs-based approach.[13] While this paper does not appraise individual company practices, the fact that leading technology companies are endorsing and actively seeking to apply a human rights-based approach to risk management demonstrates that regulatory approaches anchored in the UNGPs can be implemented in practice and can create a foundation for rights-respecting Generative AI practices.

As the hype around AI and Generative AI, more specifically, has revived regulatory efforts targeting the tech sector, a plethora of voluntary and/or ethics-based approaches have emerged[14] alongside frameworks that reflect human rights-based approaches. Ethics-based approaches can be complementary to UNGPs-inspired approaches, while human rights serve as the guardrails of expected conduct. Yet, few ethics-based approaches take business and human rights into account.[15] Several scholars from various disciplines have repeatedly emphasized the need to ensure that tech companies are required to respect human rights more generally[16] or align with the UNGPs more specifically.[17]

Several state- and regional-level policy and regulatory developments are underway and may relate to business responsibility with regard to human rights impacts in technology. This includes the European Union's Digital Services Act (adopted), which among other measures, requires a risk assessment from very large online platforms when it comes to recommender systems. The Digital Services Act makes a reference to the UNGPs in its recitals and features a range of design elements that mirror the UNGPs.[18] Another clear reference to the UNGPs has been made in Japan's G7 Hiroshima Process' Code of Conduct which draws upon both the UNGPs and OECD MNE guidelines.[19]

[10] Business for Social Responsibility, "Google Celebrity Recognition API Human Rights Assessment: Executive Summary," October 2019, https://www.bsr.org/reports/BSR-Google-CR-API-HRIA-Executive-Summary.pdf.

[11] Lewis Segall and Alexandria Walden, "Respecting Rights: Global Network Initiative Assessment Report," Google, April 23, 2020, https://blog.google/outreach-initiatives/public-policy/respecting-rights-global-network-initiative-assessment-report/.

[12] Foley Hoag LLP, "A Human Rights Impact Assessment of Microsoft's Enterprise Cloud and AI Technologies Licensed to U.S. Law Enforcement Agencies," Microsoft, June 2023, https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RW16RG2.

[13] Microsoft, "Taking on Human Rights Due Diligence," Microsoft on the Issues, October 20, 2021, https://blogs.microsoft.com/on-the-issues/2021/10/20/taking-on-human-rights-due-diligence/.

[14] Jessica Fjeld, et al., "Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI," Berkman Klein Center for Internet & Society, 2020, https://dash.harvard.edu/bitstream/handle/1/42160420/HLS%20White%20Paper%20Final_v3.pdf?sequence=1&isAllowed=y.

[15] Rikke Frank Jørgensen, "Framing Human Rights: Exploring Storytelling Within Internet Companies," *Information, Communication & Society* 21, no. 3 (2018): 340-355, https://doi.org/10.1080/1369118X.2017.1289233; Rikke Frank Jørgensen, *Human Rights in the Age of Platforms* (Cambridge, MA: MIT Press, 2019); Mark Latonero, "Governing Artificial Intelligence: Upholding Human Rights & Dignity," *Data & Society* (2018), https://datasociety.net/wp-content/uploads/2018/10/DataSociety_Governing_Artificial_Intelligence_Upholding_Human_Rights.pdf.

[16] Rebecca MacKinnon, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (New York: Basic Books, 2012); Julie E. Cohen, "The Surveillance-Innovation Complex: The Irony of the Participatory Turn," in *The Participatory Condition*, edited by Darin Barney, et al. (Minnesota University of Minneapolis: Minnesota Press, 2016); Ronald J. Deibert, "The Road to Digital Unfreedom: Three Painful Truths About Social Media," *Journal of Democracy* 30, no. 1 (2019): 25-39, https://doi.org/10.1353/jod.2019.0002; Mikkel Flyverbom, Ronald Deibert, and Dirk Matten, "The Governance of Digital Technology, Big Data, and the Internet: New Roles and Responsibilities for Business," *Business & Society* 58, no. 1 (2019): 3-19, https://doi.org/10.1177/0007650317727540; Colin M. Maclay, "Protecting Privacy and Expression Online: Can the Global Network Initiative Embrace the Character of the Net?" in *Access Controlled: The Shaping Power, Rights, and Rule in Cyberspace*, edited by Ronald Deibert, et al. (Cambridge, MA: MIT Press, 2010).

[17] Isabel Ebert, Thorsten Busch, and Florian Wettstein, "Business and Human Rights in the Data Economy: A Mapping and Research Study," *The German Institute for Human Rights*, 2020, https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analysis_Business_and_Human_Rights_in_the_Data_Economy.pdf.

[18] European Commission, "The Digital Services Act Package," Policies, last modified December 7, 2023, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

[19] Japan Ministry of Foreign Affairs, "G7 Leaders' Statement on the Hiroshima AI Process," Foreign Policy, October 30, 2023, https://www.mofa.go.jp/ecm/ec/page5e_000076.html.

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Further promising developments include the European Union's Artificial Intelligence Act[20] which includes requirements for businesses to conduct fundamental rights impact assessments for AI systems categorized as high-risk. Also, in the United States, an executive order may entail requirements for businesses to meet human rights responsibilities depending on how state agencies will review AI systems.[21] Similarly, business implications could be triggered by the regulatory developments around AI in Brazil.[22]

Against this backdrop, this paper puts a particular emphasis on the state duty to protect against human rights abuses by business, as highlighted in the UNGPs' pillar I, which reflects human rights obligations that states have under international human rights law. Pillar I recognizes that states have a key role to play in fostering responsible business conduct through a "smart mix" of both mandatory and voluntary measures, such as regulation and incentive-based measures. In line with the UNGPs, governments are required to adopt appropriate measures to prevent and address human rights abuses being linked to or stemming from corporate activities and should consider the "full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication."[23] This includes adverse impacts of tech business activities. In other words, the UNGPs provide governments with a roadmap for addressing human rights issues linked to technology companies. Through a "smart mix" of measures, the State has a critical role in ensuring responsible corporate conduct, facilitating multi-stakeholder engagement—particularly consultation with affected stakeholders—, and driving the corporate responsibility to respect through measures that foster the uptake of human rights due diligence among technology companies.

In the following, the paper presents a thematic analysis of expert interviews and focus groups on the role of business and human rights in ongoing tech regulations and presents emerging themes based on this qualitative data. These themes are then used to inform the construction of a guidance tool—a compass—for policymakers on aligning tech governance with the UNGPs.

4. The Aim of the UNGPs Compass

Digital technologies, and by extension the companies that develop them, are the subject to an ever increasing number of regulatory initiatives and processes at both national, regional and international levels. While UNGPs require policy makers to take effective measures to protect against the human rights risks associated with digital technologies, such as generative AI, there is a risk that all the many regulatory initiatives, however well intended, risk creating incoherence and misalignment with human rights standards.

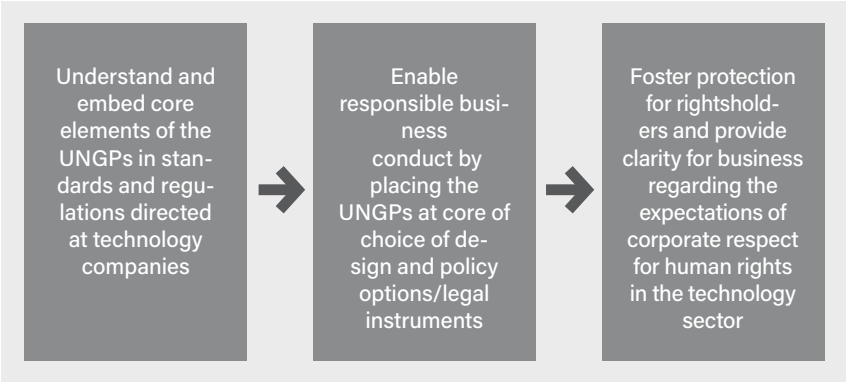


Figure 1: Aim of the UNGPs compass

To mitigate this risk, the UNGPs Compass provides policy makers with a basic framework for how to align regulatory initiative and processes with human right standards. The Compass is based on the UNGPs and the normative human rights standards that underpin them.

In order to enable responsible business in AI and tech governance more broadly on a global level, the UNGPs compass encourages legislators to place the UNGPs at the core of the choice of design and policy options and legal instruments. By supporting policymakers and lawmakers in aligning tech regulation with the UNGPs, three key objectives can be achieved:

1. Understanding and embedding core elements of the UNGPs into standards and regulations directed at technology companies, delivering greater clarity for policymakers on how to structure regulatory proposals to ensure tech companies respect human rights;

[20] European Commission, "A European Approach to Artificial Intelligence," *Policies*, last modified December 13, 2023, https://digital-strategy.ec.europa.eu/en/policies/european-approach-artificial-intelligence.

[21] White House, "Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence," Briefing Room: Statements and Releases, October 30, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/.

[22] Luca Belli, Yasmin Curzi, and Walter B. Gaspar, "AI Regulation in Brazil: Advancements, Flows, and Need to Learn from the Data Protection Experience," *Computer Law & Security Review* 48 (2023), https://doi.org/10.1016/j.clsr.2022.105767.

[23] Office of the High Commissioner Human Rights, "UN Guiding Principles on Business and Human Rights, Guiding Principle 1.

2. Enabling responsible business conduct by placing the UNGPs at the core of choice of design and policy options/legal instruments, improving the management of human rights risks; and

3. Fostering protection for rightsholders and providing clarity for business regarding the expectations of corporate respect for human rights in the technology sector, creating a level playing field of responsible conduct.

By achieving these objectives, the protection of rightsholders will be fostered in the medium to long term through rights-respecting business practices in AI and beyond.

5. Methodology

This paper builds on desk-based research as well as empirical work through expert interviews and focus groups. While a desk-based review of the existing literature on a business and human rights approach to tech regulation yielded no results, there exists a larger body of literature on considerations for mandating sector-overarching/non-sector specific human rights due diligence.[24] Additionally, there is a wider debate on tech regulatory approaches, and ethics-based frameworks to govern technology, more broadly.[25] Scholars have also raised the limitations of ethics-based approaches (Wagner, 2018) and, equally, the limitations of human rights-based approaches to technology regulation.[26] Yet, the intersection of a business and human rights perspective with technology regulation has not been specifically discussed in-depth. Hence, this paper is mainly informed by policy documents emerging from stakeholder consultations spanning from 2021 to 2023[27] and expert interviews.

In order to generate additional knowledge through qualitative data collection due to the perceived research gap, this paper relies on 25 virtual expert interviews with global policymakers and human rights representatives of tech companies; an invite-only, in-depth focus group with civil society experts, academics, and policymakers (20 attendees) held in October 2022 in Oxford; a multi-stakeholder consultation held in November 2022 in Geneva as well as two invite-only business roundtables held in Brussels in March 2023 and San Francisco in June 2023; and a multi-stakeholder consultation in Brussels in October 2023 (see list of consultations in annex). The focus groups and expert interviews were informed by a prior series of public consultations with company representatives, policymakers, academics, and civil society representatives.

The aim of the interviews was to explore how policymakers make sense of digital technologies' impact on human rights, conceptualize responsible business conduct in this context, and understand how policymakers aim to regulate digital technologies to protect rightsholders, as well as if and how the regulatory efforts impact the work of the human rights teams inside tech companies. To this end, the interviews were deliberately kept open, while ensuring information was gathered on four major themes. First, the interview process inquired about: 1) the purpose for why a regulatory process on digital technologies and human rights was initiated; 2) the core themes that the regulation ought to cover; 3) key turning points in the debate/implementation discussion and the perceived reason why those shifts occurred; and 4) overarching reflections on the key characteristics of tech regulation in line with the UNGPs. Additionally, interviewees were offered the opportunity to provide additional information by asking open ended questions.[28] As the research advanced over the months, the focus of the guiding questions was iteratively adapted to build on already gathered knowledge.

[24] Nicolas Bueno and Christine Kaufmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics," *Business and Human Rights Journal* 6, no. 3 (2021): 542-549, https://doi.org/10.1017/bhj.2021.42; Markus Krajewski, Kristel Tonstad, and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?" *Business and Human Rights Journal* 3, no. 6 (2021): 550-558, https://doi.org/10.1017/bhj.2021.43; Lise Smit, et al., "Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies," *Business and Human Rights Journal* 2, no. 5 (2020): 261-269, https://doi.org/10.1017/bhj.2020.10; Gabriela Quijano and Carlos Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?" *Business and Human Rights Journal* 6, no. 2 (2021): 241-254, https://doi.org/10.1017/bhj.2021.7.

[25] Corinne Cath, et al., "Artificial Intelligence and the 'Good Society': The US, EU, and UK Approach," *Science and Engineering Ethics* 24, no. 2 (2018): 505-528, https://doi.org/10.1007/s11948-017-9901-7; Brent Daniel Mittelstadt, et al., "The Ethics of Algorithms: Mapping the Debate," *Big Data & Society* 3, no. 2 (2016): 1-21, https://doi.org/10.1177/205395171667967; Sandra Wachter, "Normative Challenges of Identification in the Internet of Things: Privacy, Profiling, Discrimination, and the GDPR," *Computer Law & Security Review* 34, no. 3 (2018): 436-449, http://dx.doi.org/10.2139/ssrn.3083554; Sandra Wachter and Brent Mittelstadt, "A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI," *Columbia Business Law Review* 2019, no. 2 (2019), https://ssrn.com/abstract=3248829; Fjeld, et al. "Principled Artificial Intelligence."

[26] Nathalie A. Smuha, "Beyond a Human Rights-Based Approach to AI Governance: Promise, Pitfalls, Plea," *Philosophy & Technology* (2020), http://dx.doi.org/10.2139/ssrn.3543112.

[27] Isabel Ebert and Ana Beduschi, "Regulating Business Conduct in the Technology Sector: Gaps and Ways Forward in Applying the UNGPs," Geneva Academy, April 2022, https://www.geneva-academy.ch/joomlatools-files/docman-files/Regulating%20business%20conduct%20in%20the.pdf.

[28] Anselm L. Strauss, *Qualitative Analysis for Social Scientists* (Cambridge, UK: Cambridge University Press, 1987).

The focus groups considered the building blocks for regulatory options for states targeting technology companies. The guiding questions of the focus groups were the following: 1) how can the UNGPs inform elements of the legislative process to require the tech sector to fulfill their responsibility to respect human rights; 2) which are the key stages in the legislative process and accompanying regulatory architecture that need to be considered; and 3) which policy instruments/design elements need to be included to align regulations with the UNGPs.

The focus groups and multi-stakeholder consultations were documented with transcripts and iteratively analyzed. The interviewed experts were chosen by their exposure to key regulatory processes on technology company conduct, such as the EU Digital Services Act, EU AI Act, and non-European regulatory debates in the US and Brazil, among others. A thematic content analysis was applied to the expert interviews and data emerging from the focus groups, in combination with a broad thematic coding to analyze the semi-structured interviews. This was designed to allow themes to emerge inductively from the material to re-construct the key themes in the regulatory response.[29] The data analysis of the expert interviews as well as focus group transcripts was conducted using codes. Codes are "tags or labels for assigning units of meaning to the descriptive or inferential information compiled during a study" with an emphasis not on the words themselves, but their meaning.[30] The codes are used to retrieve the information from the interviews and organize it. The first round focused on "informant-centric coding,"[31] closely related to the empirical interview material. For the second round, the level of abstraction was increased to group the participant-centric codes into "aggregate dimensions." These aggregate dimensions are broader in scope and ensure an internally consistent way for clustering content through similar codes.[32]

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6. Results: Themes from the Focus Group, Consultation, and Expert Interviews

It emerged during the focus group, consultation, and expert interviews that experts widely agreed there is a lack of consistency in existing tech regulations regarding requirements for technology companies to respect human rights, in particular in light of the most recent AI developments. Some raised concerns regarding the risk this fragmentation might dilute corporate re-

[29] Dennis A. Gioia, Kevin G. Corley, and Aimee L. Hamilton, "Seeking Qualitative Rigor in Inductive Research: Notes on the Gioia Methodology," *Organizational Research Methods* 16, no. 1 (2013): 15-31, https://doi.org/10.1177/1094428112452151; Matthew B. Miles and A. Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Thousand Oaks, California: Sage, 1994); Strauss, Qualitative Analysis for Social Scientists.

[30] Miles and Huberman, Qualitative Data Analysis, 56.

[31] Gioia, Corley, and Hamilton, "Seeking Qualitative Rigor in Inductive Research."

[32] Gioia, Corley, and Hamilton, "Seeking Qualitative Rigor in Inductive Research."

[33] Dennis A. Gioia, Kevin G. Corley, and Aimee L. Hamilton, "Seeking Qualitative Rigor in Inductive Research: Notes on the Gioia Methodology," *Organizational Research Methods* 16, no. 1 (2013): 15-31, https://doi.org/10.1177/1094428112452151; Matthew B. Miles and A. Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (Thousand Oaks, California: Sage, 1994); Strauss, Qualitative Analysis for Social Scientists.

[34] Miles and Huberman, Qualitative Data Analysis, 56.

[35] Gioia, Corley, and Hamilton, "Seeking Qualitative Rigor in Inductive Research."

[36] Gioia, Corley, and Hamilton, "Seeking Qualitative Rigor in Inductive Research."

sponsibility standards and, in consequence, lower expectations below the bar set by the UNGPs. Several experts stressed that consistency in the corporate responsibility standards in turn would ensure certainty for rightsholders, and made the case for globally aligned responsible conduct across operating markets to establish a level playing field.

Taking a closer look at the contents of the expert interviews with policymakers, they confessed that they often lack time and resources to grasp the complexities of a business and human rights approach to technology policy but that there are also important features of public policy that feed into regulatory debates, e.g., the fight against misinformation. The aggregated dimensions emerging from the expert interviews, focus group, and consultations are presented through exemplary quotes in the following.

6.1.1. Policy Coherence: Tailored Approach in Context

A number of experts noted that a carefully considered balance should be struck before enacting further measures regulating business conduct in relation to digital technologies and that such measures will depend upon local contexts. In the case of AI in the workplace in Europe, one expert noted:

> "The existing regulatory frameworks are not fit for this increasing digitization of work. The digitization of work creates new risks and exacerbates existing ones, which do not fit neatly within existing laws. But our regulatory systems have a long way to go to address these issues. A lot can be said about the regulatory gaps but the EU's several proposals, including the mandatory Corporate Due Diligence Directive, Artificial Intelligence Act, and rights relating to persons with disabilities are encouraging initiatives in this regard."[37]

Adding to this, another expert highlighted the contextual nature of any legislation:

> "The question now is less about whether to regulate technologies, and more about how to regulate them—specifically how to differentiate good regulation from bad regulation. What may seem like good regulation at a global scale, may lead to poor consequences locally."[38]

A company representative added:

> "In terms of contagion to other jurisdictions, there is a risk that pieces of a legislation are being picked out—other people might pick up the language of their legislation and twist it around, hence the ground needs to be defined clearly in terms of human rights."[39]

6.1.2. Value Chain Focus Across the Full Business Sphere

A number of experts pointed out that regulation can be slow-moving and static, which stands in contrast to new technologies, that are often characterized by a dynamic and evolving nature. A key consideration for lawmakers and policymakers is to treat technology as similar to infrastructure, such as roads, energy, and supply chains. As one expert noted:

> "Identifying technology as a subject for regulation is a big issue, but it is not just about hardware and software; these categorizations are no longer applicable. For instance, there are various aspects to cloud computing. Our understanding/categories haven't kept up with the phenomenon: capacity and frequency, who is the buyer, who is the supplier are all important questions. What are the types of exchange, what is the business model? These are often hidden from view. There is a need for understanding the infrastructure behind it all." (Expert 2023).

6.1.3. Consistent Application of the Human Rights Due Diligence Terminology

In line with UNGPs 3 and 15, experts stressed that process-based due diligence should be considered as part of a range of regulatory techniques. Commensurate with risks and appropriate to the individual company's circumstances and context, including the specificities of the upstream tiers of the supply chain and the company's size, due diligence should apply not only to the possible negative impacts that the company may cause or to which it could contribute as a result of its own activities, products, or services, but also to the impacts linked to its operations, products, or services through its business relationships, including its subsidiaries, suppliers, and contractors. Experts noted that

> "[t]he risk analysis piece needs to be sharp and powerful to ensure that legislation is focused on harms to people with strong language that signals relevance of human rights framework."[40]

[37] Expert, 2022.

[38] Expert, 2022.

[39] Expert, 2022.

[40] Expert, 2023.

> “Just as new regulatory measures can be adopted, existing laws may need to be modified or revoked to align with the UNGPs.”

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Isabel Ebert
Technology and Human Rights Fellow

Since due diligence should be adapted to the nature of the risks to people in terms of severity (scope, scale, and remediability), it is important to consider how these risks affect different groups, such as religious or ethnic minorities, as well as how different risks may be faced depending on gender. Further, as well as helping companies proactively engage with and address risks in their value chain, including in high-risk contexts, due diligence can also help companies make decisions on when and how to responsibly disengage from suppliers or business relationships, or exit from operating markets. A company representative highlighted that there needs to be:

> "clear process expectation, and expectations towards maintaining a structure how companies manage these issues—a company couldn't be doing the risk assessment and perpetually learning on these issues without a human rights structure."[41]

6.1.4. Process-Oriented Character of the Legislation Relating to the Expectations Towards Business

Most experts agreed that, in line with the UNGPs, legislation should focus on regulating systems and processes deployed by companies, rather than regulating on the basis of lists of forbidden artefacts or similar static measures. Partly this would also allow for "futureproofing" regulation against emerging new tech innovations. Regarding the type of information transparency required from companies, one lawmaker noted:

> "We have an enormous information asymmetry. Tech companies gather enormous amounts of data about citizens, about us as policymakers, and about us as societies. And they know everything. We don't have access to anything. It is very difficult to make evidence-based policy actually, because we don't have the evidence. In fact, if we don't have this regulation, we will never have evidence. So, in my view, this is only the first step. We might need further regulation actually, but we needed the regulation to make it clear that democratic governments make the rules and not the platforms."[42]

On the flipside, company representatives highlighted that calls for algorithmic transparency are extremely complex to implement due to proprietary business interests and the danger that authoritarian governments could use such information for nefarious purposes that impact rightsholders negatively. Others argued that transparency needs to focus on disclosing the process of analyzing systemic risk to rightsholders, which links to the emphasis on process-based due diligence.

6.1.5. Genuine Stakeholder Engagement: Initiating Public Debate and Stakeholder Engagement Processes

On initial consultations, one expert described how their team conceives stakeholder engagement as a crucial step to:

> "start talking to the experts; academics; talk to NGOs how can you identify the problem; talk to lawyers how that is feasible; and only then start speaking to 'the lobby.' Try to have a conversation in society about this: there are a lot of people who are affected by these laws but they have no idea; it is really about making people understand."[43]

Another expert stressed the importance of initiating a public debate and engagement process:

> "Through public consultations and other impact assessments, which then turned into a legal proposal that is now law, I would say that we've done the first steps, we've opened really broadly the debate and it was a very public debate at the time as well. It was also a very political debate, but it was addressing a very concrete issue."[44]

6.1.6. Anchoring Responsibility for Compliance in Human Rights Functions Inside Tech Companies

Company representatives stressed that legislative efforts should include recommendations to require companies to anchor responsibility within human rights functions, whose teams should set up and oversee the mandated risk assessment processes. This is to ensure that people with dedicated human rights skills are strategically involved in governing the compliance with the law inside tech companies and that such "*human rights teams should be responsible for managing the risk assessment processes*."[45] Additionally, in order to achieve this, explicitly mentioning and anchoring legislative approaches in international human rights standards was considered to be essential.

[41] Expert, 2023.

[42] Expert, 2022.

[43] Expert, 2022.

[44] Expert, 2022.

[45] Expert, 2023.

While corporate human rights representatives stressed that there is a "wide range of teams involved in this with various backgrounds and they might look at this in different ways," it is important to find a way of complying with the laws from a human rights perspective. It is important to bear in mind that

> "the regulatory team might look at it in a different way, yet again the security background teams or the corporate auditing background [teams] saying this is what we need."[46]

So, the cross-departmental response is a standard process in most companies, yet ensuring teams are led with dedicated human rights expertise when responding to new legislative developments on responsible tech business conduct and human rights is key.

6.1.7. Accompanying Measures, Such as Incentive-Based Policy Instruments and Enforcement Provisions

Ideally, laws are not created in silos but embedded in a mix of additional voluntary policy measures in line with the UNGPs' recommendation for states to adopt a

> "smart mix of measures" to foster business respect for human rights. Interview partners stressed that "we need guidelines for the implementation of laws that set out recommendations that there should be human rights functions through which these processes should be managed. Human rights teams should be responsible for managing these risks to rights."[47]

For example, implementation guidelines can clarify assessment criteria which companies are judged against in relation to human rights due diligence requirements. Expert credits can offer additional incentives if they are awarded to those companies that can demonstrate robust rights-respecting conduct through policies and processes in line with the UNGPs.

6.1.8. Clear Provisions for Access to Remedy

Access to remedial mechanisms for those adversely impact by technology company conduct was raised in various interviews. Experts highlighted that remedy mechanisms need to be able to grasp process-based issues in company management:

> "Access to remedy needs to also entail mechanisms to seek remedy regarding operation of algorithms, including measures that harm that occurred once is not repeated, and ideally preventive regulation would be key."[48]

Interviewees also showed fatigue in non-compliance by companies:

> "The unwillingness of platforms to follow up on court orders, for example, to delete content, to block accounts, or the contrary to reinstate legal content and to reinstate legal accounts, and the whole situation was quite what was absolutely not satisfying."[49]

The need for clear provisions on access to remedy in tech regulation came out strongly in the expert conversations, yet without providing insights on how this could be best achieved.

6.1.9. Generative AI as the New Frontier for Responsible Business Conduct: Re-Emphasizing the Need for Policy Coherence

During the course of the consultations, concerns about the adverse impacts stemming from or being linked to Generative AI increased:

> "While regulation such as the EU AI Act will impact companies mostly, it is also important to influence how states think about the UNGPs and its application. Those thinking about Generative AI and its impact in the government and policy are different people than those in charge of responsible business conduct."[50]

Experts emphasized the need to build capacities across government departments and across different specialist groups within policymaking spaces to futureproof regulation against the specific emerging risks of Generative AI.

[46] Expert, 2022.

[47] Expert, 2023.

[48] Expert, 2023.

[49] Expert, 2022.

[50] Expert, 2023.

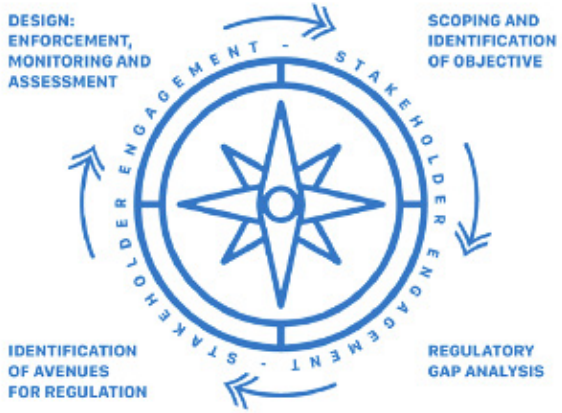
7. Constructing the UNGPs Compass Tool

The interviews and focus groups confirmed that policymakers were interested in consulting expert guidance to accompany policymaking processes around technology regulation from a business and human rights perspective. Through an iterative interpretation between the gathered materials, and a review of the UNGPs, an initial list was constructed of key elements to be considered when drafting regulations in line with the UNGPs.

Deducting from the expert insights, the following non-exhaustive list summarizes key design features for regulatory bodies to include when drafting regulations through a UNGPs perspective:[51]

- A broad view on human rights: all human rights need to be considered when conducting human rights due diligence with a view to identifying the most salient human rights risks and impacts;
- Consistent application of the human rights due diligence terminology: expectations towards human rights due diligence to be conducted across all businesses and relationships, risks assessment methodologies, and mitigation measures;
- Value chain focus across the full business sphere, i.e. both upstream/supply chains and downstream;
- Accompanying measures, such as incentive-based policy instruments and enforcement provisions;
- Process-oriented character of legislation relating to the expectations businesses are expected to meet: legislation should focus on regulating systems and processes deployed by companies;
- Meaningful stakeholder engagement; and
- Measures enabling easy and direct access to effective remedy and redress, including appeal procedures.

These design features have been transposed into a step-based guidance that can accompany the drafting cycle for a regulatory piece. The result is the "UNGPs compass," a guidance document for policymakers to understand and embed core elements of the UNGPs into standards and regulations directed at technology companies.



The UNGPs compass is an evidence-based policy tool structured along four iterative steps for policymakers:

STEP 1: SCOPING AND IDENTIFICATION OF OBJECTIVE

The first step is to clearly identify the human rights-related "problem" in the technology sector that any policy or regulatory measure is trying to address. Having identified the problem, consideration needs to be given to which types of technology companies are within the scope of the regulatory effort, what is the nature and model of their business operations, and what will be the nature of the legal obligations and their scope, along with the supporting regulatory and enforcement architecture. An empirical assessment about how the technology in focus is used in practice and how this type of usage can be brought in line with human rights standards, including the UNGPs, would ensure proportionate and appropriate regulation and control of technology.

Guiding questions:

- What is the problem the regulatory effort is trying to address?
- Is there a human rights dimension to the problem?
- What do civil society/stakeholders have to say about the problem?
- What is the level of understanding and awareness of such risks to the general population?
- What would be the objectives of state intervention, e.g., correction of unregulated behavior, limitation of power, protection of access, transparency of activities, or redress for harm and accountability to users?

[51] Ebert and Beduschi, "Regulating Business Conduct in the Technology Sector."

STEP 2: REGULATORY GAP ANALYSIS

Having identified the problem and the human rights dimensions, it is important to identify whether there is an actual regulatory gap before considering further implementation of regulatory measures on technology company conduct. Just as new regulatory measures can be adopted, existing laws may need to be modified or revoked to align with the UNGPs, which state that "[i]t is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights."[52] This includes making sure that "laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights."[53] Further legal domains, including both domestic and international private and public law, such as human rights law, corporate law, commercial law, trade law, and labor law can inform this step. In addition, ensuring coherence of existing regulation—both in statute and judge-made precedent—requires an assessment of the landscape of voluntary measures for potential accompanying voluntary measures to enhance efficacy. These may include existing laws and policies on corporate social responsibility. It includes the human rights themes covered and why. In order to ensure tech companies covered by the regulation are assessed in their compliance with the regulation along objective and appropriate criteria, robust scrutiny, and monitoring and enforcement measures are required with a particular view to affected stakeholder perspectives.

Guiding questions:

- What government policies are already in place and how are they enforced? What is the extent of monitoring?
- Are there specific aspects of the technology business model that are not covered by existing laws but which impact human rights greatly?
- Does the problem relate to a specific type of technology that presents risks to human rights?
- What does the regulatory gap consist of, and which regulatory architecture has the potential to close it?
- Are there specific human rights risks that are currently not adequately addressed through existing regulation?

STEP 3: PROCESS: IDENTIFICATION OF AVENUES FOR REGULATION

Depending on the findings in step 1 and 2 above, policymakers and lawmakers should consider a range of regulatory and voluntary measures to identify the most appropriate "smart mix." Regulatory measures beyond traditional "command-and-control"-style regulations should be considered. Some suggestions include "responsive regulation" and "new governance"-style regulation, which incorporate elements of iterative and consultative decision-making. Other mechanisms, including transparency or reporting, could have an initial socializing effect (as shown by section 54 UK's Modern Slavery Act 2015). The "treatment" of the problem should determine a state's policy choice. It is vital to balance and assess different options and consider harnessing existing social momentum and pressures. Policymakers and lawmakers must 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, and digital products and services, including amendments to existing laws and delegated regulations.

Guiding questions:

- What should be the nature of the legal obligations (e.g., whether the companies covered by the regulation will be judged by standards of conduct, standards of outcome, or both; whether liability will be automatic, or based on proof of fault)
- What should be the scope of these obligations (e.g., the entities, activities, and parts of the value chain to which the obligations extend, as well as the jurisdictional reach for cross-border matters)?
- What should be the scope of these obligations (e.g., the entities, activities, and parts of the value chain to which the obligations extend, as well as the jurisdictional reach for cross-border matters)?
- Which human rights themes and risks should be targeted (i.e., some may focus on a narrower range of issues and impacts, such as privacy)?

[52] Office of the High Commissioner for Human Rights, "UN Guiding Principles on Business and Human Rights," Guiding Principle 3.

[53] Office of the High Commissioner for Human Rights, Guiding Principle 3.

- What is the reach of their business activities in relation to both supply and procurement, and end use, and what are the implications for human rights of this value chain structure?

- Linked to the nature of the obligations, what should be the standard of responsibility and what constitutes a breach and defense against liability? What is the maturity of conduct? To what extent have these companies put in place policies and processes to prevent and mitigate human rights risks?

8. Limitations and Conclusion

This paper has applied a "building blocks" approach rooted in multi-stakeholderism.[54] With the empirical work around the UNGP compass and its validation process still on-going, this paper presents a work in progress as more regulatory pieces on tech com-pany conduct emerge and more lessons are learned based on early implementation experiences. The UNGPs compass can provide an orientation for policymakers to align legislative efforts on technology company conduct with the UNGPs, and make an important contribution also to AI governance debates.

The UNGPs compass can inform relevant stakeholders to assess regulatory action against expectations of the UNGPs. At the same time, the UNGPs compass is limited in so far as it does not aim to address the political system in which the legislative process is embedded. The usage of the UNGPs compass is primarily relevant for jurisdictions with a strong rule of law, governed by a political leadership that seeks to apply a hu-man-rights based approach to governing AI and technology more broadly. Further re-search could discuss the complementarity of approaches developed and/or rooted in other geographies and/or epistemologies,[55] for example, among others, in African Eth-ics.[56]

AI poses increasing risks and opportunities around stakeholder engagement. Increas-ingly powerfully AI systems may rapidly cause significant impacts on millions or bil-lions of people, which necessitates new approaches to stakeholder engagement. On the other hand, some scholars argue that AI systems may actually help support stake-holder engagement through translation and consolidation, and by supporting efforts to find consensus.[57] This is increasingly important because, as companies and AI systems become ever more powerful, they begin to rival the power of governments, and stake-holder engagement might need to transition into more democratic decision-making.[58]

To enable responsible business conduct in the AI race, the UNGPs should be placed at the core of the choice of design and policy options and legal instruments in AI poli-cy, and tech policy more broadly, that targets technology companies—whether it is for specific technologies or specific business practices in connection with the use of tech-nology. This will ensure policy coherence in alignment with international human rights standards, which in turn ensures coherence in expectations of tech companies when it comes to preventing and mitigating their human rights risks.

Aligning regulation with the UNGPs supports policymakers and lawmakers in deliver-ing greater clarity for companies developing or deploying AI and digital technologies, in order to improve the management of human rights risks, protect against reputational risks, and enhance responsible business opportunities. Therefore, alignment with the UNGPs fosters protection for rightsholders and creates responsible value for the busi-ness in the medium to long term.

[54] John G. Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights," *Global Governance: A Review of Multilateralism and International Organizations* 20, no. 1 (2014): 5-17, https://www.hbs.edu/faculty/Shared%20Documents/conferences/2014-business-beyond-the-private-sphere/Global%20Governance%20and%20%27New%20Governance%20Theory%27.pdf.

[55] Joy Buolamwini, "When the Robot Doesn't See Dark Skin," *The New York Times*, June 21, 2018, https://www.nytimes.com/2018/06/21/opinion/facial-analysis-technology-bias.html#:~:text=On%20the%20simple%20task%20of,it%20was%20for%20white%20men; Joy Buolamwini and Timnit Gebru, "Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification," *Proceedings of Machine Learning Research* 81 (2018): 1–15, https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf; Nick Couldry and Ulises A. Mejias, "Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject," *Television & New Media* 20, no. 4 (2019): 336-349, https://doi.org/10.1177/1527476418796632; Mark Graham, "There Are No Rights 'in' Cyberspace," *Research Handbook on Human Rights and Digital Technology*, edited by Ben Wagner, Matthias C. Ketterman, and Killian Vieth (Cheltenham, UK/Northhampton, MA: Edward Elgar Publishing, 2019); Stefania Milan and Emiliano Treré, "Big Data from the South(s): Beyond Data Universalism," *Television & New Media* 20, no. 4 (2019): 319-335, https://doi.org/10.1177/1527476419837739.

[56] Kebene Wodajo and Isabel Ebert, "Reimagining Corporate Responsibility for Structural (In)justice in the Digital Ecosystem: A Perspective from African Ethics of Duty," *Afronomicslaw*, October 15, 2021, https://www.afronomicslaw.org/category/analysis/reimagining-corporate-responsibility-structural-injustice-digital-ecosystem.

[57] Aviv Ovadya, "'Generative CI' Through Collective Response Systems," *arXiv*, February 1, 2023, https://arxiv.org/abs/2302.00672.

[58] Aviv Ovadya, "Towards Platform Democracy: Policymaking Beyond Corporate CEOs and Partisan Pressure," Belfer Center for Science and International Affairs, October 18, 2021, https://www.belfercenter.org/publication/towards-platform-democracy-policymaking-beyond-corporate-ceos-and-partisan-pressure.

STEP 4: DESIGN: ENFORCEMENT, MONITORING, AND ASSESSMENT

Impact assessment, initial and further consultation, information gathering, revision, and built-in trials are necessary and important aspects of making good and responsive regulations. The iterative approach supports a process-oriented character and facilitates ongoing assessments of business practices and design questions that need to be elaborated iteratively. Engagement with affected stakeholders leads back to identification and scoping, in particular regarding questions around which types of technology companies are within the scope of the deliberated regulatory effort, what the nature and model of their business operations are, and what the nature of the legal obligations and their scope will be, along with the supporting regulatory architecture. (see Step 1). Each step informs one another, and it is important to continue the process throughout the regulatory effort and beyond.

Guiding questions:

- What should be the way in which, and the mechanisms through which, compliance with legal obligations are to be scrutinized, monitored, and enforced?
- What is a suitable supporting regulatory architecture, and what are the corresponding services, that may be needed (e.g., guidance, consultations, regulatory effectiveness reviews, education, etc.)?
- What should be the types of liability that will result from non-compliance (e.g., civil and/or criminal liability)?
- What sanctions and/or remedial steps may be required in the event of non-compliance?
- What specific requirements do companies within the scope of the law need to comply with in terms of human rights due diligence?

It is important to highlight that the UNGPs compass proposes an on-going process, meaning that existing laws and policies have to be assessed in a regular manner to ensure they are capturing the potential adverse impacts stemming from or being linked to technology company conduct in light of the current state of technological innovation. Certain advances in technological innovation might require an adaptation of the regulatory and incentive-based measures to ensure technology companies are upholding their corporate responsibility to respect.

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