Some Concerns on ICT and Human Rights Impact Assessments

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The Center for Studies on Freedom on Freedom of Expression and Access to Information is an academic research center affiliated with Universidad de Palermo in Argentina. The Center provides technical, legal analysis on issues affecting this fundamental right, and since 2012 has been studying freedom of expression on the Internet as a specific research area. The Center is a leading voice on the promotion and protection of freedom of expression nationally, regionally and internationally. This submission was prepared in response to the public call for input published by the High Commissioner. The call was to "inform the High Commissioner report on the practical application of the Guiding Principles on Business and Human Rights to the activities of technology companies to be presented at the 50th session of the Human Rights Council in June 2022".

Further information, research and analysis on this an other issues are available at www.palermo.edu/cele or through email to cele@palermo.edu. We thank the High Commissioner for considering this submission.

A. Introduction

During 2020 and 2021, CELE began to study how human rights impact assessments (HRIAs) can be used in the technological sector, with a special focus on freedom of expression. The issue was for us relevant, but it also fell outside the scope of our institutional and personal expertise. The project was then a true inquiry into a practice and a field of which we knew very little. We thus developed two exploratory papers. One of them sought to

understand the conceptual history of HRIAs. The second paper assessed—based on information publicly available—the extent to which the tool can be used in the ICT sector. In this brief report we summarize our main findings into the potential use of HRIAs as tool of governance of the tech industry.

Between Two Worlds

Our initial inquiries convinced us that HRIAs are strange animals. On the one hand, they seem clearly linked to the environmental impact assessments that emerged in the United States in the 1960s, as a tool for governing environmental interests through a process that may prevent damages by forcing potential harm-doers to study the effects of their activities on the environment. On the other, the tool—as used by private companies and encouraged by international human rights bodies—was part of the voluntary business and human rights framework developed by John Ruggie in the United Nations in the 2000s.[1] While the administrative law origins of the tool implied an oversight authority invested with specific regulatory powers, its adoption by corporations within Ruggie's voluntary framework meant that such oversight was lacking and would have to be replaced by something else. For us, this is an important insight that must be kept in mind when assessing the use of the tool, its challenges and its potential: absent a centralized regulatory authority, HRIAs can only become an effective tool of governance if some other mechanism of enforcement or coercion is in place, whether it is peer-pressure within the industry, regulations at the national level (as in countries with specific mandates of human rights due diligence for activities overseas), self-regulation in the form of the creation of industry-wide bodies, and so on.

In that sense, we see HRIAs as standing at a critical crossroad between two different normative worlds, and the future may push them in one direction or the other. Laws forcing corporations to take active measures to

[1] J. Ruggie, «Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises». Human Rights Council, Geneve. A/HRC/8/5. 7 de abril de 2008.

ensure that their overseas activities respect human rights may bring HRIAs closer to their administrative law origins. So far, several laws around the world impose obligations on national companies regarding their activities overseas. As long as HRIAs become a *mandatory requirement*, as it has been proposed within the European Union and in bills presented in different European countries, the *oversight gap* implied in its current voluntary nature may be corrected. On the other hand, the rise of audited self-regulation initiatives may also strengthen the effectiveness of HRIAs as an instrument of governance, insofar as an industry-wide consensus is formed around the need to respect human rights, the nature of the industry's impact on them and the best way to prevent or mitigate those impacts [2].

Currently, HRIAs are complex processes of inquiry, outreach, and analysis, designed to deal with specific challenges posed to corporations, such as to anticipate potential risks within a given industry, to develop strategies to mitigate, manage, and eventually repair potential negative impacts, and to do so through a self-conscious cycle of learning and improvement. These processes are a specific form of *knowledge*, developed mainly by the practitioners that have until now crafted this tool and used it to assist companies in dealing with the human rights risks posed by their operations [3]. But we are still unsure about the extent to which these tools effectively govern the conduct of companies. This is so for a couple of reasons. First, there is a pervasive lack of transparency regarding when HRIAs are conducted, how are they deployed and what are the outcomes of these assessments. We will return to this point later. Second, because within Ruggie's international voluntary framework HRIAs—unlike their environmental brethren, born out of settled national administrative law—the lack of an adequate oversight body in charge of using these tools to to *govern* the conduct of others is a fundamental weakness. In that scenario, we think that companies use

[2] On this possible future *see* C. Marsden; T. Meyer; I. Brown, «Platform Values And Democratic Elections: How Can The Law Regulate Digital Disinformation?», COMPUTER LAW & SECURITY REVIEW, vol. 36, 2020, Disponible en http://www.sciencedirect.com/science/article/pii/S026736491930384X.

[3] *See* e.g., report by leading practitioners such as J. Ruggie, «Human rights impact assessments --- resolving key methodological questions». Human Rights Council, Geneve, Switzerland. A/HRC/4/74. 2007 and D. Abrahams; Y. Wyss, «Guide to Human Rights Impact Assessment and Management». International Business Leaders Forum, International Finance Corporation & el Global Compact de las Naciones Unidas, Washington D.C. 2010.

HRIAs to *govern themselves*, and this raises a number of important questions regarding the effectiveness and usefulness of the tool. The UN voluntary model assumes that companies will take-up their duty to *respect* human rights even if it goes against their business interests, which is—to put it mildly—somewhat counter intuitive.[4] This *oversight gap* is the cause of limitations we actually found when looking at how HRIAs are being used in the ICT sector.

Empirical and Normative Challenges

One of the first issues we noticed when looking at how ICT companies were using HRIAs was they were not particularly transparent about it. HRIA reports are usually kept secret, and only executive summaries are published. Only in a handful of cases we were capable of accessing actual reports. This deprives HRIAs from real usefulness as a tool of governance, at least if we consider—as the good practices that emerge from practitioners' guidelines—that one goal of these tools is to build trust and create accountability mechanisms *vis à vis* the stakeholders who will be affected by companies' actions.

The biggest problem, however, lies within the difficulties in casting the language of Ruggie's voluntary framework into the effects of ICT companies, specially those that provide hosting services, offer publishing platforms to users, and generally facilitate the sharing of information. To recall, Ruggie's voluntary framework affirms that companies must "[a]void *causing* or *contributing* to adverse human rights impacts through their own activities" and "address such impacts when they occur" (emphasis added) [5] When businesses have not contributed to adverse human rights

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4 S. Bittle; L. Snider, «Examining The Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?», Critical Criminology, vol. 21, 2, 2013, pág. 187, Disponible en https://doi.org/10.1007/s10612-013-9177-4.

5 J. Ruggie, «Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework». Human Rights Council. eport of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, New York. HR/PUB/11/04. 2011, 14. Principle 19 elaborates on how businesses should address impacts and instructs that "appropriate action" will vary according to two factors: (1) the determination of whether the businesses "causes or contributes to an adverse impact,"or rather is

impacts but are nonetheless directly *linked* to those impacts through their operations, the responsibility to respect human rights requires that they "seek to prevent or mitigate," those impacts.[6] These are difficult concepts to cast on the services that many tech companies provide, for several reasons.

For instance, some companies of the ICT sector have a really weak physical footprint, which allows for different decisions that directly affect how much they *impact* in a given country. As Colin Maclay recalls, when Yahoo had to decide on an investment in Vietnam they produced a HRIA that led them in making choices that shield them from uncomfortable requests of an authoritarian state, such as storing information in a server in Singapore rather than locally, or hiring a handful of sales employees with no operational responsibilities.[7] This was possible because some companies—specially those that can provide cloud-based services—can enter a country without deploying anything: cables, servers, employees, and so on. Most ICT companies that fall within this category do not need—and usually, do not have—neither local corporate personhood nor representation, unless markets become particularly important. This feature of some of the most important companies in the ICT sector is related to another one: because they do not have a local presence, the *governance gap* that affects trans national companies and their respect for human rights is bigger in them than in other corporations more tied to the ground such as e.g. those working on the extractive industry.

Putting those practical obstacles aside, we found three main problems in the use of HRIAs in the ICT sector.

The first has to do with a feature that seems to emerge clearly from our review: for companies it is easier to acknowledge negative impacts when these are caused by the undue influence on their services by clear bad actors, such as when e.g. authoritarian governments force a company to remove

"directly linked," to the impact by "its operations, products or services by a business relationship;" and (2) the business's "leverage in addressing the adverse impact".

6 *Ibid.*, pág. 14.

7 C. M. Maclay, «Can the Global Network Initiative Embrace the Character of the Net?», en Ronald, John Palfrey, Rafal Rohozinski, Jonathan Zittrain (eds.) *Access Controlled*, MIT Press, Cambridge, Mass, 2010, (Information revolution and global politics), pág. 87.

posts or videos from dissidents. In these cases—that, for instance, come out from Facebook's HRIA on Myanmar developed by BSR—the company does not *cause* nor *contributes* to the negative impact, but is simply *linked* to it.[8] The same happens when the HRIA concludes that a "minority of users is seeking to use Facebook as a platform to undermine democracy and incite offline violence".[9] This feature of HRIAs in the ICT industry limits the usefulness of HRIAs, at least if it is to be used as a tool for corporate governance, for the approach dilutes the responsibility of companies for the way their services are used or how they are governed by state actors.

The second issue has to do with a more structural problem: the services many of these companies provide have effects that are difficult to measure, and this makes the HRIAs endeavor extremely difficult, if not impossible. This is for at least two reasons. The first one has to do with the lack of sufficient empirical knowledge on the effects that many of these services produce, at the macro, meso and micro levels of the society in which they are developed and at the global level. This lack of empirical knowledge makes assessing effects difficult: most conclusions are either based on incomplete knowledge or, in the worst case-scenario, on intuitions and biases upon which HRIAs cannot be based. The second reason why measuring effects is difficult is that we do not have a shared consensus on what human rights standards entail. Rights often conflict with each other and we hold different views in terms of how that tension should be resolved. This is obviously a structural weakness in the edifice of human rights law, and HRIAs participate in that weakness. It is not an unsolvable challenge (or so we tend to think in our more optimistic moments), but it is a difficulty that must be addressed by international human rights bodies, who should strive to settle—globally or regionally—difficult questions which answers are necessary to make HRIAs useful, such as the limits of hate speech, the degree to which discriminatory speech is acceptable or not, how to deal with mis-

8 A. Castañeda; R. Álvarez Ugarte, «Human Rights Impact Assessments: Trends, Challenges, And Opportunities for ICT Sector Adoption». Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE), Buenos Aires, Argentina. octubre de 2020. Págs. 13-14.

9 Myanmar Center for Responsible Business; Institute for Human Rights and Business; Danish Institute for Human Rights, «Myanmar ICT Sector Wide Impact Assessment». Myanmar Center for Responsible Business, Yangoon, Myanmar. septiembre de 2015.

information and disinformation, and so on. This is especially important if big corporations that capture a substantive part of traffic choose to rely on international human rights law to shape their moderation policies.

The third problem has to do with something already mentioned: the lack of transparency, that is a partial consequence of the *oversight gap* produced by the voluntary framework. This problem feeds the other two: because companies are—as most corporations—rather secretive about their operations, we are left with inadequate information to empirically assess not only how HRIAs are used within the internal corporate governance structure of corporations, but also with the effects of their services on society at large, on vulnerable communities, and so on. Initiatives such as Social Science One are a step in the right direction, and open and transparent APIs built for academics also contribute to address this specific challenge. But other, more structural and pervasive challenges remain, such as the concentration of research resources on the global North, the challenges for research in mid-income countries, and so on.

Conclusion

Our research on HRIAs is ongoing. In the near future, we will update our report on the use of HRIAs in the ICT sector, with new information that has become available since publication and interviews with practitioners. We found value in HRIAs: as a tool of measuring, outreach, and self-reflection, HRIAs are procedural tools that may help decision-makers make complex decisions, in this case within corporations. This is no small thing: for companies to take on the responsibility to respect human rights is, within the UN voluntary approach to business and human rights, a necessary first step. HRIAs can help companies keep walking. But as we are hopeful on a future for HRIAs, we are still unsure where this tool will *land* in the regulatory range that goes from traditional regulation to self-regulation. We sense that HRIAs can become an important tool for audited self-regulation, as within the Global Network Initiative (GNI). But for that future to materialize, the challenges we identified—and others we surely missed—must be addressed, and the responsibility of doing so fall within different stakeholders.

From our point of view, companies must increase levels of transparency across the board. Without it HRIAs cannot become an effective tool of *governance* or *self-governance*. Governments, on the other hand, must respect human rights and cannot force corporations under their jurisdiction to act in ways that are contrary to international human rights law. This is obvious, but no less important. And international human rights bodies must strive to settle the difficult questions that currently affect freedom of expression law across the globe, some of which we identified before. Dwelling on this problem goes beyond the scope of this document, but we currently see a growing discord within the human rights field between those who would embrace a strong protection of traditional freedom of expression principles and those who would like to see the level of control over the speech that flows through the Internet increased, under visions that are themselves also based on human rights, such as e.g. non-discrimination, inclusiveness, and so on. In such a context of disagreement, we fail to imagine how HRIAs could serve their function.