
With Great Reliance Comes Great Responsibility: The Role of Technology Companies during Covid-19

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Abstract

Technology companies have been playing a key role during Covid-19 from assisting state responses to improving quality of life during lockdown. These companies are providing means of communication, work, education, social and cultural life that would otherwise be impossible. As tech companies are now playing an essential facilitating role in enabling human rights in this way, a key question emerges: Should tech companies facilitating essential services bear special responsibilities?

This paper argues that tech company obligations are heightened to the extent that the means through which they meet their due diligence obligations are amplified. This will be demonstrated by first illustrating the unique role that tech companies are playing during Covid-19, and second, examining whether special obligations should apply to those companies that are facilitating essential services. Third, this paper will recommend practical steps in the form of three types of human rights impact assessments (HRIAs) that companies should carry out as a starting point to understanding how they can meet their responsibility to respect human rights.

I. Introduction

Tech companies are providing crucial tools to overcome social isolation, promote social cohesion and raise awareness of health and safety guidelines during the pandemic.¹ Not only do they improve quality of individual life, but by assisting states to deliver public functions, and helping courts, doctors' surgeries, counselling and advice centres, schools and others to operate through online platforms, they are enabling the enjoyment of human rights which would otherwise not be possible due to schools, places of work and public spaces being closed during lockdown.

This demonstrates not only the great reliance of individuals and states on technology but also the tremendous opportunities that technology presents. However, not all technology and data processing practices bring about positive human rights impacts. In fact, technology poses a wide range of risks to human rights. The main human rights risks typically associated with technology are the right to privacy, freedom of expression, and non-discrimination, but risks go well beyond these and can affect all human rights.²

* The Human Rights, Big Data and Technology Project is funded by the Economic and Social Research Council [grant number ES/M010236/1].

¹ United Nations, 'Shared Responsibility, Global Solidarity: Responding to the socio-economic impacts of COVID-19', March 2020, 6, available at https://www.un.org/sites/un2.un.org/files/sg_report_socio-economic_impact_of_covid19.pdf.

² Lorna McGregor, Vivian Ng, Ahmed Shaheed, Elena Abrusci, Catherine Kent, Daragh Murray and Carmel Williams, 'The Universal Declaration of Human Rights at 70: Putting Human Rights at the Heart of the Design, Development and Deployment of Artificial Intelligence' Human Rights, Big Data and Technology Project, University of Essex, 20 December 2018, 11-14.

Considering this two-fold nature of technology, safeguards must be a priority to ensure that advantages may be harnessed without endangering human rights. Safeguards may take various forms depending on the enforcing actor. While states are the main duty bearers under international law and are required to protect, respect and fulfil human rights, businesses under the UN Guiding Principles on Business and Human Rights (UNGPs) have a responsibility to respect human rights by preventing, mitigating and remedying any actual or potential adverse human rights impacts caused, contributed or linked to their business operations and activities.

Recognising that technology companies are serving as sole facilitators of essential services in a time when they are inaccessible any other way raises two red flags in regard to potential human rights harms. These are (1) harms associated with the use and deployment of these tech products and services and (2) harms resulting from a lack of access to these services.

To prevent and mitigate both of these harms, it is important to understand what responsibilities both companies and states have in regard to human rights. While the role of the State is significant in this context, the scope of this paper is limited to the responsibilities of tech companies and the safeguards they must put in place to meet their responsibility to respect under the UNGPs.

This paper will argue that tech company obligations are heightened to the extent that the means through which they must meet their due diligence obligations are amplified. This means that policies and processes to identify and address adverse impacts must be proportionate to the potential severity of impact of their operations among other factors. This will be demonstrated by illustrating the unique role that tech companies are playing during Covid-19, examining whether special obligations should apply to those companies that are facilitating essential services, and recommending practical steps in the form of three types of HRIAs as a starting point to understanding how tech companies can meet their obligation to respect human rights.

II. The Role of Tech Companies - Digital Society in Lockdown

Technology is being used in all facets of Covid-19 responses. The Internet of things (IOT) market is providing assistance through technology such as drones for sanitation, smart thermometers for tracking virus spread, autonomous vehicles for deliveries and various wearables that measure vitals.³ Tech companies are also assisting governments in digitalising their services, spreading public health and safety information, conducting data analysis to track infection rates, and developing contact tracing apps.⁴ At an individual level, communication apps and platforms provide the means of online teaching, video conferencing for work, online gaming, and streaming services that enable the enjoyment of public and private life online.

³ Alexandra Rehak, 'IoT impact in the COVID-19 world', 22 April 2020, <https://www.omdia.com/resources/product-content/iot-wins-and-challenges-in-the-covid-19-world>; Thomas Brewster, 'Palantir, The \$20 Billion, Peter Thiel-Backed Big Data Giant, Is Providing Coronavirus Monitoring To The CDC', 31 March 2020, <https://www.forbes.com/sites/thomasbrewster/2020/03/31/palantir-the-20-billion-peter-thiel-backed-big-data-giant-is-providing-a-coronavirus-monitoring-tool-to-the-cdc/#4a6619ff1595>.

⁴ 'NHS COVID-19 App', NHSX, <https://www.nhs.uk/covid-19-response/nhs-covid-19-app/>, accessed 14 June 2020.

Many of these products and services are not new but already played some role in our daily lives pre-Covid-19. The use of the technology itself is, in this way, not novel. What is different now is that individuals, businesses and states many times do not have any choice but to use technology to enable many parts of ordinary daily life from work to school and healthcare. For example, even before Covid-19 there was a high adoption of education technology (EdTech), with global investments reaching US\$18.66 billion in 2019.⁵ This EdTech however served as a supplementary tool in addition to the main source of education through face-to-face learning. During Covid-19 however, as the pandemic response measures require school closures in many countries, online/distance learning is the only mechanisms through which education is enabled.⁶ The complete reliance on technology and the lack of choice to use the tools both from the side of the individual as well as the educational institution, whether public or private, is what makes the difference significant.

With many public spaces closed and lock down measures limiting face-to-face interactions, trends of increased tech use can be observed in various areas. Tech companies offering means of communication are in particularly high demand such as Zoom, Hangouts Meet and Google Classroom which experienced significant spikes in their usage (figure 1).⁷ According to a survey by Kantar, web browsing has generally increased by 70% and social media engagement by 61% over normal usage rates.⁸ Additionally, individual companies saw dramatic rises in particular apps. Facebook reported that, by 24 March, total messenger use increased by more than 50% over the previous month and, 'in those places hit hardest by the virus', voice and video calling more than doubled on Facebook Messenger and WhatsApp.⁹ See figure 2 for group call minutes by Facebook Italy for example.¹⁰

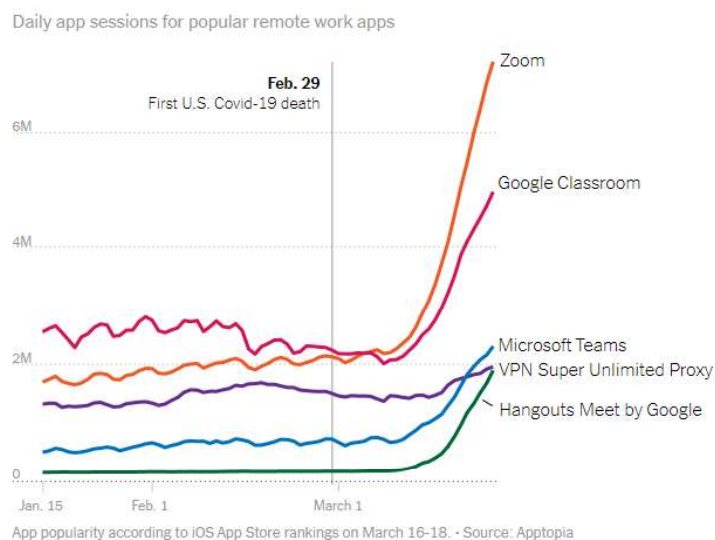


Figure 1 Daily app usage for popular remote working apps

⁵ Cathy Li and Farah Lalani, 'The COVID-19 pandemic has changed education forever. This is how', World Economic Forum, 29 April 2020, <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/>.

⁶ Laura Bicker, 'Coronavirus: How South Korea is teaching empty classrooms', BBC News, 10 April 2020.

⁷ Ella Koeza and Nathalie Popper, 'The Virus Changed the Way We Internet', New York Times, 7 April 2020.

⁸ 'COVID-19 Barometer: Consumer attitudes, media habits and expectations', Kantar, 3 April 2020, <https://www.kantar.com/Inspiration/Coronavirus/COVID-19-Barometer-Consumer-attitudes-media-habits-and-expectations>.

⁹ Alex Schulz, 'Keeping Our Services Stable and Reliable During the COVID-19 Outbreak', Facebook, 24 March 2020, <https://about.fb.com/news/2020/03/keeping-our-apps-stable-during-covid-19/>.

¹⁰ Ibid.

Rising numbers of users and changing public policies may indicate new demographics and different operational contexts which can alter the effect that services have on human rights. While companies are accustomed to evolving user bases and spikes in demand, Covid-19 is producing unprecedented rapid changes. Zoom CEO Eric Yuan, in his public letter, noted that Zoom services were built primarily for enterprise customers and that it was not designed for every person working, studying, and socialising from home with a much broader set of users using the services in a myriad of ways.¹¹ Facebook similarly reported that while its services are built to withstand 'spikes during events such as the Olympics or New Year's Eve,' they are predictable and happen infrequently, unlike the spikes experienced during Covid-19.¹²

Group Call Time (minutes) in Italy

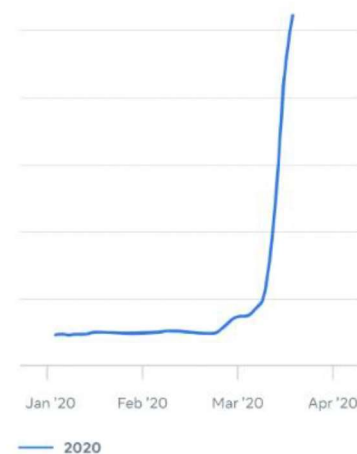


Figure 2 Facebook statistics from Italy

The UN Working Group on Business and Human Rights has explained that 'some businesses have a special role in this situation because of the nature of their products or services' referring specifically to those providing life-saving products.¹³ Under what category, however, do we put products and services which act as the only means of enabling the enjoyment and fulfilment of human rights? With offices, schools, courts and other public services closing or operating at limited capacity, some obvious associated rights can immediately be said to be at risk, such as the right to education, work, and fair trial. However, thanks to new technology allowing for some parts of society to function, many people in the world are still in a position to enjoy these rights, at least to an extent. Significant disparities in access to technology, often referred to as the digital divide, are however preventing many individuals from reaping these benefits and can constitute human rights harm for people who are already marginalised.¹⁴ The technology does not fulfil or enable the right to life itself, but rather enables the enjoyment of other human rights, which cannot be fulfilled in any other way during this time.

Following this realisation, one may wonder whether tech companies that provide such rights-enabling services should have special responsibilities. If a tech company is, for example, the operator of a platform that serves as the only means through which education is enabled, should the company bear greater responsibility?

¹¹ Eric S. Yuan, 'A message to Our Users', Zoom Blog, 1 April 2020, <https://blog.zoom.us/wordpress/2020/04/01/a-message-to-our-users/>.

¹² 'How production engineers support global events on Facebook', Facebook Engineering, 12 February 2018, <https://engineering.fb.com/production-engineering/how-production-engineers-support-global-events-on-facebook/>.

¹³ OHCHR, 'Ensuring that business respects human rights during the covid-19 crisis and beyond: the relevance of the UN Guiding Principles on Business and Human Rights', <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25837&LangID=E>, accessed 14 June 2020.

¹⁴ Lorna McGregor and Dr. Ahmed Shaheed, 'The COVID-19 pandemic: Five urgent principles for leaving no one behind through technology', 19 May 2020, <https://www.universal-rights.org/nyc/blog-nyc/the-covid-19-pandemic-five-urgent-principles-for-leaving-no-one-behind-through-technology/>.

III. Business Respect for Human Rights

Given these changes in function and operational context, understanding the role of tech companies in respecting human rights is crucial. Does the essential facilitating, or rights enabling, nature of their products and services change their responsibility in regard to human rights? This section will demonstrate why the responsibility to respect of tech companies remains the same, yet calls for heightened means of meeting that responsibility. This will be done by (1) recalling the business responsibility to respect human rights, (2) understanding the importance of proportionate means of meeting that responsibility and (3) examining why they do not bear special responsibilities, such as those of states.

a) Back to basics

Under the UNGPs all businesses have a responsibility to respect human rights. This means that they should prevent and mitigate any adverse human rights impact they may have caused, contributed to, or are linked to.¹⁵ This includes human rights impacts within their business operations, supply chains and business relationships, as well as impacts on individuals and communities that may be adversely affected by their products and services. In this way the UNGPs provide an accountability framework based on prevention, oversight, monitoring and remedies for victims. The UNGPs do not create new substantive human rights obligations but rather enshrine states' obligations to protect human rights from third party harm and articulate businesses' responsibilities to respect human rights and provide effective remedy.¹⁶

Businesses respect human rights by conducting human rights due diligence, which is the ongoing process whereby a company assesses its human rights impacts, acts upon the findings, transparently reports and provides effective remedies to affected rightsholders.¹⁷ The detailed process can be seen in figure 3 below. Respecting human rights is not only good for rights holders but can also support businesses in building consumer trust and mitigating future legal liability. As confirmed by the UN Working Group on Business and Human Rights in its Covid-19 Statement: 'human rights due diligence is key to ensuring that any risks to people are identified and mitigated.'¹⁸

¹⁵ UN, 'Guiding principles on business and human rights: implementing the United Nations 'Protect, Respect and Remedy' framework', HR/PUB/11/04, January 2012, Principle 13, p 14.

¹⁶ John Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights,' (2017) *Working Paper Series*, Harvard University, p. 1.

¹⁷ UN, 'Guiding principles', (n. 15), Principle 17.

¹⁸ 'Ensuring that business respects human rights', (n. 13).

A Human Rights Due Diligence process

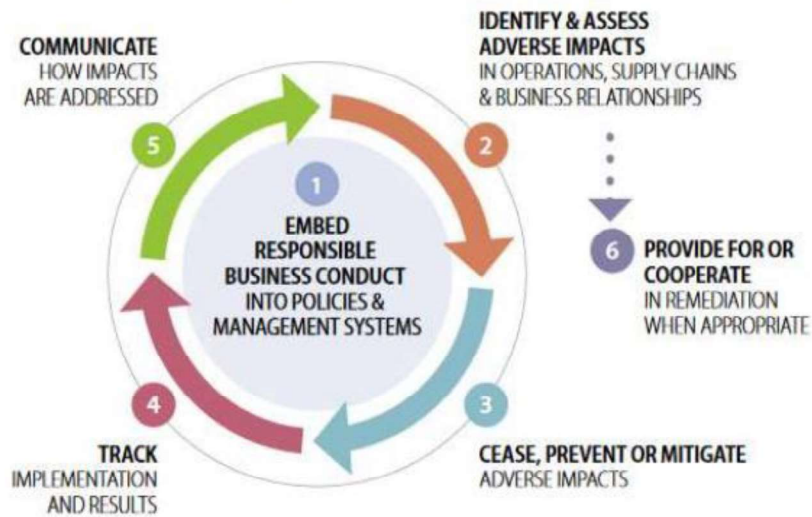


Figure 3 OECD (2018). *OECD Due Diligence Guidance for Responsible Business Conduct*.
<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

The responsibility to respect human rights applies to all businesses regardless of the sector, size, operational context, ownership and structure.¹⁹ However, ‘the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.’²⁰ This means that companies must have measures in place which are proportionate to the factors listed above. Considering this specification, it can be argued that due to a significant and rapid change to the operational context of some tech companies which change the potential severity of impacts, the means by which they must meet their responsibility to respect are heightened.

b) Why businesses don’t bear special responsibilities

According to the UNGPs, it is a company’s responsibility to respect human rights and a State’s responsibility to protect human rights. In the case that a company is the sole enabler of a right, the State would bear the responsibility to ensure that the company’s services are available and accessible to everyone. The company’s responsibility would however remain to ensure that the products and services it provides “do no harm” and to prevent, mitigate and remedy any adverse human rights impacts.

Whether or not it is a rights enabling service is, therefore, irrelevant to the extent that the company must ensure, at all times, that no human rights harms are caused, contributed to or linked to its business operations. The means through which the company meets its responsibility is heightened however, as potential severity of impact, scale and scope are affected by being the sole rights-enabler. The risk may continually change due to a range of extraneous factors and therefore ongoing human rights due diligence and impact assessments are required in order to ensure harms are prevented and mitigated.

¹⁹ UN. “Guiding principles”, (n. 15) Principle 14.

²⁰ Ibid.

c) Proportionate means of meeting the responsibility to respect

The “means” of demonstrating respect refers to the ‘scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights’.²¹ The means of demonstrating this respect is dependent on the size, sector, operational context, ownership and structure, but most of all to the severity of a business’s adverse human rights impacts. The process must therefore be proportionate to the human rights risk of its operations.²² This means that the policies and processes a company has must reflect and encompass the severity of impact, size, sector and operational context as well as its ownership and organizational structure. For example, a large multinational enterprise is more likely to undertake diverse and complex activities than a smaller one which increases its human rights risk.²³ Their policies and processes for demonstrating respect for human right must be reflective of these factors. Similarly, the sector and operational context in which a business operates is likely to determine which risks are probable in its operations.

While the general sector, ownership and structure of most companies has not changed during Covid-19 for tech companies, the operational context and size for most has, as illustrated in section II above. It follows that the severity of impact a company has may have changed and that therefore enhanced means should be provided to respond to these changes to ensure human rights are respected throughout their operations.

This means that businesses must first understand how the new operational context, in this case Covid-19, affects their operations and thereby their users through the products and services they provide. The only way to achieve this is to conduct human rights impact assessments as a first step.

IV. Three Types of HRIAs Tech Companies Should be Conducting

HRIAs are the first step to identifying, understanding, assessing and addressing the adverse effects of tech products and services. They provide an opportunity for companies to assess and review the types of due diligence they have already undertaken for their products, and to reevaluate whether changes are required to ensure they respect human rights. Key criteria for a human rights impact assessment process include participation, non-discrimination, empowerment, transparency, and accountability, and in terms of content should include a benchmark of human rights standards, actual and potential impacts caused or contributed to, assessment of the severity of impact, impact mitigation measures and access to remedy.²⁴

HRIAs are the only way for companies to identify the adverse human rights impacts their products might have before a rights holder is affected. It is the way through which effective remedies can be provided and a precautionary approach to new products and relationships

²¹ UN, ‘The Corporate Responsibility to Respect Human Rights- an Interpretive Guide’, HR/PUB/12/02, January 2012, 19.

²² Ibid.

²³ Ibid.

²⁴ Nora Götzmann, Tulika Bansal, Elin Wrzoncki, Cathrine Poulsen-Hansen, Jacqueline Tedaldi and Roya Høvsgaard, ‘Human Rights Impact Assessment Guidance and Toolbox’, Danish Institute for Human Rights, 2016, 22-28.

can be ensured. HRIAs should be conducted as early as possible in the lifecycle of a project and repeated at regular intervals or “critical gateways” which include project expansions and significant changes in social and political circumstances.²⁵ This is definitely the case during Covid-19.

For the purposes of this paper HRIAs are divided in three categories of when they are needed: (1) when new products are developed, (2) new partnership and collaborations are formed, and (3) when a product or service is exposed to a new context. All of these three triggers can be observed in the tech sector during Covid-19 and therefore require significant attention especially if linked to providing or facilitating access to essential services.

a) Baseline HRIAs for new products

For new products and services, baseline HRIA are essential to gather information in order to understand the current state of enjoyment of human rights in any particular operational context. The process should include all risks throughout the development and deployment of any new product, from conceptualisation to design, testing and deployment.²⁶ This may be based on knowledge gained from HRIAs for similar products, desk based research on socio-economic and political context, expert human rights reports such as from civil society, academia and international organizations, and most importantly consultation with potentially affected rights holders.

Consultation and meaningful engagement with rights-holders, duty bearers and other relevant parties through surveys, interviews, focus groups and other means are primary ways to understand actual and potential impact.²⁷ It is from this baseline assessment that existing impacts are analysed and future impacts can be predicted. The benchmark for the assessment must be international human rights standards. The baseline data should also ‘inform the selection of human rights indicators, against which predicted change and any measures to address the predicted impacts can then be measured and tracked over time’.²⁸

Establishing this baseline is crucial to understanding what potential impacts a particular technology may have especially if it has not yet been deployed. An example of this is the current development of various contact tracing apps around the world which bring about a range of human rights concerns, specifically in regard to privacy and surveillance.²⁹

Applying the UNGP framework, companies developing contact tracing apps should consider what they know of human rights impacts from assessments of similar products both internally and externally, how they may meaningfully consult with potentially affected rights holders, and how impacts stand up to the scrutiny of the benchmark of international human rights standards and principles.

²⁵ Ibid, 12.

²⁶ Lorna Mcgregor, Daragh Murray and Vivian Ng, ‘International Human Rights Law as a Framework for Algorithmic Accountability’, (2019) 68(2) International and Comparative Law Quarterly 309.

²⁷ Götzmann et al, (n. 24) 51.

²⁸ Ibid, 53.

²⁹ Amos Toh and Deborah Brown, ‘How Digital Contact Tracing for COVID-19 Could Worsen Inequality’, Human Rights Watch, 4 June 2020.

b) Renewed HRIAs for existing products

Many of the products and services that are enabling individuals to overcome isolation, to work from home and maintain a social life are possible through already existing products and services. These include various social media platforms, communication apps, search engines, cloud storage and others. If companies providing such tools have operationalized the UNGPs, then a baseline HRIA should already exist prior to the rollout of the particular product. This will give the company an understanding of the types of impacts that their product is having on human rights in various operational contexts. Many companies may not have this in place however, and therefore new baseline HRIAs may be needed.

Products that have been operational pre-Covid-19 but which are facing increasing numbers of users, different demographics, and different socio-economic operational contexts must consider the effects of these variances on human rights, and/or whether the severity of impact has changed. The unprecedented uses of Zoom, as previously mentioned, is an illustration of this.³⁰ Understanding that its products are used in new and different ways should trigger a renewed impact assessment.

c) HRIAs for new and existing business relationships

The third type of HRIA is needed to assess how existing and new business relationships affect human rights. This is significant as companies are responsible not only for the human rights impact they cause and contribute to, but also those to which they are linked.³¹ This includes direct business partners, suppliers, distributors, government relationships and others.³²

Particularly when it comes to public private partnerships, it is key that relationships and procurement standards are transparent to foster access to information for the public. Companies need to consider for whom and how they make particular technologies available as some states, for example, may not have sufficient human rights protections in place, which could mean that a collaboration would increase risks to human rights. Companies such as Amazon, Google and Microsoft have each been criticised for their governmental projects, particularly those relating to facial recognition, drone surveillance and border policing.³³

Key aspects for consideration of human rights impacts of business relationship is whether any existing relationships are contributing to human rights harm, whether ending or beginning business relationships may cause human rights harm, whether certain actors due to their past record of abuse, or use of technology present risks to human rights and whether specifically government requests are legal necessary and proportionate. Asking these types of questions not only enables respect for human rights but also protects the business itself.

³⁰ Yuan (n. 11).

³¹ UN, 'Guiding principles', (n. 15) Principle 13, 16 (c), 17, 19.

³² European Commission, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights', June 2013, 32, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/information_and_communication_technology_0.pdf.

³³ ACLU, 'Pressure mounts on Amazon, Microsoft and Google against selling facial recognition to government', 15 January 2019, <https://www.aclu.org/press-releases/pressure-mounts-amazon-microsoft-and-google-against-selling-facial-recognition>.

VI. Implications Post-Covid-19: Preparing for a Better World

Covid-19 has brought to the forefront the true binary nature of technology. The tremendous potential of technology has been demonstrated in facilitating everything from personal conveniences, to essential and government services. At the same time, however, all the alarm bells have been rung in validating how new and existing technologies and data processing practices can affect not only the right to privacy and freedom of expression but all human rights.

To enjoy the benefits and keep the harms at bay, safeguards must be the top priority. This chapter has demonstrated that the responsibility of companies is to respect human rights through means that are proportionate to their severity of impact. For tech companies during Covid-19 this means heightened responsibility to have enhanced due diligence measures because of the significant and rapid change in operational context and thereby potential severity of impact.

While Covid-19 serves as a perfect example of the types of HRIAs that should be triggered, it should not take a global pandemic to assess or reassess risk. Moving forward beyond the pandemic, ongoing due diligence must be a main concern of businesses. The role of technology will presumably not diminish over time and with numerous global challenges looming and a rise in tech-solutionism, respect for human rights must become the new normal.

Businesses are however not alone in this. States must ensure that all human rights are protected, especially when it comes to potential third party harm.³⁴ The safeguards should encompass comprehensive regulation, mandatory due diligence requirements, and effective oversight to ensure human rights are protected. Only when all actors understand their respective responsibilities and do everything within their power to protect and respect human rights can the full potential of technology be realised and sustainable, inclusive and resilient growth be ensured.

³⁴ UN, 'Guiding principles', (n. 15) Principle 1.