

## ■ Consulting Users the Right(s) Way

A new [report](#) by Microsoft, Center for Democracy and Technology (CDT), and Business for Social Responsibility (BSR) takes aim at a thorny issue in business and human rights: consulting users.

The UN [Guiding Principles](#) on Business & Human Rights clearly and repeatedly state that companies must assess the risks their activities poses to human rights. Part of this assessment includes “meaningful consultation with potentially affected groups and other relevant stakeholders.” It’s a general recommendation that still leaves much to be determined: how does a company identify ‘potentially affected groups and relevant stakeholders’ and how can they consult meaningfully with them?

The question has real, immediate applications. For instance, two telcos began [operations](#) this year in Myanmar, a country with a legacy of repressing voices for change. Should those firms attempt to contact every individual who will be impacted by their new mobile phone and data networks, SIM distribution channels, and cell tower construction projects? How should that consultation be designed so that it is inclusive and productive?

At the outset, the new report admits, “Meaningful engagement with rights holders of the type envisioned by the UNGPs is very difficult to achieve in practice.” To find best practices, BSR used its experience of completing “around 15 different human rights due diligence assessments for ICT sector companies,” and also consulted civil society groups, including Access.

Access welcomes the report’s findings, and add some points we feel need emphasis below.

### Variety of Stakeholders

The paper smartly proposes the ‘all of the above’ approach to consultation. It states:

Deciding which stakeholders to consult should be viewed as an “and question” rather than an “or question” — stakeholder dialogue can include both rights holders and intermediary stakeholders, and is about consulting with a broad enough range of stakeholders to make informed decisions.

The report demarcates a division in civil society, identifying separate categories of “rights holders,” or people whose human rights are affected by a company, and “intermediary stakeholders,” or experts and civil society groups that may operate at national or international levels. BSR’s research also uncovered a wide gulf in the technological expertise between older human rights groups and newer digital-focused organizations.

While there may be truth to these divisions, Access sees the gaps narrowing quickly. Indeed, we set out to build connections and knowledge-sharing through our [RightsCon](#) event series. While a common language to map the ecosystem of groups in civil society is helpful, companies should not ignore the many ties that bind civil society groups, from coalitions to conferences, listservs to face-to-face interaction.

Implicitly endorsing a multi-stakeholder model, where all stakeholders have a meaningful voice in decision-making, the report also identifies the need for adequate funding for all stakeholders. Access reiterates the importance of not only hearing but seeing change actors from disparate regions at the table with policymakers and corporate executives.

**Recommendation:**

- All stakeholders should be provided with greater support for travel expenses and additional assistance to address related obstacles that users at risk encounter in accessing policy-making forums and conferences worldwide. These interactions create the ties that bind us and yield stronger engagement.

## **Security of Participants and their Data**

Security of rights holders is highlighted as a principle of engagement, as it should be. The closer your consultations get to marginalized and at risk parties, the more of a concern security should be. As acknowledged in the paper, certain techniques for consulting rights holders, such as online surveys, should not invite the participation of vulnerable populations. Collecting information via open networks, without proper encryption and data security standards in place, may increase risks to rights holders. This is especially true in regions with systematic or repeated patterns of surveillance or restrictions on freedom of expression.

It's important to acknowledge that even when "doing good," organizations involved in disaster relief, refugee care, and responses to political and social disruptions can create risks by mishandling or sharing data without proper safeguards.

**Recommendations:**

- Minimize the amount of data collected and retained, and vigilantly guard and discard data gathered.
- Employ highest possible data security and encryption standards.

## **Long-term involvement & agenda setting by rights holders**

Rights holders should be asked to provide inputs into the agenda itself, as companies' understanding of human rights risk might not be complete. On that matter, the paper fairly concludes that companies

should engage with rights holders prior to making business decisions, but suggests engaging “on topics, not specifics” at that stage. Risks can vary depending on specifics, and to get the most accurate and reliable overview of a situation prior to investment, companies’ engagement on human rights should be as complete as possible.

The paper identifies two forms of rights holder engagement: those initiated by the company, and those called for by the rights holders. The latter method could be and should be fostered. To do so, companies could provide greater information on planned products and services, and once a consultation is scheduled, give notice on how to participate, the objective of the consultation, and follow-up reports on the use of the received contributions. But there are larger issues to consider as well: while it is crucial to know who and how to engage, to tackle human rights issues, the question of on which topic to engage is also fundamental.

To further improve meaningful rights holder engagement, companies could develop more inclusive approaches than consultations or roundtables. The lack of involvement of rights holders and intermediate stakeholders in the company’s human rights strategy is identified in this paper. More than short-term inputs, long-term engagement with rights holders in the development and implementation of a company’s human rights strategy would be greatly beneficial. Post-consultation follow up will be key to enabling these long-term relations between stakeholders.

#### **Recommendations:**

- Involve rights holders in development and implementation of the company’s human rights strategy.
- Provide rights holders with the best point of contact within the company.
- Align incentives for all stakeholders to schedule continuing engagement.

## **Diversity of Corporate Staff**

Closely related to agenda setting is the question of which corporate officers are engaged in the consultation, from its conception through execution and follow up. The diversity of the employees in the internet sector has made headlines lately, with good reason: the tech firms seen as the beacon of the U.S. economy and innovation more generally are staffed predominantly by [white and Asian males](#). This closed hiring model persists even though more [black and Latino engineers](#) are graduating from U.S. colleges. Overall, the high representation of U.S. citizens at the top levels of the world’s major internet platforms orients decision-making toward a centralized and Western, rather than global perspective.

Without attempting to make broad statements on human nature, Access has anecdotally seen multiple instances where ICT firms have changed policies only when the issues began to personally affect staff members. A lack of diversity of backgrounds and viewpoints, and a hiring process biased toward more privileged communities, often leave tech firms with a woeful lack of expertise and sensitivity to the way their products and services affect vulnerable communities.

Even firms that recognize their gaps may require assistance in making meaningful outreach, whether for rights holder consultations, hiring, or any number of other decision points. The corporate representatives who interact with rights holders must be not only sensitive to the legacies of the communities they consult, but also empowered to act across the corporation. Their learning must transfer to high level policy and action, which the report refers to as “the ability to make or influence relevant company decisions.” Consultations must produce outcomes across the company, not just within a “sustainability” silo. While the paper acknowledges the need for engagement on human rights to happen at different levels in companies, it only recommends in-depth training for staff specifically dealing with human rights issues. ICT companies would greatly benefit from providing training on human rights, in particular on freedom of expression and privacy issues, to every staff member, to improve awareness and early detection of risks.

Lastly, special care must be taken when contracting third-party proxies, like a for-profit public relations or consulting firm, to carry out consultations. Proxy consultants are tasked with gaining certain information or perspectives from rights holders, and perhaps even given a pre-written survey or list of questions by the company. But proxies should be trained and ready to implement the 8 principles that BSR recognizes, as well as those considerations identified in this post. When third-party consultants are employed, all participating stakeholders must clearly be notified of the arrangement, and be provided with direct access to the responsible individual at your company, beyond just the proxy representative.

#### **Recommendations:**

- Increase diversity employees with decisions over corporate policies impacting human rights.
- Integrate the findings of consultations into decisions across the divisions of the corporation.
- ICT companies should train all employees in human rights, especially on privacy and freedom of expression issues.
- When contracting third-party consultants, ensure proper training and attention to transparency and accountability. Provide rights holders with contact information of the appropriate corporate representative.

## **Transparency**

Ensuring transparency during the overall engagement process is also key. The report could do more to emphasize this fundamental principle. Instead, it does quite the opposite: while discussing “trust,” the paper refers to a rights holder’s statement recommending to conduct stakeholder engagement “in secret.” While recognizing that the confidentiality of participants can be essential to maintaining security, transparency and security are not at odds. Businesses that respect fundamental human rights by operating transparently and accountably to all stakeholders foster more sustainable investment and goodwill in their services.

#### **Recommendation:**

- Seek ways to maximize transparency at all points of the consultation process

## Corporate Responsibilities vs. Rule of Law

Finally, when addressing the question of content removal, the paper overlooks the controversial issue of corporate responsibilities on content, sometimes referred to as [privatized enforcement](#). This practice describes the corporation's intervention to impose restrictions in order to achieve political or public goals.

The report recommends ensuring that staff members who have to make decisions on the removal of user-generated content receive proper training in human rights and international law, but misses the larger issues at stake: How will actions that impact fundamental rights -- such as the right to due process of law, the right to privacy and freedom of expression and communication -- be dealt with? What is the responsibility of the company, and who will provide access to remedy?

Businesses should not be pushed into making these types of sometimes arbitrary decisions outside the rule of law as it undermines the presumption of innocence and the right to due process of law. In accordance with the [European Convention for Human Rights](#), the [International Covenant on Civil and Political Rights](#), and the [UN Covenant on Civil and Political Rights](#), removal of content should always be dealt with in accordance with the law or a court order. Otherwise, discretionary decisions have a chilling effect on human rights, democracy, and the rule of law.

### **Recommendation:**

- ICT companies should engage in a thorough discussion with stakeholders on “intermediary liability” to assess the impact of their decisions when removing online content and come up with a solution that is satisfactory for both private companies to comply with their responsibilities and the enjoyment of human rights online.

## Concluding Remarks

As ICT companies are always faced with new and challenging human rights issues, stakeholder engagement enables early detection as well as adequate response to risks. Moving forward, BSR should build on the efforts of this paper to further develop its approach, and influence the sector to do the same, including at its upcoming [conference](#).

In sum, Access welcomes the progress made in that report as a significant step forward. We recommend that BSR further consider transparency, security, and diversity of stakeholders when thinking about legitimate and meaningful engagement. These criteria are crucial to establish a two-way relationship between rights holders and ICT companies, to the benefit of both.

### **For More Information**

Please visit [www.accessnow.org](http://www.accessnow.org)

### **Contact**

Peter Micek | Senior Policy Counsel | [Peter@accessnow.org](mailto:Peter@accessnow.org) | +1-888-414-0100 x709