UN General Assembly's Overall Review of the Implementation of the Outcomes of the World Summit on the Information Society

Submission by the Economic and Social Research Council Funded 'Human Rights and Information Technology in an Era of Big Data' Large Grant at the Human Rights Centre of the University of Essex

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1. This submission is made by the ESRC-funded 'Human Rights and Information Technology in the Era of Big Data' Large Grant at the University of Essex's Human Rights Centre ('the Project').

2. The Project maps and analyses the challenges and opportunities presented by the use of information and communication technology (ICT) and big data from a human rights perspective. Drawing on the wide range of expertise of its interdisciplinary researchers and partner organisations, the Project considers whether fundamental human rights concepts and approaches need to be adapted to meet the rapidly evolving technological landscape. The Project brings together practitioners in the fields of human rights, ICT, and Internet governance to assess existing regulatory responses and whether further reforms are required in order to maximise effective human rights protection.

3. The Project congratulates the co-Facilitators, contributing States and other stakeholders on the Zero Draft and the progress made towards the High Level Meeting on the Overall Review of the Implementation of the Outcomes of the World Summit on the Information Society and commends the inclusion of human rights' concerns in the current draft.

4. Technology has the potential to impact upon all aspects of society. The use of ICT is becoming essential to the conduct of government operations, to business, and to individuals' day-to-day lives. ICT and human rights have become inextricably intertwined, and this is set to continue in line with progress towards the Information Society. This interconnectivity means that ICT has concrete human rights' implications, which can be both positive and negative. Significantly, the full extent of the human rights' implications are not yet known. ICT and the use of big data may offer an unprecedented opportunity to secure the fulfilment of human rights. Equally, the misuse of ICT and big data may interfere with human rights protections and undermine the achievement of the Sustainable Development Goals (SDGs).

5. Given the inextricable link between human rights, the SDGs and ICT, the Project considers that the current draft would be strengthened by taking a systematic approach to human rights, in order to reflect the full scope of the human rights' implications raised by the use of ICT and big data. To facilitate this process, this submission highlights the opportunities and challenges of ICT and big data as they relate to the protection of human rights and sustainable development.

6. This submission is divided into two sections. First, it sets out the interrelationships between ICT, big data, sustainable development and human rights. Through this

discussion, the submission addresses five of the Guiding Questions posed by the co-Facilitators of the WSIS+10 Review.[1] Second, the submission makes specific suggestions of language that could be incorporated within the Second Draft.

Opportunities and Challenges Presented by the Use of ICT and Big Data

7. The transformative potential of ICT and big data for the protection and promotion of human rights is becoming increasingly apparent. For example, over one million individuals participated online in open consultations for the development of the SDG framework.[2] Digital platforms have facilitated local and global dialogue between human rights defenders, minorities and other democratic voices,[3] giving rise to the phrase 'liberation technology'.[4] Analytics and the use of big data can assist in the identification of otherwise invisible forms of vulnerability and discrimination.[5] This information can be utilised to target interventions and to facilitate efficient resource allocation.[6] Equally, predictive medicine can facilitate more effective and resource efficient health interventions and treatments.[7]

8. ICT and big data can also be employed to facilitate the achievement of the Sustainable Development Goals.[8] Indeed, the effective use of ICT and big data is arguably essential. In relation to 'good health and well-being',[9] for example, the adoption of e-health and m-health can lead to cost-effective access to health care, while analytics can identify appropriate treatments and facilitate early intervention, reducing future health care costs.[10] Equally, technological assistance in the identification of vulnerability and discrimination facilitates 'reduced inequalities',[11] and can assist in tackling the 'digital divide'.

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[1] The questions addressed are: 'How should the outcome address any challenges and priorities for the future?', discussed in paras. 16-19; 'How can ICTs be harnessed for sustainable development?', discussed in paras. 7-13; 'What should be the appropriate linkage between WSIS and the 2030 Agenda for Sustainable Development?', discussed in para. 13; 'What should the main goals of Internet governance be, now and in the future?', discussed in paras. 14-19; 'How should HR issues related to ICTs be addressed in the Zero Draft?', discussed in paras. 4-5, 7-19.

[2] Human Rights Council, *Summary of the Human Rights Council Panel Discussion on the Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights* (19 December 2014) UN Doc A/HRC/28/39, para. 5.

[3] *ibid*.

[4] See, e.g., Larry Diamond. 'Liberation Technology' (2010) 21(3) *Journal of Democracy*, pp. 69-83.

[5] Human Rights Council, *Report of the UN Independent Expert on Minority Issues: Mission to Hungary* (2007) UN Doc A/HRC/4/9/Add.2, para. 100; Todd Landman and Edzia Carvalho. *Measuring Human Rights* (Routledge 2007) p. 116.

[6] New York City Office of Data Analytics. *Disaster Response and Resiliency* (undated) available online: <www.nyc.gov/html/analytics/html/initiatives/disaster_response.shtml>; Jurij Paraszczak. 'Data Analysis Holds the Answer for Cities' Efficiency' (*Financial Times*, 11 December 2013) available online: <www.ft.com/cms/s/0/4de0e638-5c94-11e3-931e-00144feabdc0.html#axzz3p2vrFKTX>.

[7] Zina Moukheiber. 'IBM and Epic Apply Predictive Analytics to Electronic Health Records' (*Forbes*, 19 February 2014) available at: <www.forbes.com/sites/zinamoukheiber/2014/02/19/ibm-and-epic-apply-predictive-analytics-to-electronic-health-records/>.

[8] UNGA, *Resolution Adopted by the General Assembly on 20 December 2013: Information and Communications Technologies for Development* (15 January 2014) UN Doc A/RES/68/198, para. 1. See also: International Telecommunication Union *et al*. *Advancing Sustainable Development Through Information Communication Technologies: Linking WSIS Action Lines with Sustainable Development Goals* (Geneva, 2015) available at: <http://www.itu.int/net4/wsis/sdg/Content/wsis-sdg_matrix_document.pdf>; United Nations Conference on Trade and Development. *Implementing WSIS Outcomes: A Ten-Year Review* (New York and Geneva, 2015) pp. 22-28.

[9] UNGA. *Transforming Our World: The 2030 Agenda for Sustainable Development* (18 September 2015) UN Doc A/70/L.1, p. 14, Goal 3.

[10] See e.g.: World Health Organisation and International Telecommunication Union. *E-Health and Innovation in Women's and Children's Health: A Baseline Review* (Geneva, 2014).

[11] *The 2030 Agenda for Sustainable Development*, above n. 9, Goal 10.

9. However, the inappropriate use of ICT and big data has the potential both to interfere with human rights protections and to undermine the achievement of the Sustainable Development Goals. There are three main areas in which ICT and big data can act as gateways to violations of human rights if adequate safeguards do not exist.

10. First, as already acknowledged in the Zero Draft, the collection, storage, sharing, and re-purposing of personal data may infringe the right to privacy.[12] However, privacy is not the only gateway to the infringement of human rights.

11. Second, issues of consent and re-purposing arise when data is used for a purpose for which the individual that disclosed it did not originally consent. These two gateways can arise in the context of state surveillance or near ubiquitous non-state 'soft surveillance', whereby monitoring of social media, consumer activity and smartphones' location occurs on a routine, daily basis.

12. Third, in an Information Society in which the use of data can affect all aspects of daily life, decisions made on the basis of data analysis can have significant human rights' implications. For example, predictive analytics may be utilised to identify 'high risk' and therefore high cost individuals, affecting their access to health care or the affordability of health insurance,[13] while decisions made on the basis of data analysis may equally affect individuals' access to employment,[14] or credit.[15] This may result in direct discrimination. Discrimination may also be indirect, and unintentional. Indirect discrimination occurs when apparently neutral laws or policies lead to consequences that, without justification, disproportionately affect individuals who share particular protected characteristics. For instance, predictive analytics may be used to determine individuals' suitability for a particular health care intervention. If the underlying algorithm does not incorporate human rights requirements, this may result in indirect discrimination. An ostensibly neutral algorithm may disproportionately affect individuals from a particular socio-economic background, thereby further disadvantaging the disadvantaged.[16] To avoid indirect discrimination, decision making processes must take human rights obligations into account.

13. These examples illustrate how the use of ICT and big data may result in a wide range of human rights violations. Potentially affected human rights include the right to freedom of expression, the right to liberty, the right to health, the right to work, the right to the

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[12] UNGA's Overall Review of the Implementation of WSIS Outcomes. *Zero Draft* (9 October 2015) para. 43.

[13] Charles Nyce, 'Predictive Analytics White Paper' (2007) American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, p. 1.

[14] Natalie Burg. 'Your Company Can See the Future with Predictive Analytics (*Forbes*, 26 March 2014) available at: <www.forbes.com/sites/sungardas/2014/03/26/your-company-can-see-the-future-with-predictive-analytics-2/>.

[15] Seeta P Gangadharan. 'The Dangers of High-Tech Profiling, Using Big Data' (*Forbes*, 7 August 2014) available at: <www.nytimes.com/roomfordebate/2014/08/06/is-big-data-spreading-inequality/the-dangers-of-high-tech-profiling-using-big-data>; Charles Nyce, 'Predictive Analytics White Paper' (2007) American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America, p. 1.

[16] For an example of this issue in the context of access for the least well-off to water, please see: Special Rapporteur on the Right to Safe Drinking Water and Sanitation. *An Open Letter from the United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation* (21 July 2015). See also the strategies described in: GSMA *Mobile-Enabled Community Services*. 'New Report on Sizing the Opportunity of Mobile to Support Energy and Water Access (3 December 2013).

highest attainable standard of living, and the right to equality and non-discrimination. They may also undermine achievement of the Sustainable Development Goals, affecting, for example, efforts to combat poverty,[17] improve health and well-being,[18] and reduce inequality.[19]

14. It is impossible to look at the opportunities provided by the use of ICT and big data in isolation from the challenges posed. A holistic approach to Internet governance that overcomes the digital divide through greater, informed, and consensual participation, while simultaneously protecting against risk, is required. The potential of ICT and big data to facilitate the fulfilment of human rights and the achievement of the Sustainable Development Goals, coupled with the significant potential harm associated with their inappropriate use underscore the need for a human rights based approach to the governance of the use of ICT and big data.

Foundational Principles of Internet Governance

15. In light of the challenges and opportunities presented by the use of ICT and big data, the Project suggests that Internet governance should both mitigate risk while ensuring that benefits to human rights protection are secured.

16. The Project commends the WSIS common desire and commitment to build a people-centred, inclusive and development-orientated Information Society, which is reflected in paragraph 4 of the Zero Draft.[20] These three pillars are central to Internet governance, which, for the purpose of this submission, is deemed to encompass the regulation of both the evolution of technology and the collection, storage, sharing, use and re-purposing of data, as per the working definition of Internet governance set out in paragraph 34 of the Tunis Agenda and reaffirmed in paragraph 32 of the Zero Draft.[21]

17. The concepts of 'people-centred, inclusive and development-orientated' have evolved over the last decade. While paragraph 4 of the Zero Draft echoes the language of the Tunis Commitment of 2005,[22] the concept of inclusive and people-centred development is today articulated by the UN to include a clear human rights commitment as expressed in the notion of a human rights based approach. For example, the importance and

[17] *The 2030 Agenda for Sustainable Development*, above n. 9, Goal 1.
[18] *ibid*, Goal 3.
[19] *ibid*, Goal 10.
[20] Paragraph 4, Zero Draft: 'We reaffirm our common desire and commitment, undertaken at the WSIS, to build a people-centred, inclusive and development-orientated Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life, premised on the purposes and principles of the Charter of the United Nations, and respecting fully and upholding the Universal Declaration of Human Rights.'
[21] Paragraph 32, Zero Draft: 'We recognise the general agreement that the governance of the Internet should be open, inclusive, and transparent. We reiterate the working definition of Internet governance set out in paragraph 34 of the Tunis Agenda, as 'the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision making procedures, and programmes that shape the evolution and use of the Internet.'
[22] 'We reaffirm our desire and commitment to build a people-centred, inclusive and development-oriented Information Society, premised on the purposes and principles of the Charter of the United Nations, international law and multilateralism, and respecting fully and upholding the Universal Declaration of Human Rights, so that people everywhere can create, access, utilize and share information and knowledge, to achieve their full potential and to attain the internationally agreed development goals and objectives, including the Millennium Development Goals.' World Summit on the Information Society. *Tunis Commitment* (2005) para. 2.

relevance of human rights for development is recognised in the 2030 Agenda for Sustainable Development, which sets out the Sustainable Development Goals, grounds itself in, *inter alia*, the Universal Declaration of Human Rights and international human rights treaties, and emphasises the responsibilities of States to 'respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind'.[23] Human rights are now recognised as central to the development agenda.

18. The Zero Draft would benefit from explicitly including a human rights based approach in order to highlight the links between development, ICT, big data and human rights. This submission suggests that a human rights based approach should be one of the key goals of Internet governance and, therefore, paragraph 4 would be strengthened by the addition of a 'human rights-based' approach.

19. A human rights based approach applies human rights norms and principles, with specific reference to international human rights standards, to policy and programmes, incorporating the perspective of both rights bearers and duty bearers.[24] A human rights based approach should ensure:[25]

    - Equality and non-discrimination;
    - True participation and inclusion;
    - Indivisibility and interdependence of all human rights, which is reflected in the Zero Draft,[26] and;
    - The tripartite obligation to respect, protect and fulfil human rights.

20. Therefore, the development and utilisation of ICT and big data should be guided and regulated by international human rights law in order to facilitate the realisation of human rights, while avoiding negative human rights consequences, whether intentional or unintentional. Internet governance should be framed around fundamental human rights principles, in particular transparency, openness, inclusivity, non-discrimination and equality.[27] Transparency and accountability are central to good governance, with the former being a necessary precondition for the latter. In relation to transparency in particular, the re-purposing of data poses a real threat to human rights and should be specifically addressed. It is essential that these fundamental human rights principles be respected by commercial enterprises as much as by States.[28]

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[23] *The 2030 Agenda for Sustainable Development*, above n. 9, paras. 10, 19.

[24] Sakiko Fukuda-Parr. 'Human Rights and Politics in Development' in Michael Goodhart, *Human Rights: Politics and Practice* (2nd edition, OUP 2013) p. 167.

[25] Second UN Inter-Agency Workshop. *The Human Rights-Based Approach to Development Cooperation: Statement of Common Understanding among UN Agencies* (Stamford, 2003); Office of the High Commissioner for Human Rights. *Human Rights Indicators: A Guide to Measurement and Implementation* (New York and Geneva, 2012) p. 13.

[26] Paragraph 41, Zero Draft: 'We reaffirm the commitment set out in the Geneva Declaration and the Tunis Commitment to the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, including the right to development.'

[27] International Covenant on Civil and Political Rights (1966) Article 2(1); International Covenant on Economic, Social and Cultural Rights (1966), Article 2(2).

[28] Office of the High Commissioner for Human Rights. *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011).

21. Additionally, an Internet governance structure premised on human rights should incorporate the right to an effective remedy. Internet governance should address how and where individuals can challenge violations of their rights, ensuring that remedies are known and accessible.[29] Investigations into alleged violations must be prompt, thorough and impartial.[30] Internet governance remedies must be able to end ongoing violations, such as through ordering data to be deleted.[31] Finally, in cases of gross human rights violations where non-judicial remedies are not adequate, an effective framework must provide for criminal prosecution.[32]

Suggestions for Reformulation of Specific Paragraphs

22. In order to recognise the full range of human rights implications of ICT and big data beyond the right to privacy, the following suggestions for revisions to the Zero Draft are made.

23. The Project proposes that paragraph 4 of the preamble could be amended as follows:[33]

> 'We reaffirm our common desire and commitment, undertaken at the WSIS, to build a people-centred, inclusive, **human rights-based** and development-orientated Information Society […]'

24. The Project recommends that a new paragraph should be inserted into the preamble, following current paragraph 7:[34]

> 'We recognise that ICT, sustainable development, and human rights are intertwined. A human rights based approach to the development and utilisation of ICT is necessary to facilitate human rights protection and the achievement of the SDGs, and to avoid the potential harm caused by the inappropriate use of ICT. It is essential that this central role for human rights be a priority for commercial enterprises as they develop and deploy ICT in their operations'.

25. The Project suggests that the following sentence should be added to the end of paragraph 14:[35]

> '…A human rights based approach to the development and utilisation of ICT is therefore necessary to facilitate human rights protection and sustainable

[29] Human Rights Council, *The Right to Privacy in the Digital Age: Report of the Office of the United Nations High Commissioner for Human Rights* (30 June 2014) UN Doc A/HRC/27/37, para. 40.
[30] *ibid* at para. 41.
[31] *ibid* at para. 41.
[32] *ibid* at para. 41. Referencing UNGA. *Resolution Adopted by the General Assembly on 16 December 2005: Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (21 March 2006) UN Doc GA Res 60/147.
[33] See further above paras. 5-6.
[34] See further above paras. 14-19.
[35] See further above paras. 7-13.

development and to prevent the potential harm caused by the inappropriate use of ICT.'

26. The Project proposes that a new paragraph should be inserted into the section ICT for Development, following current paragraph 15:[36]

> 'However, we acknowledge that the use of ICT and big data also has the potential both to interfere with human rights protections and to undermine the achievement of the Sustainable Development Goals. The human rights implications of ICT and big data extend beyond the rights to privacy and freedom of expression, and may include potential violations of all rights from liberty, work, and health to equality and non-discrimination.'

27. The Project recommends that paragraph 32 should be amended as follows:[37]

> 'We recognise the general agreement that the governance of the Internet should **conform with fundamental human rights principles, including openness, inclusivity, informed consent and transparency** [….]'

28. The Project proposes that paragraph 36 of the Zero Draft should be amended as follows:[38]

> 'We note that a number of member states have called for an international legal framework for internet governance. **This framework should abide by fundamental human rights principles, including openness, inclusivity and transparency, and provide for the right to an effective remedy.**'

29. The Project suggests that paragraph 41 of the Zero Draft should be amended as follows:[39]

> 'We reaffirm the commitment set out in the Geneva Declaration and the Tunis Commitment to the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, including the right to development. **We recognise the fundamental importance of human rights norms and principles, especially equality, non-discrimination, inclusion, participation and provision of effective remedy, to harness the opportunities presented by ICT and to address the challenges posed by its misuse. We further affirm that a human rights-based approach will be necessary to bridge the digital divide within and across communities and to redeem the pledge of the sustainable development agenda to leave no one behind.'**

30. The Project proposes that paragraph 42 of the Zero Draft should be amended as follows:[40]

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[36] See further above paras. 9-12.
[37] See further above para. 18.
[38] See further above paras. 14-19.
[39] See further above paras. 14-19.

'We reaffirm the principle, recognised in General Assembly resolution 68/167, that the same rights that people have offline must be protected online. **The use of ICT and big data has the potential to affect all human rights. The misuse of ICT and big data may interfere with diverse human rights including freedom of expression, the right to health, the right to work, and the right to equality and non-discrimination. In turn, these interferences may undermine the SDGs, affecting efforts to improve health and well-being, combat poverty, and reduce inequality.**'

[40] See further above paras. 7-12.