

## ‘Human Rights by Design’ Should Guide Companies Developing Digital Contact Tracing Tools

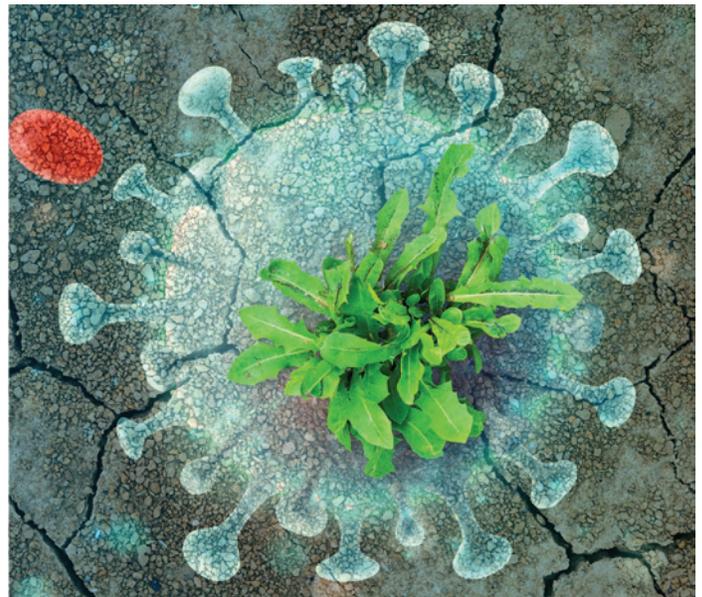
Companies developing digital contact tracing technology should consider the short-, mid-, and long-term impacts of such technology to human rights and develop, negotiate, and monitor the use of such technology in a way that mitigates adverse impacts.

By *Betsy Popken*

COVID-19 is poised to overtake the post-9/11 government surveillance surge—what role will companies choose to play in this? **Digital contact tracing apps are being used and developed around the world** with the goal of reducing the spread of COVID-19 and thus saving lives. At their base, such tools track and inform people when they have been near a COVID-positive person by gathering location data using Bluetooth or GPS on their smartphones. **Singapore, Hong Kong, South Korea, and Taiwan were some of the earliest state adopters, having built up their digital disaster-response infrastructure following the outbreaks of SARS and MERS, but Germany, France, the U.K., and the U.S.—among many others—are on their heels.** While there is **some concern that the promise of digital contact tracing apps is overblown, some early research suggests that it**

**can help**—particularly where **adoption of the technology is widespread and one part of an overall approach that includes extensive testing.**

**While some states are creating tools of their own, still more are partnering with companies to develop the technology**—and tech companies are rising to the occasion. Thus far, **digital contact tracing tools vary widely in their consideration of the human rights of the populations they are designed to serve.** This article discusses international human rights law during a pandemic, the human rights considerations of digital contact tracing, and recommendations



for companies seeking to design their technology in way that promotes, rather than harms, human rights.

### International Human Rights Law During a Pandemic

International human rights law recognizes that certain rights can be limited—with conditions—in the interest of public health. According to the **1984 Siracusa Principles**, “public health may be

invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population," but the essence of the right must be preserved and the limitation must be pursuant to a "clear and accessible" law, pursue a legitimate aim, be necessary and proportionate, and include "adequate safeguards and remedies."

While the responsibility to protect human rights ultimately lies with states, the **United Nations Guiding Principles on Business and Human Rights** instruct companies to "respect" human rights by "avoid[ing] infringing on the human rights of others and ... address[ing] adverse human rights impacts with which they are involved." Therefore, regardless of what decisions states make, companies face their own decisions about how to respect human rights in the development of digital contact tracing tools.

### **Human Rights Considerations of Digital Contact Tracing**

Of course, certain human rights—most importantly, the right to life—might be advanced if digital contact tracing can help reduce the spread of the virus. And an effective digital contact tracing app could potentially encourage states to lift their mandatory shelter orders, thus

facilitating the freedom of movement, the rights to associate and assemble, and the rights to work and a standard of living. Despite these potential advantages, a company developing digital contact tracing should also consider potential adverse impacts, with the goal of mitigating them.

**Privacy:** Much has been written about the privacy rights at stake with digital contact tracing. While **some digital contact tracing apps have intruded significantly on privacy, other apps are being designed with privacy at the fore—requiring use to be voluntary and data to be localized and anonymized.** However, **experts warn that even the best designed systems do not preclude authorities and others from building privacy-violating applications or misusing data.**

**Freedom of movement:** Less attention has been paid to potential impacts on the freedom of movement—perhaps because many governments have already limited movement to stem the spread of the virus. State-mandated lockdowns will inevitably lift, but what chilling effect might digital contact tracing bring to our freedom of movement if we believe we may be monitored? Might authorities be tempted to use digital contact tracing to restrict freedom of movement for certain groups of people long after it is warranted?

**Rights to peaceful assembly and association:** Digital contact tracing may also have a longer-term chilling effect on the rights to peaceful assembly and association. Will someone be less likely to attend a protest if she knows that her movements may be tracked? Might that person also rethink going to a political party meeting if the authorities may also know she is there?

**Freedom of religion:** Digital contact tracing could also have a potential chilling effect on freedom of religion, particularly for religious minorities and especially in states where certain religions are persecuted. In such circumstances, might people be discouraged from community worship if they know that authorities could know?

**Freedom from discrimination:** Digital contact tracing apps necessarily require a person to have a smartphone. **As of June 2019, 81% of Americans had smartphones,** meaning that 19% of Americans may not have access to digital contact tracing apps. Because of this, data from lower income communities may not be as accurate. Therefore, digital contact tracing has the potential to further exacerbate the socio-economic divide—already worsened by the virus. The divide will be even more severe between nations, with poorer nations with lower smartphone adoption

receiving fewer benefits from such tools. Furthermore, we have already seen instances where **digital contact tracing has resulted in discrimination towards individuals who contracted COVID.**

**Right to life, liberty, and security of person:** It is unfortunately also possible that digital contact tracing could be used by malign actors (states or otherwise) to track and threaten the life, liberty, and security of people, wholly unrelated to the intended purpose of preventing the spread of COVID.

### **Companies Should Use a 'Human Rights by Design' Approach**

Companies are racing to develop digital contact tracing tools to stem the COVID tide, but to prevent their work from doing more harm than good, companies should also be conducting human rights impact assessments. A human rights impact assessment—**increasingly common in the tech sector**—would seek to **"identify and assess any actual or potential adverse human rights impacts,"** such as the rights identified above, and **"integrate the findings from [the] impact assessment[] across relevant internal functions and processes"**—including product development, contract negotiations, and product use.

This process should **"involve meaningful consultation with potentially affected groups and other relevant stakeholders,"** such as human rights and privacy experts, medical and research professionals, government representatives, and importantly—citizens whose rights may be impacted. For instance, if a company determines that infringement on the right to privacy is a potential consequence of digital contact tracing, **it could build in requirements during the development stage that use must be voluntary and data must be localized and anonymized.** At the government contracting stage, the company could negotiate terms of use that, for instance, **require a sunset clause for use of the application** to prevent against mission creep.

With the input of stakeholders, companies should also build processes to monitor the digital contact tracing's impact on rights and make changes to the product and government arrangement as necessary. Companies would also benefit from involvement of a **human rights (or ethics) oversight board** that would be involved from the beginning of the product lifecycle through the conclusion of the app's use. A proactive, "human rights by design" approach can help a company mitigate any

unintended adverse impacts its digital contact tracing tools might have.

### **Conclusion**

Companies developing digital contact tracing technology should consider the short-, mid-, and long-term impacts of such technology to human rights and develop, negotiate, and monitor the use of such technology in a way that mitigates adverse impacts. Human rights impact assessments can help a company do just that.

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