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on the Promotion and Protection of
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Gender Justice and Freedom of Expression: From Public Spaces to Digital Platforms and Facial Recognition Technologies

Submission to the Thematic Report on the Right to Freedom of Opinion and Expression and
Gender Justice for the 76th session of the General Assembly

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Thank you for the opportunity to make a submission to this inquiry. I do so in a private capacity as a scholar of human rights law and technology at UNSW Law in Sydney, Australia. The views expressed are my own, and not of the UNSW Sydney or any other institution.

Women in the public sphere, including women journalists, human rights defenders, politicians, and activists face many challenges in exercising their freedom of expression and opinion across the globe. Both online and in public spaces in our cities, which are increasingly surveilled and monitored by government and law enforcement agencies, women face challenges. In this submission, I would like to draw attention to several issues:



1. Freedom of Expression and Women in Public Spaces

1.1. Face-Covering Prohibitions and Women's Freedom of Expression

First, many countries around the world do have discriminatory face-covering laws, which ban Muslim face coverings in public spaces and thus prevent women from Muslim cultural backgrounds from exercising their right to freedom of expression and opinion, among other rights. Women politicians and activists are impacted. For example, in Europe alone, France, Belgium, Italy, Switzerland, Russia, Germany, Spain, Bulgaria, the Netherlands, Denmark, and Austria¹ as well as many governments in other parts of the world, such as ECOWAS, have established various forms of such prohibitions.²

As I explain with my colleague Catharine Weiss (paper is also attached to this submission), such laws have particularly strong discriminatory and racist effect on women from Muslim cultural backgrounds in countries, in which Muslims constitute small minorities, usually immigrants from former colonies.³ The face covering prohibitions are widely accepted by the judiciary including the European Court of Human Rights, and the UN treaty bodies, such as the committees on the *Convention on Elimination of All Forms of Racial Discrimination* (“CERD”)⁴ and on the *Convention on Elimination of All Forms of Discrimination Against Women* (“CEDAW”),⁵ which have failed to question

¹ A summary of such measures can be found in *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), <https://perma.cc/AK8D-EQM6>.

² A number of Muslim-majority African states have also introduced various prohibitions on face covering, including Chad, parts of Niger, Cameroon (Muslim-majority in the region the burqa was banned), and Gabon. David Blair, *Why West Africa's Muslim-majority states are banning the burqa*, TELEGRAPH (May 2, 2016), <https://perma.cc/65U5-NJBC>. All 15 member states of the Economic Community of West African States (ECOWAS) have also officially endorsed a prohibition on clothing that prevents the clear identification of persons. *ECOWAS Leaders Seek to Ban Wearing of Hijabs*, AFRICAN SUN TIMES (Dec. 17, 2015), <https://perma.cc/E9JS-42BF>.

³ Monika Zalnieriute and Catherine Weiss, ‘Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions’ (2020) 35 Berkeley Journal of Gender, Law and Justice 71. A number of Muslim-majority African states have introduced various prohibitions on face covering, including Chad, parts of Niger, Cameroon (Muslim-majority in the region the burqa was banned), and Gabon. David Blair, *Why West Africa's Muslim-majority states are banning the burqa*, TELEGRAPH (May 2, 2016), <https://perma.cc/65U5-NJBC>. All 15 member states of the Economic Community of West African States (ECOWAS) have also officially endorsed a prohibition on clothing that prevents the clear identification of persons. *ECOWAS Leaders Seek to Ban Wearing of Hijabs*, AFRICAN SUN TIMES (Dec. 17, 2015), <https://perma.cc/E9JS-42BF>. However, analysis of prohibitions on face-covering should be sensitive to the context of power relations in which they operate.

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, adopted on December 21, 1965; entered into force January 4, 1969.

⁵ UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted on December 18, 1979, by the United Nations General Assembly; entered into force as an international treaty on September 3, 1981.



the legitimacy and the impact of, for example, the French prohibitions, on women from Muslim cultural backgrounds.⁶

I therefore invite the UN Special Rapporteur to call the UN bodies to enhance their understanding of theory intersectionality to ensure that all women in the public sphere, including those from Muslim cultural backgrounds, can exercise their right to freedom of expression and opinion in public places freely. With my colleague Catherine Weiss, I have recently proposed a way to enhance judicial interpretation of reconceptualizing by reference to a modified concept of “harmful cultural practices”,⁷ and I attach this paper for your reference.

1.2. Facial Recognition Technology and Women’s Freedom of Expression

Second, a lot of public places, including cities and airports, are increasingly equipped with facial recognition technology. As I explain in the forthcoming article (also attached),⁸ the surveillance of public spaces has a ‘chilling’ effect on the rights to freedom of expression, peaceful association, and assembly.⁹ Facial recognition technology threatens the right of feminist and other activists to protest anonymously, which is fundamental to social movements, and which requires a population to feel confident and safe in their ability to gather in public spaces to manifest their disagreement with the status quo.¹⁰ Yet, facial recognition technology also entails discriminatory effects on women and minority groups, which have been demonstrated in an increasing body of academic research. The emerging consensus is that facial recognition technologies are not ‘neutral’,¹¹ but instead reinforce historical inequalities.¹² For example, studies have shown that facial recognition technology performs poorly in relation to women, children, and individuals with darker skin

⁶ CERD, Concluding Observation regarding France, Apr. 18, 2005, CERD/C/FRA/CO/16 at ¶ 18; CEDAW, Concluding Observation regarding France, Apr. 8, 2006, CEDAW/C/FRA/CO/6 at ¶¶ 20, 21.

⁷ Zalnieriute and Weiss (n 3).

⁸ Monika Zalnieriute, ‘Burning Bridges: The Automated Facial Recognition Technology and Public Space Surveillance in the Modern State’ (2021) 22 Columbia Science and Technology Review forthcoming.

⁹ *ibid.*

¹⁰ Genna Churches and Monika Zalnieriute, ‘The Instrumentality of Metadata Access Regime for Suppressing Political Protests in Australia’ (*I·CONnect*, 2020) <<http://www.iconnectblog.com/2020/08/the-instrumentality-of-metadata-access-regime-for-suppressing-political-protests-in-australia/>>.

¹¹ Clare Garvie, Alvaro Bedoya and Jonathan Frankle, ‘The Perpetual Line-Up’ (Centre on Privacy and Technology 2016) <<https://www.perpetuallineup.org/>> accessed 11 November 2019; BF Klare and others, ‘Face Recognition Performance: Role of Demographic Information’ (2012) 6 Information Forensics and Security, IEEE Transactions On 7 1789; Joy Buolamwini and Timnit Gebru, ‘Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification’, *Proceedings of Machine Learning research* (2018) <<http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf>> accessed 17 June 2020.

¹² Matthew Schwartz, ‘Color-Blind Biometrics? Facial Recognition and Arrest Rates of African-Americans in Maryland and the United States’ (Thesis in partial fulfilment of a Master of Public Policy, Georgetown University 2019) 15.



tones.¹³ The bias and discrimination can be introduced into the facial recognition technology software in three technical ways: first, through the machine learning process through the training data set and system design; secondly, through technical bias incidental to the simplification necessary to translate reality into code; and thirdly, through emergent bias which arises from users' interaction with specific populations.¹⁴ Because the training data for facial recognition technologies in law enforcement context comes from photos relating to past criminal activity,¹⁵ minority groups, and therefore, women of colour, are overrepresented in facial recognition technology training systems.¹⁶ In some jurisdictions, such as the United States, women of colour are at a much higher risk of being *pulled over*,¹⁷ *searched*,¹⁸ *arrested*,¹⁹ *incarcerated*,²⁰ and *wrongfully convicted*²¹ than white women. Therefore, facial recognition technology is capable of producing a large number of false positives because it is already functioning in a highly discriminatory environment, and can impact on women's freedom of expression (and freedom of assembly, where police uses facial recognition to repress political protests).

¹³ Salem Hamed Abdurrahim, Salina Abdul Samad and Aqilah Baseri Huddin, 'Review on the Effects of Age, Gender, and Race Demographics on Automatic Face Recognition' <<https://link-springer-com.wwwproxy1.library.unsw.edu.au/content/pdf/10.1007/s00371-017-1428-z.pdf>> accessed 2 June 2020; 'Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots' (*American Civil Liberties Union*) <<https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28>> accessed 2 June 2020.

¹⁴ Rebecca Crotoft, "'Cyborg Justice" and the Risk of Technological-Legal Lock-In' (2019) 119 *Columbia Law Review* 1, 8; Batya Friedman and Helen Fay Nissenbaum, 'Bias in Computer Systems' (1996) 14 *ACM Transactions on Information Systems* 330, 333–36.

¹⁵ Henriette Ruhrmann, 'Facing the Future: Protecting Human Rights in Policy Strategies for Facial Recognition Technology in Law Enforcement' (May 2019) 46 <https://citripolicylab.org/wp-content/uploads/2019/09/Facing-the-Future_Ruhrmann_CITRIS-Policy-Lab.pdf> accessed 1 June 2020; Garvie, Bedoya and Frankle (n 11).

¹⁶ Ruhrmann (n 15) 63; Garvie, Bedoya and Frankle (n 11).

¹⁷ 'New Data Reveals Milwaukee Police Stops Are About Race and Ethnicity' (*American Civil Liberties Union*) <<https://www.aclu.org/blog/criminal-law-reform/reforming-police/new-data-reveals-milwaukee-police-stops-are-about-race-and>> accessed 2 June 2020; Frank R Baumgartner, Derek A Epp and Kelsey Shoub, *Suspect Citizens What 20 Million Traffic Stops Tell Us About Policing and Race* (Cambridge University Press 2018).

¹⁸ 'New Data Reveals Milwaukee Police Stops Are About Race and Ethnicity' (n 17); Camelia Simoiu, Sam Corbett-Davies and Sharad Goel, 'The Problem of Infra-Marginality in Outcome Tests for Discrimination' (2017) 11 *The Annals of Applied Statistics* 1193; Lynn Lanton, 'Police Behavior during Traffic and Street Stops, 2011' <<https://www.bjs.gov/content/pub/pdf/pbtss11.pdf>> accessed 2 June 2020.

¹⁹ 'NAACP | Criminal Justice Fact Sheet' (*NAACP*) <<https://www.naACP.org/criminal-justice-fact-sheet/>> accessed 2 June 2020; Megan Stevenson and Sandra Mayson, 'The Scale of Misdemeanor Justice' (2018) 98 *Boston University Law Review* 371.

²⁰ 'The Color of Justice: Racial and Ethnic Disparity in State Prisons' (*The Sentencing Project*) <<https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>> accessed 2 June 2020.

²¹ Samuel Gross, Maurice Possley and Klara Stephens, 'Race and Wrongful Convictions in the United States' (*NATIONAL REGISTRY OF EXONERATIONS* 2017) <http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf> accessed 2 June 2020.



Law and border enforcement agencies around the world are experimenting with automated facial recognition technology with complete discretion and on *ad hoc* basis, without appropriate legal frameworks to govern their use nor sufficient oversight or public awareness.²² I invite the Special Rapporteur to call for a ban (or at least suspension) on the use of facial recognition technology by governments pending independent scrutiny of the discriminatory impacts the technology may have against women and other protected groups.²³

2. Gender and Freedom of Expression on the Internet & Digital Platforms

Third, in the digital environment and media platforms, women and marginalized groups, such as LGBTI communities, face new threats and challenges – their speech and expression is often suppressed and also weaponized against them. Like I explain in my research, examples of limitations on freedom of expression online by women, especially from LGBTI communities, are numerous (papers also attached).²⁴ Contrary to the popular belief that Internet filtering and censorship is only demanded and imposed by authoritarian governments, limitations on the expression by LGBTI communities online are also imposed by democratic governments, as well as by private actors and social media platforms themselves. Drawing on my research, I briefly discuss these in turn.

2.1. Gender and Government Censorship Online

The most worrying ones are death penalties for accessing LGBTI-content online in countries such as Sudan, Saudi Arabia, Yemen, Mauritania, Somalia and Iran.²⁵ More modest restrictions range from explicit blanket bans of queer expression online, such as the Russian anti-gay propaganda

²² Monika Zalnieriute, 'Burning Bridges: The Automated Facial Recognition Technology and Public Space Surveillance in the Modern State' (2021) 22 *Columbia Science and Technology Review* Forthcoming.

²³ For example, the UK Equality and Human Rights Commission had, in March 2020, called on suspension, see 'Facial Recognition Technology and Predictive Policing Algorithms Out-Pacing the Law' (*Equality and Human Rights Commission*, 12 March 2020) <<https://www.equalityhumanrights.com/en/our-work/news/facial-recognition-technology-and-predictive-policing-algorithms-out-pacing-law>> accessed 16 September 2020.

²⁴ Monika Zalnieriute, 'Digital Rights of LGBTI Communities: A Roadmap For A Dual Human Rights Framework' in Ben Wagner, Matthias C Kettleman and Kilian Vieth (eds), *Research Handbook on Human Rights and Digital Technologies* (Edward Elgar 2019); Monika Zalnieriute, 'The Anatomy of Neoliberal Internet Governance: A Queer Critical Political Economy Perspective' in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks* (1st edn, Routledge 2017).

²⁵ Jessie Daniels and Mary L Gray, 'A Vision for Inclusion: An LGBT Broadband Future' <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1213&context=gc_pubs> accessed 5 November 2016.



law,²⁶ to covert Internet filtering mechanisms, like the Internet filters in public schools and library networks in the US and other countries.²⁷ This makes providing positive information to young LGBTI people a real challenge, especially through school-based Internet access. For example, the American Civil Liberties Union's (ACLU) 'Don't Filter Me' project revealed Internet filters on school computers that are unconstitutionally blocking access to hundreds of LGBTI websites, including sites that contain vital resources on subjects like bullying and student gay-straight alliances.²⁸ It is unclear to what extent access to queer community websites is limited by public schools and public libraries in other EU member states, or in the global North more generally. This issue urgently requires empirical research. The limited research which has been conducted in the US suggests that the Internet filtering of LGBTI content, including critical health-related information (and even words such as 'breast cancer'),²⁹ are prevalent also in Western liberal democracies.³⁰

2.2. Global Standards on Free Speech are set by Private Platforms

As I explain in my research, digital platforms, such as Facebook, directly set *de facto* global standards for freedom of expression for women and LGBTI communities.³¹ Examples range of Facebook removing animated videos promoting breast cancer awareness,³² the iconic photograph of a girl fleeing a Napalm attack during the Vietnam War in 1972 (restored after a huge protest on social media),³³ and a number of pictures of mothers breastfeeding their children.³⁴ These examples

²⁶ Russian federal law for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values 2013.

²⁷ American Civil Liberties Union, 'ACLU "Don't Filter Me" Initiative Finds Schools In Four More States Unconstitutionally Censoring LGBT Websites' (*American Civil Liberties Union*) <<https://www.aclu.org/news/aclu-dont-filter-me-initiative-finds-schools-four-more-states-unconstitutionally-censoring-lgbt>> accessed 5 November 2016. See also Jac sm Kee and others, *EROTICS: Sex, Rights and the Internet* (2011) <<http://gb1.apc.org/fr/system/files/EROTICS.pdf>> accessed 4 November 2016.

²⁸ ACLU 'Don't Filter Me' Initiative, American Civil Liberties Union (n 27).

²⁹ Daniels and Gray (n 25).

³⁰ See Kevicha Echols and Melissa Ditmore, 'Restricted Access to Information: Youth and Sexuality', *EROTICS: Sex, rights and the internet* <https://www.researchgate.net/profile/Sonia_Correa4/publication/241764777_Internet_Regulation_and_Sexual_Politics_in_Brazil/links/5500bbf90cf2d61f8210ac93.pdf#page=176> accessed 5 November 2016. 'Don't Filter Me' (Report, American Civil Liberties Union, 'Don't Filter Me' (2012) <https://www.aclu.org/files/assets/dont_filter_me-2012-1001-v04.pdf> accessed 11 May 2016..

³¹ Zalnieriute, 'Digital Rights of LGBTI Communities: A Roadmap For A Dual Human Rights Framework' (n 24); Zalnieriute, 'The Anatomy of Neoliberal Internet Governance' (n 24).

³² 'Facebook Apologises for Removing Breast Cancer Awareness Video', *BBC* (online), 20 October 2016 <<http://www.bbc.com/news/world-europe-37721193>>.

³³ 'Facebook U-Turn over "Napalm Girl" Photograph', *BBC* (online), 9 September 2016 <<http://www.bbc.com/news/technology-37318040>>.

³⁴ Facebook vs Breastfeeding Alliance <<https://www.facebook.com/the.ban.on.breastfeeding/>>.



indicate that it is very often private Internet platforms set global free speech standards online about, for example, which parts of bodies can be displayed (not allowing for female nudity and nipples in particular). These standards are set through Facebook’s content moderation and standard contractual policies, to which users must agree to be able to use the service. The hurdles for freedom of expression for LGBTI people also include ‘real name’ policies of Internet platforms, such as Facebook,³⁵ and controversial decisions by the Internet Corporation for Assigned Names and Numbers (ICANN), such as not approving an LGBTI community application for the *.lgbt* and *.gay* top level domain name.³⁶

2.3. Targeting and Freedom of Expression

Furthermore, the rise of large-scale data collection and algorithm-driven analysis targeting sensitive information poses many threats for women in the public sphere, especially from LGBTI communities, who are especially vulnerable to privacy intrusion due to their often hostile social, political, and even legal environments. A lot of publicly available data, such as Facebook friend information or individual music playlists on Youtube, are incredibly effective at inferring individual sexual preferences with high levels of accuracy.³⁷ The accuracy of the online trail of information we leave is argued to be higher than predictions by our human friends about our personal sexuality and gender preferences.³⁸ If widely-traded advertising information ‘correctly discriminates between homosexual and heterosexual men in 88% of cases’,³⁹ then most Internet users should assume that the companies advertising to them can predict their sexual orientation with a high degree of accuracy — and are incentivised to do so in order to sell them products. Issues may go well beyond simple product advertising, and can potentially include different treatment in, for example, health and life insurance policies,⁴⁰ as well as lead to arrests in certain countries based on sexual orientation. Such ready access to personal information can get even more complicated with

³⁵ Andrew Griffin, ‘Facebook to Tweak “Real Name” Policy after Backlash from LGBT Groups and Native Americans’, *The Independent* (online), 2 November 2015 <<http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-to-tweak-real-name-policy-after-backlash-from-lgbt-groups-and-native-americans-a6717061.html>>; Shawn M Powers and Michael Jablonski, *The Real Cyber War: The Political Economy of Internet Freedom* (University of Illinois Press 2015).

³⁶ Monika Zalnieriute and Thomas Schneider, ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values’ (Report, Council of Europe, 2014) 15–35.

³⁷ Michal Kosinski, David Stillwell and Thore Graepel, ‘Private Traits and Attributes Are Predictable from Digital Records of Human Behavior’ (2013) 110 *Proceedings of the National Academy of Sciences* 5802.

³⁸ Wu Youyou, Michal Kosinski and David Stillwell, ‘Computer-Based Personality Judgments Are More Accurate than Those Made by Humans’ (2015) 112 *Proceedings of the National Academy of Sciences* 1036.

³⁹ Kosinski, Stillwell and Graepel (n 35).

⁴⁰ Angela Daly, ‘The Law and Ethics of “Self Quantified” Health Information: An Australian Perspective’ (2015) 5 *International Data Privacy Law* 144.



the ‘real name’ policies of social platforms, such as Facebook,⁴¹ which may place women, especially from LGBTI communities, but also women activists, and journalists in danger of physical assaults, in certain parts of the world.

3. A Call for Action & Recommendations

I invite the UN Special Rapporteur to:

- 1) Call on the UN bodies to enhance their understanding of theory intersectionality. I have recently proposed a way to enhance judicial interpretation of reconceptualizing by reference to a modified concept of “harmful cultural practices”,⁴² and I attach this paper for your reference.
- 2) Call for a ban (or at least a suspension) on the use of facial recognition technology by governments pending independent scrutiny of the discriminatory impacts the technology may have against women and other protected groups.⁴³
- 3) Call for the development of binding international human rights law for private actors to remedy the violations of freedom of expression of women and LGBTI communities in the digital environment. Because private actors such as digital platforms hold a lot of power and set de facto global standards on freedom of expression of women and LGBTI communities, the basic tools of accountability and governance — public and legal transparency and pressure – are very limited. Like I have argued in detail, existing efforts focused on voluntary ‘social and corporate responsibility’ and ethical obligations of digital platforms are insufficient and incapable to tackle these challenges for freedom of expression.⁴⁴ The existing international human rights framework is not adequate to safeguard human rights online because its obligations are limited to states, and not such private actors. Binding obligations for private actors under international human rights framework are needed to ensure protection of fundamental rights in the digital age for three main reasons:
 - Firstly, to rectify an imbalance between hard legal commercial obligations and human rights soft law.

⁴¹ Andrew Griffin, ‘Facebook to Tweak “Real Name” Policy after Backlash’ (*The Independent*, 1 November 2015) <<http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-to-tweak-real-name-policy-after-backlash-from-lgbt-groups-and-native-americans-a6717061.html>> accessed 6 November 2016.

⁴² Zalnieriute and Weiss (n 3).

⁴³ For example, the UK Equality and Human Rights Commission had, in March 2020, called on suspension, see ‘Facial Recognition Technology and Predictive Policing Algorithms Out-Pacing the Law’ (n 23).

⁴⁴ Monika Zalnieriute, ‘From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN’ [2019] *Yale Journal of Law & Technology* 278.



- Secondly, to ensure that women and LGBTI communities, whose freedom of expression have been affected, can access an effective remedy.
- Finally, as I demonstrated with numerous content moderation examples above, private actors are themselves engaging in the balancing exercise around fundamental rights, therefore, an explicit recognition of their human rights obligations is crucial for the future development of access to justice in the digital age.