

# Cyberspace and women's human rights in the international legal order: Transnational risks and gender-based violence

## El ciberespacio y los derechos humanos de las mujeres en el ordenamiento jurídico internacional: Riesgos transnacionales y violencia de género

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**Resumen:** Cyberspace has exacerbated certain transnational risks, such as cyber-discrimination, harassment, and aggression, particularly affecting women and girls on the basis of gender. Gender-based violence as a form of gender discrimination, including in its new forms, harms women and girls disproportionately, especially in their rights to equality, freedom from violence and freedom of expression. This article explores the contributions offered by different sources of law, in particular international human rights law, to address these gender-based risks and to prevent, eradicate and redress discrimination and gendered cyber-violations. It also analyses the opportunities that both the technological advancement concerning cyberspace, and the normative and interpretative standards developed to this effect, present for the construction of gender equality for women and girls worldwide.

**Palabras clave:** cyberspace, gender-based violence, human rights of women and girls, cyber-violations, gender equality.

**Abstract:** El ciberespacio ha exacerbado ciertos riesgos transnacionales, como la ciber-discriminación, el acoso y la agresión, que afectan particularmente a mujeres y niñas por razón de género. La violencia de género como forma de discriminación de género, incluyendo en sus nuevas formas, daña de manera desproporcionada a mujeres y niñas, especialmente en sus derechos a la igualdad, a vivir sin violencia y a la libertad de expresión. Este artículo explora las aportaciones que ofrecen las distintas fuentes del derecho, en particular el derecho internacional de los derechos humanos, para hacer frente a estos riesgos de género y para prevenir, erradicar y reparar la discriminación y las ciber-violaciones de género. Asimismo, analiza las oportunidades que tanto el avance tecnológico relativo al ciberespacio, como las normas y estándares interpretativos desarrollados al efecto, presentan para la construcción de la igualdad de género para las mujeres y las niñas a nivel mundial.

**Keywords:** ciberespacio, violencia de género, derechos humanos de mujeres y niñas, ciber-violaciones, igualdad de género.

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**Summary:** I. Introduction. II. Gender equality and international legal standards relevant to cyberspace. 1. The concept of 'gender' and gender equality as a human right. 2. Gender-based discrimination and legal responses. III. Gender cyberviolence and cyberviolations: transnational risks and new forms of gender discrimination. IV. Challenges for women's and girls' freedom of expression in cyberspace. V. New openings for women and girls in cyberspace? Some proposals with a gender perspective. VI. Final reflections.

## I. Introduction

1. While gender-based discrimination and violence, including in cyberspace, does not only impact women and girls, but comprises broader dimensions,<sup>1</sup> this article focuses on women and girls as victims on the understanding that violence against women is inflicted (by men) on the basis of gender, and gender-based violence affects women disproportionately.<sup>2</sup> As such, it explores the relevant normative standards, in particular of international human rights law, to address the transnational risks of discrimination and violence affecting women and girls particularly heightened by the development of cyberspace.

2. Globally, an estimated 736 million women -around one in three- have experienced physical or sexual violence by an intimate partner, or sexual violence perpetrated by a non-partner (30 per cent of women aged 15 and over). This data does not include sexual harassment, for example, that which occurs in the world of work, and some national studies show that the proportion may be as high as 70 per cent of women.<sup>3</sup> This phenomenon is experienced similarly in a number of regional contexts.<sup>4</sup> Gender-based violence around the world was exacerbated by the COVID-19 pandemic and the measures taken to address it, for example, home confinement where domestic tension and violence increased, and the resulting economic crisis which increases women's vulnerability to various forms of exploitation and violence.<sup>5</sup>

3. Women, in general, suffer more frequently from cyber-violence based on their sex or gender, in particular sexual forms of cyber-violence. Women are systematically targeted online by violent right-wing extremist and terrorist groups seeking to spread hatred against them. Girls and young women are particularly affected by cyber-violence. In the EU context, for example, in 2020, it was estimated that 1 in 2 young women experienced gender-based cyber-violence.<sup>6</sup> Different forms of risk, discrimination

<sup>1</sup> It can also affect men and boys, gender-diverse and non-binary people. See generally, e.g., THE GENDER TRUST, "Gender Concepts around the World", available at: <http://www.gendertrust.org.uk/gender-concepts-around-the-world/>; COUNCIL OF EUROPE, "What is gender-based violence?", available at <https://www.coe.int/en/web/gender-matters/what-is-gender-based-violence>; and Office of the Prosecutor of the International Criminal Court, "Policy on the Crime of Gender-based Persecution", ICC, 2022.

<sup>2</sup> COUNCIL OF EUROPE, "What is gender-based violence?", *op. cit.*

<sup>3</sup> UN WOMEN, "Facts and figures: Ending violence against women", Figures 2021, available at <https://www.unwomen.org/es/what-we-do/ending-violence-against-women/facts-and-figures>. See also International Labour Organisation Convention 190 on violence and harassment in the world of work, which specifically addresses gender-based violence and harassment in labour relations, and which entered into force for Spain on 25 May 2023.

<sup>4</sup> See, e.g., COUNCIL OF EUROPE, "What is gender-based violence?" *op. cit.*; and at the EU level, prevalence and incidence data in the Preamble of the proposal prepared by EUROPEAN COMMISSION, "Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence", COM(2022) 105 final, Strasbourg, 8 March 2022; at the Americas level, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, "Annual Report 2022. Report of the Office of the Special Rapporteur for Freedom of Expression", OEA/Ser.L/V/II. Doc. 50. rev.1., 6 March 2023; and at the African level, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, "Statement by the Special Rapporteur on the Rights of Women in Africa on the Occasion of the 'International Day for the Elimination of Violence Against Women'", 25 November 2022, available at <https://achpr.au.int/en/news/press-releases/2022-11-25/statement-special-rapporteur-rights-women-africa-elimination>, with special emphasis on gender-based cyber-violence in the African region.

<sup>5</sup> EUROPEAN INSTITUTE FOR GENDER EQUALITY (EIGE), "Cyber-violence against women and girls", EIGE, 2017; UNITED NATIONS WORKING GROUP ON DISCRIMINATION AGAINST WOMEN AND GIRLS (WGDAGW), "Gender inequalities in poverty: feminist and human rights-based approaches", Report to the UN Human Rights Council, A/HRC/53/39, 2023, para. 10.

<sup>6</sup> EUROPEAN PARLIAMENTARY RESEARCH SERVICE (EPRS), "Combating gender-based violence: Cyberviolence, European added value assessment, 2021; and EIGE, "Cyber-violence against women and girls", *op. cit.* See also PLATFORM OF INDEPENDENT EXPERT MECHANISMS ON ELIMINATION OF DISCRIMINATION AND VIOLENCE AGAINST WOMEN (EDVAW PLATFORM), Joint Statement on

and cyber-violence like online attacks and hate-speech, may also particularly affect women confronting specific vulnerabilities, such as (undocumented) migrant, asylum-seeker and refugee women, including those fleeing from domestic violence, as well as lesbian, bisexual and trans women, all of whom are often not protected enough by current legal frameworks, among others, in the intra-European and EU context.<sup>7</sup> Gendered cyber-violence affects women active in public life more, such as politicians, journalists and human rights defenders. This can have the effect of silencing women and hindering their participation in different spaces.<sup>8</sup>

4. In this context, two central ideas run throughout the article. One: it is crucial to remember that discrimination is a prelude to violence and constitutes its basis, given that violence does not occur in isolation, but in a certain social, economic, political, interpersonal and familial context of discrimination experienced by a great diversity of women and girls around the world. It is therefore relevant to focus on the context of discrimination in order to understand not only the phenomenon of discrimination itself, but also its most serious and visible manifestation, gender-based violence. Two: cyber-discrimination, cyber-bullying and cyber-violence have a connection to violence in the physical world and, because of the nature of cyberspace, constitute transnational risks that transcend national boundaries and jurisdictions. As such, efforts must continue to implement and not neglect applicable norms in that area, while adapting those norms or creating relevant instruments to address the new needs related to cyberspace.

5. Thus, each individual act of cyber discrimination, harassment and violence must be understood in its broader context. One dimension of this context is the digital and gender divide that has been widely documented, for example, considering the fact that, as a result of poverty, gender discrimination itself, lack of physical or technological access, and situations of occupation or armed conflict, there are 300 million fewer women than men with access to mobile internet.<sup>9</sup> For all of them, therefore, cyberspace is still a distant reality. The other dimension is that the particular or disproportionate impact on women and girls in cyberspace that does occur is occurring in a global situation of gender backlash and loss or undermining of previously recognised rights - a situation that feminist and human rights movements are trying to counter, including by resisting and proposing creative initiatives in the face of human rights violations in cyberspace.<sup>10</sup>

6. Based on these core ideas and the framework referred to above, this article addresses in section II a doctrinal and normative examination of the conceptualisation of 'gender' and its impact on the human rights to non-discrimination and gender equality in the international legal system of the United

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International Day of the Girl Child, where the seven UN and regional mechanisms of the Platform call for safe and inclusive digital spaces, free from online violence and harassment, so that girls' potential, well-being and prosperity can be attained, 11 October 2023, available at <https://www.coe.int/en/web/istanbul-convention> and <https://www.coe.int/en/web/istanbul-convention/edvaw-platform>.

<sup>7</sup> See, e.g., C. RUIZ SUTIL, *Las violencias de género en entornos transfronterizos. Interconexión de las perspectivas de extranjería, asilo y del Derecho internacional privado*, Dykinson, Madrid, 2023; and C. AZCÁRRAGA MONZONIS, "La mujer extranjera víctima de violencias. Un estudio sobre la evolución de la extranjería y la protección internacional en la última década", *Revista Electrónica de Estudios Internacionales*, 2023, n° 2, pp. 413-443. Especially on the protection challenges faced by women embarking on international journeys to flee from domestic and intra-family violence, see C. RUIZ SUTIL, "La movilidad intra-europea de las mujeres extranjeras irregulares víctimas de la violencia intrafamiliar: carencia de igualdad de género en la normativa de la Unión Europea", *Diario La Ley Unión Europea*, n° 83, julio de 2020, and C. HONORATI, "Violenza domestica e protezione cross-border", *Rivista di Diritto Internazionale Privato e Processuale*, 2022, n° 2, pp. 225-256.

<sup>8</sup> See, e.g., UN SPECIAL RAPPORTEUR ON FREEDOM OF OPINION AND EXPRESSION, Report to the UN Human Rights Council, "Gender Justice and the Right to Freedom of Opinion and Expression", A/76/258, 2021; EPRS, Combating gender-based violence: Cyberviolence, *op. cit.*, and EIGE, "Cyberviolence against Women and Girls", *op. cit.*

<sup>9</sup> See WORLD BANK, "The World Bank in Gender", 6 April 2023.

<sup>10</sup> See, e.g., Y. ERGAS, "Take Back the Future: Global Feminisms and the Coming Crisis of the Beijing Settlement", *Journal of International Affairs*, Vol. 72, No. 2, 2019, pp. 19-36; Centre for Feminist Foreign Policy, "Disrupting the multilateral order? The impact of anti-gender actors on multilateral structures in Europe", November 2022; A. Khan, 'Lessons on backlash from Women Deliver: tackling the enemy in the room', Overseas Development Institute, Conference recap of 14 August 2023, available at <https://odi.org/en/insights/lessons-on-backlash-from-women-deliver-tackling-the-enemy-in-the-room/>.

Nations (UN), as well as the specific legal responses to gender-based discrimination. Section III analyses cyber-violence and cyber-violations as new transnational risks that are materialised in online discrimination and other contemporary forms of harms to women's and girls' human rights. It also explores the standards applied and articulated by the different international human rights protection mechanisms explicitly dedicated to the rights of women and girls: the CEDAW Committee, the UN Special Rapporteur on Violence against Women and Girls, and the UN Working Group on Discrimination against Women and Girls. Section IV examines the impact of cyber-discrimination and gender-based cyber-violence on specific human rights, particularly freedom of expression and opinion, and the response of international human rights protection mechanisms. Section V examines the resilience and transnational organisation of women and girls in the face of these phenomena and the different initiatives that have been articulated in defence of women's human rights in cyberspace by various social and technological actors. Finally, section VI presents some final reflections that seek to provide constructive guidance on the concrete actions of both States and technology corporations for the better protection and construction of human rights and gender equality in cyberspace.

## II. Gender equality and international legal standards relevant to cyberspace

7. Let us carry out a gendered analysis of the international legal regulation of cyberspace, both of that which currently exists and of that which may be potentially articulated in the future. To do so, it is necessary to start with a doctrinal and normative examination of the conceptualisation of the right to non-discrimination and gender equality in the international legal system. This section examines this development, above all in the field of human rights, but also less directly in other areas such as international criminal law.

8. This analysis will make it possible to understand the different forms of online discrimination and violence that particularly and/or disproportionately affect women and girls, as well as the different uses of cyberspace that can be used for the exercise of women's and girls' human rights, in particular freedom of expression, and for the joint construction - by women and men, institutions and civil society - of substantive gender equality. In this regard, the umbrella legislation in this area refers to the principle and the specific rule of equality and non-discrimination, in this case, on the basis of sex and/or gender.

9. The human rights of equality and non-discrimination, as two sides of the same coin, constitute the foundation of the obligation not to discriminate - neither in law nor in practice - on the basis of sex or gender, and the cornerstone of the principle, and in turn the norm, of equality between men and women, boys and girls. Indeed, 'if the principles embody the fundamental values of the [international] order, the norms establish more concrete rules, which regulate the diversity and plurality of situations that occur among the members of the social group'.<sup>11</sup>

### 1. The concept of 'gender' and gender equality as a human right

10. Equality has been regarded as one of the central values and principles of modernity, which is 'rooted in the fabric of the legal order since classical international law'.<sup>12</sup> With regard to gender equality specifically, it should be recalled that the term 'gender' was originally conceptualised to explain and

<sup>11</sup> C. GUTIÉRREZ ESPADA and M. J. CERVELL HORTAL, *El derecho internacional en la encrucijada*, Trotta, Spain, fourth edition, 2017, p. 33. On the role played by principles in the particular field of international human rights law, see G. LE MOLI, "The Principle of Human Dignity in International Law", in M. ANDENAS, M. FITZMAURICE, A. TANZI, AND J. WOUTERS (eds.), *General Principles and the Coherence of International Law*, Brill, Leiden, 2019, pp. 35-38; and more generally WOUTERS, J., "The Role of General Principles in a Multi-layered Legal Setting", in M. ANDENAS, M. FITZMAURICE, A. TANZI, AND J. WOUTERS, J. (eds.), *General Principles and the Coherence of International Law*, Brill, Leiden, 2019, pp. 195-202.

<sup>12</sup> C. FERNÁNDEZ LIESA, "Transformaciones del Derecho internacional por los Objetivos de Desarrollo Sostenible", in *Anuario Español de Derecho Internacional*, No. 32, 2016, p. 59.

challenge the systematic oppression of women and, after the 1995 Beijing International Conference on Women, was considered one of the fundamental concepts of human rights at the international level.<sup>13</sup>

**11.** The concept of gender first appeared in feminist writings in the 1970s to challenge the then dominant position of biological determinism, which had naturalised women's inequality as a result of the biological difference between women and men.<sup>14</sup> There were different feminist interpretations of the term,<sup>15</sup> but the dominant approach defined gender as referring to the social norms, roles and expectations for women and men, as opposed to sex, which referred to the biological difference between them.<sup>16</sup> While women of different social identities and socio-economic backgrounds have been part of the feminist movement since its origins,<sup>17</sup> it was in the 1990s that the intersectional perspective, which calls for an analysis of the multiple interconnected dimensions of oppression such as sex, gender, class, race, sexuality, ethnicity and disability, firmly established itself as an important tool for analysing discrimination. The coining of the term intersectionality helped to clarify that women's social identities profoundly influence how individual women experience gender.<sup>18</sup>

**12.** Feminist theories developed the concept of gender to highlight the construction of social structures and norms that produce the unequal position of women and the relational aspect of the meaning of femininity and masculinity. Emphasising the social construction of women's inequality, feminist theories and activists around the world called for political action to change this. At the insistence of feminist activists in the 1990s the term 'gender' began to be used in international human rights law. In 1992 the UN Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) used the phrase 'gender-based violence' in its General Recommendation No. 19 on violence against women.<sup>19</sup> In multilateral documents the term was first included in the Vienna Declaration and Programme of Action (1993),<sup>20</sup> and a year later in the Programme of Action of the International Conference on Population and Development, but was not defined.<sup>21</sup>

**13.** The concept of gender was referred to more than 200 times in the Beijing Declaration and Platform for Action, but only after States agreed to a declaration stating that the term 'should be interpreted and understood as it is in its "ordinary and generally accepted usage"'.<sup>22</sup>

**14.** Following the Beijing Conference in 1995, a panel of experts was convened by the newly established United Nations Office of the High Commissioner for Human Rights (OHCHR) to help clarify the use of the term with respect to women's human rights. The term gender was defined as referring to 'the ways in which societies throughout the world construct roles, attitudes, values and relationships

<sup>13</sup> See UN WGDWAG, Position Paper "Gender Equality and Attacks on Achievements towards Gender Equality", written by Ivana Radačić and Alda Facio on behalf of the UN WGDWAG (and with input from other UN WGDWAG members), and unofficially translated by Martha Martell, edited and coordinated by Priscilla Mansilla Jiménez/Women's Human Rights Education Institute (WHRI), 2020. See also Report of the WGDWAG to the Human Rights Council, A/HRC/38/46, 2018.

<sup>14</sup> Although the connected ideas of sex roles and psychological traits are discussed as early as the late 1940s, the concept of gender in feminist writings first appears in K. MILLET, *Sexual Politics*, New York, Doubleday, 1970, and in A. OAKLEY, *Sex, Gender and Society*, Templesmith, London, 1972; see UN WGDWAG Position Paper, 2020, *ibid*.

<sup>15</sup> See, for example, "Gender Concepts around the World", *op. cit*.

<sup>16</sup> For a discussion of the main theories, see R. W. CONNELL, "Theorising Gender", *Sociology*, Vol. 19, No. 2, 1985, pp. 260-272.

<sup>17</sup> For an account of the engagement of women's movements with the United Nations, see A. FACIO, "Women's Human Rights on the Global Stage: Unfinished History", in *Canadian Women's Studies*, Vol. 22 (1-2), 2018-2019, pp. 1-13.

<sup>18</sup> The term 'intersectionality' was famously coined by Kimberle Crenshaw in an effort to point out the "multidimensionality of black women's experience" that a single-axis analysis could not comprehend; K. CRENSHAW, "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *Legal Forum of University of Chicago*, Vol. 1, 1989, pp. 139-167.

<sup>19</sup> CEDAWA COMMITTEE, General Recommendation No.19, A/47/38, 1992.

<sup>20</sup> Declaration and Programme of Action, Vienna, 14-25 June 1993, UN Doc. A/CONF.103/9.

<sup>21</sup> Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, UN. Doc. A/CONF.171/13/Rev.1.

<sup>22</sup> Report of the Fourth Women's Conference, Beijing, 4-15 September 1995, UN Doc. A/CONF.177/20/Rev.1.

with respect to women and men'. The expert group explained, 'Historically, different cultures construct gender in different ways, so that women's roles, the value their societies place on those roles, and the relationship to men's roles can vary considerably over time and from one context to another.'<sup>23</sup>

**15.** It was not until 2011 that the term was finally explicitly defined in an international human rights instrument, in line with the feminist approach to its conceptualisation as a social construct. Noting gender as an important concept for addressing gender-based violence, the Council of Europe Convention on preventing and combating violence against women and domestic violence ('Istanbul Convention'), in its Article 3, defined it as 'the socially constructed roles, behaviours, activities and attributes that a specific society considers appropriate for women and men'.

**16.** While this is the first such definition in a legally binding international instrument, it was in fact already operative earlier in international human rights law. For example, in 2010, in interpreting sex discrimination as including gender discrimination, the CEDAW Committee similarly defined the term gender as follows:

the socially constructed identities, roles and attributes of women and men and the social and cultural meaning that society attaches to these biological differences, resulting in hierarchical relations between men and women and the distribution of power and rights in favour of men and to the detriment of women.<sup>24</sup>

**17.** Similar to the inclusion of the concept of gender in international human rights law, significant advances can also be observed in international criminal law. Indeed, the gender mandate in the Rome Statute of the International Criminal Court (ICC)<sup>25</sup> was a historic milestone in the field of international criminal justice, allowing for the integration of a gender perspective in the criminalisation and prosecution of crimes,<sup>26</sup> as well as the participation of victims, many of whom are women, throughout the criminal process, including in the granting of reparations.

**18.** In December 2022, the ICC Office of the Prosecutor adopted the "Policy on the Crime of Gender-Related Persecution",<sup>27</sup> defined in Article 7(1)(h) of the Rome Statute as a crime against humanity (CLH), i.e., an act committed "as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack". It is intended to strengthen the 'gender perspective' in the investigation and prosecution of gender-based crimes, with 'gender' being understood, based on Article 7(3) of the Rome Statute, to mean sex characteristics and the social constructs and criteria used to define masculinity and femininity, including roles, behaviours, activities and attributes.

**19.** The ICC Policy on Gender Persecution is particularly important for the assessment of possible cybercrimes against women and girls, including the crime against humanity of gender-based persecution, that may come under the ICC's lens in light of the Rome Statute. This possibility, which until recently remained rather theoretical, is now a reality that the ICC Prosecutor Karim Khan is seriously

<sup>23</sup> Expert Group Panel on the Development of Guidelines for the Integration of Gender Perspectives in Human Rights Activities and Programmes, 20 November 1995, UN. Doc. E/CN.4/1996/105, para. 13.

<sup>24</sup> CEDAW Committee, General Recommendation No. 28, section 5, CEDAW/C/GC/28, 2010.

<sup>25</sup> Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998; entry into force: 1 July 2002.

<sup>26</sup> This requires contextualising the gender dimensions not only of crimes of sexual and gender-based violence committed in the framework of war crimes, crimes against humanity (CAH), or genocide, but also of 'non-sexual' crimes such as homicide or kidnapping as part of CAH that create the conditions for the former acts of a more clearly sexual or gendered nature to be perpetrated; see I. ROSENTHAL, V. OOSTERVELD, AND S. SÁCOUTO, "What Is 'Gender' in International Criminal Law?", in *Gender and International Criminal Law*, Oxford University Press, 2022, p. 41.

<sup>27</sup> ICC OFFICE OF THE PROSECUTOR'S OFFICE, "Policy on the Crime of Gender-Related Persecution", ICC, December 2022: "'gender-related persecution' is the crime against humanity of gender-related persecution under Article 7(1)(h) of the Statute. Gender-related persecution is committed against persons because of their sexual characteristics or because of the social constructs and criteria used to define gender", p. 3.

considering in the context of Russia's cybercrimes against Ukraine's critical infrastructure.<sup>28</sup> More recently yet, the implications of cyber hate-speech in the current Israel-Gaza conflict have also been explored.<sup>29</sup> These situations strengthen the understanding suggested in this article to legally analyse the connection of cyberspace with physical space and the damage that virtual conduct and the violation of obligations arising from this conduct can produce in physical space.

## 2. Gender-based-discrimination and legal responses

**20.** Gender-based discrimination against women and girls, including in its online forms and its different manifestations in cyberspace, have been analysed by various human rights bodies. In this respect, and similarly to the CEDAW Committee, the Working Group on Discrimination against Women and Girls (WGDAGW), one of the UN Human Rights Special Procedures, has concluded that discrimination against women is based on both biological differences and social constructions.

**21.** The WGDAGW has recognised that women's and girls' experiences of discrimination are also determined by other identities (race, ethnicity, disability, age, sexuality, socio-economic status, etc.). The analysis of women facing *intersectionality and multiple forms of discrimination* is reflected in the Working Group's 2018 thematic report, where the Working Group noted that there are multiple and intersectional forms of discrimination against women around the world and within countries that reinforce and sustain each other. All women, in their diversity and in different circumstances, are affected differently by discriminatory laws and practices.<sup>30</sup>

**22.** Regarding the legal concept of discrimination, it should be emphasised that this phenomenon refers not only to explicit and/or intentional acts, but also to measures that have the effect in reality of producing a deterioration or impairment of rights. It should be kept in mind that as early as 1979, CEDAW enshrined the principle of equality between women and men (Article 2.a.) and defined 'discrimination against women' as comprising any distinction, exclusion or restriction made on the basis of sex which has the effect *or purpose of* impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (Article 1). In addition, other prohibited grounds of discrimination are race, colour, descent, culture, language, religion, political opinion, national or ethnic origin, immigrant status, age, disability or any other status with the aforementioned intention or effect.<sup>31</sup>

**23.** Women and girls, therefore, can face discrimination, harassment, aggression and/or online violence both because of their sex and/or gender, and for reasons that add up cumulatively. A black or

<sup>28</sup> K. A. A. KHAN KC, "Technology Will Not Exceed Our Humanity", *Digital Front Lines*, 20 August 2023, available at <https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/>.

<sup>29</sup> S. FRENKEL and S. L. MYERS, "Antisemitic and Anti-Muslim Hate Speech Surges Across the Internet", *The New York Times*, 15 November 2023, available at <https://www.nytimes.com/2023/11/15/technology/hate-speech-israel-gaza-internet.html>

<sup>30</sup> A/HRC/38/46, para. 11.

<sup>31</sup> See UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR COMMITTEE), 'General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2)', E/C.12/GC/20, 10 June 2009, para. 7, in combination with the definitions of discrimination in article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 1 of the Convention on the Elimination of All Forms of Discrimination against Women; article 2.2 of the Convention on the Rights of the Child; and article 2 of the UN Convention on the Rights of Persons with Disabilities. The UN HUMAN RIGHTS COMMITTEE reaches a similar interpretation in 'General Comment No. 18, On the right to non-discrimination on the basis of immigration status' (paras. 6 and 7; see also UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, 'General Recommendation No. 30: Discrimination against non-citizens: 01/10/2004 (General Comments)', available in 'Compilation of general comments and general recommendations adopted by the human rights treaty bodies', Addendum, HRI/GEN/1/Rev.7/Add.1, 4 May 2005.

indigenous girl or young woman, for example, may face (and indeed often does face) cyberdiscrimination or cyberviolence on the basis of her sex and gender, as well as her age, race and ethnicity.<sup>32</sup>

24. Based on the referred definition of Article 1 of CEDAW and its correlative articles, differences in treatment may constitute discrimination against women if they have the effect or purpose of 'impairing or nullifying' the rights of women directly or indirectly. *Direct discrimination* occurs when the difference in treatment is 'explicitly based on sex and gender'.<sup>33</sup> However, identical treatment can be indirectly discriminatory if it has the effect of impairing or nullifying the rights of women. Such *indirect discrimination* can occur when 'a law, policy, programme or practice appears to be neutral with respect to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure'.<sup>34</sup>

25. An illustrative example of the phenomenon of indirect discrimination in relation to the issue at hand, as mentioned in the Introduction, is access to the internet. This access is legally covered by a series of apparently neutral and non-discriminatory norms, but in practical reality they encounter a series of obstacles to being fully realised or complied with in relation to women. Thus, women are 50% less likely than men to have access to the internet, and 30-50% less likely to use it for personal empowerment. Indeed, in a World Wide Web Foundation survey of respondents, 59% of men reported having access to the internet compared to 37% of women.<sup>35</sup> This digital and gender divide in developing countries is even greater, with an average percentage of only 11% of women of the total population in these countries having access to the internet.<sup>36</sup>

### III. Gender cyberviolence and cyberviolations: transnational risks and new forms of gender discrimination

26. While there are new manifestations of gender-based discrimination against women and girls, such as the cyber-violations addressed in this article, it must be noted that their origin dates back to and also reflects more 'typical' forms of exclusion and marginalisation. As such, it is worth remembering that, as the CEDAW Committee has stated, gender-based violence is a manifestation -the most extreme one- of gender-based discrimination.<sup>37</sup>

27. International human rights law defines gender-based violence against women as "any act of gender-based violence that results in actual or threatened physical, sexual or psychological harm, including threats, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".<sup>38</sup> As mentioned above, gender-based violence does not occur in a vacuum or in isolation, but is the result of historical and structural contexts of discrimination, i.e. unequal power relations, male control and gender stereotypes towards women and girls that become a breeding ground for the materialisation of

<sup>32</sup> See, e.g., S. C. FRANCISCO and D.H. FELMLEE, "What Did You Call Me? An Analysis of Online Harassment Towards Black and Latinx Women", *Race and Social Problems*, Vol. 14, 2022, pp. 1-13.

<sup>33</sup> CEDAW COMMITTEE, "General Recommendation No. 28 on the core obligations of States Parties under Article 2 of CEDAW", UN Doc. CEDAW/C/GC/28, 2010, para. 16.

<sup>34</sup> *Ibid.* See also the highly regarded EUROPEAN COURT OF HUMAN RIGHTS (ECtHR) case, *D.H. and Others v. Czech Republic (Grand Chamber)*, Case No. 57325/00, 13 November 2007, where the ECtHR for the first time gave central recognition to indirect discrimination when analysing the disproportionate placement of Roma (Gypsy) students in schools for persons with disabilities, especially paras. 181, 175 and 196.

<sup>35</sup> WORLD WIDE WEB FOUNDATION, 'A Global Snapshot of Women Online', available at <https://webfoundation.org/wro-network/>.

<sup>36</sup> WORLD BANK, "The World Bank in Gender", *op. cit.*

<sup>37</sup> See, e.g., CEDAW COMMITTEE, General Recommendations No. 19 (1992) and No. 35 (2017) on gender-based violence against women. Docs. No. A/47/38 and CEDAW/C/GC/35, respectively.

<sup>38</sup> UN GENERAL ASSEMBLY, "Declaration on the Elimination of Violence against Women", Resolution 48/104, 20 December 1993, articulated largely on the basis of the 1992 CEDAW Committee's GR No. 19, *op. cit.*

different forms of violence: physical, sexual, reproductive, obstetric, psychological, economic, political, social, institutional and, as evidenced in this text, virtual and 'online' environments.

**28.** Certainly, the development in technologies has created a different, now virtual, field for different forms of violence and discrimination that manifest themselves in various spaces and phenomena, such as cyberstalking, cyberharassment, non-consensual dissemination of intimate images, incitement to violence or hatred by cybernetic means, 'sexting', 'doxing', 'trolling' or 'revenge pornography'.<sup>39</sup> Another example, less explored by the literature from a human rights perspective, is that of sex work in the international arena (work that is highly female-dominated and in which most of the consumers are men -thus displaying a clear gendered dimension). This space generates a parallel clandestine market where human trafficking, leaks of intimate content and the production of abusive material of children and adolescents are the main products.<sup>40</sup> Hence, different proposals focus on the construction of international regulations in conjunction with civil society and by listening to and addressing the needs, challenges and proposals of sex workers themselves.

**29.** Along these lines, and based on the analysis presented in the previous section, it can be seen that the United Nations (UN) human rights protection mechanisms have approached the issue from the aforementioned lens of understanding the underlying forms of discrimination that make possible the most evident and visible manifestations of oppression and violence. Thus, it is relevant to look at the actions of the triad of mechanisms dedicated specifically to the human rights of women and girls (although as women and girls make up about half of humanity, many of the other human rights mechanisms also address the issue in a cross-cutting manner). In the system of international human rights protection, the three UN bodies dealing specifically and primarily with the human rights of women and girls are the CEDAW Committee, the treaty body referred to above, which began its work in 1982; and the two mechanisms under the Special Procedures on Human Rights, whose mandates are created by the UN Human Rights Council: the UN Special Rapporteur on Violence against Women and Girls, its Causes and Consequences (UN Special Rapporteur on VAWG), which began its mandate in 1994; and the Working Group on Discrimination against Women and Girls (WGDAGW), created in 2010, which has delved into the various forms of intersectional and structural discrimination faced by women and girls, as noted above.

**30.** For its part, the CEDAW Committee, the body that interprets and monitors compliance with CEDAW by States Parties and other obligated parties, in its 1992 General Recommendation (GR) No. 19 on violence against women, defined discrimination under Article 1 of the Convention as including gender-based violence, which is "violence that is directed against a woman because she is a woman or that affects her disproportionately", and which constitutes a violation of her human rights. In its 2017 General Recommendation No. 35, revising and updating its GR No. 19 on violence against women,<sup>41</sup> the CEDAW Committee identifies that gender-based violence against women, whether committed by states, intergovernmental organisations or non-state actors, individuals and armed groups among others, remains widespread in all countries, with a high degree of impunity. It concludes that it manifests itself in a range of multiple, interrelated and recurrent forms, in a variety of settings, from private to public, including "...contemporary forms of violence occurring online and in other digital environments", and transcends national borders in the contemporary globalised world.

<sup>39</sup> For a more detailed description of these manifestations of online gender-based violence, see "Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence", *op. cit.*; UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN AND GIRLS, ITS CAUSES AND CONSEQUENCES, Report to the UN Human Rights Council, A/HRC/38/47, 2018. On the effects of some of these phenomena at the national level, see, e.g., A. PLANNS, "Sexting, victimisation and anxiety in young Spanish women", *Quaderns de Politiques Familiars*, No. 6, 2020, pp. 44-49.

<sup>40</sup> See, e.g., J. E. BENAVIDES DELVA and I. S. GONZÁLEZ LÓPEZ, "Venta sexual digital: las redes sociales y su regulación internacional", *Juridicas CUC, Universidad de Guadalajara*, vol. 18, n° 1, 2022, pp. 241-278.

<sup>41</sup> CEDAW COMMITTEE, General Recommendations No. 19 (1992) and No. 35 (2017) on gender-based violence against women, *op. cit.*

**31.** As far as the UN Special Rapporteur on VAWG is concerned, and developing further the interpretative line advanced by the CEDAW Committee, her 2018 report to the UN Human Rights Council was entirely devoted to online violence, in order to address the new challenges posed by this violence against women, including prevention, protection, prosecution and redress for such acts. In the report, the Special Rapporteur notes that the use of information and communication technologies has contributed to the empowerment of women and girls and to a fuller realisation of their human rights. She also indicates that there is a need to examine online violence and the applicability of national laws in this regard. It makes recommendations for States and non-state actors to combat online violence against women and girls, while respecting freedom of expression and the prohibition of incitement to violence and hatred, in accordance with Article 20 of the International Covenant on Civil and Political Rights,<sup>42</sup> to which the vast majority of the 193 UN States are Parties, plus Palestine as one of the two observer subjects at the UN.<sup>43</sup>

**32.** The WGDAGW has maintained a similar line of analysis across the different phenomena and cases presented to it (several of them on violence, including online violence), as well as in its thematic reports and country visits.<sup>44</sup> This line consists of looking at the phenomena of violence understood as the most serious and visible manifestation of gender discrimination against women and girls. As indicated above, the Working Group focuses on all forms of discrimination in law and practice, from the most overt and obvious, to the structural and root causes of such discriminatory norms or practices, with an intersectional and life-cycle approach, addressing the lived experiences of discrimination against girls, women and older women in all their diversity.<sup>45</sup>

**33.** In this perspective, the Working Group has noted in its 2022 report to the Human Rights Council, "Girls' and young women's activism", that girls and young women face significant obstacles in accessing information about their human rights, as well as the mechanisms available to them to seek protection from violations and redress in case their rights are violated, sometimes lacking specific forms of redress, including in case of online harassment and violence. It has also indicated that the lack of effective age- and gender-sensitive procedures, information, counselling, legal and other assistance, and access to independent complaints procedures, including courts, often leads to impunity.<sup>46</sup>

#### **IV. Challenges for women's and girls' freedom of expression in cyberspace**

**34.** In response to the diversity of challenges identified in relation to gender-based cyber-violence and other forms of discrimination, attack and harassment, other UN Human Rights Special Procedures have also taken action. The different concrete expressions of online gender-based violence and its effects on women's human rights have been identified, including the right to privacy and, most notably, the human right to freedom of opinion and expression and its correlative right to access to information.

**35.** Thus, the first woman UN Special Rapporteur on Freedom of Expression and Opinion dedicated her 2021 report to the Human Rights Council to "Gender justice and the right to freedom of opinion and expression". In this report, the Special Rapporteur shines the spotlight for the first time on 'gender censorship' and concludes that it is pervasive, both online and offline. She notes that women's voices are suppressed, controlled or punished explicitly by discriminatory laws, policies and practices, and implicitly by patriarchal social attitudes, cultural norms and values. Along the lines advanced above

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<sup>42</sup> See UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN AND GIRLS, ITS CAUSES AND CONSEQUENCES, Report to the UN Human Rights Council, "Online violence against women", A/HRC/38/47, 2018, especially paras. 115-119.

<sup>43</sup> See status of ratifications at [https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtmsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND)

<sup>44</sup> The author is, at the time of writing, a member and chairperson of the WGDAGW.

<sup>45</sup> For a more detailed explanation of these tools and activities, see the WGDAGW webpage managed by the UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, available at <https://www.ohchr.org/en/special-procedures/wg-women-and-girls>.

<sup>46</sup> WGDAGW, 2022 Report to the Human Rights Council, "Girls' and young women's activism", A/HRC/50/25, 2022.

regarding the current era of gender backlash, the Rapporteur notes that sexism and misogyny, which are dominant factors in gender censorship, have been exacerbated by the rise of populist, authoritarian and fundamentalist forces around the world.<sup>47</sup> Fundamentalist movements often play a prominent and visible role in gender censorship on social media platforms. Content moderation by *corporations* also shows signs of gender bias, sometimes using *algorithms* that reflect the biases of human norm-setters,<sup>48</sup> i.e., they produce indirect discrimination, such as that discussed in section II above.

**36.** Finally, the Rapporteur underlines that sexual and gender-based violence, hate speech and misinformation are widely used online and offline to chill or shut down women's expression. In many cases, online threats escalate to physical violence and even murder. Women journalists, politicians, human rights defenders and feminist activists are the targets of vicious and coordinated online attacks. The aim is to intimidate, silence and expel them from platforms and public life. The effect is to undermine human rights and roll back media diversity and inclusive democracy. Through consultations for the above report, the Rapporteur identifies that women's rights groups and feminist movements have also been subject to threats and pressures as authoritarian regimes seek to restrict civic space.<sup>49</sup>

**37.** It should be emphasised that even in this often hostile or unfriendly environment for the realisation of human rights and gender equality, women have not simply been passive subjects on the receiving end of cyber-discrimination and cyber-violence without reacting or opposing. On the contrary, many of them have initiated different actions and campaigns of 'cyber-activism' to defend their rights.<sup>50</sup> Likewise, young women activists who previously resorted to in-person advocacy tactics are increasingly using online spaces in several countries; social media platforms such as TikTok, Instagram, Twitter, or services such as Telegram and Signal, are used for organising, mobilising and networking, campaigning and advocacy.<sup>51</sup> These women and girls, and the groups and organisations they are part of or support, have proposed concrete actions that have fed into the recommendations of UN human rights mechanisms.

**38.** These recommendations have been addressed not only to States as the main obligated subjects, but also to other subjects with different levels of responsibility, such as transnational companies in a variety of relevant matters in cyberspace (such as the 'Big five in tech' or the 'tech giants': Google, Apple, Meta, Amazon and Microsoft). Thus, the UN Special Rapporteur on Freedom of Expression and Opinion has recommended that the digital space should be safe for women and that States should adopt strong laws and ensure their effective enforcement to prohibit, investigate and prosecute gender-based violence online.<sup>52</sup>

**39.** Lastly, the UN Special Rapporteur stresses that there cannot be a trade-off between women's right to freedom from violence and the right to freedom of opinion and expression, but that both rights must be upheld equally by States. Restrictions on freedom of expression must therefore fully comply with *legality, necessity and proportionality*, and pursue legitimate objectives. Nor should public morality laws be a weapon to inhibit women's cultural, gender and sexual expression, or to restrict feminist speech.<sup>53</sup>

<sup>47</sup> UN SPECIAL RAPPOREUR ON FREEDOM OF OPINION AND EXPRESSION, Report to the UN Human Rights Council, "Gender justice and the right to freedom of opinion and expression", A/76/258, 2021. See also WGDAGW, Report to the UN Human Rights Council, "Reaffirming gender equality, and combating setbacks", A/HRC/38/46, 2018; Y. ERGAS, "Take Back the Future: Global Feminisms and the Coming Crisis of the Beijing Settlement", *op. cit.*; CENTRE FOR FEMINIST FOREIGN POLICY, "Disrupting the multilateral order? The impact of anti-gender actors on multilateral structures in Europe", *op. cit.*; K. A. A. KHAN KC, "Lessons on backlash from Women Deliver: tackling the enemy in the room", *op. cit.*

<sup>48</sup> UN SPECIAL RAPPOREUR ON FREEDOM OF OPINION AND EXPRESSION, Report to the UN Human Rights Council, "Gender Justice and the Right to Freedom of Opinion and Expression", *op. cit.*

<sup>49</sup> *Ibid.*

<sup>50</sup> See, e.g., S. NÚÑEZ PUENTE, D. FERNÁNDEZ ROMERO and P. PEÑA JIMÉNEZ, "Ciberactivismo contra la violencia de género: fetichismo tecnológico e interactividad", *Feminismo/s*, No. 27, June 2016, pp. 177-195.

<sup>51</sup> See, e.g., WGDAGW, Report to the UN Human Rights Council, "Girls' and Young Women's Activism", *op. cit.*

<sup>52</sup> UN SPECIAL RAPPOREUR ON FREEDOM OF OPINION AND EXPRESSION, Report to the UN Human Rights Council, "Gender Justice and the Right to Freedom of Opinion and Expression", *op. cit.*

<sup>53</sup> *Ibid.*

40. Another relevant normative instrument to address the phenomena of cyber-discrimination, harassment, and gender-based violence is the UN Guiding Principles on Business and Human Rights. This soft-law instrument states, based on international human rights law, that social media companies should conduct regular human rights and gender impact assessments to identify and mitigate systemic risks affecting women. They should also create safe and gender-sensitive platforms, adopt effective security policies and tools, ensure meaningful transparency, including of algorithms, and provide adequate remedies.<sup>54</sup>

41. The Guiding Principles also indicate that States and other duty bearers are responsible for the observance of human rights. In this regard, they must comply with the legal norms and standards enshrined in international human rights instruments. Where they fail to do so, aggrieved rights holders have the right to initiate proceedings for appropriate redress before a competent court or other adjudicatory body, in accordance with the rules and procedures provided by law.<sup>55</sup>

42. As is well known, the Guiding Principles form the basis of the current draft treaty on business and human rights, a legally binding instrument under negotiation at the time of writing. This potential international treaty will include not only obligations for States, among others, in relation to cyberspace, but also more direct avenues of complaint and enforcement against transnational corporations themselves, including information and communication technology companies.<sup>56</sup> This process opens a window of hope for more effective, protective and gender-sensitive regulation of 'human rights cyber-violations' against women and girls, including those that may constitute violations of domestic, regional<sup>57</sup> -including at the EU level with the most legally advanced proposal for a Directive in this field,<sup>58</sup> or international criminal law, as mentioned in sections II and III above.

## V. New openings for women and girls in cyberspace? Some proposals with a gender perspective

43. The CEDAW Committee's GC 35, referred to above, indicates that violence occurs in the redefinition of the public and the private through technological environments. It is considered that this redefinition can play out in favour of women and girls if States comply with their obligations under international human rights law and technology companies support this effort.

44. Along these lines, there are several social, academic and professional initiatives led by and for women and/or adopting a gender perspective. These actions aim to make the internet accessible to all women and girls, to level the playing field and to open up the full range of opportunities that cybers-

<sup>54</sup> UN HUMAN RIGHTS COUNCIL, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", Resolution 17/4, 16 June 2011.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Z. MIKULLOVCI, "Overview of the Proposed Binding Treaty on Business and Human Rights", *Georgetown Law Transnational Business Center*, Blog, 9 March 2023, available at <https://www.law.georgetown.edu/transnational-business-center/blog/an-overview-of-the-proposed-legally-binding-instrument-to-regulate-in-international-human-rights-law-the-activities-of-transnational-corporations-and-other-business-enterprises/>.

<sup>57</sup> See, e.g., GREVIO (Expert group on action against violence against women and domestic violence), "General Recommendation No. 1 on the digital dimension of violence against women", Council of Europe, Strasbourg, 20 October 2021; INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, "Annual Report 2022. Informe de la Relatoría Especial para la Libertad de Expresión", *op. cit.*

<sup>58</sup> The "Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence", *op. cit.*, specifically provides for minimum rules for certain cybercrimes relating to cyber violence in its Articles 6 to 10. The European Parliament has also asked the Commission to propose legislation on violence against women and domestic violence, as well as on gender-based cyber violence. The European Parliament has adopted two legislative own-initiative reports based on Article 225 of the Treaty on the Functioning of the European Union (TFEU), requesting the Commission 7 to submit proposals on combating gender-based violence and cyber-violence 8 and on the inclusion of gender-based violence as a new criminal offence in Article 83(1) TFEU 9 respectively.

pace can provide.<sup>59</sup> They also aim to make it an environment where human rights and gender equality are respected and protected, based on regulations that also apply in the physical world, as well as on provisions - currently in existence or in the process of negotiation or adoption - specifically aimed at the regulation and use of cyberspace.

**45.** It is conceivable that these initiatives could permeate international and comparative law, as well as the actions of different actors in the international community who are influential in understanding and confronting gender-based cyber-violence and the different risks and threats to women and girls in cyberspace.

**46.** An illustrative example is the Women, Peace and (Cyber)Security Agenda, based centrally on Resolution 1325 on “Women, Peace and Security” (WPS), adopted in 2000 by the UN Security Council, on the basis of which all UN Member States are obliged to have such an agenda at the national level. The WPS Agenda calls for privileging and facilitating women's participation in the prevention, response and resolution of armed conflict, and adopting gender-sensitive considerations in all international, national and local attention to conflict.<sup>60</sup>

**47.** In this regard, some academics and organisations have explored the relationship between the Women, Peace and Security Agenda, on the one hand, and threats and cybersecurity, on the other. As such, the links between the priority issues of the WPS agenda (gender equality, women's participation in international security, prevention and protection of violence against women, gender-differentiated needs) and international cybersecurity have been analysed. These studies and initiatives have also identified priority areas that need to be addressed to ensure a gender-inclusive cyberspace that protects the rights of women and girls.<sup>61</sup>

**48.** The WPS Agenda, which holds intrinsic value, also becomes particularly relevant when tracing the interconnection with international crimes that may be perpetrated in the context of armed conflict and in light of the ICC's ongoing position on international cybercrimes, including possible international gender-based crimes, as referred to above.<sup>62</sup>

**49.** Another notably significant area of cyberdiscrimination and gender-based violence is the field of artificial intelligence (AI). In this respect, there are at least two central aspects that may influence the ways in which women and girls experience the use of cyberspace and the impact it may have on their rights. On the one hand, algorithmic bias whereby existing social, cultural and legal gender biases and stereotypes are reproduced in the design and application of algorithms and, in a circular process, reinforce and perpetuate these experiences of discrimination in the real world.<sup>63</sup> And on the other, the demonstrated ability of AI to contaminate human decision-making.<sup>64</sup>

**50.** In relation to these risks, it has been argued that some AI systems cause or are likely to cause physical or psychological harm through the use of ‘subliminal techniques’ or by exploiting the vulnerabilities of a ‘specific group of people due to their age, physical or mental disability’ - a risk which may

<sup>59</sup> For example, WOMCY- Latam, Women in Cybersecurity; WISECRA, Women in Security and Resilience Alliance; and Women4Cyber (<https://www.women4cyberspain.es/>).

<sup>60</sup> See UN DEPARTMENT OF POLITICAL AND PEACEBUILDING AFFAIRS, “Women, Peace and Security”, available at <https://dppa.un.org/en/women-peace-and-security>.

<sup>61</sup> L. SHARLAND, *et al.*, “System Update: Towards a Women, Peace and Cybersecurity Agenda”, UNIDIR, Geneva, available at <https://doi.org/10.37559/GEN/2021/03>

<sup>62</sup> See ICC OFFICE OF THE PROSECUTOR, “Policy on the Crime of Gender-Related Persecution”, *op. cit.* and K. A. A. KHAN KC, *op. cit.*

<sup>63</sup> See, e.g., M. SEPÚLVEDA, “Tecnología biométrica en programas sociales, ¿una preocupación legítima?», *México Social*, 2019, available at <https://www.mexicosocial.org/madalena-sepulveda-tecnologia-biometrica-programas-sociales/>.

<sup>64</sup> See, e.g., J. BORANA, ‘Applications of artificial intelligence and associated technologies’, in *Proceedings of the ETEBMS-2016*, Jodhpur, India, 2016, pp. 64–67.

particularly affect girls and young women, as explored above. For some authors, such use of AI should be prohibited. The World Health Organisation supports this prohibition and, in particular, describes such uses of AI as precluding informed consent in the health care setting.<sup>65</sup>

**51.** There have been significant efforts from academia in combination with technology companies that seek to build equality, including gender equality, in the use and application of AI.<sup>66</sup> These initiatives are aimed at data scientists, but are multidisciplinary in their conception and delivery, as social scientists and future policy makers need to understand the fundamentals of the technology they increasingly employ to implement policy objectives. Summarising their objectives, projects of this type seek to understand how applying basic human rights principles - equality and non-discrimination, participation and inclusion, accountability and the rule of law - in the technological and cyberspace framework relate to the design, construction, deployment and use of artificial intelligence systems, as well as understanding human rights as fundamental concepts that are indivisible, interdependent and interrelated with technological products.<sup>67</sup>

**52.** In this context, the question arises, can our algorithms and technological tools simply be made 'blind' to the inequalities and asymmetries of power that exist in the real world? An essential starting point is that real-world inequalities have been found to be reproduced in algorithms and returned to the real world. Thus, while there is still sometimes a common belief in the data science and engineering community that data is neutral and true, today several authors and practitioners conclude that this is a myth: data is relative and contextual. Without context and purpose, data is just a meaningless set of numbers.<sup>68</sup>

**53.** My submission is that by using a human rights-based approach, there is a greater chance of creating an environment in which technologists, policy makers and citizens share a common vocabulary, unlocking informed debates about their visions of data and purposeful policy. Such an approach would focus on the impact of technology on human beings and their fundamental and inalienable rights. Thus, the entire life cycle of technology should be examined in an ecosystemic approach: from target to creation, through construction and deployment, and back again, in an iterative approach that recognises the changing nature of algorithms in a real-world context.

**54.** However, one might question why a human rights-based approach should be advocated in the face of existing ethical or 'responsible AI' initiatives. In this respect, if parallels are drawn with similar approaches such as corporate social responsibility or ethical codes in technology, a human rights-based approach to artificial intelligence aims to put equality and inclusion at the heart of machine learning algorithms. Integrating the human rights principles reviewed throughout this article into information technology to help technology, policy makers and citizens create technology that is aware of and aligned with human rights values, rather than unintentionally harming them.

**55.** Ethics, which is certainly crucial, is also situational. A record from 2023 shows that there were more than 80 guidelines and recommendations in this field from groups ranging from universities to the private sector to governments. Regardless of the strength of some guidelines, their sheer number and variety create an 'à la carte' application of ethical and responsibility principles that ultimately blur the ethics debate.<sup>69</sup>

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<sup>65</sup> See, e.g., J. BARD, "AI's Ability to Manipulate Decision Making Requires a Moratorium on Its Use in Obtaining Consent for Biomedical Research", *Bill of Health*, Harvard Law Petrie Flom Center, 14 July 2023, available at <https://blog.petrieflom.law.harvard.edu/2023/07/14/ais-ability-to-manipulate-decision-making-requires-a-moratorium-on-its-use-in-obtaining-consent-for-biomedical-research/>.

<sup>66</sup> See, e.g., AI & EQUALITY, "AI & Equality. Human Rights Toolbox", available at <https://aiequalitytoolbox.com/>

<sup>67</sup> *Ibid.*

<sup>68</sup> On algorithmic gender discrimination, see EIGE, "Gender Equality Index 2020: Digitalisation and the future of world", EIGE, 2021, available at <https://eige.europa.eu/publications-resources/toolkits-guides/gender-equality-index-2020-report/digitalisation-and-equal-rights-role-ai-algorithms>.

<sup>69</sup> See detailed analysis in AI & EQUALITY, *op. cit.*

**56.** In comparison to ethics, normativity and human rights frameworks have an agreed and established international body of law that makes the conversation and objectives more concrete as a starting point. Ultimately, human rights focus on the impact of the use of cyberspace on human beings. In this context, technology must be developed based on a gender and intersectional perspective, guided by the principles and rights of equality and non-discrimination, freedom from violence, privacy, freedom of opinion and expression, autonomy, and personal liberty and security.<sup>70</sup>

**57.** With specific regard to the human right to gender equality, Article 5 of CEDAW requires States Parties to take measures to eliminate gender stereotypes. Likewise, Article 4 allows States to adopt temporary affirmative measures in order to close inequality gaps and correct systemic discrimination against women and girls, whether direct or indirect, as mentioned in section II of this text. It is true that these measures are commonly understood as mandatory gender quota policies or even gender parity. However, these are not the only temporary affirmative measures that are possible. In a comprehensive sense, in order to remedy structural discrimination, other measures can also be considered in the light of this provision, for example, those that promote and facilitate financial literacy, access to formal employment and access to higher education.

**58.** This is therefore a clear example of how to use the principles and norms of international human rights law on gender equality and non-discrimination of women to address and regulate cyberspace more efficiently and justly.

## VI. Final reflections

*At best, the digital revolution will empower, inform, connect and save lives. At worst, it will disempower, misinform, disconnect and cost lives. Human rights will make the difference in this equation.*<sup>71</sup>

International human rights law, as well as relevant doctrine and practice, has been concentrated in recent years in the field of cyberspace and women's human rights, as shown in this article. More specifically, in the text I have reviewed the standards articulated by international human rights protection mechanisms, with a closer focus on those dedicated to women's and girls' human rights and those that explicitly adopt a gender perspective. It has been analysed and demonstrated that the reviewed norms and standards provide a legally binding framework, and at the same time useful in practice, for protecting and enhancing women's human rights, especially the rights to gender equality and non-discrimination. Other relevant rights involved in protecting women and girls effectively from transnational risks derived from the development of cyberspace, are the rights to freedom of opinion and expression, freedom from violence, privacy, autonomy, and personal liberty and security.

In terms of substance, such norms and standards call on States and corporations, particularly technology corporations, to create or facilitate inclusive, equal and safe online platforms and spaces for women and girls, with a gender and intersectional perspective, that promote and protect all their human rights.

In terms of process, they require that women and girls be included, and their voices and needs heard in relation to the development of cyberspace regulation, especially those who are marginalised and excluded, so as to ensure gender equality, but also other forms of equality, such as racial and socio-economic equality. International legal principles and standards therefore call for the promotion of broad

<sup>70</sup> In this regard, see R. CELORIO, *Women and International Human Rights in Modern Times. A Contemporary Casebook*, Edward Elgar Publishing, UK, 2022, pp. 346-347.

<sup>71</sup> M. BACHELET, former UN High Commissioner for Human Rights, "Human Rights in the Digital Age - Can They Make a Difference?", Conference, 17 October 2019.

civil participation in decision-making and the design and implementation of online platforms and spaces that contribute to gender equality and gender justice.

Thus, a human rights-based and feminist approach would require that, as concentric circles and in this order of priority, artificial intelligence should address the following points: **(i)** that it complies with human rights obligations to women and girls, **(ii)** that it is guided by human rights standards and principles from its first design to its development and implementation, **(iii)** that it prevents and addresses transnational risks such as cyber-violations in the form of cyber-discrimination, harassment and violence, and that it contributes to human rights, and **(iv)** that it empowers women and girls, especially those in situations of greater marginalisation, discrimination or exclusion, and that it empowers duty-bearers as well to contribute to these human rights-based parameters.

In this context, in my opinion, the main challenge of the current historical moment is to move from non-discrimination in cyberspace to the reaffirmation and realisation of human rights. It is the responsibility of States, corporations and civil society, and particularly of those subjects and actors in positions of greater power and resources, to proactively build safe, egalitarian and just spaces for women and girls in the virtual world and in the physical world with which it is connected.