

15 October 2019

Secretariat of the Human Rights Council Advisory Committee
OHCHR - United Nations Office at Geneva
CH-1211 Geneva 10, Switzerland
E-mail: hrcadvisorycommittee@ohchr.org

Submission on New and emerging digital technologies and human rights

Lyria Bennett Moses,
Daniel Joyce
Allens Hub for Technology, Law and Innovation,
UNSW Law, Sydney Australia

with Louise Chappell, Director, Australian Human Rights Institute and Justine Nolan, UNSW Law

The Allens Hub for Technology, Law and Innovation ('The Hub') is a community of scholars at UNSW Sydney aiming to add breadth and depth to research on the interactions among law, legal practice and technological change in order to enrich scholarly and policy debates and enhance understanding and engagement among the legal profession, the judiciary, industry, government, civil society and the broader community. The Australian Human Rights Institute is a unique centre of knowledge in Australia and the world, for bringing together medical, engineering and legal minds to find human rights solutions.

Thank you for the opportunity to make a submission. We do so in our capacity as experts, and the views in this submission do not represent the views of UNSW Law or Allens. Due to time constraints as we were not aware of this opportunity until recently, we focus on *some* of the questions posed, adapting a submission prepared with colleagues on similar issues for the Australian Human Rights Commission. The authorship of those colleagues is acknowledged, but there was insufficient time to consult in relation to this separate submission.

In what ways do new and emerging digital technologies help to protect and promote human rights? How can the positive benefits of these technologies be realized?

Our colleague Bassina Farbenblum (and her co-authors) have written a report on digital technology initiatives seeking to engage migrant workers and other low waged workers, as well as digital

A joint initiative of

Allens < > Linklaters



platforms designed to facilitate migrant workers' access to justice.¹ Adopting a worker-centred lens, the Report critically analyses the risks to users of the various digital platforms and the challenges confronting developers who seek to improve conditions for workers through the use of technology. It considers a range of practical, ethical, and legal challenges, many of which are generalizable to digital tools developed for vulnerable individuals beyond the migrant worker context. These include, for example, factors that determine the effectiveness of digital tools in terms of yielding clear outcomes for vulnerable individual users; privacy and security risks as well as defamation risks to vulnerable individual users; and challenges in design and implementation to ensure accessibility and uptake by vulnerable individuals. Further research has been conducted on the potential of e-governance and the digitisation of migrant recruitment as promising means to facilitate safe and responsible labour migration and reduce forced labour and exploitation.²

Another Hub researcher, Monika Zalnieriute, has focused on the positive impact that digital technologies, and the internet in particular, may have on historically marginalized groups and the exercise of their fundamental rights.³ She has developed an interdisciplinary research agenda for future research on these issues.

What are some of the key human rights challenges arising from new and emerging digital technologies? How can these risks be mitigated? Do new and emerging digital technologies create unique and unprecedented challenges or are there earlier precedents that help us understand the issue area?

Daniel Joyce has done research on the question of whether human rights law should be used to protect citizens from being subject to mass surveillance conducted by their own governments.⁴ The Snowden revelations illustrated how public and private organisations have the capacity to use a range of surveillance technologies and act in ways that are 'invasive and detrimental to our liberty.'⁵ The General Assembly resolutions on the right to digital privacy sought to extend human rights to online contexts.⁶ Mass surveillance revelations have, as Monika Zalnieriute suggested, created an international constitutional moment for data privacy in the times of mass surveillance.⁷ However, the complexity of the digital environment, as well as the UN's institutional limitations, means that the practice of surveillance is difficult to curb.

Academics have debated over the utility of international human rights law in protecting privacy. Some have argued that Snowden revelations paved the way for the development of customary international law of data privacy.⁸ On the one hand, it has been argued that international human rights law offers non-discrimination in terms of treatment of citizens in different states and helps to overcome the

¹ Bassina Farbenblum, Laurie Berg and Angela Kintominas, 'Transformative Technology for Migrant Workers: Opportunities, Challenges and Risks' available online at <<https://www.mwji.org/>>.

² See further, Bassina Farbenblum and Justine Nolan, 'The Business of Migrant Worker Recruitment: Who Has the Responsibility and Leverage to Protect Rights?' (2017) 52 *Texas International Law Journal* 1, Bassina Farbenblum, 'Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin' (2017) 7 *Asian Journal of International Law* 152, Bassina Farbenblum, Laurie Berg and Angela Kintominas, *Transformative Technology for Migrant Workers: Opportunities, Challenges and Risks* (Open Society Foundations, September 2018).

³ Monika Zalnieriute, 'Digital Rights of LGBTI Communities: A Roadmap for Dual Human Rights Framework', in Wagner, B. et al (eds), *Research Handbook on Human Rights and Digital Technologies*, Edward Elgar, 2019.

⁴ Daniel Joyce, 'Privacy in the Digital Era – Human Rights Online?' (2015) 16(1) *Melbourne Journal of International Law* 270.

⁵ Ibid.

⁶ *The Right to Privacy in the Digital Age*, GA Res 68/167, UN GAOR, 3rd Comm, 68th sess, 70th plen mtg, Agenda Item 96(b), UN Doc A/RES/68/167 (21 January 2014, adopted 18 December 2013).

⁷ Monika Zalnieriute, 'An International Constitutional Moment for Data Privacy in the Times of Mass-Surveillance,' *International Journal of Law and Information Technology*, 2015, Vol. 23 Issue 2, pp. 99 – 133.

⁸ Monika Zalnieriute, 'An International Constitutional Moment for Data Privacy in the Times of Mass-Surveillance,' *International Journal of Law and Information Technology*, 2015, Vol. 23 Issue 2, pp. 99 – 133.

partisan approach of domestic constitutions to such issues. However, critics have pointed to the limitations of privacy in the era of big data. Despite the development of privacy jurisprudence in domestic and international contexts, few concrete protections are in place.

There is a disproportionate impact of digital censorship and surveillance for marginalized groups.⁹ We have conducted research that explores narratives of the liberatory role of the Internet and digital technologies for marginalized groups and discusses how the neoliberal model has been used to repress and limit the rights of LGBTI people (among others) and how such repressions have been justified.¹⁰

Is the existing international human rights framework adequate to safeguard human rights in an era of rapid technological innovation? Why or why not? If not, what types of reforms are needed?

The internet is an essential tool for expressing political opinions, which relates to the human right of freedom of expression.¹¹ Academics and politicians alike have experimented with the idea of treating Internet Freedom as a human right.¹² Indeed, the Arab Spring and ‘Me too’ Movement both serve as powerful reminders on how important the internet is at influencing social change. However, there is unequal access to media, information and communications infrastructure, posing important questions on whether ‘we can adapt the right of freedom of expression to extend it to deal with the imbalances that exist regarding communication flows and access to communications?’¹³

In 2010, Hillary Clinton outlined the US commitment to ‘Internet Freedom,’ alongside references to the role ‘online organising’ has played in human rights advocacy.¹⁴ UN Special Rapporteur Frank La Rue has gone as far as suggesting that ‘access to the Internet should be considered in human rights terms and that achieving universal access to the Internet should be a priority for all states.’¹⁵ Overall, viewing the internet as a ‘public good’ contrasts with the current approach, where the internet is viewed as a ‘private sphere’ where entrepreneurs have free-reign to create world-shaping companies.

Recently, Monika Zalnieriute has argued that the existing international human rights framework is not adequate to safeguard human rights in an era of rapid technological innovation because its obligations are limited to states and not to private actors.¹⁶

⁹ Zalnieriute, Monika. "The anatomy of neoliberal Internet governance: A queer critical political economy perspective." In D. Otto, *Queering International Law*. Routledge, 2017. 53-73.

¹⁰ Monika Zalnieriute, 'The anatomy of neoliberal Internet governance: A queer critical political economy perspective' In D. Otto, *Queering International Law*. Routledge, 2017. 53-73. Monika Zalnieriute, 'Digital Rights of LGBTI Communities: A Roadmap for Dual Human Rights Framework, in Wagner, B. et al (eds), *Research Handbook on Human Rights and Digital Technologies*, Edward Elgar, 2019.

¹¹ Daniel Joyce, 'Internet Freedom and Human Rights' (2015) 26(2) *European Journal of International Law* 493.

¹² Ibid.

¹³ Ibid

¹⁴ Hillary Rodham Clinton, Remarks on Internet Freedom, 21 January 2010, available at <<http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm>>.

¹⁵ Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (Special Rapporteur's Report), Human Rights Council, A/HRC/17/27, 16 May 2011.

¹⁶ Monika Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN," *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming*; available at SSRN: <https://ssrn.com/abstract=3333532>. See also Monika Zalnieriute and Stefania Milan, 'Internet Architecture and Human Rights: Beyond Human Rights Gap,' *Policy & Internet*, 2019. Vol 11(1).

What should be the role of the private sector in mitigating the risks of new and emerging digital technologies to human rights? What about the roles of other key stakeholders?

In addition to the role of the private sector and key stakeholders, It is worth noting that human rights law is not the only legal framework that has a protective function in the context of digital technologies. Research on eObjects (enhanced objects) and their implications for consumer rights¹⁷ has demonstrated the role that consumer law, if revised, might play in resolving negative implications for human rights to privacy, safety and security, non-discrimination and equal treatment. The private sector responds to a wide array of legal frameworks and the place of human rights law needs to be understood in this broader context.

More specifically with regard to private actors, Monika Zalnieriute has argued that the increasing power of private actors over our social, political and economic lives necessitates reframing the obligations of private actors and imposing legally binding obligations on them.¹⁸

There is a complex array of business and academic buzz words surrounding new and emerging digital technologies, such as convergence, digital transformation, Industry 4.0, and the fourth industrial revolution, among others. Could you please summarize what, in your opinion, makes today's new and emerging digital technologies different from earlier periods?

Every era's new technologies are different from those of the previous era. While it is easy to focus on what is different, there are important continuities. An example is "artificial intelligence", which is a term often used in place of older ideas like "software" or "algorithms" – these terms tend to be ill-defined. While it is true that computer science has evolved, and machine learning has come of age, focusing on newness is not always helpful.

In particular, despite extensive focus on the ethical and human rights implications of "artificial intelligence", many systems being used by governments in harmful ways are not complex technically. The Australian government has implemented a system of automated debt collection that produces erroneous debts, but the underlying logic is simple division. The problem is not fancy new technology, but a division of an annual figure to calculate a fortnightly figure that misrepresents the income of many citizens.

It may therefore be wise not to focus on "a selected few technologies" or even "new and emerging digital technologies" but rather to look at a broad range of practices that impact on human rights, some of which will involve newer technologies while others will be re-imagined deployment of older techniques. Technological change does make new harms possible, and human rights organisations should remain aware of this potential, but it is important that any new rights or principles are not confined technologically.

¹⁷ Kayleen Manwaring, 'Emerging information technologies: challenges for consumers' (2017) 17(2) *Oxford University Commonwealth Law Journal* 265; Kayleen Manwaring, 'Kickstarting reconnection – An approach to legal problems arising from emerging technologies' (2017) 22 (1) *Deakin Law Review* 53.

¹⁸ Monika. Zalnieriute, "From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Example of Internet Governance and ICANN," *Yale Journal of Law & Technology* (2019), Vol XXI, *forthcoming*; available at SSRN: <https://ssrn.com/abstract=3333532>.