Lecture



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Sim Peter Baehr Lecture: Ensuring human rights for all in the digital age

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Annual SIM Peter Baehr Lecture, 16 October 2020¹

Thank you very much for joining us today, in this most unusual year. It is an honour to be delivering this lecture, which is part of a series named in memory of the late Peter Baehr, one of the pioneers of human rights research and activism in the Netherlands. A political scientist, Peter Baehr played an important role at Amnesty International, both in the Netherlands and internationally, and was the director of the Netherlands Institute of Human Rights (SIM) at Utrecht University from 1991 until his retirement in 1997. Following his passing in 2010, this annual SIM lecture series was renamed in his honour. I understand his family members are joining us today as well, and I would like to extend a special welcome to them: thank you for being with us today.

I just referred to this year as 'unusual' which history may or may not judge to be the ultimate euphemism for the situation we are going through. What is certain, however, is that our current circumstances were not foreseeable when Peter Baehr was doing his important human rights work, and they were certainly not foreseeable at the time our current international human rights framework — the Universal Declaration of Human Rights and the two binding treaties that followed from it, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights — was drafted following the Second World War. Nevertheless, this human rights framework persists today, and it is proving to be as relevant as ever amidst a global pandemic and a landscape of rapid technological change, both of which are having significant impact on our human rights.

We will touch upon all of these issues in this lecture.

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The SIM Peter Baehr Lecture is held every year at Utrecht University, the Netherlands, to celebrate the founding of the Netherlands Institute of Human Rights (SIM) in 1981 and to commemorate the late professor Peter Baehr, one of its former directors.

Digital rights are human rights

The ways in which we exercise our fundamental rights and freedoms have been transformed in what is often referred to as the 'digital age'. Looking at our daily lives, it is difficult to imagine aspects of them that are truly free from technology.

Three years ago, I wrote that, in many ways, we were already living the sci-fi future we once imagined. The internet of things is here. We ask a device on our kitchen table to play our favourite music, tell us what the weather will be like, or how long we should boil our eggs if we want them hard or soft. Many of the technical and engineering triumphs of the past, such as cars, have little to do with old-fashioned mechanics anymore. When testing out the Tesla 3 model two years ago, a tech columnist at the Washington Post described it as 'a giant iPhone' and a 'car that's really a connected gadget'. Our social lives, too, are permeated by technology. We split the bill in a café or bar — or at least, when we used to go out, before being faced with lockdown measures – by beaming money to our friends, and we can find a romantic partner by swiping left or right on an app. Our mobile devices are often the principal way in which we communicate with our colleagues, family, and loved ones.

Technologies are also being increasingly used to make decisions that have a significant impact on our daily lives. Access to essential services such as healthcare, public transport, and insurance is provided with the help of technology. Algorithms help decide if we can get a loan, if we are suitable for a job, and can even determine how we will be treated by the justice system. Add to that the impact social media platforms have been shown to have on information ecosystem and elections, and we see a clear line between technology and the very health of our democracies.

To the extent the line between what is 'offline' and online ever really existed, it has now blurred to the point of invisibility. This is all the more brought into focus in the context of the COVID-19 pandemic, where we are relying on technology more than ever before *and* the difference between those of us who have easy access to tech and connectivity and those who do not can have serious implications for our health and livelihood.

At the organisation I run, the Digital Freedom Fund, we work under the motto that 'digital rights are human rights'. This means two things in particular.

First, it means that we consider *all* human rights as engaged in the digital context to be digital rights. So not only the 'traditional' civil and political rights, such as privacy and freedom of expression, but also economic, social and cultural rights. I just mentioned how technology is being used to make important decisions about our lives and often facilitates our access to essential services. This relates to, for example, our right to health, our right to housing, and — an example that has been brought to the fore in the COVID-19 context of schooling during lockdown — our right to education.

If digital rights *are* human rights, then why use a different term? The label 'digital rights' helps pinpoint the sphere in which we are exercising our fundamental rights and freedoms. The digital context can mean both physically constructed spaces, such as infrastructures and devices, as well as spaces that are virtually constructed, like our online identities and communities. Using a term that expresses the context can help draw attention to it and also helps frame and highlight its fundamentality in a compact manner.

With our digital rights under threat on many fronts, this is important. Just as it was important, in 1995, 25 years ago, for Hillary Clinton to state at the Women's Congress in Beijing that 'human rights are women's rights, and women's rights are human rights', and for President Obama in 2016 to stress that LGBT rights are human rights, we should all be aware that digital rights are human rights, too. And they need to be protected.

There is an additional, important layer to mention here, which brings me to my second point. 'Digital rights are human rights' also means the human rights *of all* in the digital context. Not only the rights of those we still implicitly take to be the 'norm' for the 'average person' in our society (or, in technology, the 'average user'), namely the cis-gender, able-bodied, white male.

While the ever-expanding use of technology in our lives holds much promise to help us change things for the better by offering increased efficiency, precision, and good old-fashioned convenience, it also has the potential to exacerbate what is wrong in our societies. Technology can reproduce and even amplify the power structures present in our society, especially when it comes to issues of ethnicity, gender, and ability. It also has the potential to amplify social and economic inequality. This is something we need to examine carefully and respond to, before we reach a point of no return.

Today, we will examine these issues more closely. First, we will take a look at the protection of digital rights and specifically the role the courts play in safeguarding our fundamental rights and freedoms in a rapidly changing landscape. Then, we will briefly consider the impact the COVID-19 pandemic has had on our digital rights. Finally, I will reflect on how we can guarantee the human rights of all in the digital age, so looking at the question how we can decolonise technology and how we can decolonise digital rights.

The role of the courts in protecting our human rights in the digital context

While the concept of human rights is often criticised – it is said to be an ineffective, Western imperialistic system – it is a framework that I believe has an indispensable role in our society. It not only shows where the boundaries lie – the red lines that cannot be crossed – but it is also a framework that is flexible enough to stay relevant in an ever-changing context. This is not to say that there is no room for improvement to the system as it was devised by the small group of nations involved in drafting the foundation for the UN human rights framework right after the Second World War. However, the system – as well as the international, regional, and national human rights instruments that build and improve on its standards – provides us with tools to counter many of the human rights threats we see today, in a world that – as I mentioned at the outset – was unimaginable for the drafters.

But a framework alone is not enough. Human rights only mean something when that system of values is acted upon: countries must enable us to exercise our rights and cannot actively infringe on our rights or let us do so with respect to others. When countries do not abide by these rules, there must be independent authorities where we can go to enforce them.

Courts are important umpires in this context. Not only do they have the final say in judging complaints about human rights violations, they also play a crucial role in keeping the human rights framework itself relevant. Courts are sometimes also able to act more quickly on recent events – including the rapid technological developments nowadays – than politicians and lawmakers are.

I would like to illustrate this by discussing two decisive court cases that were initiated by students: one in India, and one in Austria.

The first case, *Shreya Singhal v. India*, was sparked by the Facebook status update of two teenage girls. After transportation and other services in the city of Mumbai were shut down in preparation for the funeral of a right-wing political leader, a teenage girl posted a statement on Facebook criticising the city's decision. Someone complained about her statement, using a provision in India's Information Technology Act of 2000. Under Section 66A of this law, it was a criminal offence to send 'annoying' messages to another person. Following the complaint, Mumbai police arrested the girl, as well as her friend who had 'liked' her post on Facebook.

The arrests drew the attention of 21-year-old Indian law student Shreya Singhal, who felt that the law violated the right to free speech as provided for by India's constitution. According to Singhal, the language of the statute against annoying, grossly offensive, and menacing speech was vague, and had been misused to censor innocent speech. In India, litigation on an issue of public interest can be initiated by any individual before an Indian appellate court. So: Singhal filed her petition with India's Supreme Court, calling for the repeal of Section 66A of the IT Act. Many more petitioners followed after this, filing additional and similar claims, and a broad coalition consisting of lawyers, technologist, academics, and activists put its weight behind the case.

Three years later, the Supreme Court agreed with the petitioners. The court affirmed the value of free speech and expression and held that Section 66A made no distinction 'between mere discussion or advocacy of a particular point of view, which may be annoying or inconvenient or grossly offensive to some, and incitement by which such words lead to an imminent causal connection with public disorder, security of State, etc'. Section 66A was too vague, the court said, and could therefore work as a form of censorship by producing a chilling effect that discouraged expressions of dissent. It struck down the provision, in a decision that was perceived as a triumph of free speech lawyering and activism.

The second case I would like to highlight is that of Max Schrems, who took on Facebook after whistle-blower Edward Snowden revealed that the American secret services had direct access to personal information held by companies like Facebook, Microsoft, and Apple. Max Schrems, then still a law student in Austria, had already been investigating the way Facebook handled the information of its users. After a conversation with a lawyer from Facebook, he filed a request to access his information on the platform. In response, he received a CD-ROM with 1.222 pages of information, including data he had deleted online, and data from friends of his own Facebook friends – people he did not know at all.

Schrems filed a complaint with the Data Protection Authority in Ireland, where Facebook has its registered European office. He argued that, by transferring personal data to the US, Facebook was playing the role of purveyor of personal data to the NSA, the National Security Agency.

Facebook was allowed to send data to the US under the so-called Safe Harbour Agreement. Based on European privacy legislation at the time, companies could only send personal data to countries outside of the EU when those countries could provide an equal level of protection to EU standards. The US, to which a lot of data is sent, but where the legal protection of privacy across different states is far from universal, did not offer sufficient safeguards. To still enable the export of data, the European Commission and the US concluded the Safe Harbour Agreement in 1998. American companies who joined the *Safe Harbour Framework* would then be deemed safe enough for data-export.

Schrems' complaint was referred to the Court of Justice of the European Union, which in October 2015 declared Safe Harbour invalid, meaning that for any further data export to the US, a new framework had to be developed.

Both cases show that, because a student got upset and went to court, *all* citizens in the jurisdiction of that court got a chance for better protection of their digital rights. Cases like that of Shreya Singhal and Max Schrems are part of a long tradition of going to court, not only to protect human rights but also to promote them. These are not just regular court cases, but strategic litigation, in which the goal pursued transcends that of the individual case.

Many strategic cases from the US appeal to our imagination, like *Brown v. Board of Education*, a decision that enabled the desegregation of schools. Or *Obergefell v. Hodges*, which finally legalised gay marriage in 2015. But there is a rich history of social lawyering here in Europe as

well, which resulted in many victories, including on the right to hold demonstrations, or the right to freedom of speech. Some cases were big and dramatic, and resulted in huge leaps forward in a short timespan; others were years or even decades in the making and part of a carefully planned strategy. What all these cases have in common is that they allowed courts to protect human rights where legislation and policy did not suffice.

For courts to exercise this role, they need to be given the opportunity: they have to have cases brought before them. Cases can end up before courts by chance or with an intended purpose or a specific aim. Which begs the question: what makes a court case strategic?

A first characteristic is that the case is aimed at bringing about change. This can look at many different things: a change in the law, change in the application and implementation of the law, or change in the wider policies around a specific issue.

A second characteristic is that the impact of the case is intended to go beyond the individual or group acting as claimants or: those bringing the case. The case is not just litigated to get results for those who brought the case, but for a broader group. In Singhal's case, the decision had a direct impact for everyone in India; in Schrems' case, the CJEU's decision affected the entire European Union.

A third characteristic is that the case is part of a wider strategy or movement. This last element is crucial: litigation that is *strategic* is more than a court case alone — it is one of the many tools in the toolbox being used for creating the society we want and should be employed in tandem with other efforts such as advocacy, lobbying and campaigning.

Singhal's and Schrems' cases were cases that set safeguards for our rights. Strategic litigation can also be a helpful tool for working to achieve a variety of other goals, including:

- Changing law or policy, as we have seen in the recent SyRI case in the Netherlands, where the courts ruled a risk-scoring algorithm used by Dutch authorities to identify those likely to commit welfare fraud to be a violation of the right to privacy as protected under the European Convention on Human Rights.
- Changing practice, as we saw in a case in the US that was brought by a number of teachers from Houston against the use of a statistical model to assess a teacher's performance. The system resulted in the firing of 221 teachers in one year. The case was settled before it could go to full trial, but as part of that settlement the Houston Independent Schools District agreed to cease the use of the model to make personnel decisions.
- Truth telling and transparency: here I can point to some exciting litigation that has sought to get access to information on algorithms used by government institutions, including algorithms used to assign judges to cases and to conduct welfare needs assessments.
- Raising public awareness about problematic issues within our society, as the challenge brought by the NGO Liberty in the United Kingdom has done about the police use of facial recognition, a case they recently won on appeal. The issue of facial recognition has come sharply into focus recently, in the wake of the Black Lives Matter protests we will come back to that in a moment.

All of these objectives are applicable in our current context, where automated decision-making is just one of the many new frontiers we and our legislators need to keep up with. The courts need to keep up with all these new technological developments as well, and, as the guarantors of our rights, we need to take them with us in this changing landscape and give them the opportunity to engage with these issues. An often-heard response to new technological developments is to adopt new legislation, but we do not always need that to make sure our society remains a just one. We first need to properly investigate what frameworks and tools we already have in place and consider how we can make optimal use of them. Litigation, when properly framed and conducted, can help the courts fill gaps the legislature is unable to address at short notice and also point the way to there were additional or improved regulation would be most helpful and effective.

COVID-19 and digital rights

One situation that has been challenging for governments across the world to deal with is the COVID-19 pandemic. Faced with an unprecedented situation, relying on seductive 'quick fixes' in the form of technology — tracing apps, symptom checking apps, digital immunity passports, to name but a few — has proven to be too hard to resist for many governments. The narrative of technologitation invitability was quick to take hold, eagerly supported by big tech.

Tensions between protecting public health and upholding people's basic rights and liberties have risen in the context of the pandemic. While it is of course necessary to put in place safeguards to slow the spread of the virus and protect those at risk, it is absolutely vital that these measures are balanced and proportionate. Unfortunately, this is not always proving to be the case. The pandemic has triggered a myriad of human rights violations, with Amnesty International commenting earlier this year that human rights restrictions are spreading almost as quickly as the coronavirus itself.

The fast-paced nature of the pandemic response has empowered governments to rush through new policies and introduce new technologies with little to no legal oversight. Some of the human rights-violating measures that have been adopted to date have been taken outside the framework of proper derogations from applicable human rights instruments, adherence to which would ensure that emergency measures are temporary, limited, and supervised. We have seen legislation being adopted by decree, without clear time limitations, and technology being deployed in a context where clear rules and regulations are absent. For example, 'biosurveillance' – which involves the tracking of people's movements, communications, and health data — has taken off across the globe, resulting in the materialisation of a panopticon world on a scale we have not seen before. We are also seeing an increased deployment of Artificial Intelligence, which can have negative con sequences for human rights at the best of times, but now is regularly being adopted with minimal oversight and regulation.

These developments are of great concern for two main reasons. First, this type of 'legislating through the back door' of measures that are not necessarily temporary avoids going through a proper democratic process of oversight and checks and balances, resulting in *de facto* authoritarian rule. Second, if left unchecked and unchallenged, what is happening now could set a highly dangerous precedent for the future. This is the first pandemic we are experiencing at this scale – we are currently writing the playbook for global crises to come. If it becomes clear that governments can use a global health emergency to instate human rights infringing measures without being challenged or without having to reverse these measures, making them permanent instead of temporary, we will essentially be handing over a blank cheque to authoritarian regimes to wait until the next pandemic to impose whatever measures they want.

In tandem with advocacy and policy efforts, here, too, we will need strategic litigation to challenge the most egregious COVID-19 measures through the court system. Going through the legislature alone will be too slow and, with public gatherings banned or limited in many places, public demonstrations will not be possible at scale. For this reason, the Digital Freedom Fund created the COVID-19 Litigation Fund earlier this year, to support litigators wanting to push back at digital rights infringements right away. So far, we have supported a multi-country effort to protect our data protection and privacy rights against invasive 'Covid-apps', a challenge to the use of thermal scanners across areas such as employment, travel and education, allegedly to detect infection and without proper human rights safeguards, and an effort to provide women access to reproductive health information online in a time where in-person doctor's visits are increasingly difficult.

Safeguarding the digital rights for everyone

Some have referred to COVID-19 as 'the great equaliser'. Ignorant statements such as these have generally come from celebrities, such as Madonna — who made this statement in a video on Instagram whilst seated in a bathtub sprinkled with rose petals. The privilege of these celebrities would generally shield them from the harshest impacts of the pandemic, other than perhaps having had to stay home (though having a 'back yard' that is big enough to play baseball in, like Jennifer Lopez' family apparently did, will certainly have helped).

Referring to the pandemic as an equalising factor within society, completely disregards what all research is showing, namely that the pandemic is having a disproportionately negative impact on racialised groups, marginalised communities, and women.

Imagine this scenario. Your government is rolling out a contract tracing app to help citizens protect themselves by notifying them of exposure risks. In order for those apps to work, researchers at Oxford tell us, more than half of the population should be using the app. What if the app requires you to have a phone that is relatively new to function properly? What if you do not have a recent phone and cannot afford a new one? What if you do not have a smartphone that is yours alone, or none at all? What if you do, but can only access internet if you are able to connect to free wifi?

Similar questions could be asked about remote learning. Great: your school is offering classes online now. What if you do not have adequate internet at home? Or no internet at all and need to go to a public space – with all the risks that entails — to attend class? What if you do not have a device of your own to participate and the choice is between you following a class, your siblings following theirs, or a parent being able to work remotely? What if the only way to engage in class is by using the interface big tech 'donated' to your school, and which is harvesting your personal data? Rather than being an equaliser, the pandemic underlines how technology replicates and reinforces societal power structures and positions of wealth and privilege.

This is nothing new: we have seen plenty of examples of this from before COVID-19 hit. One well-known example is the way Google search engine results reinforce racism. Professor Safiya Noble has written extensively about the way Google image searches for terms like 'woman' or 'girl' produced images that were for the most part thin, able-bodied, and white. Here, as a preview to what we will talk about in a moment when we look at the cause of these problems, it is good to keep in mind that in 2018, the year Noble's book 'Algorithms of Oppression' was published, Google had a workforce that included only 1.2 percent women.

Another example is how CAPTCHAs – short for 'completely automated public Turing test to tell computers and humans apart' – the tests you get on websites after ticking the 'I am not a robot' box, are making the internet increasingly inaccessible for disabled users. Artificial Intelligence learns from the way internet users solve these tests, which often have you select all images with traffic lights and storefronts, or make you type out a nonsensical set of warped letters. As the AI gets more sophisticated, the CAPTCHAs need to stay ahead of clever bots that can read text as well as humans can, which brings a huge disadvantage to those without perfect sight or hearing and who

rely on exactly that type of technology to make the internet accessible to them, for example by using software that converts text into audio.

The list goes on: hiring software that favours white, male candidates; Google job ads showing ads for high-paying jobs predominantly to male user profiles; facial recognition technology that is unable to recognise non-white, non-male faces; Apple's credit card offering lower credit rates to women; software that is only able to classify gender in a binary way... and the list continues.

What causes us to have this problem in the first place?

First, there is a common and incorrect assumption that technology is neutral. The apps, algorithms, and services we design ingrain choices made by their creators. It replicates their preferences, their perceptions of what the 'average user' is like, what they want or *should* want to do with the technology. Design choices are based on the designer's world view and therefore also mirrors it. When those designers are predominantly male, privileged, able-bodied, cis-gender, and white, and their views and opinions are being encoded, this poses serious problems for the rest of us.

This relates to the second cause, which is that Silicon Valley has a notorious "brogrammer" problem. When you look at any graph reflecting the makeup of Silicon Valley, where most of our technology here in Europe comes from — and this is a problem in and of itself, as technology developed from a white, Western perspective is deployed around the world – this is easily visible. For professions such as analysts, designers, and engineers the numbers for Asian, Latina, and Black women decrease as role seniority increases. Often to the point that they literally become invisible on the graph because their numbers are so small.

Analysis of 177 Silicon Valley companies by investigative journalism website Reveal showed that ten large technology companies in Silicon Valley did not employ a single Black woman in 2018, three had no Black employees at all, and six did not have a single female executive. This should make it less surprising that, for example facial recognition software built by these companies is predominantly good at recognising white, male faces.

However, a predominantly male, white — and able-bodied — workforce is not the only thing that factors into technological discrimination.

A third cause is that technology is built and trained on data that can already reflect systemic bias or discrimination. If you then use those data to develop and train new software, it is not surprising that this software will be geared towards replicating those historical data. Technology based on data from a racist, sexist, classist, and ableist system, will provide outcomes that reflect that racism, sexism, classism, and ableism. Unless a conscious effort is made to get the system to make different choices, systems built on such data will replicate the historical preferences it has been fed.

Finally, we do not work consistently with interdisciplinary design teams. Engineers will build technology to certain specifications, and those will have systemic biases baked into them; you can have all the non-male, non-white, non-ableist engineers you can think of, but it will not be up to them (alone) to solve the systemic problems. It is unhelpful to focus on the systems alone as it negates the political and societal systems in which it is developed and operates. An interdisciplinary approach in developing technology systems is therefore crucial. There is a role for social scientists and others — including human rights lawyers – at crucial stages of the design and decision-making process: developing suitable technology is not just a task for engineers and programmers.

We obviously have a large-scale problem on our hands and one that should be urgently addressed, as we are seeing our reliance on technology grow by the day. There are, however, a number of things we can do, both in the shorter and longer term.

- Push for moratoriums on new technologies until we understand their social impact, particularly on human rights. The call for a ban on the use of facial recognition technology has gained more traction following the Black Lives Matter protests, with several tech giants putting a hold on (part of) their products in this area. This should be a guiding principle: unless we know and understand in full what the human rights impact of new technology is, it should not be developed or used.
- We also need to have the debate on where to draw the so-called 'red lines' on where AI or other technologies should not be used at all. This conversation needs to be people-centred; the individuals and communities whose rights are most likely to be violated by technology are those whose perspectives are most needed to make sure the red lines around the use of technology are drawn in the right places.
- When we analyse the impact of new technologies, this needs to be done from an intersectional perspective, accounting for the different human rights harms that individuals can experience simultaneously due to different aspects of their identity. Companies and governments need to be held accountable for these violations. They also need to work closely and consistently with affected groups and individuals to understand the full extent of the impact of new technologies to prevent violations from occurring in the first place.
- We need to push for enforcement and compliance with existing legislation protecting human rights. Calls for new regulation conveniently forget that we actually have existing international and national frameworks that set clear standards on how our human rights should be respected, protected, and fulfilled. This is also a healthy antidote to the fuzzy 'ethics' debate companies would like us to have instead of focusing on how their practices can be made to adhere to human rights standards.
- Finally, we need to not only decolonise the tech industry: we also need to decolonise the digital rights field. The individuals and institutions working to protect our human rights in the digital context right now clearly do not reflect the composition of our societies. This leaves us with a watchdog that has too many blind spots to properly serve its function for *all* the communities it is supposed to look out for.

To address this last point, when I say that we need to work on a decolonising process, I mean that we need more than what is often referred to as 'diversity and inclusion'. To make the change that needs to happen, we should not focus on token representation, which essentially treats the current status of the digital rights field as a pipeline problem, but we need to change the ecosystem on a structural level. We need to change its systems and its power structures. This is something that is fundamentally different from 'including' those with disabilities, from racialised groups, the LGBTQI+ community, and other marginalised groups in the existing, flawed ecosystem.

At the Digital Freedom Fund, we are therefore working on a process to decolonise the digital rights field instead, together with European Digital Rights (also known as EDRi). We of course do not expect to succeed in this effort alone, our drive and energy for this work notwithstanding; especially since digital rights cover the scope of all human rights and therefore permeate all aspects of society, the field does not exist in isolation. We can therefore also not solve any of these issues in isolation either — there are many moving parts, many of which will be beyond our reach to tackle. But: we need to start somewhere, and we need to do so with urgency as we need a proper watchdog to fight for all of our rights now more than ever before.

Much has changed since we first started talking about the need to decolonise digital rights two years ago. The recent international Black Lives Matter protests have done a lot to boost awareness

about systemic racism. This is on the one hand encouraging and on the other hand the threat of 'decoloniality' becoming yet another buzzword that people like to use but not practice looms large. The irony of our work now being of interest to many — the media, policymakers, funders — now that is has been validated because the 'white gaze' became captivated by racial justice protests amidst the boredom of a global lockdown is also not lost on me. That being said, the current mood does illustrate how necessary this work is, not only in the digital rights space, but everywhere in our society. And the more of these processes we can set in motion, the better a world we will be creating for all of us.

These are not easy times. The challenges are manifold, and it is at times difficult to balance the conflicting interests we are faced with. But: if we continue putting human rights front and centre in facing these challenges, we have a compass to navigate ourselves towards a future that is fair, safe and equitable for all of us.