

Mandates of the Working Group on discrimination against women and girls; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right to privacy; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and the Special Rapporteur on violence against women and girls, its causes and consequences

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16 May 2024

Excellency,

We have the honour to address you in our capacities as Working Group on discrimination against women and girls; Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the right to privacy; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and Special Rapporteur on violence against women and girls, its causes and consequences, pursuant to Human Rights Council resolutions 50/18, 53/3, 50/17, 46/16, 50/10 and 50/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the recently introduced S. 3696, the "Disrupt Explicit Forged Images and Non-Consensual Edits Act of 2024" or the "DEFIANCE Act of 2024". While we commend the introduction of legislation addressing the grave potential of digital forgeries as a tool of online gender-based discrimination and violence against women and girls, we note that **the DEFIANCE Act of 2024, if adopted without amendment, may fall short of international human rights norms and standards, due to the lack of preventative measures.**

The DEFIANCE Act of 2024, introduced in the Senate of the United States Congress on 30 January 2024, and referred to the Senate Committee on the Judiciary, seeks "to improve rights to relief for individuals affected by non-consensual activities involving intimate digital forgeries, and for other purposes."

The DEFIANCE Act of 2024 amends section 1309(a) of the Consolidated Appropriations Act, 2022 (15 U.S.C. 6851(a)), including by inserting the following:

"(3) DIGITAL FORGERY —The term 'digital forgery' means any intimate visual depiction of an identifiable individual created through the use of software, machine learning, artificial intelligence, or any other computer-generated or technological means, including by adapting, modifying, manipulating, or altering an authentic visual depiction, to appear to a reasonable person to be indistinguishable from an authentic visual depiction of the individual, regardless of whether the visual depiction indicates, through a label or some other form of information published with the visual depiction, that the visual depiction is not authentic."

In general, the DEFIANCE Act of 2024 amends section 1309(b) of the Consolidated Appropriations Act, 2022 (15 U.S.C. 6851(b)), including by inserting the following:

- “(i) an identifiable individual whose intimate visual depiction is disclosed, in or affecting interstate or foreign commerce or using any means or facility of interstate or foreign commerce, without the consent of the identifiable individual, where such disclosure was made by a person who knows or recklessly disregards that the identifiable individual has not consented to such disclosure, may bring a civil action against that person in an appropriate district court of the United States for relief as set forth in paragraph (3);
- (ii) an identifiable individual who is the subject of a digital forgery may bring a civil action in an appropriate district court of the United States for relief as set forth in paragraph (3) against any person that knowingly produced or possessed the digital forgery with intent to disclose it, or knowingly disclosed or solicited the digital forgery, if—
 - (I) the identifiable individual did not consent to such production, disclosure, solicitation, or possession;
 - (II) the person knew or recklessly disregarded that the identifiable individual did not consent to such production, disclosure, solicitation, or possession; and
 - (III) such production, disclosure, solicitation, or possession is in or affects interstate or foreign commerce or uses any means or facility of interstate or foreign commerce; and
- (iii) an identifiable individual who is the subject of a digital forgery may bring a civil action in an appropriate district court of the United States for relief as set forth in paragraph (3) against any person that knowingly produced the digital forgery if—
 - (I) the identifiable individual did not consent to such production;
 - (II) the person knew or recklessly disregarded that the identifiable individual did not consent to such production; and
 - (III) such production is in or affects interstate or foreign commerce or uses any means or facility of interstate or foreign commerce.”

In terms of relief, the DEFIANCE Act of 2024 inserts the following:

- “(3) RELIEF.—In a civil action filed under this section—
 - (A) an identifiable individual may recover the actual damages sustained by the individual or liquidated damages in the amount of \$150,000, and the cost of the action, including reasonable attorney’s fees and other litigation costs reasonably incurred; and

- (B) the court may, in addition to any other relief available at law, order equitable relief, including a temporary restraining order, a preliminary injunction, or a permanent injunction ordering the defendant to cease display or disclosure of the intimate visual depiction or digital forgery.”

In terms of statute of limitations, the DEFIANCE Act of 2024 adds the following:

“(6) STATUTE OF LIMITATIONS.—Any action commenced under this section shall be barred unless the complaint is filed not later than 10 years from the later of—

- (A) the date on which the identifiable individual reasonably discovers the violation that forms the basis for the claim; or

- (B) the date on which the identifiable individual reaches 18 years of age.”

While the DEFIANCE Act of 2024 represents an important step in addressing the grave potential of digital forgeries as a tool of online gender-based discrimination and violence against women and girls, we note that it focuses solely on ex-post remedies, without mentioning preventative measures. Due to the lack of preventative measures, the DEFIANCE Act of 2024, if adopted without amendment, may fall short of international human rights norms and standards.

International human rights norms and standards

We wish to refer your Excellency’s Government to its obligations under the International Covenant on Civil and Political Rights (ICCPR), ratified by your Excellency’s Government on 8 June 1992. Article 2 requires State Parties to take necessary steps to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant. Article 7 prohibits cruel, inhuman, or degrading treatment. Article 17 of the ICCPR guarantees that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation. It further states that everyone has the right to the protection of the law against such interference or attacks.

Of relevance to this case is also the United Nations Declaration on the Elimination of Violence against Women. Article 4 (c & d) of this instrument notes the responsibility of States to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons. To this end, States should develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women and girls who are subjected to violence. Women and girls who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered. States should, moreover, also inform victims of their rights in seeking redress through such mechanisms.

In this context, we wish to recall that the Committee on the Elimination of Discrimination against Women (CEDAW) in its general recommendations No. 19 (1992) and No. 35 (2017), defines gender-based violence against women as impairing or nullifying the enjoyment by women of human rights and fundamental freedoms, and constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All forms of Discrimination Against Women, whether perpetrated by a State official or a private citizen, in public or private life. Thus, the Committee considers that States parties are under an obligation to act with due diligence to investigate all crimes, including that of sexual violence perpetrated against women and girls, to punish perpetrators and to provide adequate compensation without delay. In General Recommendation No. 19, the Committee sets out specific punitive, rehabilitative, preventive and protective measures States should introduce to fulfil this obligation; in paragraph 9, it makes clear that “under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.

Moreover, as stated in the report on the due diligence standard as a tool for the elimination of violence against women (E/CN.4/2006/61) of the former Special Rapporteur on violence against women, its causes and consequences, both customary and conventional international law establish that States have due diligence obligations for preventing, responding to, protecting against and providing remedies for acts of violence against women whether such acts are committed by State or non-State actors. The State cannot delegate its obligation to exercise due diligence, even in situations where certain functions are being performed by another State or by a non-State actor. It is the territorial State as well as any other States exercising jurisdiction or effective control in the territory that remain, in the end, ultimately responsible for ensuring that obligations of due diligence are met. Related to this point is the notion that due diligence may imply extraterritorial obligations for States that are exercising jurisdiction and effective control abroad. Another fundamental principle connected to the application of the due diligence standard is that of non-discrimination, which implies that States are required to use the same level of commitment in relation to prevention, investigation, punishment and provision of remedies for violence against women as they do with regards to the other forms of violence. Moreover, in exercising due diligence to effectively implement human rights law - in order to prevent, protect, prosecute and provide compensation with regard to violence against women - States and other relevant actors must use multiple approaches in intervening at different levels: the individual, community, State and the transnational arena.

We also wish to turn your Excellency’s Government’s attention to the report on online violence against women and girls from a human rights perspective (A/HR/38/47) of the Special Rapporteur on violence against women, its causes and consequences, which stated that in many States, the non-consensual online dissemination of intimate or sexually explicit images of an adult person, even if identifying information is included with the image, is not per se illegal. In States where such acts are not criminalized, prosecutors are limited to charging perpetrators with other crimes, such as stalking, harassment, unlawful surveillance or the dissemination of child sexual abuse material. Without criminalization, victims cannot protect their human rights to privacy and dignity. Even where criminal laws specifically criminalize the non-consensual distribution of sexually explicit images, many such laws have shortcomings;

for example, many criminal laws require evidence of the intent to cause harm or emotional distress to the victim, which may be difficult to prove, making convictions harder to achieve. Moreover, many laws currently in place do not address threats to release a certain image or video. In the same report, she recommended States Parties to promote digital literacy in the use of the Internet and ICT for all, without sex- or gender-based discrimination, and promote gender equality at all levels of education, including online education, from early childhood onwards. She further recommended that States should inform girls about the risks of taking, or allowing others to take, intimate images, and that the dissemination of such images is a form of gender-based violence and a crime. Girls should also learn about safety on social media platforms and the Internet, and how to protect their own privacy online.

We also bring to your attention the former Special Rapporteur on privacy's recommendations (A/HRC/43/52, para. 44) that States should:

- (a) Recognize online-facilitated violence targeted by gender as a human rights violation and form of discrimination and take measures to apply international human rights instruments, in conjunction with national laws, to prevent and mitigate its occurrence;
- (b) Review, strengthen and devise policies and legal and regulatory privacy and data protection frameworks to address gender-based violence in online contexts, in particular technologically interconnected violence;
- (c) Reform criminal and civil laws to address technologically facilitated violence and establish criminal and civil causes of action to allow victims to pursue remedies with adequate protection of their privacy to avoid secondary victimization and to provide them with greater control;
- (d) Allow victims to obtain orders of protection (e.g., restraining orders) in family or civil courts to prevent abusers from posting or sharing intimate images and footage without their consent or engaging in other unlawful harassment.

In addition, the Working Group on discrimination against women and girls in its report on public and political life (A/HRC/23/50), has stated that the Internet has become a site of diverse forms of violence against women, in the form of pornography, sexist games and breaches of privacy. The Working Group has recommended States to ensure gender-responsiveness in the promotion and protection of human rights on the Internet.

Moreover, the Working Group on discrimination against women and girls' report on Girls' and young women's activism (A/HRC/50/25) stated that digital gender-based violence and harassment add a further layer of challenges to girls' and young women's activism, especially for girls and young women engaging on themes related to gender equality, particularly sexual and reproductive rights, equality in marriage and lesbian, gay, bisexual, transgender, intersex and queer+ issues. Digital technologies may be used to blackmail, control, surveil, coerce, harass, humiliate or objectify girl and young women activists, including by resorting to "deep-fake" pornographic content and death threats. As a result, many victims of these practices limit their online

activities, leading to self-censorship, endure stigma in their families and communities, or flee online spaces altogether. Attacks against girl and young women activists are often orchestrated with the aim of discrediting and delegitimizing them and exposing them to ridicule, contempt or defamation. In some cases, their families may prohibit them from continuing their activism because of the reputational damage that may follow. In certain countries, their very presence on social media may constitute a great risk to girls' and young women's personal integrity. Large-scale data collection and algorithm-driven analysis targeting sensitive information creates new threats for girl and young women activists, particularly those from lesbian, gay, bisexual, transgender, intersex and queer+ communities. The Working Group on discrimination against women and girls recommended States, private companies and all stakeholders concerned should take appropriate measures to ensure online access and safety, including by taking measures to foster a safe online environment for girls and young women, in particular by creating effective regulatory frameworks, including for content moderation and reporting mechanisms, sanctioning perpetrators and providing reliable information to address online gender- and age-related discrimination and violence.

Furthermore, we would like to draw your attention to the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, and are relevant to the impact of business activities, including social media companies, on human rights. These Guiding Principles are grounded in recognition of:

- a) “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b) The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

According to the Guiding Principles, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. States are required to take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (guiding principle 1). This requires States to “state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities” (guiding principle 2). In addition, States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights [...]” (guiding principle 3). The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities occur.

Principles 17-21 lays down the four-step human rights due diligence process that all business enterprises should take to identify, prevent, mitigate and account for how they address their adverse human rights impacts. Principle 22 further provides that when “business enterprises identify that they have caused or contributed to adverse

impacts, they should provide for or cooperate in their remediation through legitimate processes”.

States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

We further wish to highlight the Working Group on business and human rights’ report on the Gender dimensions of the Guiding Principles on Business and Human Rights (A/HRC/41/43), which underlines the differentiated and disproportionate impact of business activities on women and girls, develops a gender framework for the Guiding Principles on Business and Human Rights and proposes gender guidance specific to each of the Guiding Principles, including on human rights due diligence to identify, prevent, mitigate and assess potential or actual human rights impacts.

We also wish to turn your Excellency’s Government’s attention to the report on gender justice and freedom of opinion and expression (A/76/258) of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, which stressed that online gender-based violence includes both harmful speech and behaviour. It is often sexist or misogynistic in nature and contains digital threats or incitement to physical or sexual violence. “Sextortion”, doxing, trolling, online bullying and harassment, online stalking, online sexual harassment and the non-consensual sharing of intimate images have been identified as digitalized forms of violence against women by the Special Rapporteur on violence against women, its causes and consequences. Such acts can also involve smear campaigns, electronic sabotage, impersonation of the victim online and the sending of abusive messages in the victim’s name. Moreover, the harm caused by online violence, sexist hate speech and disinformation are real and diverse, affecting the mental and physical health of those targeted, undermining their confidence and autonomy, stigmatizing them and generating fear, shame, and professional and reputational damage. In extreme cases, online threats can escalate to physical violence and even murder. The overall objective is to intimidate and silence female and non-binary journalists, writers, artists and politicians and drive them out of digital spaces. Since online networks are the dominant space for freedom of expression in the digital age, silencing such voices online may prevent them from being heard at all, reducing diversity and affecting democratic debate. The Special Rapporteur recommended that social media platforms should be guided by international human rights standards in their content moderation. We would like to further draw your attention to the report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/41/41) that stressed the need to investigate online trolling and intimidation targeted at civil society actors, provide effective remedies, adopt and implement preventive measures, with a focus on identifying and addressing gender-specific forms of online violence and barriers that prevent women from accessing justice.

Furthermore, in line with the United Nations Guiding Principles on Business and Human Rights, as a matter of due diligence companies should carry out regular human rights and gender impact assessments to identify and mitigate systemic risks affecting women and gender nonconforming people. Policies on safety from online violence

should be developed and made available, with full transparency in relation to algorithms, practices and decision-making processes, in an accessible, non-technical jargon in local languages. Companies should improve both their transparency, making it more meaningful, and their remedies, along the lines discussed earlier in the report. In addition, in the interest of greater accountability, they should explore an external appeals system, e.g. independent social media councils. Companies should ensure data security and privacy, and ensure that the use of data is in compliance with international human rights law and relevant national laws, and has the full informed consent of data providers.

Finally, the Working Group on discrimination against women and girls' report on Gendered inequalities of poverty: feminist and human rights-based approaches (A/HRC/53/39) recommended that corporations, and the States and international and regional organizations exercising jurisdiction and control over them, should contribute to the realization of the rights of all women and girls, implement due diligence processes, in compliance with the Guiding Principles on Business and Human Rights, and ensure that grievance mechanisms and remedies for business-related abuses are accessible, effective and gender-transformative.

Conclusion

While the DEFIANCE Act of 2024 represents an important step in combating digital forgeries, and online gender-based discrimination and violence against women and girls more broadly, if adopted without amendment, it may fall short of international human rights norms and standards, due to the lack of preventative measures. Taking into consideration the above-mentioned international human rights standards, we would like to urge your Excellency's Government to incorporate preventative provisions to stem the proliferation of digital forgeries in the proposed DEFIANCE Act of 2024, in accordance with its obligations under the International Covenant on Civil and Political Rights. Such preventative measures should include the creation of effective regulatory frameworks to facilitate safe and inclusive online platforms for girls' and young women, including for content moderation and reporting mechanisms, sanctioning perpetrators and providing reliable information to address online gender-related discrimination and violence, as well as ensuring social media companies' implementation of due diligence processes, grievance mechanisms and remedies for business-related human rights abuses, in line with the UN Guiding Principles on Business and Human Rights. We hope that the executive and legislative authorities will seize this reform process to ensure that domestic law is brought in line with such obligations and that it will not lead to potential retrogressions. We remain at your disposal to provide any technical assistance to the authorities upon request.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the current status of the DEFIANCE Act of 2024 and any plans to amend it to include preventative measures, in compliance with international human rights law.

2. Please provide information on any other measures that your Excellency's Government has taken or intends to take in order to combat digital forgeries as well as all forms of online gender-based discrimination and violence against women and girls, to facilitate safe and inclusive online platforms for girls' and young women.
3. Please provide information on any measures that your Excellency's Government has taken or intends to take to ensure social media companies' implementation of human rights due diligence processes, grievance mechanisms and remedies for business-related human rights abuses, including any gender impact assessments to identify and mitigate risks affecting women and girls, in line with the UN Guiding Principles on Business and Human Rights and the Working Group on business and human rights' guidance on the gender dimension of the UN Guiding Principles (A/HRC/41/43).
4. Please provide information on any measures that your Excellency's Government has taken or intends to take to ensure the alignment of the DEFIANCE Act of 2024 with its commitments under the National Action Plan on Responsible Business Conduct, adopted in 2024, especially as they relate to expectations for businesses on human rights due diligence and the technology sector. In particular, please indicate how the lack of preventative measures in the DEFIANCE Act of 2024 align with the Department of State's commitment under the National Action Plan that "in its implementation of the U.S. Strategy to **Prevent** and Respond to Gender-Based Violence Globally, will engage with the private sector to identify solutions to technology-facilitated gender-based violence [...] on three strategic objectives: advance national, regional, and multilateral policies; scale programming and resources; strengthen the evidence base for **preventing** and responding to technology-facilitated gender-based violence" (emphasis added).

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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