In her report on 'racial discrimination and emerging digital technologies', E. Tendayi Achiume, the UN's Special Rapporteur on racial discrimination, observed that emerging digital technologies 'exacerbate and compound' existing inequities based upon race, ethnicity, and national origin'.[1]

While the adverse human rights impacts of the public and commercial reliance of algorithmic decision-making are extensively discussed, one of the most profound challenges pertains to our *ability to detect* possible cases of discrimination.

The issue of non-detection is not only because of the difficulties for affected groups to gain access to data and codes, or because of limitations to the technical explainability of algorithmic decision-making.[2] It is also due to the 'contextuality' of non-discrimination

law itself, as Wachter et al. have argued.[3] The application of the principle of non-discrimination partly relies upon judges and other assessors' case-by-case and intuitive assessment. Such an assessment is not workable, however, in detecting discrimination arising from artificial intelligence systems.[4]

To remedy non-detected injustice, we must thus learn to employ different testing methods, such as statistics-based bias tests, as part of the process of safeguarding the principle of non- discrimination.[5] Various impact assessment tools have also been developed, including, for instance, the Fundamental Rights and Algorithms Impact Assessment (FRAIA) endorsed by the Dutch parliament.[6]

To detect the true extent of discrimination and other human rights

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[1] UN Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 'Racial Discrimination and Emerging Digital Technologies: A Human Rights Analysis', UN Doc. A/HRC/44/57 (18 June 2020), para 4.
[2] Ibid., para 44.

[3] S. Wachter, B. Mittelstadt and C. Russell, 'Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI' (2021) 41 *Computer Law & Security Review* 105567.
[4] Ibid., at 4.
[5] E.g., ibid., at 24-27.
[6] J. Gerards et al., 'Fundamental Rights and Algorithms Impact Assessment (FRAIA)' (2022), https://www.government.nl/documents/reports/2021/07/31/impact-assessment-fundamental-rights-and-algorithms.

violations is the first step in further maturing conversations about the present and future of human rights protection in the digital age.

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**June 30th, 2023**