COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

COMMITTEE ON ARTIFICIAL INTELLIGENCE (CAI)

**COMPILATION OF COMMENTS ON THE
ZERO DRAFT [FRAMEWORK] CONVENTION
ON ARTIFICIAL INTELLIGENCE, HUMAN RIGHTS,
DEMOCRACY AND THE RULE OF LAW**

Document prepared by the Secretariat

www.coe.int/ai

MEMBER STATES

Andorra

Preamble

Conscious of the fact that human rights, democracy and the rule of law are inherently interwoven and convinced of the need to establish, as a matter of priority, a common legal framework establishing fundamental principles and rules governing design, development, and application of artificial intelligence systems which would effectively preserve the shared common values and at the same time be conducive to innovation;

> **Commented [C1]:** We believe that this aim should include the necessary participation and collaboration in these values from different actors both private, public and society in general

Article 2 – Definitions

Paragraph b

b. "lifecycle" means all phases of existence of an artificial intelligence system between its design and decommissioning;

> **Commented [C2]:** Including its operation and maintenance processes

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds.

> **Commented [C3]:** We believe that is worth mentioning the discrimination related to the so-called "Digital Divide"

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 2

2. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability and solidarity and the need to protect the environment;

> **Commented [C4]:** And to reduce the impact on climate change and global warming

Paragraph 5

5. ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of design, development and application of artificial intelligence systems throughout their lifecycle and that appropriate redress mechanisms are available;

> **Commented [C5]:** And the need to set up a framework of denunciation and protection for those who disclose these harms (aka whistleblowers)

Paragraph 6

6. ensure that, where appropriate, adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

> **Commented [C6]:** This must consider the necessary protection of industrial patents and other mechanisms related to Intellectual Property

Paragraph 9

9. strive to ensure that fundamental questions raised by the design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ethical and legal implications;

> **Commented [C7]:** These implies the need to set up mechanisms of collaboration among parties to do so in order to enhance the so-called "Ethics by Design" spirit

Article 7 – Procedural safeguards

Paragraph 4

4. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where appropriate, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

> **Commented [C8]:** In here we should consider that, depending on a previous risk assessment, this possibility of using a AI system or a human interaction should be granted in equal condition

Article 11 – Risk and impact assessment

Paragraph 1

1. Without any prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

> **Commented [C9]:** This methodology shall be undertaken considering the different actors, both public, private, and society. We believe that to be truly effective should consider the reality of the industry and the ways on what the IA systems are designed, implemented, deployed, operated, maintained, and decommissioned

Azerbaijan

Preamble

Mindful also of the right to privacy and the protection of personal data, as conferred, for example, by the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and amending protocols;

> **Commented [C10]:** Considering that General Data Protection Regulation set forth the rules as regards the protection of natural persons with regard to the processing of personal data and rules rela ing to he free movement of personal data, besides, protects fundamental rights and freedoms of natural persons and in par icular their right to the protec ion of personal data, GDPR may also be added to this paragraph.

Article 2 – Definitions

Paragraph a

a. "artificial intelligence system" means a machine-based system that is capable of informing or autonomously generating outputs such as predictions, recommendations or decisions using

machine and/or human-based data and inputs and influencing the environment that it interacts with

Paragraph c

c. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed with a view to putting it into service/commissioning it;

Paragraph e

e. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by decisions made or substantially informed by the application of an artificial intelligence system

Article 6 - Additional requirements for design, development and application of artificial intelligence systems in the public sector

Chapeau

Bearing in mind the increased risks posed to human rights, democracy and the rule of law by the application of artificial intelligence systems or combinations of such systems in the public sector and the need to ensure proper accountability, responsibility and legal liability in relation to the application of such systems."

Paragraph 4

4. ensure that all relevant artificial intelligence users receive appropriate training in operating any artificial intelligence systems employed as well as the respective limitations of such systems.

Article 7 - Procedural safeguards

Parties shall ensure that, where appropriate, the usage of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised shall be governed by domestic law as prescribed in paragraph 5

Article 11 - Risk and impact assessment

Without any prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties

Commented [C11]: Article 3 (1) of he "Proposal for a Regulation of the European Parliament and of he Council Laying Down Harmonised Rules on Artificial Intelligence (ar ificial intelligence act) and Amending Certain Union Legislative Act also defines the «artificial intelligence system" concept. Would it be better to prescribe the same definition as in he EU AI Act 2021

Commented [C12]: According to paragraph c, provider develops artificial intelligence system. However, as stipulated in Article2 paragraph b *(attachment 2)*, the lifecycle of AI system starting from « design » phase and ends « decommissioning » phase, while the « development » and « application » are the middle phases.
Thus, in paragraph d, it would be better to add other phases of lifecycle.

Commented [C13]: Why "public authority or other body" are not included in this paragraph, while these definitions are stipulated in the paragraph "d" *(attachment 2)*?
Their (public authority or other body) rights may also be impacted by the use artificial intelligence system.

Commented [C14]: Why other phases of AI systems, such as design or development are not stated in this content, while both phases are referred to in the title of Article 6?

Commented [C15]: Why such trainings are not intended for artificial intelligence providers (Look Article 2, c *(attachment 2)* for the meaning of "artificial intelligence provider)?

Commented [C16]: As it is written in paragraph 5 of the Ar icle 7, applicable law regarding the « exercise of rights and including the grounds on which these rights may be exercised » will be domes ic law of the respective Parties. Therefore, it is not reasonable to include « governing law issue » in another parapgraph of Artcile 7

undertake to adopt a ==methodology== applicable to design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Commented [C17]: What will be the legal effect of the me hodology?
The legal effect of methodology might be in the form of a legally binding, such as drafted and adopted by a respective state body document as a binding law or a guideline prepared and issued as a soft law?

Article 12 - Measures in respect of artificial intelligence systems posing significant levels of risk

Parties shall, in accordance with their domestic law, provide for the imposition on artificial intelligence providers and users of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system, deemed in accordance with the methodology referred to in Article 11, paragraph 2, to present significant levels of risk of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law, aimed at mitigating that risk, as well as to document and keep the records of the respective process.

Commented [C18]: Either in writing or electronic copy?

Article 14 – Prohibited artificial intelligence practices

The following artificial intelligence practices shall be banned:

Commented [C19]: May be extended to he scope of EU AI act article 5.
In Article 5 (1), paragraph D *(Attachment 3)* of EU AI act, « the use of 'real-time' remote biometric iden ification systems in publicly accessible spaces for the purpose of law enforcement » is a banned prac ice, which is necessary to include such sort of clause into this Convention

Paragraph 1

1. the use of artificial intelligence systems by public authorities using biometrics to identify, categorize or infer emotions of individuals;

Commented [C20]: Recommended to replace wi h "by whom such use is executed" or "by whom it can be implemented".
Because ar ificial intelligence systems may be used by private sector

Article 17 - International co-operation

Paragraph 2

2. Parties shall, on a regular basis, exchange information between them concerning design, development and application of artificial intelligence systems which they assess as posing significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Commented [C21]: In what form and to what extent the exchange of information will be conducted?

Malta

At this moment, Malta has no additional comments to make with respect to the Zero Draft Convention. Having said that, Malta agrees and emphasises on the establishment of a 'national supervisory authority' in line with Article 18 in order for there to be a primary communication between the respective country and the legislative body. On the other hand, there are concerns with respect to Article 11 which requires a risk and impact assessment of AI systems in relation to human rights, democracy and rule of law which in our opinion would create a cumbersome procedure especially for start-ups. Moreover, Malta stresses

the need for there to be coherence amongst the draft legislative instruments which are being proposed by different legislative bodies with respect to AI. Lastly, Malta takes the opportunity to once again express its opinion that the legislative instruments being proposed go beyond regulating AI, into regulating particular activity, such as social scoring and high-risk operations. While we agree that such activity should be regulated, it is out of place in the regulation of technology. In addition, the proposed legislative instruments are too technology specific, in the sense that it is not the activity that is being banned or limited, but the use of AI in that activity.

Sweden

Preamble

We would like to ask for clarifications regarding the formulation on the balance between interests, specifically between "*various economic, security and other interests*" and the respect for human rights. One understanding could be that the interest and respect for human rights should be superior to other interests insofar as this instrument/framework is concerned.

Article 5 - Design, development and application of artificial intelligence systems

We appreciate that the Draft Explanatory Report specifically mentions the so-called "margin of appreciation" with regard to these matters.

Paragraph 2

We note that while section 19 in the Draft Explanatory Report (corresponding to article 5.1) includes a motivation for the inclusion of "research" in Article 5.1, such a motivation is missing with regard to the inclusion of "research" in Article 5 2. We also note that "research" is excluded in Article 5.3 and the rest of Article 5. Thus, we would like to ask for further elaborations on the choice to include research in Article 5.2 but not in 5.3 nor the remaining sub-articles of Article 5.

Paragraph 3

We welcome that the importance of the principle of equality and the risk of discrimination is explicitly mentioned and underlined in relation to implementation and use of AI, and especially what is stated in the Draft Explanatory Report in sections 21, 22, 24 and 25.

Article 11 - Risk and impact assessment

We would like to ask if any assessment or analysis has been done regarding the administrative burden brought on by the risk and impact assessment as specified in Article 11. The administrative burden is often a point of concern, especially in relation to innovation and technological development.

Article 12 - Measures in respect of artificial intelligence systems posing significant levels of risk

Paragraph 1

We would like to ask for the reasoning behind the formulation "to apply *all* necessary preventive and mitigating measures" compared to, for instance, "to apply *sufficient* preventive and mitigating measures" or similar.

Article 14 - Prohibited artificial intelligence practices

We would like to ask for the motivation behind why these specific systems/areas of application (Art 14.1 and Art 14.2) have been included. In the corresponding section in the Draft Explanatory Report (section 57), it is stated that this provision gives "a few examples of the systems which may require particular attention" which does not give the impression that the choice to include these specific systems is definite. If the actual systems to be included under prohibited practices are to be determined at a later stage, how will that process work?

Switzerland

General comments

- **Building on existing regulation:** The convention should build on existing international law, expanding and concretizing it only where necessary.

- **"Technology Neutrality":** Wherever possible, the convention should focus on regulating the potentially negative and undesirable effects of AI, and not the "technology" AI per se.

- **Distinction between government and private responsibility:** The convention should take into account the different responsibilities of public and private actors and, where appropriate, set specific requirements for government use of AI.

- **Strengthening human rights, democracy and the rule of law while being innovation-friendly:** The convention should be exemplary in terms of human rights, democracy and the rule of law and strengthen these. At the same time, the convention should also emphasize the opportunities of AI and be designed in such a way that it promotes innovation and does not "stifle" it.

- **Impact assessment:** The convention should not only focus on a prior ("ex-ante") risk assessment of the applications of AI, but also include impact assessment considerations.

- **Implementation mechanisms:** To guarantee the effectiveness of the convention, it should provide for implementation mechanisms. States should be given as much leeway as possible in designing national mechanisms.

- **Building on recognised methods:** Alignment of implementation mechanisms amongst Member States reflects the globalised nature of technology. The convention should invite Member States to make use of internationally recognised methods following recommendations from competent organisations, good practices, or international standards. Adherence to recognised methods should facilitate or promotes compliance with the requirements of the Convention.

- **Promoting digital self-determination:** The convention should promote digital self-determination by protecting data while at the same time enabling innovation. Coherence with Convention 108+ must be ensured.

- **Focus on democracy:** While the convention is much concerned with human rights and the rule of law, there seems less focus on the overall impact and systemic risks of AI on democracy and the wider society. This could be made more specific, e.g. in an own article.

- **Freedom of science:** As long as research is in accordance with human dignity, human rights and fundamental freedoms, no unnecessary requirements should be imposed on research and science so that they can reach their full potential for the benefit of society.

- **Inclusivity and transparency of the process & multistakeholder approach:** The CAI negotiation process should be inclusive and transparent and should involve all interested and relevant stakeholders. The draft of the convention should be made available for public consultation in due time.

- **Gender equality:** Gender equality is a priority for Switzerland. Switzerland is therefore committed to ensuring that the gender equality perspective is maintained and upheld throughout the Convention.

- **The lack of the Annex / Methodology for risk and impact assessment of artificial intelligence systems:** Switzerland considers this methodology to be a fundamental element of the convention. As long as the annex is still under development, it is difficult to conclusively define the positions on the overall convention, as there are many references to this methodology.

Preamble

Recognising the value of fostering cooperation between the ~~with the other~~ Parties to this Convention;

Conscious of the accelerating developments in science and technology and the profound changes brought about by the ~~application~~ use of artificial intelligence systems through the provision of new tools, which have the potential to promote human prosperity as well as individual and social well-being by enhancing progress and innovation;

Concerned by the risk that certain uses of some artificial intelligence systems also have the potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining democracy and violating the rule of law through such harmful practices and effects as, for instance, unrestricted mass surveillance, information distortion, the failure to respect the principle of non-discrimination ~~possible unlawful discrimination,~~ the general weakening of human agency, unlawful electoral interference and digital exclusion;

> **Commented [C22]:** *what is "digital exclusion", who is excluded from what and how can some artificial intelligence systems lead to "digital exclusion"?*

Conscious also of the fact that in view of its framework character the Convention may be supplemented by further binding or non-binding instruments to address challenges and using the benefits relating to the ~~application~~ use of artificial intelligence in specific sectors;

Article 1 – Purpose and object

Paragraph 3

3. In order to ensure effective implementation of its provisions by its Parties, this Convention establishes a follow-up mechanism.

Article 2 – Definitions

Paragraph a

a. "artificial intelligence system" means a machine-based system that is capable of informing or autonomously generating outputs such as predictions, recommendations or decisions using machine and/or human-based data and inputs and influencing the environment that it interacts with;

b. "lifecycle" means all phases of existence of an artificial intelligence system between its design and decommissioning;

c. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed with a view to putting it into service/commissioning it;

e. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are ~~impacted~~ affected by ~~decisions made or substantially informed by~~ the ~~application~~ use of an artificial intelligence system.

Article 4 – Scope

Paragraph 1

1. Parties undertake to apply this Convention to ~~design, development and application of~~ artificial intelligence systems throughout their lifecycle regardless of whether these activities are undertaken by public or private actors.

Paragraph 2

2. The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.

10

Commented [C23]: *In the explanatory report, the term "specific mechanisms" is used in the plural. We propose to standardise the terminology and use the singular everywhere.*

Commented [C24]: *The definition of the term "artificial intelligence system" (AI system) is of outmost importance and needs to be carefully established. Defining AI system is defining the object of regulation of this Convention. We propose to have a thorough discussion with respect to the definition of this term before moving on to discuss how AI systems should be regulated.*

We support the idea of using a definition that is generic enough for it not to be restricted to a specific area of data science or a specific technology in order to primarily focus on the outcome of an AI system and allow the Convention to be future-proof. However, as the definition reads currently, it is so brad that even classical statistics or economic forecasts would fall under it, what we do not support. We see the need to discuss to what extend an AI system should be understood as performing at least some sort of data analysis or whether any form of digital process automation should fall into the scope of this Convention. We believe the latter option would broaden the scope of this Convention to such an extent that it would become impracticable and miss its target.

Commented [C25]: *The term "lifecycle" is defined here but only used in three other instances in this draft. The three terms "design, development, and application [of artificial intelligence systems]" are used at almost twenty instances, at times with the addition of the term "research", while the term lifecycle is mostly not.*

Commented [C26]: *: In the last part of this definition, we find it unclear what "has an AI system developed" means. We underline the importance of holding all participants accountable in case of violation, we have to make sure each party to the contract must apply this convention.*

Commented [C27]: *We propose deleting these terms as it suggests a further qualification of AI system while reiterating elements already used in the definition for AI system.*
C: We note that natural or legal person potentially affected by the application of an AI system are not included in this definition.

Commented [C28]: *See our comment under Article 2 (b). We consider the terms used being ambiguous and insufficiently defined. If "design, development and application" are considered being a subset of "lifecycle", then these terms are used redundantly.*

Commented [C29]: *see comment regarding these terms under Article 2 (b) We consider the terms used being ambiguous and insufficiently defined. If "design, development and application" are considered being a subset of "lifecycle", then these terms are used redundantly.*

Article 5 – Design, development and application of artificial intelligence systems

Chapeau

~~Bearing in mind the need~~ In order to safeguard and uphold human dignity, human rights and fundamental freedoms, preserve and foster robust and accountable democratic institutions and safeguard the rule of law as the institutional basis for assuring both democratic participation and the effective protection of human rights and fundamental freedoms from the use of artificial intelligence systems with the potential to affect these values, ~~in their respective jurisdictions~~ Parties shall:

Paragraph 1

1. ensure that any research, design, development and application of artificial intelligence systems or ~~combinations of such systems~~ is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application are not aimed at undermining or curtailing fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;

Paragraph 2

2. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability and solidarity and the need to protect the environment;

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and rights related to discriminated groups and people in vulnerable situations;

Paragraph 4

4. ensure that privacy of individuals is protected including through applicable personal data protection and data governance laws and standards and that data protection principles and rules are applied in respect of design, development and application of artificial intelligence systems and that appropriate guarantees and safeguards have been put in place for data subjects;

10. ensure that artificial intelligence systems are sufficiently transparent, traceable and explainable in their design, development and application.

Paragraph 5

5. ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of design, development and application of artificial intelligence systems throughout their lifecycle and that appropriate redress mechanisms are available;

Paragraph 6

Commented [C30]: *see comment in Article 2 (b) re. "lifecycle" We consider the terms used being ambiguous and insufficiently defined. If "design, development and application" are considered being a subset of "lifecycle", then these terms are used redundantly.*

Commented [C31]: *The introduction to this Article is a reiteration of the Preamble that serves no further purpose if left as such. Therefore, we propose to bring the focus back on the purpose of this Convention being containing potential harm of application of artificial intelligence systems to human rights, democracy and the rule of law.*

in order to align with Article 6 and Chapter III, and prevent confusion, we propose to utilize the term "use" instead of "application".

Commented [C32]: *The addition "or combination of such system" is undefined and broadens the applicability of this Convention. We believe that a combination of AI systems is an AI system, therefore this addition is not needed.*

Commented [C33]: *As a general comment, it is unclear how research is to be included in this Convention. It should be made clear if research is included in the life cycle and how it should be limiting the scope of the convention. We believe*

Commented [C34]: *We propose to use a unified definition for what the Convention intends to prevent. The Preamble uses "potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining e..*

Commented [C35]: *"research" see comments in Article 2 (b) re. "lifecycle" and 5 (1) re. "basic research or research and development in industry"*

Commented [C36]: *It would be appropriate to clarify the scope of this principle in the explanatory report. What are the expectations?*

Commented [C37]: *see comments in Article 2 (b) re. "lifecycle" We consider the terms used being ambiguous and insufficiently defined. If "design, development and*

Commented [C38]: *see comments in Article 2 (b) re. "lifecycle" We consider the terms used being ambiguous and insufficiently defined. If "design, development and*

Commented [C39]: *In general, we support the principle that any measure is necessary, appropriate and proportionate. It will be up to the member states to implement this convention according to their legal system.*

Commented [C40]: *We think it is important to include this element in the "core principles". Transparency is indeed included in number 7, but is somewhat "hidden" since it is associated with control and audit mechanisms.*

Commented [C41]: *French version to be revised. In both language version, the extent of and the difference between the terms used should be made clear.*

6. ensure that, where appropriate, adequate oversight mechanisms as well as transparency and auditability evaluation requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

Paragraph 7

7. with a view to encouraging research and fostering innovation, ensure that a controlled regulatory environment for testing artificial intelligence systems is available for artificial intelligence providers and users under the supervision of their competent authorities;

Commented [C42]: *French version to be revised. Further, see comment re. "research" under Article 5 (1). The principle proposed here ("innovation sandbox") appears to be more restrictive than empowering.*

Paragraph 8

8. ensure that adequate safety, security, data quality data integrity, data accuracy data security, cybersecurity and robustness requirements are in place regarding design, development and application of artificial intelligence systems;

Commented [C43]: *French version to be revised ("data quality" missing).*

Commented [C44]: *adequate "data accuracy" as a further requirement as – to the extent possible – the data must not only be complete, but also correct.*

Commented [C45]: *Robustness in relation to what?*

9. strive to ensure that fundamental questions raised by the design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ethical and legal implications;

Commented [C46]: *see comment in Article 2 "b" re. "lifecycle"*

Commented [C47]: *see comment in Article 2 "b" re. "lifecycle"*

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Commented [C48]: *The convention should make a clear distinction between government and private responsibility. However, many requirements outlined here do not really seem specific to AI systems used in the public sector. This should be made clear.*

Chapeau

Bearing In order to address the in mind the increased risks posed to human rights, democracy and the rule of law by the application use of artificial intelligence systems or combinations of such systems in the public sector and the need to ensure proper accountability, responsibility and legal liability in relation to the application use of such systems, Parties shall:

Commented [C49]: *as in Article 5, we propose Article 6 be less programmatic or else it would be a reiteration of the Preamble*

Commented [C50]: *see comment in Article 5 (1) re. uniform language for the threats to human rights, democracy and the rule of law.*

Paragraph 1

1. ensure that the deployment and application of artificial intelligence systems in the public sector do not undermine human rights and fundamental freedoms, legal rights and interests which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party and respect the principle of the rule of law.

Commented [C51]: *It is unclear how research fits into the differentiation between "public sector" and "private sector". If basic research would be attributed to the "public sector" as a result of its public funding, whereas research and development in industry be attributed to the "private sector", it would result in the basic research being subject to greater constraints as the R&D in the industry. We believe that basic research and research and development in industry should operate on a level playing field, including research projects that cannot be clearly assigned to one or the other category.*

Paragraph 2

2. ensure that the deployment and application of artificial intelligence systems in the public sector have, if necessary, depending on the associated risk, an appropriate legal basis and that a careful preliminary consideration of the necessity and proportionality of the use of such system is carried out in view of the context of the deployment.

Commented [C52]: *Is it on purpose that, only "deployment and application" is listed, instead of using the term life cycle, or is this only applicable for deployment and application?*

Commented [C53]: *A legal basis is not required in all cases. Otherwise, any use of an AI system would need a legal basis? It seems unrealistic in this digitalized society.*

Paragraph 4

4. ensure that all relevant artificial intelligence users receive appropriate training in operating any artificial intelligence systems employed as well as the respective limitations of such systems.

Article 7 – ~~Procedural safeguards~~ Rights of the artificial intelligence subjects

Paragraph 1

1. Parties shall ensure that, where appropriate, the use~~age~~ of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned. ~~The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be governed by domestic law;~~

Paragraph 2

2. Parties shall also ensure that in cases where artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the ~~application~~ use of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

Paragraph 3

3. Parties shall ensure that, ~~where appropriate,~~ relevant explanations and justifications are offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

Paragraph 4

4. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where appropriate shall provide for the option of interacting with a human in addition to ~~or instead of~~ an artificial intelligence system.

Paragraph 5

5. The exercise of the rights set out in paragraphs 1 to 4, ~~including the grounds on which they may be exercised,~~ shall be governed by domestic law.

Commented [C54]: *It appears the Convention intends to set the requirement of sufficient training of an AI operator's personnel when using an AI system in a professional capacity. In all other Articles in this draft, the term "user" appears. It is therefore worthwhile discussing what actors should be defined in this Convention and what name they should bear.*

Commented [C55]: *To speak of "procedural" safeguards brings to mind administrative procedure. However, the safeguards in Art. 7 apply irrespective of whether an artificial intelligence system is used by a public or private authority.*

We would suggest that this article also mentions the need to put in place accessible and effective remedies.

Commented [C56]: *It seems unclear in what way §1 and §2 interact. If the purpose of the convention is the protection against any human rights violations, this paragraph might be broadening the scope.*
Propose deletion of last sentence as it reiterates Article 7 (5)
the term "where appropriate" needs to be better translated in the French version.

Commented [C57]: *see comment in Article 2 (a), the term inform or "substantially" inform is not defined. This is mostly an issue in the French version.*
review French version, it should read "informe substantiellement"

Commented [C58]: *"and that there is a right to human review" – what is this based on? Shouldn't the right be formulated somewhere?*

Commented [C59]: *The right of AI subjects/users to access effective remedies in case of violation of their rights should be clearly stated.*

Commented [C60]: *This position is potentially very far reaching*

the term "where appropriate" needs to be better translated in the French version. Here, "Where appropriate" should be understood as according to the risk the AI system poses for human rights.

It should be clear that the possibility of a "human in the loop" is about the impact on the person of the use of an AI system (which is why transparency, explicability, traceability etc. are needed so that the human being has the necessary elements to explain the decision / impact). But it would not make sense for the human involved to be asked to replace the AI system (which may be a complex statistical model). It is in particul...

Commented [C61]: *We propose only Article 8 should be followed with respect to the grounds on the basis of which the paragraphs 1–4 should be exercised.*

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Chapter III: Risk and impact assessment and related measures

Article 11 – Risk and impact assessment

Paragraph 1

1. Without any prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the ~~application~~ use of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Paragraph 2

2. The methodology shall be based on the model set out in the Appendix to the present Convention. It shall set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such systems that in view of their concrete ~~applications~~ use pose significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law.

Paragraph 3

3. Each Party shall take appropriate measures, particularly in the field of training of national supervisory authorities, artificial intelligence providers and artificial intelligence users, with a view to ensuring that the relevant actors are capable of identifying, analysing and evaluating risk and assessing impact of the ~~application~~ use of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law, in accordance with the present methodology.

Article 12 – Measures in respect of artificial intelligence systems posing significant levels of risk

Paragraph 1

1. Parties shall, in accordance with their domestic law, provide for the imposition on artificial intelligence providers and users of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system, deemed in accordance with the methodology referred to in Article 11, paragraph 2, to present significant levels of risk of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law, aimed at mitigating that risk, as well as to document and keep a ~~the~~ records of the respective process.

Paragraph 2

Commented [C62]: *The structure of this chapter is not clear. It should be reordered before looking at the changes in detail. There are many long provisions with many repetitions, this should be expressed in a more concise manner.*
- For example, Article 14 (3) is a general provision and should be in Article 13
- A different structure could be divided into a part defining the types of risks and the necessary impact assessment (e.g. Chapter III) and a second part on the applicable measures (e.g. Chapter IV).
- the difference in between "unacceptable levels of risk" and "prohibited practices" should be made clearer, as well as how "practice" should be understood in light of this Convention. If the risk is really "unacceptable", shouldn't the AI system then be banned anyways?

The convention should not only focus on a prior ("ex-ante") risk assessment of the applications of AI, but also include impact assessment considerations. In our opinion, there is currently not enough focus on the impact assessment.

Commented [C63]: *see comments in Article 2 (b) re. "lifecycle". Also, the applicability of Chapter III seems to be broader than in Chapter II, since the latter is only applicable to "application of artificial intelligence systems" whereas the Risk impact assessment shall lay down a methodology applicable to "design, development and application" of artificial intelligence systems, therefore adding "design" and "development" apparently out of scope in Chapter II The methodology seems to be applicable to the "design, development and application" of AI systems, whereas the risk assessment is limited to the "application" of AI system. Please align terminology.*

Commented [C64]: *See comment in Article 12 re. "levels of risk"*

Commented [C65]: *see comment in Article 18 re. "national supervisory authorities"*

Commented [C66]: *who are the "relevant actors"?*

Commented [C67]: *We note that the Convention proposes three different categories ("levels") for a not further specified number of risks. After singling out Prohibited artificial intelligence practice (Article 14) the remaining applications of artificial intelligence are identified to have risks that fall into the categories of insignificant levels of risks (unnamed category), "significant levels of risk" (Article 12) and "unacceptable levels of risk" (Article 13). See comment in Chapter III re. structure of the Convention.*

Commented [C68]: *See comment in Article 2 re. definitions*

Commented [C69]: *Prevention of what? Significant interference with fundamental rights? The aim and object of this obligation to "prevent" must be defined as clearly as possible.*

Commented [C70]: *A since it has not been mentioned before.*

2. Each Party shall also ensure that the relevant requirements in respect of such artificial intelligence systems take into account the measures set out in Article 15 (a) to (e) and are proportionate to ~~the nature~~ of the risk they pose to human rights, democracy and the rule of law.

> **Commented [C71]:** *See comment in Article 5 (4) with respect to the appropriateness of measures. Here, the term "proportionate" is used. Align terminology.*
> *Not only the type, but also the severity of the risk should be considered*

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 1

1. Parties shall, in accordance with their domestic law, provide for the possibility of imposing a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (e) are ~~deemed~~ considered, on an objective basis, to present unacceptable levels of risk of interfering with the enjoyment of human rights, the functioning of democracy, and the observance of the rule of law. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk.

> **Commented [C72]:** *inconsistency with French version as to what "full or partial" is applied to.*
>
> *the title of Article 15 suggests that it should only be read in connection with the "significant" risk (Article 12)! Reading Article 13 (1), however, it appears it also applies in connection with Article 13?*

Paragraph 2

2. Parties shall, in accordance with their domestic law, establish appropriate and independent review procedures in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures are ~~become~~ available.

Article 14 – Prohibited artificial intelligence practices

Paragraph 1

1. the use of artificial intelligence systems by public authorities using biometrics to identify, categorise or infer emotions of individuals;

> **Commented [C73]:** *Are we trying to limit emotional recognition systems or the use of biometrics in general? What about the use of AI systems for such means by private entities, should this be allowed?*
> *Does this § only prohibits the use of biometric to identity emotions and not facial recognition for instance?*
> *using artificial intelligence to determine emotions of individuals might be part of a legitimate research project. See comment in Article 6*

Paragraph 2

2. the use of artificial intelligence systems for the purpose of determining access to essential services and intended to assess or rank individuals on the basis of their social behaviour or known or predicted personal or personality characteristics, with the social rating leading to one or both of the following ~~social scoring to determine access to essential services leading either to~~ (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or ~~whole~~ groups ~~that is unjustified or disproportionate~~ to their social behaviour;

> **Commented [C74]:** *Article 14 (2) and in particular (b) indirectly suggest that AI systems of social scoring to determine access to essential services that have a detrimental effect on certain individuals could be justified or proportionate. We are concerned that, under the guise of prohibiting such practices, they are in fact being legitimised, which we find very sensitive. We wonder in which cases the use of AI based on social behaviour could be justified and what exactly is meant by "social behaviour" which is a very broad concept.*
> *Use uniform language with respect to the term "social scoring"*

3. ~~any other use of artificial intelligence systems by public authorities for such purposes as are not compatible with core values of democratic societies, do not pursue a legitimate aim and are not necessary in a democratic society;~~

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Paragraph a

a.   minimizing and, to the extent possible, preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the inappropriate ~~application~~ use of artificial intelligence systems;

Paragraph b

b.   preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms resulting from the inappropriate ~~application~~ use of artificial intelligence systems;

Paragraph d

d.   ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including gender equality and rights related to discriminated groups and people in vulnerable situations, or reproduce prejudices or stereotypes in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

Paragraph e

e.   ensuring that the rights to privacy and to personal data protection are adequately respected during design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors, notably through additional safeguards for special categories of data such as medical data.

Article 16 – Consultation of the Parties

Paragraph 1 - a

1. Parties shall consult periodically with a view to:

Commented [C75]: *This does not seem clear to us.*

According to the Explanatory Report, this paragraph "sets out the criteria that national authorities should use when considering the possibility of imposing a moratorium or a total or partial prohibition as referred to in paragraph 1 of Article 13".
Systematic problem. Art. 13 says that it is the methodology under Art. 11 that will determine which technologies are at unacceptable risk!

We propose the deletion of § 3, as in our opinion it does not add anything. At most, this paragraph can be moved to Article 13.

Commented [C76]: *There is a broad overlap between these principles and the fundamental principles in Chapter II. This might create confusion: which of the principles in Art. 15 do not also apply to all other systems, i.e. what is the value added here in Art. 15?*
This article has almost the same title as Article 12.

Commented [C77]: *Are we referring here to the same concept as in Article 6 of Convention 108+, namely sensitive data? Why, then, should only the example of medical data be cited, and what is more, should another concept be used than that of 'health', which is broader?*

making proposals to facilitate or improve the effective ~~use~~ application and implementation of this Convention, including the identification of any problems and the effects of any declaration made under this Convention;

Article 17 – International co-operation

Paragraph 1

1. Parties shall, as appropriate co-operate to the fullest extent in the realisation of the purpose of this Convention.

> **Commented [C78]:** *See comment in Article 5 (4) with respect to the appropriateness of measures. Also, in what does "as appropriate" differ from "where appropriate"?*

Paragraph 2

2. Parties shall, on a regular basis, exchange information between them concerning design, development and application of artificial intelligence systems which they assess as posing significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

> **Commented [C79]:** *see comments in Article 2 (b) re. "lifecycle".*

Paragraph 3

3. Parties shall on a regular basis exchange information between them concerning the use of internationally recognised methods following ~~such as~~ recommendations from competent organisations, good practices, or international standards and where the adherence to said recognised methods facilitates or promotes compliance with the requirements of the Convention in accordance with their domestic law.

> **Commented [C80]:** *Alignment of implementation mechanisms amongst Member States reflects the globalised nature of technology. The convention should invite Member States to make use of internationally recognised methods following recommendations from competent organisations, good practices, or international standards. Adherence to recognised methods should facilitate or promotes compliance with the requirements of the Convention.*

Article 18 – National implementation procedures ~~supervisory authorities~~

Paragraph 1

1. Parties shall in accordance with their domestic law provide for efficient procedures ~~establish or designate national supervisory authorities tasked, in particular, with~~ to oversee~~ing~~ and to supervis~~ing~~ compliance with the requirements of the risk and impact assessment of artificial intelligence systems in accordance with article 11 and 12.

> **Commented [C81]:** *States should be given as much leeway as possible in designing national mechanisms. We are not sure if putting in place national supervisory authorities is necessary to guarantee compliance with the convention. Implementation procedure should be provided, but imposing the creation of a national authority seems too excessive.*

Paragraph 2

2. Parties shall, in accordance with their domestic law, provide for efficient procedures for the imposition of a moratorium or a ban on design, development and ~~application~~ use of an artificial intelligence system in accordance with Articles 13 and 14.

> **Commented [C82]:** *Depending on the legal interest protected, authorities or courts may be responsible for implementing the rights and obligations enshrined here.*

Paragraph 3

3. ~~Parties shall ensure the national supervisory authorities have sufficient resources and properly trained personnel to carry out their activities.~~

Paragraph 4

4. ~~The national supervisory authorities shall be independent and impartial in the exercise of their duties~~

Commented [C83]: *We suggest deleting this, as we do not think that the Convention should impose the establishment of national supervisory authorities at all. But if, the question arises independent from whom? The industry? The state? Someone would have to establish the national authority and a court would need to be able to "control" the authority's decisions (appeal?).*

Article 19 – Effects of the Convention

Paragraph 2

2. Parties which are members of the European Union or associated with it by an agreement which obliges them to apply its rules shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

Article 21 – Revision of the Appendix

Paragraph 2

2. The Consultation of the Parties ~~may~~ adopt any revision to the methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix by unanimity and shall communicate such revision to the Secretary General of the Council of Europe.

Commented [C84]: *Do we want to leave the choice to the Parties to decide by unanimity or by majority? Given Art. 20, it seems logical that the revision of the Annex should also be done unanimously.*

Appendix: Methodology for risk and impact assessment of artificial intelligence systems

Commented [C85]: *Switzerland considers this methodology to be a fundamental element of the convention. As long as the annex is still under development, it is difficult to conclusively define our positions on the overall convention, as there are many references to this methodology (see e.g., chapter IV, article 16.d).*

Turkiye

General comments

I) REGARDING LIFECYCLE

It is seen that "lifecycle" is defined in the draft document, yet in the majority of the text, the phrase "design, development and application of AI systems" is preferred. There are several issues with the draft definition (*"all phases of existence of an artificial intelligence system between its design and decommissioning"*) and this approach.

As is known, CAI is instructed to deliver an *"appropriate legal instrument on the development, design, and application of artificial intelligence systems democracy and the rule of law, and conducive to innovation, in accordance with the relevant decisions of the Committee of Ministers."*

To fully serve this purpose;

- For clarity, each phase in the lifecycle should be named. For instance, what is included in the "design" phase?
- Data handling/usage is critical to include in the lifecycle.
- **It is important that the AI lifecycle includes even the initial stages where data is collected and labeled**, as it is known from experience that even these stages may create biased AI systems. (E.g.: In the case where an AI system is being developed to summarize data and put together a report regarding crimes, if the data is predominantly collected from areas where vulnerable groups/minorities are residing, this would result in the AI system putting together reports "showing" that such vulnerable groups/minorities are the ones that are committing crimes the most. Same is true for incorrectly labeling data, whether or not it is collected in the right manner.)
- **It is equally important that the instrument covers the post-application phase, as the AI systems can be used in a way to violate human rights, democracy and rule of law even after decommissioning.**
- Additionally, it should be borne in mind that, especially due to the widespread usage of ML/DL, even after decommissioning, data collection, labeling, training and AI model changes can still be made, which could in turn make it difficult to precisely draw the line as to where the lifecycle ends.

As such, we propose to use the term "lifecycle" and improve the definition in line with the explanations above.

II) REGARDING SECTORS

It is seen throughout the document that sectors to which certain provisions apply are specified as "public and private sectors". In such parts, NGOs should also be mentioned to avoid confusion.

III) CAHAI OUTPUTS

The initial version of the Zero Draft appears to be addressing the issues from a very high-level perspective. If the instrument is aimed at being developed into a legally binding instrument, it would better serve this purpose to address these issues at a more micro level. We had reached this level during the mandate of CAHAI, through extensive debates of Member States and all the issues were specifically addressed. As such, we are of the opinion that it would be more beneficial to integrate CAHAI's work in CAI's draft. This is especially important for the provisions as regards the risk levels and ban/moratorium of certain AI systems.

Lastly, we understand that what is meant by the title "Methodology for risk and impact assessment of artificial intelligence systems" at the Appendix section of the Zero Draft, is the CAHAI PDG's HUDERIA framework. If that is not the case, we propose to refer back to this document.

Article 1 – Purpose and object

Paragraph 2

2. Each Party shall take the necessary measures in its domestic legislation to give effect to the principles, rules and rights set out in this Convention. The Council of Europe shall support and encourage the Parties to implement this Convention.

Article 2 – Definitions

For the purposes of this Convention:

Paragraph a

c. "artificial intelligence system" means a machine-based system that is capable of informing or autonomously generating outputs such as predictions, recommendations or decisions using machine and/or human-based data and inputs and influencing the environment that it interacts with;

Paragraph b

b. "lifecycle" means all phases of existence of an artificial intelligence system between its design and decommissioning;

Paragraph c

c. "artificial intelligence provider" means any natural or legal person, ~~public authority or other body~~ that develops an artificial intelligence system on its own or under its authority and/or that has an artificial intelligence system developed with a view to putting it into service/commissioning it;and/or that is responsible from the operation of an artificial intelligence system belonging to someone else;

Paragraph d

d. "artificial intelligence user" means any natural or legal person, ~~public authority or other body~~ using an artificial intelligence system in their own name or under their authority;

Paragraph e

e. "artificial intelligence subject" means any natural or legal person, whose human rights and fundamental freedoms, legal rights or interests are impacted by decisions/actions made or ~~substantially~~ informed by the application of an artificial intelligence system.

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, pregnancy, race, colour, language, age, religion, political or any other opinion, national or social origin, citizenship association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds.

Article 4 – Scope

Paragraph 1

20

Commented [C86]: The risk levels of artificial intelligence systems should be defined either in the definitions section or in the relevant part of the document.

Commented [C87]: We believe it would be a more objective approach to base this definition on the explanations in ISO documents.

Commented [C88]: Please see our comments on our annex document.

Commented [C89]: The phrase «any natural or legal person» includes «public authorities or other bodies». As such, this part is removed to avoid confusion.

Commented [C90]: The phrase «any natural or legal person» includes « public authorities or other bodies». As such, this part is removed to avoid confusion.

Commented [C91]: We welcome the adoption and inclusion of the definition of the term "AI subject," which was proposed by the Turkish delegation during the mandate of CAHAI.

1. Parties undertake to apply this Convention to design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public, ~~or~~ private actors or non-governmental organizations.

Paragraph 2

2.   The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 1

> **Commented [C92]:** Post-application phase should be included. - comment to be repeated throughout the document where the phrase "design, development and application" is used. Please see our general comments in the annex document.

1. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application are not aimed at undermining or curtailing fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;

> **Commented [C93]:** Although fundamental rights are mentioned in this article, the right to life should be emphasized.
>
> It should also be noted that, as was discussed during CAHAI meetings, if artificial intelligence applications are likely to cause psychological and physical violence, they should be strictly prohibited.

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of inclusiveness and equality, including social, political, economic and gender equality and rights related to discriminated groups and people in vulnerable situations, particularly children and asylum-seekers;

Paragraph 6

6. ensure that, where appropriate, adequate oversight mechanisms as well as transparency, explainability and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

> **Commented [C94]:** There is a slight turn from human oversight to institutional oversight particularly for regulating government algorithms. This institutional approach operates in two stages. First, agencies must justify that it is appropriate to incorporate an algorithm into decision-making and that any proposed forms of human oversight are supported by empirical evidence. Second, these justifications must receive democratic public review and approval before the agency can adopt the algorithm.
> See: Ben Green; The Flaws of Policies Requiring Human Oversight of Government Algorithms, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921216

Paragraph 7

7. with a view to encouraging research and fostering benevolent innovation, ensure that a controlled regulatory environment for testing artificial intelligence systems is available for artificial intelligence providers and users under the supervision of their competent authorities;

Paragraph 8

8. ensure that adequate safety, security, data quality, data integrity, data security, privacy by default and design, cybersecurity and robustness requirements are in place regarding design, development and application of artificial intelligence systems;

Paragraph 9

9. strive to ensure that fundamental questions raised by the design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-

stakeholder consultation _including children and young people_ in the light, in particular, of relevant social, economic, _health, psychological, environmental,_ ethical and legal implications;

Paragraph 10

10. AI systems that interact with or may create legal effects concerning children must ensure that these systems are designed, developed and used respectful to children's rights, are child-centered, and use age-appropriate design and language to describe AI systems lifecycle. These systems shall exclude children from profiling, dark patterns, ads and manipulative/deceptive design.

11. encourage and promote digital literacy _digital citizenship_ and digital skills for all segments of the population.

~~11.~~12.   take measures to protect persons who report potential or present negative impacts of AI systems shall be implemented.

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Paragraph 4

4.   ensure that all relevant artificial intelligence users receive appropriate training in operating any artificial intelligence systems employed as well as the respective limitations of such systems.

> **Commented [C95]:** A certification mechanism for AI providers that have completed necessary trainings and/or that compy with certain procedures may be introduced.

Paragraph 5

5.   ensure public consultation and meaningful participation of stakeholders in the adoption of public AI systems and of high-risk AI systems. Such participation shall be guaranteed at minimum prior to procurement in the public sector and deployment in the private sector and throughout the impact assessment stage.

Paragraph 6

~~5.~~6. adopt open procurement standards in relation to AI systems in the public sector.

Paragraph 7

~~6.~~7. establish public registers to account for AI systems being procured designed developed or used by/for the public sector. Parties shall take measures to ensure that private/external service providers submit all information on their AI systems to relevant public authorities using them or whose work will be affected by such systems.

Article 7 – Procedural safeguards

Paragraph 1

1. Parties shall ensure that, where appropriate, the usage of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned in compliance with the principle of accountability. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be provided for and governed by domestic law;

> **Commented [C96]:** It is recommended to clarify within the scope of the explanatory report, which information and documents as regards the use of an artificial intelligence system are to be recorded.

> **Commented [C97]:** It should be clearly communicated to the AI subject that ML/DL is used, as with the use of these technologies, new AI models are generated that may be entirely different than that of their initial version.

Paragraph 2

2. Parties shall also ensure that in cases where artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of, the right to contest and the right to an effective remedy regarding such decisions.

> **Commented [C98]:** It is recommended to clarify at which stage of this process artificial intelligence subjects are to be informed.

Paragraph 3

3. Parties shall ensure that, where appropriate, relevant explanations and justifications for how the data of artificial intelligence subject is handled and/or used, how the artificial intelligence algorithm works, possible negative consequences the artificial intelligence subject might face, how to redress the damage are offered by the artificial intelligence provider and/or user in plain, understandable, age-appropriate and coherent language and are tailored to the context and the age group of the artificial intelligence subject. Such communication shall contain sufficient and comprehensive information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, other legal rights and interests insofar as any use of artificial intelligence technology is concerned.

> **Commented [C99]:** It should also be stated to which authority the objection will be made regarding redress. For further reference, CAHAI SG 7 outputs may be taken into consideration.

Paragraph 4

4. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where appropriate, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system

> **Commented [C100]:** It is very important to introduce the obligation of transparency. The purpose of using these systems should also be explained. The user must always be authorized to revert from their preferences.

> **Commented [C101]:** The following excerpt from CAHAI SG 5 document may be included:
>
> *«Parties shall ensure that vulnerable groups, including but not limited to children, persons with special needs, and the elderly or their caregivers are provided sufficient understanding of their interactions with AI systems, in accordance with their needs and capabilities»*

Article 9 – Relationship with other legal instruments

Nothing in the present Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms as well as other legal rights which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party.

> **Commented [C102]:** This is such a broad formulation that may yield to situations where the purpose of the instrument is defeated, e.g. trade secrets, IP rights of AI providers. Inevitably, rights will need to be limited when rights arising from this instrument are exercised, in which case a balancing exercise in accordance with the ECHR will be carried out. Accordingly, this provision is prone to abuse and at best, is redundant. We submit that Article 9 be deleted.

Article 10 – Wider protection

None of the provisions of this Convention shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection in terms of human rights than is stipulated in this Convention.

Article 11 – Risk and impact assessment

Article 12 – Measures in respect of artificial intelligence systems posing significant levels of risk

Paragraph 1

1. Parties shall, in accordance with their domestic law, provide for the imposition on artificial intelligence providers and users of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system, deemed in accordance with the methodology referred to in Article 11, paragraph 2, to present significant levels of risk of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law, aimed at mitigating that risk, as well as to document and keep the records of the respective process.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 2

2. Parties shall, in accordance with their domestic law, establish appropriate and independent legal review procedures in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available.

Article 14 – Prohibited artificial intelligence practices

The following artificial intelligence practices shall be banned:

Paragraph 1

1. the use of artificial intelligence systems by public authorities and private entities using biometrics to identify, categorise or infer emotions of individuals;

Paragraph 2

2. the use of artificial intelligence systems for social scoring to determine access to essential services leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unlawful, unjustified or disproportionate to their social behaviour;

Paragraph 3

3. any other use of artificial intelligence systems by any natural or legal person, public authorities or other bodies for such purposes as are not compatible with core values of democratic societies, do not pursue a legitimate aim and are   not necessary in a democratic society;.

Commented [C103]: ●It appears that the we have reverted back to risk assessment. We propose that our position is rights based approach, as was agreed to as a result of CAHAI debates. (At CAHAI PDG, the document's name was changed into «Human Rights, Democracy and Rule of Law Impact Assessment» (HUDERIA))
Under this title, we propose Member States to conduct Child Rights Impact Assessments.

Commented [C104]: It is recommeded to specify explanations as regards the required period of time during which information and documents are to be kept.

Commented [C105]: Each risk level should be defined as was done in CAHAI SG 6 documents.

Commented [C106]: We had conducted extensive debates as regards bans/moratoria in CAHAI SG 6. CAI can benefit from the outputs of CAHAI SG 6.

Commented [C107]: It is inexplicable to make this an obligation only for public authorities, as private entities have shown to manipulate AI systems to violate democratic values.
E.g.: Cambridge Analytica

Paragraph 4

4. AI systems that profile and target those who are deemed children as per the Convention on the Rights of the Child.

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Parties shall take such measures as are aimed at:

Paragraph a

a. preventing any violation of human rights and fundamental freedoms and minimizing and, to the extent possible, preventing any unlawful harm or damage to ~~human rights, fundamental freedoms,~~ legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph d

d. ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including social, political, economic and gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

Paragraph e

e. ensuring that the rights to privacy and to personal data protection are adequately respected during design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors and non-governmental organizations, notably through additional safeguards for special categories of data such as health~~medical~~ data.

Article 17 – International co-operation

Paragraph 2

2. Parties shall, on a regular basis, exchange information between them concerning design, development and application of artificial intelligence systems which they assess as posing significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Commented [C108]: It may be discussed whether the bias detection measure mentioned below should be listed under Article 15:

«*minimizing the risk of biases embedded in the model by training and testing artificial intelligence systems with a sufficiently representative dataset and ensuring that the biases can be addressed through appropriate bias detection, correction and other mitigating measures.*»

It is recommended to include the explanation as regards additional liabilities (mentioned below) within the scope of the explanatory report:

«*ensuring that the artificial intelligence systems are designed, developed and applied in line with the additional sector-specific requirements envisaged for artificial intelligence systems that pose significant level of risks in specialization-required areas, such as autonomous vehicles.'* »

Commented [C109]: We believe that this expression creates the confusion that "unlawful harm or damage .... that could result from the appropriate application of AI systems" may be out of scope. As such, it was removed.

Commented [C110]: Should be clarified in the explanatory report.

Article 19 – Effects of the Convention

Paragraph 3

3. Nothing in this Convention shall _adversely_ affect other rights, obligations and responsibilities of a Party and individuals under international law.

> **Commented [C111]:** A provision may be added where the Parties are required to set forth the penalties for breach of this Convention under their domestic law.

United Kingdom

General comments

- The UK is encouraged that the Council of Europe (CoE) is pursuing a high-level approach in the development of this instrument through the consideration of general common principles. It is important that global instruments such as this adopt a proportionate, agile and flexible approach in order to effectively govern AI. This instrument should provide for sufficient safeguards while encouraging innovation and competition, and ensure that potential positive uses in the future are not hindered.

- The UK is keen to ensure that this instrument works in alignment with existing rights and obligations (to minimise contradictions, undue burdens or overlaps with existing frameworks). It should demonstrate clear practical and societal value based on strong evidence and invite further collaborative, multi stakeholder consultation, including with wider global partners, industry and civil society to ensure provisions add value to the current international landscape and have the widest possible acceptance.

- In some areas of this instrument, further consideration of the text is necessary to clarify the intentions and scope of the obligations. This will help to ensure that the language appropriately captures the meaning behind the text, and that the appropriate exemptions and caveats are included to mitigate unpractical impacts.

- Areas that may be of concern to the UK which we'd like to explore further, include: the scope of national defence (dual use AI - under Art.4) and the way that the prohibition of high-risk AI systems will be enforced (under Art.14). Further detail on the underlying methodology of the risk classification system and the mechanism for determining justification outside of the courts is also needed.

- It will be necessary to discuss the scope for providing for reservations at a later stage in the drafting process.

- These are initial official-level views, subject to later ministerial approval following appointment of a new Cabinet in September 2022. It may therefore be necessary to provide further feedback that is not captured by these comments.

- We have not provided comments on every paragraph but the absence of a comment does not mean we are content. There are areas we need to do further analysis and consultation on before returning further comments.

Preamble

Conscious also of the fact that in view of its framework character the Convention may be supplemented by further binding or non-binding instruments to address challenges relating to the application of artificial intelligence in specific sectors;

Mindful of the need to ensure a proper balance between respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties and various economic, security and other interests in the development and use of artificial intelligence;

Underlining that the present Convention is intended to complement those conventions in order to fill in any legal gaps in view of the specific challenges raised by design, development and application of artificial intelligence systems;

"Mindful also of upholding laws that respect ~~the right to~~ privacy and the protection of personal data, as conferred, for example, by the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and amending protocols;"

Commented [C112]: We think that this issue of further binding instruments is addressed in the text of the instrument. If a Party signs this instrument, they should not be automatically bound by further instruments which haven't yet been developed at the time of signing. We should clarify this to prevent signatories assuming this.

Commented [C113]: What is the term 'other interests' intended to capture?

Commented [C114]: Likely requires further consideration to ensure interaction between this convention and existing CoE treaties is addressed appropriately.

Commented [C115]: To better align with the wording of ECHR which confers the 'right to respect for privacy'.

Article 2 – Definitions

Paragraph a

a. "artificial intelligence system" means a machine-based system that is capable of informing or autonomously generating outputs such as predictions, recommendations or decisions using machine and/or human-based data and inputs and influencing the environment that it interacts with;

Paragraph b

b. "lifecycle" means all phases of existence of an artificial intelligence system ~~between~~ from its design ~~and~~ to its decommissioning;

Commented [C116]: Minor text amendment to ensure it is more explicit that this includes the design and decommissioning.

Paragraph c

c. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed with a view to putting it into service/commissioning it;

Commented [C117]: Is this qualifier intended to take out R&D for demonstration or experiment only out of the equation? How would one prove that something does not meet this description? Would the distance between development and commissioning or use be sufficient?

Paragraph e

d. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by decisions made or substantially informed by the application of an artificial intelligence system.

Commented [C118]: This would effectively cover the majority of humans (i e. we would argue that "the interests" of almost every human on the planet is "informed" by the application of at least one AI system). This should be clarified to ensure it's clear that it's the subject to the system in question, not any system.

Article 4 – Definitions

Paragraph 1

1. Parties undertake to apply this Convention to the design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.

Commented [C119]: Minor text amendment to improve language.

Paragraph 2

2. The present Convention shall not apply to the design, development and application of artificial intelligence systems used for purposes related to national defense.

Commented [C120]: Minor text amendment to improve language.

Article 5 – Research, design, development and application of artificial intelligence systems

Commented [C121]: Art 5 likely requires further consideration.
While 'research' is not included in each paragraph, it should be added to the title to demonstrate that some parts of the article capture research - see text amendment.

Paragraph 1

1. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application are not aimed at undermining or curtailing ~~fundamental~~ human rights and fundamental freedoms, the functioning of democracy or the observance of rule of law;

Commented [C122]: What are the core values? If these are Human Rights, Rule of Law and Democracy as referenced in previous para, consider adding reference to them here, or adding the term 'as referenced above'

Commented [C123]: Text amendment: It would be helpful for there to be a distinction between fundamental in relation to rights and freedoms to ensure consistency with other paragraphs e.g. Article 6(1).

Paragraph 2

2. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability and equity ~~solidarity~~ and the need to protect the environment;

Commented [C124]: What is the intended meaning of sustainability and solidarity? And solidarity with whom/what? As such, does 'equity' better capture the intended meaning than solidarity?

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and rights of individuals belonging to ~~related to~~ discriminated groups and people in vulnerable situations;

Commented [C125]: Was research deliberately not included in this paragraph (as it was in 5.1 and 5 2)?
Rights belong to individuals – not the group.
Re 'people in vulnerable situations', what situations does the text have in mind?

Paragraph 4

4. ensure that privacy of individuals is protected including through applicable personal data protection where personal data is used in the research, design, development and application of artificial intelligence systems, and data governance laws and standards, and that data protection principles and rules are applied in respect of design, development and application of artificial intelligence systems, and that appropriate guarantees and safeguards have been put in place for data subjects;

Commented [C126]: Text amendment added to acknowledge that the data protection dimension only applies when there's personal data/information involved in the design, development, and application of AI systems and that otherwise data protection legislation doesn't apply.
We agree that there is a need to further examine how 'inferred personal data' fits
in here as referenced in the explanatory note.

Paragraph 5

28

5. ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of design, development and application of artificial intelligence systems throughout their lifecycle and that appropriate redress mechanisms are available;

Commented [C127]: Should research be added before 'design, development and application' or was it deliberately not included?

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Commented [C128]: Art 6 likely requires further consideration.

Paragraph 2

2. ensure that the deployment and application of artificial intelligence systems in the public sector have an appropriate legal basis and that an appropriate careful preliminary consideration of the necessity and proportionality of the use of such systems is carried out in view of the context of the deployment.

Commented [C129]: What does 'appropriate legal basis' mean and what would it look like in practice?
Why has 'careful' been chosen? 'Appropriate' seems like a better word.

Paragraph 4

4. ensure that all relevant artificial intelligence users receive appropriate training in operating any artificial intelligence systems employed as well as the respective limitations of such systems.

Commented [C130]: This paragraph should be defined more to ensure 'all relevant artificial intelligence users' can be properly understood. A cross reference to either fundamental freedoms or Human Rights, Democracy and the Rule of Law should be added here to help define.

Article 7 – Procedural safeguards

Commented [C131]: Art 7 likely requires further consideration.

Paragraph 1

1. Parties shall ensure that, where appropriate, the usage of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be governed by domestic law.

Commented [C132]: How is 'where appropriate' quantified? For example, is it intended to be where the amount or nature of personal makes procedural safeguards more appropriate?
Should be clarified more

Paragraph 2

2. Parties shall also ensure that in cases where an artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

Commented [C133]: The language used in this paragraph covers a range of AI-driven activity that is broad. As a result, the language would place stringent requirements on organisations deploying such systems to apply safeguards even where the function of those safeguards would already have been performed during the decision-making process, risking the proportionality of such safeguards. This is because a decision that has been 'substantially informed' by an artificial intelligence system may also include a substantial level of human involvement. It is therefore more appropriate to require a right to human review only in instances where such a system has taken a decision with no meaningful human involvement.

Paragraph 3

3. Parties shall ensure that, where appropriate, relevant explanations and justifications are offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

Commented [C134]: What would constitute an interest? Is this being used to cover additional rights to HR or commercial interests or other?

Commented [C135]: As with the previous paragraph, what do interests mean here?

Paragraph 4

4. Where appropriate, parties shall ensure that artificial intelligence ~~providers that any person has the right to know knows that one~~ is make it clear to users that they are interacting with an artificial intelligence system rather than with a human and, where appropriate, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system

Article 10 – Wider protection

None of the provisions of this Convention shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection than is stipulated in this Convention, while maintaining the principle of proportionality.

Article 11 - Risk and impact assessment

Paragraph 3

3. Each Party shall take appropriate measures, particularly in the field of training of national supervisory authorities, artificial intelligence providers and artificial intelligence users, with a view to ensuring that the relevant actors are capable of identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law, in accordance with the present methodology.

Article 12 - Measures in respect of artificial intelligence systems posing significant levels of risk

Article 13 - Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 2

2. Parties shall, in accordance with their domestic law, establish appropriate and independent review procedures in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available.

Article 14 – Prohibited artificial intelligence practices

Article 15 - Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Paragraph a

Commented [C136]: Further qualifications and explanation of this obligation and the circumstances it would apply is necessary to prevent and mitigate impracticability.

A better balance between safeguarding and not being too burdensome or economically non viable on business must be achieved.

There are lots of AI uses that we take for granted, that people wouldn't really expect to be done by a human. E.g. We assume that this isn't intended to cover uses like e g. google translate queries?

Furthermore, 'interacting' may need further qualification. e.g. assume it is direct engagement with an AI system, rather than a situation where AI is used as part of the process but this needs clarifying.
Consideration of whether this is required in every case or only where Human Rights, Democracy and Rule of Law are potentially threatened?

Commented [C137]: To address proportionality between impacted and those bringing products to market

Commented [C138]: Our comments and position on this Article will be dependent on the content of the appendix.

Commented [C139]: What is the term 'actors' intended to capture?

Commented [C140]: Our comments and position on this Article will be dependent on the content of the appendix.

Commented [C141]: Art 13 likely requires further consideration. The UK is committed to taking a proportionate, pro-innovation approach to regulating AI technologies and further
discussion on this article will be useful

Commented [C142]: Art 14 likely requires further consideration. The UK is committed to taking a proportionate, pro-innovation approach to regulating AI technologies and further
discussion on this article including the caveats will be useful

Commented [C143]: Art 15 likely requires further consideration

a. minimizing and, to the extent possible, preventing any unlawful harm ~~or damage~~ to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the inappropriate application of artificial intelligence systems;

> **Commented [C144]:** Unlawful harm accepted, but considering removing 'damage' as 'damage to human rights' opens up a potential minefield because human rights can often involve a balance of competing rights where one or other are impacted.

> **Commented [C145]:** What are 'interests'?

> **Commented [C146]:** What is "inappropriate" application? Is this around Human Rights, Democracy and Rule of Law? Or wider criteria as set out in this instrument? Or contrary to the purpose of the instrument?

Paragraph b

b. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the ~~right~~ enjoyment of rights to freedom of expression and assembly and association, democratic participation and the exercise of other relevant human rights and fundamental freedoms resulting from the inappropriate application of artificial intelligence systems;

> **Commented [C147]:** Whether it's the rights that are affected or the enjoyment of the rights affected needs clarified.

Paragraph d

d. ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

> **Commented [C148]:** Not clear why gender equality specified with everything else simply grouped together. What rights are being referenced and for whom? Equality for all is not an unqualified right.

Paragraph e

e. ensuring that the ~~rights to~~ right to respect for privacy and to personal data protection are adequately respected during design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors, notably through additional safeguards for special categories of data such as medical data

> **Commented [C149]:** To align with wording of ECHR which confers the 'right to respect for privacy

Article 16 – Consultation of the Parties

Paragraph 2

2. The Consultation of the Parties shall be convened by the Secretary General of the Council of Europe whenever (s)he finds it necessary and in any case when a majority of the Parties or the Committee of Ministers request its convocation.

> **Commented [C150]:** 'Request its convocation': The text should set out what mechanisms are available for requesting this.

Paragraph 3

3. The Consultation of the Parties shall adopt its own rules of procedure

> **Commented [C151]:** Useful to clarify how consultations in practice would work.
> What input from signatories would be recognised?

Article 17 – International cooperation

> **Commented [C152]:** Art 17 likely requires further consideration.
> Not clear what requirements are, and would want the same to be agreed, rather than one country doing a six monthly report and another a five yearly report. This should be expanded more to detail this.

Paragraph 2

2. Parties shall, on a regular basis, exchange information between them concerning design, development and application of artificial intelligence systems which they assess as posing

significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Article 18 – National Supervisory Authorities

Paragraph 1

1. Parties shall establish or designate national supervisory authorities tasked, in particular, with overseeing and supervising compliance with the requirements of the risk and impact assessment of artificial intelligence systems in accordance with Article 11 and 12.

Paragraph 2

2. Parties shall, in accordance with their domestic law, provide for efficient procedures for the imposition of a moratorium or a ban on design, development and application of an artificial intelligence system in accordance with Articles 13 and 14.

Article 22 – Dispute settlement

In the event of a dispute between Parties as to the interpretation or application of this Convention which cannot be resolved by the Consultation of the Parties, as provided for in Article 16 , paragraph 1, e, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 26 – Reservations

No reservation may be made in respect of any provision of this Convention.

Commented [C153]: The text should set out the mechanism for exchanging information.
Will the amount of info we pass, and what it concerns, be left to individual states' discretion?
Should there be cooperation / collaboration on AI applications which pose an 'unacceptable' level of risk too?

Commented [C154]: Art 18 likely requires further consideration.

Commented [C155]: Not clear what 'in particular' is intended to add. The Article has already made the point that for some already established but that others would have to formulate new authorities.

Commented [C156]: Who decides what the 'efficient' procedures are? Who can challenge?

Commented [C157]: Art 22 likely requires further consideration.

Commented [C158]: Is it appropriate that this is the first option referred to? Why not use other product safety resolution measures initially?

Commented [C159]: In a few of the Convention's articles, there has been language to the effect of parties can object / amend certain elements, if pre-existing domestic legislation allows for it. Yet here we are saying 'no reservations' which seems to be a contradiction? This may not be intended, but should be clarified.
There will likely be a need to consider scope for reservations at later stage in drafting process.

OBSERVER STATES

Japan

(1) Article 4
-The "scope" in Article 4 seems to be unclear and too broad.
-As for the exemption of national security/defense in Article 4.2, it is questionable if, at the stage of design and development, a sharp distinction can be made between intended applications, considering the fact that, in general, artificial intelligence systems are applicable as dual-use technology.
-The article 4.2 of the Convention excludes from its scope "design, development and application of artificial intelligence systems used for purposes related to national defense". What does the usage of "national defense" imply, especially in comparison to "national security" which has a broader implication?

(2) The following provisions seem to be too ambitious, and their feasibility and implementation seem to be doubtful.
Article 5.5, 5.7, 5.8
Article 6.2
Article 7.2, 7.4
Article 11.1
Article 13.1, 13.2
Article 14.1, 14.2, 14.3
Article 18.1, 18.2, 18.3, 18.4

COMMITTEES AND OTHER COUNCIL OF EUROPE BODIES

Congress of Local and Regional Authorities (comments by David Eray, Spokesperson on digitalisation and artificial intelligence)

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability, access to technology ~~or other status~~, or based on a combination of one or more of these grounds.

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 2

2. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability, sobriety ~~and solidarity~~ and the need to protect the environment;

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of solidarity and equality, including gender equality and rights related to discriminated groups and people in vulnerable situations;

Paragraph 5

5. ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of design, development and application of artificial intelligence systems throughout their lifecycle and that appropriate redress mechanisms are available;

Paragraph 6

6. ensure that, ~~where appropriate,~~ adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

Paragraph 8

Commented [C160]: They cannot be considered as « status »

Commented [C161]: To be seen where exactly to put it in this article (as part of this paragraph or even ideally a separate paragraph). But it seems to me that the question of access to technology can constitute a ground for discrimination. The Congress report on Urban-rural interplay and the Report on smart cities and regions underline the problem of digital divide.

Commented [C162]: "Sobriety and sustainability requirements help to evaluate the balance between the cost of developing such solutions and its value for the end-users." Sobriety becoming increasingly a key requirement. As more sober and responsible digital use shows that environmental and digital transition go hand-in hand.

Commented [C163]: It is positive that the draft Convention mentions the principle of sustainability and solidarity and the need to protect environment. The explanatory report specifies that these principles encourage approaches based on circular economy and the need "to minimise any deleterious effects resulting from the use of artificial intelligence systems on the environment". The Congress report on "A fundamental right to the environment: a matter for local and regional authorities" was approved by the Monitoring Committee and is going to be debated in Congress session in October 2022. Also the Governance Committee will prepare a thematic report on circular economy. The sustainable development is an important current priority for the Congress.
→ The draft Convention could more prominently mention, beyond the fundamental principles part, the need to ensure that design, development and application of artificial intelligence do not compromise but on the contrary contribute to strengthen the principle of sustainability (ex. similarly to the principle of equality in the Chapter III on risk and impact assessment) – See new point added in Art. 15 e.

Commented [C164]: Solidarity fits better here with equality

Commented [C165]: Liability provisions are indeed important. When the damage is caused by AI systems there will inevitably be questions as to who can be held legally liable and in what circumstances.

Commented [C166]: It is beneficial that oversight mechanisms are being put in the highlight. We do concord that adequate oversight mechanisms as well as transparent and auditability requirements tailored to specific risks should be put in place. And they are always "appropriate" and needed. In some countries they may exist at the level of regions for example. But, as the Smart cities and regions

8. ensure that adequate safety, security, data quality, data integrity, data security, cybersecurity ~~and~~ robustness and resilience requirements are in place regarding design, development and application of artificial intelligence systems;

Paragraph 9

9. strive to ensure that fundamental questions raised by the design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ethical and legal implications;

Paragraph 10

10. encourage and promote digital literacy and digital skills for all segments of the population in particular for ~ marginalised groups to bridge digital divide.

Article 14 – Prohibited artificial intelligence practices

Paragraph 2

2. the use of artificial intelligence systems for social scoring to determine access to essential services leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

e) ensuring that design, development and application of artificial intelligence systems do not compromise the principle of sustainability and the need to protect the environment;

Appendix: Methodology for risk and impact assessment of artificial intelligence systems

Commented [C167]: AI revolutionises energy sector. The Congress Report on Smart Cities and Regions gives good examples in this respect. However, AI is also reliant on energy supply and its cuts or cyberattacks against AI systems can adversely affect the operation of AI systems and of critical infrastructure. May be adding a provision on building resilience could be useful.

Commented [C168]: The principle related to the need to ensure "appropriate public discussion" and "multi-stakeholder consultation" is a very central one for a sound democracy. Beyond a mere requirement, it has important practical implications for citizens, influencing the success and the sustainability of efforts in introducing AI. The smart cities and regions report of Governance committee of the Congress indicates that the lack of attention to the needs of users is a reason for failure in introducing digital and AI technologies..

Commented [C169]: It is positive that the draft Convention encourages and promotes digital literacy and digital skills. The digital literacy is of key importance. It is necessary to ensure inclusiveness of technology-based services in order to mitigate the risks of digital divide (geographical, generational, gender etc). The disadvantaged /marginalised groups (*such as elderly, women and girls, children and youth, low-income residents, persons with disabilities, indigenous people, those living in informal settlements, rural communities, refugees and immigrants*) require special attention. The Covid 19 pandemic introduced even greater urgency to bridge the digital divide.

→The explanatory report could usefully provide more details on this point. The smart cities and regions report provides interesting insight on digital equity.

Commented [C170]: It is positive to see that the proposed text of the Convention bans "social scoring" AI tools. The Congress smart cities and regions report raises concerns about social scoring practices rating trustworthiness and behaviours of citizens and determining access to essential services. They are mentioned as detrimental to human rights and freedoms, alongside with practices of mass camera surveillance and facial recognition technologies.

Commented [C171]: See comments under Article 5.2

Commented [C172]: Environment is already mentioned under point a) and as a Minister of Environment I am glad to see this. I wonder if this could not be reinforced by a separate point similar to the point d)

Commented [C173]: The future methodology for risk and impact assessment of artificial intelligence systems to be included in the appendix to the Convention will provide a very useful and practical tool for decision makers at different levels of power and the private sector alike. We will provide an input to this work so as to ensure that the matters related to regional and local governance are duly taken into accou

CDADI

Article 2 – Definitions

Paragraph e

e. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by decisions made or substantially informed by the application of an artificial intelligence system.

Commented [C174]: This term is not very respectful for designating those whose rights are at stake. What about « person impacted by artificial intelligence » ?

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender identity, sexual orientation, "race"[1], colour, language, age, religion, political or any other opinion, nationality, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds.

Commented [C175]: This narrows the principle too much. The principle would only apply to the Parties and not oblige them to ensure that the use of AI systems does not lead to discrimination on any ground. Please consider incorporating Article 5.3 into Article 3.

Commented [C176]: We would suggest taking the exact wording of § 2 of CM/Rec(2022)16 (including the inverted commas around the word « race » and possibly the adapted text of the footnote), which is the outcome of intense negotiations at the level of the GR-H and the CM:

such as "race",2 colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation.

Footnote : 2. Since all human beings belong to the same species, the Committee of Ministers rejects, as does the European Commission against Racism and Intolerance (ECRI), theories based on the existence of different "races". However, in this document, the term "race" is used in order to ensure that those persons who are generally and erroneously perceived as "belonging to another race" are not excluded from the protection provided for by the legislation and the implementation of policies to prevent and combat hate speech.

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 3

4. ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and the prohibition of discrimination on the grounds listed in Article 3[in particular of rights related to discriminatedpersons and groups and people in situations of vulnerabilityle situations];

Paragraph 10

10. encourage and promote and support digital literacy and digital skills for all segments of the population.

Commented [C177]: Situations are not vulnerable.

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Paragraph 1

1. ensure that the deployment and application of artificial intelligence systems in the public sector promote and do not undermine human rights and fundamental freedoms, legal rights and interests which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party and respect the principle of the rule of law.

Commented [C178]: See §§ 2 and 8 of ECRI's General Policy Recommendation No. 7.

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[1] Since all human beings belong to the same species, theories based on the existence of different « races" are rejected. However, in this Convention, the term „race" is used in ordert o ensure that those persons who are genrally and erroneously perceived as „belonging to another race" are not excluded from the protection provided for by this Convention.

Paragraph 4

4. ensure that all relevant artificial intelligence users receive appropriate training in operating any artificial intelligence systems employed in line with the provisions of this Convention as well as the respective limitations of such systems.

Article 7 – Procedural safeguards

Paragraph 1

1. Parties shall ensure that, where appropriate, the usage of an artificial intelligence system, the data used and the decision criteria applied is duly recorded and communicated to the artificial intelligence subjects concerned. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be governed by domestic law;

> **Commented [C179]:** In my view, such transparency provisions only make sense if they secure information on the data(sets) used and the decision criteria applied. These are the minimum éléments that end-users and the judiciary need in order to check whether AI has been used in line with the relevant regulation, or whether any right has been violated.

Paragraph 2

2. Parties shall also ensure that in cases where an artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

Paragraph 3

3. Parties shall ensure that, where appropriate, relevant explanations and justifications are offered by the artificial intelligence provider and/or user in the language of the end-user and in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

> **Commented [C180]:** This information should in principle also be made available in minority or regional languages.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 2

2. Parties shall, in accordance with their domestic law, establish appropriate and independent review procedures including judicial control in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available.

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Paragraph d

a. ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

> **Commented [C181]:** See comment to Article 5 3.

Children's Rights Division

Preamble

Concerned by the risk that certain uses of some artificial intelligence systems also have the potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining democracy and violating the rule of law through such harmful practices and effects as, for instance, unrestricted mass surveillance, information distortion, possible unlawful discrimination, to manipulative tactics that exploit vulnerabilities of individuals [individuals in vulnerable situations] [including children]; the general weakening of human agency, unlawful electoral interference, and digital exclusion or discrimmination;

Conscious also of the fact that in view of its framework character the Convention may be supplemented by further binding or non-binding instruments to address challenges relating to the application of artificial intelligence in specific sectors or for specific groups of people;

> **Commented [C182]:** To pave the way for further instruments to address specific challenges for children and their rights, also compare our proposal and comments under point 4 the draft EM

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds.

> **Commented [C183]:** Better gender identity, no ? also issue with race

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality avoiding discrimination on any of the grounds listed in Article 3 and enabling access to rights related to discriminated groups and for people in vulnerable situations;

> **Commented [C184]:** This formulation can be improved. I would even include an obligation of result for AI systems that is non-discriminatory

Paragraph 10

10. encourage and promote digital literacy and digital skills for all segments of the population

> **Commented [C185]:** This is crucial for everyone, and children and young people in particular, compare our drafting proposal in para. 36 of the EM.

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

> **Commented [C186]:** I am missing, possibly in this article, a reference to robust reporting systems to alert on potential violations or would this fall into something more general. It is so specific that it might be interesting to emphasise this

Article 7 – Procedural safeguards

Paragraph 2

3. Parties shall also ensure that in cases where artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

> **Commented [C187]:** Is this sufficient? At least the request for human review should be simple enough to ensure that all those that need it can obtain it

Paragraph 3

3. Parties shall ensure that, where appropriate, relevant explanations and justifications are offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context, and the target group. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

> **Commented [C188]:** To ensure such explanations are child-friendly for AI systems that affect children, also see our proposed addition to para 43 of the draft EM.

Article 11 – Risk and impact assessment

Paragraph 1

1. Without any prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems in relation to the enjoyment of human rights, including the rights and best interests of children the functioning of democracy and the observance of rule of law.

> **Commented [C189]:** It is essential that this methodology pays specific attention to risks to the full range of children's rights, and the principle of the best interests of the child must be a guiding factor in a risk assessment.

> **Commented [C190R189]:** This is particularly crucial when having to strike the right balance between protecting children from sexual exploitation and abuse and guaranteeing the right to privacy when the use of automated detection tools is envisaged.

Paragraph 2

2. The methodology shall be based on the model set out in the Appendix to the present Convention. It shall set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such systems that in view of their concrete applications pose significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law.

> **Commented [C191]:** Inspiration can be drawn in that regard from Child Rights Impact Assessment methodologies. See for an interesting document: S Mukherjee, K Pothong and S Livingstone, Child Rights Impact Assessment: A tool to realise child rights in the digital environment, https://digitalfuturescommission.org.uk/wp-content/uploads/2021/03/CRIA-Report.pdf

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 1

3. Parties shall, in accordance with their domestic law, provide for the possibility of imposing a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (e) are deemed to present unacceptable levels of risk of interfering with the enjoyment of human rights, the functioning of democracy, and the observance of the rule of law. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk.

> **Commented [C192]:** See also our remark added to para. 54 of the Explanatory report regarding the precautionary principles when it comes to children's rights

Article 14 – Prohibited artificial intelligence practices

Paragraph 1

3. the use of artificial intelligence systems by public authorities using biometrics to identify, categorise or infer emotions of individuals or that manipulate or interfere with [children's/individual's] right to freedom of thought and belief;

> **Commented [C193]:** -Suggestion to review the reference to "the use of" in every sub-paragraph, to make it more readable.
> Should the ban also cover the design and development of such systems?

Paragraph 2

4. the use of artificial intelligence systems for social scoring to determine access to essential services leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;

> **Commented [C194]:** This is not clear

> **Commented [C195]:** Could this be clarified?

Paragraph 3

5. [the use of artificial intelligence systems that materially distort the behaviour of children or other vulnerable persons in a manner that causes or is likely to cause that person or another person physical or psychological harm;

> **Commented [C196]:** Particularly relevant for children, also compare article 5.1.b EU Proposal for an AI Act.

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Paragraph a

b. ~~minimis~~ing and, to the extent possible, preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public

health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph b

c. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms resulting from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph c

d. ensuring that all interested parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions;o

Paragraph d

e. ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality ~~before the law~~ including gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

Paragraph e

f. ensuring that the rights to privacy and to personal data protection are adequately respected during design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors, notably through additional safeguards for special categories of data such as medical data and data of children.

Appendix: Methodology for risk and impact assessment of artificial intelligence systems

CDDG (in cooperation with the CDDG Rapporteur on Democracy and Technology)

General comments

1. The purpose of the proposed "(Framework) Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law" is to establish *"fundamental principles and rules aimed at ensuring*

Commented [C197]: Proposal to remove « inappropriate » (because precisely the harms caused are what makes it inappropriate).

Commented [C198]: perhaps remove inappropriate (because precisely the harms caused are what makes it inappropriate)

Commented [C199]: See comment above.

Commented [C200]: idem

Commented [C201]: unclear what is meant by this phrase. I guess the idea is that AI should not pose obstacles to public debate and inclusive democratic process. There is a whole issue of jurisdictions and the global influence of technology companies. If this is what is meant, it should be worded more clearly

Commented [C202]: Not only before the law, but in general

Commented [C203]: this is almost identical to 5.3 in chapter II but the second part of the sentence is not very helpful

Commented [C204]: It is important that this methodology pays specific attention to risks for the full range of children's rights. Inspiration can be drawn from Child Rights Impact Assessments. See also our remark under Article 11 above.

that design, development and application of artificial intelligence systems is fully consistent with respect for human rights, the functioning of democracy and the observance of rule of law."

2. Repeated reference to the functioning of democracy and core democratic values throughout the Draft are welcomed. The CDDG has highlighted in its previous contribution to the CAHAI that it is essential that the use of AI systems does not undermine the functioning of democracy. This includes strengthening of democratic institutions as well as a need to safeguard democratic processes and democratic participation.

3. Democracy is based on two cornerstone assumptions, i.e. that citizens have both agency (capacity to form an opinion and act on it) and influence (capacity to effect decisions made on their behalf). AI can strengthen but, depending on how it is used, can also become a threat to both these assumptions.

4. In recent years, **democratic processes** and freedom of agency have come under pressure among others due to micro-targeting, profiling or manipulation of content in elections, use of bots and various social media manipulation techniques, disinformation campaigns and other digitally enhanced interferences in electoral processes etc. The use of AI systems in this context could further aggravate the situation. The Draft should therefore explicitly address the protection of inclusive and participatory democratic processes, along with reference to fostering robust and accountable democratic institutions (Art. 5), including in respect of protection against various forms of manipulation which AI systems fuelled by big data and big processing power (including big nudging) can bring.

5. Citizens' influence, including through direct participation in deliberations and decision making, is also a cornerstone of democracy. A fair and accessible **public debate** on the use of AI systems and its societal implications should be encouraged, as it contributes to an informed public able to participate, and has the potential to enhance trust in the actions of public authorities. AI is however but one tool at the disposal of decision makers and should not be overused or abused, as government should remain "of the people, by the people, for the people". More emphasis could be given to ensuring democratic participation in general and enabling public debate in particular. Openness and transparency on the use of AI systems and explainability might be considered as guiding principles for such public debate. Furthermore, public debate should not be limited to areas of significant risk (Art. 15(c)).

6. The introduction of an article devoted to ensuring proper accountability, responsibility, and legal liability of the **public sector,** including private actors that act on behalf of the public sector is timely. The scope of Art. 6 could be broadened to include design and procurement as areas to be covered, thus not limiting accountability, responsibility and legal liability to the areas of deployment and application.

7. In its current terms of reference, the CDDG is tasked with preparing a **Handbook on the use of digital technologies and artificial intelligence by the public administration.** Work to this effect will start in 2023 and any relevant insights and findings will be shared with the CAI in due course.

8. As the steering committee with primary responsibility in the field of democracy and good governance, the CDDG stands ready to further contribute to the development of a "*Methodology for risk and impact assessment of artificial intelligence systems*". The CDDG is currently preparing a **draft recommendation** of the Committee of Ministers on **principles of good democratic governance** building on the 12 principles of good democratic governance at local level, as per its current terms of reference, with a view to the adoption in the first half of 2023. The recommendation could potentially also provide a useful set of benchmarks for the risk and impact assessments of the use of AI systems.

9. Finally, the CAI Secretariat may wish to take note of the various instruments and documents prepared by the CDDG which could give substantial input for the text and could feed into the Explanatory memorandum, notably Study on the impact of digital transformation, including AI and automated decision making on democracy and good governance in particular the chapter on Democracy; Handbook on e-democracy, highlighting existing good practices among member States; Guidelines on the use of ICT in the electoral process providing principles for the use of technology in this context; and Guidelines on civil participation in decision-making underlining the importance of participation for democracies to thrive.

Conference of International Non-Governmental Organisations of the Council of Europe

Preamble

Concerned by the risk that ~~certain uses of~~ some artificial intelligence systems or certain uses of such systems also have the potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining democracy and violating the rule of law through such harmful practices and effects as, for instance, unrestricted mass surveillance, information distortion, possible unlawful discrimination, the general weakening of human agency, unlawful electoral interference and digital exclusion;

Commented [C205]: Since the Convention is also going to tackle "red lines", i e., AI systems to be considered for bans or moratoria, some AI systems as such may end up being banned altogether, especially if they are designed specifically and exclusively for purposes that present unacceptable risks. Therefore, we propose this slight revision.

Conscious of the fact that human rights, democracy and the rule of law are inherently interwoven and convinced of the need to establish, as a matter of priority, a common legal framework with ~~establishing~~ fundamental principles and rules governing design, development, and application of artificial intelligence systems which would effectively preserve the shared common values and at the same time be conducive to innovation;

Commented [C206]: We propose to remove this as it is redundant with "need to establish" in the same sentence.

Mindful of the need to ensure consistency ~~a proper balance~~ between respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties and various economic, security and other interests in the development and use of artificial intelligence;

Commented [C207]: The use of the terms "proper balance" here - i.e., not between rights as such but between human rights instruments - implies a lack of consistence/complementarity between such human rights instruments, as if the protection included in some were at odds with the protection included in the others. We suggest removing this ambiguity by replacing with another term, such as "consistency", which ensures mutual strengthening and implies a common goal of such instruments.

Article 1 – Purpose and object

Paragraph 1

1. This Convention establishes certain fundamental principles and rules aimed at ensuring that research design, development and application of artificial intelligence systems are~~is~~ fully consistent with respect for human rights, the functioning of democracy and the observance of rule of law.

Article 2 – Definitions

Paragraph b

b. "lifecycle" means all phases of existence of an artificial intelligence system ~~between its design and decommissioning~~, including ~~;~~(i) planning and design, data collection and processing and model building; (ii) verification and validation; (iii) deployment; (iv) operation and monitoring; and (v) end of life.

Paragraph c

c. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed with a view to placing it in the market putting it into service/commissioning it;

Paragraph d

d. "artificial intelligence ~~user"~~ deployer means any natural or legal person, public authority or other body deploying ~~using~~ an artificial intelligence system in their own name or under their authority;

Paragraph e

e. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by outputs such as decisions recommendations or predictions made or ~~substantially~~ informed by the application of an artificial intelligence system.

Article 3 – Prohibition ~~Principle~~ of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds.

Article 4 – Scope

Commented [C208]: We propose to add "research" here because:
1) it is in line and consistent with the language of Article 5 below, which already includes "research";
2) the phase of research should also be complaint with the respect of human rights since it may already affect individuals and their rights, e.g., the data protection, health, etc., of individuals involved in the research (indeed, there are treaties such as the CoE Oviedo Convention that are mindful of human-rights compliant research).

Commented [C209]: We recommend using this definition since it is already formulated by the CoE Commissioner for Human Rights in her Recommendation "Unboxing AI - Ten steps to protect human rights": https://book.coe.int/en/commissioner-for-human-rights/9664-unboxing-artificial-intelligence-10-steps-to-protect-human-rights.html

Commented [C210]: As also clarified in the current draft EU AI Act, the term "putting into service" only defines the supply of an AI system for first use directly to the user for its intended purpose., whereas a private company, e.g., may be designing an AI system and just place it/make it available on the market for anyone to purchase it. Therefore, we recommend adding "placing on the market" as well.

Commented [C211]: This term already proves confusing under the draft EU AI Act because the term "user" in common languge is usually mostly referred to individuals/consumers as "end-users". Even though we suppose that the intention of the draft here is to use language consistent with the draft EU AI Act currently under negotiations, it is important to remember that under these negotiations there are also proposals from MEPs to replac...

Commented [C212]: This change is proposed to make the text consistent with the definition proposed by the zero draft text in paragraph *a.* above in the same article.

Commented [C213]: We strongly recommend removing this qualifier, since it may cause unclarity in its practical interpretation (what is "substantially"?). Besides, this qualifier does not appear even in the definition of "artificial intelligence system" in para *a.* above, when referring to decisions made using machines etc. ...

Commented [C214]: We recommend using the same strong wording ("Prohibition") as in the heading of Article 14 of the ECHR, since the text of this article is also transposed from Article 14.

Commented [C215]: We welcome this addition compared to the simple non-discrimination prohibition of Article 14 of the ECHR, since it explicitly acknowledges that there can be intersectionality between different grounds of discrimination. We recommend that this clarification is ma...

Paragraph 1

1. Parties undertake to apply this Convention to research design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.

1.2. This Convention shall apply within the mandate and competences established by the Statute of the Council of Europe.

Paragraph 2

2. The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.

Article 5 – Research, Ddesign, development and application of artificial intelligence systems

Bearing in mind the need to safeguard and uphold human dignity, human rights and fundamental freedoms, preserve and foster robust and accountable democratic institutions and safeguard the rule of law as the institutional basis for assuring both democratic participation and the effective protection of human rights and fundamental freedoms, in their respective jurisdictions Parties shall:

Paragraph 1

1. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application are not aimed at undermining or curtailing fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;

Paragraph 3

3. ensure that any research design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and rights related to discriminated groups and people in vulnerable situations;

Paragraph 4

4. ensure that privacy of individuals is protected including through applicable personal data protection and data governance laws and standards and that data protection principles and rules are applied in respect of any research, design, development and application of artificial intelligence systems and that appropriate guarantees and safeguards have been put in place for data subjects;

Paragraph 5

Commented [C216]: Added here to make it consistent with the inclusion of "research" already in Article 5 and with the suggested amendments in Article 1 above.

Commented [C217]: When it comes to defining the scope of this future legally binding horizontal instrument, the CAHAI final document ("Possible Elements") pointed out that "*matters relating to national defence fall outside the scope of a legal framework of the CoE*" as per Article 1d of the Statute of the CoE and, therefore, cannot be included in a future CoE legally binding, or even non-binding, instrument. However, we respectfully argue that this statement omits to clarify that this so-called "Defence Clause", introduced at the time of creation of the CoE to preserve the competence of the governments and the competent military organisations such as the North Atlantic Treaty Organization (NATO), does not rule out the possibility for the CoE to engage in matters of security and conflict when they may jeopardise the protection of human rights (especially the "right to life"). Indeed, e.g., the leadership of the CoE recently stressed, in the context of the war in Ukraine, that while the CoE "*is not directly involved in the peaceful settlement of the conflict*", they remain concerned by the impact of the conflict at humanitarian and human rights levels, since "*there are very clear legal obligations on member States, on all member States, to ensure that every individual's human rights are respected.*" (See CoE Secretary General Marina Pejčnović-Burić, 'Vote: The Assembly's vision on the strategic priorities for the Council of Europe'). As a result, the "Defence Clause" should not preclude any legally binding or non-binding regulation at CoE level of the impact on human rights, the rule of law and democracy that AI systems may have when applied in situations of conflict or post-war peacekeeping operations. We can provide examples of ECtHR case law where the Court did acknowledge its own competence to assess compliance of military actions conducted by CoE Member States with human rights. [...]

Commented [C218]: We recommend adding "research" in the heading since it is also already featured in paras 1 and 2 below.

Commented [C219]: As explained above, since "research" already correctly features here among the phases that need to comply with fundamental principles, "research" should also be added in the Preamble and in Article 1.

Commented [C220]: We believe that not having "research" added here too, consistently with paras 1 and 2 above, is an oversight, so we recommend adding it.

Commented [C221]: Again, here too "research" should be added to be compliant with data protection rules and standards.

5. ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of any research, design, development and application of artificial intelligence systems throughout their lifecycle and that appropriate redress mechanisms are available;

> **Commented [C222]:** Again, even "research" should not be exempt from minimum requirements of accountability, responsibility and liability.

Paragraph 6

6. ensure that, ~~where appropriate~~ appropriate and adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

> **Commented [C223]:** Oversight mechanisms, transparency and auditable mechanisms are always appropriate. It is actually the level of oversight, transparency and auditability that should be appropriate/tailored to the situations. Hence, the proposed re-wording.

Paragraph 7

4. ~~with a view to encouraging research and fostering innovation, ensure that a controlled regulatory environment for testing artificial intelligence systems is available for artificial intelligence providers and users under the supervision of their competent authorities;~~

> **Commented [C224]:** We strongly recommend removing this unnecessary paragraph. The Council of Europe is not an economic organisation whose primary objective is the protection and promotion of the internal market, like the EU, or the promotion of economic development and innovation, like the OECD. The main purpose of the CoE and of this Convention should be the promotion of innovation that is only compliant with democracy, human rights, and rule of law.

Paragraph 8

8. ensure that adequate safety, security, data quality, data integrity, data security, cybersecurity and robustness requirements are in place regarding any research, design, development and application of artificial intelligence systems;

> **Commented [C225]:** Same as comments above on the addition of "research".

Paragraph 9

9. strive to ensure that fundamental questions raised by the research, design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ethical and legal implications;

Paragraph 10

> **Commented [C226]:** Debates and public discussions should equally be promoted for the research of AI systems, especially in crucial or controversial sectors (e g., healthcare, law enforcement, judiciary, etc.).

10. encourage and promote meaningful multi-stakeholder inclusion and consultation, digital literacy and digital skills for all segments of the population.

> **Commented [C227]:** Multi-stakeholder inclusion and consultation should feature among the fundamental principles informing States and private companies' actions.

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Paragraph 1

1. ensure that the design, deployment and application of artificial intelligence systems in the public sector do not undermine human rights and fundamental freedoms, legal rights and interests which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party and respect the principle of the rule of law.

> **Commented [C228]:** The design in some cases may also already undermine human rights and fundamental freedoms before the system's concrete deployment and application (see, e g., systems designed with in-built bias). So we recommend including it here.

Paragraph 3

3. ensure compliance with the standards set out in this article insofar as any private entity acting on ~~their~~ behalf of a public authority or institution is concerned.

> **Commented [C229]:** We believe this text clarifies the relationship better.

Paragraph 4

4. ensure that all relevant artificial intelligence deployers ~~users~~ receive appropriate training in operating any artificial intelligence systems ~~dee~~mployed as well as on the respective limitations of such systems.

Article 7 – Rights and Procedural safeguards

Paragraph 1

1. Parties shall ensure that, ~~where appropriate~~, the deployment ~~usage~~ of an artificial intelligence system is duly and appropriately recorded and communicated to the artificial intelligence subjects concerned. Parties shall also grant any person the ~~The exercise of the~~ right of access to the relevant records~~, including the grounds on which it may be exercised, shall be governed by domestic law~~ in accordance with the relevant international standards and obligations on access to information:

Paragraph 2

2. Parties shall also ensure that in cases where an artificial intelligence system ~~substantially~~ informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

Paragraph 3

3. Parties shall ensure that~~, where appropriate,~~ appropriate ~~relevant~~ explanations and justifications are always offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

Paragraph 4

~~3.~~4. Parties shall ensure that any natural or legal person has the right to an effective remedy before a national authority (including judicial authorities) against decisions made or informed by artificial intelligence systems affecting a subject's human rights legal rights and interests.

Paragraph 5

~~4.~~5. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and~~, where appropriate,~~ shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

47

Commented [C230]: Once again, in line with what recommended above and what is currently being propose by most MEPs within the draft AI Act, we call for the replacement of the term "users" with the term "deployers".

Commented [C231]: Just missing preposition.

Commented [C232]: This article does not only list procedural safeguards but also acknowledges specific rights, as explicitly indicated in para 5 and in Article 8 below (he latter referring to restrictions on such rights).. Therefore, we recommend reflecting this correctly in the heading of this Article.

Commented [C233]: Recording and communication is always necessary and appropriate. It is the type/methods of recording and communication that should be appropriate/tailored to the specific situations. Hence, the proposed re-wording.

Commented [C234]: The exercise of this right and its grounds cannot be left to the entire discretion of domestic law. Besides, this para appears redundant in light of the same specification outlined in the concluding paragraph below, so we propose a reformulation consistent with the concluding paragraph of the article.

Commented [C235]: Missing article

Commented [C236]: It is not clear who would decide what is a "substantial" level of information. This obligation should *always* apply whenever the decision - whether it is taken by the AI system or aided by the latter on any level - affects humans rights and freedoms. Therefore, the qualifier "substantially" should be removed.

Commented [C237]: As already explained above, we believe that it is *always* appropriate to have such obligation, whereas there may be different levels of appropriate implementation/detailing of the obligation, depending on context and situations.

Commented [C238]: It is crucial to explicitly include the right to an effective remedy, (including before judicial authorities) rather than a vague "possibility of challenging decision(s)." This was also explicitly recommended by the "Potential Elements" document (para 34). Furthermore, if not directly here in the text, the Explanatory Memorandum [...]

Commented [C239]: We believe that as a minimum, the alternative of a human "in addition to" an AI system - for example, to explain/review its decision - is always appropriate and therefore should always be granted.

Paragraph 6

~~5.~~6. The exercise of the rights set out in paragraphs 1 to 4, including the grounds on which they may be exercised, shall be governed by domestic law in accordance with the relevant international and Council of Europe standards on human rights rule of law and democracy.

Article 8 – Restrictions

Restrictions on the exercise of the rights specified in Article 7 paragraphs 1 to 4 may be provided for by law where necessary and proportionate in a democratic society in the interests of national security, territorial integrity or public safety ~~or the economic well-being of the country~~, for the prevention of disorder or crime, for the protection of health or morals, ~~or~~ for the protection of the rights and freedoms of others for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Article 11 – Risk and impact assessment

Paragraph 1

1. Without ~~any~~ prejudice to already existing relevant national and international legal instruments, and regardless ~~irrespective~~ of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to the design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the design development and application of artificial intelligence systems as well for mitigating risks in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law. Risk and impact assessments shall be conducted regularly throughout the life cycle of the artificial intelligence systems and their context-specific deployment. The Parties shall impost an obligation to document keep records and publish relevant findings of such assessments.

Paragraph 2

2. The methodology shall be based on the steps and criteria ~~mode~~ set out in the Appendix to the present Convention. It shall set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such systems that in view of their concrete applications pose significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law.

Paragraph 3

3. Each Party shall take appropriate measures, particularly in the field of training of national supervisory authorities, artificial intelligence providers and artificial intelligence users, with a view to ensuring that the relevant actors are capable of identifying, analysing and evaluating risk and assessing impact of the design, development and application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law, in accordance with the present methodology.

48

Commented [C240]: We believe that as a minimum, the alternative of a human "in addition to" an AI system - for example, to explain/review its decision - is always appropriate and therefore should always be granted.

Commented [C241]: This part appears to be reproduced from Article 8, ECHR = restrictions permitted to the right to privacy and protection of family life. However, the rights specifically outlined above are all different articulations of the right to freedom of information/right to know, which in Article 10, para 2, ECHR is subject to different restrictions: *"prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."* In other parts of the Convention, where the right to privacy/data protection is outlined, then the relevant specific restrictions (such as *"economic well-being of the country"*) as per Article 8, ECHR should be included, but not here.

Commented [C242]: Unnecessary qualifier

Commented [C243]: We suggest replacing with a less redundant term in the same sentence (irrespective...respective).

Commented [C244]: Even the type of design undertaken can present risks to human rights, which will only be amplified by its subsequent implementation: e g., choosing to design an algorithm-based system with biased formulation of instructions (bias in design); selection of poor quality database for initial training in order to finetune the ...

Commented [C245]: It has to be clear in this text as well that "risk/impact assessment" includes identification of risk mitigation measures and strategies.

Commented [C246]: The reference to regular assessments throughout the system's lifecycle is in line with what is required in Article 5, para 5 above and in Article 15, para *e.* below. It is also in line with Recommendation CM/Rec(2020)1 of the Committee of Ministers to member ...

Commented [C247]: Which model? The previous model developed by ADA Lovelace Institute had already been discussed as presenting several methodological shortcomings - let alone having been developed without adequate multi-stakeholder consultations ahead of its ...

Commented [C248]: Consistently with what suggested above (Even the type of design undertaken can sometimes present risks to human rights).

Article 12 – Measures in respect of artificial intelligence systems posing ~~significant levels of~~ risks

Paragraph 1

1. Parties shall ~~, in accordance with their domestic law,~~ provide by law for the imposition on artificial intelligence providers and deployers ~~users~~ of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system that ~~deemed~~ in accordance with the methodology referred to in Article 11, paragraph 2, ~~to~~ presents ~~significant levels of~~ risks of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law, ~~aimed at mitigating that risk,~~ as well as to document and keep the records of the respective process.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 1

1. Parties shall, ~~in accordance with their domestic law,~~ establish ~~provide~~ by law the imposition of ~~for the possibility of imposing~~ a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (e) ~~are deemed to~~ present unacceptable levels of risk of interfering with the enjoyment of human rights, the functioning of democracy, and the observance of the rule of law. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk also given the specific sphere of application of the system.

Paragraph 2

2. Parties shall, ~~in accordance with their domestic law,~~ establish appropriate and independent review procedures in order to enable the addition or reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available.

Article 14 – Prohibited artificial intelligence practices

Paragraph 1

1. the placing on the market, putting into service or use of artificial intelligence systems that claim to ~~by public authorities using biometrics to~~ identify, categorise or infer emotions, opinions and mental states of individuals from physical, physiological, behavioural as well as biometric data, with the exception of well-specified cases, namely for health or research purposes, with appropriate safeguards in place and always subject to all other data protection conditions and limitations;

Commented [C249]: The reference to "significant levels" should be removed: the level of preventive/mitigating measures will be proportionate to the level of risk, but even in case of low risk, providers and deployers should have an obligation to apply all necessary and relevant measures. The proportionality of the burden of the obligation is ensured by the different level of risk identified.

Commented [C250]: This terminology is confusing, as it implies there is already domestic law covering this, which may not be the case. If the law is not there already, the countries should adopt one to establish this obligation, in accordance with this Convention.

Commented [C251]: As explained in a comment above, the level of preventive/mitigating measures will be proportionate to the level of risk, but even in case of low risk, providers and deployers should have an obligation to apply all necessary and relevant measures. The proportionality of the burden of the obligation is ensured by the different level of risk identified.

Commented [C252]: This is repetitive/superfluous, since "mitigating measures" is already said at the beginning of the sentence.

Commented [C253]: Same comment as above: this terminology is confusing, as it implies there is already domestic law covering this, which may not be the case. If the law is not there already, the countries should adopt one to establish this obligation, in accordance with this Conventio...

Commented [C254]: This part does not clarify what "provide for the possibility of imposing" means in practice: will the national law immediately list specific AI systems subject to bans/moratoria or will it establish a (more flexib...

Commented [C255]: This additional specification was made in the "Possible Elements" document.

Commented [C256]: Same comment as above: this terminology is confusing, as it implies there is already domestic law covering this, which may not be the case. If t...

Commented [C257]: A flexible mechanism should include both the possibility of adding bans/moratoria and the possibility of removing them, without necessarily having to pass primary legislation to add or remove them.

Commented [C258]: Not just the use/deployment of such systems

Commented [C259]: This provision is not clearly formulated: e.g., it excludes private sector acting on behalf of public authorities; it implies that only emotion recognition inferred by use of biometrics presents unacceptable risks, ...

2. the placing on the market, putting into service or use of artificial intelligence systems to track and categorise individuals in publicly accessible spaces on the basis of biometric data or of special categories of personal data, protected characteristics or gender identity;

3. the placing on the market, putting into service or use of artificial intelligence systems that use data about individuals' bodies to make inferences about personal traits such as personality, character, political and religious beliefs ("AI physiognomy");

4. the placing on the market, putting into service or use of AI systems by law enforcement and criminal justice authorities to make predictions, profiles or risk assessments for the purpose of predicting crimes;

    The placing on the market, putting into service or use of AI systems for immigration enforcement purposes to profile or risk-assess natural persons or groups in a manner that restricts the right to seek asylum and / or prejudices the fairness of migration procedures.

Paragraph 2

2.5. the placing on the market, putting into service or use of artificial intelligence systems by public authorities or on their behalf for the social scoring, evaluation or classification of natural persons or groups, based on criteria such as their education, employment, housing, socio-economic situation, health, reliability, social behaviour, location or movements, where the score or assessment leads to to determine access to essential services leading either to (a) detrimental or unfavourable treatment affecting the fundamental rights of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour or to its gravity; or c) treatment of certain natural persons or whole groups amounting to an unnecessary or disproportionate

Paragraph 3

3. any other placing on the market, putting into service or use of artificial intelligence systems by public authorities for such purposes that as are not compatible with core values of democratic societies, do not pursue a legitimate aim and are not necessary in a democratic society.

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risks

Paragraph a

a. minimizing and, to the extent possible, preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public

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Commented [C260]: Not just the use/deployment of such systems

Commented [C261]: Not just the use/deployment of such systems

Commented [C262]: Not just the use/deployment of such systems

Commented [C263]: Not just the use/deployment of such systems

Commented [C264]: We propose to add these categories as well, recently included in the EP LIBE-JURI Committees' draft Report with proposed amendments to the draft AI Act.

Commented [C265]: Not just the use/deployment of such systems

Commented [C266]: The scope of "social scoring" should be better detailed out and clarified: the original definition in this draft text is copied from the draft AI Act and what the European Commission wanted to ban appears to be only the dystopian, "China-style", social scoring, while we argue that the ban should also include systems that actually exist already when their deployment is incompatible with fundamental rights, e.g. AI systems like Syri (see the Dutch case of fraud detection). Therefore, we propose this more articulated definition.

Commented [C267]: Not just the use/deployment of such systems

Commented [C268]: This concluding clause should capture all remaining AI systems incompatible with such rights, regardless of the public/private nature of the provider, deployer, etc.

Commented [C269]: We find it odd that Article 13 and Article 15 - whose heading only differs for the addition of "combinations of such systems" - are detached and separated in-between by Article 14 on "Prohibited artificial intelligence practices". We propose to change the order (Article 15 becoming 14 and current Article 14 becoming 15).

Commented [C270]: Same comment as per heading above.

Commented [C271]: This *caveat* is implicit in the use of "aimed at", which stresses the objective rather than the actual outcome. Therefore, we propose to remove it witho...

health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph b

b. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms which could result~~ing~~ from the ~~inappropriate~~ application of artificial intelligence systems;

> **Commented [C272]:** The wording "inappropriate application" suggests that there must be some fault or malice in how the system is applied, but risks could also result from "appropriate" (meaning "correct") application of the system and it's actually the system itself that is harmful and based on harmful assumptions (e.g., in-built bias). Therefore, this qualifier should be removed.

Paragraph c

c. ~~ensuring that all interested parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions~~;

> **Commented [C273]:** We propose to move (with amendments) this paragraph further down in a new article titled "Public Debate", as also recommended by the CAHAI in its "Possible Elements" document (see proposed new Article18).

Paragraph d

d. ensuring that research design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to inform or ~~take~~ generate outputs such as predictions, recommendations or decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

> **Commented [C274]:** Some of these rights may be compromised already at research level (e.g., real case of research trying to identify and single out LGBT people from their facial traits: https://www.zmescience.com/science/news-science/controversial-homosexual-ai-study-0432423/

Paragraph e

e. ensuring that the rights to privacy and to personal data protection are adequately respected during research, design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors, notably through additional safeguards for special categories of data such as medical data.

> **Commented [C275]:** These rights should be respected even during research.

Article 1~~6~~ – Committee~~nsultation~~ of the Parties

1. A Committee of Parties shall be set up within one year after the entry into force of this Convention.

2. Each Party shall appoint a representative to the committee and a deputy representative from the national supervisory authorities or from the government. Any member State of the Council of

> **Commented [C276]:** The CAHAI "Possible Elements" (XI, 44) specifically referred to "provisions on the establishment of a "committee of the parties" to support the implementation of the instrument. In this regard, the CAHAI referred to the standard provisions used in other Council of Europe legally binding instruments, which may, if and as necessary, be amended to better suit the purposes of the present legally binding instrument." We therefore recommend drawing inspiration from the more solid "Committee of Parties" mechanism of CoE Convention 108+ rather than from the "Consultation of Parties" mechanism of other instruments.

Europe which is not a Party to the Convention shall have the right to be represented on the committee by an observer.

3. The Convention Committee may/shall regularly invite external experts, in particular experts from independent national human rights authorities such as NHRIs, AI researchers and developers, and observers to attend its meetings and hold appropriate consultations with relevant stakeholders and ensure appropriate participation

4. The Committee of Parties shall consult periodically with a view to:
~~Parties shall consult periodically with a view to:~~

> f. making proposals to facilitate or improve the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration made under this Convention;

> g. making proposals for the amendment of this Convention in accordance with Article 20;

> h. formulating their opinion on any proposal for the amendment of this Convention which is referred to them in accordance with Article 20, paragraph 3;

> i. examining and revising, as necessary and in accordance with the procedure prescribed in Article 21, the methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix to this Convention;

> j. expressing an opinion on any question concerning the interpretation and application of this Convention and facilitating the exchange of information on significant legal, policy or technological developments.

> ~~j.~~ k. evaluating, at the request of a State or an international organisation, whether the level of protection to human rights democracy and rule of law the former provides is in compliance with the provisions of this Convention and where necessary recommend measures to be taken to reach such compliance

Commented [C277]: Still in line with the mechanism of Convention 108+, like all amendments suggested below as well.

~~1.~~5. The Committee ~~Consultation~~ of the Parties shall be convened by the Secretary General of the Council of Europe after the whenever (s)he finds it necessary and in any case when one third of the representatives ~~a majority~~ of the Parties or the. Committee of Ministers request its convocation.

~~2.~~

~~3. The Consultation of the Parties shall adopt its own rules of procedure.~~

~~4.~~6. Parties shall be assisted by the Secretariat of the Council of Europe in carrying out their functions pursuant to this article.

~~5.~~7. A contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Consultation of the Parties in a manner to be decided by the Committee of Ministers upon consultation of that Party.

Article 18 Public debate

1. Parties shall ensure that the fundamental questions raised by the research design development and implementation of artificial intelligence systems are the subject of appropriate public discussion in the light in particular of their implications for human rights rule of law and democracy and that their possible application is always made the subject of appropriate meaningful and inclusive consultation.

2. Parties shall ensure that all interested parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes taking in particular due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions.

Article 19 8 – National supervisory authorities

1. Parties shall establish or designate national supervisory authorities tasked, in particular, with overseeing and supervising compliance with the requirements of the risk and impact assessment of artificial intelligence systems in accordance with Article 11 and 12.

2. Parties shall, in accordance with their domestic law, provide by law for efficient procedures for the imposition of a moratorium or a ban on design, development and application of an artificial intelligence system in accordance with Articles 13 and 14.

3. Parties shall ensure the national supervisory authorities have sufficient resources and properly trained personnel to carry out their activities.

4. The national supervisory authorities shall be independent and impartial in the exercise of their duties.

5. Parties shall ensure close cooperation of national supervisory authorities with independent authorities equality bodies national human rights institutions universities standard-setting organisations, operators of services, developers of algorithmic systems and civil society organisations in various fields, such as, particularly, those engaged in defending human rights.

Article 21 0 – Amendments

Paragraph 1

1. Amendments to this Convention may be proposed by any Party, the Committee of Ministers of the Council of Europe or the Committee nsultation of the Parties.

Paragraph 2

2. Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the Parties.

Commented [C278]: As already recommended in the "Possible Elements" document by CAHAI, we believe it is "useful to include a provision calling for Parties to promote evidence-based public deliberations on and inclusive engagement with this topic. Inspiration for the wording of such a provision may be found in Article 28 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (CETS No 164). Drawing on that article, we propose the following formulation.

Commented [C279]: It does not necessarily have to be in accordance with existing national legislation: if the law is not there already, they should adopt one to establish this obligation, in accordance with this Convention.

Commented [C280]: Language as per Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems - Obligations of States with respect to the protection and promotion of human rights and fundamental freedoms in the context of algorithmic systems (para 1.4: Institutional Frameworks).

Commented [C281]: In line with preferred follow up mechanism. Same below.

Paragraph 3

3. Moreover, any amendment proposed by a Party, or the Committee of Ministers, shall be communicated to the Committee~~nsultation~~ of the Parties, which shall submit to the Committee of Ministers its opinion on the proposed amendment.

Paragraph 4

4. The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Committee~~nsultation~~ of the Parties and may approve the amendment.

Article 22~~1~~ – Revision of the Appendix

1. The methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix shall be regularly examined by the Committee~~nsultation~~ of the Parties and, as necessary, revised, as provided for in Article **16** , paragraph 1, d.

2. The Committee~~nsultation~~ of the Parties may adopt any revision to the methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix by unanimity and shall communicate such revision to the Secretary General of the Council of Europe.

Article 23~~2~~ – Dispute settlement

In the event of a dispute between Parties as to the interpretation or application of this Convention which cannot be resolved by the Committee~~nsultation~~ of the Parties, as provided for in Article **16** , paragraph 1, e, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned.

European Network of National Human Rights Institutions (ENNHRI)

Preamble

Concerned by the risk that ~~certain uses of~~ some artificial intelligence systems or certain uses of such systems ~~also~~ have the potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining democracy and violating the rule of law through such harmful practices and effects as, for instance, unrestricted mass surveillance, information distortion, automated recognition of emotions health predictions ~~possible unlawful~~ discrimination, ~~the~~ general weakening of human agency, unlawful electoral interference and digital exclusion, causing individual, societal and collective harm;

Concerned by the risk that some artificial intelligence systems or certain uses of such systems replicate and reinforce pre-existing biases exacerbate inequality digital divides exclusion deepening existing and new divides and inequalities in the world, within and between countries;

> **Commented [C282]:** ENNHRI proposes to amend this consideration in line with article 13 and 14 of this Convention. The Convention provides for fully or partial moratoria or bans of certain AI systems, the artificial intelligence system itself can thus pose the risk.

> **Commented [C283]:** ENNHRI proposes to add 'individual, societal and collective harm' in line with the scope of application of this Convention, UNESCO Recommendation on the Ethics of Artificial Intelligence & Ethics Guidelines for Trustworthy AI. The use of AI-systems can cause societal harm, which can be distinguished from—and which can transcend—individual harm and collective harm. Certain AI systems or uses of such systems risk harming the democratic process, eroding the rule of law or exacerbating inequality, thus going beyond the concern of (the sum of) individuals but affects society at large (N. Smuha 2021). See also explanatory memorandum, point 3 5 European Artificial Intelligence Act.

> **Commented [C284]:** ENNHRI proposes to add this paragraph in line with Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems (A.5), and UNESCO's Recommendation on the Ethics of Artificial Intelligence (24.11.2021). Drawing on both texts, we propose the following formulation.

Conscious of the fact that human rights, social justice democracy and the rule of law are inherently interwoven and convinced of the need to establish, as a matter of priority, a common legal framework ensuring full respect of ~~establishing~~ fundamental principles and rules governing research, design, development, and application of artificial intelligence systems which would effectively preserve the shared common values and at the same time be conducive to innovation;

Welcoming efforts undertaken by other international and supranational Organisations and fora, most notably the European Union, the United Nations Human Rights Council and UNESCO which further advance international understanding and cooperation in this area;

Mindful of the need to ensure ~~a proper balance~~ consistency ~~between respect~~ between the prevalent respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties and various economic, social or public health policy, security and other interests in the development and use of artificial intelligence;

Recognising the central role of private sector in the fields of artificial Intelligence, human rights, democracy and the rule of law and convinced of the need of a process of human rights due diligence in line with the responsibility of business to respect human rights as laid out in the UN Guiding Principles on Business and Human Rights;

Article 1 – Purpose and object

Paragraph 1

1. This Convention establishes certain fundamental principles and rules aimed at ensuring that research, design, development and application of artificial intelligence systems are ~~is~~ fully consistent with respect for human rights, the functioning of democracy and the observance of rule of law.

Paragraph 3

3. ~~In order to ensure effective implementation of its provisions by its Parties, this Convention establishes a follow-up mechanism.~~

Article 2 – Definitions

b. "lifecycle" means all phases of existence of an artificial intelligence system including (i) conception (ii) planning and design, data collection and processing, and model building; (ii) verification and validation; (iii) deployment; (iv) operation and monitoring; and (v) end of life;

Paragraph b

Commented [C285]: ENNHRI proposes to delete this word since the fundamental principles referred to are already predominantly established.

Commented [C286]: ENNHRI request to include research in accordance with article 5 of this Convention and in line with the CoE Convention on Human Rights and Biomedicine.

Commented [C287]: ENNHRI requests 'a proper balance' to be replaced by 'consistency', whilst underlining the prevalent need to ensure respect for Human Rights. The Convention can only complement and refine Human Rights obligations, it can not undermine standing obligations.

Commented [C288]: ENNHRI proposes to add this paragraph to ensure policy coherence. This need for policy coherence is particularly relevant given the numerous recent and ongoing regulatory and policy initiatives at the European level which aim to ensure that AI systems are safe and respect the existing laws on fundamental rights through processes aligned with human rights due diligence.

Commented [C289]: ENNHRI request to include research in accordance with article 5 of this Convention and in line with the CoE Convention on Human Rights and Biomedicine.

Commented [C290]: ENNHRI proposes to delete paragraph 3, in line with the common wording of 'purpose and object' provisions of CoE conventions and to detail the scope of work of the follow-up mechanisms in the dedicated articles (below)

Commented [C291]: ENNHRI recommends using the definition already formulated by the CoE Commissioner for Human Rights in her Recommendation "Unboxing AI", supplemented with the word conception.

b. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed with a view to placing it in the market, putting it into service/commissioning it;

Paragraph c

c. "artificial intelligence ~~user~~deployer" means any natural or legal person, public authority or other body using an artificial intelligence system in their own name or under their authority;

Paragraph d

d. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by outputs such as decisions, recommendation or predictions made or ~~substantially~~ informed by the application of an artificial intelligence system.

Article 3 – Principle of non-discrimination

3.1. The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground whether actual associated with or perceived such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, ~~association with a~~ national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds including when discrimination occurs as a unique result of the intersection of these grounds.

3.2 Each Party shall ensure that the measures it takes in its domestic legislation to give effect to the principles rules and rights set out in this Convention have due regard to the need to promote full and effective equality of all persons.

Article 4 – Scope

Paragraph 1

1. Parties undertake to apply this Convention to research design, development and application of artificial intelligence systems developed deployed or used in the territory of each party throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.

Paragraph 2

2. ~~The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.~~

Article 5 – Research d~~D~~esign, development and application of artificial intelligence systems

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Comments:

Commented [C292]: ENNHRI recommends including these words to avoid legal gaps. The current drat AI Act of the European Union (hereafter AIA), clarifies that "putting into service" only defines the supply of an AI system for first use directly to the user or for own use for its intended purpose, whereas a private company, e.g., may be designing an AI system and just place it/make it available on the market for anyone to purchase it. Thus, not including this wording will create legal gaps.

Commented [C293]: ENNHRI recommends to replace the term user by the term deployer. The term user causes confusion because of its strong connotation with individuals/consumers, as demonstrated in the ongoing AIA negotiations. This proposition is in in line with proposed amendment 132.

Commented [C294]: ENNHRI recommends to specify the impact referred to in accordance with the definition of an AI system in the CoE HRC Recommendation on Unboxing Artificial Intelligence:10 steps to protect Human Rights.

Commented [C295]: ENNHRI recommends to delete this word, since there is no qualifier included in the definition the term substantially could cause interpretative problems and legal uncertainty.

Commented [C296]: ENNHRI recommends to move the words 'association with' to the beginning of the list in line with ECtHR and CJEU jurisprudence (ECtHR, Guberina v. Croatia, No. 23682/13, 22 March 2016, ECtHR, Škorjanec v. Croatia, 25536/14, 28 March 2017, ECtHR, Weller v. Hungary, No. 44399/05, 31 March 2009, CJEU, S. Coleman v. Attridge Law and Steve Law).
The current wording of the article is unclear and might cause legal uncertainty. Moreover this wording is not in line with existing standards as association with other gounds then national minority might equally give rise to discrimination. ENNHRI also equally recommends to add the word perceived in accordance with ECtHR jurisprudence (Sejdić and Finci v ...

Commented [C297]: ENNHRI proposes to add these words in line with the formulation of article 1 of the 108 Convention, to ensure that the Convention will apply to:
- providers placing on the market or putting into service AI systems in countries that ratified the Convention, ...

Commented [C298]: ENNRHRI request deleting these words in line with the common wording of 'Scope' provisions of CoE conventions (ECHR, Convention on Cybercrime, Convention 108+).
ENNRI is concerned that this wording could exclude dual-purposes AI. Although the convention provides for risk ...

Commented [C299]: ENNHRI proposes to include 'research' in line with previous comment.

Paragraph 1

1. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application ~~are not aimed at~~ do not result in undermining or curtailing fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;

Paragraph 2

2. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability and solidarity and the need to protect the environment;

Paragraph 3

3. ensure that any ~~research~~ data collection, design, development and application of artificial intelligence systems is fully compliant with the right to non-discrimination, respects the principle of equality, including gender equality and rights related to discriminated groups and people in vulnerable situations, whilst ensuring the right to reasonable accommodation for persons with disabilities;

> **Commented [C300]:** ENNHRI proposes to include 'research' in line with previous comment.

> **Commented [C301]:** ENNHRI proposes to add these words in line with previous comments.

> **Commented [C302]:** ENNHRI proposes to add the following words in line with the obligation to provide reasonable accomodation for persons with disabilities as laid out in articles 2, 13 and 14 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and ECtHR jurisprudence (e.g. Enver Şahin v. Turkey, 2018 § 60; Çam v. Turkey, 2016, §65).
> The prohibition of discrimination requires more than a mere refraining from unequal treatment. This is particularly evident with regard to disability, since refusing to provide reasonable accommodation constitutes a sui generis form of discrimination (CRPD). Automated systems that do not take into account the obligation of reasonable accommodation could be considered prima facie discriminatory, regardless of whether accommodation is requested by virtue of the shift in the burden of proof. The need for particular attention for persons with disabilities is recognized by several proposed AIA amendments: they specifically consider the situation of people with disabilities in the case of high-risk AI systems.

Paragraph 4

4. ensure that privacy of individuals is protected including through applicable rights to privacy, personal data protection, ~~and~~ data governance laws ~~+~~ and standards and that data protection principles and rules are applied in respect of any research design, development and application of artificial intelligence systems and that appropriate guarantees and safeguards have been put in place for data subjects;

> **Commented [C303]:** ENNHRI recommends to add privacy rights in accordance with article 15, e. of the Convention.

> **Commented [C304]:** ENNHRI proposes to include 'research' in line with previous comment.

Paragraph 6

6. ensure that, ~~where appropriate,~~ appropriate and adequate oversight mechanisms involving all relevant national authorities such as, National Human Rights Structures, data protection, consumer protection competition authorities and others as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

> **Commented [C305]:** ENNHRI proposes to replace 'where appropriate' by 'appropriate and' since oversight mechanisms, transparency and auditable mechanisms are always appropriate in varying degree. It is the level of oversight, transparency and auditability that is tailored to the concrete situation conform article 11-12 of this Convention.

Paragraph 7

7. with a view to encouraging research and fostering innovation, ensure that ~~a~~ controlled regulatory environments for testing artificial intelligence systems ~~is available~~ for artificial intelligence providers and users comply with human rights, rule of law and democracy and reside under the supervision of their competent authorities in consultation with independent national supervisory authority and other independent National Human Rights Structures; ~~Structures;~~

> **Commented [C306]:** ENNHRI proposes this amendment with a view to ensure compliance with human rights, democracy and rule of law and to ensure independent monitoring

Paragraph 8

8. ensure that adequate safety, security, data quality, data integrity, data security, cybersecurity and robustness requirements are in place regarding any research design, development and application of artificial intelligence systems;

Paragraph 9

9. ~~strive to~~ ensure that fundamental questions raised by the research design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ethical and legal implications;

Paragraph 10

10. encourage and promote meaningful multi-stakeholder and multi-disciplinary consultation and discussion digital literacy and digital skills for all segments of the population.

Article 6 – Additional requirements for the setting-up of big data and for the design, development and application of artificial intelligence systems in the public sector

Bearing in mind the increased risks posed to human rights, social justice democracy and the rule of law by the application of artificial intelligence systems or combinations of such systems in the public sector and the need to ensure proper accountability, responsibility and legal liability in relation to the application of such systems, Parties shall:

1. ensure that the design deployment and application of artificial intelligence systems in the public sector do not undermine human rights and fundamental freedoms, legal rights and interests which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party and respect the principle of the rule of law.

2. Ensuring that the collection of data and the setting-up of big data is fully compliant with existing personal data protection data governance laws privacy rights and standards.

2. ~~Ensure that the deployment and application of artificial intelligence systems in the public sector have an appropriate legal basis and that a careful preliminary consideration of the necessity and proportionality of the use of such system is carried out in view of the context of the deployment.~~ Necessity and proportionality shall be subject to periodic monitoring throughout its lifecycle and throughout their context-specific deployment.

3. Ensure compliance with the standards set out in this article insofar as any private entity acting on ~~their~~ behalf of a public authority or institution, including any form of public procurement, is concerned.

4. Ensure that all relevant artificial intelligence users receive appropriate training in operating any artificial intelligence systems de~~m~~ployed as well as on the respective limitations of such systems.

Commented [C307]: ENNHRI proposes to include 'research' in line with previous comment.

Commented [C308]: ENNHRI requests to include 'research' in line with previous comment.

Commented [C309]: ENNHRI requests to include meaningful multi-stakeholder consultation in line with existing standards and CoE recommendations:
- Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems (preamble 5. and 9, B. 4.4 and 5.2, C.4.5)
- CAHAI's Possible elements of a legal framework on artificial intelligence §25 and §59;
- by Council of Europe Commissioner for Human Rights, 'Unboxing Artificial Intelligence: 10 steps to protect Human Rights' (step 2);
- the AIA.

Commented [C310]: ENNHRI recommends to include 'the setting-up of big data'
The collection of data might in itself undermine human rights and fundamental freedoms. Without prejudice to applicable existing laws and standards, it is necessary to include the setting-up of big data to ensure meaningful human rights protection.
The setting-up of big data can entail obvious risks to human rights, democracy and rule of law.
The collection of data is also mentioned in the definition of lifecycle in the CoE Commissioner on HR's recommendation on AI.

Commented [C311]: ENNHRI proposes to include 'design' to ensure meaningful protection.
It is well established that the design of AI system may undermine human rights and fundamental freedoms before the system's concrete deployment and application (e.g., systems designed with in-built bias).

Commented [C312]: ENNHRI proposes to add this paragraph in line with article 5.4 and 15, d of this Convention. Without prejudice to existing applicable laws and standards it should be reminded that data collection in the context of AI might pose particular consequences and therefore particular adherence to general principles of data protection law and privacy rights is warranted. See also previous comment.

Commented [C313]: ENNHRI proposes to add these words to avoid ambiguities in line with Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems e.g. 5.2.

Article 7 – Rights and pProcedural safeguards

1. Parties shall ensure that where appropriate, the usage of an artificial intelligence system is duly and appropriately recorded and communicated to the artificial intelligence subjects concerned according to the minimum standards set out in Appendix 2 of the present Convention.

2. Parties shall also grant any natural or legal person The exercise of the right of meaningful access to the relevant records, including the grounds on which it may be exercised. This right shall be governed by domestic law in accordance with the relevant international standards on access to information including but not limited to Art.19 ICCPR The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108) and its protocols, CoE CoM Recommendation 2021(1) art.8 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and the free movement of such data.

1.3. National Human Rights Structures shall have the power to request and access any documentation created or maintained under this Convention when access to that documentation is necessary for the fulfilment of the competences under their mandate refusal to provide meaningful access shall lead to investigation under article 19 of this Convention;

2.4. Parties shall also ensure that in cases where an artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process. In addition the artificial intelligence subject should be informed about and that there is a the right to meaningful human review by non-automated means of such decisions including being provided with accessible and practical information on how to exercise this right.

5. Parties shall further ensure that in cases where an artificial intelligence system informs or takes decision(s) affecting human rights and fundamental freedoms legal rights and interests the artificial intelligence subject in question is informed about the results of the risk and impact assessment of this system performed as a result of the obligations under this Convention. The artificial intelligence subject shall have the right not to be subject to AI systems that pose risks based on the outcomes of assessment under the Convention.

6. Parties shall ensure that, where appropriate, relevant appropriate explanations and justifications are always offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context including meeting any relevant requirement for accessibility. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

7. Parties shall ensure that any natural or legal person has the right to an effective remedy before an independent national authority (including judicial authorities) against decisions made or informed by artificial intelligence systems affecting the subject's human rights, legal rights and interests including collective and societal harm.

5.

Commented [C314]: ENNHRI proposes to these words as this article does not only list procedural safeguards but also acknowledges specific rights, as explicitly indicated in para 5 below.

Commented [C315]: ENNHRI proposes to replace 'where appropriate' by 'appropriate and' as the type of recording and communication should be appropriate/tailored to the situations, but they are always appropriate as a minimum.

Commented [C316]: ENNHRI proposes to add a second Appendix to the Convention listing minimum standards. National Human Rights Structures should be provided with all the necessary information to assess the compliance of the AI system with human rights. Minimal mandatory requirements should for example entail clear and accessible explanation about the purpose of the system and which are the groups expected or intended to be impacted by the use of the AI system. These two items of information would be key to proving AI-enabled human rights violations. The AIA can serve as inspiration for other minimum standards listed in art. 9, 2. art. 10, 2. art. 12, 4. and art. 13, 3..

Commented [C317]: ENNHRI recommends to add these words in line with the wording in line with Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems. The recommendation states that collective redress mechanisms should be available for 'individuals, groups and legal entities'.

Commented [C318]: ENNHRI requests to add this paragraph. In order to properly fulfill the obligations under CoE relevant national structures should have access to information for the fulfilment of their tasks in line with Recommendation CM/Rec(2021)1 of the Committee of ...

Commented [C319]: ENNHRI requests to add the words 'meaningful' and 'by non-automated means' in line with the existing ethical standards as set out in the EC Ethics Guidelines for Trustworthy AI 2019, identifies 'human agency and oversight' as one of the core principles of ethic ...

Commented [C320]: ENNHRI proposes to add this paragraph in line with privacy and data protection rights, most notably article 9 Convention 108+, the right to explanation following from the combined reading art. 13 (2)f ,14 (2) g and art 15(1)h, art 22(3) GDPR).

Commented [C321]: ENNHRI proposes to replace 'where appropriate' by 'appropriate and' in line with previous arguments. It is always appropriate to have such obligation, whereas there may be different levels of appropriate ...

Commented [C322]: ENNHRI requests to add this paragraph in line with B 4.5, 4.6, C.4.3, 4.4 of the Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts o ...

6.8. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where appropriate, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

7.9. The exercise of the rights set out in paragraphs 1 to 4, including the grounds on which they may be exercised, shall be governed by domestic law . in accordance with the relevant international and Council of Europe standards on human rights rule of law and democracy.

Article 8 – Restrictions

Restrictions on the exercise of the rights specified in Article 7 paragraphs 1 to 4 may be provided for by law where necessary and proportionate in a democratic society in the interests of national security, territorial integrity or public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

Article 11 – Risk and impact assessment

1. Without any prejudice to already existing relevant national and international legal instruments, and irrespective regardless of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to the design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the design, development and application of artificial intelligence systems as well for mitigating risks in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law. The impact assessment shall involve periodic monitoring throughout the entire life cycle and throughout their context-specific deployment.

2. The methodology shall be based on the steps and criteria model set out in the Appendix to the present Convention. It shall set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such systems that in view of their concrete applications pose significant different levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law.

2. The methodology shall adopt a clear and sufficiently broad definition of risk, which takes into account the individual, collective and societal levels of impact of artificial intelligence systems and thereby, reflects the complex nature of the harm that these systems could pose to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

3. Each Party shall take appropriate measures in cooperation with national human rights structures, particularly in the field of training of national supervisory authorities, artificial intelligence providers and artificial intelligence users and artificial intelligence subjects with a view to ensuring that the relevant actors are capable of identifying, analysing and evaluating and understanding risk and assessing impact of the design development and application of artificial intelligence systems in relation to the enjoyment of human rights, including the right to non-

Commented [C323]: ENNHRI proposes to add this words in line with common wording of CoE Conventions.

Commented [C324]: ENNHRI requests to replace "the economic well-being of the country" by "territorial integrity" in line with restrictions articulated for article 10, para 2, ECHR.
Whilst article 8 ECHR, restrictions permitted to right to privacy and protection of family life, provides for restrictions based on the economic well-being of the country we believe it is not applicable in the case at hand. The rights specifically outlined in this Convention are all different articulations of the right to freedom of information/right to know, which in Article 10, para 2, ECHR are subject to different restrictions: "prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for ...

Commented [C325]: ENNHRI proposes to add these words in accordance with the restrictions listed in art. 10 ECHR, in the same manner as previous comment.

Commented [C326]: ENNHRI requests to add these words as the type of design can present risks to human rights, which will only be amplified by its subsequent implementation: e.g., choosing to design al algorithm-based system with biased formulation of instructions (bias in ...

Commented [C327]: ENNHRI requests to add these words to avoid ambiguity, "risk/impact assessment" includes identification of risk mitigation measures and strategies.

Commented [C328]: ENNHRI proposes to add this phrase. The reference to long-term monitoring is mentioned in chapter II 'Fundamental principles' of this Convention (Art. 5, 5) and under Chapter III 'Risk and Impact Assessment and related measures' in connection with personal data (Art. 1...

Commented [C329]: ENNNHRI proposes to replace the word 'model' by the words 'steps and criteria' .
ENNHRI suggests that the model set out in the Appendix reproduces the main steps/criteria for a HUDERIA as already outlined in Chapter XII of the "Possible Elements" ...

Commented [C330]: ENNHRI proposes to add this paragraph. The classification of an AI system as high-risk that for would be based exclusively on existing product safety legislation (e.g. AIA) and accordingly, does not reflect the unique nature of harm that results from fundamental right...

Commented [C331]: ENNHRI requests to add this phrase in line with Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States
on the human rights impacts of algorithmic systems also refers to periodic assessments in B. 5.2. "States should ...

Commented [C332]: ENNHRI requests to add these words in light of consistency with the provision above (art. 11.1).

discrimination, the functioning of democracy and the observance of rule of law, in accordance with the present methodology.

3.4. The methodology shall be aligned with human rights due diligence as set out in the UN Guiding Principles on Business and Human Rights.

Article 12 – Measures in respect of artificial intelligence systems posing ~~significant levels~~ of risk~~s~~

1. Parties shall~~, in accordance with their domestic law,~~ provide by law for the imposition on artificial intelligence providers and users of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system that ~~deemed~~ in accordance with the methodology referred to in Article 11, paragraph 2, ~~to~~ present~~s~~ ~~significant levels of~~ risk~~s~~ of interfering with the enjoyment of human rights, non-discrimination, the functioning of democracy and the observance of the rule of law ~~, aimed at mitigating that risk,~~ as well as to document and keep the records of the respective process.

1. Each Party shall also ensure that the relevant requirements in respect of such artificial intelligence systems take into account the measures set out in Article 15 (a) to (e) and are proportionate to the nature or gravity of the risk they pose to human rights non-discrimination democracy and the rule of law.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

1. Parties shall~~,~~ establish by law the imposition of ~~in accordance with their domestic law, provide for the possibility of imposing~~ a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (de) ~~are deemed to~~ present unacceptable levels of risk of interfering with the enjoyment of human rights, including the right to non-discrimination, the functioning of democracy, ~~and~~ or the observance of the rule of law. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk also given the specific sphere of application of the system.

1. Parties shall~~, in accordance with their domestic law,~~ establish by law appropriate and independent review procedures, which involve artificial intelligence subjects, in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced, or appropriate mitigation measures become available.

Article 14 – Prohibited artificial intelligence practices

The following artificial intelligence practices shall be banned:

Commented [C333]: ENNHRI proposes to add these words in line with previous comments.

Commented [C334]: ENNHRI requests these words to be deleted. The level of preventive/mitigating measures will be proportionate to the level of risk, but even in case of low risk, providers and users should have an obligation to apply all necessary and relevant measures. The proportionality of the burden of the obligation is ensured by the different level of risk identified.

Commented [C335]: ENNHRI proposes to replace 'in accordance with their domestic law' with 'by law'. This is consistent with the formulation of article 8 of the Convention. Indeed, the measures do not necessarily have to be in accordance with existing national legislation. If the law is not yet existant, they should adopt one to establish this obligation, in accordance with this Convention.

Commented [C336]: ENNHRI proposes to add these words in line with previous comments.

Commented [C337]: ENNHRI proposes to delete these words: "mitigating measures" is already mentioned at the beginning of the sentence, thus rendering it superfluous.

Commented [C338]: ENNHRI proposes to replace 'in accordance with their domestic law, provide for the possibility of imposing' with 'establish by law the imposition of' in line with previous comment.

Commented [C339]: ENNHRI proposes to replace 'and' with 'or' in line with the next phrase of this article. It should be clear that there should no cumulative risks to human rights, functioning of democracy and the rule of law to consider a moratorium or ban.

Commented [C340]: ENNHRI proposes to add these words in line with the additional specification made in CAHAI's "Possible Elements" §21 .

Commented [C341]: ENNHRI proposes to replace 'in accordance with their domestic law, provide for the possibility of imposing' with 'establish by law the imposition of' in line with previous comment.

1. placing on the market, putting into service or the use of artificial intelligence systems that claim by public authorities using biometrics to or do identify, categorise or infer emotions and mental states of individuals, from physical physiological, behavioural as well as biometric data with the exception of well-specified use-cases, namely for health or research purposes, with appropriate safeguards in place and always subject to all other data protection conditions and limitations;

2. placing on the market, putting into service or the use of artificial intelligence systems to track and categorise individuals in publicly accessible spaces on the basis of biometric data or of special categories of personal data protected characteristics or gender identity;

3. placing on the market, putting into service or the use of artificial intelligence systems that use data about individuals' bodies to make inferences about personal traits such as personality character political and religious beliefs ("AI physiognomy");

4. placing on the market, putting into service or the use of AI systems by law enforcement and judicial authorities to make predictions, profiles or risk assessments for the purpose of predicting crimes;

5. placing on the market, putting into service or the use of AI systems for immigration enforcement purposes to profile or risk-assess natural persons or groups in a manner that restricts the right to seek asylum and / or prejudices the fairness of migration procedures;

6. placing on the market, putting into service or the use of an AI system that deploys subliminal techniques beyond a person's consciousness that gives rise to individual collective or societal harm;

7. placing on the market, putting into service or the use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their connection with a protected ground, in particular age, physical or mental disability, that gives rise to individual, collective or societal harm;

1.8. Placing on the market, putting into service or the use of artificial intelligence systems for social scoring to determine access to essential services; leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;

9. any other placing on the market, putting into service or use of artificial intelligence systems by public authorities for such purposes as that are not compatible with core values of democratic societies, do not pursue a legitimate aim and are not necessary in a democratic society.

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risks

Paragraph a

Commented [C342]: ENNHRI proposes to amend 1. in line with EDPS, EDPB, EDPB-EDPS Joint Opinion 05/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 18 June 2021, p.14.

They suggest to ban the deduction of emotions through the use of AI, except in certain specific cases *"particularly for health and research purposes"*.

Therefore, ENNHRI recommends that emotion recognition technologies should be banned, except if their use aims to reinforce the independence of people for health or research purposes.

Commented [C343]: ENNHRI recommends adding 2. - 7. based on the list of prohibited practices listed in the article 5 in the AIA. The wording of prohibited practices listed in this article has been changed based on suggestions made by the European Digital Rights institution (in cooperation with a number of civil society organisations, including Access Now, Algorithm Watch, Bits of Freedom, European Disability Forum (EDF), European Not for Profit Law Center, Fair Trials, Panoptykon Foundation, and PICUM) when they were too limited in scope (wide exemptions with low threshold) or posed a threat to existing human rights (e g. privacy rights, Incompatibility with requirements of necessity and proportionality,...).

Commented [C344]: ENNHRI proposes to delete the word 'essential', including essential in this provision excludes situations where social scoring is used to asses the risk of fraud or recidivism for instance, such assessments can pose risks to fundamental rights, democracy and rule of law and should thus be included.

Moreover, this wording implies its exclusive application to public services. Limiting the prohibition to uses in a public context, by public authorities or on their behalf, excluds commercial uses, such as scoring of customers on online ...

Commented [C345]: ENNHRI proposes to delete these words since the prohibition is limited to uses which lead detrimental or unfavourable treatment. Such conditions suggest that the central principle is not the harm caused, otherwise these conditions would not be relevant. Social scoring systems should be contestable regardless of the presence of proof of unfavourable outcomes insofar as they reduce the complexity of human experience to a combination of limited, measurable indicators, with potential negative implications for fundamental rights to good administration and human dignity.

Commented [C346]: ENNHRI proposes to delete 'by public authorities'. Limiting the prohibition to uses in a public context, by public authorities or on their behalf, excludes commercial uses, which equally pose risks to fundamental rights, democracy and rule of law and should thus be included.

a. minimizing and ~~to the extent possible,~~ preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph b

b. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms _which could_ result~~ing~~ from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph c

~~c.~~ ~~ensuring that all interested parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions;~~

Paragraph d

~~d.~~c. ensuring that _the right to non-discrimination and related rights are respected during research_ design, development and application of artificial intelligence systems _and_ do not compromise the principle of equality before the law, including gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to inform or _generate outputs such as predictions recommendations or_ ~~take~~ decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons_, whilst ensuring the right to reasonable accommodation for persons with disabilities;_~~;~~

Paragraph e

~~e.~~d. ensuring that the rights to privacy and to personal data protection are ~~adequately~~ respected during _research,_ design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors, notably through additional safeguards for special categories of data such as medical data.

Article 16 – ~~Consultation of the Parties~~ Committee of Parties

1. A Committee of Parties shall be set up within one year after the entry into force of this Convention.

Commented [C347]: ENNHRI proposes to delete 'to the extent possible'. The use of "aimed at" stresses the objective rather than the actual outcome. Therefore, we propose to remove it without detriment to the understanding that Parties should aim at a result even if they cannot achieve it all the time.

Commented [C348]: ENNHRI requests to delete 'inappropriate' since harm or damage can also occur without an inappropriate application of AI system. E g. the design of the system or the technology could be flawed, thus not requiring an inappropriate application to cause harm or damage.

Commented [C349]: ENNHRI requests to delete 'inappropriate' in line with previous comment.

Commented [C350]: ENNHRI requests to create a separate provision ensuring public debate recognizing its importance (see proposed art. 19).

Commented [C351]: ENNHRI requests to add these words in line with article 2.e.

Commented [C352]: ENNHRI proposes to add the following words in line with the obligation to provide reasonable accomodation for persons with disabilities as laid out in articles 2, 13 and 14 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and ECtHR jurisprudence (e.g. Enver Şahin v. Turkey, 2018 § 60; Çam v. Turkey, 2016, §65 and .
The prohibition of discrimination requires more than a mere refraining from unequal treatment. This is particularly evident with regard to disability, since refusing to provide reasonable accommodation constitutes a sui generis form of discrimination (CRPD). Automated systems that do not take into account the obligation of reasonable accommodation could be considered prima facie discriminatory, regardless of whether accommodation is requested by virtue of the shift in the burden of proof. The need for particular attention for persons with disabilities is recognized by several proposed AIA amendments: they specifically consider the situation of people with disabilities in the case of high-risk AI systems.

Commented [C353]: ENNHRI requests to delete this word in line with previous comments.

Commented [C354]: ENNHRI recommends to replace "Consultation of the Parties" by "Convention Committee" in line with CAHAI recommendation in the possible elements document (XI, 44) "*should also contain provisions on the establishment of a "committee of the parties" to support the implementation of the instrument. In this regard, the CAHAI referred to the standard provisions used in other Council of Europe legally binding instruments, which may, if and as*

2. Each Party shall appoint a representative to the committee and a deputy representative from the national supervisory authorities or from the government. Any member State of the Council of Europe which is not a Party to the Convention shall have the right to be represented on the committee by an observer

> **Commented [C355]:** ENNHRI proposes to add this paragraph based on the Convention 108+ and §155 of it's accompanying explanatory report: "A Convention Committee is composed of representatives of all Parties, *from the national supervisory authorities* or from the government".

3. The Convention Committee shall regularly invite external experts in particular experts from independent national human rights authorities such as NHRIs AI researchers and developers organizations representing artificial intelligence subjects and observers to attend its meetings and hold appropriate consultations with relevant stakeholders and ensure appropriate participation.

> **Commented [C356]:** ENNHRI proposes to add this paragraph to ensure sufficient multidisciplinary expertise to carry out it's tasks under 4. of this article. This language is based on Article 57 AIA and amendments.

1.4. ~~Parties~~ The Committee of Parties shall consult periodically with a view to:

k.l. making proposals to facilitate or improve the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration made under this Convention;

l.m. making proposals for the amendment of this Convention in accordance with Article 20;

m.n. formulating their opinion on any proposal for the amendment of this Convention which is referred to them in accordance with Article 21~~0~~, paragraph 3;

o. examining and revising, as necessary and in accordance with the procedure prescribed in Article 21, the methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix to this Convention;

n.p. examining and revising, as necessary and through ensuring the involvement of artificial intelligence subjects, the list of banned practices under Article 14;

> **Commented [C357]:** ENNHRI proposes to add this in line with the responsibilities of the approach in the AIA (European EU Board, art. 58, d AIA - Second Presidency compromise text).

q. expressing an opinion on any question concerning the interpretation and application of this Convention and facilitating the exchange of information on significant legal, policy or technological developments;.

r. evaluating at the request of a State or an international organisation whether the level of protection to human rights democracy and rule of law the former provides is in compliance with the provisions of this Convention and, where necessary, recommend measures to be taken to reach such compliance

> **Commented [C358]:** ENNHRI proposes to add this mandate in line with CoE 108+.

2.5. The ~~Consultation of the Partie~~ Committee of Parties ~~s~~ shall be convened by the Secretary General of the Council of Europe whenever (s)he finds it necessary and in any case when ~~a majority~~ one-third of the representatives of the Parties or the Committee of Ministers request its convocation.

> **Commented [C359]:** ENNHRI requests to replace 'a majority' with 'one-third of the representatives' in line with CoE 108+ (will look for other conventions).

3.6. The ~~Consultation of the Parties~~ Committee of Parties shall adopt its own rules of procedure.

7. Parties shall be assisted by the Secretariat of the Council of Europe in carrying out their functions pursuant to this article.

8.　A contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Consultation of the Parties in a manner to be decided by the Committee of Ministers upon consultation of that Party.

Article 18 - National supervisory authorities

1.　Parties shall establish or designate one or more national supervisory authorities tasked , in particular, with overseeing and supervising and promoting compliance with the Convention. The national supervisory authorities will have appropriate powers to carry out their mandate including investigation, complaint-handling, reporting and promotional powers. Parties will consult existing independent national human rights authorities such as NHRIs when establishing or designating the national supervisory authority.

In particular, the national supervisory authorities will be tasked with:

- supervision of the requirements of the risk and impact assessment of artificial intelligence systems in accordance with Article 11 and 152 .

shall have

Parties shall, in accordance with their domestic law, provide for efficient procedures for

- the imposition of (temporary) moratoriaum or a bans on design, development and application of an artificial intelligence system in accordance with Articles 13.1. and 14;
- monitoring and supervision of restrictions from art. 7 provided for by art. 8;
- monitoring and supervision of compliance with requirements rights and procedural safeguards as provided by article 7 and 8;
- coordinating cooperation between all national authorities which have jurisdiction and complementary expertise necessary to carry out the risk and impact assessments of artificial intelligence systems in accordance with Article 11 and 12.

1.2.　Parties shall ensure the national supervisory authorities have sufficient financial and human resources and including properly trained personnel with expertise on human rights democracy and rule of law as well as relevant technical knowledge related to the design deployment and testing of artificial intelligence systems to carry out their activities.

The national supervisory authorities shall be independent and impartial in the exercise of their duties.

3.　The national supervisory authorities will participate in the Convention Committee, and will institutionalise cooperation with other independent national human rights authorities such as NHRIs ombuds-institutions and equality bodies in carrying out their mandate as well as with standard-setting organisations operators of services developers of algorithmic systems and civil society organisations in various fields such as particularly those engaged in defending human rights.

Article 19 – Public debate

65

1. Parties shall ensure that the fundamental questions raised by the research design development and implementation of artificial intelligence systems are the subject of appropriate public discussion in the light, in particular, of their implications for human rights, rule of law and democracy   and that their possible application is always made the subject of appropriate meaningful and inclusive consultation.

2. Parties shall ensure that all interested parties groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions.

Article 2~~1~~0 – Amendments

Paragraph 1

1. Amendments to this Convention may be proposed by any Party, the Committee of Ministers of the Council of Europe or the Convention committee~~Consultation of the Parties~~.

Paragraph 2

2. Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the Parties.

Paragraph 3

3. Moreover, any amendment proposed by a Party, or the Committee of Ministers, shall be communicated to the Convention committee~~Consultation of the Parties~~, which shall submit to the Committee of Ministers its opinion on the proposed amendment.

Paragraph 4

4. The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Convention committee ~~Consultation of the Parties~~ and may approve the amendment.

Article 2~~1~~2 – Revision of the Appendix

Paragraph 1

1. The methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix shall be regularly examined by the ~~Consultation of the Parties~~ Committee of Parties and, as necessary, revised, as provided for in Article 16 , paragraph 5~~1~~, b~~d~~.

Paragraph 2

2. The ~~Consultation of the Parties~~ Committee of Parties may adopt any revision to the methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix by unanimity and shall communicate such revision to the Secretary General of the Council of Europe.

Article 2~~3~~2 – Dispute settlement

In the event of a dispute between Parties as to the interpretation or application of this Convention which cannot be resolved by the ~~Consultation of the Parties~~ Committee of Parties as provided for in Article 16 , paragraph 5~~1~~, d~~e~~, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned.

European Commission Against Racism and Intolerance (ECRI)

General comments

We make this submission to the Committee on Artificial Intelligence (CAI) regarding the Zero Draft (Framework) Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law - Proposal by the Chair, based on the mandate of the European Commission on Racism and Intolerance (ECRI) and drawing on ECRI's previous work in this area.

On behalf of ECRI, we welcome this substantial and well-balanced draft, in particular because it addresses some of its key concerns. Above all, it is positive to see:

- the binding nature of this proposed instrument,
- the overall scope of the convention: the text is dealing with all aspects of AI from the design of the AI systems to their development and application;
- the dynamic nature of the convention: AI is a highly evolving and versatile technology, therefore we are pleased that the convention sets the stage for quick adaptations of the legal framework established, as well as for additional sectorial specific regulations;
- the obligation for member states to put in place effective compliance monitoring mechanisms,

and more specifically, regarding non-discrimination/equality, to see that

- the principle of non-discrimination is defined using a broad and open list of anti-discrimination grounds;
- discrimination/equality issues are not only expressly mentioned as problems for member states to remedy (art. 5 par 3), but listed among the major risks of AI (art. 15 lit. d, in particular exacerbation of adverse effects);
- social scoring methods to determine access to essential services, when certain vulnerable persons or groups are at risk of harm, are banned (art. 14 par. 2).

Thus said, we feel compelled to highlight four negative aspects of the draft:

- we regret that more stricter rules apply only to the public sector (art. 6), as we are convinced that discrimination in the private sector is no less frequent nor damaging;

- we regret that some provisions of the draft are vague; in particular, it would be useful to provide more details regarding concrete aspects of discrimination. An improvement in that respect would be to integrate in art. 5 par. 3 of the convention the short but relevant list of damaging discrimination practices provided by par. 22 of the explanatory report;

- we propose the principle of discrimination in art. 3 should include the concepts of discrimination by association (also in relation to other grounds, not just association with a national minority) and discrimination by perception/discrimination based on perceived characteristic(s);

- last but not least, we are of the opinion that a fully-fledged (independent) monitoring mechanism (and not just a follow-up mechanism) should be put in place in order to regularly examine to what extent the Parties to the convention fulfil their obligations under the convention. In that respect, the Conventional Committee set up by art. 16 could be specifically tasked with reviewing the implementation of the Convention by Parties and recommending measures to be taken in the case where a Party is not in compliance with the Convention.

Gender Equality Division

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds.

> **Commented [C370]:** Important to keep both sex and gender as grounds for discrimination

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and rights related to discriminated groups and people in vulnerable situations;

> **Commented [C371]:** This is an important specification, so the GED is happy to see that it has been included in the draft

COUNCIL OF EUROPE PARTNER INTERNET COMPANIES

IBM

Article 2 – Definitions

Paragraph a

a. "artificial intelligence system" means a machine-based system that is capable of informing or autonomously generating outputs such as predictions, recommendations or decisions using machine and/or human-based data and inputs and influencing the environment that it interacts with for defined objectives;

> **Commented [C372]:** The concept of a defined objective (or purpose) is central to both the OECD and EU AI Act definitions of an AI System - we propose it be included here too, for consistency and to avoid unintentionally widening the scope.

Paragraph c

c. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed defining its intended purpose and with a view to putting it into service/commissioning it;

> **Commented [C373]:** It is important to clearly define the role of Provider, and to distinguish it from entities that for example develop technical AI components that do not themselves constitute an AI system. Introducing the concept that the Provider is the entity that defines the intended purpose of an AI system adds clarity in this regard.

Paragraph d

d. "artificial intelligence user" means any natural or legal person, public authority or other body using an artificial intelligence system in their own name or under their authority;

> **Commented [C374]:** The user could also be the provider - perhaps this could be noted in the explanatory comments.

Article 4 – Scope

Paragraph 1

3.2. Parties undertake to apply this Convention to design, development and application of artificial intelligence systems posing potential threats to human rights, democracy and the rule of law, throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.

> **Commented [C375]:** For clarity, we suggest including this text from para 15 of the Explanatory Report, since this Article is likely to be frequently referred to and should be explicit about the "clear intention of the drafters that the Convention should focus on ... potential threats to human rights etc."

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 2

2. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability and solidarity and the need to protect the environment;

> **Commented [C376]:** We suggest including a reference to an appropriate definition of the principles of sustainability and solidarity.

Article 14 – Prohibited artificial intelligence practices

Paragraph 1

1. the use by public authorities of artificial intelligence systems by public authorities using biometrics to identify, categorise or infer emotions of individuals in publicly accessible places (but allowing systems whose sole purpose is verification/authentification, i.e. to confirm that a specific natural person is the person he or she claims to be);

> **Commented [C377]:** Borrowing language from the latest EU AI Act text, which draws an important distinction between identity verification of an individual (e.g. a passport control application), vs identifying individuals in a crowd (e.g. a law enforcement application).

Microsoft

INTRODUCTION

Working with European and global customers and partners, we witness the wide range of ways organizations are innovating with AI. AI enables the creation of new products and services and improves those currently available. It also plays a role in helping to tackle key societal challenges. Put simply, AI has the potential to transform our society and every sector in it, from agriculture to healthcare, education, and the environment.

We also recognize that the increasing deployment of AI systems raises questions around how to ensure this powerful new technology can be used in a way that is responsible and ensures that potential harms are mitigated. That's why Microsoft continues to build out its own responsible AI program[1] and shares externally the lessons learned from this program to help inform responsible use, including our Responsible AI Standard[2] and impact assessment template for our development and use of AI.[3] As part of this work, we have also long supported the goal of creating a regulatory framework for AI, including in Europe, that sets common guardrails for high-risk scenarios.

Over a year ago, the European Commission led the way by publishing its landmark proposal on regulating AI. It is an ambitious and important step towards making trustworthy AI the norm in Europe and beyond; we support the AI Act's vision and goals. Thoughtful regulation of AI that ensures it is used in a way that is fair, safe and rights respecting can propel Europe into a hub for innovation and human-centric AI deployment. At the same time, we must ensure regulatory frameworks can be effective in addressing the breadth and variety of the AI ecosystem and the rapid development of the technology.

Microsoft similarly applauds the Council of Europe, through the Committee on Artificial Intelligence (henceforth CAI), for its leadership in developing a Framework Convention on Artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law. The 'Zero Draft' of the Framework Convention carefully builds upon work that has been done over a period of many years in other domains to address legal gaps that arise from the design, development and deployment of modern AI systems.

We have previously offered comments on the Council of Europe's initiative, based on the lessons we have learned from working with customers and from our own journey building out an internal responsible AI

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[1] The building blocks of Microsoft's responsible AI program - Microsoft On the Issues
[2] Microsoft's framework for building AI systems responsibly - Microsoft On the Issues
[3] Responsible AI principles from Microsoft

program. We are grateful for the opportunity to continue to submit suggestions and share our knowledge in support of this initiative.

In short, Microsoft supports the broad direction of the Framework Convention. We welcome the objectives set forth therein to advance AI principles grounded in human rights, narrow the gap between public and private sector regulatory requirements, and set a common risk-based approach and impact assessment methodology with regards to the design, development, and deployment of AI systems. We also welcome the inclusion of (multi-) stakeholders in raising awareness within the AI community and beyond regarding the societal impact of AI and the promotion of the industry's use of evidence-based public deliberations. Finally, we support the CAI's drawing the attention of the Parties of this Convention to the need to promote digital literacy and skills. We urge the Council of Europe's CAI and Parties to preserve these elements as the Framework Convention on AI moves through this drafting process.

Our substantive comments below focus on advancing the Framework in a manner that reflects the realities of the AI ecosystem. Our comments are aimed at strengthening the existing draft by ensuring that it helps:

1. **address the context specific nature of AI risk by allocating responsibilities across providers[1] and users of AI systems** to identify and address AI risk, to ensure responsibilities for mitigation sit with the party best placed to satisfy them.

2. **advance a risk-based approach focused on outcomes** setting out what organizations should achieve, rather than *how* they achieve it.

3. **advance impact assessments and system testing** to further transparency and accountability and ensure AI systems are developed and deployed in a fair, safe and rights-respecting way.

SUBSTANTIVE COMMENTS

1. Risk and impact assessments

From the outset, the 'Zero Draft' Framework centres the evaluation of the risk on undertaking a risk and impact assessment (Article 11) as well as respective mitigation measures for systems posing significant levels of risk (Article 12). We welcome this risk-based approach, and we endorse the focus on an impact assessment process, which is an important, guided process that organizations can use to identify and address AI risk. The impact assessment should include an assessment of potential negative impacts of the system on individuals across society, not just those using the system.

Articles 11 and 12 propose that the Parties adopt a methodology by which to identify, analyze and evaluate risk posed by AI systems to human rights, democracy, and the rule of law, and require that providers and users "apply all necessary preventive and mitigating measures" where the results of that assessment indicate an AI system poses "significant risk". We encourage the CAI to consider the many

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[1] We use the terms developers and providers as well as users and deployers interchangeably for the purpose of these comments to the Zero Draft of this Framework Convention.

other efforts underway - across legislators, standards bodies, multilateral groups, and innovators, among others - to develop methods by which to assess AI-related risk, and to align to and support these efforts in a way that ensures organizations can effectively identify risks of potential harms and mitigate them. We urge the CAI to consider that a chosen assessment methodology must have the ability to account for the wide variety of AI systems and their many different contexts of use.

We would suggest that Article 11 emphasize the broad principles governing risk analysis - for example, requiring that actors throughout the AI system's life cycle commit to analyzing risks specific to the context of the AI system's actual use (on the user side) or intended use (on the provider side). Article 11 might also be amended to identify the specific risks that providers and users should account for, including those human rights, democratic functioning, and rule of law, so that stakeholders might take an outcomes-based approach when organizing their risk-management procedures. Further, Article 12 should also be revised to make it clear that the mitigation measures to be deployed should be those that are reasonable, effective, and appropriate to the context of use.

We would encourage CAI to continue to help advance the use of impact assessments to frame risk identification and mitigation and believe that developers and deployers should conduct assessments relating to the respective development and deployment parts of the lifecycle. Impact assessments should include the following, with responsibilities delineated between developers and deployers:

Developers

- A system's purpose and its intended benefits.
- An analysis of potential harms and whether the system may potentially negatively impact individuals implicated by the system.
- Mitigation strategies for potential harms that may occur to those negatively impacted by the system.
- Known system limitations.
- How the system was evaluated, including information about the evaluation methods and results.
- Developers should share information based on this assessment with deployers to help inform responsible deployment decisions.

Deployers

- The specific use case for a system and an assessment of how the system will help solve the problem it is being applied to.
- If a system deployment is "high-risk", i.e., being used for consequential decisions that may implicate life opportunities, safety or human rights and should therefore be subject to additional safeguards to ensure responsible performance and regulatory compliance.
- A scenario specific analysis of potential harms and potentially negative impacts to stakeholders.
- Mitigation strategies for potential harms identified.

- Information about operational testing, including how the system was evaluated in the environment in which it is going to be used with information about the evaluation methods and results provided.

Microsoft also believes that in determining which AI systems should be subject to risk assessment, it is important to identify higher-risk AI systems and focus safeguards on these systems to ensure use is fair, safe and rights-respecting. Higher-risk systems are those that would be used for consequential decisions that may impact a person's:

- Legal status, legal rights or access to opportunities including in relation to decisions taken in the criminal justice system and access to opportunities like credit, education, employment, housing, and public services.
- Physical or psychological safety, including mental wellbeing and physical health and safety.
- Human rights, including civil liberties and democratic freedoms.

Finally, we note that the 'Zero Draft' encourages Parties to establish artificial intelligence regulatory sandboxes to facilitate the development and testing of innovative AI systems under strict regulatory oversight before these systems are placed on the market or otherwise put into service. Beyond this reference, however, there is no mention of testing in the Framework. We urge the CAI to endorse the need for continuous testing as part of ensuring systems are performing appropriately for a chosen use case. This includes developers testing systems against established benchmarks during development and deployers testing systems in operational conditions prior to deployment and conducting ongoing monitoring of systems.

2. Design, development, and application of artificial intelligence systems

We note the CAI's intent to establish a set of fundamental principles which should inform the Parties' approach to the regulation of artificial intelligence systems (Art. 5). We welcome this principles-based approach. Indeed, Microsoft itself deploys such an approach in our own design, development, and deployment of AI systems. We have shared these principles publicly, and more recently have published our Responsible AI Standard that is guiding product development towards more responsible outcomes while respecting enduring values like fairness, reliability and safety, privacy and security, inclusiveness, transparency, and accountability. Our Responsible AI Standard is grounded on these core principles.

We encourage the CAI to explicitly recognize - in Article 5 or elsewhere in the draft Framework - the important principle that the responsibilities to mitigate risk must be allocated appropriately across the AI system value chain. Developers of AI systems, for example, will generally be best placed to identify and address risks arising in the design and development phase, including testing the system to make sure that it is performing appropriately and can be used responsibly, while AI system deployers will be best suited to identify and address those risks that vary depending on the scenario in which the AI system is used and the affected population. Given the scenario specific, "sociotechnical" nature of AI risk, it is important that a scenario-specific assessment is conducted by a deployer that identifies the risks of a particular deployment scenario, emerging from the interplay of a system's technical characteristics with decisions about how and where to use a system and the social context.

In implementing the Convention's principles and processes, the Parties thus should ensure that responsibilities fall on the actor that is able to meet them in a way that helps address the risks of a specific deployment scenario. The Convention should be clear that Parties should not require one set of actors to ensure compliance with requirements that should reasonably fall to another.

3. Additional requirements for high-risk uses in the public sector

We agree that certain uses of AI by the public sector can pose heightened risks, given that many public sector decisions can have consequential impacts on individuals' rights and freedoms and on their ability to access essential benefits and services. We thus agree that, as part of advancing a risk-based approach to AI safeguards that focuses on the higher-risk uses cases where AI is being used for a consequential decision, heightened requirements are appropriate for high-risk public sector uses - but we encourage the Council to link such obligations closely to the risk-based approach introduced in Chapter III.

Article 6(2) seems to cover all deployments and applications of AI systems and unintentionally extend to mundane software functionalities that are embedded in tools such as email services, excel spreadsheets and the like that do not pose risks to safety, fundamental rights, democracy, and/or the rule of law. Proportionality and necessity tests are customarily undertaken as a balancing act when conflicting (fundamental) rights are at stake. This may be more appropriately formulated as a mitigation measure when risks have been identified in specific scenarios of deployment.

Rather than assessing all AI capabilities by default, the Framework should seek to focus requirements on systems posing the highest risks and link the necessity and proportionality evaluation to AI systems that inform actions or decisions impacting human rights, the functioning of democracy, or the observance of rule of law. Further, this evaluation should be tied to an initial impact assessment. These initial impact assessments, including in other sectors, open enormous opportunities for a human-centric AI approach. They are an important way to identify potential risks a system can pose on individuals across society, and frame mitigations.

We also wish to propose additional requirements for consideration in Article 6, focusing on enhanced transparency measures and on fairness.

Transparency around AI systems is particularly important in public sector uses, to ensure AI systems are used appropriately and seen as trustworthy. The transparency discussion is complex and wide ranging, cutting across related concepts like explainability, interpretability and disclosure. It is important that transparency requirements are crafted with a clear understanding of the objective they are intended to advance. Requiring the sharing of large volumes of technical information, for example, will do little to advance an understanding about whether AI systems are performing in a fair, safe and rights respecting manner, about how and where they are being used, and may present privacy and security challenges.

In addition, any transparency requirement should ensure that the public understands how and where AI is being used, particularly in the context of systems that pose significant levels of risk. This should include requiring: public sector users to share a summary of impact assessments for high-risk systems, setting out 1) the use case and type of system being deployed, 2) a high-level overview of how the system works, 3)

a high-level overview of any potential system risks and mitigations. The type of information in the Amsterdam Algorithm register[1] is a helpful reference. These requirements provide contextual and accessible information, helping the public understand AI use.

Turning from transparency to fairness, addressing potential fairness harms should be an important goal in relation to higher-risk systems, in particular for public sector users. Public sector bodies (and indeed all organizations) developing and deploying AI should do so in a way that advances fairness by minimizing disparities in outcomes for identified groups, including marginalized groups. This should include requiring systems to be developed and deployed so that they 1) provide a similar quality of service for identified groups impacted by the system 2) allocate resources or opportunities in a manner that minimizes disparities for identified demographic groups impacted by the system and 3) minimizes the demeaning, stereotyping or erasure of relevant demographic groups. Systems should also be used in a way that ensures related decisions align to local laws that address issues of discrimination, for example anti-discrimination laws.

The Convention should also ensure that a public sector user can appropriately act on system output, be trained using the system to make a decision, and be aware of the risk of over-reliance on the system, or "automation bias".

Last, the use of biometric technologies, such as facial recognition, requires heightened scrutiny - particularly when used by law enforcement in the light of the consequential nature of the decisions law enforcement takes – notwithstanding articles 13 and 14. Facial recognition technologies utilized by law enforcement can provide societal benefit in helping increase public safety and security if appropriate guardrails are enacted. But we believe that such systems should only be available for use by law enforcement within strict legal safeguards that advance transparent, accountable, and rights-respecting use. We encourage the CAI to advance safeguards for facial recognition use by law enforcement to ensure any such use is within the following safeguards:

> • Providers of facial recognition technology should test their systems to identify any performance gaps, including across demographic groups, and address any gaps identified. They should also provide for legitimate third-party testing of their systems, e.g., via an API or a similar technical mechanism. Law enforcement agencies using facial recognition technology should also test these systems in operational conditions to identify and address any performance gaps, including across demographic groups. This is important given the significant impact of environmental factors on performance.

> • Provide for greater transparency, accountability, and public scrutiny through accountability reporting, including a publicly available use policy for how and where systems will be used and how responsible use will be ensured

> • Reinforce fundamental rights protections to avoid undermining the freedom of assembly, expression and association while prohibiting uses of these technologies based on characteristic

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[1] Amsterdam Algoritmeregister

protected by law, such as religion, political/social views, race, ethnicity, age, disability, gender, sexual orientation, inter alia.

4. AI Definitions

Microsoft supports the CAI's use of definitions that stem from relevant national, international and supranational instruments on AI, encouraging legislative cohesion across Europe and beyond. Microsoft would like to suggest that the definition of "artificial intelligence system" (Art. 2(a)) should be more clearly focused on systems developed through machine learning and other artificial intelligence techniques, This will help ensure Parties target their domestic measures to address the specific potential risks AI systems can pose, without bringing more conventional software systems into scope. The basic concepts from the OECD definition[1] of an AI system could be used as a solid foundation for developing the set of AI definitions of the Framework Convention.

We would also suggest adding the definition of an "artificial intelligence deployer" to the Convention, to reflect the important role of the entity deploying an AI system in identifying and addressing risk. This is essential if AI risk is to be appropriately mitigated, given the scenario specific nature of AI's sociotechnical risks which can emerge from technical design decisions and the social context into which the system is deployed. The same AI system deployed in two different social contexts will likely result in different risk profiles and require different mitigations. A definition for an "artificial intelligence deployer" should capture those entities that decide how and where to use an AI system and have knowledge of the social context into which the system is being used. This entity often differs from the end user of a system which can be, for example, a customer of the deployer.

5. Conclusion

Microsoft appreciates the opportunity to share our initial comments on the 'Zero Draft' of the Framework Convention on AI, Human Rights, Democracy and the Rule of Law. We recognize the scale of the task that the Council of Europe, through the CAI, has undertaken and look forward to sharing any additional thoughts as we continue to study the proposal and engage in dialogue about it. Microsoft is committed to doing its part to help the signatory Parties of the Council of Europe, in the EU and beyond, embrace AI technologies safely and in ways that respect fundamental rights and European values. We look forward to engaging with CAI, the Council of Europe members, and other stakeholders to support the development of the Framework Convention.

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[1] OECD AI s list of resources for learning about Artificial Intelligence and what it can do - OECD.AI

CIVIL SOCIETY ORGANISATIONS, OTHER PRIVATE SECTOR AND ACADEMIC ACTORS RELEVANT TO THE WORK OF THE CAHAI

ALLAI

Chapter I: General Provisions

• We welcome the clear objective of protecting human rights, democracy and the rule of law (art. 1). We recommend including the precautionary principle to strengthen this objective even further. We offer the following text:

o *The Convention is underpinned by the precautionary principle.*

• We welcome the broad definition of AI (art. 2). By focusing on characteristics of technical systems rather than concrete techniques the definition is more future-proof than other regulatory initiatives and avoids an over specific focus. As a slightly more elaborate alternative we offer the following definition:

o *Artificial intelligence (AI) refers to computer systems that act in the physical or digital world and that, in an automated manner:*

i. decide on action(s) to take according to predefined parameters by perceiving their environment and analysing the collected structured or unstructured information from that environment;

ii. adapt their behaviour by analysing how the environment is affected by their previous actions.

• We welcome the wide scope of the Zero Draft (art. 4). By proposing fewer exceptions than for example the European proposal for the AI Act, it provides a strong horizontal approach that can be applied equitably across sectors.

• We appreciate that the single exclusion for national defence is based on the mandate of the Council of Europe. However, even if national defence cannot be part of the Convention, we encourage the Parties to express their shared intention to avoid any proliferation of autonomous weapons systems and arms race dynamics in the field of AI, for instance by adding:

o *All Parties acknowledge the individual and global risks of the proliferation of autonomous weapons systems and arms race dynamics in AI. All Parties share the goal of preventing such proliferation and race and commit to all necessary and proportionate preventive measures. They commit to pursuing further agreements to this effect through other legally binding means.*

Chapter II: Fundamental Principles

• The stated principles (art. 5) are sensible and integrate previous work in the field. In order to prevent the proliferation of harmful AI applications, especially towards vulnerable groups, we propose the following additional principle:

o Parties shall ensure that providers and users of artificial intelligence systems with an impact on (groups of) natural persons have a special fiduciary duty of care towards those who are affected or likely to be affected by the systems they develop and use. In particular, Parties shall ensure that artificial intelligence systems are not used against (the interests of) those who are affected by them in situations of imbalance of knowledge and/or power.

• The transparency and explanation requirements (art. 7) are welcome but could be further expanded. It is essential that not only providers and users of AI systems know about them and understand their effects but that those affected by the system have the right to know about them. In the AI transparency and explanation literature a common problem is how to provide meaningful information about complex black box machine learning systems. This is an important technical problem, yet the more common and fundamental issue at stake here is not whether an AI is technically opaque to its developer, but whether a lay person even has institutional and legal guarantees to know if and if so how he/she is being impacted by the use of an AI system. To effectively access this right, lay persons may require assistance to process and use the technical information provided by developers and users, for instance through consumer protection or non-governmental organisations. Hence we propose the following changes:

o Delete the words „where appropriate" in art. 7, section 1, otherwise this would unacceptably weaken the transparency rights of individuals and could be read to be in conflict with the transparency provision in art. 7, section 4.

• Art. 8 provides wide restrictions on the exercise of transparency rights that, given the general description ("in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"), run the risk of completely undermining the rights granted in art. 7. We propose to set a higher and more clearly defined legal bar for invoking the restrictions (art. 8) to the transparency requirements and limiting them to only a few carefully selected situations where there is a true need to keep the use of AI hidden and unexplainable. We also suggest including a formal process and time limit for invoking such restrictions.

• We welcome artt. 9 and 10 as they make explicit that the aim is not to limit human rights and fundamental freedoms and encourage the introduction of further protections.

Chapter III: Risk and Impact Assessment and Related Matters

• We note that the referenced methodology (art. 11 and Appendix 1), which is yet to be developed will be the crucial leverage point for the implementation of the Convention. We caution against outsourcing too many potential controversies to the technical methodology and encourage a further specification of what compliance with the stated and shared values means in the text of the Convention. Moreover, we encourage a participatory process for the development of the methodology which should be grounded in diverse expertise and take into account interests of vulnerable and underrepresented groups.

• We welcome the three proposed prohibitions of unacceptably risky AI systems (art. 14): for biometric emotions categorization and identification (section 1), social scoring determining access to essential services (section 2), public sector AI systems which are unnecessary for or incompatible with democratic societies (section 3).

• Crucially however, we do not see a sensible reason why the bans in section 1 and 3 should be limited to public authorities. The power of private actors in many domains rivals that of public actors, especially in AI. If implemented as proposed, this could further intensify the concentration of power in large private tech firms:

    o *We propose deleting the words "by public authorities" in art. 14, section 1 and 3.*

• For art. 14 section 1, rather than only a (narrow) ban on emotion recognition, we propose a wider biometric recognition ban with exceptions. As described in the initial report by Catelijne Muller (2020) for CAHAI ("The Impact of AI on Human Rights, Democracy and the Rule of Law"), there are many AI-driven biometric recognition applications which pose unacceptable risks to fundamental rights. We offer the following text to consider for art. 14, section 1:

    o *the use of biometric recognition, meaning AI-systems in on- or offline public or private spaces, aimed at the automated recognition of physical, physiological, behavioural and/or psychological human features for the purpose of:*

        i. verification of an individual's identity by comparing biometric data of that individual to stored biometric data of individuals in a database (oneto- many identification);

        ii. categorization of individuals into clusters based on ethnicity, gender, political or sexual orientation, or other grounds on which discrimination is prohibited under European Convention of Human Rights; and/or

        iii. assessment of a person's personality, traits, characteristics, emotions, behaviour, intentions, beliefs or ideas

    o *biometric recognition shall be allowed for healthcare purposes, as far as such use takes place under strict conditions, is evidence based, and is in line with the principles of responsible research and innovation.*

• Moreover we propose to add the use of AI aimed at deception or material distortion of a person's beliefs or behaviour or at exploitation of a person's vulnerabilities. We offer the following text:

    o *the use of artificial intelligence systems deployed, aimed at or used for deception or materially distorting a person's behaviour or exploit a person's vulnerabilities, in a manner that causes or is likely to cause harm to natural person's fundamental rights, including their physical or psychological health and safety.*

• While art. 14 section 3 could in principle cover this, albeit only for public institutions, we recommend adding a separate ban for this, also aimed at private actors.

AlgorithmWatch

Preamble

Conscious of the fact that human rights, democracy and the rule of law are inherently interwoven and convinced of the need to establish, as a matter of priority, a common legal framework with ~~establishing~~ fundamental principles and rules governing design, development, and application of artificial intelligence systems which would effectively preserve the shared common values and at the same time be conducive to innovation;

Mindful of the need to ensure ~~a proper balance~~consistency between respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties and various economic, security and other interests in the development and use of artificial intelligence;

Underlining that the present Convention is intended to complement those conventions in order to fill in any legal gaps and to clarify the application and interpretation of existing human rights norms in view of the specific challenges raised by the research, design, development and application of artificial intelligence systems;

Article 1 – Purpose and object

Paragraph 1

3. This Convention establishes certain fundamental principles and rules aimed at ensuring that research, design, development and application of artificial intelligence systems is fully consistent with respect for human rights, the functioning of democracy and the observance of rule of law.

Article 2 – Definitions

Paragraph a

a. "artificial intelligence system" means a machine-based system that is capable of informing or ~~autonomously~~ generating outputs such as content predictions, recommendations or decisions using ~~machine and/or human-based~~ data and inputs and influencing the environment that it interacts with;

Paragraph c

c. "artificial intelligence provider" means any natural or legal person, public authority or other body that develops an artificial intelligence system or that has an artificial intelligence system developed with a view to placing it on the market and/or putting it into service/commissioning it;

Paragraph d

d. "artificial intelligence ~~user~~deployer" means any natural or legal person, public authority or other body ~~using~~ deploying an artificial intelligence system in their own name or under their authority;

Paragraph e

Commented [C378]: ‚Balance' implies a potential trade-off between human rights and other interests. However, first, human rights cannot be outweighed as such, and second, they are not contrary to other interests. A reliable framework on AI is exactly a means to ensure the consistency between human rights and other interests, and to protect human rights and enable innovation at the same time.

Commented [C379]: For reasons of legal clarity, anthropomorphic and vague terms should be avoided here.

Commented [C380R379]: Also: excluding ‚simper', rule-based systems and statistical methods is not only detrimental from a fundamental rights perspective, but would also stifle innovation. The 'simple' systems are often very complex, opaque socio-technical systems that have a severe impact on fundamental rights. If the scope is narrowed to 'cutting edge' technologies, this will stifle innovation, as developers would then have incentives to use simpler techniques instead of cutting-edge techniques to avoid falling within the scope of the Convention: if we only add obligations for so-called 'true AI' systems (i.e. machine learning) and none for simpler techniques, we'll disincentivise the use of the very technologies we want to promote

Commented [C381]: This must absolutely be added in order to also cover generative AI systems.

Commented [C382]: This is a very vague phrase.
It is particularly unclear what "human-based data" means in this context. Would data about the weather, or about other 'non human' phenomena not count as 'human-based'? The specification does not seem necessary here.

Commented [C383]: To distinguish and avoid confusion with the term ‚end-user', i e. individual users. In the current negotiations on the EU's AI Act, this terminology is also debated.

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e. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by outputs such as content, decisions, recommendations or predictions made or ~~substantially~~ informed by the application of an artificial intelligence system.

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds or new types of differentiation that are not traditionally protected.

Article 4 – Scope

Paragraph 1

~~4.~~3. Parties undertake to apply this Convention to research design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.

Paragraph 2

4. This Convention shall apply within the mandate and competences established by the Statute of the Council of Europe,

~~5. The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.~~

Article 5 – Research, d~~D~~esign, development and application of artificial intelligence systems

Paragraph 3

3. ensure that any research, design, development and application of artificial intelligence systems respects the principle of justice non-discrimination and equality, including gender equality and rights related to discriminated groups and people in vulnerable situations;

Paragraph 5

3. ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of any research design, development and application of artificial intelligence systems by public or private actors throughout ~~their~~ the systems' lifecycle and that appropriate redress mechanisms are available;

Paragraph 6

Commented [C384]: In order to make it consistent with definition in Art. 2a.

Commented [C385]: We strongly recommend removing this qualifier, since it may cause unclarity in its practical interpretation (what is "substantially"?). Besides, this qualifier does not appear even in the definition of "artificial intelligence system" in para a., when referring to decisions made using machines etc.

Commented [C386]: We welcome this explicit mentioning of non-discrimination here. In the Explanatory Memorandum, it could make sense to explain in which way AI systems can lead to or reinforce discrimination.

Commented [C387]: What lies within the scope should depend on the CoE's statute, and is up to domestic courts and/or the ECtHR to decide.
Also, the CoE's Statute does not imply that matters of conflict and security are beyond the potential field of engagement of the CoE. There are many instances and cases dealing with situations of armed conflict in which the Court regarded its jurisdiction as given.

Commented [C388R387]: The original formulation is also significantly reducing the scope by introducing the vague notion of 'national defense', which would give the opportunity to exclude many systems under the pretext of 'defense', such as in the context of migration, etc.
The original formulation is also not explicit enough on the inclusion of dual use systems. Civilian uses of dual use systems must absolutely be in the scope of the Convention, even if originally developed for national defense purposes. It is also in this regard that the reference to the Statute of the CoE provides much more clarity.

Commented [C389]: See comment above. In addition, the term 'national defense' is not clearly defined, e.g., the demarcation of national defense from national security is, in reality, often very difficult to make.

4. ensure that~~t, where~~ appropriate _and,_ adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

Paragraph 7

8. ~~with a view to encouraging research and fostering innovation, ensure that a controlled regulatory environment for testing artificial intelligence systems is available for artificial intelligence providers and users under the supervision of their competent authorities;~~

> **Commented [C390]:** Is not implied by the objectives and the mandate of the CoE (human rights, democracy, rule of law).
>
> Cf. explanatory report, para. 3.

Paragraph 8

5. ~~strive to~~ ensure that fundamental questions raised by the _research_ design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ethical and legal implications, _and including individuals and groups affected by them_;

Paragraph 9

9. _provide and legally secure access to relevant information and data on deployments of artificial intelligence systems for researchers from academia journalism and civil society in order to enable public interest research on the design   development and application of artificial intelligence systems and their effects on human rights democracy and the rule of law;_

Paragraph 10

10. encourage _meaningful multi-stakeholder inclusion and consultation to promote an evidence-based public debate_ ~~and promote~~ digital literacy and digital skills for all segments of the population.

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Chapeau

Bearing in mind the increased risks posed to human rights, democracy and the rule of law by the application of artificial intelligence systems or combinations of such systems in the public sector _by public authorities or on their behalf_ and the need to ensure proper accountability, responsibility and legal liability in relation to the application of such systems, Parties shall:

Paragraph 1

1. ensure that the _design,_ deployment and application of artificial intelligence systems in the public sector do not undermine human rights and fundamental freedoms, legal rights and interests which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party and respect the principle of the rule of law.

Paragraph 2

2. ensure that the deployment and application of artificial intelligence systems in the public sector have an appropriate legal basis and that a careful preliminary consideration of the necessity, appropriateness and proportionality of the use of such system is carried out in view of the context of the deployment.

3. ensure that the deployment and application of artificial intelligence systems in the public sector is made transparent. To this end Parties shall establish a public register containing all systems deployed by public administration including essential information on their deployment its purpose, the agents involved in its development and deployment, basic information about the model and the results of the impact assessment.

> **Commented [C391]:** Cf. Cahai recommendations, para. 61

4. ensure compliance with the standards set out in this article insofar as any private entity acting on ~~their~~ behalf of a public authority or institution is concerned.

5. ensure that all relevant artificial intelligence ~~users~~ deployers receive appropriate training in operating any artificial intelligence systems ~~de~~employed as well as on the purpose logic context and respective limitations of such systems.

Article 7 – Rights and pProcedural safeguards

> **Commented [C392]:** Which of these can directly be referred to by individuals? Even if the Convention still needs to be implemented at the level of Member States, some of these provisions could be already as concrete so as to be immediately justiciable – which is to be welcomed, but needs to be kept in mind or clarified.

Paragraph 1

1. Parties shall ensure that the deployment, ~~where appropriate, the usage~~ of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned and that the subjects concerned . ~~The exercise of the~~are granted the right of access to the relevant records and information in accordance with the relevant domestic and international standards on access to information ~~including the grounds on which it may be exercised, shall be governed by domestic law~~;

Paragraph 2

2. Parties shall also ensure that in cases where an artificial intelligence system ~~substantially~~ informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process about the parameters decisive for its outcome and that there is a right to human review of such decisions.

> **Commented [C393]:** When decisions *affect human rights*, then subjects should always be informed.

Paragraph 3

3. Parties shall ensure that appropriate ~~, where appropriate, relevant~~ explanations and justifications are offered by the artificial intelligence provider and/or ~~user~~ deployer in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

Paragraph 4

4. Parties shall ensure that any natural or legal person has the right to an effective legal remedy against developers or deployers of artificial intelligence systems by which they are affected and has access to individual and collective redress mechanisms before a national authority (including judicial authorities) against decisions made or informed by artificial intelligence systems affecting a subject's human rights legal rights and interests.

5. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where appropriate, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

4.6. Parties shall take measures to ensure that all developers and deployers of artificial intelligence systems receive appropriate training in operating any artificial intelligence systems deployed as well as on the respective limitations of such systems.

5.6. The exercise of the rights set out in paragraphs 1 to 54, including the grounds on which they may be exercised, shall be governed by domestic law in accordance with relevant international and Council of Europe standards on human rights democracy and rule of law.

Article 8 – Restrictions

Restrictions on the exercise of the rights specified in Article 7 paragraphs 1 to 4 may be provided for by law where necessary and proportionate in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 11 – Risk and impact assessment

Paragraph 1

1. Without any prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to the design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems and for mitigating risks in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law. This impact assessment mechanism must precede any deployment of an artificial intelligence system accompany the system throughout its lifecycle and be conducted on a case-by-case basis and in a context-specific way. Parties must ensure that the results of this impact assessment are documented and that where the deployer is a public authority or acting on behalf of it made publicly available in the register as set out in Article 6(3)..

Paragraph 2

2. The methodology shall be based on the model set out in the Appendix to the present Convention. It shall the principles of human rights democracy and the rule of law and set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such

Commented [C394]: In the paragraph above, it only contains the obligation to provide information in order to give the possibility of challenging decisions. However, it must also explicitly mention the right to legal remedy

Commented [C395]: All deployers should receive adequate training. For affected individuals, it can be similarly consequential if her employer uses a system.

Commented [C396]: The risks that come with an application of a system highly depend on the context in which a specific system is put to use. Such an impact assessment thus cannot be done for an entire category of systems at once but must be conducted on a case-by-case basis.

Commented [C397]: To allow for public scrutiny, it is key that the results of the IA are made transparent.

systems that in view of their concrete applications pose significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law.

Paragraph 3

3. Each Party shall take appropriate measures, particularly in the field of training of national supervisory authorities, artificial intelligence providers and artificial intelligence ~~users~~deployers, with a view to ensuring that the relevant actors are capable of identifying, analysing and evaluating risk and assessing impact of the research design development and application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law, in accordance with the present methodology.

Article 12 – Measures in respect of artificial intelligence systems posing significant levels of risk

Paragraph 1

2. Parties shall, in accordance with their domestic law and relevant international conventions, provide for the imposition on artificial intelligence providers and ~~users~~ deployers of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system, deemed in accordance with the methodology referred to in Article 11, paragraph 2, to present ~~significant levels of~~ risk of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law, aimed at mitigating that risk, as well as to document and keep the records of the respective process.

> **Commented [C398]:** Risks for human rights are always significant, and ‚significant' adds a condition here that is vague, giving rise to legal insecurity.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 1

1. Parties shall, in accordance with their domestic law and relevant international conventions, ~~provide for the possibility of imposing a~~impose a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (e) are deemed to present unacceptable levels of risk of interfering with the enjoyment of human rights, the functioning of democracy, and the observance of the rule of law. This includes but is not limited to the application of artificial intelligence practices as set out in Article 14. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk considering the specific purpose sphere and context of application.

> **Commented [C399]:** It must be made clear that Art. 14 sets a unique legal framework and prohibits certain uses of AI. This paragraph should not give the impression that parties can themselves decide which systems/uses to ban, but that they can use this review mechanism to see whether they have reasons to ban additional uses/systems.

Paragraph 2

2. Parties shall ~~, in accordance with their domestic law,~~ establish appropriate and independent review procedures in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available. The same

review procedures shall also enable the imposition of a new moratorium or ban provided that relevant risks are discovered or mitigation measures are not or no longer available.

Commented [C400]: See comment above. This review mechanism should intend to be used for additional systems (additional to Art.14). If the review mechanism refers to the banning of systems under Art. 14, it should not be established at the domestic level but at the level of the Committee of Parties.

Article 14 – Prohibited artificial intelligence practices

Chapeau

In addition to artificial intelligence practices which Parties decide to subject to a full or partial moratorium or ban according to the procedure as set out in Article 13 , Tthe following artificial intelligence practices shall be ~~banned~~subject to a full ban :

Commented [C401]:

1. the use of artificial intelligence systems ~~by public authorities~~ that claim to ~~using biometrics to identify,~~ identify categorise or infer personal traits mental states opinions or emotions of individuals from physical physiological behavioural as well as biometric data with the exception of well-specified cases namely for health or research purposes with appropriate safeguards in place and always subject to all other data protection conditions and limitations;
2. the use of artificial intelligence systems to remotely identify and/or track people in publicly accessible space on the basis of their biometric data as well as any other uses of artificial intelligence systems that enable mass surveillance;
~~1.~~3.

4. the use of artificial intelligence systems for the scoring, evaluation or classification of natural persons or groups, based on criteria such as their education, employment, housing, socio-economic situation, health, reliability, social behaviour, location or movements, where the score or assessment leads to~~social scoring to determine access to essential services leading either to~~ (a) detrimental or unfavourable treatment affecting human rights of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment affecting human rights of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;
5. the use of AI systems for law enforcement or criminal justice purposes to make predictions profiles or risk assessments for the purpose of predicting crimes;

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing ~~significant levels of risk~~risks

Paragraph a

a. minimizing and ~~, to the extent possible,~~ preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems;

Commented [C402]: Regardless of whether the application was considered ‚appropriate' (understood as ‚technically correct'), harm can result. ,

Paragraph b

b. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms resulting from the ~~inappropriate~~ application of artificial intelligence systems;

Paragraph c

c. ensuring that all interested and affected parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions;

Paragraph d

d. ensuring that- design, development and application of artificial intelligence systems do not compromise the presumption of innocence and the principle of equality before the law, including gender equality and rights related to discriminated groups and people in vulnerable situations in so far as they are used to ~~inform or take~~ generate outputs such as content predictions recommendations or decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

Article 16 – ~~Consultation~~ Committee of the Parties

9. A Committee of Parties shall be set up within one year after the entry into force of this Convention.

10. Each Party shall appoint a representative to the committee and a deputy representative from the national supervisory authorities or from the government. Any member State of the Council of Europe which is not a Party to the Convention shall have the right to be represented on the committee by an observer.

11. The Convention Committee shall regularly invite external experts in particular experts from independent national human rights authorities such as national human rights institutions (NHRIs) AI researchers and developers civil society organizations and further observers to attend its meetings and hold appropriate consultations with relevant stakeholders and ensure appropriate participation

> **Commented [C403]:** Cf. Cahai recommendations and the mechanism foreseen in CoE Convention 108+

Paragraph 1

s. evaluating at the request of a State or an international organisation whether the level of protection to human rights democracy and rule of law the former provides is in compliance with the provisions of this Convention and where necessary recommend measures to be taken to reach such compliance

> **Commented [C404]:** Cf. convention 108+

Article 17 – International co-operation

Paragraph 2

~~2.~~3.   Parties shall, on a regular basis, exchange information between them concerning research, design, development and application of artificial intelligence systems which they assess as posing significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Article 18 – National supervisory authorities

Paragraph 1

~~4.~~6. Parties shall establish or designate national supervisory authorities tasked, in particular, with overseeing and supervising compliance with the requirements of the risk and impact assessment of artificial intelligence systems in accordance with Article 11 and 12. Where appropriate, this can take the form of several decentralized supervisory authorities under the coordination and leadership of one central superior supervisory authority.

Paragraph 3

3.   Parties shall ensure the national supervisory authorities have sufficient resources, capacities and properly trained personnel to carry out their activities.

Paragraph 5

5.   Parties shall ensure close cooperation of national supervisory authorities with independent authorities, equality bodies, national human rights institutions, universities, individual researchers and experts, standard-setting organisations, operators of services, developers of algorithmic systems and civil society organisations in various fields, such as, particularly, those engaged in defending human rights

> **Commented [C405]:** Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems - Obligations of States with respect to the protection and promotion of human rights and fundamental freedoms in the context of algorithmic systems (para 1.4: Institutional Frameworks).

Article 20 – Amendments

Paragraph 1

5.   Amendments to this Convention may be proposed by any Party, the Committee of Ministers of the Council of Europe or the ~~Consultation~~ Committee of the Parties.

Paragraph 3

3.   Moreover, any amendment proposed by a Party, or the Committee of Ministers, shall be communicated to the ~~Consultation~~ Committee of the Parties, which shall submit to the Committee of Ministers its opinion on the proposed amendment.

Paragraph 4

4. The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the ~~Consultation~~ Committee of the Parties and may approve the amendment.

Article 21 – Revision of the Appendix

Paragraph 1

4. The methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix shall be regularly examined by the ~~Consultation~~ Committee of the Parties and, as necessary, revised, as provided for in Article 16 , paragraph 1, d.

Paragraph 2

5. The ~~Consultation~~ Committee of the Parties may adopt any revision to the methodology for risk and impact assessment of artificial intelligence systems contained in the Appendix by unanimity and shall communicate such revision to the Secretary General of the Council of Europe.

Article 22 – Dispute settlement

In the event of a dispute between Parties as to the interpretation or application of this Convention which cannot be resolved by the ~~Consultation~~ Committee of the Parties, as provided for in Article 16 , paragraph 1, e, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned.

Article 25 – Territorial application

Paragraph 1

1. Any State or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply. This specification does not preclude the extraterritorial applicability of the Convention.

Center For AI and Digital Policy

Preamble

Concerned by the risk that ~~certain uses of~~ some artificial intelligence systems or certain uses of AI systems also have the potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining democracy and violating the rule of law through such harmful practices and

> **Commented [C406]:** Change reflects that some AI systems are a direct risk to fundamental rights, or that they are pseudoscientific, regardless of how they are used. These should be covered under Article 14 (Prohibitions). Sometimes risk may arise due to a specific use of AI system.

effects as, for instance, unrestricted mass surveillance, information distortion, possible unlawful discrimination, the general weakening of human agency and disrespect for human dignity and presumption of innocence unlawful electoral interference and digital exclusion;

Conscious of the fact that human rights, democracy and the rule of law are inherently interwoven and convinced of the need to establish, as a matter of priority, a common legal framework of establishing fundamental principles and rules governing design, development, and application of artificial intelligence systems which would effectively preserve the shared common values and at the same time be conducive to innovation;

Conscious also of the fact that in view of its framework character the Convention may be supplemented by further binding or non-binding instruments to address challenges relating to the application of artificial intelligence in specific sectors;

Conscious of the need that compatibility between the different instruments should be ensured in order not to impact adversely human rights democracy and the rule of law;

Mindful of the need to ensure alignment proper balance between respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties and various economic, security and other interests in the development and use of artificial intelligence;

> **Commented [C407]:** The need should reflect alignment, not a "balance" between fundamental rights vs economic or other interest. Human rights are 'fundamental' and any development and use should align with respect to such rights.

Underlining that the present Convention is intended to complement those conventions in order to fill in any legal gaps in view of the specific challenges raised by design, development and application of artificial intelligence systems with regard to fundamental rights democracy and the rule of law;

Article 2 – Definitions

Paragraph a

a. "artificial intelligence system" means a machine-based system that is capable of informing or autonomously generating outputs such as predictions, recommendations, categorizations or decisions using machine and/or human-based data and inputs and influencing the environment that it interacts with;

> **Commented [C408]:** This leaves out AI systems not based on ML/Deep Learning, where developers can specify how outputs should be generated

> **Commented [C409]:** CAIDP appreciates the acknowledgement of sociotechnical nature of AI systems

Paragraph d

e. "artificial intelligence userdeployer" means any natural or legal person, public authority or other body using an artificial intelligence system in their own name or under their authority;

> **Commented [C410]:** Should align with current discussions re definitions in EU AI Act

Paragraph e

f. "artificial intelligence ~~subject~~impacted parties" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by decisions made or ~~substantially~~ informed by the application of an artificial intelligence system.

Commented [C411]: "AI subject" can be confusing in 2 ways. It can be interpreted as 1)being under the control of, 2)a personhood category. It also does not acknowledge the necessary human agency

Article 3 – ~~Principle~~ Right to ~~of~~ non-discrimination

The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds or new types of differentiation that are not traditionally protected

Commented [C412]: CAIDP welcomes the acknowledgement of intersectionality. Also CoE previously acknowledged in the feasibility study that "AI systems can also give rise to unjust treatment based on new types of differentiation that are not traditionally protected." https://edoc.coe.int/en/artificial-intelligence/9648-a-legal-framework-for-ai-systems.html

Article 4 – Scope

Paragraph 1

1. Parties undertake to apply this Convention to design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.

Commented [C413]: CAIDP strongly supports that when it comes to protection of fundamental rights, democracy and the rule of law, the rules should apply to both public and private actors

Paragraph 2

2. ~~The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.~~

Commented [C414]: CoE does not include such a restriction in Scope of in neither Convention 108+ nor Budapest Convention. Such exclusion here SIGNIFICANTLY restricts the protection of fundamental rights and rule of law and opens the possibility for governments to exclude themselves from any accountability under the pretense of 'defense'.
Since this section also does not refer to 'military', the 'defense' exclusion can be used for example to restrict rights of asylum seekers and refugees; to discriminate against those on the move due to environmental changes; to restrict right to privacy of citizens in border towns; to restrict freedom of movement in conflict zones; to degrade/harm the environment...to name a few examples.

Chapter II: Fundamental principles

Article 5 – ~~Design, development and application of artificial intelligence systems~~ Protection of Democratic Values

Bearing in mind the need to safeguard and uphold human dignity, human rights and fundamental freedoms, preserve and foster robust and accountable democratic institutions and safeguard the rule of law as the institutional basis for assuring both democratic participation and the effective protection of human rights and fundamental freedoms, in their respective jurisdictions Parties shall:

Commented [C415]: The following format change reflects the need for the document to be more understandable and consequential. It also allows for other parties to identify the possible further adds / edits against these principles.

I. ensure that any research design, development and application of artificial intelligence systems or combinations of such systems is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and

Commented [C416]: "research" is not replicated in other references of "design, development and application of AI systems" throughout the document. There is a need for consistency

application ~~are not aimed at undermining or~~ <u>do not</u> curtail~~ing~~ fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;

Article 6 - Sustainability
<u>Parties shall</u> ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is grounded in the principle of sustainability and solidarity and the need to protect the environment;

Article 7 – Equality
<u>Parties shall</u> ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and rights related to discriminated groups and people in vulnerable situations;

Article 8 – Data Protection
<u>Parties shall</u> ensure that privacy of individuals is protected including through applicable personal data protection and data governance laws and standards and that data protection principles and rules are applied in respect of design, development and application of artificial intelligence systems and that appropriate guarantees and safeguards have been put in place for data subjects;

Article 9 – Liability
<u>Parties shall</u> ensure <u>legal liability structures are established and</u> ~~a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of design, development and application of artificial intelligence systems~~ throughout their lifecycle and that appropriate redress mechanisms are available <u>for those harms by use of AI systems by both public and privat entities</u>;

Article 10 – Data Protection
<u>Parties shall ensure processing of personal data at any stage including data sets of an AI system's lifecycle must be based on the principles set out under the Convention 108+ (including fairness and transparency proportionality lawfulness of the processing quality of data right not to be subject to purely automated decisions and other rights of the data subject data security accountability impact assessments and privacy by design)</u>;

Article 11 – Oversight
<u>Parties shall</u> ensure that, ~~where appropriate,~~ adequate oversight mechanisms as well as transparency<u>, explainability</u> and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

~~9.   with a view to encouraging research and fostering innovation, ensure that a controlled regulatory environment for testing artificial intelligence systems is available for artificial intelligence providers and users under the supervision of their competent authorities;~~

Article 12 – Safety
<u>Parties shall</u> ensure that adequate safety, security, data quality, data integrity, data security, cybersecurity and robustness requirements are in place regarding design, development and application of artificial intelligence systems <u>throughout their lifecycle</u>;

Article 13: Public Consultation

Commented [C417]: This reflects wording from CoE's feasibility study's "Key substantive rights and obligations" section. https://edoc.coe.int/en/artificial-intelligence/9648-a-legal-framework-for-ai-systems.html

Commented [C418]: Unneccessary caveat which weakens the convention

Commented [C419]: Aim of CoE is to protect human rights and fundamental freedoms, democracy and the rule of law...not foster innovation. This is mandate for EU or OECD.

~~strive to~~ Parties shall ensure that fundamental questions raised by the design, development and application of artificial intelligence systems are the subject of appropriate public discussion and meaningful multi-stakeholder consultation in the light, in particular, of their implications with regard to human rights, democracy and rule of law and relevant social, economic, ethical and legal implications;

Article 14: Digital Literacy
Parties shall encourage and promote digital literacy and digital skills for all segments of the population in full respect of their human rights and in compliance with Convention 108+.

~~Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector~~

~~Bearing in mind the increased risks posed to human rights, democracy and the rule of law by the application of artificial intelligence systems or combinations of such systems in the public sector and the need to ensure proper accountability, responsibility and legal liability in relation to the application of such systems, Parties shall:~~

Article 15 – Public Administration

Parties shall

2. ensure that the design deployment and application of artificial intelligence systems in the public sector do not undermine human rights and fundamental freedoms, legal rights and interests which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party and respect the principle of the rule of law.

3. ensure that the deployment and application of artificial intelligence systems in the public sector have an appropriate legal basis and that a careful preliminary consideration of the necessity and proportionality of the use of such system is carried out in view of the context of the deployment.

4. ensure compliance with the standards set out in this article insofar as any private entity acting on ~~their~~ behalf of a public entity is concerned.

5. ensure that all relevant artificial intelligence ~~users~~ deployers receive appropriate training in AI ethics, model logic and operations of ~~operating~~ any artificial intelligence systems ~~employed~~ deployed as well as the respective limitations of such systems.

Article 16 – Public Registries

Parties shall establish public registers listing AI systems used in the public sector containing essential information about the system such as its purpose, actors involved in its development and deployment, basic information about the model, and performance metrics, and the result of the impact assessment.

Article 17 - Transparency

~~7 – Procedural safeguards~~

Parties shall ensure that, ~~where appropriate,~~ the ~~usage~~ deployment of an artificial intelligence system is duly recorded and appropriately communicated to the artificial intelligence ~~subjects~~ impacted

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Commented [C420]: Should not be limited to aspirations but actually be reflected as a core requirement

Commented [C421]: Meaningful requires that institutions create equitable participation structures for civil society which do not have the resources of corporations or industry organizations.

Commented [C422]: Training in "operating" a system is useless, without understanding the context, and why the system was developed in the first place and how it works.

Commented [C423]: As was recommended by CAHAI (item 61)

Commented [C424]: Unnecessary caveat/limitation

parties~~concerned~~. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be governed by domestic law _and relevant international conventions_;

Article 18 - Human Review
Parties shall also ensure that in cases where artificial intelligence system ~~substantially~~ informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence ~~subject~~ _impacted party_ in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

Commented [MH425]: Unnecessary caveat/limitation

Article 19 – Explainability
Parties shall ensure that~~, where appropriate~~, relevant explanations and justifications are offered by the artificial intelligence provider and/or ~~user~~ _deployer_ in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence ~~subject~~ _impacted party_ in question with an effective possibility of challenging the decision(s) affecting the ~~subject's~~ _party's_ human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

Article 20 – Right to Remedy
Parties shall ensure that those who might be negatively impacted by AI systems have an effective and accessible remedy against the developers or deployers of AI systems who are responsible. The availability of such remedy should be clearly communicated to them, with special attention to those who are marginalised or in vulnerable situations. Effective remedies should involve redress for any harm suffered, and may include measures under civil, administrative, or, where appropriate, criminal law.

Commented [C426]: To reflect Art. 13 ECHR; and the previously recommendation in CoE feasibility study. https://edoc.coe.int/en/artificial-intelligence/9648-a-legal-framework-for-ai-systems.html

Article 21 – Disclosure of AI Techniques
Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, ~~where appropriate~~ shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

Commented [C427]: Unnecessary caveat/limitation

Article 22 – Applicable Law

The exercise of the rights set out in paragraphs ~~1~~ _17_ to ~~4~~ _21_, including the grounds on which they may be exercised, shall be governed by domestic law _and relevant international conventions_.

Article 8 – Restrictions

Restrictions on the exercise of the rights specified in Article 7 paragraphs 1 to ~~4~~ _5_ may be provided for by law where necessary and proportionate in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. _Such restrictions shall be proportionate and strictly limited to what is necessary._

Article 11 – Risk and impact assessment

Paragraph 1

1. Without any prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to design, development and application of artificial intelligence systems, for identifying, analysing and regularly evaluating risk and assessing impact of the application of artificial intelligence systems and mitigating risks in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law. Impact assessment must precede any deployment of an artificial intelligence system accompany the system throughout its lifecycle and be conducted on a case-by-case basis and in a context-specific way. Impact assessment mechanisms should include meaningfu multi-stakeholder consultation before the deployment of an artificial intelligence system. Parties must ensure that the results of this impact assessment are documented and that where the deployer is a public authority or acting on behalf of it made publicly available in the register as set out in Article 6(X).

   The methodology shall be based on the ~~model~~ criteria relevant to the principles of human rights, democracy, and the rule of law and set out in the Appendix to the present Convention. It shall set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such systems that in view of their concrete applications pose significant levels of risk to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law. It is the responsibility of AI providers and deployers to demonstrate compliance with principles of human rights democracy and the rule of law.

   > **Commented [C428]:** Meaningful requires that institutions create equitable participation structures for civil society which do not have the resources of corporations or industry organizations.

   > **Commented [C429]:** No one-size-fits-all model/assessment framework should be mandated - especially the impact of AI systems will be different depending on the context. Such a mandated model also does NOT provide flexibility for the future relevance of the convention

   > **Commented [C430]:** Proof of burden sits with providers & deployers

   Paragraph 2

2. Each Party shall take appropriate measures, particularly in the field of training of national supervisory authorities, artificial intelligence providers and artificial intelligence ~~users~~ deployers, with a view to ensuring that the relevant actors are capable of identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law, in accordance with the present methodology.

Article 12 – Measures in respect of artificial intelligence systems posing significant levels of risk

Paragraph 1

1. Parties shall, in accordance with their domestic law and relevant international conventions, provide for the imposition on artificial intelligence providers and ~~users~~ deployers of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system, deemed in accordance with the methodology referred to in Article 11, paragraph 2, to present significant levels of risk of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law, aimed at mitigating that risk, as well as to document and keep the records of the respective process.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 1

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1. Parties shall, in accordance with their domestic law _and relevant international conventions_, provide for the possibility of imposing a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (e) are deemed to present unacceptable levels of risk of interfering with the enjoyment of human rights, the functioning of democracy, and the observance of the rule of law. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk.

Paragraph 2

2. Parties shall~~, in accordance with their domestic law,~~ establish appropriate and independent review procedures in order to enable the reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available.

Article 14 – Prohibited artificial intelligence _systems and_ practices

The following artificial intelligence _systems and_ practices _by public and private entities_ shall be banned:

1. ~~the use of~~ artificial intelligence systems ~~by public authorities~~ _which_ us~~ing~~ biometrics _and purported_ to ~~identify,~~ ~~categorise or~~ infer emotions _mental state character personality traits competencies and abilities_ of individuals;

2. _artificial intelligence systems which use biometrics and purported infer and categorize sexual or ethnic identity, political or religious preferences or any other protected category of individuals;_

3. _artificial intelligence systems which use biometric, behavioural, or network data to profile individuals and locations to predict future crimes;_

4. _the use of biometric recognition (facial voice and gait) systems used for mass surveillance purposes._

~~1.~~5. the use of artificial intelligence systems ~~for social scoring~~ _which use biometric, behavioural, or network data to profile and score individuals_ to determine access to essential services_, or result in harmful stereotypes, or_ lead~~ing~~ either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour_._

3. any other use of artificial intelligence systems ~~by public authorities~~ for such purposes as are not compatible with core values of democratic societies, do not pursue a legitimate aim and are not necessary in a democratic society.

Commented [C431]: As mentioned at beginning, the change reflects that some AI systems are a direct risk to fundamental rights, or that they are pseudoscientific, regardless of how they are used.

Commented [C432]: So far, the response by both EU and CoE to scoring and profiling algorithms have been to suggest that China style social scoring is bad, but everything else (such as credit scoring, immigration risk profiling, employment social media background & risk scoring, fraud risk.. etc) are and acceptable. Banning an all encompassing scoring system is a low-hanging fruit and does not address the existing standalone practices by public & private entities. Human dignity relates to the recognition of the intrinsic and equal worth of each individual
human being, not a normative judgement of one group over another about what is good behavior. Even if they are not 'connected' under a 'social score', biased outputs of one system used as an input to another system still creates discrimination and cumulative disadvantage. Consider a tenant risk score being part of insurance / employment / credit decision...

Commented [C433]: The prohibition should similarly apply to private entities

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing ~~significant levels of~~ risk

Parties shall take such measures as are aimed at:

f. ~~minimizing and, to the extent possible,~~ preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems;

> **Commented [C434]:** There should not be any 'acceptable' level of UNLAWFUL harm or damage

g. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms resulting from the ~~inappropriate application~~ deployment or use of artificial intelligence systems;

h. ~~ensuring that all interested parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions;~~

> **Commented [C435]:** Move under Chapter IV

~~i.~~h. ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including gender equality and non-discrimination, presumption of innocence and rights related to ~~discriminated~~ marginalized groups and people in vulnerable situations in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

i. ensuring that the rights to privacy and to personal data protection are adequately respected in accordance with the standards of Convention 108+ during design, development and application of artificial intelligence systems throughout their lifecycle in both public and private sectors, notably through additional safeguards for special categories of data such as medical data.

j. Member States should include non-discrimination and promotion of equality requirements in public procurement processes for AI systems are independently audited for discriminatory effects prior to deployment and regularly thereafter.

> **Commented [C436]:** As was previously recommended in CoE feasibility study. https://edoc.coe.int/en/artificial-intelligence/9648-a-legal-framework-for-ai-systems.html

Article 16 – Consultation of the Parties

1. Shall be established within X year after the entry into force of this Convention.

~~1.~~2. ~~Parties~~ shall consult periodically with a view to:

> **Commented [C437]:** "Consultation" does not reflect the activities listed below or the nature of the mechanism. A more appropriate term could be committee / board / council... Any new terminology should be updated in the rest of the document

Paragraph d

d. examining and revising, as necessary and in accordance with the procedure prescribed in Article 21, the ~~methodology~~ criteria for risk and impact assessment of artificial intelligence systems contained in the Appendix to this Convention;

> **Commented [C438]:** As mentioned above, should not prescribe a particular method but criteria

f. ensuring that all interested parties groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes taking in particular due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions;

3. Shall include or invite as needed representatives from civil society organizations working independently to protect fundamental rights or rule of law.

Article 18 – National supervisory authorities

Paragraph 2

~~5.~~7. Parties shall, in accordance with their domestic law and relevant international conventions, provide for efficient procedures for the imposition of a moratorium or a ban on design, development and application of an artificial intelligence system in accordance with Articles 13 and 14.

Article 19 – Effects of the Convention

Paragraph 2

2. Parties which are members of the European Union shall, in their mutual relations, apply ~~Community and~~ European Union rules in so far as there are ~~Community or~~ European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

Article 20 – Amendments

Paragraph 1

1. Amendments to this Convention may be proposed by any Party, the Committee of Ministers of the Council of Europe, ~~or~~ the Consultation of the Parties, or civil society organizations which have Observer status.

Global Partners Digital

Preamble

Concerned by the risk that ~~certain uses of~~ some artificial intelligence systems _or certain uses of such systems_ also have the potential for unduly interfering with the exercise of human rights and fundamental freedoms, undermining democracy and violating the rule of law through such harmful practices and effects as, for instance, ~~unrestricted~~ mass surveillance, information distortion, ~~possible~~ unlawful discrimination the general weakening of human agency, unlawful electoral interference and digital exclusion;

> **Commented [C439]:** Is the term "unlawful" used here synonymous with not being permitted by the ECHR? An ordinary reading of this term would be that it is unlawful under domestic law, which might not itself be compatible with ECHR. Clarification on this term would be helpful.

Conscious also of the fact that in view of its framework character the Convention may be supplemented by further binding or non-binding instruments to address challenges relating to the application of artificial intelligence ~~in specific sectors~~;

> **Commented [C440]:** Deletion could be beneficial as to not limit further instruments which may address challenges beyond those within specific sectors

Mindful of the need to ensure ~~a proper balance between~~ full respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties ~~and various economic, security and other interests~~ in the development and use of artificial intelligence;

> **Commented [C441]:** Deletion here as such treaties already contain restrictions on particular human rights for legitimate purposes.

Underlining that the present Convention is intended to complement those conventions in order to ~~fill in any legal gaps in view of the~~ respond to specific challenges raised by design, development and application of artificial intelligence systems;

Article 1 – Purpose and object

Paragraph 1

1. This Convention establishes certain fundamental principles and rules aimed at ensuring that design development and application of artificial intelligence systems is fully consistent with respect for human rights, the functioning of democracy and the observance of rule of law.

> **Commented [C442]:** "research" is not included here but is within Article 5 below. Would recommend including throughout for consistency.

Article 2 – Definitions

Paragraph d

d. "artificial intelligence user" means any natural or legal person, public authority or other body using an artificial intelligence system in their own name or under their authority;

> **Commented [C443]:** Not sure "user" is mos appropriate term given it's use elsewhere. Would recommend deployer to align with EU AI Act.

Paragraph e

e. "artificial intelligence subject" means any natural or legal person whose human rights and fundamental freedoms, legal rights or interests are impacted by decisions made or ~~substantially~~ informed by the application of an artificial intelligence system.

Article 4 – Scope

Paragraph 2

2. ~~The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.~~ <u>The Convention shall apply within the mandate and competencies established by the Statute of the Council of Europe.</u>

> **Commented [C444]:** Would recommend the deletion of this sentence and advocating against reference to the mandate or competency as this is not included within other CoE instrumeents. However, if there is a need for language specifying the mandate, then we would recommending doing so with more general language as provided.

Article 5 – Design, development and application of artificial intelligence systems

Paragraph 3

3. ensure that design, development and application of artificial intelligence systems respects the principle of equality, including gender equality and rights related to <u>groups vulnerable to discrimination</u> ~~discriminated groups and people in vulnerable situations~~;

> **Commented [C445]:** The threshold should be groups vulnerable to discrimination, as opposed to those who are objectively discriinated against. Also, "vulnerable situations" isn't a term defined anywhere and is superfluous.

Paragraph 6

6. ensure that, ~~where appropriate,~~ adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

Paragraph 7

7. ~~with a view to encouraging research and fostering innovation, ensure that a controlled regulatory environment for testing artificial intelligence systems is available for artificial intelligence providers and users under the supervision of their competent authorities;~~

Paragraph 8

8. ensure that adequate safety, security, data quality, data integrity, data security, cybersecurity and robustness requirements are in place regarding design, development and application of artificial intelligence systems;

> **Commented [C446]:** Concerned that there is a risk of confusion over what compliance with this looks like if you have to ensure "security", "data security" and "cybersecurity". Would suggest that this be simplified or clarified.

Paragraph 9

9. strive to ensure that fundamental questions raised by the design, development and application of artificial intelligence systems are the subject of appropriate public discussion and multi-stakeholder consultation in the light, in particular, of relevant social, economic, ~~ethical~~ and legal implications;

Article 6 – Additional requirements for design, development and application of artificial intelligence systems in the public sector

Paragraph 2

2. ensure that the deployment and application of artificial intelligence systems in the public sector have an appropriate legal basis and that a careful ~~preliminary~~ consideration of the necessity and proportionality of the use of such system is carried out in view of the context of the deployment.

> **Commented [C447]:** We are concerned that this risks creating a two-tier system depending on whether the AI is deployed within the public or private sector. States should have the same obligation to ensure protection from human rights violations regardless of the source. Would be open to extending Article 6 to the private sector, and that paragraph 3 be deleted.

Article 7 – Procedural safeguards

Paragraph 1

1. Parties shall ensure that, ~~where appropriate,~~ the usage of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned _and that artificial intelligence subjects have the right to access relevant records. ~~. The exercise of the right of access to the relevant records~~ in accordance with international obligations on access to information, ~~including the grounds on which it may be exercised, shall be governed by domestic law~~;

Paragraph 2

2. Parties shall also ensure that in cases where an artificial intelligence system ~~substantially~~ informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

Paragraph 3

3. Parties shall ensure that, ~~where~~ appropriate explanations ~~appropriate, relevant explanations~~ and justifications are offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

Paragraph 4

~~3.~~4. Parties shall ensure that any natural or legal person has the right to an effective remedy before a national authority (including judicial authorities) with respect to decisions made or informed by artificial intelligence systems which affect a subject's human rights, legal rights or other interests.

Paragraph 5

~~4.~~5. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where feasible ~~appropriate~~, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

Paragraph 6

5.6. ~~The exercise of the rights set out in paragraphs 1 to 4, including the grounds on which they may be exercised, shall be governed by domestic law.~~

> **Commented [C448]:** Article 1(2) already provides that states must ensure that the rights within this convention are guaranteed by domestic law. So not entirely sure there is a need for this here.

Article 8 – Restrictions

Restrictions on the exercise of the rights specified in Article 7 paragraphs 1 to 4 may be provided for by law where necessary and proportionate in a democratic society in the interests of national security, territorial integrity or public safety~~, or the economic well-being of the country~~ for the prevention of disorder or crime, for the protection of health or morals, ~~or~~ for the protection of the rights and freedoms of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

> **Commented [C449]:** This reflects Article 8, ECHR and restrictions permitted to the right to privacy and protection of family life. However, the rights specifically outlined above in Article 7 are all different variations of the right to freedom of information/right to know, which in Article 10, para 2, ECHR is subject to different restrictions. This is reflected now here.

Article 11 – Risk and impact assessment

Paragraph 1

1. Without ~~any~~ prejudice to already existing relevant national and international legal instruments, and irrespective of whether the respective activities are undertaken by public or private actors, Parties undertake to adopt a methodology applicable to the design, development and application of artificial intelligence systems, for identifying, analysing and evaluating risk and assessing impact of the application of artificial intelligence systems in relation to the enjoyment of human rights, the functioning of democracy and the observance of rule of law.

Paragraph 2

2. The methodology shall be based on the model set out in the Appendix to the present Convention. It shall set out clear, concrete and objective criteria for identifying such artificial intelligence systems or combinations of such systems that in view of their concrete applications pose ~~significant levels of~~ risks to the enjoyment of human rights, the functioning of democracy and the observance of the rule of law.

> **Commented [C450]:** While the specifics of the methodology in the Annex have not been set out, we would like to flag that this language may need to be modified. This is to reflect the reality that it may be difficult, particularly for providers, to determine the concrete applications of an AI system.

Article 12 – Measures in respect of artificial intelligence systems posing significant levels of risk

Paragraph 1

1. Parties shall, ~~in accordance with their domestic law,~~ provide for the imposition on artificial intelligence providers and users of an obligation to apply all necessary preventive and mitigating measures to an artificial intelligence system that, ~~deemed~~ in accordance with the methodology referred to in Article 11, paragraph 2, ~~to~~ presents ~~significant levels of~~ risks of interfering with the enjoyment of human rights, the functioning of democracy and the observance of the rule of law,

~~aimed at mitigating that risk,~~ as well as to document and keep the records of the respective process.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Paragraph 1

1. Parties shall, ~~in accordance with their domestic law~~, provide for the possibility of imposing a full or partial moratorium or ban in respect of artificial intelligence systems, which in accordance with the aforesaid methodology and in view of the measures set out in Article 15 (a) to (e) are deemed to present unacceptable levels of risk of interfering with the enjoyment of human rights, the functioning of democracy, and the observance of the rule of law. A moratorium or ban should, however, only be considered, where on an objective basis an unacceptable risk to human rights, democracy or the rule of law has been identified and, after careful examination, there are no other measures available for mitigating that risk.

> **Commented [C451]:** Would suggest editing or removing this text as we are not entirely sure what a "partial" moratorium or ban would entail. Is this simply another means of providing exceptions? If so, it would be helpful to clearly provide this in the text so it can be debated and critiqued.

Paragraph 2

2. Parties shall, ~~in accordance with their domestic law~~, establish appropriate and independent review procedures in order to enable the addition or reversal of a moratorium or ban provided that relevant risks are sufficiently reduced or appropriate mitigation measures become available.

Article 14 – Prohibited artificial intelligence practices

The following artificial intelligence practices shall be banned:

1. the use of artificial intelligence systems ~~by public authorities~~ using biometric including physical and behavioural data~~s~~ to identify, categorise or infer emotions opinions and mental states of individuals, with the exception of specific cases, namely for health or research purposes, with appropriate safeguards in place~~;~~

2. the use of an artificial intelligence system that deploys subliminal techniques beyond a person's consciousness in order to materially distort a person's behaviour in a manner that causes or is likely to cause that person or another person physical or psychological harm;

3. the use of an AI system that exploits any of the vulnerabilities of a specific group of persons due to their age physical or mental disability in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm;

4. the use of AI systems by law enforcement and criminal justice authorities to make predictions profiles or risk assessments for the purpose of predicting crimes;

1.5. the use of an artificial intelligence system for immigration or border control purposes to profile or risk-assess natural persons or groups in a manner that restricts the right to seek asylum and / or prejudices the fairness of migration procedures;

2.6. the use of artificial intelligence systems for social scoring to determine access to essential services leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;

3. any other use of artificial intelligence systems by public authorities for such purposes that as are not compatible with core values of democratic societies, do not pursue a legitimate aim and are not necessary in a democratic society.

> **Commented [C452]:** Unclear whether the purposes has to meet all three criteria or just one? And how do you determine if a purpose is "compatible with core values of democratic societies".

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Parties shall take such measures as are aimed at:

Paragraph a

a. minimizing and, to the extent possible, preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the inappropriate application of artificial intelligence systems;

> **Commented [C453]:** Simply "minimising" harm to human rights is insufficient

Paragraph b

b. preserving individual freedom, human dignity and autonomy and in particular the ability to reach informed decisions free from undue influence, manipulation or detrimental effects which adversely affect the right to freedom of expression and assembly, democratic participation and the exercise of other relevant human rights and fundamental freedoms resulting from the inappropriate application of artificial intelligence systems;

Paragraph c

c. ensuring that all interested parties, groups and individuals enjoy equal and fair access to public debate and inclusive democratic processes, taking, in particular, due account of the relevant implications of the technological developments in the area of artificial intelligence and the role of public and private entities that help shape the public debate in their respective jurisdictions;

> **Commented [C454]:** This seems to significnatly overlap with Article 5(9). Would recommend they be consistent in language or potentially merged together where most appropriate.

Paragraph d

d. ensuring that design, development and application of artificial intelligence systems do not compromise the principle of equality before the law, including gender equality and rights related to ~~discriminated~~ groups vulnerable to discrimination ~~and people in vulnerable situations~~ in so far as they are used to inform or take decisions affecting human rights and fundamental freedoms, legal rights and interests of natural or legal persons;

Article 18 – National supervisory authorities

Paragraph 2

2. Parties shall~~, in accordance with their domestic law,~~ provide for efficient procedures for the imposition of a moratorium or a ban on design, development and application of an artificial intelligence system in accordance with Articles 13 and 14.

International Commission of Jurists

1. Introduction

This briefing paper provides comments on selected elements of the *Zero Draft [Framework] Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law*.

This draft treaty is one of the first attempt in the world to set a legal framework for AI technology at supranational level and one which takes significant account of the impact of AI on human rights. The ICJ welcomes efforts in this regard, as AI technology is going to be – and to a great extent, already is - one of the defining elements of human society globally. It is therefore critical for the protection of human rights and the rule of law that States step in to design and implement regulatory frameworks in order to fulfil their duty under international law to secure the respect and protection of the human rights of all, both online and offline.

Artificial intelligence and any regulatory framework addressing its development, deployment, functioning, use and impact have the potential to affect all human rights to varying degrees depending on scope and context. While international human rights bodies have carried out thorough assessments on the impact that AI may have on the freedoms of expression and assembly or the rights to privacy including in relation to data protection, a broader range of human rights may directly or indirectly be impacted by AI technology. For example, AI may be used for the implementation of measures interfering upon the right to liberty; freedom of torture or cruel, inhuman or degrading treatment; the right to a fair trial; the right to life and the right to an effective remedy, among others.

It is therefore critical that any regulation on AI be fully in compliance with all human rights law and standards. The EU legislator should therefore pay particular attention to the fact that certain human rights allow for no restriction of any sort: the right to life (in the Council of Europe space and outside of armed conflict); freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom from slavery and forced labour, the principle of non-retroactivity in criminal law; the right to recognition as a person before the law; the freedom of thought, conscience and religion; the right to hold an opinion;

the freedom from discrimination[1] and the right to an effective remedy whenever needed to seek redress for violations or abuses of these rights. The rights to liberty and a fair trial, while allowing for certain adaptations in scope, equally do not allow for restrictions in their core elements.[2]

Finally, the rights to family life, a private life, to the freedoms of expression and impart, to assembly, and association, to political participation, and to exercise one's religion or belief, while allowing for restrictions, do so in very strict situations, must not be arbitrary, must be provided by law, and be necessary and proportionate to the aim pursued. It is against these principles that the Regulation on AI must be tested.

In the present contribution, the ICJ will provide comments on selected issues of concern with the draft treaty proposed before the Committee on Artificial Intelligence of the Council of Europe.

2. Preamble

Preambulary Paragraph 9 (PP9)

> *Mindful of the need to ensure a proper balance between respect for human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties and various economic, security and other interests in the development and use of artificial intelligence;*

The ICJ expresses concern at the approach undertaken in the drafting of PP9. This paragraph as drafted implies that human rights protection and economic, security and other interests are opposing goals that require balancing. The ICJ strongly contends that this is not the case. In the field of counter-terrorism it has long been clear that respect of human rights is the best counter-terrorism strategy as highlighted in several resolutions by the UN General Assembly and the UN Human Rights Council. The right to security of the person is enshrined in article 5.1 ECHR and article 9.1 ICCPR.

Furthermore, as an organization dedicated to human rights, democracy and the rule of law, it should not be the priority of the Council of Europe to protect economic, security or other interests over human rights protection.

The ICJ strongly recommends that this paragraph either be deleted or be rephrased to ensure that all artificial intelligence outputs must respect human rights law.

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[1] AI technology has been considered at high risk of perpetuating or exacerbating discriminatory practices: CERD, *General Recommendation No. 36*, para. 31, and para 32: "There are various entry points through which bias could be ingrained into algorithmic profiling systems, including the way in which the systems are designed, decisions as to the origin and scope of the datasets on which the systems are trained, societal and cultural biases that developers may build into those datasets, the artificial intelligence models themselves and the way in which the outputs of the artificial intelligence model are implemented in practice." See also, the Consultative Committee of the Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data, *Guidelines on Facial Recognition*, 28 January 2021, Doc. T-PD(2020)03rev4, p. 5.

[2] See, CCPR, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001. See articles 4 ICCPR and 15 ECHR and the European Court of Human Rights' jurisprudence here https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf .

Recommendation:

> *Mindful of the need to ensure a proper balance between* **Recalling that the development and use of artificial intelligence must always** *respect* for *human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties*, *subject to the provision made by those treaties for appropriate restrictions on rights, including in the interests of public order and national security, and for derogation in case of public emergency threatening the life of the nation* and various economic, security and other interests in the development and use of artificial intelligence

Preambulary Paragraph 10 (PP10)

> *Underlining that the present Convention is intended to complement those conventions in order to fill in any legal gaps in view of the specific challenges raised by design, development and application of artificial intelligence systems;*

The ICJ suggests that, either in this paragraph or in the explanatory report, a clarification is inserted that all human rights obligations must be interpreted in light of the text of those treaties and the jurisprudence of their courts or treaty bodies.

> *Underlining that the present Convention is intended to complement those conventions in order to fill in any legal gaps in view of the specific challenges raised by design, development and application of artificial intelligence systems,* **and that the human rights obligations therein contained must be interpreted in light of the jurisprudence of, respectively, the European Court of Human Rights and the UN Human Rights Committee;**

3. Chapter 1: General Provisions

Article 3 – Principle of non-discrimination

> *The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds*

In light of the specific objective of this treaty, the ICJ suggest to reflect to include as well discrimination grounds that are specific to this topic, such as "digital literacy".

Recommendation:

> *The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, race, colour, language, age,*

*religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability**, digital literacy** or other status, or based on a combination of one or more of these grounds*

Article 4 – Scope

1. *Parties undertake to apply this Convention to design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.*
2. *The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.*

The ICJ understands that the current formulation of article 4.2 is based on article 1.d of the Statute of the Council of Europe according to which "[m]atters relating to national defence do not fall within the scope of the Council of Europe."

While it is understandable that the sphere of defence is not under the competence of the Council of Europe, it is very problematic to exclude systems "developed" for military purposes, even if exclusively. Technological advances are often carried out at first for exclusive military purposes that later find a civilian use, sometimes unexpected. More importantly, the fact that the Council of Europe has no competence on national defence does not mean that its human rights legal framework does not apply to national defence activities. In fact, all values that this Framework Convention purports to protect, i.e. human rights and fundamental freedoms, democracy and the rule of law, apply also to cases or situations of national defence. This is also evident by the fact that article 15 ECHR provides for derogations in times of war.

For these reasons, the exclusion from the scope of this FC of AI systems used for national defence is misplaced and will likely create a considerable gap in human rights protection. The ICJ therefore recommends the deletion of Article 4's second paragraph.

Recommendation:

1. *Parties undertake to apply this Convention to design, development and application of artificial intelligence systems throughout their lifecycle, regardless of whether these activities are undertaken by public or private actors.*
2. ~~*The present Convention shall not apply to design, development and application of artificial intelligence systems used for purposes related to national defense.*~~

4. Chapter II : Fundamental Principles

Article 5 – Design, development and application of artificial intelligence systems

Bearing in mind the need to safeguard and uphold human dignity, human rights and fundamental freedoms, preserve and foster robust and accountable democratic institutions and safeguard the

rule of law as the institutional basis for assuring both democratic participation and the effective protection of human rights and fundamental freedoms, in their respective jurisdictions Parties shall:

1. *ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is compatible with core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application are not aimed at undermining or curtailing fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;*
2. *…*
3. *…*
4. *…*
5. *ensure a continuous chain of accountability, responsibility and legal liability for any unlawful harm in respect of design, development and application of artificial intelligence systems throughout their lifecycle and that appropriate redress mechanisms are available;*
6. *ensure that, where appropriate, adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;*
7. *…*

The ICJ considers that article 5 requires amendment to be framed in a way reflecting the existing obligations of States under international human rights law, including under the European Convention on Human Rights.

First of all, the introductory paragraph should reflect the fact that States do not only have a "need" to secure human rights but a legal "obligation" to do so. Furthermore, in terms of the type of obligation it would be advisable to use the ECHR's terminology of "securing" human rights.

With regard to sub-paragraph 1, the content of the "core values of democratic societies" may be disputable. In any case it is of primary importance from a legal point of view that the compatibility with international human rights law be ensured. It is also matter of concern that in the current text the focus of the control is to the element of intention or aim of the producer of the AI application instead of its actual impact on human rights. In a system where AI may be self-learning and adaptative, it is unwise to centralise the system on the "aim" of the producer and not on harm and the effective capacity of such technologies to be used for – or being cause of - violations and abuses of human rights.

The ICJ appreciates that sub-paragraph 5 addresses the issue of accountability and legal liability. It remains however concerned that, as currently formulated, it does not reflect States' obligations under international human rights law.

International human rights law provides that individuals must be able to access effective remedies and redress for violations of their human rights occurring both online and offline.[1]

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[1] See, UN Special Rapporteur on the promotion and protection of the right to freedom of assembly and association, *Annual Report to the UN Human Rights Council,* UN Doc. A/HRC/41/41, para. 15.

The Council of Europe Recommendation on the human rights impacts of algorithmic systems[1] affirms that "States should ensure equal, accessible, affordable, independent and effective judicial and non-judicial procedures that guarantee an impartial review, in compliance with Articles 6, 13 and 14 of the Convention, of all claims of violations of Convention rights through the use of algorithmic systems, whether stemming from public or private sector actors. Through their legislative frameworks, States should ensure that individuals and groups are provided with access to effective, prompt, transparent and functional and effective remedies with respect to their grievances. Judicial redress should remain available and accessible, when internal and alternative dispute settlement mechanisms prove insufficient or when either of the affected parties opts for judicial review or appeal."[2] Remedies should be provided as well by the private sector that should also allow for collective redress mechanisms, both offline and online and that should not foreclose access to national judicial bodies.[3]

While national legal systems may provide judicial remedies via their tort law and civil liabilities systems, as well as regulations on the responsibility of the producers, AI technology gives rise to complex questions of jurisdiction, choice of the judicial forum, as well as the causality chain in tort law that would require regulation at European level to be able to address the global complexity of the phenomenon.

Sub-paragraph 5 currently does not refer to the right to a remedy but only to redress that is one part of the right to an effective remedy. Furthermore, it refers only to "unlawful" harms. However harm – including human rights violations – may occur as well from activities or omissions that are considered lawful under domestic law, yet not in compliance with international human rights law.

The ICJ appreciates the importance given to the issue of oversight mechanisms under sub-paragraph 6. It however considers that this reference fails to stress the importance of the independence of these mechanisms.

The UN Human Rights Committee, OHCHR and the Committee of Ministers of the Council of Europe have called for independent and transparent scrutiny over decisions affecting data and the use of algorithmic systems.[4] The UN Special Rapporteur on freedom of opinion and expression has recommended that the independence of oversight bodies or regulators must be assured and scrupulously respected.[5]

The Court of Justice of the EU has ruled that "supervisory authorities responsible for supervising the processing of personal data outside the public sector must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task of establishing a fair balance between the protection of the right to private life and the free movement of personal data. The mere risk that the scrutinising authorities could exercise a political influence over the decisions of the

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[1] Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, adopted by the Committee of Ministers on 8 April 2020 at the 1373 d meeting of the Ministers' Deputies.
[2] Ibid., 4. 5
[3] Ibid., 4.4 on Private Entities. The same is affirmed in paras 1.5.1 – 1.5.2 and 2.5.1 – 2.5.3., Appendix to Recommendation CM/Rec(2018)2, Guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities
[4] CCPR, General Comment No. 37, para. 62; A/HRC/39/29, para. 33; A/HRC/48/31, para. 47. Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, adopted by the Committee of Ministers on 8 April 2020 at the 1373 d meeting of the Ministers' Deputies, para. 4.4. ee also, CAHAI Feasibility Study, para. 43
[5] UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Annual Report to the UN Human Rights Committee, A/HRC/47/25, paras. 59, 60.

competent supervisory authorities is enough to hinder the latter authorities' independent performance of their tasks."[1]

Recommendation:

~~Bearing in mind the need~~ **In light of the obligations of States** to safeguard and uphold human dignity, **to secure** human rights and fundamental freedoms, preserve and foster robust and accountable democratic institutions and safeguard the rule of law as the institutional basis for assuring both democratic participation and the effective protection of human rights and fundamental freedoms, in their respective jurisdictions Parties shall:

1. ensure that any research, design, development and application of artificial intelligence systems or combinations of such systems is compatible **with international human rights law and** with **other** core values of democratic societies. In particular, Parties shall ensure that such research, design, development and application are not aimed at **or do not result in** undermining or curtailing fundamental rights and freedoms, the functioning of democracy or the observance of rule of law;

2. …

3. …

4. …

5. Ensure **that everyone has access to an independent, impartial and effective remedy, including via judicial mechanisms, against violations of human rights** <u>in respect of design, development and application of artificial intelligence systems throughout their lifecycle</u> **by ensuring** a continuous chain of accountability, responsibility and legal liability ~~for any unlawful harm~~ and that appropriate redress **is** ~~mechanisms are~~ available;

6. ensure that, ~~where appropriate,~~ **independent, transparent and** adequate oversight mechanisms as well as transparency and auditability requirements tailored to the specific risks arising from the context in which the artificial intelligence system is designed, developed and applied are in place;

7. …

Article 7 – Procedural safeguards

1. Parties shall ensure that, where appropriate, the usage of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be governed by domestic law;

2. Parties shall also ensure that in cases where artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an

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[1] Judgment of 9 March 2010 (Grand Chamber), Commission v Germany (C-518/07, EU C 2010 125) 5. See also, Judgment of 16 October 2012 (Grand Chamber), Commission v Austria (C-614/10, EU C 2012 631) "The fact that such an authority has functional independence in so far as its members are independent and are not bound by instructions of any kind in the performance of their duties is not by itself sufficient to protect that supervisory authority from all external influence. The independence required in that connection is intended to preclude not only direct influence, in the form of instructions, but also any indirect influence which is liable to have an effect on the supervisory authority's decisions."

artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

3. *Parties shall ensure that, where appropriate, relevant explanations and justifications are offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.*

4. *Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and, where appropriate, shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.*

5. *The exercise of the rights set out in paragraphs 1 to 4, including the grounds on which they may be exercised, shall be governed by domestic law.*

The ICJ considers that article 7 appears to apply a minimalistic approach to procedural safeguards. Further research and reflection of the procedural safeguards already existing under international human rights law should be undertaken to properly reflect this in the FC and assist States in their regulation of AI.

For example, in light of the right to privacy, including data protection, it is not possible to provide States and companies with the level of discretion that the clause "where appropriate" will imply. The restrictions to the right to access one's information and to know whether and how they have been used are clearly set out in article 8.2 ECHR and article 17.2 ICCPR and cannot be extended further. The "where appropriate" qualification in sub-para 4 also provides insufficient clarity on protection of procedural rights including under Articles 6 and 13 ECHR.

Finally paragraph is misleading in that it implies that domestic law is the only body governing the exercise of these procedural rights. This is incorrect. International human rights law is the legal source of these rights and domestic law implements them. As currently formulated, the paragraph would lead to the dismissal of all jurisprudence of the European Court of Human Rights or of the UN Human Rights Committee in the interpretation of human rights. The ICJ considers that paragraph 5 was likely referring to the principle of legality and therefore should be reformulated accordingly.

Recommendation:

1. Parties shall ensure that, ~~where appropriate,~~ the usage of an artificial intelligence system is duly recorded and communicated to the artificial intelligence subjects concerned. The exercise of the right of access to the relevant records, including the grounds on which it may be exercised, shall be governed by domestic law;

2. Parties shall also ensure that in cases where artificial intelligence system substantially informs or takes decision(s) affecting human rights and fundamental freedoms, legal rights and interests, the artificial intelligence subject in question is informed about the application of an artificial intelligence system in the decision-making process and that there is a right to human review of such decisions.

3. Parties shall ensure that, where appropriate, relevant explanations and justifications are offered by the artificial intelligence provider and/or user in plain, understandable, and coherent language and are tailored to the context. Such communication shall contain sufficient information in order to provide the artificial intelligence subject in question with an effective possibility of challenging the decision(s) affecting the subject's human rights, legal rights and interests insofar as any use of artificial intelligence technology is concerned.

4. Parties shall ensure that any person has the right to know that one is interacting with an artificial intelligence system rather than with a human and**, wherever needed to ensure procedural fairness and protection of human rights** ~~where appropriate,~~ shall provide for the option of interacting with a human in addition to or instead of an artificial intelligence system.

5. ~~The~~ **Any domestic regulation on the** exercise of the rights set out in paragraphs 1 to 4, **must be prescribed by law** ~~including the grounds on which they may be exercised, shall be governed by domestic law.~~

Article 8 – Restrictions

Restrictions on the exercise of the rights specified in Article 7 paragraphs 1 to 4 may be provided for by law where necessary and proportionate in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The ICJ is extremely concerned that the scope of article 8 unduly extends the grounds for restriction of the exercise of the right to an effective remedy.

In addition to the right to respect for private life – as the ICJ understands that the grounds for restrictions drafted originate from article 8.2 ECHR – the right to an effective remedy under article 13 ECHR and the right to access a court under article 6.1 ECHR are also affected by the procedural rights under article 7 FC.

These two rights do not allow for restrictions in the same way as Article 8 ECHR and therefore cannot be subsumed under this clause.

Furthermore in order to be consistent with Article 8 ECHR, it should be clear that the standards of prescription by law and necessity are mandatory rather than enabling – i.e. that restrictions that do not meet these criteria are not permissible.

<u>Recommendation:</u>

*Restrictions on the **right to respect for private life under** Article 7 paragraphs 1 to 4**,** ~~may~~ **must** be provided for by law, and must be ~~where~~ necessary and proportionate in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

6. Chapter III: Risk and impact assessment and related measures

Article 14 – Prohibited artificial intelligence practices

The following artificial intelligence practices shall be banned:

1. *the use of artificial intelligence systems by public authorities using biometrics to identify, categorise or infer emotions of individuals;*
2. *the use of artificial intelligence systems for social scoring to determine access to essential services leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;*
3. *any other use of artificial intelligence systems by public authorities for such purposes as are not compatible with core values of democratic societies, do not pursue a legitimate aim and are not necessary in a democratic society.*

While welcoming the prohibition of these AI practices, yhe ICJ is concerned that the use of biometrics is prohibited only for the purpose of categorizing or inferring emotions. Several international authorities, including the UN High Commissioner for Human Rights, have called for a moratorium on the use of potentially high-risk technologies such as remote real-time facial recognition unless and until it is ensured that their use cannot violate human rights.[1]

Indeed, the UN High Commissioner for Human Rights has called on States to "[e]xpressly ban AI applications that cannot be operated in compliance with international human rights law and impose moratoriums on the sale and use of AI systems that carry a high risk for the enjoyment of human rights, unless and until adequate safeguards to protect human rights are in place."[2]

With regard to "social scoring to determine access to essential services", the ICJ underlines that, in general, "essential services", such as health services, education, courts, are implementations of obligations States have to secure civil, cultural, economic, political and social rights. They cannot therefore discriminate on the basis of social scoring and the criteria enshrined in paragraph 2.

With regard to paragraph 3, such a general clause should be brought in line with the categories of international human rights law. Furthermore this protection should also extend to uses by private entities, since States already have obligations to ensure that private entities or individuals do not violate the rights of others (ECHR positive obligations).

Recommendation:

The following artificial intelligence practices shall be banned:

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[1] UN High Commissioner for Human Rights, *op. cit.* fn 5, para. 45. See, also, para. 59; Consultative Committee of the Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data, *Guidelines on Facial Recognition*, 28 January 2021, Doc. T-PD(2020)03rev4, p. 5. See also, CAHAI Feasibility Study, para. 43.
[2] UN High Commissioner for Human Rights, *The Right to Privacy in the Digital Age,* UN Doc. A/HRC/48/31, 13 September 2021, para. 59

1. *the use of artificial intelligence systems by public authorities using biometrics to identify **individuals and/or to** categorise or infer emotions of individuals;*
2. ~~*the use of artificial intelligence systems for social scoring to determine access to essential services leading either to (a) detrimental or unfavourable treatment of certain natural persons or whole groups in social contexts which are unrelated to the contexts in which the data was originally generated or collected, or (b) detrimental or unfavourable treatment of certain natural persons or whole groups that is unjustified or disproportionate to their social behaviour;*~~
3. *any other use of artificial intelligence systems ~~by public authorities~~ for such purposes as are not compatible with core values of democratic societies, **are not prescribed by law** do not pursue a legitimate aim and are not necessary in a democratic society **nor proportionate to the aim pursued**.*

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

Parties shall take such measures as are aimed at:

1. *minimizing and, to the extent possible, preventing any unlawful harm or damage to human rights, fundamental freedoms, legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the inappropriate application of artificial intelligence systems; …*

In light of the binding nature of States' obligations under international human rights law, that include the "duty to prevent" human rights violations, the ICJ considers that point 1 of article 15 as currently drafted falls short of current human rights obligations under Council of Europe and UN human rights instruments.

Furthermore, a finding of a potential or actual violation of a human right cannot be linked with the intention of the producer or the user – this being more a category for criminal or tort law – but solely on its impact on the individual's rights.

<u>Recommendation:</u>

Parties shall take such measures as are aimed at:

1. *~~minimizing and, to the extent possible,~~ preventing any ~~unlawful harm or damage to~~ **violation of** human rights, fundamental freedoms, **and unlawful harm or damage to** legal rights and interests of natural or legal persons, democratic institutions and processes, the administration of justice, public health and the environment, which could result from the ~~inappropriate~~ application of artificial intelligence systems; …*

7. Chapter IV: Follow-up mechanism and cooperation

The ICJ considers that the follow up mechanism proposed, i.e. a Conference of the Parties, presents several shortcomings and is not adapted to the subject matter of the Convention.

Artificial intelligence is a highly technical subject and, if this Framework Convention is to be given any proper and effective guidance to its State Parties, expert advice is going to be sorely needed. A Conference of Parties composed by State delegates is not the place appropriate to provide such expertise. Furthermore, it does not have the independence required to deal with this issue objectively.

For these reasons, the ICJ recommends that a Committee of Independent Experts based on the model of GREVIO be established under the FC.

Istanbul Bar Association

General comments

Generally, the Draft gives the impression that it is inspired by the draft European Union AI Act at various points. While it mostly covers the protection of human rights, democracy, and rule of law, because of this inspiration, it is thought that some points are not within the scope of this draft Convention.

Article 2 – Definitions

It is very appropriate to aim that the definition both comply with the principle of certainty and are suitable for possible technological developments, but it is just as difficult to do so. On the other hand, introducing definition such as "artificial intelligence system", "provider" and "user" with an international Convention may be problematic; it is thought that it would be appropriate to deal with it in accordance with national regulations. Terms such as "lifecycle" may also need to be reconsidered in the light of new developments and should be evaluated by taking such situations into account.

Article 3 – Principle of non-discrimination

Although discrimination is specifically included, it can be expanded to include other fundamental rights, or it can be considered that this right and other rights be evaluated together, since it cannot be prioritized among rights.

Article 7 – Procedural safeguards

Although the right to object is included in the regulations regarding the protection of personal data, it is thought that it also should be regulated as a right in AI field.

Article 8 – Restrictions

Recognition of a wide list of restrictions and making it with "national interest, public security, economic security" and similar open-ended concepts could bring discussions both in practice and in doctrine. It is emphasized in the Explanatory Report that these restrictions will be applied in a very limited number of cases. We would like to point out that the wording of the Article has a very wide application possibility that it can have a risk to abuse in practice by states.

Article 11 – Risk and impact assessment

Determining the methodology to be used while taking the "prohibitions" and "measures" will require a separate evaluation, especially in the context of fundamental parameters and "proportionality" in human rights violations.

Article 13 – Measures in respect of artificial intelligence systems posing unacceptable levels of risk

Prohibited and unacceptable AI gives the impression that they correspond to the similar issue, but the regimes they are subject to are different. It should be clarified. Similarly, it is also thought that the scope of significant AI should be determined in more detail. Because these differences should be determined in a way that leaves no room for doubt as they may require different responsibilities and obligations.

Article 14 – Prohibited artificial intelligence practices

In the first paragraph, a limited exception to policing practices such as public safety can be considered. On the other hand, it is considered that it is necessary to clarify why the public emphasis is placed in paragraphs 1 and 3. Because, in these matters, it may be considered to impose obligations on the states regarding the measures to prevent the violations of rights that may be caused by the practices in the private sector. Besides, the phrase of "any other use of artificial intelligence systems" should be clarified, as it could indicate very general framework in practice.

Article 15 – Measures in respect of artificial intelligence systems and combinations of such systems posing significant levels of risk

The issues mentioned in the Explanatory Report on online platforms can be reminded as positive obligations of states.

Chapter IV: Follow-up mechanism and cooperation

As a suggestion: the National Supervisory Authority (NSA), which is envisaged to be established in each country, could draw up and present annual or biennial reports on the practices and activities in its country.

In this perspective, the establishment of a European authority within the COE may provide a solution at the management stage. Members of this authority could be selected from experts by the Consultation of the Parties (CP). The Authority in question will be able to make recommendations to CP based on practices and activities. This will be its main function. It will not have the authority to supervise or instruct the NSAs.

There will be a twofold benefit:

1) At the national level, the NSA could be formed and worked more seriously. It is important to have accountability, at least partially. On the other hand, the absence of clear instructions or supervision could not undermine independence.

2) At the European level, such an authority would be very beneficial in terms of developing proposals in a new field, determining the best-practice, and a broad application unity. It could also contribute to the active work of CP.

Article 21 – Revision of the Appendix

The procedures in the Article 21 and 22 should be clearly defined, such as the quorum for decision. Or, if the general meeting procedure of the Council is to be adopted, it may be pointed out at certain points.

Article 25 – Territorial application

Article 25, entitled "Territorial Application", recognizes "the power to determine in which region or regions in its territory the Convention shall apply". In the Explanatory Report, while explaining the Article 25, it was stated that this determination "cannot include a regional designation, contrary to the purpose of the Convention, without a legally valid reason". It is obvious that the expression in the Report is open to criticism. We are of the opinion that it has been sufficiently experienced by the legislators that the use of an ambiguous concept such as "legally valid justification" may render the application of the Convention dysfunctional.