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Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Thórhildur Sunna ÆVARSDÓTTIR, Iceland, Socialists, Democrats and Greens Group

Summary

The Committee on Legal Affairs and Human Rights welcomes the finalisation of the draft Framework Convention on Artificial Intelligence, human rights, democracy and the rule of law by the Committee on Artificial Intelligence (CAI). It strongly believes that legal regulation is necessary in order to avoid or mitigate the potential risks to democracy, human rights and the rule of law arising from the use of artificial intelligence (AI).

The Framework Convention, once adopted, will become the first ever international treaty on AI. Part of its added value will be its global reach. The committee is satisfied that most of the key ethical principles endorsed by the Assembly are reflected in different provisions of the draft. It regrets however that the draft does not cover to an equal extent public and private actors. The Assembly should strongly call on all member States, when ratifying the Framework Convention, to recognise the full applicability of its principles and obligations to activities of private actors. The reporting obligation, peer pressure and a dynamic interpretation by the future Conference of the Parties should foster advances over time.

Having considered the criticisms and proposals made by different stakeholders, the committee proposes some improvements to the draft Framework Convention.

1. Reference to committee: Bureau decision, Reference 4806 of 15 April 2024.

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A. Draft opinion[2]

1. The Parliamentary Assembly considers that artificial intelligence (AI) brings both opportunities and challenges. The position of the Assembly in this field has always highlighted the importance of striking the right balance between mitigating the risks and making full use of the advantages that AI can offer in promoting a better life for all.

2. The Assembly recalls its previous work on AI. In 2020, it adopted a set of resolutions and recommendations examining the opportunities and risks of AI for democracy, human rights and the rule of law. These included Resolutions 2341 (2020) "Need for democratic governance of artificial intelligence", 2342 (2020) "Justice by algorithm – The role of artificial intelligence in policing and criminal justice systems**",** 2343 (2020) "Preventing discrimination caused by the use of artificial intelligence", 2344 (2020) "The brain-computer interface: new rights or new threats to fundamental freedoms?", 2345 (2020) "Artificial intelligence and labour markets: friend or foe?", 2346 (2020) "Legal aspects of 'autonomous' vehicles", its related recommendations as well as Recommendation 2185 (2020) "Artificial intelligence in health care: medical, legal and ethical challenges ahead". The Assembly endorsed a set of key ethical principles that should be respected when developing and implementing AI applications. These principles, which were further elaborated in a common appendix to all these reports, are:

2.1. transparency, including accessibility and explicability;

2.2. justice and fairness, including non-discrimination;

2.3. human responsibility for decisions, including liability and availability of remedies;

2.4. safety and security;

2.5. privacy and data protection.

3. The Assembly strongly believes that legal regulation is necessary in order to avoid or mitigate the potential risks to democracy, human rights and the rule of law arising from the use of AI. In this context, the Council of Europe, as a leading international standard-setting organisation in the field of democracy, human rights and the rule of law, should play a pioneering role. While supporting the work of the Council of Europe *Ad hoc* Committee on Artificial Intelligence (CAHAI) at the time, Assembly called on the Committee of Ministers to decide upon the preparation of a legally binding instrument governing artificial intelligence, possibly in the form of a convention open also to non-member States that should be based on a comprehensive approach, deal with the whole life cycle of AI-based systems, be addressed to all stakeholders and include mechanisms to ensure its implementation. The Assembly therefore warmly welcomes the finalisation of the draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law by the Council of Europe Committee on Artificial Intelligence (CAI).

4. The Assembly has always considered that private actors should fall within the scope of such a legally binding instrument. In its Resolution 2341 (2020), it expressed the view that the instrument should contain provisions to limit the risks of the use of AI-based technologies by State and private actors to exercise control over people, and that the activity of private actors should be subject to democratic oversight.

5. The Framework Convention, once adopted, will become the first ever international treaty on AI. It is based on the Council of Europe's standards on human rights, democracy and the rule of law, which are also shared by the non-member States that participated in the negotiations. This is an example of the Council of Europe's leadership in developing standards in emerging areas, including the digital sphere, in line with the Reykjavik Declaration adopted by the Heads of State and Government in May 2023. Part of the Framework Convention's added value will be its global reach, since it will bring together States from all over the world wishing to address the global challenges posed by AI with a human rights-based approach. The Assembly therefore understands that the drafting process has had to accommodate diverse legal and political traditions and systems, with the result that the draft text often contains very general and abstract provisions, allowing for a certain level of flexibility in its implementation. Its "framework" nature also means that it will need to be supplemented by other binding or non-binding instruments concerning the use of AI in specific sectors or developing certain provisions of the convention further. The Assembly is ready to contribute to the preparation of such instruments.

6. The Assembly is satisfied that most of the key ethical principles endorsed in its 2020 reports are reflected in different provisions of the draft Framework Convention, although some of these principles could have been formulated as positive individual rights rather than general principles (for instance, privacy, equality

2. Draft opinion adopted unanimously by the committee on 16 April 2024.

and non-discrimination). Furthermore, it could have been made even clearer that each individual government should be obliged to inform its citizens of the use of AI systems in administrative processes leading to binding legal decisions. Another significant added value of this draft Framework Convention is that it is intended to protect not only human rights but also democratic processes and the rule of law in the context of AI. AI technologies have a potential to disrupt the functioning of democratic institutions and processes, for instance through interference in electoral processes, disinformation and manipulation of public opinion. They can also have an impact on the functioning of the rule of law, including the independence and impartiality of the judiciary and access to justice. In this regard, the Assembly considers that the interpretation of "democratic institutions and processes" and "the rule of law" within the meaning of the draft Framework Convention should be guided by the relevant standards developed over the years by Council of Europe bodies such as the European Court of Human Rights and the European Commission for Democracy through Law (Venice Commission), as well as by the Reykjavik Principles for Democracy. The drafters however missed the opportunity to cover more specifically the positive uses of AI for democratic processes, for instance improving government accountability and facilitating democratic action and participation.

7. The Assembly regrets that the draft Framework Convention does not cover to an equal extent public and private actors. Rather, it introduces a system where each Party will be able to determine in a declaration how it intends to address the risks and impacts arising from the use of AI by private actors. This is far from ideal for legal certainty and predictability of the obligations imposed by the Framework Convention and is not in line with the positions previously expressed by the Assembly, the Council of Europe Commissioner for Human Rights and the CAHAI. It also goes against the principle that States have positive obligations to protect individuals against human rights abuses by private actors, in accordance with the case law of the European Court of Human Rights, the United Nations Guiding Principles on Business and Human Rights and relevant recommendations of the Committee of Ministers of the Council of Europe. Many AI systems are developed and deployed by private entities, and introducing a differentiated approach for the private sector creates a significant loophole.

8. The Assembly therefore strongly calls on all member States of the Council of Europe, when ratifying the Framework Convention and submitting their declarations under Article 3.1 (b), to recognise the full applicability of the principles and obligations set forth therein (Chapters II to VI) to activities of private actors, and to report accordingly to the future Conference of the Parties under Article 24. It further invites the Conference of the Parties to fully use its powers and conduct a proper review of how all Parties comply with Article 3.1 (b). The Assembly believes that a dynamic interpretation of this provision by the follow-up mechanism set up by the Framework Convention will foster advances over time, through reporting requirements and peer pressure, including with respect to non-member States that may choose not to apply the Framework Convention obligations to private actors.

9. Having considered some of the proposals by different stakeholders, and taking due account of the overall structure and the transversal character of the agreed text, the Assembly proposes the following amendments to the draft Framework Convention:

9.1. replace Article 3.2 with the following text: "Each Party may restrict the application of the provisions of this Convention if activities within the lifecycle of artificial intelligence systems are necessary to protect its national security or national defence interests and if such activities are conducted in a manner consistent with applicable international law, including international human rights law obligations, and with respect for its democratic institutions and processes.";

9.2. delete Article 3.4;

9.3. in Article 5.1, after "effectiveness of democratic institutions and processes, including" add the following words: "free and fair elections,";

9.4. in Chapter III, add the following article: "Every Party shall adopt or maintain measures to preserve health and the environment in the context of activities within the lifecycle of artificial intelligence systems, in line with applicable international and domestic law.";

9.5. in Article 14.2 (c) or in the explanatory report, add a reference to "judicial authorities" or "judicial review";

9.6. in Article 15.1, add a reference to "human review";

9.7. in Articles 16.1, 16.2 (a), (e) and 16.3, after the words "the rule of law" add the following words: "and the preservation of the environment";

9.8. replace Article 16.4 with the following text: “Each Party shall take such legislative or other measures as may be required to put in place mechanisms for a moratorium or ban or limitations in respect of certain uses of artificial intelligence systems where such uses are considered incompatible with the respect of human rights, the functioning of democracy or the rule of law.”;

9.9. in Chapter VI, add the following article: “Each Party shall take appropriate measures to ensure protection of whistleblowers in relation to the activities within the lifecycle of artificial intelligence systems which could adversely impact human rights, democracy and the rule of law.”;

9.10. at the end of Article 26.2, add the following sentence: “The functions and powers of such mechanisms shall include investigative powers, the power to act upon complaints, periodic reporting, promotion, public awareness and consultation on the effective implementation of this Convention.”;

9.11. in Chapter VII, after Article 26, add the following article: “Parliamentary involvement”: “1. National parliaments shall be invited to participate in the follow-up and review of the measures taken for the implementation of this Convention. 2. The Parliamentary Assembly of the Council of Europe shall be invited to regularly take stock of the implementation of this Convention.”

10. The Assembly wishes to participate in the future Conference of the Parties set up by the Framework Convention and engage in the co-operation and exchange of information envisaged under Article 25.

11. The Assembly invites its Sub-Committee on Artificial Intelligence and Human Rights to raise awareness of the Framework Convention once adopted, including by promoting its ratification or accession by member States, observer States, and States whose parliaments enjoy observer or partner for democracy status with the Assembly.

12. Finally, the Assembly will continue to work on AI-related issues, through new reports on emerging topics and by following closely and contributing where necessary to the standard-setting activities of the CAI and other relevant Council of Europe inter-governmental bodies.

B. Explanatory memorandum by Ms Thórhildur Sunna Ævarsdóttir, rapporteur

1. Introduction

1. In 2021, the Committee of Ministers of the Council of Europe decided to create an *ad hoc* Committee on artificial intelligence (CAI) and entrust it with the preparation of an "appropriate legal instrument on the development, design, and application of Artificial Intelligence (AI) systems based on the Council of Europe's standards on human rights, democracy and the rule of law, and conducive to innovation, which can be composed of a binding legal instrument of a transversal character, including notably general common principles, as well as additional binding or non-binding instruments to address the challenges relating to the application of AI in specific sectors".[3] The CAI is composed of representatives of member States, the European Union, observer States to the Council of Europe, other interested non-European States (Argentina, Australia, Costa Rica, Israel, Peru and Uruguay), representatives of relevant Council of Europe bodies and committees, other international organisations, representatives of civil society and the private sector. It has held 10 meetings between April 2022 and March 2024 to finalise a draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law ("the draft Framework Convention" or "DFC"). The CAI submitted the DFC to the Committee of Ministers on 15 March 2024 and the Committee of Ministers transmitted it to the Parliamentary Assembly on 20 March 2024, inviting the Assembly to give an opinion on the text as soon as possible. The Assembly committed itself to give an opinion during the April 2024 part-session, in order to allow for the adoption of the Framework Convention by the Committee of Ministers in due time. These timings imply that the opinion needed to be adopted by the Committee on Legal Affairs and Human Rights (once seized by the Bureau of Assembly) and debated in the plenary under urgent procedure. The committee appointed me rapporteur at its meeting of 4 March 2024, subject to the finalisation of the DFC and its transmission to the Assembly.

2. In my capacity as former Chairperson of the Assembly's Sub-Committee on Artificial Intelligence and Human Rights (2022-2023), I have participated actively throughout the process of negotiation of the DFC and attended several plenary meetings of the CAI on behalf of the Assembly. Like other Council of Europe bodies and civil society representatives, I was given the chance to submit written comments and drafting proposals on the text and present them orally where necessary.[4] However, I could only participate in the plenary meetings, not in the drafting group sessions which were restricted to potential Parties to the Framework Convention and preceded the plenary meetings. I would like to stress that some of the final compromises reached on the text (particularly on its scope of application) were decided by the drafting group at the very last stages in the process and were therefore submitted to the CAI plenary with no time for meaningful analysis and debate.

3. This Framework Convention will be the first ever legally binding international treaty on artificial intelligence. I am aware that the preparation and negotiation of the DFC has been a complex task and process, given the need for reconciling different positions of States from different parts of the globe. The Convention's added value will also be its global reach, as it will bring together Parties from different continents and with diverse legal traditions wishing to regulate AI from the perspective of human rights, democracy and the rule of law. Artificial intelligence is an area which raises world-wide challenges that need to be addressed and regulated globally. In the Reykjavik Declaration of May 2023, the heads of State and government of the Council of Europe understood the importance of this topic and committed to "ensuring a leading role for the Council of Europe in developing standards in the digital era to safeguard human rights online and offline, including by finalising, as a priority, the Council of Europe's Framework Convention on Artificial Intelligence".[5] The Committee of Ministers now has the responsibility to ensure that the final convention is fully in line with the principles and values of the Council of Europe.

4. In my explanatory memorandum, I will start by outlining the previous and current work of the PACE on AI (chapter 2). I will then set out briefly the main features of the DFC (chapter 3). I will present the criticisms on the DFC voiced by different stakeholders (chapter 4). Finally, I will give my own assessment of the draft text and suggest some amendments that could be proposed in the Assembly's opinion, in order to improve the final text of the Framework Convention (chapter 5).

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3. Terms of reference of the CAI. See also the current terms of reference.
4. These comments have not been made public by the CAI. The CAI decided to make public three different versions of the convention throughout the process: a Revised Zero Draft on 6 January 2023, a Consolidated Working Draft on 7 July 2023 and a Draft Framework Convention on 18 December 2023, before the 3rd and final reading.
5. See also PACE Recommendation 2245 (2023) "The Reykjavik Summit of the Council of Europe – United around values in the face of extraordinary challenges", paragraph 17.

2. Previous and current work of the Assembly on Artificial Intelligence

5. The Assembly's previous work on the topic of artificial intelligence shows that its position has always been in favour of striking the right balance between mitigating the risks posed by AI and making full use of the advantages that it can offer. The Assembly strongly believes that there is a need to create a cross-cutting regulatory framework for AI, with specific principles based on the protection of human rights, democracy and the rule of law.

6. In October 2020, the Assembly adopted a set of resolutions and recommendations (based on 7 reports prepared by its different Committees)[6], examining the opportunities and risks of AI for democracy, human rights and the rule of law. The Assembly endorsed a set of key ethical principles that should be respected when developing and implementing AI applications. These principles, which were further elaborated in a common appendix to the reports, are: transparency, including accessibility and explicability; justice and fairness, including non-discrimination; human responsibility for decisions, including liability and the availability of remedies; safety and security; and privacy and data protection. However, the Assembly considered that "self-regulatory ethical principles and policies voluntarily introduced by private actors are not adequate and sufficient tools to regulate AI, as they do not necessarily lead to democratic oversight and accountability". In each of the situations examined in its reports, the Assembly concluded that legal regulation was necessary in order to avoid or minimise the potential risks to democracy, human rights and the rule of law. It therefore called on the Committee of Ministers to support the elaboration of "a legally binding instrument governing artificial intelligence, possibly in the form of a convention" [that is] "based on a comprehensive approach, deals with the whole life cycle of AI-based systems, is addressed to all stakeholders, and includes mechanisms to ensure the implementation of this instrument" (see paragraph 4 of Recommendation 2181 (2020) "Need for democratic governance of artificial intelligence"). Such a convention should be open to non-member States (see paragraph 11.1 of Recommendation 2185 (2020) "Artificial intelligence in health care: medical, legal and ethical challenges ahead" and paragraph 2 of Recommendation 2186 (2020) "Artificial intelligence and labour markets: friend or foe?").

7. In its resolutions, the Assembly considered that private actors should fall within the scope of the above-mentioned legally binding instrument. For instance, in Resolution 2341 (2020) "Need for democratic governance of artificial intelligence", the Assembly stated that such instrument should "contain provisions to limit the risks of the use of AI-based technologies by State and *private actors* to control people" (paragraph 14.5) and "contain safeguards to prevent the threats to democratic order resulting from the concentration of data, information, power and influence in the hands of a few major *private companies* involved in developing and providing AI-based technologies and services (…), as well as provisions that the activity of such actors is subject to democratic oversight" (paragraph 14.6). In the Assembly's view, the legally binding instrument on AI should indeed be addressed to *all stakeholders* (paragraph 4.2 of Recommendation 2181 (2020).

8. In its Resolution 2341 (2020) "Need for democratic governance of artificial intelligence", the Assembly considered that the advocated legally binding instrument should ensure that AI-based technologies comply with the Council of Europe's standards (on human rights, democracy and the rule of law), as well as with the key ethical principles mentioned above. It should not only minimize the risk that AI is misused to damage democracy (e.g. through interference with electoral processes and manipulation) but also seek to maximise the possible positive impact of AI on the functioning of democracy, including through improving government accountability, the fight against corruption, transparency and making democracy more direct. In order to ensure accountability, the legal framework should provide for an independent and proactive oversight mechanism, involving all relevant stakeholders, which would guarantee effective compliance with its provisions.

9. In its Resolution 2343 (2020) "Preventing discrimination caused by the use of artificial intelligence", the Assembly underlined that many uses of AI can have a direct impact on equality of access to fundamental rights. They can also cause or exacerbate discrimination, leading to denials of access to rights that disproportionately affect certain groups (e.g. women, minorities). The Assembly therefore called on member States to draw up clear national legislation, standards and procedures to ensure that AI-based systems "comply with the rights to equality and non-discrimination wherever the enjoyment of these rights may be affected by the use of such systems". Governments should notify parliaments before AI-based technologies are deployed by public authorities. Member States should promote the inclusion of women, girls and

6. Committee on Political Affairs and Democracy, Committee on Legal Affairs and Human Rights, Committee on Social Affairs, Health and Sustainable Development and Committee on Equality and Non-Discrimination. Before 2020, the Assembly had already adopted Recommendation 2102 (2017) on "Technological convergence, artificial intelligence and human rights", on the basis of a report by the Committee on Culture, Science, Education and Media.

minorities in science and technology education paths, support research into data bias and promote digital literacy. In its Recommendation 2183 (2020), the Assembly called on the Committee of Ministers to take into account the particularly serious potential impact of the use of AI on the rights to equality and non-discrimination when assessing the feasibility of an international legal framework for AI.[7]

10. In its Resolution 2342 (2020) "Justice by algorithm – The role of artificial intelligence in policing and criminal justice systems", the Assembly called for national legal frameworks to regulate the use of AI in police and criminal justice work, based on the core ethical principles mentioned above. It stressed that the use of AI in policing and criminal justice systems risks having a particularly serious impact on human rights if it is not properly regulated. Its use may be inconsistent with the core ethical principles, including transparency, human responsibility, justice and fairness. In this context, the Assembly recommended *inter alia* that member States maintain a register of all AI applications in use; ensure that there is a sufficient legal basis for every AI application; conduct initial and periodic human rights impact assessments of these applications; establish effective and independent oversight mechanisms; and ensure that there is effective judicial review. In its Recommendation 2182 (2020), the Assembly also called on the Committee of Ministers to take into account the particularly serious impact on human rights of the use of AI in this context when assessing the feasibility of a European legal framework.

11. In its Recommendation 2185 (2020) "Artificial intelligence in health care: medical, legal and ethical challenges ahead", the Assembly underlined its support for an AI convention with an emphasis on the human rights implications of AI in general and on the right to health in particular. It recommended the Committee of Ministers to encourage member States to build comprehensive national strategies for AI use in healthcare, set up systems to evaluate and authorise health-related AI applications and elaborate a legal framework for clarifying the liability of stakeholders. The Assembly also stressed the need to ensure "privacy, confidentiality and cyber-safety of sensitive personal health data" (to avoid any sovereign or commercial misuse of such data) and the informed consent of users of AI-driven healthcare applications. Such applications should "not replace human judgment completely" so that decisions in professional healthcare "are always validated by adequately trained health professionals".

12. In its Resolution 2345 (2020) "Artificial intelligence and labour markets: friend or foe?", the Assembly alerted to the fact that "AI used unwisely has the potential to disrupt the labour market, fragmenting professional lives and exacerbating socio-economic inequalities". The Assembly noted that "the use of AI for recruitment and in situations impacting workers' rights should always be treated as "high risk" and hence heightened regulatory requirements should apply"; it also highlighted the importance of "substantive human oversight in the implementation of AI technology that affects labour markets and individual social rights" and the need to "guarantee that any use of surveillance techniques at the workplace is subject to special precautions in terms of consent and privacy protection". Therefore, the Assembly called on member States to adopt a series of measures in this regard, such as drafting national strategies for responsible AI use, requiring AI developers to always notify users whenever they are in contact with AI applications, designing a regulatory framework that promotes complementarity between AI applications and human work and ensures proper human oversight, as well as ensuring that algorithms used in the public sphere are understandable, transparent, ethical and gender sensitive. The Assembly further advocated for introducing "AI literacy" through digital education programmes for young people and lifelong learning paths for all. In its Recommendation 2186 (2020) on the same subject, the Assembly recommended that the European legal instrument on AI cover the need for enhanced protection of work-related social rights.

13. In its Resolution 2344 (2020) "The brain-computer interface: new rights or new threats to fundamental freedoms?", the Assembly referred to "the huge potential benefits of neurotechnology, especially in the medical field", while stressing the "unique and unprecedented threats to fundamental values of human rights and dignity" that brain-computer interfaces (BCI) may pose. BCI technology should be developed with respect for human rights and dignity; it should be safe; it should not be used against a subject's will or in a way that prevents the subject from acting freely and being responsible for their actions; and it should not create a privileged status for its users. The Assembly therefore called on member States to establish ethical and legal frameworks for research, development and application of BCI technology and to consider the establishment of new "neurorights" such as cognitive liberty, mental privacy, mental integrity and psychological continuity.

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7. These resolutions and recommendations were adopted in October 2020, when the Council of Europe Ad Hoc Committee on Artificial Intelligence (CAHAI) had not yet finalised its work on the feasibility and potential elements of a legal framework for the development, design and application of artificial intelligence, based on Council of Europe standards in the field of human rights, democracy and the rule of law. The CAHAI adopted its Feasibility Study on 17 December 2020 and its final paper on Possible elements of a legal framework on artificial intelligence, based on the Council of Europe's standards on human rights, democracy and the rule of law on 3 December 2021.

Finally, in its Recommendation 2184 (2020), it called on the Committee of Ministers to take into account the impact on human rights of AI in connection with BCI systems, when assessing the feasibility of a legal framework for AI.

14. In its Resolution 2346 (2020) "Legal aspects of 'autonomous' vehicles", the Assembly stressed that the circulation of semi-autonomous or autonomous vehicles may create a "responsibility gap", where the human in the vehicle cannot be held liable for criminal acts or torts. New approaches to apportioning criminal or civil liability or alternatives to such liability may be required. It considered that since modern automated driving systems (ADS) rely on AI, ethical and regulatory standards applicable to AI in general should also be applied to its use in autonomous vehicles. Member States should ensure that the relevant regulation is in accordance with human rights and rule of law standards, including respect for the right to life, privacy rights and legal certainty. In its Recommendation 2187 (2020), the Assembly recommended the Committee of Ministers to take into account the particularly serious potential impact on human rights of the use of AI in ADS when assessing the necessity and feasibility of a legal framework for AI.

15. Most recently, in its Resolution 2485 (2023) "Emergence of lethal autonomous weapons systems (LAWS) and their necessary apprehension through European human rights law", the Assembly addressed the concerns regarding the emergence of LAWS (weapon systems that can attack and select targets without human intervention) The Assembly supported clear regulation of the development and use of LAWS to ensure respect for international humanitarian law and human rights, on the basis of human control. In this context, it endorsed a two-tier approach proposed by a group of European States Parties to the Convention on Certain Conventional Weapons (CCW). Under this proposal, LAWS operating completely outside human control should remain banned, while other lethal weapons that have elements of autonomy should be subject to appropriate human control, human responsibility and accountability, measures to mitigate risks and appropriate guarantees. According to this resolution, the appropriate forum to agree on the future regulation of LAWS is the Conference of the States Parties to the CCW. Pending agreement on a binding regulation (in the form of a protocol to the CCW), the Assembly proposed the drawing up of a non-binding code of conduct.

16. In addition to its reports and resolutions, the Parliamentary Assembly has organised or participated in several events focused on AI.[8] The Assembly's President Theodoros Rousopoulos named AI as one of his main priorities in his inaugural address to the Assembly at its first part-session of 2024 and stated: "*AI is to be welcomed and it must remain a tool to assist human capabilities and not a substitute for human will and autonomy*". The Assembly has a dedicated Sub-Committee on Artificial Intelligence and Human Rights (within the Committee on Legal Affairs and Human Rights), currently chaired by Damien Cottier (ALDE/Switzerland). During my chairmanship, the Sub-Committee held a meeting and an exchange of views on social media bots and the threat they pose to democratic discourse and elections. The Assembly will continue to work on the challenges and benefits of AI for human rights, democracy and the rule of law, through new reports and resolutions on emerging or sectorial topics[9] and by following closely and contributing where necessary to the standard-setting work of the CAI and other relevant inter-governmental bodies.[10] It would obviously also wish to participate as an observer in the future follow-up mechanism set up by the Framework Convention (the Conference of the Parties).

3. Main features of the Draft Framework Convention

17. Chapter I of the DFC contains general provisions such as the object and purpose of the framework convention (Article 1), the definition of artificial intelligence systems for the purposes of the convention (Article 2) and its scope of application (Article 3). As explained in the Draft Explanatory Report ("DER"), "no provision of this Framework Convention is intended to create new human rights obligations or undermine the scope and content of the existing applicable protections, but rather, by setting out various legally binding obligations contained in its Chapters II to VI, to facilitate the effective implementation of the applicable human rights

8. Round table Artificial intelligence, freedom of expression and disinformation: challenges and risks for democracy (coe.int), 26 May 2023; Athens students explain how to put ethics into AI at PACE hearing – with some help from 'Niki' (coe.int), April 2023; Programme 2022 – European Conferences of Electoral Management Bodies (coe.int): "Artificial Intelligence and Electoral Integrity" organised by the Venice Commission, November 2022.

9. Risks and opportunities of the Metaverse, Doc. 15636, ongoing report by the Committee on Culture, Science, Education and Media. See also the new motion for a resolution on "Artificial intelligence and migration", Doc. 15952 of 27 March 2024.

10. For instance, the ongoing work of the Committee of Experts on Artificial Intelligence, Equality and Discrimination (GEC-ADI/AI), where the Assembly is represented by a member of its Committee on Equality and Non-Discrimination. This committee of experts is mandated to draft a recommendation on the impact of AI systems, their potential for promoting equality and the risks they may cause in relation to non-discrimination.

obligations of each Party in the context of the new challenges raised by artificial intelligence". As regards the scope, the most challenging and disputed provision throughout the negotiations, Article 3.1 (a) obliges each Party to "apply the Convention to the activities within the lifecycle of artificial intelligence systems undertaken by public authorities, or private parties acting on their behalf". Article 3.1 (b) obliges all Parties to "address risks and impacts arising from activities within the lifecycle of artificial intelligence systems by private actors to the extent not covered in subparagraph (a) in a manner conforming with the object and purpose of the Convention". As explained in the DER, "addressing risks is not merely acknowledging those risks, but requires the adoption or maintaining of appropriate legislative, administrative or other measures to give effect to this provision as well as co-operation between the Parties (…)". Each Party is obliged to specify in a declaration "how it intends to implement this obligation, either by applying the principles and obligations set forth in Chapters II to VI of the Framework Convention to activities of private actors or by taking other appropriate measures". Although Parties may amend their declarations at any time, the DER states that "for Parties that have chosen not to apply the principles and the obligations of the FC in relation to activities of other private actors, the Drafters expect the approaches of those Parties to develop over time as their approaches to regulate the private sector evolve". Article 3.2 excludes from the scope of the FC "activities within the lifecycle of artificial intelligence systems related to the protection of its national security interests, with the understanding that such activities are conducted in a manner consistent with applicable international law, including international human rights law obligations, and with respect for its democratic institutions and processes". The DER clarifies in this respect that "all regular law enforcement activities for the prevention, detection, investigation, and prosecution of crimes, including threats to public security, also remain within the scope of the FC if and insofar as the national security interests of the Parties are not at stake". Finally, Articles 3.3 and 3.4 exclude "research and development activities" under certain conditions ("unless testing or similar activities are undertaken in such a way that they have the potential to interfere with human rights, democracy and the rule of law") and "matters relating to national defence".

18. Chapter II contains two provisions enshrining general obligations on the protection of human rights (Article 4) and integrity of democratic processes and respect for the rule of law (Article 5). While the reference to human rights must be understood as meaning human rights obligations under international treaties already binding on the Parties (a list is provided in the DER) and domestic law protections, the DER acknowledges that there is no commonly agreed definition of "democratic institutions and processes" and gives some examples of areas where AI may pose risks: the principle of separation of powers, judicial independence, access to justice (these three also mentioned in the text of Article 5.1), an effective system of checks and balances, political pluralism and free and fair elections.

19. Chapter III lays down "general common principles that each Party shall implement in regard to artificial intelligence systems". These include human dignity and individual autonomy (Article 7), transparency and oversight (Article 8), accountability and responsibility (Article 9), equality and non-discrimination (Article 10), privacy and data protection (Article 11), reliability (Article 12), and safe innovation (Article 13). Chapter IV regulates remedies and procedural guarantees (Articles 14 and 15). Remedies for violations of human rights resulting from the activities within the lifecycle of AI systems must be accessible and effective. Effective procedural guarantees shall be available where an AI system significantly impacts on the enjoyment of human rights. Chapter V contains a unique and dedicated provision on "Risk and impact management framework", obliging the Parties to "identify, assess, prevent and mitigate risks posed by artificial intelligence systems by considering actual and potential impacts to human rights, democracy and the rule of law" (Article 16.1). As explained in the DER, the purpose of this provision is to ensure a uniform approach to risk and impact assessment, while leaving a certain degree of flexibility in the measures the Parties choose, which should be in any case "graduated and differentiated, as appropriate" (Article 16.2). Within this framework, Article 16.4 states that Parties "shall assess the need for a moratorium or ban or other appropriate measures in respect of certain uses of AI systems where it considers such uses are incompatible with the respect of human rights, the functioning of democracy or the rule of law". The determination of what is "incompatible" in this context is made by each Party, according to the DER.

20. Chapter VI on "Implementation of the Convention" contains transversal or interpretative clauses: on non-discrimination (Article 17), rights of persons with disabilities and of children (Article 18), public consultation (Article 19), digital literacy and skills (Article 20), safeguard for existing human rights (Article 21) and wider protection (Article 22).

21. Chapter VII contains provisions on the "Follow-up mechanism and co-operation". Article 23 sets up a Conference of the Parties as a follow-up mechanism. This Conference will be composed of representatives of the Parties. It will have the power to identify problems in the use and implementation of the Convention; make proposals for amendment and formulate its opinion on any amendment proposals; express specific recommendations on any question concerning its interpretation or application; facilitate the exchange of

information; facilitate the friendly settlement of disputes; and facilitate co-operation with relevant stakeholders (Article 23.2 as interpreted in the DER). Although there is no required periodicity of convocation, Article 23.2 states that Parties "shall consult periodically" and Article 23.4 imposes an initial obligation for the Conference of the Parties to adopt its rules of procedure "within 12 months of the entry into force". Interestingly, Article 24 establishes a reporting obligation to the Conference of the Parties "within the first two years after becoming a Party and then periodically thereafter". This reporting obligation on States covers also the activities each Party undertakes to give effect to the obligation set out in Article 3.1 (b) (address risks from private actors). Article 25 sets out provisions on international co-operation between the Parties (mainly exchange of information). Article 26 requires Parties to "establish or designate one or more effective mechanisms to oversee compliance with the obligations in the Convention" ("effective oversight mechanisms"). Parties may indeed establish new dedicated mechanisms or structures or adapt or redefine the functions of existing ones. Parties have an obligation to facilitate or promote co-operation among the different designated mechanisms and between these and existing domestic human rights structures (Article 26.3 and 4).

22. Chapter VIII "Final clauses" contains clauses which are similar to those contained in other Council of Europe Conventions. It is important to note that in accordance with Article 34, the only reservation that a State may make in respect of the Convention is the one provided for in Article 33.1 (so-called "federal clause"). No other reservations are possible.

4. Criticisms voiced by different stakeholders

23. At the final stages of the negotiations of the FC (March 2024), a joint open letter to States and the EU was published by civil society organisations. The signatories included citizens, academics, experts in digital technologies and civil society organisations that had been observing the negotiations, including the Conference of INGOs of the Council of Europe (CINGO)[11]. In the letter, the signatories called on the negotiators "to cover equally the public and private sectors" and "to unequivocally reject blanket exemptions regarding national security and defence". They stressed that leaving the private sector out of the scope would result in "giving these companies a blank check rather than effectively protecting human rights, democracy and the rule of law". As regards the blanket exemption on national security and defence, they argued that "nothing justifies the unconditional waiving of the safeguards set in international, European and national law that usually apply in these fields". This letter joined similar initiatives that had been addressed to the EU delegation[12] and the Biden Administration.[13] In the letter addressed to Secretary of State Antony Blinken, it was stated as follows: "if the United States Department of State is specifically concerned about the alignment of the treaty with domestic law, then the solution is to take a derogation or exception to those provisions that you believe may be incompatible with US law. It is not to ask every other nation at the table to sacrifice safeguards they are prepared to establish".

24. The European Data Protection Supervisor (EDPS), in a statement published on 11 March 2024 in view of the last plenary meeting of the CAI, raised several concerns. The EDPS was concerned that "the very high level of generality of the legal provisions of the draft Framework Convention, together with their largely declarative nature, would inevitably lead to divergent application of the Convention, thus undermining legal certainty, and more generally its added value". As concerns its scope, recalling that the Committee of Ministers had instructed the CAI to elaborate a "binding legal instrument of a transversal character", it stressed that "any limitation of the scope of the future Framework Convention only to the activities undertaken by public authorities or entities acting on their behalf would contradict the overall policy objective of the Framework Convention". The EDPS further expressed concerns about "the absence of 'red lines' in the draft Framework Convention, which from the outset prohibit AI applications posing unacceptable levels of risk". In this regard, "the latest drafts of the Framework Convention and its Explanatory Report offer neither clear and unambiguous criteria, nor any specific examples of prohibited uses".[14]

11. Open letter to COE AI Convention negotiators: Do not water down our rights | ECNL. 5 March 2024.
12. Letter of 24 January 2024: CAIDP Statements – Center for AI and Digital Policy.
13. Letter of 24 January 2024: CAIDP Statements – Center for AI and Digital Policy.
14. EDPS statement in view of the 10th and last Plenary Meeting of the Committee on Artificial Intelligence (CAI) of the Council of Europe drafting the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law | European Data Protection Supervisor (europa.eu).

25. The European Network of National Human Rights Institutions (ENNHRI), which participated in the negotiations as an observer, delivered the following statement of concern at the end of the final plenary session of the CAI on 14 March 2024.[15]

> *"ENNHRI participated actively throughout the negotiations as an observer. We have asked for opportunities to engage in the negotiation process and have consistently contributed with a view to a Convention embedding a human rights-based approach to artificial intelligence. While obstacles were encountered along the way, we have witnessed commendable goodwill to find solutions for tackling these obstacles.*
>
> *From a human rights perspective, we are pleased to see the inclusion in the draft Convention of some possibility to lodge a complaint, the attention to human dignity and individual autonomy, and references to public consultation processes. These formulations demonstrate a commitment to protect human rights, democracy and rule of law.*
>
> *Yet, we believe that for the Convention to guarantee high standards of human rights protection, certain aspects cannot be overlooked:*
>
> *– First, the Convention should have covered both the public and the private sector equally. This was recommended by different CoE instruments and standards, including the Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems and the Recommendation CM/Rec(2022)13 to member States on the impacts of digital technologies on freedom of expression. It is also in line with the commitment in the Reykjavik Declaration "for the Council of Europe to play a leading role in developing standards in the digital era to safeguard human rights online and offline." Since many AI systems are developed and deployed by private entities, the private sector is a central actor in this field, with critical impacts on how AI affects human rights, democracy, and the rule of law. A Convention introducing a differentiated approach for the private sector, including non-binding regulation, creates an important protection gap.*
>
> *– Secondly, the scope of the Convention should equally include AI systems used for national security, such as heightened surveillance, data collection, and decision-making processes aimed at countering perceived threats to national security, could present significant risks to human rights, democracy and rule of law. They could affect freedom of movement, of peaceful assembly and association and of expression and the right to non-discrimination, participation and privacy, among others. An exemption on national security from the scope of the Convention leads to a gap in the protection of human rights. Consistent with the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), national security could constitute a legitimate basis for restrictions, yet is subject to the provisions of these Conventions.*
>
> *– Thirdly, ENNHRI is concerned that other essential elements to ensure a human rights-based approach to AI are missing in the draft Convention. The failure to include elements, such as for example clear and unambiguous criteria for bans, undermines principles of accountability and transparency which are needed to ensure effective human rights protection. The absence of sufficiently robust and independent oversight mechanisms foreseen by the draft Convention at the Council of Europe and domestic levels exacerbates these concerns.*
>
> *– Furthermore, imprecise language dilutes commitments and raises concerns about the enforceability and effectiveness of the obligations outlined in the draft Convention. This includes recurrent use of 'seek to ensure' or 'where practicable' and 'where appropriate' in the draft Convention. The frequent references to 'in accordance with domestic law' conflict with the Convention's task of ensuring common international legal standards.*
>
> *ENNHRI urged the CAI on multiple occasions to address these issues, with a view to ensure an effective CoE Convention that protects human rights, democracy and rule of law in the context of AI.*
>
> *ENNHRI calls on the Committee of Ministers to ensure effective human rights protection in the Convention, thereby addressing our concerns"*

15. Draft Convention on AI, Human Rights, Democracy and Rule of Law finalised: ENNHRI raises concerns – ENNHRI. See also its previous common position throughout the negotiation: common position, which includes interesting proposals as regards oversights mechanisms.

26. The European Network of Equality Bodies (Equinet), which also participated in the negotiations as an observer, publicly raised similar concerns on 15 March 2024.[16] Equinet expressed the view that it is important to clearly acknowledge the need for improvement of certain aspects of the FC, not only for transparency and accountability purposes, but also with a view to the implementation of the convention in order to identify possible solutions for overcoming the identified gaps.

27. The Council of Europe Commissioner for Human Rights, in a statement published on 13 March 2024, hoped that the outcome of the negotiations would be a "solid human rights treaty that effectively addresses the adverse impacts of AI on individuals and society and expands the predictability and dependability of the use of the AI systems world-wide". She further recommended as follows.[17]

> *"Given the speed and reach of technological advances today, the Convention should include a positive obligation for states to create a legal and regulatory framework that effectively protects individuals from all human rights violations, whether these are committed by public or private sector actors. Any exemptions from the scope of the Convention should be based on law and necessary and proportionate in a democratic society. It is also essential for the Convention to establish clear criteria for identifying and banning unacceptable risks to human rights, democracy and the rule of law across states parties. Finally, it should explicitly safeguard the right to an effective remedy, including the right to human review of automated decisions, aligned with Article 13 of the European Convention on Human Rights."*

28. Jan Kleijssen, member of ALLAI (independent organisation dedicated to foster responsible AI) advisory board and former Director of Information Society and Action against Crime at the Council of Europe, also made some public comments following the finalisation of the DFC by the CAI.[18]

> *"While many have celebrated the agreement there has also been much criticism on both procedure and final outcome (…) I do agree with those who are unhappy with the way the negotiation process developed, away from the envisaged multistakeholder model. (…) it is no secret that the agreed draft falls short of the high expectations based on the final report of the CAHAI, the pioneering Committee that prepared the ground for the negotiations. Like many others, I pushed hard for a strong instrument, especially with regard to the private sector, national security issues and environmental impact assessments. The future Conference of the Parties can, and should, play a crucial role in the implementation and development of the Convention. Similar Conventional Committees, such as the TPD and the TCY have ensures that the respective Conventions on Data Protection and Cybercrime became effective global benchmarks – with State Parties on all continents."*

29. CINGO (on behalf of its President and Steering Committee on AI) also submitted to the Assembly certain recommendations in view of the preparation of its Opinion. They raised three points and proposed concrete amendments. First, they strongly objected to the blanket exemption for national security. National security should rather be a legitimate ground for restrictions to the application of the Framework Convention based on legality, necessity and proportionality. Since the FC does not create new rights but only adapts them to the AI context, the loophole of this Framework Convention for national security alone cannot be justified. Secondly, health and environment should be reintroduced in the list of principles (Chapter III) or alternatively in the provision on risk and impact management framework (Article 16). Thirdly, the DFC uses imprecise language throughout the text which may lead to legal uncertainty and unenforceability. CINGO therefore proposes to replace expressions such as "seek to ensure" in all key provisions with "ensure" (for instance, Articles 5.1 and 15.2).

30. On 11 April 2024, I received a submission from Amnesty International containing several recommendations and improvements to the DFC addressed to the Assembly (as well as to the Committee of Ministers).[19] These include: drawing clear red lines on AI-based practices that are incompatible with human rights, such as systems used for public facial recognition, predictive policing, etc; rejecting blanket exemptions for national security, defence, and research and development; including in the scope all private and public actors; ensuring a comprehensive rights-based framework; ensuring effective transparency and accountability for AI developers and deployers; ensuring effective human rights due diligence throughout the AI lifecycle;

16. Equinet, European Network of Equality Bodies: posts | LinkedIn.
17. AI instrument of the Council of Europe should be firmly based on human rights – Commissioner for Human Rights (coe.int). See also: Unboxing Artificial Intelligence: 10 steps to protect Human Rights, 2019.
18. "Jan Kleijssen" | Recherche | LinkedIn.
19. See for further details: Council of Europe: Amnesty International's Recommendations on the Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law – European Institutions Office

ensuring effective redress and remedy for impacted people and communities; establishing clear obligations to support meaningful involvement of impacted communities, civil society organisations and human rights experts; and establishing clear obligations to ensure consistent and effective application of the Convention.

5. Assessment and possible improvements

5.1. Positive aspects of the Draft Framework Convention

31. First of all, the Framework Convention will be the first global treaty on AI based on standards of human rights, democracy and the rule of law. The fact that it is a convention open to non-member States that have participated in the negotiations and other non-European countries which might join from all over the world at a later stage is crucial. As I said in my introduction, the challenges and risks posed by AI are transnational and need to be tackled in a global instrument. For this reason, I fully understand that the framework convention has been drafted in such a way that it will facilitate ratification or accession by States having different legal and political traditions, allowing for a sufficient level of flexibility and margin of discretion in its implementation. Furthermore, the fact that the first international treaty regulating AI will be based on a human-rights approach and the *acquis* of the Council of Europe (human rights, democracy and the rule of law) must be acknowledged as a very important achievement for the Council of Europe and as a sign of its global leadership in setting standards in emerging areas. We have seen this before with previous open Council of Europe conventions such as the Budapest Convention (Cybercrime) and the Data Protection Convention (CETS No. 108).

32. I am also pleased to see that most of the key ethical principles endorsed by the Parliamentary Assembly in its 2020 reports are reflected in one way or the other in the text of the DFC: transparency, including accessibility and explicability (in Article 8); justice and fairness, including non-discrimination (in Articles 10, 14-15 on remedies and procedural guarantees, and 17); responsibility (in Article 9 on accountability and responsibility); safety and security (in Article 12 on reliability) and privacy (in Article 11). I also welcome the inclusion of the overarching principle of human dignity and individual autonomy, as the basis of all human rights.[20] The Assembly has already considered that certain technologies such as brain-computer interfaces have the potential to threaten human rights and more generally human dignity, therefore stressing the importance of applying in this context the principles of capacity, autonomy, human agency and responsibility.[21]

33. Another significant added value of this convention is that is not only intended to protect human rights in the context of AI, but also the two other core values of the Council of Europe, democracy and the rule of law (see Article 5, as reflected in the title of the convention itself). Artificial intelligence technologies have a potential to disrupt the functioning of democratic institutions and processes, for instance through interference in electoral processes, misinformation and manipulation of public opinion. They can also have an impact on the functioning of the rule of law, including the independence and integrity of the judiciary and access to justice. For instance, the use of AI by the police and criminal justice systems raises serious issues with regard to the principles of human responsibility for decision-making, justice and fairness.[22] While there is no common definition of "democratic institutions and processes" in the text of the Convention, the DER gives a non-exhaustive list of principles that can be potentially threatened by AI: separation of powers, political pluralism, judicial independence, free and fair elections, rule of law, etc. In my opinion, the interpretation of Article 5 should also be based on the interdependent notions of democracy and rule of law as developed over the years by different Council of Europe bodies, particularly the European Court of Human Rights (notions of "democratic society" and "the principle of the rule of law" underpinning the ECHR), the Venice Commission (the Rule of Law Checklist)[23] or the recently formulated Reykjavik Principles for Democracy endorsed by the Council of Europe's Heads of State and Government.[24]

34. Other very positive aspects of the FW are the explicit reference to gender equality (Article 10) and women (Preamble) in the context of non-discrimination, the obligation to take due account of the vulnerabilities of the rights of persons with disabilities and children (Article 18),[25] the obligation to conduct

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20. The European Court of Human Rights considers that the very essence of the European Convention on Human Rights (ECHR) is respect for human dignity and that the notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life guaranteed by Article 8 ECHR (see *Pretty v. the United Kingdom*, Judgment of 29 April 2002, paragraphs 61 and 65).
21. Resolution 2344 (2020) "The brain-computer interface: new rights or new threats to fundamental freedoms?".
22. See Resolution 2342 (2020) "Justice by algorithm – The role of artificial intelligence in policing and criminal justice systems".
23. Venice Commission, Rule of Law Checklist.
24. Appendix III of the Reykjavik Declaration.

public consultations on AI-related issues "in the light of social, economic, legal, ethical, environmental and other relevant implications" (Article 19) and the obligation to promote digital literacy and skills (Article 20). In this regard, the Assembly has stressed that the use of AI may lead to discriminatory results or disproportionately affect certain groups, including women, and that women's access to professions in science and technology should be improved for the sake of diversity and equality.[26] It has also called on member States to promote digital or AI literacy in general and in specific contexts.[27]

35. With regard to the follow-up mechanism, I commend the introduction – at the very advanced stages of the negotiation – of an obligation for the Conference of the Parties to adopt its own rules of procedure "within 12 months of the entry into force of the Convention" (Article 23.4). This will indeed facilitate the implementation of the reporting obligation by the first States having ratified the FC, which will need to present their first report within the first two years after becoming a Party. The reporting obligation enshrined in Article 24 (as part of the compromise reached on the scope of application of Article 3) will be key to the interpretation, implementation and development of the Convention, including with regards to the private sector. I would have preferred to see an explicit reference in Article 23.2 to the power to *review* or *monitor* the implementation of the Convention by the Conference of the Parties, but in my understanding the power to identify any problems in the effective use and implementation (Article 23.2 (a)) and the power to make "specific recommendations concerning the interpretation and application" of the Convention (Article 23.2 (c)) give a sufficient legal basis for the review or assessment needed for an effective reporting system.[28] The DER clarifies that "although not legally binding in nature, these recommendations may be seen as a joint expression of opinion by the Parties on a given subject which should be taken into account in good faith by the Parties in their application of the Framework Convention".

36. I also find it interesting that the Conference of the Parties will be tasked with facilitating co-operation with "relevant stakeholders" (Article 23.2 (f)) and that the latter may also be involved in the exchanges of information and co-operation envisaged between the Parties "as/where appropriate" (Article 25.2 and 3). According to the DER, "relevant stakeholders" should include NGOs, non-State actors (academics, industry representatives) as well as other bodies which can improve the effectiveness of the follow-up mechanism. Although it would have been preferable to foresee in the text of the Convention or at least in the DER that "relevant stakeholders", including other Council of Europe bodies, may be invited to attend as observers the meetings of the Conference of the Parties, I trust that the Assembly will be given the opportunity to participate in the exchanges of information and engage in the co-operation envisaged.

5.2. Areas for improvement in the Draft Framework Convention and proposed amendments

37. I agree with ENNHRI and civil society organisations that some language and qualifiers used throughout the text may raise difficulties with regard to the enforceability and uniform application of the Convention. For instance, the use of "seek to ensure" instead of "ensure" (for instance, Articles 5.1 and 15.2), "where appropriate" or "as appropriate" (e.g. Articles 16.2 (g) and 19), "where practicable" (Article 26.3 and 4) and the frequent references to "domestic law/legal system" (e.g. Articles 6, 14.1, 15.1 and 18) may be seen as undermining legal certainty and foreseeability in the interpretation of the Convention. As regards the use of expressions such as "seek to ensure", there is no reason for instance to treat differently the general obligation to ensure the respect for human rights (Article 4) and the general obligation to protect democratic institutions and process (Article 5). Both obligations should be read in the light of the object and purpose of the Convention which is to "*ensure* that activities within the lifecycle of AI systems are fully consistent with human rights, democracy and the rule of law". As concerns the multiple references to "domestic law", the DER states that "all references to domestic law in this Framework Convention should be read as limited to cases where domestic law provides for a higher standard of human rights protection than applicable international law"

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25. In this regard, the Social Affairs Committee has recently adopted a draft report on "The protection of children against online violence". In the draft recommendation, it has invited the Committee of Ministers to incorporate the best interests of the child in the DFC: PACE committee urges new laws to protect children online (coe.int).
26. Resolution 2343 (2020) "Preventing discrimination caused by the use of artificial intelligence".
27. Resolution 2343 (2020) "Preventing discrimination caused by the use of artificial intelligence"; Recommendation 2185 (2020) "Artificial intelligence in health care: medical, legal and ethical challenges ahead"; Resolution 2345 (2020) "Artificial intelligence and labour markets: friend or foe?".
28. For instance, the Budapest Convention on Cybercrime set up a system of consultations of the Parties with similar tasks (identification of problems, exchange of information) (see Article 46). On this basis, the Parties created the Cybercrime Convention Committee (T-CY) and included in its rules of procedure the power of "undertaking assessments of the implementation of the Convention by the Parties to enhance the practical application of the Convention". This includes sending questionnaires to the Parties and preparing assessment reports on the different provisions of the Convention based on the compilations of those replies.

(commentary to Article 21). If this is applied coherently, it means that international (human rights) obligations should always be the minimum standard applicable from which domestic law provisions cannot derogate (see also commentary to Article 4).

38. I regret that the DFC refers to some internationally established rights as "principles" and not as "rights" (Chapter III). For example, the right to non-discrimination and equality or the right to privacy should have been formulated as positive rights of individuals. This would not have implied creating new human rights, as negotiating States are already bound by international treaties which recognise them as individual rights. In my view, a better option would have been to refer in the heading of Chapter III to "fundamental principles and rights".[29] The fact that it is a Framework Convention rather than a Convention should not make a difference, as we have seen with other Framework Conventions that refer to individual "rights" when setting out the principles and obligations for State Parties (see the Framework Convention for the Protection of National Minorities). More generally, I believe that the drafters have missed an opportunity to include new rights, rights that could flow from already existing rights (human dignity, personal autonomy, right to respect for private life) but adapted or specifically tailored to an AI context. For instance, when examining the brain-computer interface technology, the Assembly called on member States to consider establishing new "neurorights", such as cognitive liberty, mental privacy and mental integrity.[30] The DFC could also have contained specific provisions on how to maximise the positive impact of AI for democratic processes, for instance improving government accountability and facilitating democratic action and participation.[31] Although there are references to the "benefits" (Preamble) or "positive effect" of AI (Article 25.2 concerning the exchange of information), there are no specific obligations on how to use the potential of AI for improving democratic processes and the enjoyment of human rights.

39. Finally, I tend to agree with most of the critical voices mentioned above regarding the scope of application of the FC (Article 3), the most controversial issue of the agreed draft. I had submitted my own written comments on this issue throughout the process, stressing that the Assembly supports as a matter of principle the widest scope of application possible and recalling that in its AI reports it had considered that self-regulatory principles introduced by private actors are not sufficient. A legally binding instrument should be based on a comprehensive approach and be addressed to *all stakeholders*, including private actors. I therefore fully supported Option A of the version published in December 2023, which did not exclude private actors from its scope, in line with previous PACE resolutions and the CAHAI position[32]. However, given that some negotiating States were not ready to accept a horizontal scope covering equally both public and private entities, different options (B and C) introducing a differentiated approach for the private sector (with an obligation for all Parties to take appropriate steps for the realisation of the Convention or to progressively address the risks in respect of private entities) were also presented. In the version sent ahead of the final plenary meeting, new options introducing opt-out clauses for States wishing to exclude private entities were added. In one of the proposals, the opt-out option was subject to strict conditions as well as to an obligation to take appropriate steps to address the risks and impacts arising from private actors. Although I preferred option A, an opt-out clause along these lines would have been an acceptable alternative, giving the flexibility for certain (a minority of) States to exclude private actors through a declaration, while keeping by default full applicability of the Convention to private actors.

40. The current version (introduced at the very last stages of the negotiations within the drafting group with no meaningful discussion at the plenary) is a system rather "à la carte", where each Party will be able to determine in a declaration how it intends to address the risks and impacts arising from the use of AI by private actors in a manner conforming with the object and purpose of the Convention. This is far from ideal for legal certainty and predictability of the obligations imposed by the Convention vis-à-vis private actors. I am of course aware of the constraints of the final stages of the negotiations and the enormous pressure to reach a compromise. I think that the time pressure was not necessarily beneficial for the quality of the final outcome reached. The process followed did not allow for a timely and in-depth analysis and consultation with all stakeholders, including civil society and other observers participating in the CAI. This seems to be in contrast with previous Council of Europe practices of drafting conventions.

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29. The version of January 2023 (Revised Zero Draft) referred to "principles, rules and rights" when defining the purpose and object of the Convention (Article 1). The CAHAI paper of December 2021 on "Possible elements (…)" favoured a combination of both direct positive individual rights and certain obligations (see paragraph 17).
30. See also: The Council of Europe's AI Convention (2023–2024): Promises and pitfalls for health protection – ScienceDirect.
31. See Resolution 2341 (2020) "Need for democratic governance of artificial intelligence", paragraph 14.3.
32. CAHAI paper of 2021, paragraphs 11-12.

41. Although I would have preferred other options and more consultation on the scope public/private, I will not propose a particular amendment at this stage. I understand that the difficulties in reaching the final compromise make it rather unrealistic to expect a re-opening of the negotiations with all the parties involved on this point. Having said that, I would like to stress that the reporting obligation introduced as part of the compromise in Article 24 must be seen as a positive safeguard and as a compensation for the differentiated scope public/private. Furthermore, I expect that all member States of the Council of Europe that will ratify the FC will opt for the full application of Chapters II to VI when they submit the relevant declaration on private actors under Article 3. The Assembly should strongly call on them to do so, to be fully coherent with the mandate given by the Committee of Ministers to elaborate a convention of a transversal character, the previous work of the CAHAI, as well as more generally with Council of Europe standards, including Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business and the case law of the European Court of Human Rights regarding States' positive obligations vis-à-vis private actors. The Conference of the Parties should also play its part and conduct a proper assessment of how State Parties comply with Article 3.1(b), including with respect to those States that decide to take "other appropriate measures" as an alternative to applying the Convention to private sector activities. I trust that a progressive interpretation of this provision by the follow-up mechanism will foster advances over time, through reporting requirements and peer pressure.

42. I will now set out the list of possible improvements and amendments to the DFC. These are limited to the issues that I consider sufficiently important to be included in the opinion of the Assembly and that seem to me reasonable with regard to the overall structure, nature and purpose of the draft Framework Convention:

1. Replace Article 3.2 with the following text:

> *"Each Party may restrict the application of the provisions of this Convention if activities within the lifecycle of artificial intelligence systems are necessary to protect its national security or national defence interests and if such activities are conducted in a manner consistent with applicable international law, including international human rights law obligations, and with respect for its democratic institutions and processes."*

2. Delete Article 3.4

While I could have been ready to accept a compromise on the issue of public/private entities based on an opt-out clause subject to conditions, I cannot accept a full exemption of national security from the scope of the Convention. The Council of Europe does not have limited competences in the area of national security.[33] On the contrary, measures taken by public authorities for the protection of national security must be subject to the rule of law and the European Convention on Human Rights. If authorities invoke national security grounds as a justification for using AI tools, any interference with human rights resulting from that use must be in accordance with the law, pursue a legitimate aim (e.g. national security) and be necessary and proportionate in a democratic society. The Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223, Convention 108 +) also applies to the processing of data for national security purposes, while allowing for a number of exceptions and restrictions. For non-member States, the International Covenant on Civil and Political Rights similarly allows for restrictions on grounds of national security. This is why a blanket exemption seems to me completely unjustified and contrary to existing human rights obligations.[34] The fact that Article 3.2 refers to international human rights obligations outside the FC or respect for democratic institutions does not change the nature of the exemption, which is furthermore not subject to any reporting obligation under Article 24 (unlike the exemption related to the private sector).

The same considerations apply to the blanket exclusion of national defence from the scope of the Convention (Article 3.4). While the Statute of the Council of Europe excludes matters relating to national defence, interferences with human rights resulting from military activities are not outside the scope of human rights treaties, including the ECHR.[35] The Assembly has in fact adopted a report on the use of AI within the area of

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33. Unlike the EU, where national security remains the sole responsibility of Member States in accordance with Article 4(2) TEU. The EU AI Act adopted by the European Parliament therefore excludes the use of AI for exclusively national security purposes from its scope (see Texts adopted – Artificial Intelligence Act – Wednesday, 13 March 2024 (europa.eu)). This text still needs to be endorsed by the Council of the EU.

34. Although the DER explains that regular law enforcement activities (prevention or prosecution of crimes) remain within the scope of the FC, if and insofar as the national security interests are not stake, the distinction between law enforcement and national security may sometimes be blurry, as we have seen in recent cases of targeted surveillance with spyware.

defence and lethal force.[36] The use of AI in ongoing armed conflicts raises serious issues with regards to international humanitarian law and human rights law.[37] If the FC applies mainly to public entities, the exemptions regarding AI uses for national security and defence purposes risk narrowing even more the scope of application and calling into question its transversal nature.

I therefore propose to treat national security and national defence in the same way and in a single Article.[38] The suggested provision would be partly based on Option C of the DFC version of December 2023, while adding "national defence" and "with respect for its democratic institutions and processes" and removing "essential" from "national security interests". The ER could also add some clarifications as to the test established by international human rights law for restrictions based on national security grounds (legality, necessity, proportionality).

3. In Article 5.1, add:

"*free and fair elections*" after "democratic institutions and processes, including"

It is important to explicitly refer to "free and fair elections" as one of the main democratic institutions and processes that may be threatened by AI. It is already mentioned in the ER as well as in the Reykjavik Principles for Democracy. The Court has also recognised that the rights guaranteed by Article 3 of Protocol No. 1 to the ECHR (right to free elections) are crucial to "establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law".[39]

4. Insert a new Article under Chapter III:

> *"Every Party shall adopt or maintain measures to preserve health and the environment in the context of activities within the lifecycle of artificial intelligence systems, in line with applicable international and domestic law."*

In previous versions of the DFC (January and December 2023) there was a specific provision on the preservation of health and the environment. Although in the current version there are some references to health and environment in the Preamble (12) and to environmental implications in Article 19 (public consultation), a specific provision on health and environment should indeed be laid down expressly as a general principle under Chapter III. This principle could be qualified by a reference to "applicable international and domestic law". The Assembly already recommended in 2020 that a convention on AI should also address the implications of AI on the right to health, having in mind the development of AI-driven health applications and medical devices.[40] In line with the principle of human responsibility, it was also stressed that AI health applications should not replace human judgment completely and that AI-enabled decisions in healthcare should always be validated by health professionals (what some have called the right to a human doctor). The right to health is already guaranteed by the European Social Charter, the International Covenant on Economic, Social and Cultural Rights and the EU Charter of Fundamental Rights, and indirectly protected through the case law of the European Court of Human Rights (under articles 2, 3 and 8 of the ECHR).[41]

As regards the protection of the environment, AI technologies and industries have in fact considerable impacts on natural resources and energy. Although not yet fully recognised as an autonomous human right at the Council of Europe, the heads of state and government in Reykjavik 2023 noted the increased recognition of the right to a clean, healthy and sustainable environment in international and regional human rights instruments, national constitutions, legislations and policies and decided to strengthen the work of the Council of Europe in this field (the "Reykjavik process").[42] The European Court of Human Rights has recently derived from Article 8 a right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life.[43] The Court had already held that

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35. See the case law of the ECtHR as regards military operations within the (territorial or extra-territorial) jurisdiction of member States.
36. Resolution 2485 (2023) "Emergence of lethal autonomous weapons systems (LAWS) and their necessary apprehension through European human rights law".
37. See, for instance, the reported use of AI tools by the Israeli military in Gaza. The UN Secretary General Antonio Guterres referred to these reports: "I am deeply troubled by reports that the Israeli military's bombing campaign includes AI as a tool in the identification of targets, resulting in a high level of civilian casualties…" / X (twitter.com), 6 April 2024.
38. See similarly Article 11 of Convention 108 +.
39. *Mugemangango v. Belgium* [GC], no. 310/15, § 67, 10 July 2020.
40. Recommendation 2185 (2020) "Artificial intelligence in health care: medical, legal and ethical challenges ahead", paragraph 11.1.
41. *Vavřička and Others v. the Czech Republic* [GC], 8 April 2021, § 282.

Article 8 extends to adverse effects arising from various sources of environmental harm and risk of harm. Member States would send a wrong message if they omitted a reference to the environment (as a general principle) in the first international treaty negotiated after Reykjavik. The reference to "applicable international and domestic law" would allow for a gradual recognition of this principle/right in line with international and Council of Europe normative developments, reflecting the evolution of the political will of States.

5. Add in the text of Article 14.3 (c) or in the Explanatory Report a reference to:

"j*udicial authorities*" or "*judicial review*"

The DER states that the complaints may be lodged with the oversight mechanism(s) referred to in Article 25. A reference to "judicial authorities" or "judicial review" would also make sense, with the understanding that this would apply only to the extent required by each Party's international and domestic law obligations (in accordance with the logic of paragraph 1 of Article 14). While it is true that Article 13 of the ECHR does not as such require that the national authority be strictly a "judicial authority", Article 6 (right to an independent and impartial tribunal) and the Court's case law under different Articles of the Convention may impose in certain contexts and circumstances the right of access to a court or to effective judicial review. The Assembly had also recommended, in the context of policing and criminal justice systems, that the introduction, operation and use of AI applications be subject to effective judicial review.[44]

6. In Article 15.1, add a reference to:

"*human review*"

The DER indicates that effective procedural guarantees in the context of this provision should, for instance, include human oversight, including *ex ante* and *ex post* review of the decision by humans. A reference to "human review/oversight" appeared in previous public versions of the text of the Convention (January and December 2023). Furthermore, the Assembly always stressed the importance of the principle of human responsibility for decisions in its AI-related reports, including in the context of policing and criminal justice systems, healthcare, work, neurotechnology and LAWS. The CAHAI also advocated for including in the future AI treaty a mandatory right to human review of decisions taken or informed by an AI system in the public sector, except where competing legitimate overriding grounds exclude this.[45] The reference to "human review" is all the more important because Article 15 only applies "where an artificial intelligence system *significantly* impacts upon the enjoyment of human rights". This should not be understood however as implying that where an artificial intelligence system simply produces effects on individual rights and interests (but does not reach the threshold of significantly impacting on human rights) human review is no longer needed.

7. Add in Articles 16.1, 16.2 (a), (e) and 16.3:

"*and the preservation of the environment*" after "the rule of law"

The Preamble of the DFC underlines that the Convention is intended to encourage the consideration of "wider risks and impacts related to these technologies including, but not limited to, human health and the environment, and socio-economic aspects including employment and labor". The DER also mentions in its commentary to Article 16 that risk and impact assessments "can, where appropriate, take due account of the need to preserve a healthy and sustainable environment." For the sake of coherence, this should also be reflected in the text of Article 16, particularly if the proposal to include a separate provision on health and environment under Chapter III (see above no. 4) is not retained. Environmental sustainability should be one of the criteria for risk and impact assessment of AI systems.

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42. The Committee on Social Affairs, Health and Sustainable Development has recently adopted a report in which it reiterates the Assembly's call to draw up a binding legal instrument recognising a right to a healthy environment: PACE committee backs Council of Europe strategy on the environment and recommends drawing up a binding legal instrument recognising a right to a healthy environment (coe.int).
43. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (GC), Judgment of 9 April 2024, par. 519.
44. See Resolution 2342 (2020) "Justice by algorithm – The role of artificial intelligence in policing and criminal justice systems", paragraph 9.13. See also the CAHAI paper of 2021 which refers to "judicial authorities" in respect of the right to an effective remedy before a national authority (paragraph 40).
45. Paper of 2021, paragraph 34.

8. Replace Article 16.4 with the following text:

> *"Each Party shall take such legislative or other measures as may be required to put in place mechanisms for a moratorium or ban or limitations in respect of certain uses of artificial intelligence systems where such uses are considered incompatible with the respect of human rights, the functioning of democracy or the rule of law."*

I understand the disappointment expressed by some civil society organisations and other stakeholders concerning the absence of 'red lines' in Article 16 which prohibit certain AI applications on the basis of unacceptable levels of risk.[46] In addition, the DER does not provide any objective criteria nor any specific examples of prohibited uses. I hope that this gap will be filled in the future by other legally binding or non-binding instruments prepared by the CAI.[47] The Conference of the Parties could also contribute to the interpretation of this provision by giving examples of prohibited uses. The national oversight mechanisms referred to in Article 26 could also possibly propose lists of prohibited or high-risk uses of AI or be consulted on such lists.

In any event, the current version of Article 16.4 still does not seem satisfactory to me as it leaves too much leeway to the Parties to the Convention. It only creates an obligation to "assess the need" for a moratorium or ban or other measures and leaves the determination of what is "incompatible" to each Party. I would therefore suggest using a stronger and clearer wording (similar to previous versions of the draft): an obligation to 'take legislative or other measures" to put in place "a moratorium or ban or limitations" where such uses "are considered incompatible" with human rights. This implies that practices that are considered incompatible with human rights, democracy and the rule of law by domestic authorities or the Conference of the Parties, including on the basis of other applicable legal instruments, should be prohibited, be the object of a moratorium, or be appropriately limited.

9. Insert a new Article under Chapter VI:

> *"Each Party shall take appropriate measures to ensure protection of whistleblowers in relation to the activities within the lifecycle of artificial intelligence systems which could adversely impact human rights, democracy and the rule of law."*

This provision was included in previous versions of the DFC. Now there is only a reference to whistleblowers in the DER concerning Article 8 (transparency and oversight). The Assembly has been a pioneer in the protection of whistleblowers[48] and would strongly support a specific provision in the Convention. Whistleblowers may indeed report misconduct and breaches of law by AI private and public actors and therefore contribute to the implementation of general principles such as transparency, accountability and responsibility, reliability and safe innovation. Furthermore, the CAHAI in 2021 also recommended including a specific provision on whistleblowers in the future legally binding transversal instrument.

10. Add the following sentence at the end of Article 26.2:

> *"The functions and powers of such mechanisms shall include investigative powers, the power to act upon complaints, periodic reporting, promotion, public awareness and consultation on the effective implementation of this Convention."*

The Assembly considers that effective and proactive oversight mechanisms should have the necessary powers for overseeing the compliance with the Convention, with the needed technical and legal expertise for following the new developments in AI and evaluating its risks.[49] They should be able to deal with the complaints referred to in Article 14.2 c. They should also prepare periodic reports, which could be used for the

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46. Compare with the EU AI Act which for instance prohibits 'real-time' remote biometric identification of natural persons in publicly accessible places for law enforcement purposes, except in narrowly defined situations. See also the position of the UN High Commissioner for Human Rights who expressed support for a ban on the use of biometric recognition tools and AI systems that seek to infer people's emotions, individualized crime prediction tools, etc. (Türk open letter to European Union highlights issues with AI Act | OHCHR).
47. For instance, the CAI has been instructed to elaborate a legally non-binding methodology for the Risk and Impact Assessment of AI Systems from the point of view of Human Rights, Democracy and Rule of Law (HUDERIA) to support the implementation of the Framework Convention (deadline: end of 2024).
48. See Resolution 2300 (2019) "Improving the protection of whistle-blowers all over Europe". The Assembly has a General Rapporteur on the protection of human rights defenders and whistle-blowers.
49. See Resolution 2341 (2020), paragraph 15.

reporting obligation to the Conference of the Parties under Article 24. They should also be consulted on proposals for any legislative or other measures aimed at the implementation of the Convention, for instance any possible bans or moratoria issued under Article 16.4. In case of multiple mechanisms, these functions could be shared by the different existing mechanisms. If this proposal is not retained in the text of the Convention, the DER could at least be amended to give more guidance on the type of powers envisaged for national oversight mechanisms.

11. Insert a new Article under Chapter VII, after Article 26, entitled "Parliamentary involvement":

> *"1. National parliaments shall be invited to participate in the follow-up and review of the measures taken for the implementation of this Convention.*
>
> *2. The Parliamentary Assembly of the Council of Europe shall be invited to regularly take stock of the implementation of this Convention."*

Given the Framework Convention's specific focus on the impacts of AI on the functioning of democracy, a more visible role for national parliaments in the follow-up of the implementation of the measures taken to implement the Convention would be fully justified. The Assembly has already referred to the need to "ensure that the use of AI-based technologies by public authorities is subject to adequate parliamentary oversight and public scrutiny".[50] PACE could also be invited to regularly follow the implementation of the Convention by member States, given the importance of parliamentary debate on the impacts of AI on democracy, human rights and the rule of law and the Assembly's role and continuous engagement on this subject. The proposed new provision under Chapter VII draws inspiration from a provision in the Istanbul Convention on preventing and combating violence against women and domestic violence (Article 70).

6. Conclusions

43. The Draft Framework Convention on AI, human rights, democracy and the rule of law should be seen as an important achievement of the CAI and the Council of Europe. Once adopted by the Committee of Ministers, it will become the first ever international treaty on artificial intelligence. It is based on the Council of Europe standards on human rights, democracy and the rule of law, which are commonly shared by the non-European States that have participated in the negotiations and will hopefully sign and ratify the Framework Convention. Its added value will be its global reach, bringing together States from all over the world wishing to address the global challenges posed by AI from the perspective of these values and with a view to mitigating or limiting its risks. This means that the negotiation and drafting process has had to accommodate diverse legal and political traditions and systems, with the result that the draft text often contains very general and abstract provisions that will need to be clarified and developed through its interpretation and follow-up mechanisms. I also expect that the Framework Convention will be supplemented by other binding or non-binding instruments concerning the use of AI in specific sectors (for instance, work-related and social rights, cultural rights, or specific sectors of the public administration such as law enforcement, justice, healthcare, migration and electoral administration) and the risk and impact management methodology.

44. The most problematic aspect of the DFC is its restricted scope of application, with a system "à la carte" with regard to private actors, and with blanket exemptions on national security and defence purposes. The final compromise on the public/private sectors should not be used by member States of the Council of Europe to modulate or dilute the application of the Convention to private actors operating within their jurisdictions. The Assembly should strongly call on all member States to fully apply the Convention provisions to private actors when submitting their declarations under Article 3.1, in line with the mandate given by the Committee of Ministers, the position of the Assembly and the Council of Europe Commissioner for Human Rights, as well as the requirements under the ECHR. The Conference of the Parties to the Framework Convention should also be invited to fully use its powers and reporting system to assess how Parties apply the Convention to private actors and to provide guidance in its interpretation and effective application.

45. The critical comments and proposals made by different stakeholders deserve to be taken seriously. I have based my suggested improvements and amendments to the DFC on some of these proposals, or on my previous drafting proposals submitted to the CAI. All these amendments are intended to strengthen the draft taking due account of the overall structure and underlying logic of the agreed text. Some relate to the national security and defence exemptions (1, 2). Others aim to add explicit references or develop the content of certain provisions with regard to: free and fair elections (3), health and environment (4, 7), judicial review (5), human

50. See Resolution 2343 (2020) «Preventing discrimination caused by the use of artificial intelligence", paragraph 11.

review (6), prohibition of AI uses (8), whistleblowers (9), national oversight mechanisms (10) and parliamentary involvement (11). They are all reflected in the draft Opinion preceding this explanatory memorandum.