ICC comments on the Council of Europe draft Convention on Artificial Intelligence

The International Chamber of Commerce (ICC) welcomes the Council of Europe's (CoE) efforts to elaborate a global instrument on the design, development, and application of artificial intelligence (AI) systems based on the CoE's standards on human rights, democracy and the rule of law. Businesses worldwide design, develop, distribute and rely on AI systems to enhance productivity, streamline operations, and create innovative products and services both in the private and public sectors. As the institutional representative of over 45 million businesses, reaching more than 170 countries, ICC is committed to fostering responsible AI development globally, based on human rights and democratic principles, as a cornerstone of trust among stakeholders and an enabler of innovation and competitiveness. Therefore, the work of the Committee on Artificial Intelligence (CAI) is of vital importance to us and our members.

As AI continues to evolve, the nexus between its potential for socioeconomic development and the safeguarding of fundamental human values becomes paramount. This technology holds the potential to increase productivity and build impactful solutions across numerous sectors as varied as healthcare, transportation, education, agriculture and more. Policies that emphasize education, collaboration, and prudent application can facilitate harnessing the positive potential of this technology.

Based on the *Consolidated Working Draft of the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law*, this document explores the implications and perspectives of the global business community on the efforts of the CAI in harmonizing AI practices with human rights and democratic principles, and on the importance of globally interoperable and technologically feasible approaches to foster responsible AI.

Global governance and interoperability of approaches

As countries increasingly consider the governance of this technology, it is imperative to think about the compatibility and interoperability of approaches to the governance of AI and avoid creating a complex and potentially fragmented policy environment. This will not only support the realisation of the full potential for socioeconomic development that AI holds but will also facilitate business operations and compliance for businesses operating in different jurisdictions. We appreciate,

therefore, the CoE's efforts to align its approach with the European Union's (EU) AI Act[1] and encourage alignment with other AI frameworks such as the U.S. National Institute for Standards and Technology (NIST) AI Risk Management Framework (AI RMF)[2] and the Organisation for Economic Co-operation and Development's (OECD) Recommendations on Artificial Intelligence.[3]

In the interest of compatibility and interoperability, we would like to highlight the need for the definition of AI to be consistent with other governance mechanisms. The current proposed definition could be interpreted in an overly broad manner. It is vital that the Convention is clear that it is applicable only in situations where there is a clearly identifiable and materially relevant AI aspect. Many algorithmic systems which would not normally be considered AI aid human decision-making. We encourage the drafting group to consider aligning the definition with the OECD[4] and United Nations (UN)[5], as well as the International Organization for Standardization (IOS)[6], and NIST[7] to allow for sector-specific definitions. Upon defining AI systems, the focus should be on the level of autonomy under which a system operates and the outcomes a system is able to achieve.

Furthermore, the OECD and other multilateral bodies referenced above will likely be revising and adjusting definitions of AI to take into account technology innovations, and the CoE should reserve the right to do the same. This is particularly relevant given the rapid pace of developments in technologies (e.g. generative AI), which could lead to new or incremental risks due to the level of opacity presented by these types of systems and the difficulty of ascertaining the relationship between an input and output, thereby creating challenges for transparency and understandability that might affect human decision-making.

We also suggest that references to decommissioning throughout the text are removed, as this lacks clarity and is not found in existing treaties or national laws and regulations pertaining to AI and human rights protections.

Therefore, we suggest to amend Article 3 as follows:

> *Article 3 - Artificial intelligence systems ***

> *For the purpose of this Convention, an Artificial Intelligence (AI) system is a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy. The Conference of the Parties may,*

[1] European Commission, European Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, April 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206

[2] NIST, AI Risk Management Framework (AI RMF), Released January 2023, https://www.nist.gov/itl/ai-risk-management-framework

[3] OECD, Recommendation of the Council on Artificial Intelligence, Adopted on 25 May 2019, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449

[4] ibid.

[5] UNESCO, Recommendation on the Ethics of Artificial Intelligence, Adopted on 23 November 2021, https://unesdoc.unesco.org/ark:/48223/pf0000381137

[6] International Standards Organisation, ISO/IEC 22989:2022 Information technology — Artificial intelligence — Artificial intelligence concepts and terminology, July 2022, https://www.iso.org/standard/74296.html

[7] NIST, AI Risk Management Framework (AI RMF), Released January 2023, https://www.nist.gov/itl/ai-risk-management-framework

as appropriate, <u>decide to revise</u> this definition in a manner consistent with relevant technological developments.

For the work of the CAI to exert a genuine global influence, it must find enthusiastic embrace and adoption among countries beyond the CoE's membership. It is vital that the drafting group considers how the Convention can best be formulated in a way that as many countries as possible choose to join it. Business stands ready to support efforts to broaden the reach of the Convention. With this in mind, we suggest that Article 15 should include language which takes into account the varying ways in which countries provide voluntary or legally mandated risk and impact management frameworks by adding "in accordance with national laws and regulations" to sub-articles where appropriate.

Unintended consequences for privacy and implementation

Terms like "recorded" and "usage" in Article 13a could be subject to broad interpretation, potentially clashing with the privacy safeguards in Article 10a and leading to monitoring or surveillance risks if not narrowly defined. Therefore, it is critical that the Convention, or an accompanying explanatory note, provides greater clarity and specifies the context and scope of such terms. It is vital that this is done without compromising privacy protections, thereby respecting the provisions of Article 10a and striking a balance between privacy and accountability in AI systems usage. Additional clarification could focus on what kinds of records are necessary for affected individuals to seek an effective remedy. Recording usage metadata would offer a more restrictive interpretation and align more consistently with Article 10a, as would requiring user consent prior to sharing such data.

There are elements of the current Convention which may be difficult to implement from a practical standpoint. Article 12 on *Safe innovation* suggests that there must be a controlled regulatory environment for testing AI systems. Business is supportive of controlled regulatory environments, or regulatory sandboxes, as an effective tool to support innovation. However, this may not be practically feasible for frontier or emerging systems or uses, as the suitable regulatory framework might not yet be in existence. Further details on regulatory sandboxes, and when they are appropriate, could be usefully added to the explanatory note that will accompany the Convention.

Effective human rights safeguards and risk-assessment frameworks

The draft Convention rightly requires risk assessments. From a business perspective, such frameworks not only ensure compliance with regulatory obligations and address legal and ethical concerns but also help foster trust, enhance quality, attract investment and drive innovation, all of which are crucial for the long-term success and sustainability of AI systems.

However, requiring the implementation of risk assessments and impact management frameworks for all AI systems is ill-advised, given that such an approach ignores the human rights assessment frameworks already in place and effectively limits the value of risk assessments that seek to identify higher-risk technologies and contexts for their use.

The Draft Convention should include 'proportionality' in order to align with the EU, the OECD, NIST, and other AI risk assessment frameworks: impact management frameworks should be applied only to genuinely high-risk AI systems (those that present a significant risk to human safety, wellbeing and fundamental rights), while a risk-based and human rights-based approach could apply to all systems.

The UN Guiding Principles on Business and Human Rights (UNGPs)[8] ensure that a human rights-based approach applies to all AI systems. Under the UNGPs, businesses are expected to conduct human rights due diligence to identify, prevent, mitigate, and account for actual and potential human rights impacts. This emphasizes the importance of businesses taking responsibility for respecting human rights in the design, development, and use of AI systems, regardless of the level of risk associated with the system. The application of the UNGPs to AI systems should be made explicit in the text of the draft convention.

This approach ensures that all AI systems are developed and deployed with a focus on human rights, while still allowing for more stringent risk assessments and regulations to be applied to high-risk systems.

In order to include 'proportionality' of risk, and align with the EU, the OECD, and NIST, we suggest that the following text would be a useful addition to Article 2:

> *Article 2 – Risk-based approach ***
> *In order to give full effect to the principles and obligations set out in this Convention, each Party shall maintain and take such graduated, proportionate, and differentiated measures in its domestic legal system as may be necessary and appropriate in view of the severity and probability of occurrence of adverse impacts on human rights and fundamental freedoms, democracy and the rule of law during design, development, and use of artificial intelligence systems. Each Party shall recognize that those measures may vary according to the risk of severe human rights impacts, the severity of the impact, the probability of occurrence, and the size, nature, and context of the entity designing, developing, and using artificial intelligence systems.*
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> *When the risk of adverse impacts on human rights is high, a human rights impact management framework shall apply to Artificial Intelligence systems. If the provisions in the treaty should apply to the private sector, and the entity designing, developing, and using artificial intelligence systems is a private business, each Party shall consider a combination of mandatory and voluntary appropriate measures, for businesses to (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.*

Ensuring that responsibilities are properly allocated

We urge the drafting group to consider how to align responsibilities with an actor's capacity to manage specific risks. Further detail should be added to the Convention, or the accompanying explanatory note, which outlines different actors in the value chain and their role in designing, developing, deploying and using an AI system. In addition, the Convention or explanatory note should delineate the responsibilities of these actors. This will help to ensure that responsibilities are best allocated to the actor who can fulfil them. For example, developers of a system should focus

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[8] OHCHR, UN Guiding Principles on Business and Human Rights, 2011,
https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

on the risks presented by the design and testing of a system, while deployers and users of a system are best placed to identify and address context-specific risks.

It is important that the Convention makes reference to the size and nature of the entity that is designing, developing, deploying or using a system (as suggested above) when discussing responsibilities. Smaller organisations and micro-small-and-medium-enterprises (MSMEs) lack the capacity to carry out impact assessments on all systems and may simply not be able to adhere to every principle in the Convention. For instance, Article 11 on *Safety, security and robustness* requires parties to ensure "data quality, data integrity, data security", MSMEs are likely to use pre-trained models as they do not have the resources to develop models or sufficient data to train them. Further detail is needed on where responsibility lies within the value chain, otherwise, the Convention could put smaller organisations at a competitive disadvantage and create a barrier to entry for smaller companies.

The role of business

Businesses design and develop AI systems, and industry is at the forefront of not just technical development, but also research which aims to ensure that this technology reflects democratic principles and does not harm fundamental rights. We suggest adding language which reflects the importance of encouraging the exchange of information between stakeholders related to the design and use of AI to Article 24. In addition, we urge the drafting group to include language that encourages public engagement in policymaking, for instance in Article 27, as this upholds the principles of democracy.

Finally, as a membership organization, our positions are drafted by our members through an open and collaborative process. Due to the modalities chosen by the Committee, we are limited to only consulting with our members on publicly available drafts of the Convention. While we are grateful that the consolidated draft was made available it does not capture significant aspects of discussions. For instance, the consolidated draft does not contain details of ongoing discussions on the applicability of the Convention to the private sector. This limits our ability to discuss this vital topic and raise issues with the practical implementation of the draft from a private sector perspective. We ask that the Committee consider releasing further documentation on this matter as we cannot make substantive comments on this central issue without it.

We appreciate the work of the Committee and the opportunity to share these comments on this global Convention. ICC is committed to this process and stands ready to support wherever we can by sharing global industry views.