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ARTIFICIAL INTELLIGENCE AT THE CROSSROADS BETWEEN
THE EUROPEAN UNION & THE COUNCIL OF EUROPE:
WHO SAFEGUARDS WHAT & HOW?

*Costanza Nardocci**

Abstract

Building on the diverse legal statuses of European Union law and international human rights law, especially that deriving from the Council of Europe (CoE), within the sources of the law of the domestic constitutional system, the Article discusses the current state of the art of the legislative approaches to AI in the European and supranational scenarios.

It departs from the European Union's never-ending debate on the controversial and desired contents of the Artificial Intelligence Act in light of its implications in terms of AI's definitions, risk assessments, liability strategies, and selection of prohibited AI technologies, to then go on exploring the CoE's fast-growing activism towards the adoption of the first international human rights treaty on AI (the Revised 'Zero Draft' of the [Framework] Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law).

The comparison between the two normative approaches unveils the heterogenous rationale of the acts alongside their respective impact and traits: still strongly and almost exclusively bound to a privacy-based approach the EU's Artificial Intelligence Act, and, vice versa, more inclined to endorse a truthful human rights-based approach the CoE.

Eventually, the Article argues the urge for a mutual exchange between the two international organizations suggesting, that AI regulatory framework should adequately respect a human-centered approach reflecting the shared principles enshrined in national Constitutions and supranational human rights law treaties.

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1. AI comes to Europe: Regulation *vs.* non-regulation

It is not unusual that before new phenomena the law keeps a slow pace. Neither, that the law struggles to regulate phenomena of a multidisciplinary nature, heterogenous implications on an individual and collective basis, and eventually cross-borders and global impact.

Conversely, it could be unusual for national States to unanimously be willing to wait for supranational interventions, delegating the definition of the *rationale* and contents of perspective regulations almost entirely to supranational but not always politically representative institutions¹.

The revolution brought by Artificial Intelligence (hereafter, AI) does not solely rest on the challenging relationships that new technologies entertain with human beings². Will AI support

¹ For the purpose of the article, reference is chiefly made to the Council of Europe and to all supranational organizations other than the European Union. For a general overview on the latest European development, see T. Giegerich, *How to Regulate Artificial Intelligence: A Screenshot of Rapidly Developing Global, Regional and European Regulatory Processes*, Saar Expert Paper (2023), Link: https://jean-monnet-saar.eu/?page_id=70.

² On the relationship between AI (the “machine”) and humans, please see the comments by S.M. Fleming, *What separates humans from AI? It’s doubt*, in *Financial Times*, 26th April 2021. Among others, argue in favor of the need to focus on the differences existing between humans and artificial intelligence, also, A. Rouvroy, *The end(s) of critique: Data-behaviourism vs. due-process*, in M. Hildebrandt, K. de Vries (eds.), *Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology* (2013), 143.

humans? Or, conversely, will AI substitute humans?³ Will AI be capable of replicating human abilities? Or will AI continue to be confined to the artificial dimension without conquering the human sphere?

Moreover, AI's impact is also expanding on the side of domestic and international relations and among different legislation levels.

In different terms, as AI is challenging human lives, actions, and behaviors, humans are grappling with finding ways to control AI by resorting to normative and prescriptive responses.

Whereas until a few years ago the legal debate on AI was almost exclusively entrenched in the alternative between regulation and non-regulation⁴, juxtaposing Europe's inclination to adopt a legislative framework to, especially, the United States' tendency to keep AI free from legal constraints, recent times witnessed instead a global move towards the acknowledged necessity to embed AI in coherent systems of laws⁵.

³ The debate on the likelihood AI will replace humans in the labor market gathers a significant resonance following the publication of the 2023 ILO's Report, *Generative AI and Jobs: A global analysis of potential effects on job quantity and quality*, (2023). Fulltext available at the following link: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_890761.pdf.

⁴ On the opportunity of keeping humans in the loop, contrasting the autonomous development of artificial intelligence technologies, see, among many others, F.M. Zanzotto, *Viewpoint: Human-in-the-loop Artificial Intelligence*, in 64 *J. Artificial Intelligence Research* 243 (2019); C. Cath, L. Floridi, *The Design of the Internet's Architecture by the Internet Engineering Task Force (IETF) and Human Rights*, 23(2) *Sci. & Engin. Ethics* 449 (2017). On the same issue, see, also, the Report delivered by the Council of Europe, *Algorithms and Human Rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications* (2018).

⁵ On the role of law in regulating artificial intelligence, see, among others, G. De Gregorio, *The Normative Power of Artificial Intelligence*, 30(2) *Ind. J. Glob. Leg. Studies* 55 (2023). Even sooner, the literature extensively debated on the possibility and opportunity to regulate AI resorting to the rule of law. See K. Yeung, M. Lodge. (eds.), *Algorithmic Regulation* (2019); R. Brownsword, *Technological Management and The Rule of Law*, 8(1) *Law, Inn. & Tech.* 100 (2016). In a comparative perspective, worth mentioning is, first, the pivotal initiatives of the African Union Development Agency - NEPAD (AUDA-NEPAD), that convened in August 2023 to discuss the adoption of the *AU-AI Continental Strategy encompassing legislative, regulatory, ethical, policy, and infrastructural frameworks*. Previously, see, also the *Study AI for Africa: Artificial Intelligence for Africa's Socio-Economic Development*, that can be consulted at the following link: <https://www.nepad.org/publication/ai-africa-artificial-intelligence-africas->

The European debate started before 2021 when the European Union published the first worldwide proposal of a regulation on AI, the now very well-known Artificial Intelligence Act⁶.

The European Union was not alone at that time, as several other international organizations were sharing the same approach, questioning the benefits of AI and discussing its risks from a human-centered perspective. UNESCO⁷ published several reports on the human rights implications of AI⁸ and the Council of Europe launched a structural operation to study the impact of AI on human rights through the establishment in 2019 of two Committees, the *Ad hoc* Committee on Artificial Intelligence (CAHAI)⁹ and the Committee on Artificial Intelligence (CAI)¹⁰.

At present, the European continent does not merely embody a favor for AI's regulation but is also witnessing a simultaneous increase in the attempts to regulate AI. The European Union and

socio-economic-development. Another leading role is being played by the Association of Southeast Asian Nations (ASEAN) that in February 2023 issued the draft of the "ASEAN Guide on AI Governance and Ethics", very likely to adopt in 2024 and same is the case of Australia, that declared its willingness to regulate AI in 2023. See, in particular, the Australian Human Rights Commission's submission to the Department of Industry, Science and Resources of a document called "*Supporting Responsible AI: Discussion Paper*", link: <https://consult.industry.gov.au/supporting-responsible-ai>.

⁶ The text of the initial proposal can be read at the following link: <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence>.

⁷ UNESCO dedicated lots of efforts in laying down principles on ethics and artificial intelligence. For an insight into the work of the international organization and to examine the texts discussed, please see the following link: <https://unesdoc.unesco.org/search/605f84e9-ad3c-4637-b7ff-c9d4ab90e697>.

UNESCO also committed itself to the study of a variety of AI's implications on a wide spectrum of human rights. UNESCO's official publications on AI and human rights might be consulted at the following link: <https://www.unesco.org/en/artificial-intelligence>.

⁸ The literature has likewise expressed its concern. Among many, see M. Risse, *Human Rights and Artificial Intelligence: An Urgently Needed Agenda*, 41(1) Hum. Rights Quart. 1 (2019).

⁹ For all the information on the composition, meetings, agenda, and reports of the activities undertaken by the CAHAI, see the dedicated webpage at the following link: <https://www.coe.int/en/web/artificial-intelligence/cahai>.

¹⁰ As of the CAI, please refer to the following link: <https://www.coe.int/en/web/artificial-intelligence/cai>.

the Council of Europe are, in fact, currently both engaged in adopting legislative measures to norm AI¹¹.

However, it is questionable how the proposals will relate to one another and will build on analogous principles, as it may as well discuss the coherence of the *rationale* of the compared normative acts. Additionally, the different actors involved in the negotiations and the much wider number of States members of the process that is taking place before the Council of Europe – one for all, the presence of the United States – could be another factor to consider in the comparison between the simultaneous initiatives.

In light of the above, the Article aims to investigate, first, and draw an analogy, second, between the proposals of the European Union and the Council of Europe. The analysis will unveil the discrepancies, identify the gaps, to then discuss the challenges with the ultimate goal of clarifying where we stand now and what we should expect shortly.

2. The Continental Normative Approach to AI: one Binary or Two?

“The question is [...] no longer if we want to make use of these powerful tools, but how we ensure that they are used for the good of humanity only”¹².

These are the words of the Chair of the Council of Europe’s Committee on Artificial Intelligence, who is currently negotiating the drafting of the first international human rights law treaty on AI. Their importance lies, in that they explicit the *rationale* of the approach of the Council of Europe bound evidently to a broad human-centered interpretation of how AI technologies should relate with human beings. Thus, in the Preambles of the Zero Draft, the Revised Zero Draft, and, more recently, the Consolidated Working Draft there is nothing to suggest that the Council of Europe is taking a step back from this solid declaration. In other words, the main goal of the Council of Europe continues to be the identification of sets of effective legislative provisions to ensure that

¹¹ Reference is chiefly made to the debate on the so-called Artificial Intelligence Act, on the EU’s side, and on the Framework Convention on AI, on the CoE’s. The drafts and the discussion on the two texts will be further analyzed, respectively, under paragraphs Nos. 3, 4, and 4.1.

¹² T. Schneider, Chair of the CAI. The full statement can be read at the following link: <https://www.coe.int/en/web/artificial-intelligence/cai>.

AI is designed, used, and implemented in full compliance with fundamental human rights.

On the other side of Europe, the European Union is showing analogous concerns about the possible misuse and perilous consequences of AI.

Before examining how the two international organizations are approaching AI from the very beginning until the latest developments, it should be noted the overlapping goal behind the legislative attempts.

First and foremost, the Council of Europe and the European Union agree on the opportunity to introduce a legislative regulation on AI, opting for the adoption of a specific legislation and both are, therefore, rejecting the opposite alternative of the self-regulation of AI technologies¹³. Similarly, beyond the methodology (to regulate *vs.* to not regulate), there appears to exist a shared concern about the risks posed by AI. Despite the acknowledged benefits AI is capable of bringing to humans' daily lives, the Council of Europe and the European Union are both inclined to opt for a regulation based on its risks rather than on the necessity to simply legislate a phenomenon considered purely profitable and benign.

AI is conceived as possessing a twofold nature: one positive and human's friendly, recalling AI's abilities to help, support, and even take care of duties on behalf of humans; one negative, possibly dangerous, deriving from the uncontrolled and likely negative potentials of AI systems that could also perform to the detriment of the human beings.

Actually, as more and less recent data reports, AI proved to be not so seldom dangerous and likely in violation of human rights. The high rates of AI-derived discriminations, meaning differences in treatment caused by the malfunctioning of AI, in particular, clearly speak for themselves¹⁴. Moreover, the discussion over the

¹³ To recall the key elements of the debate, please refer to the Symposium titled *How Will Artificial Intelligence Affect International Law?*, 114 Am. J. Int'l L. Unbound 138 (2020).

¹⁴ On the discriminatory implications on AI, the literature started to focus not so long ago. Among the most significant study, see, among others, A.D. Selbst, *Disparate impact in big data policing*, 52(1) Geo. L. Rev. 109 (2017); S.U. Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (2018); S. Barocas, A.D. Selbst, *Big data disparate impact*, 104(3) Cal. L. Rev. 671 (2016); P.T. Kim, *Data-Driven Discrimination at Work*, 58(3) William & Mary L. Rev. 857 (2017); F.Z. Burgesius, *Discrimination, artificial intelligence, and algorithmic decision-making* (2018); J. Kleinberg, J. Ludwig, S. Mullainathan, C.R. Sunstein, *Discrimination in*

risks of biases in the tech industry, caused by the lack of diversity in the actors involved, signals quite evidently the discriminatory effects that may occur in the design, development, and implementation of AI technologies.

All this considered, the Council of Europe and the European Union appear to converge on their approaches to AI, the normative and regulatory ones, and on the reasons behind the opportunity to regulate AI in light of the risks caused by new technologies and of the necessity to ensure their beneficial use.

Despite the overlapping approaches and rationale, some differences, nevertheless, do exist. The European Union, at least originally, linked AI regulation quite exclusively to data protection law as if AI was only a matter of privacy without impacting other human rights. On the contrary, the Council of Europe has since the very beginning always been convinced of the necessity to subordinate AI to the respect of a wider range of human rights and fundamental freedoms. A privacy-based approach for the European Union, and a human rights-based one for the Council of Europe.

Such a divergence seems in the latest developments of the EU's Artificial Intelligence Act mitigated by the more serious commitment of the EU institutions to AI's implications on the human rights sphere. However, this new reading of AI and human rights embodied in the latest version of the text will have to be kept under evaluation until definitive approval.

It is therefore still open to discussion whether the European Union and the Council of Europe are truly moving in the same direction and how the two texts will relate to one another once they are both approved. Surely, their impact on the domestic level will echo their different status in the system of the sources of law with the European Union's regulation expected to have the well-known binding effect that the CoE's treaty won't possibly have. Nevertheless, considering the large number of States, members,

the Age of Algorithms, 10 J. Leg. An. 113 (2018), and, of the same A., also, J. Kleinberg, J. Ludwig, S. Mullainathan, A. Rambachan, *Algorithmic fairness*, 108 AEA Papers & Proceedings 22 (2018); see also C. Nardocci, *Intelligenza artificiale e discriminazioni*, in *Rivista "Gruppo di Pisa"*, 2021, link: https://www.gruppodipisa.it/images/rivista/pdf/Costanza_Nardocci_-_Intelligenza_artificiale_e_discriminazioni.pdf, and Id., *Artificial Intelligence-Based Discrimination: Theoretical and Normative Responses. Perspectives from Europe*, 60(3) DPCE Online 2367 (2023).

and non-members of the Council of Europe, that are participating in the negotiations of the CoE's Convention, should not be underestimated the political relevance of the perspective treaty and even its possible influence on the ongoing debate within EU institutions.

3. The European Union & the Controversial Path towards the Adoption of the "Artificial Intelligence Act"

The European Union was – and, to some extent, still is – one of the leading international organizations in laying down the first regulation on artificial intelligence worldwide¹⁵.

As mentioned, the European Union has almost always been in favor of the regulatory approach. The European Union's normative inclination became more concrete in April 2021, when what will be later called the "Artificial Intelligence Act" was initially presented¹⁶.

At that time, the European Union was alone in the first row of AI regulation, and everything seemed to be moving very fast in the Continent. The United States was struggling between the two contrasting options, with the Federal Government quite far from taking into serious consideration the possibility of embedding technological innovation under the constraints of the law¹⁷ and with few local governments conversely amid experimenting strategies to control the rapid development of AI systems. China

¹⁵ An overview on the history and developments of the text is offered by J. Laux, S. Wachter, B. Mittelstadt, *Trustworthy artificial intelligence and the European Union AI act: On the conflation of trustworthiness and acceptability of risk*, Regulation & Governance 1 (2023).

¹⁶ For a critical comment on the first draft, please refer to M. Veale, F.Z. Borgesius, *Demystifying the Draft EU Artificial Intelligence Act – Analysing the good, the bad, and the unclear elements of the proposed approach*, 4 Comp. L. Rev. Int'l 97 (2021).

¹⁷ At least until the adoption by the of the *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* by the White House Office of Science and Technology Policy in October 2022. The text is available at the following link: <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>. Additionally, reference can be made to the *Algorithmic Accountability Act* of 2022. For a comparison between this latter Act and the former of 2021 proposal of the Artificial Intelligence Act, see J. Mökander, P. Juneja, D.S. Watson, et al., *The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: what can they learn from each other?*, 32 *Minds & Machines* 751 (2022).

was also not effectively equipped and likewise lacked a proposal for regulating AI, at least in 2021.

The European Union, therefore, was the only organization truly willing to adopt the first binding set of legal provisions that was expected to become law for 27 Countries globally in a few years. From this perspective, the European Union demonstrated to have acknowledged the existing concerns that other international organizations have started to express about the likelihood that AI may result in severe human rights violations. Not surprisingly, these international organizations were similarly operating in Europe. This was the case of UNESCO and the Council of Europe, which during those same years published a significant number of reports on the risks associated with the massive and uncontrolled resort to AI technologies.

The Artificial Intelligence Act aimed, thus, at stating the European Union's priority in the process of regulating AI.

Despite the existing studies and research available at the time of the delivery of the proposal hinged on the human rights implications of AI, the European Union was initially more concerned about the impact of AI on privacy and data protection law. In other words, at the outset, there was a more explicit inclination of the European Union to endorse a privacy-based approach to inspire the Artificial Intelligence Act. Despite the declared willingness to ensure the safe use of AI systems and their compliance with human rights were recurrent in the text, the Artificial Intelligence Act did not initially lay down any specific mechanism to contravene fundamental rights violations caused by AI systems. Similarly, the proposal contained a very scarce reference to the risks of discrimination deriving from AI technologies, which conversely constitute one of the major concerns related to the massive resort to AI.

As of April 2021, and after three years of activity led by the High-Level Expert Group on AI (HLEG), the text built on a series of documents published by the European Union in the years before, such as the White Paper on AI and the European Strategy for data both released in 2020, but also on several resolutions released by the European Parliament on AI. In the European Strategy for data, the European Union emphasized its "leading role model for a society empowered by data to make better decisions - in business and the public sector" and highlighted its preference for "a strong legal framework - in terms of data protection, fundamental rights,

safety, and cyber-security - [...]” to pursue its ultimate goal, meaning “to capture the benefits of better use of data, including greater productivity and competitive markets, but also improvements in health and well-being, environment, transparent governance, and convenient public services”.

Additionally, the proposal was very much connected with the General Data Protection Regulation (Regulation (EU) 2016/679) and the Law Enforcement Directive (Directive (EU) 2016/680), whose legal provisions were expected to be completed by those adopted in the new legislation on AI.

Undoubtedly, the European Union institutions and the proposal that came up in 2021 were strongly convinced of the opportunity to govern technological innovations, to boost its beneficial use in the EU marketplace, and to contain its risks.

As a result, the Artificial Intelligence Act perfectly fits in this scenario.

It was based on the risk criteria, as it is nowadays, to subject AI technologies to a more or less strict regulation depending on the levels of their possible negative impact on human rights. The risk-based approach was, therefore, also in line with a human-centric approach to AI. The inherent rationale behind the text was, thus, to prohibit only AI technologies capable of violating human rights and to, conversely, permit the gradual resort to all other technologies whose benefits were proved to overcome the threats posed to humans.

The objectives first followed by the European Union at the time of the adoption of the proposal were “to ensure that AI systems [...] are safe and respect existing law on fundamental rights and Union values; ensure legal certainty to facilitate investment and innovation in AI; enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems; facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation”¹⁸.

Recalling Article 114 of the TFEU as the legal base of the act, the memorandum insisted on the necessity to ensure the homogeneous regulation of AI and the fulfillment of the above-mentioned objectives by way of a single legislation binding all

¹⁸ See the *Explanatory Memorandum* to the AI Act, 3.

Member States to avoid fragmentation and legal uncertainty¹⁹. The idea behind the proposal was, therefore, also to anticipate nation States' interventions which would have soon proved their inadequacy before the global nature of AI as a social phenomenon.

The more interesting aspect of the first version of the text hinged on the proposed categorization of AI technologies into three categories based on their respective risks to fundamental rights and safety. The text distinguished between unacceptable risk, high risk, and low or minimal risk. More specifically, the list of prohibited AI systems included practices thought to "have a significant potential to manipulate persons through subliminal techniques beyond their consciousness or exploit the vulnerability of specific vulnerable groups"²⁰.

Title II of the proposal prohibited AI technologies due to the unacceptable risks posed to human rights and European values. AI-based social scoring of natural persons for general purposes done by public authorities and real-time biometric identification systems were, for instance, both prohibited as well as all those AI systems capable of manipulating a person's behavior without his/her consciousness.

Besides prohibited AI technologies, the debate was more complex concerning the so-called high-risk AI technologies covered by Title III. Title III and Annex III, which were expected to enumerate AI systems considered high-risk in light of the criteria set out under the proposal, would soon become the target of the vast majority of amendments presented during the legislative process.

Without delving into too many details, high-risk AI systems were expected to comply with several criteria including, among others: record-keeping, to trace AI systems' work during their lifecycle (Article 12); transparency to enable users to know the

¹⁹ The text read as follow: "[t]he nature of AI, which often relies on large and varied datasets, and which may be embedded in any product or service circulating freely within the internal market, entails that the objectives of this proposal cannot be effectively achieved by Member States alone. Furthermore, an emerging patchwork of potentially divergent national rules will hamper the seamless circulation of products and services related to AI systems across the EU and will be ineffective in ensuring the safety and protection of fundamental rights and Union values across the different Member States. National approaches in addressing the problems will only create additional legal uncertainty and barriers and will slow market uptake of AI".

²⁰ See the *Explanatory Memorandum* to the AI Act, 12.

functioning and likely outcomes of AI systems (Article 13); human oversight to ensure human's control of AI systems during the entire phases of their functioning; accuracy, robustness and cybersecurity (Article 15). Title III also contained a long list of obligations for providers and users of high-risk AI.

Regarding minimal or low-risk AI systems, the proposal allowed their use in the European Union without providing obligations to add to those already enforced at the EU and national level.

Lastly, regarding governance, Title VI established the European Artificial Intelligence Board with consultancy competencies together with national competent authorities designated by each Member State to ensure the implementation of the proposal of regulation.

After its first presentation in April 2021, a lot has happened.

Jumping to the most recent and significant developments, it is worth mentioning that in June 2023 the European Union lawmakers started the first trilogy and the second took place in July 2023 following the EU Council's position adopted in December 2022²¹.

From December 2022 until the first trilogy, the Artificial Intelligence Act was subjected to several amendments as it emerged from the text adopted in December 2022 by the Council. In the "General Approach" to the Artificial Intelligence Act, two main points were discussed and challenged: the definition of AI systems and the enumeration and classification of AI technologies as high-risk under Annex III of the proposal. These two aspects represent the core of the proposal, in that they contribute to enlarge or conversely reduce the scope and ambit of application of the proposed regulation.

In particular, in December 2022 the EU's Council narrowed down the definition of AI systems in a way to include only machine learning AI technologies and systems developed through logic-and knowledge-based approaches. The two adjustments were at the center of several criticisms, that pointed to the fact that the exclusion of a vast type of software from the ambit of application of the proposal would have generated an increase in risks of human

²¹ A note on the EU's approach is offered by M. Heikkilä, *The EU wants to regulate your favorite AI tools*, Politico, 10th January 2023, Link: <https://www.technologyreview.com/2023/01/10/1066538/the-eu-wants-to-regulate-your-favorite-ai-tools>.

rights violations that are not exclusively caused by machine learning systems²².

Shortly before the adoption of the “General Approach” in December 2022, a similar debate took place as a result of the publication of the first EU Council’s “General Approach” in the first half of 2022 in the EU Parliament, which likewise doubted the broader definition of AI, the selected high-risk AI technologies, and to some extent even the lack of a serious commitment to guarantee human rights and fundamental freedoms²³.

On this, it is worth considering that the definition accepted in the EU Council’s “General Approach” was more in tune with that accepted by computer scientists who are known as being used to confining the definition of AI to software capable of replicating human abilities, developing autonomous and human-like abilities. While the amended definition might be more appropriate, the guiding principle should, however, be the likelihood of AI affecting fundamental rights regardless of the type of AI systems in question.

Not surprisingly, in November 2021, 114 NGOs presented the Statement “An EU Artificial Intelligence Act for Fundamental Rights. A Civil Society Statement”²⁴, indicating 9 objectives²⁵ EU institutions should orient their approach to AI. The Statement criticized several aspects of the first draft of the Artificial Intelligence Act.

²² Interestingly, the AI definition adopted by the US Blueprint for an AI Bill of Rights is much wider and it covers all AI systems that are considered capable of negatively impacting on fundamental rights. Accordingly, the text “applies to (1) automated systems that (2) have the potential to meaningfully impact the American public’s rights, opportunities, or access to critical resources or services”.

²³ Reference is made to the amendments proposed by the Parliamentary Commissions in charge of examining the text of the AIA: the IMCO, LIBE, JURI, ITRE and CULT Commissions.

²⁴ The full text of the Statement could be read at the following link: <https://edri.org/wp-content/uploads/2021/12/Political-statement-on-AI-Act.pdf>, 30 November 2021.

²⁵ The “Goals” set out in the Statement were directed towards the establishment of: 1. A cohesive, flexible and future-proof approach to ‘risk’ of AI systems; 2. the Prohibitions on all AI systems posing an unacceptable risk to fundamental rights; 3. the Obligations on users of high-risk AI systems to facilitate accountability to those impacted by AI systems; 4. the Consistent and meaningful public transparency; 5. Meaningful rights and redress for people impacted by AI systems; 6. Accessibility throughout the AI life-cycle; 7. Sustainability and environmental protections; 8. Improved and future-proof standards for AI systems; 9. A truly comprehensive AIA that works for everyone.

First and foremost, the choice to classify AI technologies on an *ex-ante* basis is considered “dysfunctional”²⁶ and inadequate, because it “does not consider that the level of risk also depends on the context in which a system is deployed and cannot be fully determined in advance”²⁷.

Secondly, the selection of the prohibited AI technologies, suggesting, among others, that biometric systems should always be prohibited, and to enlarge Annex III, adding new areas like healthcare and insurance. More importantly, the Statement was very much concerned with the human rights implications of AI, invoking a revision of the AIA willing to effectively protect the individual rights of those affected by AI systems and, especially, the right to access justice and to obtain a proper redress. Coherently, the Statement called for the revision of the notion of vulnerability, the AIA narrowed to age and disability, to include all factors of discrimination safeguarded under the EU Charter of Fundamental Rights.

In short, the Statement emphasized the need to develop a human-rights-based approach to AI and to loosen the exclusive connection between AI and privacy, which surely inspired the first drafts of the proposal.

The invitation of the 114 NGOs was somehow later acknowledged by the European Union in the recent version of the text published in June 2023²⁸. In short, worth mentioning are the amendments that strengthen individual rights and, among these, the principles of equality and non-discrimination which were

²⁶ *Ibidem*, 1.

²⁷ *Ibidem*.

²⁸ Even more recently, 115 NGOs expressed their concern on the latest version of the AIA presented in June 2023 with specific regard to the amended text of Article 6. An extract is emblematic of the rationale behind the statement when it is stated that: “[i]n the original draft from the European Commission, an AI system was considered ‘high risk’ if it was to be used for one of the high-risk purposes listed in Annex III. However, the Council and the European Parliament have introduced a loophole that would allow developers of these systems decide themselves if they believe the system is ‘high-risk’. The same company that would be subject to the law is given the power to unilaterally decide whether or not it should apply to them. These changes to Article 6 must be rejected and the European Commission’s original risk- classification process must be restored. There must be an objective, coherent and legally certain process to determine which AI systems are ‘high-risk’ in the AI act”. The fulltext of the Statement may be read at the following link: Link: https://edri.org/wp-content/uploads/2023/09/AI-Act_Article-6-NGO-statement-draft-FINAL.pdf.

conversely not adequately addressed in the past versions of the AIA²⁹.

The impression is that the European Union has finally rightly connected AI with human rights advancing its proposal in a way consistent to ensure a proper safeguard of the individual rights of those negatively impacted by AI systems. Not only, therefore, does the European Union demonstrate to welcome the amendment proposals, but it also places the Artificial Intelligence Act in a coherent relationship with the simultaneous initiatives undertaken by the Council of Europe in recent years.

4. Faster than Expected: The Council of Europe towards the First Treaty on Artificial Intelligence

In 2019, the Commissioner for Human Rights of the Council of Europe delivered a report titled *“Unboxing Artificial Intelligence: 10 Steps to Protect Human Rights”*³⁰. The report was directed to the Member States of the Council of Europe and intended to ensure a human rights-friendly approach to AI technologies to guarantee their beneficial use and an effective contrast towards their risks.

Building on the resolutions and recommendations adopted by the Parliamentary Assembly of the Council of Europe in the previous years, the document prioritizes human rights’ protection over any other competing interest at stake, listing ten “steps” to guide the Member States in their attempts to regulate AI³¹.

Although no legislation existed at that time in Europe, neither none of the Member States of the Council of Europe had adopted a Country-specific regulation on AI yet, the ten “steps” defined the

²⁹ See, among others, the amendments new of the Recital No. 9 of the Preamble; amendments No. 35 about Recital No. 13; amendments Nos. 53 and 75.

³⁰ The document can be read in full at the following link: <https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64>. For an insight into the methodology and approach of the Council of Europe towards AI, see M. Breuer, *The Council of Europe as an AI Standard Setter*, in *Verfassungsblog*, (2022).

³¹The so-called “steps” or “areas of intervention” mentioned in the above-mentioned document are listed as follows: “human rights impact assessment public consultations; human rights standards in the private sector; information and transparency; independent oversight; non-discrimination and equality; data protection and privacy; freedom of expression, freedom of assembly and association, and the right to work; access to remedies; and the promotion of artificial intelligence literacy”.

rationale that would have later supported the initiatives of the Council of Europe and, in short, the establishment of the two Committees asked to draft the first international human rights law treaty on AI.

The choice of negotiating a treaty is certainly the most significant aspect of the approach of the Council of Europe towards AI and technological innovation more broadly, in that it exploits the conviction of the opportunity to lay down a legislative framework to protect human rights, democracy, and the rule of law.

Everything started in 2019 when the Council of Europe appointed an *Ad Hoc* Committee on Artificial Intelligence (CAHAI) to identify the foundations of the future legal framework for the design, development, and application of AI systems. In December 2020, the CAHAI published its first Feasibility Study on the regulation of AI³², which preceded its final report released based on the results gathered during the multi-stakeholder consultation on the elements of a legal framework on AI in 2021.

The feasibility study contains a very comprehensive analysis of the state of the art of national and supranational regulations applicable to AI, which the study carefully investigates before the identification of the “key values, rights and principles”³³, that should inform the CoE’s future legislative framework on AI.

While the European Union was still struggling at that time to find a consensual definition of AI, the feasibility study chose, instead, to approach AI neutrally. The feasibility study shows to be more worried about the possible negative consequences of AI rather than about the identification of the most accurate and science-based definition. The focus on the human rights impacts of AI, thus, favored a bottom-up approach and the option for an “umbrella term”³⁴. It is worth mentioning here a passage from the feasibility study that better clarifies the rationale behind the chosen

³² The text of the CHAI’s Feasibility Study can be read at the following link: <https://rm.coe.int/cahai-2020-23-final-eng-feasibility-study-/1680a0c6da>, 17 December 2020.

³³ *Ibidem*, 27.

³⁴ *Ibidem*, § 9. The Study goes further clarifying that: “[t]o avoid any form of anthropomorphising and to include all technologies falling under the umbrella term of ‘AI’, the terms ‘AI systems’, ‘AI applications’, ‘AI solutions’ will be generally preferred in this feasibility study to refer to algorithmic systems based, indifferently, on machine learning, deep learning, rule-based systems such as expert systems or any other form of computer programming and data processing”, 2.

definition of AI. The CAHAI states that “a balance should be sought between a definition that may be too precise from a technical point of view and might thus be obsolete in the short term, and a definition that is too vague and thus leaves a wide margin of interpretation, potentially resulting in a non-uniform application of the legal framework”³⁵. As a consequence, the CAHAI suggested that the term AI should be understood as “covering those practices or application cases where the development and use of AI systems, or automated decision-making systems more generally, can impact on human rights, democracy and the rule of law, and taking into account all of the systems’ socio-technical implications”³⁶.

Moreover, the feasibility study acknowledged the existence of a variety of gaps in the domestic and supranational legal systems that suggest that the CoE adopted a uniform regulatory provision to avoid the hamper of “cross-border trade of AI products and services”³⁷, “the benefits of AI applications”³⁸, eventually the “more comprehensive level of protection regardless of the sector concerned”³⁹.

Similarly, to the European Union’s resort to the risk-based approach, the feasibility study details the main elements of the perspective legislative framework that should also depart from the risks posed by AI systems to individual rights, to then set out the requirements developers and deployers should comply with.

Conversely, instead of the European Union’s strategy that centered its regulation on the types of AI systems, the feasibility study inverts this approach and starts with the identification of the human rights that are required to be safeguarded. Among these, the feasibility study recalls traditional human rights, such as human dignity, democracy and the rule of law, human freedom and autonomy, non-discrimination, gender equality and diversity, privacy, and data protection, along with new rights associated with AI. The latter is the case of the principles of transparency and explainability and of accountability and responsibility of AI systems. For each of these, the study carefully lists the key substantive rights and the key obligations in a way that should orient the legislative choices.

³⁵ *Ibidem*.

³⁶ *Ibidem*, § 10.

³⁷ *Ibidem*, § 88.

³⁸ *Ibidem*.

³⁹ *Ibidem*, § 89.

Finally, the feasibility study dedicates its last chapter to the mechanisms and strategies to implement to ensure the compliance of AI systems with the rights and principles set out in the document.

After the Feasibility Study and the publication of the results of the multi-stakeholder consultation in April 2021, the CAHAI delivered its final report in December 2021. The report, *“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”*⁴⁰, includes the main elements and requirements of a “legally binding transversal instrument on AI” that should be met.

At the outset, the report emphasizes that the transnational nature of AI systems in terms of effects and actors involved should suggest that non-member States of the Council of Europe may likewise have access to the treaty to favor the far-reaching impact of the legislative framework and to contain the risks of excessive fragmentation of international human rights law instruments on AI. In line with the full awareness of the “transnational criteria” is, also, the preference for not too stark definitions and for striking a balance between legal certainty, which calls for precise definitions, and technology neutrality, which would opt for abstract definitions to allow the adaptation of the chosen terminology to the future technological developments.

About the elements of the legally binding transversal instrument on AI, the CAHAI follows the European Union’s path and similarly endorses a risk-based assessment to categorize AI systems. Nevertheless, and more explicitly than the European Union, the CAHAI connects the evaluation of the risk to the likelihood of AI systems negatively impacting human rights, democracy, and the rule of law, therefore, contributing to unraveling the content and significance of the notion of “risk” that, conversely, the AIA seems to be taken too much for granted.

Additionally, worth mentioning are the indications about AI systems to be subjected to absolute prohibitions. Reference is made to AI systems using biometrics to identify individuals or to “infer characteristics or emotions”⁴¹, especially when associated with

⁴⁰ The Study delivered on December 17th, (2021). Link: <https://rm.coe.int/possible-elements-of-a-legal-framework-on-artificial-intelligence/1680a5ae6b>.

⁴¹ *Ibidem*, § 21.

public surveillance purposes, and to those technologies that make use of social scoring to allow or deny access to services⁴².

In so far as the design and development of AI systems are concerned, the document states that safety and security must be the two elements any developers and deployers should rely on and that a legally binding instrument should also include tailored mechanisms to safeguard gender equality as well as strategies of protection for vulnerable groups and individuals. Particularly interesting, is the focus placed by the CAHAI on the principle of equality and non-discrimination, vice-versa not entirely considered by the European Union at least in the first drafts of the AIA. The CAHAI suggests including a specific legal provision requiring the respect of equal treatment and non-discrimination in the design, implementation, and application of AI systems.

This time, similarly, to the European Union, the CAHAI recommends that the future legally binding instrument should be based on the new principles associated with AI in their relationship with human beings to ensure the control and prevalence of the latter.

Transparency, explainability, and accountability argues the CAHAI, “are of paramount importance for the protection of the rights of individuals in the context of AI”⁴³. Additionally, a certain level of human oversight is likewise welcomed and required.

Moving forward, particularly interesting is the efforts dedicated to the elements of safeguards. Within this framework, the document affirms the non-derogable nature of the right to access justice by specifying its corollaries in the context of AI. Therefore, a treaty should state the respect for the right to “an effective remedy before a national authority [...], the right to be informed about the application of an AI system in a decision-making process; the right to choose interaction with a human in addition or instead of an AI

⁴² Worth mentioning is also that, recently, the European Court of Human Rights (ECtHR) condemned Russia for using facial-recognition technology. In *Glukhin v. Russia*, [Third Section], n. 11519/20, 4th July 2023, the ECtHR sanctioned the respondent State for having allowed State police to resort to biometric service to identify suspects. The ECtHR concluded for the finding of a violation of Article 8 ECHR, arguing the illegitimacy of the interference in the applicant’s right to private life due “to the lack of detailed rules in the domestic law governing the scope and application of measures involving the use of facial-recognition technology as well as the absence of strong safeguards against the risk of abuse and arbitrariness”, see, extensively, §§ 82 ff. See, on this, also, *infra*.

⁴³ The CHAI’s *Feasibility Study*, § 30.

system, and the right to know that one is interacting with an AI system rather than with a human”⁴⁴.

Further suggested provisions cover the establishment of compliance mechanisms, including at the domestic level, and the feasibility of additional legal instruments to adopt to ameliorate the accuracy of the risk-assessment process.

In light of these indications, the CAHAI concluded its mandate in 2021 and left the floor to the Committee on Artificial Intelligence (CAI)⁴⁵, which in 2022 started discussing the drafting of the first global human rights law treaty entirely dedicated to artificial intelligence.

The CAI was instructed to complete within the end of November 2023 the draft of an “[a]ppropriate legal instrument on the development, design, and application of artificial intelligence systems based on the Council of Europe’s standards on human rights, democracy and the rule of law, and conducive to innovation, under the relevant decisions of the Committee of Ministers”⁴⁶.

The scope, ambit of application, and content of the proposed treaty are dedicated to the paragraph that follows.

4.1. From the Revised Zero Draft Framework Convention to the Consolidated Working Draft

The Revised Zero Draft [Framework] Convention on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law represents the most significant product of the Council of Europe’s initiatives described above. Following the publication of the first version of the text (the “Zero Draft”), the CAI delivered an updated document in January of this year and, ultimately, in July, it delivered a Consolidated Working Draft that will be the basis for the upcoming negotiations that will be held in the fall⁴⁷. The

⁴⁴ *Ibidem*, § 40.

⁴⁵ The CAI was set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2021)3 *on intergovernmental committees and subordinate bodies, their terms of reference and working methods*. The CAI will be in charge until December 31st., 2024.

⁴⁶ See the Terms of reference related to the establishment of the CAI, that can be read in fulltext at the following link: <https://rm.coe.int/terms-of-reference-of-the-committee-on-artificial-intelligence-for-202/1680a74d2f>.

⁴⁷ The 7th meeting of the CAI will take place in Strasbourg on 24-26 October 2023.

Consolidated Working Draft⁴⁸ includes provisions that were discussed and approved by the CAI while examining the Revised Zero Draft during its first meeting and additional provisions proposed by the CAI's Chair in cooperation with the Secretariat.

Despite the scope, the ambit, and the *rationale* being analogous, the two texts differ in a variety of aspects starting from the structure of the proposed Convention. As the latter contains the legal provisions that will be discussed in the next CAI meeting, the following analysis will consider this last version without omitting to underline the most relevant amendments.

At the outset, it is worth mentioning that the Consolidated Working Draft seems to be inspired by the need to ensure a more homogeneous legal framework among the contracting States compared to the previous Revised Zero Draft, limiting references to domestic laws. While several elements are still waiting for the negotiations that will be taking place in October 2023, the Consolidated Working Draft smooths the relationship between the Convention's draft and domestic laws by significantly containing the areas of deference to existing domestic laws, thus, delaying the discussion concerning the reservations to the Convention as sets out under Article 32 of the Revised Zero Draft. The importance of the reservations is bound, as known, to the prerogative recognized to the contracting States to limit the application of certain provisions of the Convention in their respect, therefore, possibly limiting the enforcement of the treaty. It will be extremely interesting, therefore, to verify what the CAI will decide next October moving from the proposed text of Article 32 that as for now excludes that reservations can be made to the Convention.

In terms of accession to the Convention, instead, the Consolidated Working Draft preserves the approach of the Revised Zero Draft and, siding with the document delivered by the CAHAI, maintains that any non-member State of the Council of Europe, that has not participated in the elaboration of the Draft, may have access following a decision taken by "the majority provide for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers"⁴⁹.

⁴⁸ The fulltext of the document published on July 7th, 2023, is available at the following link: (<https://rm.coe.int/cai-2023-18-consolidated-working-draft-framework-convention/1680abde66>).

⁴⁹ See Article 30, § 1, of the Consolidated Working Draft.

The joint participation in the negotiating process of Israel, Canada⁵⁰, the United States, Mexico, and the Holy See is emblematic of the expected transcontinental impact of the CoE's Convention. Moreover, it signals the leading position of the Council of Europe in the regulatory process of AI, while other international organizations have not yet adopted similar positions, and the willingness of a large number of States to defer the regulation of AI to the supranational system of human rights protection instead of ruling on AI at the domestic level.

Although the overlapping *rationale*, the structure and contents of the Consolidated Working Draft are slightly different compared to the Revised Zero Draft.

The General Provisions set out very clearly the main principles together with the scope and the ambit of application of the proposed treaty. Under Articles 1 and 4, the Consolidated Working Draft, thus, states that the design, development, use, and decommissioning of AI systems must comply with the principles of human dignity, individual autonomy, human rights, democracy, and the rule of law, whereas Article 2 underscores that the risk-based approach will have to guide the measures implemented at the domestic level to give full effect to the Convention⁵¹. This will necessarily imply the endorsement of graduated and differentiated mechanisms, in light of the severity of the likelihood that AI systems will endanger some of the above-mentioned principles.

Additionally, and evidentially, such a deference to domestic legislation cannot but be regarded as one of the major weaknesses of the Draft⁵².

⁵⁰ Canada is no doubt one of the most significant example of State's effortless attempt to lay down a legislation on AI. Quebec, in particular, offers some peculiar insight starting with the *La Déclaration de Montréal pour un développement responsable de l'intelligence artificielle*, that can be read at the following link: <https://declarationmontreal-iaresponsable.com/la-declaration/>.

⁵¹ According to the text that will be discussed within the year, "[i]n order to give full effect to the principles and obligations set out in this Convention, each Party shall maintain and take such graduated 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, use and decommissioning of artificial intelligence systems".

⁵² Insists on the "archaic" system of implementation of the Draft Convention, that has never challenged in the subsequent versions of the text, is T. Giegerich, *How to Regulate Artificial Intelligence: A Screenshot of Rapidly Developing Global, Regional and European Regulatory Processes*, cit. at 1, 8 who, referring to the actual text of

The Consolidated Working Draft is instead remarkable, in that it specifies the criteria to take into consideration to evaluate the “risk”. Instead of a blank reference, which could give rise to unwanted discretion, the text makes it clearer that the risk assessment will have to be based on the feasibility of AI systems to negatively impact human rights, democracy, and the rule of law. The importance of Article 2 has to be understood in light of the less clear choice of the European Union that, conversely, is silent as to the notion of risk and its significance for the AIA. Chapter I ultimately includes the definition of AI systems. Contrary to the EU’s AIA, the CAI adopts a wider definition without giving rise to the criticisms connected to the chosen narrower notion of AI intended to cover solely machine learning and deep learning systems.

One valuable trait of the Consolidated Working Draft, then, lies in the structure of the text that moves from the enumeration of the obligations and principles developers and users must conform to. The human rights-based approach emerges, therefore, evidently already in the structure of the Convention which begins by listing the old and new human rights linked to AI. Therefore, Chapters II and III, respectively, recall the obligations and principles each contracting State has to secure in the processes related to AI systems.

Moreover, Chapter III explains the significance of the already known principles of transparency and oversight (Article 7); accountability and responsibility (Article 8); Equality and non-discrimination (Article 9), which lost third place as it was for the Revised Zero Draft where it was more significantly placed in the Chapter dedicated to the General Provisions (Article 9); privacy and personal data protection (Article 10); safe, security and

Article 28, stating that “[i]n the event of a dispute between Parties as to the interpretation or application of this Convention which cannot be resolved by the Conference of the Parties, as provided for in Article 23, paragraph 1, c, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties to the dispute, or to the International Court of Justice, as agreed upon by the Parties concerned”, sheds light on the non-binding effect of the Draft Convention. The Author clarifies on this, that “Parties are unwilling to introduce any kind of compulsory third-party dispute settlement procedure which alone is suitable for effective settlement. Consequently, implementation mechanisms at the disposal of the States Parties to the Framework Convention are limited to diplomatic means”.

robustness, tracing an appropriate and much-welcomed connection with cybersecurity-related issue already object of a specific treaty in the CoE's system of human rights (Article 11); safe innovation, which is extremely important as it concerns the phase of the testing of AI technologies which, again, must not interfere with human rights, democracy and the rule of law (Article 12).

Concerning access to justice, the Consolidate Working Draft invites the Member States to provide individuals with appropriate judicial remedies alongside effective procedural safeguards, among which the right to know that one is interacting with an AI system and the right to opt for interacting with a human being instead of with an AI system.

The rights to know and to opt for not interacting with an AI system go hand in hand with the other procedural safeguards domestic laws should respect. According to the proposed Article 14, § 1, the Consolidated Working Draft requires that individuals have access to the necessary guarantees and safeguards anytime they are subject to AI systems built to make decisions or to inform.

The Consolidated Working Draft goes on, like the Revised Zero Draft, detailing the provisions on risk assessment and training. Particularly, the Consolidated Working Draft shows a much more attentive care to the crucial role of training activities that according to the amended text should be provided to all those involved in the design, implementation, use, and decommissioning of AI systems, compared to previous Revised Zero Draft that, conversely, restricted the obligation for the contracting States to a mere external supervision delegated to an established ad hoc authority.

Additionally, and again contrary to the Revised Zero Draft that stated that the implementation of the Convention should be secured without discrimination at the opening of the text under Article 3, the Consolidated Working Draft postpones the reference

to the principle of non-discrimination under Articles 9⁵³ and 17⁵⁴ and enshrines it under a specific Chapter titled “Implementation of the Convention”. Although the choice could be seen as a way of weakening the strength of the principle of non-discrimination, the Consolidated Working Draft goes on to specify additional rights in need to be safeguarded. Reference is made to the new Article 18 dedicated to the rights of persons with disabilities and children, which represents one true novelty for the Revised Zero Draft. Moreover, it will be interesting to verify whether the CAI will expand the number of vulnerable groups in light of the negative effects AI systems have demonstrated to cause to additional categories such as ethnic and national minorities, and indigenous communities. Also, no provisions of the Consolidated Working Draft target women and the recurrent gender-based discriminations deriving from AI technologies.

The implementation of the Convention is, then, left to further provisions about its complementary nature and relationship with other international human rights treaties and domestic laws. The Convention won’t have to limit or derogate from already safeguarded human rights, other treaties, and domestic laws applicable in the field of AI.

Lastly, the Consolidated Working Draft proposes only one major amendment in the Chapter dedicated to the role of contracting States in the application of the Convention. While the Revised Zero Draft provided for the establishment of national supervisory authorities tasked with oversight functions, the Consolidated Working Draft chose to defer to the contracting States how to oversight the respect of the Convention at the domestic

⁵³ The proposed text of Article 9 states that: “[e]ach Party shall take the necessary measures a view to ensuring that the design, development, use and decommissioning of artificial intelligence systems respect the principle of equality, including gender equality and non-discrimination” and, also, that “[e]ach Party is called upon to adopt special measures or policies aimed at eliminating inequalities and achieving fair, just and equal outcomes, in line with its applicable domestic and international human rights and non-discrimination obligations”.

⁵⁴ According to Article 17, “[t]he implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, gender identity, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, state of health, disability or other status, or based on a combination of one or more of these grounds”.

level. No further amendments to the Consolidated Working Draft were suggested as to the final clauses of the text.

Besides the differences between the two texts, only that of the Consolidated Working Draft will be examined and discussed in the fall. Whether the CAI will go back to the previous text or beyond the options endorsed in the Consolidated Working Draft is left to further analysis in light of the future developments of the ongoing process before the Council of Europe.

5. It Takes Two to Tango? Perspectives and Challenges at the time of “the Wait” ...

The above analysis of the EU’s Artificial Intelligence Act and, especially, of the CAI’s Consolidated Working Draft aimed at describing the major traits of the European’s approach towards AI⁵⁵.

No doubt exists anymore in Europe as of the preference for the regulatory or normative approach, that has been commonly shared by the two major European international organizations since the very beginning. Europe has always, in fact, looked at AI as a phenomenon requiring legal boundaries and rules contrary to the United States and to some extent the United Nations as well, firmly convinced of the urge to let AI develop on its own and that, conversely, recently started working domestically and internationally for laying down specific legislations.

In Europe, while the purpose of regulating AI brings together the European Union and the Council of Europe, there are nevertheless a few comments worth making⁵⁶.

⁵⁵ Very recently a debate on AI regulation also started within the United Nations. On 18 July 2023, the UN Security Council started off a discussion on AI for the first time. The document *Guiding Principles affirmed by the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System*, CCW/MSP/2019/9, Annex, see the full text at the following Link: https://www.ccdcoe.org/uploads/2020/02/UN-191213_CCW-MSP-Final-report-Annex-III_Guiding-Principlesaffirmed-by-GGE.pdf.

⁵⁶ Although referred to the initial initiatives of the CAHAI, interesting comments on the comparison between the EU’s and the CoE’s commitments in regulating AI are expressed by M. Breuer, *The Council of Europe as an AI Standard Setter*, cit. at 30, who significantly emphasized that “[b]y and large, the two proposals would seem to be complementary with each other but of course, views might be divided on specific questions. One major issue could be whether the CAHAI’s concentration on the use of AI in the public sector leads to stricter standards, compared to the market approach of the Commission proposal. Conversely, the

The first deals with the different impacts arising from the adoption of the two texts.

The European Union is discussing the approval of a regulation, that will be compulsory applied in the legal systems of all the Member States with no chances for derogations at the domestic level. Coherently with the subsidiarity nature of international human rights law, the Council of Europe's Convention will, conversely, act as a supplementary tool expected to integrate and complement already existing supranational and domestic laws and regulations⁵⁷.

Additional aspects concern the territorial application, the methodology, the scope, and the content of the AIA and the Council of Europe's Zero Draft Convention on AI.

We are not necessarily speaking of differences. More often, the heterogeneity traceable between the texts has progressively been smoothen in recent processes, in the case of the AIA especially. Despite the latter was originally intended to be more concerned with AI's implications on data protection and privacy than on human rights, the text published in mid-June 2023 shortens the distances with the CoE's approach to embracing an explicit human

CAHAI's emphasis on minimum standards could also lead to even more lenient standards. In any event, it is good to see the human individual placed in the centre of AI regulation".

⁵⁷ The precedence of the AI Act over the CoE's Convention is also established in the latter text under Article 26, according to which: "[p]arties which are members of the European Union shall, in their mutual relations, apply European Union rules governing the matters within the scope of this Convention".

rights-based and a clearer ethical sensibility⁵⁸, in the attempt to close the gap with the text released in April 2021⁵⁹.

The territorial application is an additional element of possible separation. The choice to allow non-member States to access the treaty sanctions, in fact, the further reach of the CoE's Convention compared to the AIA that will be applicable solely within the 26 member States of the European Union.

The weight of the larger territorial impact of the CoE's Convention will, nevertheless, be evaluated after its definitive approval to verify whether the non-member States will eventually sign and ratify the treaty. As for now, it should be welcomed the wider composition of the States sitting at the table of the negotiations. It signals the willingness of a vast number of – Western, except for Israel – States to adopt uniform rules to govern AI systems and, at the same time, the shared acknowledgment of the necessity to opt for global solutions avoiding fragmentations. This was one of the indications of the CAHAI's Feasibility Study described above that the CAI seems to have taken seriously in the drafting process of the Convention.

On the same issue, it will also be interesting to wait for the responses of the United Nations, that have until now postponed the discussion on the approval of any legally binding instrument but has recently engaged in a debate about the opportunity to lay down a set of Guidelines on AI and human rights. Similarly, there are

⁵⁸ Among the official documents released at the supranational level, see *AI Ethics Guidelines Global Inventory* released in 2020 by *Algorithm Watch*, Link: <https://inventory.algorithmwatch.org>; AIHLEG (High-Level Expert Group on Artificial Intelligence), *Ethics Guidelines for Trustworthy AI*, European Commission, 2019, Link: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>. Also, see J. Fjeld et al. *Principled artificial intelligence: Mapping consensus in ethical and rights-based approaches to principles for AI* (2020); L. Floridi, *Translating Principles into Practices of Digital Ethics: Five Risks of Being Unethical*, 32 *Phil. & Tech.* 185 (2019); A. Jobin, M. Ienca, E. Vayena, *The Global Landscape of AI Ethics Guidelines*, 1 *Nature Machine Intelligence* 389 (2019); L. Langlois, C. Régis, *Analyzing the Contribution of Ethical Charters to Building the Future of Artificial Intelligence Governance* in B. Braunschweig, M. Ghallab, (eds.) *Reflections on Artificial Intelligence for Humanity* (2021), 15.

⁵⁹ Additionally, the last version of the text proves to be more consistent with the European Union's Charter of Fundamental Rights, although it continues to be questionable the lacking references to the EU Directives on anti-discrimination law that should have conversely been taken properly into account.

States across the globe, China first, that preceded Europe and that now count on country-specific laws on AI. Here, the questions revolve around how the EU's regulation will act and react towards other Western and Eastern States domestic legislations, on the one hand, and international human rights law instruments towards the upcoming CoE Convention, on the other⁶⁰.

A third aspect concerns the different methodologies followed by the EU and the CoE.

While the Council of Europe engaged in a public consultation for the adoption of the CAHAI's Feasibility Study that was expected to precede the CAI's mandate, the European Union kept the debate entirely within its institutions. Interestingly despite the European Union not resorting to any public consultation, European NGOs had a say on the AIA highlighting the most significant criticisms of the first draft.

Different methodologies, yes, but quite eventually similar outcomes, at least in the *rationale*. The AIA has, in fact, progressively taken into account the major critiques of the 114 NGOs' Statement delivered in November 2021, getting closer to the *rationale* that in the same years was guiding the CAHAI, first, and the CAI, right after.

Moving on in the comparative analysis, a fourth trait that initially greatly distances the AIA from the work of the Council of Europe dealt with the rationale underneath the two proposals. Whereas time proved the divergence was more apparent than real, the investigation of the two texts suggests that it should be kept in mind the origins of the AIA and the Revised Zero Draft Convention. The AIA was, as said already, more concerned with the impact of AI systems on privacy, couched as if it was the prominent and almost exclusive field AI might have been capable of affecting. On the other side, the Council of Europe conversely diminished at the very beginning the weight of privacy and data protection, looking at the intersection between AI and human rights.

The years that followed demonstrated the increasing contamination between the European Union and the Council of Europe as to the content of the respective regulations. On this, it could be easily sustained that, perhaps, it was more the Council of

⁶⁰ A very interesting overview is offered by a recent publication of UNESCO, *Missing links in AI governance*, (2023), Link: <https://unesdoc.unesco.org/ark:/48223/pf0000384787>.

Europe to influence the European Union than the other way round. The lack of concern towards human rights implications, which originally featured the AIA, has been, in fact, progressively reduced, while the Council of Europe started publishing the previous draft of the Framework Convention.

Between 2021 and 2023, the European Union incorporated numerous references to human rights other than those related to privacy and data protection, enhancing the levels of safeguards towards traditional human rights and “new” rights associated with AI, such as transparency, explainability, and the so-called right to know. Moreover, the General Approach published in June 2023 seems to have finally filled the gaps, highlighted in the above-mentioned Statement delivered less than two years before by the 114 NGOs⁶¹, finally linking the AIA with the EU’s anti-discrimination law, thus enforcing the safeguard of the principles of equality and non-discrimination even within the AI’s discourse.

Eventually, although different in their scope and effects on the domestic level – of compulsory application of the EU’s act/subsidiary and subject to domestic norms governing international law placement in the national system of the sources of law, the CoE’s –, the two supranational organizations have reached quite similar, if not entirely overlapping, conclusions as to the strategies to handle the challenges brought by AI systems.

Besides the coherence in terms of scope and rationale, it remains unclear whether and how the two acts will complement one another. That is to say, whether the AIA and the Framework Convention will be keen on jointly operating in such a way to ensure a coherent set of legal provisions regulating AI in Europe. The coordination between the acts would be particularly important, in light of the non-overlapping States’ composition of the two supranational organizations, which suggests that the homogeneity of the legal provisions will create a common space, avoiding domestic fragmentation and contrasting rules.

Moreover, the coherence between the AIA and the Framework Convention will favor the extra-European application of the adopted rules. The participation of non-member States of the Council of Europe in the negotiations that are currently taking place following the lead of the CAI would expand the enforceability of the CoE’s regulation on a global basis, eventually impacting a vast

⁶¹ On this, see, above, Par. No. 3.

majority of Western States beyond those that are formal members of the Council of Europe. Despite the absence of approved legislation, Europe is striving to keep the lead and is doing so even by crossing European boundaries.

The more Europe will succeed in ensuring the cooperation between its two most prominent supranational organizations, the more it will play out as a true leader in laying down the first and territorially broader regulation on AI possessing a strong human-rights basis.

While we wait, the European Court of Human Rights has just delivered in July 2023 its first judgment on AI, sanctioning the use of biometric systems for public surveillance, considered “highly intrusive” and in violation of both the right to private life (Article 8 ECHR) and of freedom of expression (Article 10 ECHR)⁶². Whether the ECtHR’s judgment will affect the European debate on AI systems and beyond to soon to say⁶³. Certainly, the judgment signals that Courts are eventually starting to have a say on AI’s

⁶² See, ECtHR, *Glukhin v. Russia*, no. 11519/20, 4 July 2023. Additional cases delivered by the ECtHR on the human rights issues pertaining to new technologies maybe examined by looking at the case-law gathered under the related factsheet at the following link: (https://www.echr.coe.int/documents/d/echr/FS_New_technologies_ENG).

On the ECtHR’s judgement, see F. Palmiotto, N. Menéndez González, *Facial recognition technology, democracy and human rights*, 50 *Comp. L. & Sec. Rev.* (2023). Also, for a brief comment, see N. Camut, *Russia illegally used facial recognition to arrest protestor, human rights court rules*, in *Politico*, 4th July 2023, link: <https://www.politico.eu/article/russia-illegally-used-facial-recognition-to-arrest-protestor-european-human-rights-court-rules/>.

⁶³ Worth mentioning are even more recent worldwide developments on AI and human rights. Right after the Global Summit on AI held last November 2023 in the United Kingdom, the “Bletchley Declaration” was adopted. The text might be read at the following link: <https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023>. Another worth mentioning initiative was the Meeting hosted in Kyoto in October 2023 with the participation of the Council of Europe at the 18th United Nations’ Internet Governance Forum, *The Internet We Want - Empowering All People*. See, more specifically on this, the speech of the CoE’s Secretary General at the following link: <https://www.coe.int/en/web/deputy-secretary-general/-/%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B%E2%80%8B-internet-governance-forum-%C2%A0opening-remarks-at-the-session-shaping-artifical-intelligence-technologies-to-ensure-respect-for-human-rights-and-democratic-values->.

impact on human rights and that individuals are slowly beginning to successfully bring their cases to justice.

The future of AI and humans is ahead of us. It is a matter of time, but, maybe, Europe is on the right track⁶⁴.

⁶⁴ See, also, the initiatives undertaken in the United States of America, among which the Executive Order of President Joe Biden to regulate IA on the federal level, *on Safe, Secure, and Trustworthy Artificial Intelligence*. Fulltext available at the following link: <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/>, which follows the previous *Blueprint for an AI Bill on Human Rights*, cit. above, and an even more recent Executive Order, adopted in February 2023, significantly entitled *Strengthen Racial Equity and Support for Underserved Communities Across the Federal Government*.