ENNHRI Submission on the zero draft [framework] Convention on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law

The European Network of National Human Rights Institutions (ENNHRI) is made up of more than 40 independent National Human Rights Institutions (NHRIs) in Europe. NHRIs are established by constitution or law to protect and promote human rights in accordance with the United Nations Paris Principles and the Council of Europe Committee of Ministers Recommendation 2021/1. ENNHRI prioritises the promotion and protection of human rights, democracy, rule of law and artificial intelligence (AI), including through building capacity of NHRIs and engaging with regional policy and legislative processes.

ENNHRI makes this submission in the context of its observer status at the Council of Europe Committee on Artificial Intelligence (CAI) which is developing a Convention on artificial intelligence, human rights, democracy, and the rule of law ('AI Convention'). ENNHRI's submission draws on previous work done by the Council of Europe in this area, including: the Ad hoc Committee on Artificial Intelligence's Possible elements document of a legal framework on artificial intelligence; the Recommendation of the Committee of Ministers to member States on the human rights impacts of algorithmic systems; and the Recommendation of the Commissioner for Human Rights 'Unboxing Artificial Intelligence: 10 steps to protect Human Rights'.

1. Broad Scope of the Convention, Securing Human Rights, Universal Ethical Principles and a Human Centric Approach

ENNHRI recognises the profound and dynamic impacts of AI, both positive and negative, on societies, environment, ecosystems and human lives. It is important to reiterate that the use of AI with its specific characteristics (e.g. opacity, complexity, dependency on data, autonomous behavior) may cause collective and societal-level harms, even when they cause only negligible harm to individuals. ENNHRI welcomes efforts undertaken by international and supranational organisations and fora (such as UNESCO, OECD or the European Commission's High-Level Expert Group), insisting on the key universal ethical principles to be respected and the human centric approach in AI, and recommend this approach to be adopted throughout the AI Convention.

ENNHRI underlines the need for a sufficiently broad scope of application of the AI Convention. The Convention should not only protect against risks to individual fundamental rights, but also protect

against risks of (collective) discrimination, failure to respect the values of social justice, and societal risks, which include but are not limited to risks to the environment, language, culture, democracy, and rule of law. The Convention should be made future-proof by using technology-neutral language wherever possible. Moreover, ambiguous terminology that unduly restricts the scope of the AI Convention should be replaced by more precise terminology. The scope of the AI Convention and restrictions on the exercise of rights provided in the AI Convention should be in line with existing CoE Conventions, in particular the European Convention of Human Rights (ECHR) and European Court of Human Rights (ECtHR) jurisprudence. The AI Convention should complement and refine human rights obligations in the area of AI and should be without prejudice to the level of protection afforded under already existing human rights obligations.

ENNHRI recalls in particular the need for accessible and effective redress mechanisms allowing individuals and associations to contest and seek redress for all AI systems that create individual, collective or societal harms or infringe on other obligations set out in the AI Convention, in accordance with existing standards on effective remedy.

2. Adequate Prohibited Practices & Human Rights Impact Assessment

ENNHRI recalls the need for the AI Convention to ensure effective future-proof protection against prohibited practices which pose unacceptable risks for human rights, democracy and the rule of law. The current list with banned AI practices should be further developed to provide meaningful protection against human rights violations enshrined in the ECHR and risks to collective and societal interests. The list should be extended with AI applications which pose an unacceptable risk to human rights, democracy and the rule of law, such as, but not limited to AI systems for immigration enforcement purposes, AI physiognomy, AI systems used by law enforcement and judicial authorities for the purpose of predicting crimes. The current draft EU Artificial Intelligence Act can serve as inspiration for the revision of the current list of the AI Convention. Moreover, the procedure to revise the list should be sufficiently flexible, introducing the possibility of temporary bans under the AI Convention.

ENNHRI recognises the need to have a proportionate risks approach leading to differentiating impact assessments for various types of AI applications. Adequate human rights responsibility could be ensured by multidisciplinary two-tier human rights, democracy, and rule of law impact assessments. This would entail a third-party preliminary human rights impact assessment, and if a high risk is identified, a more complete assessment supervised by the national supervising authority would be required, including a possible third-party assessment by a qualified auditor.

3. Strong Independent Oversight at National and Council of Europe Level

ENNHRI emphasizes the importance of independent oversight and enforcement mechanisms at national and CoE level to ensure that artificial intelligence is consistent with human rights, democracy and the rule of law.

ENNHRI recalls the role of NHRIs in the supervision and enforcement of human rights, democracy and the rule of law, including in the implementation of the European Convention of Human Rights, and in the execution of judgements of the European Court of Human Rights. Accordingly, when considering the appointment of a national supervisory authority under the AI Convention, States should consult their NHRI and consider appointing one or more existing independent national human rights authorities, such as NHRIs, as the national supervisory authority.

ENNHRI underlines that the AI Convention should include requirements for formal and functional independence of national supervisory authorities, in line with existing standards on independent national human rights structures such as those laid down in Recommendation CM/Rec(2021)1 of the Committee of Ministers on NHRIs. States should ensure adequate resources will be allocated for the national supervisory authority to carry out its mandate effectively, including in terms of funding and staffing. The resources should, in particular, ensure a sufficient number of staff permanently available whose competences and expertise should include an in-depth understanding of artificial intelligence technologies, data and data processing and human rights. The authority should have a strong mandate and powers, including but not limited to, investigative powers, a complaint-handling, reporting and promotional mandate.

In light of the need for transparency and understanding of the workings of algorithms (including, when algorithms are trained on data, on the data used in these instances), the independent authority should be mandated to promote public awareness, transparency and accountability. In carrying out its mandate, the national supervisory authority under the AI Convention should cooperate with other independent national human rights structures and this cooperation should be institutionalised, in line with the approach taken in the current draft EU Artificial Intelligence Act.

The AI Convention should foresee that existing independent national human rights structures, when not being appointed as the national supervisory authority under the AI Convention, should get meaningful access to AI information to carry out their mandate. State authorities should enable and invest in training and awareness raising of staff of independent national human rights structures in relation to AI, which is intrinsically linked to fulfilling their mandates and roles in the promotion and protection of human rights, democracy and the rule of law.

At CoE level, a Convention Committee should be established whose composition will allow for sufficient expertise in the AI domain, such as the Committee set up under Convention 108+ which is composed of representatives of all Parties, 'from the national supervisory authorities or from the government'. In order to enable adequate interaction between national supervision and the European monitoring mechanism, national supervisory authorities should at least be granted observer status within the Committee.

4. Reinforced Multi-Stakeholder Participation & Public Consultation

AI biases can exacerbate inequality, digital divides, exclusion, deepening and new divides and inequalities in the world, within and between countries. Therefore, the right to non-discrimination requires particular attention. Moreover, multi-stakeholder participation, including consultation with those individuals or groups most affected by AI, should be reinforced throughout the Convention.

ENNHRI stresses the importance for the AI Convention to promote AI literacy and to ensure public consultations on AI innovations, guaranteeing equal and fair access for natural and legal persons, with particular attention to the most vulnerable. A meaningful public consultation process entails timely and prior publication of and access to all relevant information on the AI system, which facilitates a proper understanding of its operation, function, and potential or measured impacts. Consultations with all stakeholders, including state actors, private sector representatives, academia, the non-profit sector, the media and representatives from the affected are crucial to ensure that the impacts of digital technologies are comprehensively monitored, debated and addressed.

5. Strengthened Responsibilities of the Public and Private Sector

ENNHRI underlines that the use of AI by the public sector requires additional obligations as principal duty-bearers for human rights, democracy and the rule of law. For example, the general principle of good administration demands full respect of equality of access, heightened transparency obligations and the right to meaningful human review.

ENNHRI notes that the private sector is also a central actor in the fields of artificial Intelligence, human rights, democracy, and the rule of law. Accordingly, ENNHRI recommends that the Convention explicitly recognizes the responsibility of business to respect human rights as laid out in the UN Guiding Principles on Business and Human Rights and in line with ongoing European regulatory and policy initiatives, through a process of human rights due diligence.

ENNHRI stands ready to further engage with the Council of Europe CAI on the basis of this common position, including through observing the upcoming CAI drafting group meetings.