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How to Regulate Artificial Intelligence:
A Screenshot of Rapidly Developing Global, Regional and European Regulatory Processes

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Preface

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I. Mitigating Risks of AI without Stifling Beneficial Innovation – Europe Ahead in the Struggle for the Optimal *Lex Ferenda*

AI raises many legal questions because it is a new risk technology that is developing extremely fast. The latest stage is generative AI (such as ChatGPT) which has enormously increased the general interest worldwide in both the benefits and the risks involved. While the law is usually at least one step behind technological developments, it may be several steps in the case of AI. Are we sleepwalking into a brave new world of uncontrollable artificial spirits, like sorcerer's apprentices?[1]

Regulating new technologies always requires striking an adequate balance between mitigating risks and enabling innovation for the benefit of humanity. According to the basic liberal principle, there should be "as much freedom as possible, as many limitations as necessary". Where there are uncertainties due to an incomplete knowledge basis, as with regard to AI and its potential impact on humanity, the precautionary principle comes in. It requires hazard prevention even if that hazard cannot (yet) be fully established scientifically. In accordance with the precautionary principle, the Future of Life Institute in March 2023 published an Open Letter calling for a pause in giant AI experiments for at least six months: "Powerful AI systems should be developed only once we are confident that their effects will be positive and their risks will be manageable. This confidence must be well justified and increase with the magnitude of a system's potential effects."[2] More than 30,000 people all around the globe have so far signed it.

The question to be answered therefore is: How much freedom in developing, releasing, sharing and using AI can be allowed without endangering the common good and perhaps even the survival of the human species, considering that the risks involved are uncertain, but possibly great? This question is addressed to the main actors on the AI stage, both private and public: business enterprises, in particular global information and communication technology (ICT) giants,[3] that are the main driving force behind technological developments in pursuit of their own interests of maximising their influence and profits, and governments, the latter in their dual capacity as regulators of and multifaceted participants in the AI market. While the

[1] See Goethe's ballad "Der Zauberlehrling" of 1797.
[2] https://futureoflife.org/open-letter/pause-giant-ai-experiments/ (6 Sept. 2023).
[3] Such as Google, IBM, Meta, Microsoft and OpenAI.

intersection between AI use and various areas of the public international law *lex lata* has been discussed for some time,[4] we are now concerned with the *lex ferenda*: How much and what kind of new regulation is needed for keeping AI under control in a way conducive to innovation for the benefit of humanity as a whole?

Realising that there is regulatory activity by individual States as well as non-state actors,[5] I will concentrate on regulatory developments in public international and European Union law and offer just a screenshot of a rapidly developing field. Since AI is a global phenomenon, effective regulation will undoubtedly require international frameworks. Until now, however, no such framework is in place. We have no old master whom we could ask for help in bridling the spirits that we apprentices summoned. It is us who must take responsibility for bringing AI under control without stifling progress. Awareness of the need for regulating AI is rapidly growing internationally, with the European world region currently taking the lead. Both the Council of Europe (CoE), comprising most European States, and the smaller European Union (EU) are eagerly working on hard-law AI regulation. They are at the forefront of regulatory efforts worldwide in order to influence global developments in their sense. The United Nations level has so far only produced soft law rules, and more of these are in the works.

In the Western Hemisphere, the Organization of American States has for some time discussed the impact of AI on the four fundamental pillars of the OAS – development, democracy, human rights and security,[6] but not developed any regulatory ambitions of its own. The African Union Development Agency is currently finalising a draft AU-AI Continental Strategy encompassing legislative, regulatory, ethical, policy and infrastructural frameworks. AI is envisioned as a catalyst for unprecedented growth and progress in Africa; the need to ensure its use in a responsive manner is of secondary importance.[7] In contrast to this, the Association of Southeast Asian Nations (ASEAN) in February 2023 started drafting the "ASEAN Guide on AI

[4] See, in particular, the Symposium: How Will Artificial Intelligence Affect International Law?, in: American Journal of International Law Unbound, vol. 114 (2020), p. 138 ff.; Angelo Jr. Golia/Matthias C. Kettemann/Raffaela Kunz (eds.), Digital Transformations in Public International Law (2022), both open access.

[5] See, e.g., the World Economic Forums's El Presidio Recommendations on Responsible Generative AI, June 2023 (WEF_Presidio_Recommendations_on_Responsible_Generative_AI_2023.pdf (weforum.org) [29 August 2023]).

[6] See, e.g., the opening remarks of the OAS Secretary General at the High-level Roundtable Policy Dialogue "Artificial Intelligence: Public Policy Imperatives for the Americas" on 4 May 2023 (https://www.oas.org/en/about/speech_secretary_general.asp?sCodigo=23-0015 [29 August 2023]).

[7] https://www.nepad.org/news/pioneering-africas-ai-future-convening-of-african-ai-experts-finalise-au-ai-continental (29 August 2023). See also "The Digital Transformation Strategy for Africa (2020-2030) by the AU (https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf [29 August 2023]).

Governance and Ethics" that is expected to be released in early 2024.[8] While the need to promote responsible use of AI and mitigate potential risks is clearly recognised, ASEAN's regulatory approach will differ from the European one: "Any formal ASEAN-wide formulation of an AI policy will be based on 'best practices by design' rather than anything legally binding."[9]

What then is the "European approach"? There are currently two European AI rulebooks in the making, an international one within the Council of Europe (CoE) and a supranational one within the EU.

II. Council of Europe: Putting AI at the Service of Human Rights, Democracy and the Rule of Law through an International Treaty

1. Trying to Develop Global Benchmarks by Example

The example-setting ambitions of the CoE on AI regulation have been clearly formulated as follows: "The Council of Europe has on many occasions demonstrated its ability to pioneer new standards, which have then become global benchmarks. We will address AI in this tradition, in a multistakeholder approach with other international organisations, civil society, business and academia."[10] On this background, the CoE Committee of Ministers in 2019 established the Committee on Artificial Intelligence (CAI) as an ad hoc committee. According to its current terms of reference, it is tasked to submit 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, in accordance with the relevant decisions of the Committee of Ministers" by 15 November 2023.[11]

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[8] https://asianews.network/asean-working-on-nuanced-ai-rules-to-smoothen-diverse-operations/; https://www.reuters.com/technology/southeast-asia-set-guardrails-ai-with-new-governance-code-sources-2023-06-16/ (29 August 2023).

[9] Kristina Fong Siew Leng, ASEAN's New Dilemma: Managing the Artificial Intelligence (AI) Space, ISEAS Perspective 2023 No. 65, 7 August 2023, Executive Summary, p. 2 (https://www.iseas.edu.sg/wp-content/uploads/2023/06/ISEAS_Perspective_2023_65.pdf [29 August 2023]).

[10] Marija Pejčinović Burić, CoE Secretary General, in the Foreword to the CoE's Brochure "The Council of Europe & Artificial Intelligence", March 2023 (https://rm.coe.int/brochure-artificial-intelligence-en-march-2023-print/1680aab8e6 [27 August 2023]).

[11] Terms of Reference (https://rm.coe.int/terms-of-reference-of-the-committee-on-artificial-intelligence-for-202/1680a74d2f [27 August 2023]). See Marten Breuer, The Council of Europe as an AI Standard Setter, Verfassungsblog, 4 April 2022.

2. Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law (Consolidated Working Draft)

The Chair of the CAI has meanwhile produced a consolidated working draft of a Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law that was published in July 2023.[12] That very preliminary text constitutes the basis for further negotiations. As indicated by the many asterisks, most of it has not yet even been discussed, let alone agreed, within the CAI. The final outcome of the negotiations in the CAI is therefore still open.

As its name indicates, the Convention will try to ensure that AI remains compatible with the fundamental values of the CoE. Its preamble discloses the Convention's approach of reconciling contradictions generated by AI: On the one hand, it is conscious that "artificial intelligence systems … have the potential to promote human prosperity as well as individual and societal well-being, sustainable development, gender equality and the empowerment of all women … and other important goals and interests, by enhancing progress and innovation" and recognises "that artificial intelligence systems may be designed, developed and used to offer unprecedented opportunities to protect and promote human rights and fundamental freedoms, democracy and the rule of law".[13] On the other hand, it is concerned that these same systems "may undermine human dignity and individual autonomy, human rights and fundamental freedoms, democracy and the rule of law" as well as lead to discrimination and repression through surveillance and censorship.[14]

Art. 1 (1) defines the Convention's purpose and object as setting out "principles and obligations aimed at ensuring that design, development, use and decommissioning of artificial intelligence systems are fully consistent with respect for human dignity and individual autonomy, human rights and fundamental freedoms, the functioning of democracy and the observance of the rule of law." To ensure effective implementation by Parties, it establishes a

[12] Council of Europe, Committee on Artificial Intelligence, Consolidated Working Draft of the Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, CAI(2023)18 of 7 July 2023 (https://rm.coe.int/cai-2023-18-consolidated-working-draft-framework-convention/1680abde66 [27 August 2023]).

[13] Id., preamble, paras. 3-4.

[14] Id., paras. 5-7. The text of these paragraphs is still in square brackets indicating that it has been discussed but not yet been agreed upon within the CAI.

follow-up mechanism involving the Conference of the Parties.[15] It takes a risk-based approach in the sense that 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."[16] Art. 3 sentence 1 defines "artificial intelligence system" as "any algorithmic system or a combination of such systems that uses computational methods derived from statistics or other mathematical techniques and that generates text, sound, image or other content or either assists or replaces human decision-making."[17]

The Convention will "apply to design, development, use and decommissioning of artificial intelligence systems that have the potential to interfere with the respect for human rights and fundamental freedoms, the functioning of democracy and the observance of rule of law."[18] It will set only minimum standards, so that each Party can grant wider protection against AI-related risks.[19] Each Party shall take the necessary measures to ensure that "all activities in relation to the design, development, use and decommissioning of artificial intelligence systems are compatible with relevant human rights and non-discrimination obligations …"[20] Each Party shall also take the necessary measures for protecting the integrity of democratic processes and ensuring respect for the rule of law. The following principles of design, development, use and decommissioning of artificial intelligence systems are established in Art. 7 – 12: transparency and oversight; accountability and responsibility; equality and non-discrimination; privacy and personal data protection; safety, security and robustness; safe innovation. Parties shall also ensure the availability of effective remedies for human rights violations resulting from the use of AI as well as effective procedural safeguards where an AI system "substantially informs or takes decisions [potentially] impacting on human rights and

[15] Id., Art. 1 (2), Art. 23 ff.
[16] Id., Art. 2
[17] According to Art. 3 sentence 2, "[t]he Conference of the Parties may, as appropriate, decide to give interpretation to this definition in a manner consistent with relevant technological developments."
[18] Art. 4 (1). Pursuant to Art. 4 (2), the Convention will "not apply to research and development activities regarding artificial intelligence systems unless the systems are tested or otherwise used in ways that have the potential to interfere with human rights and fundamental freedoms, democracy and the rule of law."
[19] Art. 22.
[20] Art. 5.

fundamental freedoms."[21] Moreover, parties are obliged to introduce a risk and impact management framework[22] and to "encourage and promote adequate digital literacy and digital skills for all segments of the population".[23]

While it is not yet clear whether the Convention will prohibit the States Parties from making any reservation,[24] it will definitely permit them to denounce it at any time, with a notice period of three months.[25]

3. Obstacles to Implementation of the Future Framework Convention

While the CoE draft Framework Convention is very modern concerning substantive contents, it is absolutely archaic regarding the settlement of disputes. Pursuant to Art. 28 (1), "[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 … 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."[26]

This is but a reproduction of Art. 33 (1) of the UN Charter and indicates that the 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. But Art. 28 (2) sets the EU and its member States apart: Within the scope of application of Union law, they of course remain subject to the compulsory and exclusive jurisdiction of the Court of Justice of the EU.[27]

[21] Art. 13, 14.
[22] Art. 15.
[23] Art. 20.
[24] See Art. 32 in square brackets with explanatory footnote.
[25] Art. 33.
[26] The text is still in square brackets indicating that it has already been discussed but not yet agreed upon within the CAI.
[27] Art. 344 TFEU prohibits EU Member States from submitting "a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." See CJEU,

If it ultimately enters into force in whatever shape, the CoE's Framework Convention will constitute a treaty binding its Parties according to the international legal principle of *pacta sunt servanda*.[28] Its effects in the domestic law of the Parties will depend on the status each of them attributes to international treaties and vary accordingly. If the EU becomes party to it, as planned, the Framework Convention will rank between primary and secondary Union law.[29] Its designation as "Framework" Convention and the formulation used throughout its provisions – "[e]ach Party shall take the necessary/appropriate measures" – clearly indicate that these will lack direct effect in domestic law. It will therefore be impossible for natural or legal persons to enforce them by legal action which will hamper effective implementation of treaty obligations.

The one possible exception is the non-discrimination provision of Art. 17: "The implementation of the provisions of this Convention by the Parties shall be secured without discrimination on any ground such as sex, gender, sexual orientation, 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." This formulation enables direct application by courts, but Art. 17 concerns just a peripheral aspect of the Framework Convention.

4. ECHR and ESC in the Background

It should be remembered that the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[30] has put a general human rights framework (civil and political rights) in place that serves as a back-up also in all AI matters. By virtue of the ECHR, all the CoE Member States are obliged not only to respect the human rights and fundamental freedoms set forth therein when they develop and use AI, but also to protect everyone within their jurisdiction from infringements of those rights by third States and non-state actors (such

judgment of 30 May 2006 (C-459/03), Commission v. Ireland, Reports 2006, I-4635; opinion of 18 December 2014 (Opinion 2/13), Accession to ECHR, ECLI:EU:C:2014:2454, margin notes 201 ff.

[28] See Art. 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 (UNTS vol. 1155, p. 331). See also Art. 38 (1) lit. a of the Statute of the International Court of Justice of 26 June 1945 (1 UNTS XVI).

[29] See Art. 216 (2), 218 (11) TFEU.

[30] Of 4 November 1950 (ETS No. 5).

as ICT companies). These obligations can be enforced through individual complaints to the European Court of Human Rights (ECtHR) under Art. 34 ECHR. Pertinent case-law of the ECtHR on new technologies, including AI, is already developing.[31] Regarding social rights, the European Social Charter, either in its original or its revised version[32] must be respected by all CoE Member States (except Liechtenstein, Monaco, San Marino and Switzerland) also in AI contexts.

The entry into force of the Framework Convention will not change anything in this respect. It is intended to complement but not to modify or replace ECHR or the ESC with regard to AI. Recital 13 of the preamble cites the ECHR and its protocols as well as the ESC, its protocols and the revised ESC. According to Art. 5 of the draft, "[e]ach Party shall take the necessary measures to ensure that all activities in relation to the design, development, use and decommissioning of artificial intelligence systems are compatible with relevant human rights and non-discrimination obligations undertaken by it under international law, or prescribed by its domestic law." Moreover, Art. 21 on the relationship of the Framework Convention with other legal instruments reads as follows: "Nothing in the present Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms as well as legal rights and obligations which may be guaranteed under the laws of any Party or under any other agreement to which it is a Party."

III. EU: Supranational Regulatory Approach in Anticipation of the "Brussels Effect"

1. Comparing the Regulatory Powers of the CoE and the EU Regarding AI

Art. 26 of the CoE's draft Framework Convention on the effects of the Convention expressly provides that "Parties 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." This gives priority to Union law in intra-EU relations, in accordance with Union

[31] See Factsheet "New Technologies" by the Press Unit of the ECtHR, Sept. 2022 (https://www.echr.coe.int/documents/d/echr/FS_New_technologies_ENG [6 Sept. 2023]).
[32] ESC of 18 Oct. 1961 (ETS No. 35); ESC (revised) of 3 May 1996 (ETS No. 163).

law precepts on securing its autonomy vis-à-vis international law,[33] and draws attention to the EU's own regulatory efforts concerning AI.

While the CoE is a classical international organisation operating in the forms of public international law,[34] the EU constitutes a supranational organisation more similar to a federal constitutional system. Supranational Union law as an instrument to regulate AI has two qualities that set it apart from public international law and greatly enhance its effectiveness – direct effect and primacy over domestic law. Direct effect means that individual beneficiaries of EU law provisions can in many cases, though not always, sue for these benefits in the Member State courts that have to apply the pertinent Union law provision directly.[35] Primacy means that national courts must in cases of conflict leave national law provisions unapplied and in their stead apply the conflicting Union law provisions.[36]

Moreover, the only way for the CoE to establish new hard law rules is the treaty route in the sense that the Committee of Ministers can adopt a draft convention and submit it to the 46 Member States in the hope that they will ratify it.[37] Only those that do so voluntarily will be legally bound. In contrast, secondary legislation of the EU usually binds all 27 Member States immediately, without further action on their part.[38]

Whereas all this will make AI regulation by EU law more easily enforceable than rules in a future CoE Convention, the regulatory powers of the EU are more strictly circumscribed than those of the CoE which has a very broad mandate.[39] According to Art. 15 lit. a CoE Statute, the Committee of Ministers can draft treaties in order to further the aim of the CoE as broadly circumscribed in Art. 1 CoE Statute: safeguarding and realising the ideals and principles which are Member States' common heritage[40] as well as facilitating their economic and social progress, with the exception of matters relating to national defence. That means that the CoE can comprehensively regulate all non-military aspects of AI as it pleases, provided that there

[33] Art. 26 constitutes a "disconnection clause". See CJEU, opinion of 18 December 2014 (Opinion 2/13), Accession to ECHR, ECLI:EU:C:2014:2454, margin notes 170 ff.
[34] See Marten Breuer, The Council of Europe and International Institutional Law, in: Stefanie Schmahl/Marten Breuer (eds.), The Council of Europe, 2017, chapter 38, margin note 38.56.
[35] See Art. 288 (2) sentence 2 TFEU with regard to regulations.
[36] See Declaration (no. 17) concerning primacy annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon of 13 December 2007 (OJ 2016 C 202, p. 344).
[37] See Art. 15 lit. a of the Statute of the Council of Europe of 5 May 1949 (ETS No. 1).
[38] See Art. 288 (2) – (4), 291 (1) TFEU.
[39] Breuer (note 34), margin notes 38.06-38.07.
[40] See in particular Art. 3 CoE Statute.

is a two-thirds majority in the Committee of Ministers[41] and the content of the Convention does not ruin its chances of being ratified by as many Member States as possible.

In contrast, the distribution of competences in the EU law is governed by the principle of conferral according to which the Union "shall act only within the limits of the competences conferred upon the Union in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[42] The only loophole is provided by the flexibility clause in Art. 352 TFEU that permits the closing of gaps in EU competences, but requires unanimous action by the Council. Where Union competences exist, their use is further limited by the principles of subsidiarity and proportionality.[43] This limits the EU's regulatory powers regarding AI because the Treaties do not contain any general EU competence for regulating the risks of AI. Art. 114 TFEU, however, confers on the EU fairly broad harmonisation powers that can be used to regulate the impact of AI on the internal market. Art. 114 (1) TFEU prescribes the use of the ordinary legislative procedure for such harmonisation measures in which the European Commission (EC) submits a proposal that is ultimately enacted jointly by the Council of the EU (acting by a qualified majority) and the European Parliament (EP).[44] According to Art. 114 (3) TFEU, the EC needs to head for a high level of protection concerning health, safety, environmental protection and consumer protection in its proposals under Art. 114 (1) TFEU. AI regulation possibly implicates all these public interests so that the EC must include the necessary limitations in its proposal.

2. European Commission Proposal for an Artificial Intelligence Act

On 21 April 2021, the EC submitted a proposal to the European Parliament and the Council for a Regulation laying down harmonised rules on artificial intelligence (artificial intelligence act).[45] In its Explanatory Memorandum, the EC declared that, in view of the benefits and risks of AI, it is committed to strive for a balanced approach in order "to preserve the EU's

[41] Art. 20 lit. d CoE Statute.
[42] Art. 5 (2) TEU.
[43] Art. 5 (1) sentence 2, (3) and (4) TEU.
[44] Art. 294 TFEU.
[45] COM(2021) 206 final (https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF), with Annexes (https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_2&format=PDF [29 August 2023]).

technological leadership and to ensure that Europeans can benefit from new technologies developed and functioning according to Union values, fundamental rights and principles."[46] The EC supports the objective declared by the European Council of "the Union being a global leader in the development of secure, trustworthy and ethical artificial intelligence" as well as the request by the European Parliament (EP) to ensure the protection of ethical principles.[47] As a matter of fact, the EP had, on the basis of Art. 225 TFEU, asked the EC to propose legislative action on AI.

The EC's proposed regulatory framework on AI pursues four specific objectives: ensuring that "AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values"; ensuring "legal certainty to facilitate investment and innovation in AI"; enhancing "governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems"; facilitating "the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation."[48] The EC describes its regulatory approach firstly as "balanced and proportionate" in the sense that it "is limited to the minimum necessary requirements to address the risks and problems linked to AI, without unduly constraining or hindering technological development or otherwise disproportionately increasing the cost of placing AI solutions on the market." Secondly, the legal framework for AI is called "robust and flexible" so that it can "be dynamically adapted as the technology evolves and new concerning situations emerge."

On the global effects that supranational AI regulation will hopefully have, the EC says this: "The proposal also strengthens significantly the Union's role to help shape global norms and standards and promote trustworthy AI that is consistent with Union values and interests. It provides the Union with a powerful basis to engage further with its external partners, including third countries, and at international fora on issues relating to AI."[49] This alludes to the "Brussels Effect", the EU's ability to shape global rules by market forces in the sense that multinational companies voluntarily abide by EU law also in the extra-EU operations around

[46] Id., p. 1.
[47] Id., p. 1 f.
[48] Id., p. 3.
[49] Id., p. 5.

the world because this makes sense economically.[50] The EU's General Data Protection Regulation[51] constitutes an important recent example of the Brussels Effect.

The EC proposes to base the future regulation for the most part on Art. 114 TFEU and (concerning the included data protection rules) additionally on Art. 16 TFEU. Since Art. 114 TFEU permits EU only harmonisation measures to ensure the establishment and functioning of the internal market, the proposal is placed within the EU digital single market strategy. Its primary objective accordingly is "to ensure the proper functioning of the internal market by setting harmonised rules in particular on the development, placing on the Union market and the use of products and services making use of AI technologies or provided as stand-alone AI systems."[52] Since some Member States are already considering AI regulation, the EC wants to prevent the likely fragmentation of the internal market and ensuing legal uncertainty by preventive harmonisation.

Regarding the principle of subsidiarity, the EC argues that "[o]nly common action at Union level can … protect the Union's digital sovereignty and leverage its tools and regulatory powers to shape global rules and standards."[53] In the eyes of the EC, the proposal "is proportionate and necessary to achieve its objectives, since it follows a risk-based approach and imposes regulatory burdens only when an AI system is likely to pose high risks to fundamental rights and safety."[54] The choice of a directly applicable regulation[55] as a legal instrument is justified by the EC in terms of the need for uniform application and reduction of legal fragmentation.[56]

Art. 1 of the Regulation defines the subject matter as laying down harmonised rules for AI systems in the Union; prohibiting certain AI practices; formulating specific requirements for certain high-risk AI systems and obligations for their operators; harmonised transparency rules for AI systems intended to interact with natural persons (e.g., biometric categorisation systems) and generative or manipulative AI systems; market monitoring and surveillance rules. According to Art. 2 (1), the Regulation will apply to "(a) providers placing on the market or putting into service AI systems in the Union, irrespective of whether those providers are

[50] Anu Bradford, The Brussels Effect: How the European Union Rules the World (2020).
[51] Regulation (EU) 2016/679 of 27 April 2016 (OJ L 119, p. 1).
[52] Id., p. 6.
[53] Id.
[54] Id., p. 7.
[55] Art. 288 (2) TFEU.
[56] Id., p. 7.

established within the Union or in a third country; (b) users of AI systems located within the Union; (c) providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union". Lit. (a) and (c) give the Regulation a considerable extraterritorial scope, but because of the required close connection with the EU, this is in conformity with public international law. The Regulation's extraterritorial scope will further promote the "Brussels Effect",[57] as part of the EU's effort to achieve "digital sovereignty".[58]

Art. 3 (1) of the proposed Regulation contains the following definition of AI: "'artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with". According to Art. 4, the list in Annex I can easily be adapted by the EC to take account of new technological developments.

The core concept of the Regulation is its horizontal (*i.e.,* cross-sectoral) risk-based approach regarding potentially negative effects of AI use on health, safety or fundamental rights; it distinguishes between unacceptable risk, high risk and low or minimal risk AI systems.[59] Art. 5 of the Regulation prohibits AI practices posing unacceptable risks, such as deploying subliminal techniques, exploiting vulnerabilities of a specific group of persons (*e.g.*, the disabled) and social scoring by public authorities, with few exceptions. High-risk AI systems in the sense of Art. 6[60] (such as those in autonomous vehicles) need to comply with the enhanced requirements of Art. 8 ff. of the Regulation. They must, e.g., be designed and developed in such a way "that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately" (Art. 13) and that they can be effectively overseen by humans (Art. 14). They are also subject to an ex-ante conformity assessment.[61] Providers and users of high-risk AI systems are subject to special obligations, such as ensuring compliance of the systems with the enhanced requirements and documentation.[62] Certain

[57] See Mikal Ipek, EU Draft Artificial Intelligence Regulation: Extraterritorial Application and Effects, European Law Blog, 17 Feb. 2022.
[58] Alexandru Circiumaru, EU Digital Constitutionalims, Digital Sovereignty and the Artificial Intelligence Act – A network perspective, European Law Blog, 23 Dec. 2021.
[59] Id., p. 12.
[60] Art. 6 (2) with Annex III list examples of high-risk AI system.
[61] Art. 40 ff.
[62] Art. 16 ff.

low risk AI systems are subject only to specific transparency obligations,[63] while minimal risk AI systems (the majority) remain completely unrestricted.

The envisaged governance and implementation system[64] is based on cooperation between the EU and Member State levels, to be coordinated by a new European Artificial Intelligence Board. Infringements of the Regulation will be subject to potentially heavy administrative fines.[65] AI products that do not fulfil the requirements of the Regulation will be banned from the market.

In contrast to the CoE draft Framework Convention, the CE proposes to introduce not only minimum standards, but a full harmonisation ("uniform legal framework") that leaves little regulatory leeway to Member States within the scope of application of the Regulation.[66] Interestingly, the CE's hard-law regulatory approach is to be complemented by soft law: Art. 69 provides that the "Commission and Member States shall encourage and facilitate the drawing up of codes of conduct intended to foster the voluntary application to AI systems other than high-risk AI systems" of the mandatory requirements set out for the latter as well as codes of conduct with "voluntary commitments related, for example, to environmental sustainability, accessibility for persons with disability, stakeholders' participation in the design and development of AI systems, and diversity of development teams."[67]

3. EU Council's General Approach to EC Proposal

It took the Council nearly 18 months until December 2022 to find a compromise on its general approach regarding the EC proposal submitted to it.[68] The Council wants to narrow the EC's definition of AI systems to those "developed through machine learning approaches and logic- and knowledge-based approaches" (in contrast to more classical software systems) and eliminate the EC's delegated power to update that definition.[69] Art. 5 on prohibited AI

[63] Art. 52.
[64] Titles VI-VIII.
[65] Art. 71 f.
[66] Recital (1) of the preamble.
[67] Id., p. 16.
[68] Council of the EU, Doc. 14954/22 of 25 November 2022 (https://data.consilium.europa.eu/doc/document/ST-14954-2022-INIT/en/pdf [31] August 2023).
[69] Id., p. 4. See Mikal Ipek, EU Draft Artificial Intelligence Regulation: Extraterritorial Application and Effects, European Law Blog, 17 Feb. 2022.

practices is to be extended. The mode of classifying AI systems as high risk and the list of high-risk AI use cases is to be changed.[70] The Council wants a clarification and adjustment of the requirements for high-risk AI systems "in such a way that they are more technically feasible and less burdensome for stakeholders to comply with".[71] It also proposes to introduce a new category of "general purpose AI systems", clarify the scope of the Regulation in Art. 2,[72] simplify the compliance framework and substantially modify the provisions concerning the Artificial Intelligence Board (greater autonomy and strengthened role).

4. Position of the European Parliament at First Reading

The position of the EP adopted at first reading (Art. 294 (3) TFEU) on 14 June 2023 differs significantly from both the EC proposal and the Council's position so that the upcoming confidential trilogue negotiations will be difficult.[73] We should expect intense lobbying efforts by ICT giants for less and NGOs for more regulation.

The different approach of the EP, that is stricter on AI, becomes obvious from the new Art. 1 (1) with which it wants the Regulation to begin: "The purpose of this Regulation is to promote the uptake of human-centric and trustworthy artificial intelligence and to ensure a high level of protection of health, safety, fundamental rights, democracy and the rule of law, and the environment from harmful effects of artificial intelligence systems in the Union while supporting innovation …" This tendency reappears in the new Art. 4a that formulates general principles applicable to all (including low-risk) AI systems. According to its para. 1, "[a]ll operators falling under this Regulation shall make their best efforts to develop and use AI systems or foundation models in accordance with the following general principles establishing a high-level framework that promotes a coherent human-centric European approach to ethical and trustworthy Artificial Intelligence, which is fully in line with the Charter [of

[70] Art. 6 (3) subpara. 1 in the Council's version reads as follows: "AI systems referred to in Annex III shall be considered high-risk unless the output of the system is purely accessory in respect of the relevant action or decision to be taken and is not therefore likely to lead to a significant risk to the health, safety or fundamental rights."
[71] Id., p. 5.
[72] Blanket exclusion of national security, defence and military purposes.
[73] P9_TA(2023)0236 (https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.pdf [31 August 2023]). See Filip Konopczynski, One Act to Rule Them All – What Is At Stake In the AI Act Trilogue?, Verfassungsblog, 18 August 2023.

Fundamental Rights] as well as the values on which the Union is founded …" These general principles are "human agency and oversight"; "technical robustness and safety"; "privacy and data governance"; "transparency"; "diversity, non-discrimination and fairness"; "social and environmental well-being".

The EP's new Art. 4b is devoted to AI literacy and in para. 1 obliges the Union and Member States, when implementing the Regulation, to "promote measures for the development of a sufficient level of AI literacy, across sectors and taking into account the different needs of groups of providers, deployers and affected persons concerned, including through education and training, skilling and reskilling programmes and while ensuring proper gender and age balance, in view of allowing a democratic control of AI systems."

The EP has its own definition of AI system in Art. 3 (1) that is closer to the one of the Council than the one of the EC: "a machine-based system that is designed to operate with varying levels of autonomy and that can, for explicit or implicit objectives, generate outputs such as predictions, recommendations, or decisions, that influence physical or virtual environments". The EP also wants significantly to change Art. 5 on prohibited AI practices as well as Art. 6 and 7 on the classification of AI systems as high risk as well as further to specify the transparency and information requirements (Art. 13).

Another EP proposal is to introduce the new term "foundation model" to cover the like of ChatGPT. Foundation model is defined as "an AI system model that is trained on broad data at scale, is designed for generality of output, and can be adapted to a wide range of distinctive tasks."[74] Art. 28b specifies the obligations of providers of foundation models. The EP also suggests the introduction of a "fundamental rights impact assessment" for high-risk AI systems prior to their putting into use (new Art. 29a). It wants to rename the European Artificial Intelligence Board into "European Artificial Intelligence Office" and strengthen its independence[75] as well as that of the national supervisory authorities.[76] This is especially important because the EP proposes a new right of natural persons or groups of natural persons to lodge a complaint with a national supervisory authority "if they consider that the AI system relating to him or her infringes this Regulation."[77] The EP wants to introduce a further new

[74] Art. 3 (1c).
[75] Art. 56c.
[76] Art. 59 (4a).
[77] Art. 68a.

"right to explanation of individual decision-making" which deserves being fully quoted: "Any affected person subject to a decision which is taken by the deployer on the basis of the output from an high-risk AI system which produces legal effects or similarly significantly affects him or her in a way that they consider to adversely impact their health, safety, fundamental rights, socio-economic well-being or any other of the rights deriving from the obligations laid down in this Regulation, shall have the right to request from the deployer clear and meaningful explanation pursuant to Article 13(1) on the role of the AI system in the decision-making procedure, the main parameters of the decision taken and the related input data." [78]

5. Complementary Soft-Law: European Declaration on Digital Rights and Principles for the Digital Decade

In January 2022, while the legislative process for the enactment of the Artificial Intelligence Act was already under way, the EC proposed to the EP and the Council to sign up to a joint declaration of rights and principles that would guide the digital transformation in the EU.[79] On 15 December 2022, in the margins of the European Council, the Presidents of the three EU institutions signed the "European Declaration on Digital Rights and Principles for the Digital Decade".[80] The intention behind it was paraphrased as follows: "The Declaration … presents the EU's commitment to a secure, safe and sustainable digital transformation that puts people at the centre, in line with EU core values and fundamental rights. The Declaration shows citizens that European values, as well as the rights and freedoms enshrined in the EU's legal framework, must be respected online as they are offline. … the text will guide policy makers and companies dealing with new technologies. The Declaration will also steer the EU's approach to the digital transformation throughout the world."[81] It "reflects the political shared commitment of the EU and its Member States" and will also "guide the EU in its international relations on how to shape a digital transformation that puts people and human rights at the centre."[82]

[78] Art. 68c (1).
[79] Press release of 26 January 2022 (https://ec.europa.eu/commission/presscorner/detail/en/IP_22_452 [2 Sept. 2023]).
[80] Press release of 15 Dec. 2022 (https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7683 [2 September 2023]).
[81] Id.
[82] Id.

The six chapters of the declaration, that "form a holistic reference framework and should not be read in isolation",[83] concern "putting people at the centre of the digital transformation", "solidarity and inclusion", "freedom of choice", "participation in the digital public space", "safety, security and empowerment" and "sustainability". The key objective is to ensure that "[t]echnology should serve and benefit all people living in the EU and empower them to pursue their aspirations, in full security and respect for their fundamental rights." The soft-law avenue was chosen because it permits more flexibility, with regard to both the proof of EU competences (all the more since the signature by the President of the Council was based on the consensus of the Member States) and the actual implementation of political promises made. Moreover, there is a tradition of great declarations on constitutional essentials accompanying and directing the European integration process.[84]

The Declaration expressly builds on primary and secondary Union law, the case law of the Court of Justice of the EU as well as the European Pillar of Social Rights. "It has a declaratory nature and, as such, does not affect the content of legal rules or their application."[85]

6. Primary Union Law in the Background

If it enters into force, the Regulation will constitute secondary Union law and remain subject to primary Union law, such as the fundamental freedoms of the internal market[86] and in particular the Charter of Fundamental Rights of the EU (CFR). This means that it will have to be interpreted in conformity with primary law as far as possible.[87] The provisions of the CFR bind the institutions and other bodies of the EU and the Member States when they are

[83] See recital 7 of the preamble.
[84] See the Declaration on European Identity of the Copenhagen European Summit of 14 December 1973 (https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf [2 Sept. 2023]); European Council Declaration on Democracy of 8 April 1978 (https://www.consilium.europa.eu/media/20773/copenhagen_april_1978__eng_.pdf [2 Sept. 2023]); European Pillar of Social Rights of November 2017 (https://op.europa.eu/en/publication-detail/-/publication/ce37482a-d0ca-11e7-a7df-01aa75ed71a1/language-en/format-PDF/source-62666461 [2 Sept. 2023]). The Charter of Fundamental Rights of the EU was at first only solemnly proclaimed by the EP, the Council and the EC in 2002, before the Treaty of Lisbon made it part of primary Union law (Art. 6 (1) TEU).
[85] Recital 10 of the preamble.
[86] Art. 26 ff. TFEU. The freedom to provide and receive services is of particular relevance in the AI context (Art. 56 ff. TFEU).
[87] See CJEU, judgment of 21 June 2022, Case C-817/19, Ligue des droits humains, ECLI:EU:C:2022:491, paras. 86 ff.

implementing Union law, such as the future Regulation.[88] They confer individual rights that can be enforced in national courts. The minimum rules of the ECHR serve as a back up to the CFR.[89] Before the Regulation enters into force, development and use of AI remains subject to pertinent secondary Union law[90] as well as the aforementioned primary law rules.

IV. UN: Will the International Community Prove Able of Squaring the Regulatory Circle?

1. The Need for a Global Regulatory Approach

Since AI is a global phenomenon, regional regulatory approaches will not suffice to establish a proper balance of the chances and risks of that technology for humanity as a whole. Global private sector players at the forefront of AI technological developments cannot effectively be regulated by regional law alone.

Therefore the CoE's draft Framework Convention is designed for a wider catchment area than the CoE's Member States: It shall also be open for signature by the non-member States which have participated in its elaboration (Canada, Israel, Japan, Mexico, the USA and the Holy See) as well as the European Union.[91] After its entry into force,[92] the CoE Committee of Ministers may, after obtaining the unanimous consent of the Parties to the Convention "invite any non-member State of the Council of Europe which has not participated in the elaboration of the Convention to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe,[93] and by unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers."[94] The procedural hurdles are significant.

[88] Art. 51 (1) CFR.
[89] See Art. 52 (3) CFR.
[90] See the secondary law acts cited in Art. 75 ff. of the EC Proposal.
[91] Art. 29 (1).
[92] According to Art. 29 (3), this will happen on the first day of the month following the expiration of a period of three months after the date on which five Signatories, including at least three CoE member States, have ratified the Convention.
[93] The provision requires a two thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.
[94] Art. 30 (1).

More importantly, however, the CoE draft Framework Convention underlines "the need to establish, as a matter of priority, a globally applicable legal framework setting out common general principles and rules governing the design, development, use and decommissioning of artificial intelligence systems effectively preserving the shared values and harnessing the benefits of artificial intelligence for the promotion of these values in a manner conducive to responsible innovation".[95]

2. Activities on AI within the UN System

There is a lot of global activity on AI within the UN system. At central level, currently a Multistakeholder Advisory Board on Artificial Intelligence is being formed by the Office of the Secretary-General's Envoy on Technology.[96] In September 2022, Principles for the Ethical Use of Artificial Intelligence in the United Nations System were endorsed by the UN System Chief Executives Board for Coordination.[97]

The most important activities are, however, taking place in the UN's specialized agencies in the sense of Art. 57. 63 UN Charter. Thus, the International Telecommunications Union (ITU), the specialized agency for information and communication technologies, has been organising an annual AI for Good Global Summit since 2017,[98] the most recent one in 2023.[99] The World Intellectual Property Organisation (WIPO), the specialized agency for promoting and harmonizing the protection of intellectual property and copyright, has started a multi-stakeholder conversation on IP and AI.[100] It deals with questions such as whether AI innovation and creation needs IP incentives, how the value of human invention and creation should be balanced against AI innovation and creation and whether the advent of AI requires any changes to the existing IP frameworks. But neither specialized agency has formulated any rules on AI.

[95] Para. 9 of the preamble.
[96] https://www.un.org/techenvoy/content/artificial-intelligence (28 August 2023).
[97] https://unsceb.org/principles-ethical-use-artificial-intelligence-united-nations-system (28 August 2023). These are based on the UNESCO Recommendation (see below under (1)).
[98] https://www.itu.int/en/ITU-T/AI/Pages/default.aspx (27 August 2023).
[99] https://aiforgood.itu.int/ (27 August 2023).
[100] https://www.wipo.int/about-ip/en/artificial_intelligence/policy.html (28 August 2023).

a. UNESCO Recommendation on the Ethics of Artificial Intelligence (2021)

This is where the United Nations Educational, Scientific and Cultural Organization (UNESCO) comes in. At UNESCO's General Conference on 23 November 2021, the 193 Member States adopted by acclamation a very comprehensive and detailed "Recommendation on the ethics of artificial intelligence" with a much broader scope than the aforementioned draft European instruments.[101] They did so in the conviction "that the Recommendation presented here, as a standard-setting instrument developed through a global approach, based on international law, focusing on human dignity and human rights, as well as gender equality, social and economic justice and development, physical and mental well-being, diversity, interconnectedness, inclusiveness, and environmental and ecosystem protection can guide AI technologies in a responsible direction".[102] This Recommendation is the basis of all current regulatory efforts pertaining to AI.

The designation of this document already indicates that it contains only soft-law rules. This is expressly confirmed by para. 2 of the introductory text where the General Conference recommends that Member States apply the provisions of the Recommendation "on a voluntary basis". But they are also supposed to "engage all stakeholders, including business enterprises, to ensure that they play their respective roles in the implementation of this Recommendation; and bring the Recommendation to the attention of the authorities, bodies, research and academic organizations, institutions and organizations in public, private and civil society sectors involved in AI technologies, so that the development and use of AI technologies are guided by both sound scientific research as well as ethical analysis and evaluation".[103] Accordingly, the Recommendation is addressed to Member States in their capacity as AI actors and regulators as well as all other public and private AI actors for whom it provides "a basis for an ethical impact assessment of AI systems throughout their life cycle."[104] This broad field of addressees, including subjects of international law and others not so qualified, is one of the reasons why the soft-law format was chosen.[105] In its final provision, the self-evident

[101] https://unesdoc.unesco.org/ark:/48223/pf0000380455 (27 August 2023).
[102] 3rd recital of the preamble.
[103] Para. 3 of the introductory text.
[104] Para. I.4. of the operative part.
[105] See in like manner the United Nations Guiding Principles on Business and Human Rights adopted by the Human Rights Council on 16 June 2011 (https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [28 August 2023]).

consequence is underlined that "[n]othing in this Recommendation may be interpreted as replacing, altering or otherwise prejudicing States' obligations or rights under international law, or as approval for any State, other political, economic or social actor, group or person to engage in any activity or perform any act contrary to human rights, fundamental freedoms, human dignity and concern for the environment and ecosystems, both living and non-living."[106]

The Recommendation avoids providing a single definition of AI in order to remain open to technological developments, but paraphrases the phenomenon in detail, not least by describing the new types of ethical issues raised by AI systems.[107] It "aims to provide a basis to make AI systems work for the good of humanity, individuals, societies and the environment and ecosystems and to prevent harm."[108] It does so primarily by defining a wide range of values and principles that "should be respected by all AI actors in the AI system life cycle".[109] The four values are "respect, protection and promotion of human rights and fundamental freedoms and human dignity"; "environment and ecosystem flourishing"; "ensuring diversity and inclusiveness"; "living in peaceful, just and interconnected societies".[110] These values are complemented by the following ten principles: "proportionality and do no harm"; "safety and security"; "fairness and non-discrimination"; "sustainability"; "right to privacy, and data protection"; "human oversight and determination"; "transparency and explainability"; "responsibility and accountability"; "awareness and literacy"; "multi-stakeholder and adaptive governance and collaboration".[111] The Recommendation then identifies eleven areas of policy action that operationalise these values and principles. Member States are required to put in place effective measures in these areas and ensure that other stakeholders, including businesses, academic and research institutions, and civil society at large, adhere to them.[112]

Without underestimating the importance of this important soft law document, it alone will be insufficient effectively to control AI-related activities of either governments or the private sector, particularly the global ICT giants. Yet, there has been no attempt at drafting a legally

[106] Para. VIII.141. of the operative part.
[107] Id., para I.2.
[108] Id., para. II.5.
[109] Id., para. III.9.
[110] Id., para. III.1 – 13 ff.
[111] Id., para. III.2 – 25 ff.
[112] Id., para. IV.48 ff.

binding global convention for regulating AI that would give teeth to the soft law rules. This is because the approaches seem too far apart – some States favour freedom of development and use by entrepreneurs and the general public, others opt for strict State control. We are in the same dilemma that has prevented sensible global regulation of Internet governance.

b. 53rd Session of the Human Rights Council (2023)

On 14 July 2023, the Human Rights Council (HRC), a subsidiary body of the UN General Assembly,[113] adopted Resolution 53/29 "New and emerging digital technologies and human rights" without a vote.[114] In it, the HRC "[r]eaffirms the importance of a holistic, inclusive and comprehensive approach and the need for all stakeholders to collaborate in a more concerted way in addressing the possible impacts, opportunities and challenges of new and emerging digital technologies with regard to the promotion and protection of human rights".[115]

The HRC also "[h]ighlights the importance of the need to respect, protect and promote human rights and fundamental freedoms, in recognition of the inherent dignity of the human person, throughout the lifecycle of artificial intelligence systems".[116] It emphasises in particular the need to protect individuals from harm and discrimination caused by AI systems; promote the transparency of AI systems and explainability of AI-supported decisions; ensure respect for data protection obligations; strengthen the oversight and enforcement capacity of States; promote research and share best practices on ensuring transparency, human oversight and accountability in relation to the uses of artificial intelligence systems in ways that prevent and avoid the spread of disinformation and hate speech, including in instances where such systems are used to support content moderation, while ensuring that the right of individuals to freedom of opinion and expression, the freedom to seek, receive and impart information and other human rights are protected, promoted and respected".[117]

[113] See UN General Assembly Resolution 60/251 of 15 March 2006 (UN Doc. A/RES/60/251).
[114] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/146/09/PDF/G2314609.pdf?OpenElement (6 Sept. 2023).
[115] Id., para. 1.
[116] Id., para. 3.
[117] Id.

At a high-level side event of the 53rd session, the UN High Commissioner for Human Rights, the principal human rights official of the UN in the Secretariat,[118] on 12 July 2023 spoke about "What should the limits be? – A human-rights perspective on what's next for artificial intelligence and new and emerging technologies".[119] He underlined the need to ensure that the potential benefits of AI for humanity outweigh the risks and that this required limits through regulation and effective implementation, in particular regarding respect for human rights. It was not enough to entrust limitations on AI to the private sector in the sense of self-assessment of risks and self-regulation by AI developers. Rather, urgent action by government and companies was needed to embed human rights in AI's entire lifecycle.

c. Debate in the UN Security Council (2023)

There is no better evidence that more regulatory efforts are needed on the global level than one particularly important UN event that took place on 18 July 2023: On this day, the UN Security Council (SC) for the first time met to debate AI.[120] Since the SC bears the primary responsibility for the maintenance of international peace and security,[121] this shows that AI is considered as having major disruptive potential. In fact, it was underlined in the SC debate that AI offers both risks and benefits. As the UN Secretary-General stated, it has the potential to boost global economy, "turbocharge global development – from monitoring the climate crisis to breakthroughs in medical research – and it offers new potential to realize human rights, particularly in the areas of health and education." On the other hand, it "can amplify bias, reinforce discrimination [by hate speech and disinformation] and enable new levels of authoritarian surveillance." While the UN is increasingly using AI technology "to identify patterns of violence, monitor ceasefires and help strengthening peacekeeping, mediation and humanitarian efforts", AI can also make wars easier and more devastating by deploying autonomous weapons systems.[122] Other speakers made clear that AI development could not

[118] See UN General Assembly Resolution 48/141 of 7 January 1994 (UN Doc. A/RES/ 48/141).
[119] https://www.ohchr.org/en/statements/2023/07/artificial-intelligence-must-be-grounded-human-rights-says-high-commissioner (30 August 2023).
[120] See Press Release SC/15359, 18 July 2023 (https://press.un.org/en/2023/sc15359.doc.htm [27 August 2023]).
[121] Art. 24 (1) of the Charter of the United Nations of 26 June 1945 (1 UNTS XVI).
[122] See 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 III (https://www.ccdcoe.org/uploads/2020/02/UN-191213_CCW-MSP-Final-report-Annex-III_Guiding-Principles-affirmed-by-GGE.pdf [27 August 2023]).

be left solely to the private sector because of its potential for abuse and its unpredictability. One unpredictable outcome was whether AI would begin to dominate humans and ultimately even extinguish them. This is why meaningful human control must always be guaranteed.

That debate demonstrates the growing worldwide awareness that we have not yet taken our old master responsibility seriously enough. It did not result in any official UN Security Council document, resolution or otherwise, except for the press release cited above.[123] But that would also have been amazing: While the SC can make legally binding decisions on individual cases for the maintenance or restoration of international peace and security,[124] it lacks the legitimacy and competence to function as a world legislator that could enact generally binding international legal standards on AI.[125]

3. How to Proceed with Regulation at UN Level?

The way forward could be for the United Nations to draft a convention on AI development and governance that is effectively preventing evil outcomes and flexible enough not to hamper the evolution of this technology for the common good. At the same time it must be acceptable to the great majority of the UN's 193 Member States, because otherwise it will not have the necessary regulatory outreach, and also enter into force quickly to keep pace with AI developments. This sounds very much like squaring the circle. Perhaps unsurprisingly, there is no discernible effort by the UN to achieve a reasonable balance between the benefits and risks of AI in the form of hard law standards.

The development at UN level is currently rather heading toward soft law regulation. In preparation of the Summit of the Future scheduled for September 2024,[126] that is supposed to "adopt a concise, action-oriented outcome document entitled "A Pact for the Future", agreed in advance by consensus through intergovernmental negotiations",[127] the UN

[123] See above note 120.
[124] Art. 25, 39 ff. UN Charter.
[125] See Thomas Giegerich, The *Is* and the *Ought* of International Constitutionalism, German Law Journal Vol. 10/no. 1 (2009), p. 31 (49 ff.)
[126] UN General Assembly Resolution 76/307 of 12 September 2022 (UN Doc. A/RES/76/307).
[127] Id., para. 4.

Secretary-General proposed the development of a "Global Digital Compact".[128] This Compact would be negotiated from late 2023 until the second quarter of 2024 to be ultimately adopted at the Summit. It would provide an inclusive global framework for multi-stakeholder (governmental and private) action, help to close the digital divide, make the online space open and safe for everyone and govern the development and use of AI in the interest of humanity as a whole. It would rest on the purposes and principles of the UN Charter, the Universal Declaration of Human Rights and the 2030 Agenda for Sustainable Development.[129] Since the Compact would be addressed to governments as well as non-state actors, whose cooperation is needed to achieve its goals, it can only have the form of soft law, because non-state actors lack international legal personality. This is already indicated by the use of the term "Compact" which places the new instrument in a line with previous compacts at UN level.[130]

V. Conclusion: Regulatory Competition and the Need for a Holistic Approach

We are witnessing intense regulatory competition regarding AI between the global, regional and national governance levels. Since a favourable regulatory framework may attract investments in the growing ICT sector, the competition has an important economic aspect. Regulators are tempted to extend the extraterritorial reach of their rules in order to ensure a level playing field for domestic and foreign competitors.

After the global level (UNESCO) began regulation by setting soft law standards on AI, Europe will be the first to enact hard law regulation in the foreseeable future. The international and supranational legislative processes in the CoE and the EU have been running parallel for some time, but the EU Regulation will probably enter into force before the CoE Framework Convention. If European AI law is enacted, it remains to be seen whether non-European States or groups of States will be induced to adopt the European blueprints and whether multinational companies will adapt their global business activities to them ("Brussels Effect").

[128] A Global Digital Compact – an Open, Free and Secure Digital Future for All, May 2023 (https://indonesia.un.org/en/238874-our-common-agenda-policy-brief-5-global-digital-compact [30 August 2023).
[129] Id., p. 11.
[130] See the Global Compact for Safe, Orderly and Regular Migration (UN General Assembly Resolution 73/195) and the Global Compact on Refugees (https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/238/37/PDF/G1823837.pdf?OpenElement [30 August 2023]; affirmed in para. 23 of UN General Assembly Resolution 73/151).

The European AI hard law *in statu nascendi* is accompanied by soft law already in being and *in statu nascendi* on all levels, including the EU, developed by both public and private actors. Soft law plays an important complementary role, not least because soft-law rules are more flexible and can be simultaneously addressed to both State and non-state actors. It can also directly involve non-state actors in a multi-stakeholder (holistic) rule-making effort. We may well see additional voluntary commitments by ICT companies along the lines of the UN Global Compact on corporate social and environmental responsibility initiated in 2000 by former UN Secretary-General Kofi Annan.[131]

In general, hard law regulation is better enforceable than soft law regulation. If included in an international treaty at CoE or UN level, however, that holds true more theoretically than practically. If the EU Regulation enters into force, it will definitely be effectively enforced under the auspices of the EC as the guardian of EU law.[132] Moreover, individuals may be accorded actionable claims that they can enforce in national courts that are collaborate with the CJEU in the preliminary reference procedure (Art. 267 TFEU). Ultimately, the right mix between hard law and complementary soft law offer the best solution, in particular if all the relevant stakeholders are involved in the regulatory efforts.

The current discussion on AI regulation is completely focussed on ensuring the proper balance between AI-related risks and benefits. AI is the object of our regulation, something to exploit for the benefit of humans while mitigating detrimental side effects. In the future, we may be confronted with an entirely different ethical and legal problem: the subjectivity of AI. If AI one day learns to develop its own consciousness and perhaps conscience, becoming more and more similar to humans, the question arises whether it should enjoy at least some human rights. Instead of only striving to protect humans from AI, we may ultimately have to protect AI from humans. The current debate on the rights of animals[133] may be complemented by a future debate on rights of AI that have to be respected by humans when regulating and using AI.

[131] https://unglobalcompact.org/ (6 Sept. 2023).
[132] Art. 258, 260 TFEU.
[133] See, e.g., Anne Peters, Animals in International Law (2021), p. 421 ff.