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Statement on the proposed Council of Europe Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law

8 May 2023

Excellency,

I have the honour to address you in my capacity as UN Special Rapporteur on environmental defenders under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

As you may be aware, article 3 (8) of the Aarhus Convention requires that "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement." Of the forty-six member States of the Council of Europe, forty-three are also Parties to the Aarhus Convention and are thus bound by its provisions, including article 3 (8).

As the Committee of Ministers of the Council of Europe is expected to shortly finalize and adopt the draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law ("Framework Convention"), I would like to use this opportunity to strongly welcome the leadership shown by the Council of Europe in drafting urgently needed rules on the use of artificial intelligence ("AI") systems.

Under my mandate as set out in decision VII/9 of the Meeting of the Parties to the Aarhus Convention,[1] I have closely followed the negotiations of the draft Framework Convention. As acknowledged in the Preamble of the current draft, there is a significant risk of misuse of AI systems for repressive purposes,[2] including through arbitrary and unlawful surveillance and censorship against environmental defenders. Indeed, under my mandate, I have seen the increasing use of AI systems as a means to harass and intimidate environmental defenders who seek to exercise or protect their right to live in an environment adequate to health and well-being.

More broadly, AI systems have the potential to significantly impact democratic processes, for good and for bad. While AI can assist members of the public to have greater access to information, public participation and access to justice, it may also be readily abused to undermine the integrity of democratic processes, such as through widespread surveillance and the dissemination of misinformation. I welcome the fact that the Framework Convention specifically acknowledges the relevance of AI

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[1] Available at: https://unece.org/sites/default/files/2022-01/Aarhus_MoP7_Decision_on_RRM_E.pdf.

[2] Council of Europe draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, version of 15 March 2024 ("Draft Framework Convention"), Preamble, para. 7, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680aee411.

systems to democratic processes and the rule of law and, going forward, I will carefully follow the implementation of the Framework Convention in this regard.[3]

At this critical juncture between finalization, adoption and national implementation of the Framework Convention, I would like to use this opportunity to urge you to take into account the following **four key points** when finalizing and subsequently implementing the Framework Convention:

1. **Member States should re-insert the preservation of health and the environment as a common principle to inform member States' actions in the context of activities related to AI systems.**

   As also raised by the Conference of INGOs of the Council of Europe,[4] I am most concerned to see that the current draft text no longer includes the "preservation of health and environment" among the common principles related to activities within the lifecycle of AI systems under Chapter III of the Framework Convention. Excluding these two fundamental matters from the guiding principles that will inform member States' implementation of measures in relation to AI systems fails to account for the obligation of member States under international law to respect every person's right to live in a healthy environment. I therefore call on member States to re-introduce the preservation of health and environment among the guiding principles in Chapter III of the Framework Convention.

2. **Member States should limit and include specific safeguards in relation to any "national security" or "national defence" exception.**

   As currently drafted, the Framework Convention excludes from its scope activities within the lifecycle of AI systems "related to the protection of its national security interests"[5] and "matters relating to national defence"[6]. The complete exemption for matters relating to national defence and the vaguely-worded exemption of matters relating to national security ("with the understanding that such activities are conducted in a manner consistent with applicable international law") creates a significant risk for abuse and legal loopholes. Indeed, many AI systems used for surveillance and monitoring of the activities of environmental defenders could thereby be excluded from the scope of the Framework Convention on the basis that the activities are allegedly necessary for "the protection of national security interests".

   In line with the recommendations by the Parliamentary Assembly of the Council of Europe,[7] I therefore, as a matter of absolute urgency, call on member States, when finalizing the draft Framework Convention, to revise current articles 3 (2) and (4) by limiting the national security interest and national defence exceptions. While such exceptions may be warranted under certain circumstances, a blanket exception for matters of national defence is not. Instead, the text of the Framework Convention must provide in unequivocal terms that AI activities

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[3] Draft Framework Convention, arts. 5 and 19.
[4] See Conference of INGOs, Recommendations to PACE prior to drafting Opinion in the Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, p. 2, available at: https://ecnl.org/sites/default/files/2024-04/CINGO%20Recommendations%20PACE%20FC%20on%20AI%20April%202024.pdf.
[5] Draft Framework Convention, art. 3(2).
[6] Draft Framework Convention, art. 3(4).
[7] Parliamentary Assembly of the Council of Europe, Opinion on Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, Opinion 303 (2024).

necessary to protect national security interests or national defence must be conducted strictly in line with international human rights law and other international obligations, including article 3 (8) of the Aarhus Convention. This means also that any exception to the rules and principles under the Framework Convention, including in relation to matters of national interest or national defense, must pass the tripartite test of legality, proportionality and necessity under international human rights law.

3. When ratifying the Framework Convention, member States should submit declarations to fully cover the use of AI systems by private actors.

The current draft Framework Convention, regrettably, establishes a system that distinguishes between the use of AI systems by public and private actors. The draft text leaves it open to member States to issue a declaration under article 3 (1) on how the use of AI systems by private actors will be addressed at the national level.[8] As private actors extensively develop and use AI systems, this may significantly limit the practical impact of the Framework Convention, including to prevent the harassment of environmental defenders by private actors through the use of AI systems. It also fails to account for the immense amount of data controlled or owned by private actors that feeds into AI systems.

In this context, it is important that I draw to your attention that the Aarhus Convention Compliance Committee has made clear that article 3 (8) of the Convention "also covers penalization, persecution or harassment by private natural or legal persons that the Party concerned did not take the necessary measures to prevent."[9] This means that a Party to the Aarhus Convention may act in non-compliance with its obligations under article 3 (8) when it fails to prevent the use of AI systems by either public or private actors to penalize, persecute or harass environmental defenders.

I therefore strongly call on all member States of the Council of Europe, when ratifying the Framework Convention, to submit a declaration under article 3 (1) of the Framework Convention to recognize the full applicability of the principles and obligations under the Framework Convention to private actors.[10]

4. Going forward, member States must establish binding rules to ensure the protection of environmental defenders against harassment through AI systems.

As AI systems become more sophisticated and more widely accessible, there has been an increase in abuse of AI systems to penalize, persecute and harass environmental defenders as a result of their efforts to protect the environment. This ranges from the use of surveillance technologies, including facial recognition software, to the use of bots on social media to harass (or "troll") environmental defenders. It also includes more indirect attacks, such as the generation and spreading of false information about activists and their work to manipulate public opinion and increase pressure on environmental defenders to stop their activities. Given the increasing frequency with which AI systems are being used in such attacks, there is a clear

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[8] Draft Framework Convention, art. 3(1)(b).
[9] See the Compliance Committee's findings on communication ACCC/C/2014/102 (Belarus), ECE/MP.PP/C.1/2017/19, para. 70, available at: https://unece.org/fileadmin/DAM/env/pp/compliance/CC-58/ece.mp.pp.c.1.2017.19.e.pdf.
[10] As also requested by the Parliamentary Assembly of the Council of Europe, Opinion on Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law, Opinion 303 (2024), at paras. 7-8, available at: https://pace.coe.int/en/files/33517/html.

need to expressly acknowledge the risks faced by environmental defenders through the abuse of AI systems and to take effective measures to ensure environmental defenders' protection.
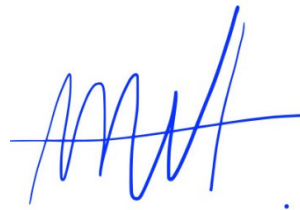
I therefore urge member States, when implementing the Framework Convention into national law, to pay particular attention to the protection of environmental defenders, including in light of their obligation under article 3 (8) of the Aarhus Convention. Indeed, article 21 of the draft Framework Convention expressly provides that the Framework Convention should not be construed as limiting, derogating from or otherwise affecting the human rights or other related legal rights and obligations. When transposing the Framework Convention into national law, the member States therefore must be mindful of their existing obligations under the Aarhus Convention, including the obligation to prevent persecution, penalization or harassment of environmental defenders under article 3 (8) of the Convention.

Moreover, as the Framework Convention provides a "framework" only, it should be supplemented by other instruments covering the use of AI system in specific contexts. I call on member States to consider adopting specific rules on the use of AI systems against environmental defenders and other human rights defenders, for example through a Protocol to the Framework Convention. Such rules or Protocol should be developed in consultation with environmental defenders and be informed by their experience.

Once adopted, the Framework Convention will establish a minimum framework on the use of AI systems that provides a floor, not a ceiling, to safeguard against the risk of harm arising from the use of AI systems. At the national level, member States should therefore strive to go beyond this minimum framework, including by covering use by private actors and expressly addressing the protection of environmental defenders. In their national implementation, member States should also be mindful to adopt a framework that can be adapted and updated to respond rapidly to new technological advancement and capture new AI technologies.

With the adoption of the draft Framework Convention by the Council of Ministers expected to take place shortly, I would be most grateful if you would bring my letter to the attention of the Minister and advisors in charge of the negotiations of the Framework Convention. I also reiterate my willingness to engage further with all relevant stakeholders regarding my comments as well as in the subsequent national implementation of the Framework Convention once adopted.

Please accept, Excellency, the assurances of my highest consideration.

Michel Forst
UN Special Rapporteur on environmental defenders under the Aarhus Convention

To: Committee of Ministers of the Council of Europe

Permanent Representatives of the member States of the Council of Europe in Strasbourg