STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

DRAFTING GROUP ON HUMAN RIGHTS AND ARTIFICIAL INTELLIGENCE

(CDDH-IA)

Draft Handbook on human rights and artificial intelligence – general structure and possible elements

I.   Introduction

- **Object**

  - Provides for the target audience of government officials and policymakers of Council of Europe member States a practical, comprehensive sectoral approach to potential risks and harms posed by AI to human rights from the perspective of the European Convention on Human Rights (ECHR, as interpreted by the European Court of Human Rights (the Court), and the European Social Charter (ESC), as interpreted by the European Committee on Social Rights (ECSR).

- **Scope**

  - Covers current AI use cases, avoiding hypothetical scenarios.
  - Reflects ongoing sectoral work of other specialised CoE bodies (e.g., freedom of expression (MSI-AI), discrimination (GEC/ADI-AI)), ensuring consistency and avoiding unnecessary duplication
  - General analysis, complemented by a catalogue of good domestic practices where relevant, while acknowledging that national variations may require adaptation.
  - Emphasizes human rights impacts, not technical details of AI systems.
  - Concentrates on (some) major public governance sectors where AI impacts human rights, with the potential to examine further sectors in future editions.

II.   AI related technical concepts relevant for human rights

- Definition of "artificial intelligence systems" from the Framework Convention:

  - "machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment".

- Further technical concepts to be identified in line with the draft texts on the sectoral analysis.

III. Analytical Framework

1. General issues

- Application of ECHR/ESC general principles in the context of AI

  - Some general principles from the ECHR:

    - Effective protection of Convention rights[1]
    - Subsidiarity
    - Evolutive interpretation and the 'living instrument' doctrine
    - Human dignity[2]
    - Self-determination and personal autonomy[3]
    - Democracy[4] and the rule of law[5]
    - Autonomous interpretation[6]
    - Vertical and horizontal effect (positive obligations)
    - Margin of appreciation
    - Lawfulness
    - Legitimate aim
    - Necessity, proportionality and fair balance

  - Some general principles from the ESC:

    - Effectiveness of rights (Concrete and effective rights) [7]
    - 'Living instrument' doctrine[8]
    - Proportionality (Article G of the Charter)[9]
    - Non-discrimination (Article E of the Charter)[10]
    - Margin of appreciation/discretion
    - Progressive implementation of certain rights (not all – some rights require immediate implementation)[11]

- Cross-cutting human rights issues (for e. g. effective remedies, non-discrimination, data protection/right to privacy) and recurring issues of competing human rights obligations

  - Certain human rights issues, such as non-discrimination, effective remedies, data protection and privacy, will also be relevant to most, if not all sectors.

  - One potentially recurrent issue is the apparent tension between the need for transparency in AI systems and the protection of intellectual property rights and trade secrets related to AI software, which may attract the protection of Article 1 of Protocol 1 (right to property) of the ECHR.

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[1] *Belgian Linguistics Case*, 23 July 1968, para I.B.5.
[2] *Pretty v. the United Kingdom*, 29 April 2002, 2346/02, §§ 65 and 67.
[3] *Jehovah's Witnesses of Moscow and Others v Russia*, 10 June 2010, 302/02, § 135-136.
[4] *United Communist Party of Turkey v Turkey*, 30 January 1998, 19392/92, § 45
[5] *Repcecevirág Szövetkezet v Hungary*, 30 April 2019, 70750/14.
[6] *Mihalache v Romania*, 8 July 2019, 54012/10, § 114-116.
[7] Digest of the case law of the ECSR, p.33.
[8] Idem, p. 34.
[9] Idem, p. 208-209.
[10] Idem, p. 205-207.
[11] Idem, p. 34.

2. Sectoral analysis

Sector	Sector Description	Some Key AI Use Cases	Relevant Human Rights and Principles (ECHR/ESC)	Cross-Cutting Issues	CoE Committees and Bodies addressing AI and Human Rights in the Sector
Law Enforcement, and Public Safety (National Security)	policing, crowd control, surveillance, protection of individuals at risk (e.g., domestic violence victims), road and traffic safety, the management of prisons and detention facilities and parole and probation services.	Predictive policing, facial recognition, surveillance	ECHR, Articles 2, 3, 5, 8, 10	ECHR Article 13, 14, Protocol 12 Competing rights issues with IP	European Committee on Crime Problems (CDPC) Parliamentary Assembly of the Council of Europe (PACE)
Administration of justice	criminal, civil, and administrative courts, processes such as bail decisions, sentencing, parole, and the management of legal evidence, the organization of the judiciary, such as judge appointments and case allocation.	Predictive sentencing, case management, legal research	ECHR Article 6 *Principles such as: equality of arms, adversarial proceedings etc.*	ECHR Article 13, 14, Protocol 12 Competing rights issues with IP	European Commission for the efficiency of justice (CEPEJ)
Healthcare	diagnostics, treatment, emergency care, mental health services, end-of-life care	Medical diagnostics, personalized treatment, health data analysis	ECHR Article 2, Article 3, Article 8 ESC, Article 11 (Right to health) ESC, Article 12 (Right to social security)	ECHR Article 13, 14, Protocol 12 Competing rights issues with IP	Steering Committee for Human Rights in the fields of Biomedicine and Health (CDBIO)
Education	access to learning, student assessments, and educational outcomes	Personalized learning, automated grading	ECHR Protocol 1 Art 2.	ECHR Article 13, 14, Protocol 12 Competing rights issues with IP	[Planned] Sectoral and specific legal instrument to regulate the use of artificial intelligence systems in education - Steering Committee for Education (CDEDU) Artificial intelligence and education – a critical view through the lens of human rights, democracy, and rule of law, November 2022

| Social Services and Welfare | social care, welfare benefits, e-governance, infrastructure planning, and emergency services. | Automated eligibility assessments, fraud detection; E-governance, automated decision-making in public services | ECHR Article 8

ESC Article 12 (Right to social security), 13 (Right to social assistance) | ECHR Article 13, 14, Protocol 12

Competing rights issues with IP | - |
|---|---|---|---|---|---|
| Immigration and Border Control | asylum claims, monitoring borders, and determining visa or residency statuses. | Risk assessments for asylum seekers, facial recognition at borders | ECHR, Article 3, 6, 18

Principles: Non-refoulement | ECHR Article 13, 14, Protocol 12

Competing rights issues with IP | - |
| Labor and Employment | recruitment, performance management, and workplace monitoring | Automated recruitment, workplace monitoring | ECHR, Article 8

Article 1 ESC (The right to work) Article 2 ESC (Right to Just Working Conditions) Article 3 ESC (The right to safe and healthy working conditions | ECHR Article 13, 14, Protocol 12

Competing rights issues with IP | European Committee for Social Cohesion (CCS) |
| Housing and Urban Planning | planning and development of housing, infrastructure, and urban spaces | Smart city planning, predictive housing policies | Article 31 ESC (right to housing) ECHR, Article 1 of Protocol 1 | ECHR Article 13, 14, Protocol 12

Competing rights issues with IP | Committee on Social Inclusion and Human Dignity of the Congress of Local and Regional Authorities |
| Taxation | tax optimization, and tax regulation | Fraud detection, tax optimization | ECHR Article 1 Protocol 1, Article 6 (criminal limb concerning tax) | ECHR Article 13, 14

Competing rights issues with IP | - |

IV. Inclusion of issues pertaining to private actors and national security

1. Private actors

- Private actors and the potential impact of their activities on human rights in the context of AI

- States' positive obligations under the ECHR and the ESC to protect human rights against violations by private actors in the context of AI

- How non-binding human rights instruments apply in the context of AI:

    - United Nations Guiding Principles on Business and Human Rights
    - Recommendation CM/Rec(2016)3 on human rights and business
    - OECD Guidelines for Multinational Enterprises on Responsible Business Conduct

- Examples of best practices from member States:

    - domestic regulatory frameworks and mechanisms;
    - examples where governments have successfully partnered with the private sector to ensure AI technologies are developed and deployed in ways that respect human rights.

2. National Security

- The growing use of AI technologies in the national security context (e.g., AI-driven mass surveillance, content moderation algorithms, facial recognition systems) and their human rights impacts

- Potential applicability of the Court's existing case law in the context of AI and national security:

    Including:
    - Article 2 ECHR
    - Article 3 ECHR
    - Article 5 ECHR
    - Article 8 ECHR
    - Article 10 ECHR
    - Article 11 ECHR

V. Prospective Challenges and Updates

- The Handbook could be drafted in such a way as to allow inclusion of further issues such as the environment in future editions, in order to respond to the rapid technological advancement and developments in relevant national and international case law in the coming years.