

WORKING PAPERS

The relevance of the Smart Mix of Measures for Artificial Intelligence - Assessing the Role of Regulation and the Need for Stronger Policy Coherence

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I. INTRODUCTION

Artificial intelligence (AI) technologies are increasingly prominent in the public and private sectors. Once a feature of financial and specialised private services, AI technologies are now commonly used in a variety of fields, including facilitating healthcare provisions, managing international migration flows and enforcing border controls, and supporting activities in the humanitarian sector.¹ AI-powered devices are also present in the daily lives of millions of people around the world — from smartphones to virtual assistants, AI technologies are ever more indispensable in contemporary societies and come along with a strong impetus of “datafying”² daily human activities.

Yet, AI technologies pose significant societal challenges, notably regarding the protection of human rights. For example, depending on how AI systems are designed, developed and deployed, they can be used to facilitate disproportionate State surveillance³⁴ and embed biases that perpetuate discriminatory narratives

and practices.⁵

Due to the significant impact that AI has on human rights, these should be at the heart of any regulatory and policy frameworks concerning the design, development and deployment of these technologies. This message has been prominently reinforced by the UN Secretary-General as he called on States ‘to place human rights at the centre of regulatory frameworks and legislation on the development and use of digital technologies’.⁶

In particular, the respect of human rights by technology companies designing and developing AI systems is a crucial point for leverage and to foster a rights-respecting technology ecosystem. In this regard, the UN Guiding Principles on Business and Human Rights (UNGPs) can serve as the basis for ensuring that advances in AI are firmly anchored in respect for human rights. In order to achieve a level playing field of rights-respecting conduct by technology companies, the role of the State in requiring companies to act responsibly is essential. The UNGPs call on States to adopt a “smart mix of measures” of national and international, mandatory and voluntary nature, to support and further implement the

¹ Mirka Snyder Caron, ‘The Transformative Effect of AI on the Banking Industry’ (2019) 34 *Banking and Financing Law Review* 169-214; Pouyan Esmaeilzadeh, ‘Use of AI-based tools for healthcare purposes: a survey study from consumers’ perspectives’ (2020) 20 *BMC Medical Informatics Decision Making* 1-19; Petra Molnar, ‘Technology on the margins: AI and global migration management from a human rights perspective’ (2019) *Cambridge Journal of International Law* 305-330; Ana Beduschi, ‘International migration management in the age of artificial intelligence’ (2020) *Migration Studies* 1-21; Michael Pizzi, Mila Romanoff and Tim Engelhardt, ‘AI for humanitarian action: Human rights and ethics’ (2020) 102 *International Review of the Red Cross* 145-180.

² Datafication is understood here as the process of transforming artifacts of social life into computerized, quantitative data to generate new forms of value, based on Kenneth Cukier, Vitkor Mayer-Schoenberger

(2013): *The rise of big data. How it’s changing the way we think about the world.* In: *Foreign Affairs* 92, pp. 28–40

³ Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Surveillance and human rights’ (2019) UN Doc A/HRC/41/35.

⁴ UN High Commissioner for Human Rights Michelle Bachelet, ‘Use of spyware to surveil journalists and human rights defenders. Statement by UN High Commissioner for Human Rights Michelle Bachelet’, (19 July 2021) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27326&LangID=E>> accessed 8 September 2021.

⁵ UNGA, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ (2020) UN Doc A/75/590; UN Secretary General’s High-level Panel on Digital Cooperation, ‘The age of digital interdependence’ (2019) <<https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>> accessed 8 September 2021; Noel Sharkey, ‘The impact of gender and race bias in AI’ (2018) *Humanitarian Law & Policy* <<https://blogs.icrc.org/law-and-policy/2018/08/28/impact-gender-race-bias-ai/>> accessed 8 September 2021.

⁶ UN Secretary General, ‘Report of the Secretary-General Roadmap for Digital Cooperation’ (2020) <https://www.un.org/en/content/digital-cooperation-roadmap/assets/pdf/Roadmap_for_Digital_Cooperation_EN.pdf> accessed 8 September 2021.

UNGPs.⁷ This entails requiring businesses headquartered in their jurisdiction to respect human rights, may it be by incentivizing structures such as through export credit schemes that ask companies to fulfil certain human rights obligations, or may it be through regulatory measures requiring companies to disclose specific processes. It is the duty of the State to ensure that business implements appropriate measures to identify, address and mitigate adverse impacts stemming from, or being linked to their business activities, including in the tech sector⁸.

While voluntary initiatives on AI ethics proliferated,⁹ many stakeholders have highlighted the need for stronger mandatory regulation of these technologies in recent years.¹⁰ As a result, some States and international organisations have started implementing regulatory and policy frameworks on AI. For instance, China has developed policy guidelines for AI,¹¹ the European Commission has proposed a new legislative proposal on AI regulation,¹² and the Council of Europe established the Ad Hoc Committee on Artificial Intelligence working on a legislative proposal as well.¹³

Against this backdrop, this paper discusses the relevance of the smart mix of voluntary and

mandatory measures requiring companies to respect human rights in the technology sector, in particular with regard to the ongoing regulatory debates on AI. The paper also reflects on how policy coherence may be necessary to overcome siloed agendas and strengthen AI governance. It builds on a multidisciplinary review of legal, social science, humanities and technology-facing academic and professional literature, and the analysis of primary and secondary sources of law. The paper also draws on the reflections arising from a multi-stakeholder consultation co-organised in February 2021 by the B-Tech Project at the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Geneva Academy of International Humanitarian Law and Human Rights.¹⁴

The analysis is structured in four parts. After laying down the main concepts and definitions relating to AI technologies (section 2), the paper briefly introduces the human rights framework (section 3). Subsequently, the paper examines the implications of the smart mix of measures in the context of AI (section 4) and the potential contribution of policy coherence to supporting AI governance (section 5). Finally, the paper draws conclusions on how to best place human rights at the centre of regulatory and policy

⁷ UN Guiding Principle 3, Commentary.

⁸ UN OHCHR, B-Tech Project, 'Foundational Paper on the State Duty to Protect' (2021) <<https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-foundational-paper-state-duty-to-protect.pdf>> accessed 8 September 2021.

⁹ Luciano Floridi and Josh Cows, 'A Unified Framework of Five Principles for AI in Society' (2019) 1 *Harvard Data Science Review* 1-15; Jessica Fjeld, Nele Achten, Hannah Hilligoss, Adam Nagy and Madhulika Srikumar, 'Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI' (2020). *Berkman Klein Center Research Publication No. 2020-1* <<https://ssrn.com/abstract=3518482>> accessed 8 September 2021.

¹⁰ Philip Püllella and Jeffrey Dastin, 'Vatican joins IBM, Microsoft to call for facial recognition regulation' *Reuters* (London, 28 February 2020); Kate Crawford, 'Time to regulate AI that interprets human emotions' (2021) 593 *Nature* 167; Business & Human Rights Resource Centre, 'Tech companies call for govt. regulation of artificial intelligence' (2021) <[\[humanrights.org/en/latest-news/tech-companies-call-for-govt-regulation-of-artificial-intelligence/\]\(https://www.business-humanrights.org/en/latest-news/tech-companies-call-for-govt-regulation-of-artificial-intelligence/\)> accessed 8 September 2021.](https://www.business-</p></div><div data-bbox=)

¹¹ Huw Roberts, Josh Cows, Jessica Morley, Mariarosaria Taddeo, Vincent Wang and Luciano Floridi, 'The Chinese approach to artificial intelligence: an analysis of policy, ethics, and regulation' (2021) 36 *AI & Society* 59-77.

¹² European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final.

¹³ Council of Europe, Ad Hoc Committee on Artificial Intelligence <<https://www.coe.int/en/web/artificial-intelligence/cahai>> accessed 8 September 2021.

¹⁴ Geneva Academy of International Humanitarian Law and Human Rights, 'Bridging governance gaps in the age of technology: A discussion on the State duty to protect' (11 March 2021) <<https://www.geneva-academy.ch/news/detail/426-bridging-governance-gaps-in-the-age-of-technology-a-discussion-on-the-state-duty-to-protect>> accessed 8 September 2021.

frameworks while supporting innovation in AI technologies. It recommends the adoption of actionable tools that would allow policymakers and other stakeholders to assess whether regulatory or incentive-based initiatives directed at the technology sector align with the UNGPs.

II. CONCEPTS AND DEFINITIONS

Since the 1950s, scientists have investigated the possibilities of having machines displaying behaviour normally associated with humans. Alan Turing investigated the potential for machines to think already in 1950.¹⁵ John McCarthy, Marvin Minsky, Nathaniel Rochester and Claude Shannon initiated AI as a discipline in 1956 with the Proposal for the Dartmouth Summer Research Project on Artificial Intelligence.¹⁶

No machine has passed the Turing test¹⁷ so far — it remains to be seen if a computer will ever be able to really ‘think’ like a human being. Yet, the interest in AI technologies continues to grow, due to at least four overarching factors:

- Speed (fast computing technologies).
- Scale (large amounts of data through self-tracking devices).¹⁸
- Granularity (very nuanced information due to lots of data points).

- Price (cheap off the shelf solutions on the market for example).

Currently, there is not a single widely agreed authoritative definition of AI. One way of conceptualising AI is to consider it as

‘software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions.’¹⁹

This definition encompasses two main elements: knowledge-based systems and machine learning and deep learning.²⁰ Machine learning is ‘the systematic study of algorithms and systems that improve their [algorithms’] knowledge or performance with experience’,²¹ machines can be trained and make sense of data. Deep learning, a subset of machine learning, is particularly used to perform tasks such as image, video, speech and audio processing.²²

¹⁵ Alan M. Turing, ‘Computing Machinery and Intelligence’ (1950) 236 *Mind* 433-435.

¹⁶ John McCarthy, Marvin Minsky, Nathaniel Rochester and Claude Shannon, ‘A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence’ (first published 31 August 1955) (2006) 27 *AI Magazine* 12-14.

¹⁷ Turing, ‘Computing Machinery and Intelligence’ n(15); Luciano Floridi, Mariarosaria Taddeo, and Matteo Turilli, ‘Turing’s Imitation Game: Still an Impossible Challenge for All Machines and Some Judges—An Evaluation of the 2008 Loebner Contest’ (2009) 19 *Minds and Machines* 145-150.

¹⁸ Gina Neff, Dawn Nafus (2016): “Self-tracking”. MIT Press.

¹⁹ EU High Level Expert Group on Artificial Intelligence, ‘A definition of AI: Main capabilities and scientific disciplines’

(2019) < <https://digital-strategy.ec.europa.eu/en/library/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines> accessed 8 September 2021, p. 6.

²⁰ Maria Pia Sacco et al, ‘Ad Hoc Committee on Artificial Intelligence (‘CAHAI’): contributions to the draft feasibility study on ‘Human Rights Due Diligence for Artificial Intelligence’ (2020) International Bar Association.

²¹ Flach Peter Flach, *Machine Learning. The Art and Science of Algorithms That Make Sense of Data* (CUP 2012).

²² Yann LeCun, Yoshua Bengio and Geoffrey Hinton, ‘Deep Learning’ (2015) 521 *Nature* 436-444.

In this regard,

*'as a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems).'*²³

Data is thus at the heart of the growing uses of AI systems. Algorithms draw on large amounts of data, including big data, to learn, find and make inferences about patterns in the data.²⁴

With these definitions and concepts in mind, the regulation of AI systems and the policy responses to human rights challenges linked to digital technologies appear to be all the more

relevant, as discussed in the following sections.

III. THE HUMAN RIGHTS FRAMEWORK

It is generally accepted that International human rights law (IHRL) applies in the digital space and that 'the same rights that people have offline must also be protected online.'²⁵

At the UN level, the Universal Declaration on Human Rights and the nine core international human rights treaties form the legal framework of reference for human rights.²⁶ At the regional level, human rights treaties such as the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights establish specific legal regimes.²⁷

The UNGPs complement this framework, providing internationally agreed norms applicable to States and businesses as a soft law

²³ EU High Level Expert Group on Artificial Intelligence, n(19) p. 6.

²⁴ Jenna Burrell, 'How the Machine "Thinks": Understanding Opacity in Machine Learning Algorithms' (2016) *Big Data & Society* 1–12; Sandra Wachter, Brent Mittelstadt and Chris Russell 'Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR' (2018) 31 *Harvard Journal of Law & Technology* 842–887; Lorna McGregor, Daragh Murray and Vivian Ng, 'International Human Rights Law as a Framework for Algorithmic Accountability' (2019) 68 *International and Comparative Law Quarterly* 309–343.

²⁵ UNGA Res 68/167, 21 January 2014, §2; See also Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' UN Doc A/HRC/20/L.13, 29 June 2012; Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' UN Doc A/HRC/32/L.20, 27 June 2016; M. N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 179.

²⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); International Convention on the Elimination of All Forms

of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD); Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT); Convention on the Rights of the Child (adopted 7 March 1990, entered into force 2 September 1990) E/CN.4/RES/1990/74 (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158 (CMW); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) A/72/280 (CPED); Convention on the Rights of Persons with Disabilities Disappearance (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953, as amended) (ECHR); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (African Charter).

instrument with significant uptake by business and early process legitimacy through endorsement by key stakeholder groups ranging from academia, civil society, business and governments²⁸ The following sub-sections provide a brief analysis of State obligations under IHRL and the UNGPs.

A. STATE OBLIGATIONS UNDER INTERNATIONAL TREATIES ON HUMAN RIGHTS

Under IHRL, State parties to international treaties on human rights owe obligations to the individuals who fall within their jurisdiction. As such, they must respect and ensure the legal rights set forth by these treaties.²⁹

A State's jurisdiction is triggered when individuals find themselves in the State's territory or an area outside of the national territory but where that State exercises 'effective control.'³⁰ Additionally, States have jurisdiction over individuals who are within their State agents' authority and control.³¹

State obligations are 'both negative and positive in nature.'³² That entails that States must not only refrain from violating individuals' rights but should also adopt all measures

necessary to safeguard the effective respect of these rights. States have the choice concerning which measures they adopt — these can be legislative, judicial, administrative, or any other appropriate measures to fulfil their positive obligations.³³

Positive obligations compel States to adopt necessary measures even when harm originates in actions or omissions committed by private persons or entities.³⁴ For instance, States may breach their positive obligations under IHRL when they fail to take appropriate measures or when they do not exercise due diligence to prevent, punish, investigate or redress the harm caused by third parties.³⁵

The State duty to protect human rights against abuse by third parties includes harms caused by businesses. This standard of conduct is reaffirmed by the UNGPs, as analysed below.

B. UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The UNGPs offer a firm basis for the development of regulatory and policy responses to AI technologies. They provide a set of internationally agreed norms for preventing, addressing and remediating human rights

²⁸ UN Human Rights Council, 'Report of The Special Representative of The Secretary-General on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (21 March 2011) UN Doc A/HRC/17/31 (UNGPs).

²⁹ UN Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add, para 5; UN Committee on Economic Social and Cultural Rights, 'General Comment No. 3 The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 2.

³⁰ UN Human Rights Committee, 'General Comment No. 31 n(29), para 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ 136, para 111; *Loizidou v Turkey* (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995) para 62. See also Bruno Simma and Andreas T. Müller, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskeniemi

(eds.) *The Cambridge Companion to International Law* (CUP 2012) 134-157.

³¹ *Al-Skeini v United Kingdom*, App no 55721/07 (ECtHR, 7 July 2011) at para. 1130-142; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011); Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121-139.

³² UN Human Rights Committee, 'General Comment No. 31' n(29), para 6.

³³ UN Human Rights Committee, 'General Comment No. 31' n(29), para 7.

³⁴ *Ibid* paras 6-8; *Airey v Ireland*, App no 6289/73 (ECtHR, 9 October 1979) para 32; *Marckx v Belgium*, App no 6833/74 (ECtHR, 13 June 1979) para 31.

³⁵ UN Human Rights Committee, 'General Comment No. 31' n(29), para 8.

violations concerning business operations, including in the technology sector.³⁶

Proposed by the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, the UNGPs were unanimously endorsed by the UN Human Rights Council in 2011.³⁷ The tripartite ‘Protect, Respect and Remedy’ framework has since become a landmark in business and human rights.³⁸



Figure 1 – UNGPs pillar structure. Source: UN Human Rights B-Tech Project (2020)

The UNGPs are structured into three pillars. The first pillar reaffirms the State duty to protect human rights. The second pillar introduces the corporate responsibility to respect human rights. The third pillar sets forth the principles on access to remedy for victims of business-related human

rights abuses. These sets of principles apply to all States and all businesses enterprises, small or large, operating in all sectors of activities.³⁹

While they are not legally binding and thus differ from international human rights treaties, the UNGPs have an authoritative normative power, which stems also from the preceding robust stakeholder engagement process with key stakeholders across academia, civil society, business and government actors and those actors’ uptake of the UNGPs. In particular, they ‘have intrinsic persuasive power, inspire or justify prescribed conduct, engender shared expectations of ends and means.’⁴⁰ In addition, they complement existing treaty-based mechanisms on human rights as they apply to businesses — as international treaty law creates obligations towards States primarily.⁴¹

State-led intergovernmental negotiations aiming at adopting a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises are currently underway.⁴² This legally binding instrument has a broad scope, applying to businesses of all sizes and sectors of activity, thus including technology companies developing AI technologies.⁴³

States are encouraged to lay out how they are implementing the UNGPs at the national level, such as in the format of so-called National Action Plans on Business and Human Rights (NAPs). NAPs are policy documents setting out commitments, priorities, and points of action to

³⁶ United Nations Human Rights Office of the High Commissioner (OHCHR), ‘The UN Guiding Principles in the Age of Technology. A B-Tech Foundational Paper’ (2020) OHCHR <<https://www.ohchr.org/Documents/Issues/Business/B-Tech/introduction-ungp-age-technology.pdf>> accessed 8 September 2021.

³⁷ UNGPs n(28).

³⁸ John Gerard Ruggie, Caroline Rees and Rachel Davis, ‘Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations’ (2021) *Business & Human Rights Journal* 1-19

³⁹ UNGPs n(28).

⁴⁰ Ruggie, Rees and Davis ‘Ten Years After’ n(38) at 2.

⁴¹ But see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006).

⁴² UN Human Rights Council, ‘Report on the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’ (14 January 2021) UN Doc A/HRC/46/73.

⁴³ Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft (06 August 2020) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OB_Es_with_respect_to_Human_Rights.pdf> accessed 8 September 2021, Article 3.

be adopted to promote the implementation of the UNGPs.⁴⁴ NAPs may encompass matters relating to the technology sector — for instance, ensuring that technology companies respect human rights when designing and developing AI systems. At the time of writing, a small number NAPs adopted by States worldwide refer to the technology sector.⁴⁵ Thus, there is considerable room for improving the breadth and depth of engagement with the UNGPs in the technology sector via NAPs, notably as fast-developing technologies such as AI impact a variety of human rights.⁴⁶

As sketched in the introduction, when adopting, promoting and supporting the implementation of the UNGPs, States may embrace a variety of measures — a smart mix of measures to foster business respect for human rights, including in the technology sector, as discussed in the following section.

IV. THE SMART MIX OF MEASURES IN THE CONTEXT OF AI

States have a duty to protect against human rights abuses by ‘taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’⁴⁷ They should also set out clear expectations about business’ respect

for human rights.⁴⁸ In doing so, States are invited to adopt a smart mix of measures — national and international, mandatory and voluntary, to support and further the implementation of the UNGPs.⁴⁹

Such a diversity of measures is even more important in the context of AI technologies. That is due to the fast pace of the technological advances in AI and the considerable impact that these systems can have on human rights.⁵⁰

Often, legislative measures alone are not apt to prevent abuses as they lack robust enforcement and monitoring mechanisms that can keep pace with the advances in technology. At the same time, relying solely on corporate self-regulation without a solid normative framework may lead to feeble respect for human rights.

Accordingly, some States and regional organisations are increasingly leaning towards adopting more mandatory measures, both in the general context of business and human rights and in the specific context of AI technologies. Still, a calibrated mix of mandatory and voluntary measures is necessary. Fine-tuning this mix will help ensure the effectiveness of laws, regulations and policies, and promote corporate uptake and compliance, as discussed in the following sub-sections.⁵¹

⁴⁴ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (UN 2016).

⁴⁵ The Danish Institute for Human Rights, *National Action Plans on Business and Human Rights* (2021) <<https://globalnaps.org/issue/information-communications-technology-ict-electronics/>> accessed 8 September 2021.

⁴⁶ Richard Wingfield, Ioana Tuta and Tulika Bansal, ‘The tech sector and national action plans on business and human rights. A thematic supplement to the “national action plans on business and human rights toolkit 2017 edition”’ (2020) The Danish Institute for Human Rights.

⁴⁷ UN Guiding Principle 1.

⁴⁸ UN Guiding Principle 2.

⁴⁹ UN Guiding Principle 3, Commentary.

⁵⁰ McGregor, Murray and Ng, ‘International Human Rights Law as a Framework for Algorithmic Accountability’ n(24); Murray, Daragh, ‘Using Human Rights Law to Inform States’ Decisions to Deploy AI’ (2020) 114 *AJIL Unbound* 158-162; Daragh Murray, Pete Fussey, Lorna McGregor and Maurice Sunkin, ‘Effective Oversight of Large-Scale Surveillance Activities: A Human Rights Perspective’ (2021) 11 *Journal of National Security Law and Policy* 1-25.

⁵¹ UN OHCHR, B-Tech Project, ‘Foundational Paper on the State Duty to Protect’, n(8).

A. THE RECENT EMPHASIS ON MANDATORY OVER VOLUNTARY MEASURES

The business and human rights community has recently seen several new developments in mandatory measures proposed and adopted by States. Mandatory human rights due diligence legislation has been adopted in France⁵², the Netherlands⁵³, Germany⁵⁴ and Norway⁵⁵. Legislative proposals have been put forward by other European countries such as Switzerland.⁵⁶ The government of Finland has published a study outlining the possible regulatory options for human rights due diligence.⁵⁷ The European Parliament has recently adopted a resolution concerning mandatory due diligence and proposed a draft of a subsequent directive that the European Commission expects to adopt later in 2021.⁵⁸

Human rights due diligence describes a process whereby businesses undertake to

‘identify, prevent, mitigate and account for how they address their adverse human rights impacts.’⁵⁹ Such a process allows companies to assess and tackle the negative impacts of their activities on human rights, which can, in turn, prevent reputational risks and improve stakeholder relationships.⁶⁰

Putting in place a due diligence process can be timely and costly for companies, which may explain the lower levels of implementation when solely voluntary measures are at stake.⁶¹ For example, a survey found that in Germany, only 22% of 455 companies were adequately engaging in human rights due diligence as per the National Action Plan requirements, prompting the country to consider the adoption of a legally binding instrument for human rights due diligence.⁶²

Markedly, the adoption of mandatory human rights due diligence measures is increasingly relevant for the technology sector, as technologies such as AI have proven wide-range

⁵² Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre JORF 74 (28 mars 2017) (French Duty of Vigilance Law - on parent companies' and donor companies' duty of vigilance).

⁵³ Kamerstukken I, 2016/17, 34 506, A (concerning child labour due diligence only).

⁵⁴ Federal Ministry of Labour and Social Affairs, Due Diligence Act <<https://www.bmas.de/DE/Service/Gesetz-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html>> accessed 8 September 2021 (the Parliament adopted the bill on 11 June 2021).

⁵⁵ Business and Human Rights Resource Centre, ‘Norwegian parliament adopts the Transparency Act’ (14 June 2021) <<https://www.business-humanrights.org/en/latest-news/norwegian-parliament-adopts-the-transparency-act/>> accessed 8 September 2021.

⁵⁶ The ambitious wide-ranging Responsible Business Initiative was rejected by referendum in November 2020 (see <<https://www.admin.ch/gov/en/start/documentation/votes/20201129/iniziativa-popolare-per-imprese-responsabili-a-tutela-dell-essere-umano-e-dell-ambiente.html>> accessed 8 September 2021). A less ambitious parliamentary counterproposal focusing solely on a few sectors of business activity is expected to enter into force in 2021 (see <

<https://corporatejustice.ch/stages-in-parliament/>> accessed 8 September 2021).

⁵⁷ Ministry of Economic Affairs and Employment of Finland, Judicial analysis specifies the planned corporate social responsibility act in Finland (2020) <<https://tem.fi/en/-/judicial-analysis-specifies-the-planned-corporate-social-responsibility-act-in-finland>> accessed 8 September 2021.

⁵⁸ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (including a draft Directive of the European Parliament and of the Council On Corporate Due Diligence and Corporate Accountability) (2020/2129(INL)).

⁵⁹ UN Guiding Principle 17.

⁶⁰ UN Guiding Principle 17; OECD, *Due Diligence Guidance for Responsible Business Conduct* (OECD 2018); Lise Smit, Claire Bright, Irene Pietropaoli, Julianne Hughes-Jennett and Peter Hood, ‘Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies’ (2020) 5 *Business and Human Rights Journal* 261-269.

⁶¹ Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2 *Business and Human Rights Journal* 195-224.

⁶² Business & Human Rights Resources Centre, ‘Germany: Coalition agrees on mandatory due diligence proposal;

negative impacts on human rights.⁶³ In addition, these mandatory measures may also level the playing field for technology companies operating in a competitive market — thus supporting responsible innovation.

This movement towards mandatory human rights due diligence may also inform the adoption of compulsory regulation on AI technologies. The recent European Commission's proposal for a regulation of AI (hereinafter the Proposal for an Artificial Intelligence Act) illustrates well this recent EU trend favouring mandatory over voluntary measures.⁶⁴ A parallel can be traced with the development of data protection regulations worldwide following the entry into force of the EU's General Data Protection Regulation (GDPR) in 2018.⁶⁵ An array of countries sought to adopt new legislation in view of obtaining an adequacy decision from the European Commission. These decisions certify that a third country offers an adequate level of data protection and thus facilitates data sharing and processing.⁶⁶

As argued in a different context, the current rise in interest in AI may lead to an 'AI divide', whereby States with less advanced technological means could be further isolated and yield less power in the international scene.⁶⁷ Yet, developing AI capabilities is not enough. As AI poses important legal and societal risks,

regulation can bring legal certainty and level the playing field for the different stakeholders in the AI industry worldwide.⁶⁸

Therefore, a 'race to AI regulation' may well be in its way, as a regulatory regime that adequately minimises the AI's adverse impacts while maximising its benefits could place a country or a regional bloc in an advantageous position in the international plane.⁶⁹ However, whether such a regulatory regime will primarily take the form of legislative measures remains to be seen.

In addition, voluntary measures may help to adjust the smart mix of measures by encouraging responsible behaviour in the AI technology sector, as discussed below.

B. THE COMPLEMENTARITY OF MANDATORY AND VOLUNTARY MEASURES

Mandatory measures in the field of AI technologies may have the potential to accelerate the uptake of human rights standards and norms, such as those recognised by the UNGPs. The current surge in interest for mandatory measures follows the calls for AI regulation emanating notably from large technology

parliament could vote in June' < <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> > accessed 8 September 2021.

⁶³ Kate Crawford, *Atlas of AI. Power, Politics, and the Planetary Costs of Artificial Intelligence* (Yale University Press 2021); Pizzi, Romanoff and Engelhardt, 'AI for humanitarian action' n(1); Alexander Kriebitz and Christoph Lütge, 'Artificial Intelligence and Human Rights: A Business Ethical Assessment' (2020) 5 *Business and Human Rights Journal* 84-104.

⁶⁴ European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final [hereinafter Artificial Intelligence Act Proposal].

⁶⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive

95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

⁶⁶ Article 45 of the GDPR. To date, the European Commission has recognised Andorra, Argentina, Canada (for commercial organisations only), Faroe Islands, Guernsey, Isle of Man, Israel, Japan, Jersey, New Zealand, Switzerland and Uruguay as providing adequate protection. Adequacy procedures concerning South Korea are currently underway. The European Commission also adopted two adequacy decisions for transfers of personal data to the United Kingdom in June 2021.

⁶⁷ Beduschi, 'International migration management in the age of artificial intelligence' n(1) at 4.

⁶⁸ Smit et al., 'Business Views on Mandatory Human Rights Due Diligence Regulation' n(60) at 266.

⁶⁹ Nathalie A. Smuha, 'From a 'race to AI' to a 'race to AI regulation': regulatory competition for artificial intelligence' (2021) 13 *Law, Innovation and Technology* 57-84, 59.

companies such as Google and Microsoft.⁷⁰ Legally binding ‘hard’ rules may provide clarity about which behaviours are expected from the AI sector — thus making it easier to identify unwanted or non-compliant behaviour.⁷¹

However, taken alone, mandatory measures might not be sufficient to foster a culture of compliance and best practices in the AI sector. Regulatory authorities would need to be put in place, and they would have to have enough capacity, technological expertise and resources to monitor compliance. For comparison, the European Commission found that the competent data protection authorities have not yet made full use of the enforcement tools provided by the GDPR and that further progress is needed concerning its complaints mechanism after two years it entered into force.⁷²

Voluntary measures taken alone might equally not be sufficient to ensure compliance with human rights norms. For example, self-regulation by formulating codes of conduct pledging respect for human rights has increased in recent years in the AI industry.⁷³ Yet, issues concerning discrimination and fairness, and the lack of respect for privacy, freedom of association and freedom of expression persist.⁷⁴ In addition,

civil society and activist groups have voiced concerns about self-regulation that can be ‘woefully inadequate at protecting people, particularly those in marginalised communities.’⁷⁵

Nonetheless, voluntary measures may support different stakeholders in finding a shared understanding about applying the global standards on human rights to the AI sector. In turn, that can define which practices are appropriate and the red lines concerning AI design and development. There is a range of policy instruments by which a State can incentivize rights-respecting business conduct such as through special human rights requirements for export credits or development finance.⁷⁶

Voluntary measures can thus complement and feed into regulatory processes. They add value to regulatory and policy frameworks in two main ways.

First, voluntary measures can be used to prepare the groundwork for future regulation. They can indeed help identify the strengths and weaknesses of the different processes concerning the design, development and implementation of AI systems in specific sectors. For example,

⁷⁰ Chris Nuttall, ‘Google chief calls for AI regulation’ *Financial Times* (London, 20 January 2020); Brad Smith, ‘Finally, progress on regulating facial recognition’ (Microsoft Blog, 31 March 2020) <<https://blogs.microsoft.com/on-the-issues/2020/03/31/washington-facial-recognition-legislation/>> accessed 8 September 2021.

⁷¹ See in general David Leslie, Christopher Burr, Mhairi Aitken, John Cows, Mike Katell, and Morgan Briggs, ‘Artificial intelligence, human rights, democracy, and the rule of law: a primer’ (2021) The Council of Europe.

⁷² European Commission, ‘Data protection as a pillar of citizens’ empowerment and the EU’s approach to the digital transition - two years of application of the General Data Protection Regulation’ (Communication) COM(2020) 264 final.

⁷³ Mark Latonero, ‘AI Principle Proliferation as a Crisis of Legitimacy’ (2020) *Carr Center Discussion Paper Series*, Harvard Kennedy School.

⁷⁴ UNGA, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ n (3); Human Rights Council, ‘Report of the United Nations High Commissioner

for Human Rights. The right to privacy in the digital age’ (2018) A/HRC/39/29; Human Rights Council, ‘Report of the Special Rapporteur on the right to privacy’ (2020) Un Doc A/HRC/43/52; Human Rights Council, ‘Report of the United Nations High Commissioner for Human Rights. Impact of new technologies on the promotion and protection of human rights in the context of assemblies, including peaceful protests’ (2020) A/HRC/44/24; Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association’ (2019) UN Doc A/HRC/41/41; Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ n(3).

⁷⁵ Access Now, *Human Rights in the Age of Artificial Intelligence* (2018) Access Now <<https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf>> 18 June 2021 at 31. See also Petra Molnar, ‘Technology on the margins: AI and global migration management from a human rights perspective’ (2019) *Cambridge Journal of International Law* 305-330; Pizzi, Romanoff and Engelhardt, ‘AI for humanitarian action’ n(1).

⁷⁶ See page 12f. <https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-foundational-paper-state-duty-to-protect.pdf>

benchmarking processes may increase the sharing of best practices in AI.

Second, voluntary measures may be used as accompanying measures, concomitantly to regulatory processes to ensure adequate uptake of human rights standards and rules. For example, codes of conduct may support and encourage responsible business behaviour,⁷⁷ which can, in turn, facilitate the implementation of standards and compliance with human rights norms.

Therefore, it is essential that stakeholders find an adequate combination of mandatory and voluntary measures, allowing for the optimal integration of human rights requirements into the design, development and implementation of AI systems.

Regulation may certainly contribute to counterpoint the growing ‘ethics-washing’ in AI.⁷⁸ However, its effectiveness is often conditioned to the presence of robust monitoring, compliance, and complaints mechanisms. If those mechanisms are weak or inexistent, regulatory frameworks may become ineffective. In addition, regulation is not as flexible and fast to keep up with the development of emerging technologies. In fact, technology is impacted by regulation as much as the latter is affected by the former.⁷⁹

Stakeholders should thus have at their disposal an extensive array of measures to

complement regulatory approaches, including standardisation, impact assessments, codes of conduct and benchmarking.⁸⁰ That would allow them to better integrate human rights standards and rules into AI regulatory and policy frameworks.

Accordingly, AI regulation should be seen as the beginning of a process in which all stakeholders should play a role towards achieving respect and protection of human rights. Such an objective cannot be attained without strong policy coherence to overcome siloed agendas and ensure the effectiveness of the smart mix of measures at stake.

V. POLICY COHERENCE TO OVERCOME SILOED AGENDAS AND STRENGTHEN AI GOVERNANCE

The concept of policy coherence has been long discussed in the academic literature, notably regarding the EU’s internal and external policies.⁸¹ While it lacks a clear, authoritative definition, in general, policy coherence can be

⁷⁷ OECD, ‘Industry Self-Regulation: Role and Use in Supporting Consumer Interests’ (2015) OECD DSTI/CP(2014)4/FINAL 20-21.

⁷⁸ Ben Wagner, ‘Ethics as an Escape from Regulation: From ethics-washing to ethics-shopping?’ in Emre Bayamlioglu et al (eds.) *Being Profiled: Cogitas Ergo Sum* (Amsterdam University Press 2018) 84-89; Paul Nemitz, ‘Constitutional Democracy and Technology in the Age of Artificial Intelligence’ (2018) 376 *Philosophical Transactions of the Royal Society A* 1-14; Karen Yeung, Andrew Howes and Ganna Pogrebna, ‘AI Governance by Human Rights-Centred Design, Deliberation and Oversight: An End to Ethics Washing’ in Markus D. Dubber, Frank Pasquale, and Sunit Das (eds.) *The Oxford Handbook of Ethics of AI* (OUP 2019) 77-106.

⁷⁹ Jürgen Feick and Raymund Werle, ‘Regulation of Cyberspace’ in Robert Baldwin, Martin Cave, and Martin Lodge (eds.) *The Oxford Handbook of Regulation* (OUP 2010) 523-547, 525.

⁸⁰ Ana Beduschi, ‘Human Rights and the Governance of Artificial Intelligence’ (2020) *Research Brief, Geneva Academy of International Humanitarian Law and Human Rights*; Adamantia Rachovitsa, ‘Rethinking Privacy Online and Human Rights: The Internet’s Standardisation Bodies as the Guardians of Privacy Online in the Face of Mass Surveillance’ (2016) *European Society of International Law Conference Paper Series* 5/2016.

⁸¹ Leonhard den Hertog, ‘In Defence of Policy Incoherence – Illustrations from EU External Migration Policy’ in

Sergio Carrera, Arie Pieter, Leonhard den Hertog, Marion Panizzon and Dora Kostakopoulou (eds.) *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill Nijhoff 2018) 364-382; Leonhard den Hertog and Simon Stroß, ‘Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term’ (2013) 18 *European Foreign Affairs Review* 373-388; Carmen Gebhard, ‘The Problem of Coherence in the European Union’s International Relations’ in Christopher

defined as the ‘synergic and systematic support towards the achievement of common objectives within and across individual policies.’⁸² As such, policy coherence implies that ‘all actors relevant in the policy making process have common objectives in mind and work in their respective fields towards the attainment of those.’⁸³

The UNGPs establish policy coherence as a central element for successfully implementing a smart mix of measures. The UNGPs 8-10 and their accompanying commentaries put forward a vision for ensuring internal and external policy coherence. The UN Working Group on Business and Human Rights stated that

‘Policy coherence, leading to clear and established policy and operational practice, serves to strengthen knowledge and accountability across government actors that shape business practice or interact with business, and significantly enhances both prevention and access to remedy for victims of human rights abuses.’⁸⁴

In the field of AI, that means that regulatory, policy and voluntary measures on AI should be followed up in practice, in line with the State’s human rights obligations under IHRL. Policy coherence within governmental structures, as well as vis-à-vis external stakeholders such as National Human Rights Institutions⁸⁵, is essential for the realisation of human rights commitments adopted by the State in the context of AI governance.

This section analyses both internal and external aspects of policy coherence applied to the AI context and examines their advantages and drawbacks in light of the UNGPs.⁸⁶

A. INTERNAL POLICY COHERENCE

The internal aspects of policy coherence concern the mandates and actions of all governmental bodies. According to the UNGP 8

‘States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.’⁸⁷

In other words, States should achieve policy coherence by ensuring that their domestic laws, policies and practices are compatible with their IHRL obligations (vertical policy coherence). They should also support and equip their domestic administrative bodies with knowledge of human rights to act in line with the States’ human rights obligations (horizontal policy coherence).⁸⁸

Achieving internal policy coherence is a complex matter for States. As with any administrative body, the administration of the State is often divided into a variety of ministries, agencies and bodies specialising in specific

Hill, Michael Smith, and Sophie Vanhoonacker (eds.) *International Relations and the European Union* (3rd edn, OUP 2017); 123-142; Maurizio Carbone, *Policy Coherence and EU Development Policy* (Routledge 2009); Maurizio Carbone and Niels Keijzer, ‘The European Union and Policy Coherence for Development: Reforms, Results, Resistance’ (2016) 28 *The European Journal of Development Research* 30-43.

⁸² Hertog and Stroß, ‘Coherence in EU External Relations’ n(81) at 377.

⁸³ Hertog, ‘In Defence of Policy Incoherence’ n(81) at 367.

⁸⁴ UNGA, ‘Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (2019) UN Doc A/74/198 at 12.

⁸⁵ Deniz Utlu, ‘Public policy and digital technologies: The role of National Human Rights Institutions in achieving policy coherence’ (2021) *B-Tech Blog*, United Nations Human Rights Office of the High Commissioner 1-3, 1 <<https://www.ohchr.org/Documents/Issues/Business/B-Tech/b-tech-blog-policy-coherence-nhris-tech.pdf>> accessed 8 September 2021.

⁸⁶ UN Guiding Principles 8-10.

⁸⁷ UN Guiding Principle 8.

⁸⁸ UN Guiding Principle 8, commentary.

domains — for example, health and social care, trade and industry, foreign affairs, home affairs etc. All these different branches of the administration should comply with the State's obligations under IHRL. Yet, in practice, that can be challenging.

For instance, when proposing new laws and policies regarding digital technologies, State agencies and bodies should bear in mind that human rights also apply online and that the State's obligations to protect and ensure human rights remain valid in the digital space.⁸⁹ However, in practice, that requires a coordinated approach, knowledge and awareness of human rights across governmental structures, which may be challenging to achieve due to institutional siloes and lack of expertise.⁹⁰

Similarly, various State's agencies and bodies increasingly use AI to deliver public services and manage their activities.⁹¹ When procuring these technologies, they should be aware of the State's obligations under IHRL and their commitments towards their NAP if one has been adopted. Public procurement should therefore align with human rights imperatives. Still, in practice, many public procurement clauses may conflict with human rights obligations as State agents often prioritise cost-efficiency over avoiding human rights risks.⁹²

A way forward may be to increase the State's commitments in their NAPs. As the UN Working Group on Business and Human Rights highlighted, NAPs could 'provide a strong foundation on which governments can achieve policy coherence in the area of business and human rights.'⁹³ However, only a few of the

adopted NAPs currently have commitments concerning digital technologies.⁹⁴ More needs to be done to include the digital agenda into the NAPs. National Human Rights Institutions may be helpful in this regard, as they can provide expertise on human rights and digital technology matters.⁹⁵

Moreover, even if States delineate their commitments regarding digital technologies in their NAPs, training and capacity building across governmental structures would still be needed. That would ensure that staff is aware of these commitments and ready to implement policies and practices that do not go against the State's human rights obligations.

Accordingly, States should build a more robust policy coherence and a coordinated framework for internal action, with appropriate training and capacity building resources. Policy coherence should involve engaging different bodies and agencies through continuous learning and dialogue about the State's commitments towards human rights and the implications that these have for policy and practice regarding digital technologies and AI. Such a process should also encompass an external dimension, as discussed below.

B. EXTERNAL POLICY COHERENCE

The external aspects of policy coherence concern the external dimension of State relations. The UNGP 9 establishes that 'States should maintain adequate domestic policy space to meet their human rights obligations when

⁸⁹ UNGA Res 68/167, 21 January 2014, §2; See also Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' UN Doc A/HRC/20/L.13, 29 June 2012; Human Rights Council, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' UN Doc A/HRC/32/L.20, 27 June 2016; M. N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 179.

⁹⁰ Utlu, 'Public policy and digital technologies' n(85).

⁹¹ Gianluca Misuraca, and Colin Van Noordt, *AI Watch. Artificial Intelligence in public services* (Publications Office of the European Union 2020); Jamie Berryhill, Kevin Kok Heang, Rob Clogher and Keegan McBride, 'Hello, World!

Artificial Intelligence and its Use in the Public Sector' (2019) OECD Working Papers on Public Governance No. 36; Ad Hoc Committee on Artificial Intelligence (CAHAI), *Artificial Intelligence in Public Sector* (Council of Europe 2021).

⁹² Utlu, 'Public policy and digital technologies' n(85) at, 2.

⁹³ UNGA, 'Report of the Working Group' n(84) at 13.

⁹⁴ The Danish Institute for Human Rights, *National Action Plans on Business and Human Rights* (2021) < <https://globalnaps.org/issue/information-communications-technology-ict-electronics/> > accessed 8 September 2021.

⁹⁵ Utlu, 'Public policy and digital technologies' n(85).

pursuing business-related policy objectives with other States or business enterprises.⁹⁶

In the technology sector, such ‘adequate policy and regulatory ability to protect human rights’⁹⁷ is particularly relevant when States contract or partner with technology companies for the provision of services. For example, States should guarantee the protection of data privacy and security when contracting with technology companies for surveillance and monitoring of their external borders.⁹⁸ A breach of cybersecurity by a subcontractor could expose their personal information, which in the migration context can have drastic consequences if the information falls into the hands of persecuting agents.⁹⁹

The external dimension of policy coherence is also concerned with making sense of the proliferation of multi-stakeholder initiatives in the technology sector, particularly in the AI field. While it is essential to have multi-stakeholder fora for dialogue and consultation, it is equally crucial to minimise the risks of having different standards and a varying degree of respect towards human rights applicable to the technology sector.

Finally, States should lead by example in the international sphere by promoting human rights in the multilateral institutions that they are members of and dealing with business-related issues.¹⁰⁰ For instance, they should set the

necessary groundwork for the development of responsible and human rights compliant AI by reaffirming their commitment to protecting and respecting human rights in the digital space.

In this regard, it is significant that States recently reaffirmed that international law, including IHRL, applies in cyberspace at the two multilateral UN-based processes on the responsible behaviour of States in cyberspace, the Open-ended Working Group (OEWG) and the Group of Governmental Experts (GGE).¹⁰¹

Still, as the UN Secretary-General has stressed recently, important gaps in international coordination, collaboration and governance of AI remain.¹⁰² New and emerging technologies, including advances in AI technologies, may significantly impact human rights and have security implications.¹⁰³ While it is vital that States encourage and promote technological innovation, they should put in place governance mechanisms that promote accountability and respect for human rights.

Such governance structures cannot be established at the domestic level only. Due to the international reach of digital technologies and the technology companies designing and developing them, States should aim for a global governance mechanism. The UNGPs and their ‘protect, respect, remedy’ framework can provide the minimal standard for such a mechanism, as States worldwide have already agreed to this set

⁹⁶ UN Guiding Principle 9.

⁹⁷ UN Guiding Principle 9, commentary.

⁹⁸ Carlyn Greenfield, ‘As Governments Build Advanced Surveillance Systems to Push Borders Out, Will Travel and Migration Become Unequal for Some Groups?’ (2020) Migration Policy Institute < <https://www.migrationpolicy.org/article/governments-build-advanced-surveillance-systems> > accessed 8 September 2021; Petra Molnar, *Technological Testing Grounds* (2020) EDRI and Refugee Law Lab < <https://edri.org/wp-content/uploads/2020/11/Technological-Testing-Grounds.pdf> > accessed 8 September 2021.

⁹⁹ Greenfield n(98); Ana Beduschi, ‘The Big Data of International Migration: Opportunities and Challenges for States under International Human Rights Law’, 49 *Georgetown Journal of International Law* 982-1017 at 1011.

¹⁰⁰ UN Guiding Principle 10.

¹⁰¹ UNGA, Open-ended working group on developments in the field of information and telecommunications in the context of international security (OEWG) Final Substantive Report (10 March 2021) UN Doc A/AC.290/2021/CRP.2, at para 3; Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security (GGE), Report of the Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security (advanced copy, 28 May 2021), Norm 13 (e).

¹⁰² UN Secretary General, ‘Report of the Secretary-General Roadmap for Digital Cooperation’ (2020) < https://www.un.org/en/content/digital-cooperation-roadmap/assets/pdf/Roadmap_for_Digital_Cooperation_EN.pdf > accessed 8 September 2021, at 17.

¹⁰³ GGE n(101) at para 40.

of principles. It is now time that States intensify the implementation of the UNGPs in the technology sector, thus supporting the governance of AI in line with human rights.

VI. CONCLUSION

The recent emphasis on mandatory measures, notably on human rights due diligence and the regulation of AI, may be indicative of a potential shift experience in “real-life politics” towards a rebalancing of the smart mix of measures in favour of the adoption of legally binding rules. If AI regulation is adopted in line with human rights, that may accelerate the uptake of standards and norms, such as those recognised by the UNGPs.

However, the sole adoption of mandatory regulation on AI may not suffice to foster a rights-respecting culture of conduct in the technology sector. Without robust regulatory bodies with sufficient capacity and resources to oversee the implementation of the measures and monitor compliance with the legal instruments, efforts to regulate AI may lack effectiveness.

Voluntary measures may be crucial to adjust the smart mix of measures and encourage responsible behaviour in the AI technology sector. For instance, the adoption of codes of conduct and benchmarking exercises may support different stakeholders in finding a common understanding of human rights application to the AI sector. Additionally, they can help identify appropriate practices and red lines concerning AI design and development. Voluntary measures can thus complement and feed into regulatory processes.

Furthermore, the successful implementation of a smart mix of measures in the AI sector requires strong policy coherence within governmental structures, as well as vis-à-vis external stakeholders. Internally, that requires a coordinated approach and knowledge and awareness of human rights across governmental structures. Externally, policy coherence requires

that States lead by example in the international sphere, promoting human rights in multilateral institutions and processes. It also implies the establishment of governance mechanisms that promote accountability and respect for human rights.

Accordingly, there is a need for the development of actionable tools to provide policymakers with the necessary knowledge of human rights and, in particular, the UNGPs. The tools could also serve as a basis for the assessment of regulatory and incentive-based initiatives directed at the technology sector, to check whether these align with the UNGPs. Such a tool/tools should be interactive and user-friendly, allowing for policymakers and other stakeholders to draw on its resources also when promoting human rights externally. More research is needed on the format, scope and reach of such tools, which could be piloted by the B-Tech Project Team following a series of multi-stakeholder consultations.

In this way, States would be able to place human rights at the centre of regulatory and policy frameworks while supporting innovation in AI.

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