

THE CAPCO INSTITUTE
JOURNAL
OF FINANCIAL TRANSFORMATION

GOVERNANCE OF TECHNOLOGY

AI, business, and
international human rights

MARK CHINEN

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#59 JUNE 2024

THE CAPCO INSTITUTE

JOURNAL OF FINANCIAL TRANSFORMATION

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DEAR READER,

In my new role as CEO of Capco, I am very pleased to welcome you to the latest edition of the Capco Journal, titled **Balancing Innovation and Control**.


The financial services and energy sectors are poised for another transformative year. At Capco, we recognize that this is a new era where innovation, expertise, adaptability, and speed of execution will be valued as never before.

Success will be determined based on exceptional strategic thinking, and the ability to leverage innovative new technology, including GenAI, while balancing a laser focus on risk and resilience. Leaders across the financial services and energy industries recognize the transformative benefits of strong governance while needing to find the optimal balance between innovation and control.

This edition of the Capco Journal thus examines the critical role of balancing innovation and control in technology, with a particular focus on data, AI, and sustainability, with wider corporate governance considerations. As always, our authors include leading academics, senior financial services executives, and Capco's own subject matter experts.

I hope that you will find the articles in this edition truly thought provoking, and that our contributors' insights prove valuable, as you consider your institution's future approach to managing innovation in a controlled environment.

My thanks and appreciation to our contributors and our readers.



Annie Rowland, **Capco CEO**

AI, BUSINESS, AND INTERNATIONAL HUMAN RIGHTS

MARK CHINEN | Professor, Seattle University School of Law

ABSTRACT

This article discusses efforts by policymakers to regulate AI through international human rights. It begins by surveying some of the human rights concerns that arise from AI applications. Because of the important role businesses are playing in the development of AI, the article then sketches the contours of international human rights law as it applies to firms. Businesses have a responsibility to respect human rights, but until recently this has not been understood as a legal obligation. Recent legislation in Europe indicates that the norm is hardening, but there is resistance to this trend. Some of the reasons why are explored here. I join others, however, in arguing that as complex as some of these issues are, international human rights as a set of principles and where appropriate, as legal obligations, are the best overarching framework for governing transformative technologies such as AI.

1. INTRODUCTION

It is now over a year since ChatGPT, the large language model (LLM) developed by OpenAI, galvanized world attention and sparked a race among the major technology firms to deploy LLMs, as well as attempts by policymakers to respond to the risks posed by these applications. The ousting and return of OpenAI's president and the subsequent reorganization of OpenAI's management reflected tensions among the AI community about the directions artificial intelligence (AI) applications should take, the need for capital to develop and monetize them, the influence of large technology companies, and the role of corporate governance in steering AI development and deployment.

It is no surprise that AI applications are subject to such scrutiny, as they have the potential to impact every domain of human life. Public governance of AI is, of course, taking place at the national level, but a nascent form of transnational, regional, and international governance is emerging from the interactions of businesses and private associations, professional organizations, academics, nation states, and international organizations. Such governance comprises a range of soft and hard, technical, and general norms that address AI applications. International human rights are one source of those norms.

This article discusses efforts by policymakers to regulate AI through international human rights. It begins by surveying some of the human rights concerns that arise from AI applications. Next, because of the important role businesses are playing in the development of AI, the article sketches the contours of international human rights law as it applies to firms. Under that law, businesses have a responsibility to respect human rights, but until recently this has not been understood as a legal obligation. Recent legislation in Europe indicates that the norm is hardening, but there is resistance to this trend. Some of the reasons why are explored here. I join others, however, in arguing that as complex as some of these issues are, international human rights as a set of principles and where appropriate, as legal obligations, are the best overarching framework for governing transformative technologies like AI.

2. AI APPLICATIONS AND THEIR IMPLICATIONS FOR HUMAN RIGHTS

AI refers to computer techniques or methods used to perform relatively sophisticated human tasks. It is now being used for diagnostic, predictive, and prescriptive analytics in areas such as transportation, healthcare, the workplace, law enforcement, education, and entertainment. One AI learning technique requires data to train a computer program as it is

being developed for a particular task. Breakthroughs in natural language processing methods, as well as AI models trained on massive amounts of data now allow the generation of images, text, and videos with sometimes startling degrees of realism.

AI applications have the potential to provide significant social and financial benefits. At the same time, observers are concerned that AI applications could lead to adverse impacts in areas such as privacy, safety, democracy, and international peace and security, in turn raising human rights concerns. B-Tech, a United Nations project focusing on human rights and transformative technologies, suggests that nine human rights established under the U.N. Declaration on Human Rights could be negatively affected by generative AI.¹ It raises, for example, the right to privacy set out in article 12 of the Declaration: “No one shall be subjected to arbitrary interference with their privacy, family, home or correspondence, nor to attacks upon their honour and reputation.” B-Tech explains that this right could be violated in several ways. For instance, data used to train generative AI models could contain personal information with no meaningful way for individuals to consent to their collection, particularly if that data is obtained by scraping the web.² Users that interact with AI chatbots could be led to provide personal information without fully understanding how such data will be used.³

AlgorithmWatch is concerned that a lack of transparency around automated decision-making systems “impedes individuals’ access to legal remedies” under article 2(3) of the International Covenant on Civil and Political Rights.⁴ The organization also identifies other risks to human rights such as the right to freedom from discrimination and the rights to freedom of expression, religion, assembly, privacy, and equal treatment.⁵ The E.U. Agency for Fundamental Rights has similarly discussed how several of the 50 rights articulated in the Charter of Fundamental Rights of the European Union could be negatively impacted by artificial intelligence systems.⁶

The international community is now focusing on the human rights implications of business models followed by technology companies. The U.N. Office of the High Commissioner for Human Rights identifies several practices that raise possible concerns:

- Gathering large volumes of personal data (whether to train algorithms or sell insights to third parties);
- Selling products to, or partnering with, governments seeking to use new technologies for state functions or public service delivery that could disproportionately put vulnerable populations at risk;
- The promise of hyper-personalization in human resources or marketing decision[s], which could lead to discrimination;
- Using “algorithmic bosses” to mediate the relationship between workers and firms that generate business value from the offline work being done, while limiting labor protections for those workers;
- Providing a technology that allows vast numbers of small and medium enterprises, or individuals to conduct activities that may result in harm to people, but where control over their activities might be limited; and
- Models that are informed by, or inform, the personal choices and behaviors of populations without their knowledge and consent.⁷

As discussed, the B-Tech project has assessed some of these practices under human rights principles. A detailed factual analysis in a specific case would, of course, be required to determine whether a particular business practice violated a human right as a legal matter, but studies like these confirm that human rights are being used for framing the development and use of artificial intelligence.

¹ U.N., 2023, “Taxonomy of human rights risks connected to generative AI: supplement to B-Tech’s foundational report on the responsible development and deployment of generative AI, Office of the High Commissioner on Human Rights, B-Tech Project, <https://tinyurl.com/4eu7ej89> [hereinafter B-Tech Human Rights Taxonomy]

² Id., at 6. In this regard, see Nasr, M., N. Carlini, J. Hayase, M. Jagielski, A.F. Cooper, D. Ippolito, C. Choquette-Choo, E. Wallace, F. Tramèr, and K. Lee, 2023, “Scalable extraction of training data from (production) language models,” arXiv.org, November 28, <https://tinyurl.com/mr39st9y> (developing a way to attack ChatGPT (gpt-3.5-turbo) so that it disgorges gigabytes of training data, some of which may contain personal information).

³ B-Tech Human Rights Taxonomy, supra note 1

⁴ AlgorithmWatch, 2022, “Position by AlgorithmWatch: Input to the High Commissioner report on the practical application of the United Nations Guiding Principles on Business and Human Rights to the activities of technology companies,” <https://tinyurl.com/4k3fdek7>, page 2

⁵ Id., p. 3, Ashraf, C., 2020, “Artificial intelligence and the rights to assembly and association,” *Journal of Cyber Policy* 5:2, 163-179

⁶ European Agency for Fundamental Rights, 2020, “Getting the future right: artificial intelligence and fundamental rights,” <https://tinyurl.com/2bvzrzuc>; European Agency for Fundamental Rights, 2022, “Bias in algorithms: artificial intelligence and discrimination,” <https://tinyurl.com/4uvhc8tf>. The 50 rights are organized under the headings of dignity, freedoms, equality, solidarity, citizen’s rights, and justice. Charter of Fundamental Rights of the European Union, 2010.

⁷ UN Human Rights Business and Human Rights in Technology Project (B-Tech), 2023, “Applying the UN Guiding Principles on Business and Human Rights to digital technologies: Overview and Scope,” <https://tinyurl.com/mrx7msh>, page 5

3. INTERNATIONAL HUMAN RIGHTS AND BUSINESS

To better understand these trends, a brief overview of the international human rights system is helpful. Human rights have at least four meanings. They can refer to normative principles about how humans are to be treated. They can stand for legal rights as such. More formally, they refer to the set of international human rights codified in human rights treaties or in other sources of international law. Finally, human rights are associated with the practice of institutions and actors that administer and enforce human rights.⁸

It should be noted at the outset that whether human rights should be the basis for international governance is contested. Human rights have been criticized for their Western origins and for their ineffectiveness. At a minimum, however, they provide an overarching vision for addressing issues of international concern, including certain AI applications. Virtually all countries are signatories to one or more of the major human rights conventions discussed immediately below and have agreed that the rights they establish are universal.⁹ There is a long history of their existence and of the institutions and practices that have emerged from them.¹⁰ At the international level human rights thus provide a common language and means to articulate and assess the positive and negative impacts of emerging technologies on people and societies.

At the international level, the primary set of formal rights is codified in treaties sponsored by the U.N., among them the Universal Declaration of Human Rights,¹¹ the International Covenant on Civil and Political Rights,¹² and the International

Covenant on Economic, Social and Cultural Rights.¹³ There are important regional human rights treaties: the African Charter on Human and Peoples' Rights,¹⁴ the American Convention on Human Rights,¹⁵ and, as mentioned, the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶ Human rights treaties are administered by organs contemplated by the treaties themselves or established for that purpose at the international and regional level.¹⁷ In the U.N. system, all U.N. bodies are supported by the Office of the High Commissioner for Human Rights.¹⁸ The regional treaties establish courts for dispute resolution: the Inter-American Court for Human Rights, the African Court on Human and People's Rights, and the European Court of Human Rights.

3.1 The U.N. Guiding Principles on Business and Human Rights: Respect for human rights and human rights due diligence and remediation

International human rights are a subset of international law and as such addresses business conduct only indirectly: in most cases, international law applies only to nation states and international organizations. States must first enact domestic legislation that applies international norms to companies under their jurisdiction, and several treaties that regulate business conduct do just that.¹⁹ In the alternative, states must consent to deep forms of regional integration. This is the case with the E.U., where regulations adopted at the E.U. level are automatically binding.

In human rights, business conduct has been governed by non-binding principles. Several documents create this framework,²⁰ but the U.N. Guiding Principles on Business

⁸ Nickel, J., 2021, "Human rights," The Stanford Encyclopedia of Philosophy, Fall 2021 ed., <https://tinyurl.com/yckbwa9j>

⁹ Vienna Declaration and Programme of Action, 1993, U.N. Doc. A/CONF 157/23

¹⁰ Latonero, M., 2018, "Governing artificial intelligence: upholding human rights and dignity," Data & Society, October 10, <https://tinyurl.com/3s8w2m33>

¹¹ Universal Declaration of Human Rights, 1948

¹² International Covenant on Civil and Political Rights, 1976

¹³ International Covenant on Economic, Social, and Cultural Rights, 1976. For a list of seven "core" international human rights instruments, see U.N. Population Fund, 2004, Core International Human Rights Instruments, <https://tinyurl.com/3kvfmurd>

¹⁴ African [Banjul] Charter on Human and People's Rights, 1981

¹⁵ American Convention on Human Rights, 1969

¹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; article 19

¹⁷ For example, within the U.N. system, several bodies are formed under the U.N. Charter. These are the Human Rights Council, Universal Periodic Review, Special Procedures of the Human Rights Council, and the Human Rights Complaint Procedure.

¹⁸ U.N. Office of the High Commissioner for Human Rights, 2021 Human Rights Bodies, <https://tinyurl.com/59534hw6>

¹⁹ These include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Paris Convention on the Third Party Liability in the Field of Nuclear Energy, the International Convention on Civil Liability for Oil Pollution Damage, the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, and the Hazardous Waste Convention. van den Herik, L., and J. Čerňič, 2010, "Regulating corporations under international law," *Journal of International Criminal Justice* 8:3, 725-743.

²⁰ According to Barnali Choudhury, these are (with current citations) the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023, OECD Publishing; the International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2022, 6th ed., ILO Publishing; the UN Global Compact (based on corporate social responsibility principles); and the UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011, U.N. Doc. A/HRC/17/31 [hereinafter Guiding Principles]. Choudhury, B., 2018, "Balancing soft and hard law for business and human rights," *British Institute of International and Comparative Law* 67:4, 961-986

and Human Rights have arguably been the most influential statement of the responsibilities of business in this area.²¹ The Guiding Principles establish three maxims: first, states have a responsibility to protect human rights; second, business firms should respect human rights; and third, victims should be given effective remedies for violations of those rights. As part of their responsibility to respect human rights, businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”²² The responsibility to address adverse human rights impacts involves not only a business’s own activities, but also seeking “to prevent or mitigate adverse impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”²³

The Guiding Principles elaborate that management should adopt policies that commit to respect human rights,²⁴ but there are two more consequential requirements. First, there is the due diligence requirement: businesses should adopt a “human rights due diligence process to identify, prevent, and account for how they address their impacts on human rights.”²⁵ Such diligence will vary according to the size of the business and should be ongoing.²⁶ Due diligence encompasses both internal activities and business relationships: it should “cover adverse human rights impacts that businesses may cause or contribute to through [a business’s] own activities, or which may be directly linked to its operations, products or services by its business relationships.”²⁷ Businesses should then take “appropriate action” based on this human rights assessment.²⁸

Second, businesses are required to mitigate human rights harms. They should establish “[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”²⁹ States have primary responsibility for providing effective remedies for breaches of human rights, but “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”³⁰ This takes place mostly through “operational level grievance mechanisms” for adversely affected individuals or communities.³¹

3.2 The Guiding Principles as principles

Although the Guiding Principles set out in detail a business’s responsibilities regarding human rights, they are not legally binding. Barnali Choudhury notes that the principles were deliberately grounded in non-legal expectations and norms. There is no legal definition of “corporate responsibility to respect.” The principles do not impose any consequences for failing to meet these responsibilities, and there is no third-party oversight of compliance.³² However, despite their non-binding nature they have been highly influential. A working group established by the U.N. Human Rights Council to promote the principles claimed with justification that “[t]here is no doubt that the Guiding Principles have succeeded in providing a globally agreed-upon authoritative standard for what States and businesses need to do to respectively protect and respect the full range of human rights across all business contexts....”³³ They have been accepted by significant parts of the business community, including the large AI companies. Amazon, Apple, Google, IBM, Meta, and Microsoft have all stated that their human rights policies are informed in part by the Guiding Principles.³⁴

²¹ For example, the OECD Guidelines “draw from” the U.N. Guiding Principles, comment 41, and the ILO Tripartite Declaration states that the Guiding Principles “outline the respective duties and responsibilities of States and enterprises on human rights,” para. 10(a).

²² Guiding Principles Principle 11

²³ Id. Principle 13(b)

²⁴ Id. Principle 16

²⁵ Id. Principles 15(b), 17

²⁶ Id. Principles 17(b)-(c)

²⁷ Id. Principle 17(a)

²⁸ Id. Principle 19

²⁹ Id. Principle 15(c)

³⁰ Id. Principle 22

³¹ Id. Principle 29

³² Choudhury, *supra* note 20; pages 968-969

³³ U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises, 2021, “Guiding Principles on Business and Human Rights at 10: taking stock of the first decade,” U.N. Doc. A/HRC/47/39, paragraph 11

³⁴ Amazon Global Human Rights Principles, <https://tinyurl.com/5nae36m5>; Apple, “Our commitment to human rights,” <https://tinyurl.com/yj7hs3kt>; Google, About Google: Human Rights, <https://tinyurl.com/2pjsw9um>; IBM, “IBM human rights statement of principles,” <https://tinyurl.com/3fwn45yh>; Sissons, M., 2021, Meta: “Our commitment to human rights,” <https://tinyurl.com/54jcccm9>; Microsoft: “Microsoft global human rights statement,” <https://tinyurl.com/mra5h7c7>

4. DUE DILIGENCE AS A LEGAL OBLIGATION

The adoption by corporations of the Guiding Principles can be viewed as consistent with the larger corporate social responsibility and environmental, social, and governance movements.³⁵ Over the past decade, some stakeholders have argued that the principles should be hardened into binding law, arguing that gaps in existing law allow for human rights abuses without recourse. The due diligence requirement has become the locus of these efforts and has become shorthand for a range of responsibilities set out in the Guiding Principles.³⁶ Some domestic legislation and regulations now require companies to engage in due diligence directed towards specific issues such as conflict minerals and forced and child labor.³⁷ Germany has adopted legislation that focuses on rights associated with labor and the environment.³⁸ France and Norway have been more expansive and have required larger companies to engage in human rights due diligence more generally.³⁹

This trend, however, is not without opposition. The push-pull is evident in the E.U. Artificial Intelligence Act; the proposed E.U. Directive on Corporate Sustainability; the Council of Europe Draft Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law; and negotiations at the U.N. for a general treaty on business and human rights.

4.1 The E.U. Artificial Intelligence Act

By early 2024, the E.U. had completed most of the stages in approving the E.U. Artificial Intelligence Act (AIA), which had been under consideration since 2021. A final vote by the E.U. Parliament was expected in April 2024.

The general contours of the Act are well known, and a provisional text was released by the E.U. Council in late January.⁴⁰ When the law goes into effect, AI systems will be regulated in proportion to their risk of harm. AI systems that pose an unacceptable risk, such as those using subliminal techniques to distort a person's or group's behavior, are prohibited.⁴¹ Other systems are high-risk because they threaten "significant potential harm to health, safety, fundamental rights, environment, democracy, and the rule of law."⁴² Such high-risk AI systems are subject to a broad range of design, risk management, documentation, and reporting requirements.⁴³ General purpose AI models, such as large language models and other generative AI systems, are also regulated, particularly if they are declared to be "general purpose models with systemic risk."⁴⁴ AI systems that are not high-risk or general purpose models with systemic risk are subject to various transparency obligations.⁴⁵ For example, a company that uses a chatbot must disclose that an individual is interacting with an AI system.

By its terms, the AIA seeks to protect fundamental rights, particularly where prohibited AI practices or high-risk AI systems are concerned. National authorities that are empowered to protect those rights can gain access to documentation that companies who develop or deploy high-risk AI systems have submitted to regulators.⁴⁶ Further, all high-risk systems must have in place a risk management system, which among other things must identify and analyze known and reasonably foreseeable risks the high-risk system might pose to health, safety, or fundamental rights.⁴⁷ Providers of high-risk systems must give deployers instructions for use that include among other things information about known or foreseeable circumstances "which may lead to risks to health

³⁵ For a review of the literature on the effect of CSR and ESG governance measures on financial and stock performance, cost of capital, brand image and reputation, risk management and operational efficiency, and innovation, see Smit L., C. Bright, R. McCorquodale, M. Bauer, H. Deringer, D. Baeza-Breinbauer, F. Torres-Cortés, F. Alleweldt, S. Kara, C. Salinier, and H. Tejero Tobed, 2020, "Study on due diligence requirements through the supply chain, Final Report for the European Commission," 306-315, <https://tinyurl.com/2d6ztn9w>

³⁶ For a general discussion as of 2020, see id., pages 192-212

³⁷ See, e.g., 17 C.F.R. § 240 13p-1 (United States, conflict materials); Child Labor Duty of Care Act, 2019 (Netherlands)

³⁸ Act on Corporate Due Diligence Obligations in Supply Chains, 2021 (Germany)

³⁹ Law n°2017-399 of 27 March 2017 Concerning the Duty of Vigilance of Parent Companies and Holding Companies (France); Bill for Responsible and Sustainable Business Conduct, 2021 (Netherlands); Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act) (Norway)

⁴⁰ European Parliament, 2023, "Artificial Intelligence Act: deal on comprehensive rules for trustworthy AI," press release, December 12, <https://tinyurl.com/2wdpt9bk>. See also AIA Annex III. All references to the AIA are based on the provisional text released by the Council of the European Union, 2024 Interinstitutional File 2021/0106 (COD), January 26

⁴¹ AIA article 5

⁴² European Parliament supra note 40

⁴³ AIA articles 8-29, 51, 61-62

⁴⁴ Id. articles 52a-52d

⁴⁵ Id. articles 52, recitals 70-70e

⁴⁶ Id. article 64

⁴⁷ Id. article 9(2)(a)

and safety or fundamental rights.”⁴⁸ Such systems must be designed to allow meaningful human oversight aimed at preventing or minimizing risks to those rights.⁴⁹

The AIA also imposes a more formal human rights due diligence requirement for a limited number of AI systems. Public entities and private firms that provide public services, as well as operators deploying high-risk systems to evaluate a person’s creditworthiness or, in the area of insurance, to perform a risk assessment and to price life and health insurance policies, must perform a “fundamental rights impact assessment.”⁵⁰ The assessment must include a description of the deployer’s processes in which the high-risk system will be used, a description of the time and frequency of its use, categories of natural persons and groups likely to be affected, the specific risks of harm to such persons or groups, a description of the implementation of human oversight measures, and “the measures to be taken in case of the materialization of these risks, including their arrangements for internal governance and complaint mechanisms.”⁵¹ It is unclear from the language of the regulation whether mitigation processes and complaint mechanisms are mandatory, but it appears that there is a strong expectation that such mechanisms should be in place.⁵²

4.2 E.U. Directive on Corporate Sustainability Due Diligence

The E.U. has also been preparing the Directive on Corporate Sustainability Due Diligence. While the AIA marks an important step in regulating AI applications as such, if approved, the Due Diligence Directive will be a milestone in the hardening of international human rights norms for business in general.

Like the AIA, the final text of the legislation has not been officially approved as of this writing, but the Directive has been under consideration since 2022. The Directive was expected to receive final approval in March 2024 and a “final” draft has been circulated,⁵³ but late opposition by some member states has left in question the final details of the measure or whether it will be adopted at all.⁵⁴ As currently written, the legislation will affect all large firms,⁵⁵ including the major AI technology companies housed outside of the E.U.⁵⁶ The Directive largely codifies the U.N. Guiding Principles as further articulated by the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, as well as international environmental norms. Member states must adopt legislation requiring large companies to conduct human rights and environmental due diligence.⁵⁷ This includes implementing due diligence policies and risk management systems, identifying and assessing actual and potential adverse human rights impacts, preventing and mitigating potential adverse impacts, bringing actual adverse impacts to an end and minimizing their extent, providing remediation, engaging with stakeholders, adopting a complaints procedure, monitoring due diligence policies and measures, and publicly disclosing its due diligence activities.⁵⁸

The Directive goes further and requires that businesses must be made subject to penalties for failure to meet the requirements of the Directive⁵⁹ and to civil liability – in the case of human rights, presumably to victims of human rights abuses.⁶⁰

⁴⁸ Id. articles 13(3)(b)(iii)

⁴⁹ Id. articles 14(2). Bias detection that requires the processing of personal data must be allowed “subject to appropriate safeguards for the fundamental rights and freedoms of natural persons.” AIA, art. 10(5)

⁵⁰ Id. article 29a(1); Annex III part 5. See also AIA recital 58g

⁵¹ Id. article 29a(1)

⁵² Id. recital 58g

⁵³ Directive on Corporate Sustainability Due Diligence Draft, 2024, January 24, <https://tinyurl.com/5n7bn26m> [hereinafter Due Diligence Directive]. All references are to the Jan. 24 draft.

⁵⁴ Wolters, L., 2024, press conference, Feb. 28, <https://tinyurl.com/4rvp4b7p> (announcing that a qualified majority in the E.U. Council needed to approve the legislation had not been achieved); Segal, M., 2024, “EU Council fails to approve new environmental, human rights sustainability due diligence law,” ESG Today, February 28, <https://tinyurl.com/5a58ppme>

⁵⁵ Companies with more than 500 employees and net worldwide turnover of €50 million. Due Diligence Directive, article 2(1)(a). Companies in the textile, agriculture and food processing, and mineral extraction and related industries are also covered if they have more than 250 employees and net turnover of €40 million. Id., article 2(1)(bb)

⁵⁶ Firms formed in third countries are subject to the Directive if they generated a net turnover of €150 million in the E.U., or had a net turnover of €40 million and operate in the sectors listed above. Id., article 2(2)

⁵⁷ Id., article 4

⁵⁸ Id., article 4(1)

⁵⁹ Id., article 20

⁶⁰ Id., article 22

4.3 Council of Europe Draft Convention on AI, human rights, democracy and the rule of law

The Council of Europe is also negotiating a framework convention on AI, human rights, democracy, and the rule of law. Meetings are planned in mid-March 2024 to finalize the text for submission to the Council of Ministers.⁶¹ The convention is intended to establish a “legal framework on the development, design, use and decommissioning of artificial intelligence, based on the Council of Europe’s standards on human rights, democracy, and the rule of law and other relevant international standards, and conducive to innovation...”⁶² At present, the major principles, rules and rights set out in the convention are organized into five areas: the application of AI systems by public authorities; the application of AI systems in the provision of goods, facilities, and services; fundamental principles of design, development, and application of AI systems; measures and safeguards for accountability and redress; and the assessment and mitigation of risks and adverse impacts. A primary issue still being negotiated is whether the treaty will apply to private entities. If so, signatories will be required to ensure that firms within their respective jurisdictions adhere to the terms of the treaty. The U.S., which is an observer in the negotiations, reportedly seeks to exclude private entities.⁶³ The E.U., on the other hand, supports applying the treaty to businesses.⁶⁴

4.4 Negotiations on a U.N. treaty on business and human rights

Work at the international level has been slower. Two years after the Guiding Principles were published, the U.N. Human Rights Council established an “open-ended intergovernmental working group” on transnational corporations and other business enterprises with respect to human rights, whose purpose is to elaborate an “international legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises.”⁶⁵

Work on the treaty has been ongoing for ten years, with no deadline for ending negotiations; thus, the final contours of the treaty are far from clear. As currently drafted, the treaty would require states parties to take measures to:

- a) prevent the involvement of business enterprises in human rights abuse;
- b) ensure respect by business enterprises for internationally recognized human rights and fundamental freedoms;
- c) ensure the practice of human rights due diligence by business enterprises;
- d) promote the active and meaningful participation of individuals and groups ... in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.⁶⁶

Like the other legislation already discussed, the treaty would also require states to enact legally enforceable obligations for businesses to engage in human rights due diligence.⁶⁷ States must also ensure that businesses take “appropriate steps to prevent human right abuses by third parties” when the business “controls, manages, or supervises” the third party.⁶⁸ The treaty has been opposed by the U.S. while the E.U. has pointed to its recent legislation to show that the E.U. is already taking action to ensure businesses respect human rights.⁶⁹

5. IMPLICATIONS FOR AI APPLICATIONS

If the efforts to require businesses to conduct human rights due diligence succeed, what are the implications for AI applications and the firms that develop, market, and use them? Under the E.U. AIA, which has all but been approved, firms that develop or use high-risk AI systems will be required to assess and to later mitigate the risks that such systems pose to fundamental rights. Because the formal

⁶¹ Council of Europe Committee on Artificial Intelligence, 2023, “Preliminary timeline for the negotiations,” CAI(2023)17rev2, December 11

⁶² Council of Europe, 2023, “Terms of reference of the Committee of Artificial Intelligence (CAI),” extract from CM(2023)131-addfinal, <https://tinyurl.com/4ddt6852>

⁶³ Bertuzzi, L., 2023, “EU’s AI ambitions at risk as US pushes to water down international treaty,” Euractiv, June 6, <https://tinyurl.com/5ybf743f>

⁶⁴ Bertuzzi, L., 2024, “EU prepares to push back on private sector carve-out from international AI treaty,” Euractiv, January 10, <https://tinyurl.com/v8w4j7rr>

⁶⁵ United Nations Human Rights Council, 2014, Res. 26/9, U.N. Doc. A/HRC/RES/26/9; page 2

⁶⁶ United Nations Human Rights Council open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 2023, updated draft legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, <https://tinyurl.com/8pny3wnf>; article 6.2

⁶⁷ Id. article 6.4

⁶⁸ Id. article 6.5

⁶⁹ Annex to Emilio Rafael Izquierdo Miño (Chair-Rapporteur), 2021, Report on the seventh session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Note by the Secretariat, U.N. Doc. A/HRC/49/65; page 24 (opening statement of the U.S.). The E.U. is not formally engaged in negotiations in the working group, but supports a legally binding treaty. OCHCR, 2023, “Note by the Secretariat: compilation of general statements from States and non-State stakeholders made during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights,” Office of the United Nations High Commissioner for Human Rights, <https://tinyurl.com/83hxmajk>

fundamental human rights assessment that applies to certain banking and insurance activities is intended to be “relatively easy to comply with,”⁷⁰ it can be argued that it should be equally straightforward to comply with the more general risk assessment and mitigation requirements that apply to high-risk systems. Companies will understandably pay closer attention to the technical and operational requirements the AIA imposes on those systems, but if only because of the financial costs of violating the AIA, firms that develop and use high-risk AI systems will nevertheless want to demonstrate that they have engaged in a fundamental rights assessment, particularly with respect to their business models. Studies of the risks posed by AI applications to human rights, such as those conducted by the E.U. Agency for Fundamental Rights and by B-Tech at the U.N. level discussed above could serve as starting points for that assessment.

If adopted, the Due Diligence Directive will be far more impactful if only for the large AI firms. There will be nuances as the individual member states implement its terms, but any due diligence requirement will almost certainly be much more detailed and, more importantly, will be grounds for liability if violated. In addition, it will involve monitoring parent, affiliated companies, and subsidiaries, as well as business partners (discussed below). Unlike with the AIA, the level of regulation will not vary with risk and the sources of international human rights law will be potentially broader. Virtually all the large AI companies already have established risk assessment and mitigation processes as part of their internal operations,⁷¹ but these will now be subject to regulatory assessment. As with the AIA, large companies developing or deploying AI should be aware of the human rights analyses conducted by the E.U. Agency for Fundamental Rights and secondarily by B-Tech, as well as by authorities within the member states where they are established or operate.

6. BROADER ISSUES

The recent evolutions in the E.U., the Council of Europe, and the U.N. mark a significant development in international human rights and business in general and AI applications in particular. They raise three closely related issues: 1) the extraterritorial application of regional and domestic law; 2) the tension between generality and specificity in international human rights law and its impact on the efficacy and feasibility of such law; and 3) the regulation of supply chains.

6.1 The extraterritorial application of regional and domestic law

When the U.N.’s work on a draft treaty began, John Ruggie, who led the work behind the Guiding Principles, did not oppose an overarching business and human rights treaty as such, but cautioned that several issues would need to be resolved for a treaty to represent true progress in advancing human rights. Among them, since states are already obligated to protect human rights, the next development in international law would involve requiring states to enforce their laws against companies for operations outside the territory. Ruggie observed that although some have argued that the extraterritorial application of human rights law is becoming a legal requirement, in his view, this was a step nation states were not willing to take.⁷² In this regard, when the Guiding Principles were adopted, a group of experts in international law and human rights issued the Maastricht Principles, concluding that current law does require states to protect human rights by enforcing them against the activities of its companies abroad.⁷³ However, not all observers agree with this contention,⁷⁴ and the law remains unsettled at this point.

Requiring states to enforce their laws abroad can be fraught. Under international law, a state can exercise jurisdiction over its own territory, actions abroad that have a direct effect in the

⁷⁰ AIA, Fundamental rights impact statement; pages 4-5

⁷¹ See, e.g., Microsoft Azure, 2022, “Foundations for assessing harm,” May 6, <https://tinyurl.com/5482xwex> (describing the company’s harms modeling approach to developing AI applications)

⁷² Ruggie, J., 2014, “A UN business and human rights treaty? An issues brief,” Harvard University Kennedy School of Government Business and Human Rights Resource Center, January 28, <https://tinyurl.com/3yzhxwff>

⁷³ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2013, art. 24; De Schutter, O., A. Eide, A. Khalfan, M. Orellana, M. Salomon, and I. Seiderman, 2012, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of economic, social and cultural rights,” *Human Rights Quarterly* 34:4, 1084-1169

⁷⁴ Ruggie did not seem persuaded by this conclusion when he expressed his concerns about a general treaty in 2014. Ruggie supra note 72. See also Knox, J., 2011, “The Ruggie rules: applying human rights law to corporations,” in Mares, R., 2012, *The UN Guiding Principles on Business and Ethics: foundations and implementation*, Brill. Knox argues that the issue is not whether states can enforce human rights extraterritorially against those within its jurisdiction, but whether they are required to do so. Id. pages 78-79. He contends further that “[d]eveloped countries have generally opposed extraterritorial human rights obligations, and developing countries may not always like the idea, either, in the context of the duty to protect . . .” Id. page 82

territory, its citizens, or entities under its control, and universal crimes such as genocide. As discussed above, states can consent to greater integration, as is true with the E.U. By their terms, the AIA and Due Diligence Directive extend respectively to AI system providers and deployers and to large AI firms no matter where located, but both pieces of legislation justify this reach because they apply to actions by those entities in the E.U. or that have effects in it.⁷⁵ However, even though they are grounded in the standard rules for jurisdiction, E.U. legislation influences the business decisions of entities that fall under the jurisdiction of other states – this is the so-called Brussels Effect.⁷⁶ For some AI firms, European law is becoming the de facto regulator of AI applications.

To apply domestic law against a company abroad is to apply that law in a state that also has jurisdiction over that entity. States and regions adopt laws specific to their values and circumstances. The issue arises whether a “sending” state that applies its law abroad interferes with the domestic and regional policies of other states. The issue is not new: conflicts have arisen over states’ competition, anti-bribery, taxation, and discovery laws. With human rights, however, it can be argued that because states have agreed that they are universal, in theory it should not matter which state enforces them. But regions and states have differing views on the nature and scope of those rights; thus, the question arises how much discretion states should be given to articulate and enforce them. To grant too much leeway could weaken the universality of human rights, while to grant too little could lead to their being rejected as imposed from outside the state. The case can also be made under principles of subsidiarity that states should remain the primary locus for the regulation of firms. The legitimacy of international law is often questioned because such law is beyond the reach of ordinary citizens, whereas there are at least some mechanisms for public consensus at the domestic level. However, to remain at the status quo could result in human rights abuses being unremedied, which in turn has its own negative impact on the legitimacy of international law.

6.2 Specificity and generality in international Human Rights Law, efficacy, and feasibility

Like the question of discretion, in international governance there is a dilemma between on the one hand, crafting a treaty that has specific, enforceable norms only to have them rejected by some states, and on the other, drafting a more general treaty that garners greater participation but that is essentially toothless. Ruggie added that by its nature, business and human rights is an area comprising a constellation of laws and issues, so that any treaty will need to be written at a high level of abstraction. Only then can such a treaty encompass the entire field and garner the consent of states. Because of such generality, however, Ruggie feared that the resulting treaty would not be effective.⁷⁷

Either approach has positive or negative aspects for human rights. For example, the Council of Europe might conclude that for now it is better for countries such as the U.S. to participate in an AI human rights treaty that applies only to state actions and not to businesses. Thus the status quo would remain if, in contrast, the Council of Europe extends the treaty obligations to businesses, this would, of course, confirm a hardening of human rights norms for AI. But the country that houses most of the major AI companies would likely not be a party.

6.3 Supply chains and human rights

Public-facing companies, particularly the manufacturers of consumer goods, have long been asked to ensure that their suppliers conform to human rights standards. AI has not been immune from these efforts. Datasets labeled by people are still needed to train AI models. As is true with the garment industry, observers are concerned that data labeling is done offshore under adverse work conditions or that the people who label data will add their own biases in the labeling process.⁷⁸ AI companies have also been criticized for the downstream uses of their technology. This has been the case with facial recognition systems and other surveillance technologies.⁷⁹ The large technology companies have

⁷⁵ AIA recitals 24-25

⁷⁶ Bradford, A., 2012, “The Brussels effect,” *Northwestern University Law Review* 107:1, 1-67

⁷⁷ Ruggie supra note 72 page 3. He writes, “[T]he category of business and human rights . . . includes complex clusters of different bodies of national and international law—for starters, human rights law, labor law, anti-discrimination law, humanitarian law, investment law, trade law, consumer protection law, as well as corporate law and securities regulation.” *Id.*

⁷⁸ Tan, R., and R. Cabato, 2023, “Behind the AI boom, an army of overseas workers in ‘digital sweatshops,’” *Washington Post*, August 28, <https://tinyurl.com/58heee5r>; Rowe, N., 2023, “Underage workers are training AI: companies that provide Big Tech with AI data-labeling services are inadvertently hiring young teens to work on their platforms, often exposing them to traumatic content,” *Wired*, November 15, <https://tinyurl.com/pt8w54t8>; Springbord Blog, 2023, “The ethics of data labeling: ensuring fair and unbiased labeling,” June 20, <https://tinyurl.com/47nxpf6k>

⁷⁹ Weise, K., 2021, “Amazon indefinitely extends a moratorium on the police use of its facial recognition software,” *New York Times*, May 18, <https://tinyurl.com/mpbvrz52>

responded to these criticisms by adopting moratoria for certain uses, application processes, end user agreements, and terms of use that restrict the way in which these applications can be used.⁸⁰ But except perhaps in very limited circumstances, they are not considered liable for actions taken by those suppliers or customers.

In its current form, the proposed Due Diligence Directive and, to a lesser extent, the AIA, expand the responsibility of companies for partners in their supply chains. The Directive expressly “lays down rules ... on the obligations for companies regarding actual and potential human rights adverse impacts..., with respect to ... the operations carried out by their business partners in companies’ chains of activities[.]”⁸¹ For the most part, this would involve a company’s upstream activities, although the downstream disposal of products would be subject to the due diligence requirement as well. (For the time being, financial institutions would be exempt from taking into account its downstream business partners).⁸²

If the Directive is adopted, it would signal a major development in using human rights (and sustainability norms) to govern not only company activities, but also those of its partners. Recall that the Directive requires companies to among other things adopt due diligence policies and risk management systems, identify and assess actual and potential adverse human rights impacts, prevent and mitigate them, bring actual adverse impacts to an end and minimize their extent, and provide remediation. Several of these obligations require companies to involve themselves with the actions of their business associates. For example, as a company takes appropriate measures to prevent or mitigate potential adverse impacts, this includes among other things considering the impacts caused

by its business partners, taking into account the ability of a company to influence those partners.⁸³ Further, a company must seek contractual assurances from its direct business partners that they will follow the company’s code of conduct and in turn seek similar assurances from its partners.⁸⁴ (As discussed above, some technology companies already require this of their customers.) In extreme cases, a company could be required to cut ties with a business partner.⁸⁵

7. CONCLUSION

AI applications are capturing public attention just as human rights as a source of governance over business is evolving from a set of principles to legally binding obligations. This article has discussed efforts by policymakers to regulate AI through international human rights, surveying some of the human rights concerns that arise from AI applications, describing international human rights law as it applies to businesses in general, and reporting how those norms have been hardening at the domestic and regional levels. At the same time, the article has identified some of the issues that arise when international human rights are applied as legal obligations at the international level, particularly the problem of extraterritoriality and the dilemma of participation versus effectiveness in international agreements. However, because states have agreed that human rights are universal, they remain the appropriate framework for governing transformative technologies such as AI. Even though international actors will argue about the meaning and scope of these rights or whether specific AI applications even raise human rights concerns, no other framework provides better terms for vigorous debate and eventual consensus.

⁸⁰ For example, see Amazon.com, 2021, Notice of 2021 Annual Meeting of Shareholders and Proxy Statement, pp. 27–28 (describing some of Amazon’s controls over downstream uses of its technology)

⁸¹ Due Diligence Directive article 1(a)

⁸² Id. recital 19

⁸³ Id. article 7(1)

⁸⁴ Id. article 7(2)(b). A direct business partner is defined in part as “an entity . . . with whom the company has a commercial agreement related to the operations, products or services of the company . . .” Id., art. 3(e)(i) An indirect partner is one that does not have such a commercial agreement, but which performs such services. Id. article 3(e)(ii)

⁸⁵ Id. article 8(6)

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