

ECNL briefer on the Study of the Human Rights Council Advisory Committee on “New and emerging digital technologies and human rights” (A/HRC/AC/25/CRP.2)



European Center for
Not-for-Profit Law

Key Takeaways

1. ECNL welcomes the Human Rights Council’s initiative and applauds the Study’s emphasis on international human rights.
2. ECNL urges the Human Rights Council and relevant UN bodies to establish human rights-based processes to assess, report on, and provide remedy to adverse impacts of AI technologies.
3. ECNL is alarmed by the lack of consideration given to the inclusive dialogue and civil society participation in discussions on this topic.

I. Study strengths

1) The study rightfully states that data-driven technologies should be consistent with international human rights.

With a global mandate, legitimacy, and constituency, the UN is well-positioned to lead artificial intelligence (AI) governance through a human rights-based approach. ECNL applauds the Advisory Committee’s statement that “in order for the data collected by new technologies to have meaningful impact on the lives of individuals, technologies should be designed with sound understanding of the international human rights framework and other legal principles.” ECNL furthermore agrees with the Advisory Committee that a human rights-based approach should include three pillars: “1) holistic understanding of new technologies; 2) holistic approach to human rights 3) holistic governance and regulatory efforts.” While ECNL as an organization focuses on civic freedoms and civic space, it seconds the Advisory Committee’s plea to “not privilege a few types of human rights issues at the expense of others but (...) to encompass the full spectrum of human rights.” When it comes to regulating emerging technologies, framing human rights considerations around datafication is wise, as AI systems are inherently data-driven. This begins with AI’s impacts on privacy, the Advisory Committee stressing that “threats to privacy should not be dismissed as the inevitable price for progress because the erosion of this right weakens the entire human rights framework.”



Sweden
Sverige

ICNL
INTERNATIONAL CENTER
FOR NOT-FOR-PROFIT LAW

The briefer was prepared as part of the ‘Strengthening Global And Regional Standards On Digital Technologies And Artificial Intelligence (AI) regional project, managed by the European Center for Not-for-Profit Law Stichting (ECNL). The project is made possible by the International Center for Not-for-Profit Law (ICNL) through the Civic Space Initiative, financed by the Government of Sweden. The Government of Sweden does not

necessarily share the opinions here within expressed. The authors bear the sole responsibility for the content.

2) The study rightfully contextualizes AI deployment against the backdrop of growing dependency on the internet and attempts to curb civic freedoms.

The study highlights that COVID-19 accelerated people's dependency on the internet and widened the digital divide (both between countries and within societies). Now more than ever, our basic human rights are under threat as they can conflict with powerful actors' activities and interests. The Advisory Committee rightfully notes that governments can restrict people's civic freedoms "by shutting down Internet services or selectively blocking access to online resources, censoring media, and persecuting people for expressing their opinions online." ECNL is concerned that adverse impacts on civic freedoms will only grow in the context of COVID-19, not least due to the ever-growing power of private digital platforms and the impacts of hate speech and algorithmic content moderation on freedom of assembly, association and expression. ECNL welcomes the UN's reiteration that end-to-end encryption, anonymization, and pseudonymization play a critical role in ensuring users' safety – both online and offline – especially for women and other vulnerable groups.

3) The study rightfully cautions against the in-built biases of technologies and their role in exacerbating existing inequality and injustice.

As evidenced by recent studies, algorithmic-driven technologies, of which automated decision-making systems are a glaring example, can exacerbate existing inequality and discrimination. ECNL fully agrees that "automated decision-making using predictive algorithms in law enforcement agencies and the judiciary has a high possibility of inducing discrimination because of in-built biases against minorities and vulnerable groups." Indeed, women and non-binary persons, ethnic, racial and religious minorities, migrants, indigenous people, disabled persons, children and the elderly, and members of lower socio-economic groups are hit particularly hard. ECNL is pleased that the Advisory Committee challenges the "neutrality" value that is sometimes (erroneously) attributed to AI systems, stating clearly that "technologies are [not] inert or neutral objects and that negative consequences are purely the result of humans misusing them." Beyond in-built biases, ECNL is alarmed by how intertwined AI systems are with existing institutional racism and sexism, which both fuel and are exacerbated by AI technologies.

II. Study concerns

1) The study reinforces the dangerous narrative of 'techno-solutionism'.

The study references AI applications as evidence for "positive outcomes" of technology, without acknowledging their limitations and/or lack of effectiveness. For example, the study suggests using facial recognition as a tool for reunifying migrant families or leveraging automation and predictive analytics for moderating content online. Yet there's little evidence that these systems are effective in practice, nor assurance that they won't adversely impact migrants and users' right to privacy, non-discrimination, and freedom of expression, among others. As such, ECNL cautions against making such arguments, which are inadequate at best, and dangerous at worst. 'Techno-solutionism' can indeed create a false justification for using potentially dangerous systems, while ignoring other effective and less rights-impacting alternatives, such as online anonymity or the commitment to not share user data with third parties. ECNL further notes that 'techno-solutionism' is especially problematic given the growing pressure to privatize social services (including welfare, political participation, and information), which disproportionately impacts women, minorities and marginalized groups.

2) The study downplays the negative impacts of emerging technologies and levels them with potential positives ones.

First, the study warns that any “comprehensive framework needs to balance the human rights opportunities and the risks associated with new technologies because too much focus on the mitigation of harm could hamper innovation.” ECNL is concerned that this statement reproduces the misconception that harm mitigation is a trade-off for innovation. Notwithstanding technologies that are inherently at odds with human rights and which should be banned (see below), rights-based technologies can indeed go hand in hand with innovation and profit-driven goals. What’s more, “mitigation of harm” and “innovation” are not a binary, but rather interact in complex ways against the backdrop of stakeholder capitalism. Second, the study only cursorily mentions the impacts of AI on the rule of law and democracy. Where it does so, it focuses on the long-term impacts while ignoring immediate and short-term outcomes on mis/disinformation, election integrity, and due process, to name a few.

3) Excessive attention is given to the needs and role of the private sector, at the expense of civil society and marginalised groups.

ECNL is alarmed that the importance of civil society, marginalized groups and affected communities is largely missing from the study’s assessment. The study praises as “encouraging that the UN, states, businesses, and academia have shown deep interest in the issues associated with new technologies.” While ECNL welcomes the Advisory Committee’s enthusiasm for multistakeholder collaboration, the failure to explicitly reference civil society is worrying. Not only have civil society organizations, activists and journalists consistently shown interest in the risks of AI and new technologies, they’ve also frequently been the first to expose and sound the alarm on dangerous impact. Even more troublesome is the disregard for the role that affected communities have played as well as the harm that they’ve suffered. The absence of groups who are already underrepresented and excluded from policy discussions, including women and non-binary persons, ethnic, religious and racial minorities, and representatives from non-U.S. and Western European countries, is disappointing. This is in stark contrast with the strong presence of private sector companies, which in turn increases the risk of corporate capture of policymaking.

In light of the above, ECNL recommends that the Advisory Committee revises the study to include the following:

1) Governments should establish clear processes for assessing risks, impacts on human rights and democracy and potential red lines (including bans and moratoriums).

While it’s important to focus on “the effects of new technologies rather than attempting to regulate specific systems”, as the study suggests, certain technologies that are inherently incompatible with human rights should be red-lined. These include but are not limited to facial recognition technologies and algorithmic-driven (mass) surveillance systems. In any case and for every regulation, it is crucial to consider both the implementation and enforcement mechanisms and the (re)evaluation of systems. This requires taking into consideration any potential negative feedback loops, where algorithmic-driven predictions lead to shaping outcomes and exacerbating existing discrimination. Relatedly, any technology-based measures responding to COVID-19 challenges must simultaneously consider digital inclusion and accessibility, and consistently offer offline alternatives. The Human Rights Council should recommend

that these measures limit data collection, storage, management, and retention to the strict necessary.

Furthermore, the Human Rights Council should urge governments to establish clear procedures for meaningful and inclusive assessments of risks and impacts on human rights and democracy. Such assessments should be conducted when developing or deploying any type of AI system, and repeated periodically throughout its lifecycle as part of a broader human rights due diligence program. Importantly, any rules around the public sector's use of emerging technologies or governance developments should include requirements for transparency as well as avenues for input from external stakeholders. These initiatives should further extend to public procurement of technology and other related public-private partnerships.

2) Companies that design, develop or deploy emerging technologies have a responsibility to respect human rights, as consistent with the UN Guiding Principles on Business and Human Rights.

Beyond merely suggesting that international human rights law inform emerging technologies, the Advisory Committee should clearly recommend that it be the leading framework for any development and governance thereof. ECNL welcomes the reference to the UN Guiding Principles on Business and Human Rights (UNGPs) in the study, and urges the Human Rights Council to demand more rigorous commitment to, and implementation of, the UNGPs. Specifically, companies should embed human rights considerations not only into their activities and operations, but also extend them to their supply chains, business models, and products. Human rights due diligence – of which human rights impact assessments are a critical component – coupled with strong reporting and transparency, should be conducted throughout the entire lifecycle of a technology. In addition, it should require that technology companies establish effective grievance mechanisms for cases where they cause, contribute to or are linked to human rights violations. Relatedly, the Human Rights Council should urge the international community to develop governance mechanisms to hold transnational companies accountable and close existing corporate liability gaps globally.

3) Ensure meaningful civil society participation.

In line with achieving the Sustainable Development Goals, UN multi-stakeholder work should center civil society and affected communities. To ensure meaningful participation, the UN should establish governance mechanisms so that decision-making power is equally distributed among stakeholders. This includes setting high standards for transparency from private sector actors within designated UN forums and related initiatives. Having recognized the benefits of collaboration between engineering and human rights communities, the UN should establish programs to strengthen mutual learning. To the extent possible, added resources should be dedicated to civil society participation, where entities such as the OHCHR B-Tech could act as a convenor. Overall, ECNL encourages the UN Tech Envoy mandate to improve coordination between existing human rights mechanisms, Special Rapporteurs, and specialised UN bodies working on this issue, while supporting the implementation of the Roadmap for Digital Cooperation. On that note, ECNL urges the UN to strengthen international cooperation, while also prioritizing the participation of states that tend to be excluded or marginalized.