



Shortcomings in ECHR and Other Council of Europe Legal Documents on Human Rights

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Abstract

The Council of Europe has arguably been one of the most effective and successful organizations in protecting human rights in Europe, and in providing remedies for those whose rights have been violated. In this regard, there are countless achievements of the organization. Yet it is harboring serious shortcomings and defects. This article examines the lack of a comprehensive and influential protection in some major legal documents on human rights adopted under the auspices of the Council of Europe. The author contends that those legal documents harbor serious defects that obstruct the full realization, observation and enjoyment of fundamental rights and freedoms. The main reason, it is argued in the article, for this lack is that the States Parties to the documents concerned are assumed to have the power and authority in protecting human rights, and implementing the norms adopted within the Council. In this respect, the organization is seen a collection of states, and not as a body superior to them.

Keywords: *The Council of Europe, human rights, the European Convention on Human Rights, international organizations*

INTRODUCTION

The Council of Europe, an intergovernmental organization established for the purpose of promoting human rights and democracy across Europe, has been regarded by many as one of the most significant actors in the field of human rights for that it has provided the most comprehensive and efficient human rights protection system in Europe. Its achievements notwithstanding, the Council of Europe's human rights protection is far from being perfect, and harbors considerable defects as well. Rather than institutional shortcomings, the present paper focuses on the major treaties on human rights codified under the auspices of the Council Europe, including the European Convention on Human Rights. It will be hereby argued that a close and detailed examination of some major legal human rights documents created under the auspices of the Council of Europe¹ reveals some considerable shortcomings that are

¹ It should be noted that the documents hereby reviewed constitute only a small portion of the treaties adopted under the auspices of the Council of Europe. Hence, the review does not assert to be exhaustive, but reflects the serious shortcomings in some of the most notable legal human rights instruments of the Council.

significantly affecting the effectiveness of the organization in protecting human rights.

SHORTCOMINGS IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Efficiency and Salience of the Convention

The original proposal of the Consultative Assembly listed ten rights from the Universal Declaration of Human Rights of the UN for inclusion in the European Convention on Human Rights. These rights were "security of person; exemption from slavery and servitude; freedom from arbitrary arrest, detention, or exile; freedom from arbitrary interference in private and family life, home and correspondence; freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of assembly; freedom of association; freedom to unite in trade unions; the right to marry and found a family."²

However, today, the scope and content of the Convention is much broader than it was in these proposals. Under the Convention, the Contracting States guarantee the basic civil and political rights, not only to their own citizens, but also to all persons within their jurisdiction. The rights guaranteed under the Convention and subsequent Protocols to the Convention include the right to life (Article 2), the right to liberty and security of person (Article 5), the right to a fair trial in civil and criminal matters (Article 6), respect for private and family life, home and correspondence (Article 8), which maybe linked to the right to marry and found a family (Article 12), the equality of rights and responsibilities of spouses during marriage (Article 5 of Protocol No. 7), the right to freedom of expression, including freedom of the press (Article 10), freedom of peaceful assembly and association (Article 11), the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1), the right to education (Article 2 of Protocol No. 1), the right to free elections (Article 3 of Protocol No. 1), liberty of movement and freedom to choose where to live (Article 2 of Protocol No. 4).

The European Convention on Human Rights has had significant impact on changing both political attitudes and legislation of member states. In that sense, it has sometimes been very effective. For instance, following the decision of the European Court of Human Rights that the beating of a boy with a cane by his stepfather was in violation of Article 3 of the European Convention of Human Rights, the government of the United Kingdom gave a sharp response, and not only promised to reform the law, but also "sought to assuage those who felt that the judgment interfered unduly with a parent's right of chastisement in the home."³ Also in the United Kingdom, both immigration and asylum legislation, and subsequent amendments to that legislation have been considerably affected by the decisions of the European Court of Human Rights.⁴

² W. Coblentz and R. Warshaw, 'European Convention of Human Rights and Fundamental Freedoms,' *California Law Review*, Vol. 44, Issue 1 (1956): 97-98.

³ Bob Gingell and Steve Foster, 'Parental Chastisement and Article 3 of the European Convention,' *Journal of Social Welfare Law*, Vol. 21, Issue 2 (1999): 187.

⁴ David Jacobson and Galya Benarieh Ruffer, 'Courts Across the Borders: The Implications of Judicial Agency for Human Rights and Democracy,' *Human Rights Quarterly*, Vol. 25, Issue 1 (2003): 89.

However, its most important achievement is the right it recognizes to the individuals to lodge complaints against the State Parties with the European Court of Human Rights. In that sense, it protects the individual from the actions of the States that violate his or her basic rights under the protection of the Convention.

The European Court is able to admit applications from member states and individuals, or group of individuals. Inter-state applications are made in accordance with Article 33 of the Convention, which states that "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."⁵

Likewise, individuals have the right to apply to the Court directly under the Article 34 of the Convention, which states that "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."⁶

Shortcomings of the Convention

However, its achievements and noble arrangements notwithstanding, the European Convention on Human Rights is marked by serious flaws and shortcomings that have been obstructing the full realization of justice and the remedies towards the violations of the human rights it does not effectively address. The insufficiency of the European Convention on Human Rights has sometimes caused serious criticisms voiced towards the human rights protection mechanism established by the Council of Europe on the grounds that it has failed to deliver justice. To this end, in particular the European Court of Human Rights was the focal point of the criticisms. However, it was only bound by the provisions of the convention, and had to rely on those provisions when ruling over a specific case. In other words, in the disputed cases, where rights of the complainant were not against the State Party, the Court had no other option but to decide in accordance with the content of the Convention.

The Narrow Scope of the Convention

"Whilst closely modeled on the 1948 UN Declaration on Human Rights,"⁷ the European Convention on Protection of Human Rights and Fundamental Freedoms created by the Council of Europe has a very narrow scope of rights to be protected than that of the Declaration, which inspired the members of the Council to create the European Convention.⁸ The Convention, in terms of coverage of rights, greatly resembles with the UN International Covenant on Civil and Political Rights adopted in

⁵ ECHR, Article 33.

⁶ ECHR, Article 34.

⁷ Hugh Storey, 'Human Rights and the New Europe: Experience and Experiment,' *Political Studies*, Vol. 43, Special Issue (1995): 137.

⁸ Şeref Ünal, *Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Komisyonu ve Divan Kararları Işığında Sözleşme Hükmülerinin Açıklanması ve Yorumu* [Interpretation and Explanation of the Convention Provisions in the Light of Judgments of the European Court of Human Rights and the European Commission on Human Rights]. (Ankara: TBMM Publications, 1995), s. 90.

1966. As Heffernan notes, "[t]he broad similarities between the European Convention and the International Covenant are more striking than the differences, both in terms of substance and procedure".⁹

Yet, the European Convention does not contain all rights spelled out in the International Covenant. For instance, it does not recognize the right to self-determination of peoples. There is no equivalent to Article 1 of the Covenant, which recognizes the right to the self-determination in the European Convention on Human Rights.¹⁰ Moreover, it does not make any reference to the rights of ethnic and religious minorities.¹¹

Therefore, while "the substantive protections guaranteed by the two treaties is broadly similar...the International Covenant is arguably more extensive in a number of respects, thereby providing greater scope for the individual petitioner."¹² As noted earlier, the European Convention on Human Rights does not protect certain rights, while those rights are protected as well as defined more broadly and expressly in the International Covenant. Among these, the right to freedom from discrimination, which is referred to throughout the Covenant, but lowered, to a secondary status under the Convention, is of significance.¹³

The superiority of the International Covenant over the European Convention is not limited to its larger scope of rights than that of the latter. Although both documents recognize certain limitations on the enjoyment of rights, the International Covenant permits narrower state discretion in imposing limits. For example, "the privacy guaranteed under Article 8 of the European Convention expressly permits states to limit the right to privacy, whereas the parallel privacy guarantee under Article 17 of the International Covenant does not". Likewise, while both documents recognize that the right to freedom of expression may be restricted in certain cases, the grounds upon which a state may restrict this right are more limited under the International Covenant. Similarly, both documents contain provisions allowing the use of the doctrine of margin of appreciation by States Parties. However, this discretion is expressly acknowledged in the jurisprudence of the Convention system, whereas the margin of appreciation doctrine has a much narrower scope under the International Covenant. The latter strictly prescribes the authority of a state to derogate from certain of its obligations in times of war or other public emergencies.¹⁴

The fact that the International Covenant is a better document than the Convention in terms of covering more rights, and limiting the States' ability to derogate from its obligations more than the European Convention does, is of considerable importance; as the Convention has less Contracting Parties than the International Covenant does, and its membership composition is more uniformed and homogenous

⁹ Liz Heffernan, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights,' *Human Rights Quarterly*, Vol. 19, Issue 1 (1997): 80.

¹⁰ Geoff Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights,' *Human Rights Quarterly*, Vol. 24, Issue 3 (2002): 773.

¹¹ Linda A. Malone, *International Law* (2nd edition) (Larchmont, NY: Emanuel Publishing Corp., 1998), 134.

¹² Heffernan, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights,' 89.

¹³ *Ibid.*, 90.

¹⁴ *Ibid.*, 90-91.

than that of the latter. In this context, the European Convention is normally expected to provide more effective protection of rights than the International Covenant does.

The European Convention also does not recognize the rights of children.¹⁵ Notwithstanding that the fundamental rights spelled out in the European Convention on Human Rights are theoretically available to children, it does not expressly mention of any rights specifically available to children; and there is only a small body of case law indicating an appreciation that these rights are as valuable to children as to adults.¹⁶

Four aspects of the European Convention are worth mentioning; since they are significantly undermining its ability to promote children's rights very effectively. The first one is its narrow scope. It only refers to civil and political rights. In contrast, the UN Convention on the Rights of Child not only provides children with fundamental freedoms, but also requires States to make resources available to meet their social and economic rights. It also sets out how the governments are expected to take positive steps toward promoting these rights.

The second negative aspect of the European Convention is that it does not exclude children from its ambit, and is not designed to expressly recognize the children as a distinct group. The Convention neither refers to special nature of the children, nor makes any attempt to protect children's rights, as distinct from those of adults. As a consequence, unlike the UN Convention, there is no intention to promote the full range of children's needs in the European Convention.

Third one is linked to the second, which is mainly the concern on that the Convention takes no account of the differences between children and adults. As a result of the non-recognition of these differences, efforts to ensure that procedures are interpreted to realize children's special vulnerabilities may be hampered by the need to conform to the inflexible standards of international human rights law. Therefore, while it would be appropriate to develop a constructive approach to deal with matters relating to children's welfare, the procedural framework of the Convention may fail to meet the ideals of fairness required by the Convention.

The last one is the absence of any guidance on how to reconcile parents' rights to freedom from state interference with children's own rights to fulfill their potential and to develop their independence from their parents. The European Convention is weak in that it may leave children without protection against the power of authoritarian parents. It is also of concern that the European Convention will be used to promote parents' rights at the expense of children's rights.¹⁷

The rights that the European Convention does not directly protect include that it does not prohibit war propaganda, and propaganda instigating discrimination.¹⁸ In addition, there is generally no right for individuals to get education in their mother tongue under the European Convention.¹⁹

¹⁵ Malone, *International Law*, 134.

¹⁶ Jane Fortin, 'Rights Brought Home: for Children,' *Modern Law Review*, Vol. 62, Issue 3 (1999): 353.

¹⁷ *Ibid.*, 354.

¹⁸ Malone, *International Law*, 134.

¹⁹ Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights,' 761.

As seen above, the European Convention does not include all rights that are today considered to be in the scope of human rights. For instance, it has been seen that so many applications alleging the violations of right to retirement, right to nationality, right to political asylum, and right to passport were turned down by the European Court of Human Rights, the primary organ charged with supervising the implementation of the Convention by the States Parties.²⁰ Moreover, it does not contain any provision that can be compared to the provisions pertinent to the freedom of religion and conscience, the provisions that referred by such international legal documents of human rights as the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and Declaration on the Prohibition of Religious Intolerance.²¹

However, it should also be noted that while the European Convention lacks of numerous essential rights, the European Court occasionally takes courageous steps to provide the protection of the right to a private and family life. It is important in that protection of family life may not be regarded as a civil or political right, but a social right. Given that the European Convention merely contains civil and political rights, its provision of protection of family life may be considered as an exception. This is an example for the Convention's protection of the right to family life: a Spanish national lodged a complaint with the Commission asserting that she was unable to obtain relief under Spanish law from the excessive emissions of a water treatment and purification plant located near her home. Both the Commission and the Court held that "serious consequences of environmental degradation may affect an individual's well-being so as to deprive her of the enjoyment of a private and family life, and ordered public authorities to take the necessary measures to protect those rights."²²

But this does not change the fact that the Convention has a limited scope. As already noted, the European Convention is, "with one or two exceptions, a catalogue limited to selected civil and political rights."²³ As such, it does not contain social and economic rights. During the discussions relating to the scope of the Convention, M. Teilgen, one of the owners of the proposals in relation to the question of the Convention's scope, indicated in his speech in September 1949 that social and economic rights were, at the present time, not included on the list. He stated that the Committee concluded that the collective guarantee should be limited to the rights and necessary freedoms that are exercised in democratic societies. He continued saying that professional freedoms and social rights would be defined and protected in the future. However, he also stated that everybody would understand that before establishing social democracy, it was necessary to guarantee political democracy in the European Union, and then coordinate the European economies.²⁴

²⁰ Hüseyin Pazarcı, *Uluslararası Hukuk Dersleri* [Courses on International Law] (2. Vol. 4th ed.). (İstanbul: Turhan, 1995), 205.

²¹ Sabahattin Nal, 'Avrupa İnsan Hakları Sözleşmesi Çerçevesinde Düşünce, Vicdan ve Din Özgürlüğü' [Freedom of Thought, Conscience and Religion under the European Convention on Human Rights]. *AÜ SBF Dergisi*, Vol. 57, Issue 4 (2002): s.67.

²² Malone, *International Law*, 135.

²³ Storey, 'Human Rights and the New Europe: Experience and Experiment,' s.141.

²⁴ Burns H. Weston, Richard A. Falk and Anthony A. D'Amato, *International Law and World Order* (St. Paul, MN: West, 1980), 502.

However, in spite of the fact that more than fifty years has passed since this speech, there is still no significant attempt made under the auspices of the Council of Europe to effectively address social and economic rights. One may argue that the Council of Europe proved to be concerned about social and economic rights, by adopting the European Social Charter. However, it should be noted that the Charter is a very weak document, and the rights it contains in legal terms are not justiciable as civil and political rights. As a consequence, since the Convention does not comprise of social and economic rights, the violations of these rights cannot be tried by the European Court.²⁵

The commitment of the Council of Europe to civil and political rights is also visible in the measures taken under the European Convention for the Prevention of Torture. As opposed to the rights included in the European Social Charter, those protected under the Convention for the Prevention of Torture are protected through concrete measures, such as the Committee on Prevention of Torture (CPT). This surely indicates the Council's stronger emphasis on rights traditionally classified as civil and political rights.²⁶

The drafters of the European Convention and of the Protocols restricted themselves to a political notion of democracy and civil and political rights. The main reason for this restriction is probably the difficulty to effectively protect economic and social rights, especially through judicial review. Moreover, it is also difficult to protect those rights, due to the sharp financial differences between the Contracting States.²⁷

Because the European Convention does not guarantee the protection of social and economic rights, many individual applications have been declared inadmissible; due to the fact that the Convention does not provide protection for those rights. Those rights included the following: right to obtain a home, right to work as a lawyer, right to reside in his/her own country, right to pursuing a career in public sector, and right to have the benefits of social security, and the like.²⁸ Likewise, because the European Convention does not make any reference to certain rights, some of the applications filed with the European Commission were declared inadmissible with the reason that the Court had no authority to reach an agreement on the complaint concerned. For instance, the Court has no authority on such issues as working in public service, staying in public service, or returning to the post in public sector. The Commission declared some of the complaints of a person who was dismissed from his job in THY (Turkish Airlines), while he would retire soon, inadmissible, stating that the complaints concerned were not under the competence of the Court.²⁹

²⁵ Morten Kjaerum, 'Refugee Protection Between State Interests and Human Right: Where is Europe Heading?'. *Human Rights Quarterly*, Vol. 24, Issue 2 (2002): 528.

²⁶ Heffernan, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights,' .86.

²⁷ Jean-Paul Costa, 'The European Court of Human Rights and Its Recent Case Law,' *Texas International Law Journal*, Vol. 38, Special Issue (2003): 459.

²⁸ Weston, Falk and D'Amato, *International Law and World Order*, 502.

²⁹ Civan Turmangil, 'Avrupa İnsan Hakları Sözleşmesi'nin 25. Maddesi ve Türkiye Örneği: Bireysel Başvuru Hakkının Kullanılmasında 7. Yıla Doğru'[Article 25 of the European Convention on Human Rights and the Case of Turkey: Toward Seventh Year in the Exercise of the Right to Individual Petition]. *İnsan Hakları Merkezi Dergisi*, Vol. 2, Issue 2 (1994): 26.

Limitations on the Exercise of Rights Contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms

The most fundamental problem with the European Convention is that not all rights spelled out in the Convention are fully protected. While there is no limitation on exercising some certain rights, a substantial number of provisions of the Convention specifically describe the restrictions on the rights concerned. There are in general four types of restrictions that the European Convention formulated: reservations, derogations, denunciations, and permissible restrictions.³⁰

Under the Convention, each state is given the right to make 'reservations' at the time of signature or ratification. Article 57(1) of the Convention states that:

Any State may, when signing the Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.³¹

Although making reservations to any multilateral treaty is a common practice in codifying an international legal document, given the sensitivity attached to the notion of human rights, such a practice could be seen as unusual, and in contrast to the spirit and sense of global protection of the individual under international human rights law. Recognizing such a right as the one provided in the European Convention is in essence not in conformity with the universal character of human rights. For this reason, the Rome Statute establishing the International Criminal Court explicitly prohibits any reservations to it.³²

'Derogations' described in Article 15 of the Convention are the most serious limitations. Article 15 (1) states that in time of war or other public emergency threatening the life of the nation, any State Party may take measures 'derogating from its obligations' under the European Convention. However, article 15 (2) states that the State Party concerned may not use this right to impose limits on so-called 'non-derogable rights', which are contained in Articles 2, 3, 4, and 7, covering "the right to life, prohibition of inhuman and degrading treatment, retroactive criminal penalties and protection from forced labor and slavery."³³ The issue of 'derogations', and the related one, the doctrine of margin of appreciation will be examined in details in the following section.

Under Article 58 of the Convention, States Parties have the right to denounce the Convention. However, this right is available to the State Party concerned "only the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties".

³⁰ Storey, 'Human Rights and the New Europe: Experience and Experiment,' 138-139.

³¹ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No.005, as amended by Protocol No. 11, adopted on 4.11.1950 and entered into force on 3.9.1953, Rome, Italy, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

³² Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Article 120. It states, "No reservations may be made to this Statute."

³³ Storey, 'Human Rights and the New Europe: Experience and Experiment,' 138.

In addition to those general limitation clauses that are specifically explained in separate articles, there are also "various fixed clauses attached to most of guaranteed rights specifying the 'permissible restrictions' which States could place on them and on what grounds."³⁴

Some articles of the Convention first describe the right to be protected in general, and then specify the restrictions applicable to this right by States Parties. For instance, Article 8 (1) states that "everyone has the right to respect for his private and family life, his home and his correspondence". However, Article 8 (2) states that a public authority may interfere with the exercise of this right, provided that this interference is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Likewise, under Article 9, everyone has the right "to freedom of thought, conscience and religion". As Article 9 (1) states, "this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance". However, Article 9 (2) sets out almost the same limitations mentioned in Article 8 (2) on the exercise of this right. That Article 9 received little priority within the work of the Commission and the Court, and the Court has very rarely ruled that there has been a violation of this article demonstrates how the limitations on the exercise of this right have negatively affected the recognition of this right by the Strasbourg institutions. It could even be argued that Article 9 is being used to limit religious freedom, not to protect or expand them.³⁵

A similar limitation also exists in Article 10, which contains the right to freedom of expression, and states that this right includes "freedom to hold opinions or to receive and impart information and ideas without interference by public authority and regardless of frontiers". In Article 10 (2), it is stated that the exercise of these freedoms may be subject to such limitations as "are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

In addition to Articles 8, 9 and 10, Article 11 provides limitations on the rights it protects as well. The Article states that everyone "has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests". Article 11 (2) provides the similar restrictions that are stated in other articles, and adds "this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the Police or of the administration of the State".

³⁴ *Ibid.*, 139.

³⁵ James T. Richardson, 'Minority Religions, Religious Freedom, and the New Pan-European Political and Judicial Institutions'. *Journal of Church and State*, Vol. 37, Issue 1 (1995): 43.

The European Convention also contains a provision limiting the rights of non-nationals in a member state. While Article 1 of the Convention states that the rights set out in the Convention are guaranteed to all persons falling in the jurisdiction of the State, the Convention does not recognize certain rights for the nationals of each country. Article 1 clearly covers non-nationals who are on the territory of the State. However, Article 16 of the Convention provides that "nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens". This implies that some specific rights are reserved to nationals only. The Convention leaves it to each state to decide who its national are.³⁶

A number of limitations are justified by the European Convention and its subsequent Protocols, in order to preserve 'public interest'. In this regard, interference with two rights by the State Party is justifiable: peaceful enjoyment of possessions (Article 1 of Protocol No. 1) and to liberty of movement and freedom to choose residence, if one is lawfully within a territory of a state party (Article 2 (1) and (4) of Protocol No. 4). Moreover, Articles 8 to 11 of the Convention may be limited by more specific 'legitimate purposes'. Similar restrictions are also applicable to the rights to a public trial (Article 6 (1)), of free movement and choice of residence to leave any country (Article 2 (2) of Protocol No. 4) and to due process before expulsion of an alien lawfully resident in a state (Article 1 of Protocol No. 7).³⁷ Interpreting the Convention and the subsequent protocols to the Convention with the limitations clauses, the Strasbourg institutions have found the relationship between human rights and public interest 'problematic, failing to develop a coherent set of tests for determining when rights prevail over the public interest or *vice versa*.'³⁸

In general, the limitations that can be called as 'permissible restrictions' can be justified under three conditions: the interference with the right must be (1) prescribed by law, (2) in furtherance of a legitimate aim, and (3) necessary in a democratic society. If the first two are met, the Court must assess whether the last one was satisfied. When making its assessment, the Court bases its judicial review on the 'proportionality principle': "any disproportionate or excessive measure is deemed to be in breach of the relevant article of the Convention."³⁹

As seen above, the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding its widespread recognition and striking achievements in the field of human rights, harbors significant shortcomings that will likely undermine its legitimacy and reputation. Therefore, it became evident that the Convention under review is in fact an insufficient legal document in providing the individuals it applies to with an effective protection. The fundamental reason for its insufficiency is that it was prepared as a "lowest common denominator of rights observance within Western Europe", and consequently, the standards it provides "were

³⁶ Ruth Rubio Marin and Rory O'Connell, 'The European Convention and the Relative Rights of Resident Aliens'. *European Law Journal*, Vol. 5, Issue 1 (1999): 5.

³⁷ Ailen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights'. *The Modern Law Review*, Vol. 62, Issue 5 (1999): 684.

³⁸ *Ibid.*, 695.

³⁹ Costa, 'The European Court of Human Rights and Its Recent Case Law,' 461.

set at a deliberately modest level so as to encourage compliance and avoidance of clashes with Contracting States jealous of their sovereignty."⁴⁰

Concerned about their sovereignty, States Parties to the Convention avoided making strong commitments to safeguard rights and freedoms of the individuals in their jurisdictions. As a consequence of those concerns regarding sovereignty, the protection of the rights guaranteed under the Convention and the implementation of the judgments by the Court, are left to national authorities. In that sense, it is national authorities, and not the Convention bodies, who are expected to be the primary protectors and overseers of human rights.⁴¹

It is ironic that states, as the European Convention understands them, are both the violators and the protectors of the rights and fundamental freedoms. It should be noted that the Convention recognizes only one violator, by allowing either individual or inter-state applications against states only.

This is the major difference between the approach of the Council of Europe and that of the European Union to protecting human rights. While the Council of Europe sets standards and leaves the protection of human rights and the implementation of these standards to member states, the European Union, as a truly supranational organization, provides organizational protection; that is to say that it sets the standards, and holds the responsibility for their implementation as well. It means that member states in the EU have almost no determinative authority on the implementation of policies, including those regarding human rights.

SHORTCOMINGS IN OTHER TREATIES ADOPTED BY THE COUNCIL OF EUROPE

In addition to the European Convention on Human Rights, which is the major treaty adopted by the Council of Europe in the field of human rights, certain treaties created by the Council have significant shortcomings as well. Among them, four more will be evaluated briefly: the European Social Charter, the European Convention for the Prevention of Torture, the Framework Convention for the Protection of National Minorities, and the Convention for the Protection of Human Rights with Regard to the Application of Biology and Medicine.

The European Social Charter

The European Social Charter "sets out rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the States Parties."⁴² It was adopted in 1961; however, the 1996 revised European Social Charter, which entered into force in 1999, is replaced the original one.

The original text of 1961 did not recognize the right to education, the right to housing, the general protection against poverty, the general discrimination clause,

⁴⁰ UK Law Online, "The European Convention on Human Rights," <http://www.leeds.ac.uk/law/hamlyn/echr.htm>.

⁴¹ *Ibid.*

⁴² The Council of Europe website, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

and the general character of social rights. While the revised text removed these discrepancies, yet it does not contain any provision concerning the right to education.

The Charter consists of four parts. The first contains social rights and principles, which the acceding parties accept as the aim of their policy. However, the provisions concerning the safeguarding these rights are not legally binding *per se*. It is Part II, which contains the legal obligations designed to ensure the exercise of those rights. This part deals with the specific measures to be taken in relation to each of rights. Part III "reflects the principle of progressive implementation tailored to suit the circumstances of individual states."⁴³

Accordingly, the Contracting States have to accept at least half of the provisions and five out of seven articles considered to be of central importance. And finally, Part IV provides the procedure for a monitoring system based on the submission of regular reports by Contracting Parties. The European Social Charter lacks of a judicial body; thus, it is not possible for either legal or real entities to file a complaint against Any Contracting Party.

A quick glance at the content of the Charter, and the monitoring system it established reveals that the European Social Charter, in fact, does not ensure the protection of rights it claims to do so. Its reporting mechanism is too complicated and far beyond to produce effective measures. On that matter, a member of the Committee of Independent Experts (CIE) commented in 1992 "the Charter has been until now one of the less prominent human rights treaties. The conclusions, or annual reports, of the [CIE] might almost be classified in the rare books category."⁴⁴

The European Convention for the Prevention of Torture

The European Convention on Human Rights did not provide a precise definition of torture, and thus, did not ensure the prevention of torture. This lack has significantly affected the legitimacy and the recognition of both the Council of Europe and the Convention. To fill out this void, the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987. Unlike other treaties aimed at the prohibition of torture, the underlying objective of the European Convention for the Prevention of Torture is predominantly the prevention of torture before its occurrence. It is, thus, "an innovative approach to the question of torture and is more intrusive in its approach to implementation."⁴⁵

The adoption of the Convention followed the adoption of the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1984. The reason for the fact that the Council of Europe adopted its own Convention on torture shortly after the UN adopted the Convention mentioned above is that the Council of Europe was concerned especially with prevention rather than

⁴³ Henry J. Steiner and Philip Alston, *International Human Rights in Context: Laws, Politics, and Morals* (Oxford: Clarendon Press, 1996), 580–581.

⁴⁴ *Ibid.*, p. 581.

⁴⁵ Jastine Barret, 'The Prohibition of Torture under International Law: The Institutional Organization,' *The International Journal of Human Rights*, Vol. 5, Issue 1 (2001): 6.

prohibition. Therefore, it created a Convention that is "far more innovative and intrusive in its approach to supervision."⁴⁶

The monitoring mechanism of the Convention is based on a system of visits made by a Committee of Independent Experts; called the European Committee for the Prevention of Torture and Inhuman, or Degrading Treatment or Punishment (CPT). Article 1 states its function: as "to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons" from torture, inhuman, or degrading treatment. Each Party to the Convention is required to give permission to the Committee to visit any place within the State's jurisdiction (Article 2). Most visits are routine and scheduled in advance. However, the Committee may pay *ad hoc* visits as well (Article 7). The places to be visited are generally prisons. The purpose of the visits is "to assess how detainees are treated and, where applicable, to suggest improvements."⁴⁷

Even though CPT seems to be effective in some respects, it does not fully ensure the prevention of torture. Moreover, it will have to deal with the challenge posed by the growing number of States bound by the Convention. Especially, the fact that Protocol No.1. to the Convention opens it for signature by non-member States will likely increase the burden of the Committee. Most importantly, the individuals subjected to torture that is substantiated by the Committee is unable to proceed with claiming a remedy before the European Court of Human Rights, as the Court is able to act in accordance with the provisions of the European Convention on Human Rights only. Of course, ECHR provides guarantee against torture. Hence, those individuals who hold that they are subjected to torture are entitled to file a complaint with the European Court of Human Rights. But what is important here is that the findings of the Committee on the commission of torture cannot be brought before the Court.

The Framework Convention for the Protection of National Minorities

The Council of Europe has at its inception avoided dealing with national minorities within Europe, due to the fact that "the issue had proven too controversial and complex for the Council...to adopt specific standards until November 1994 when the Framework Convention was adopted."⁴⁸ It was opened for signature on 1 February 1995, and entered into force in 1998. It is too significant in that it is "the first treaty designed to protect the rights of persons belonging to national minorities."⁴⁹ It is also "the first concrete manifestation of a concern for the rights of minorities that the Council of Europe has shown since its inception."⁵⁰

However, violations concerning the minority rights under protection of the Framework Convention cannot be brought before the Court, or any other judicial body vested with the authority to provide remedy. As already seen, the European Convention on Human Rights contains no minority rights provision similar to Article 27 of the International Covenant on Civil and Political Rights. Thus, there is no direct

⁴⁶ Steiner and Alston, *International Human Rights in Context: Laws, Politics, and Morals*, 582.

⁴⁷ The Council of Europe website, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

⁴⁸ Steiner and Alston, *International Human Rights in Context: Laws, Politics, and Morals*, 582.

⁴⁹ The Council of Europe website, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

⁵⁰ Geoff Gilbert, 'The Council of Europe and Minority Rights,' *Human Rights Quarterly*, Vol. 18, Issue 1 (1996): 173.

way for the members of national minorities to claim their rights at the Court.⁵¹ Given that national minorities take an important place in the composition of Europe, the Council of Europe sought a way to fill this void, by adopting the Framework Convention in 1995. However, this Convention contains no complaint mechanism for individuals or groups.⁵² Therefore, individual members of national minorities cannot file complaints with the Court, as the Framework Convention does not fall into its competence.

However, the most remarkable shortcoming of the Framework Convention is that it does not provide a definition of national minority.⁵³ This rises "fundamental questions about to whom the Convention applies."⁵⁴ In other words, it is unclear that whether these rights are bestowed on the individual members of the minority group, or on the collectivity itself.⁵⁵ Instead of a definition of the concept, it "defines legal standards in the form of principles and provisions constituting a program to be put into effect."⁵⁶ Although it is often the case that Declarations such as the Framework Convention have no definitional provisions, the fact that such a binding legal document as the Framework Convention contains no definition of minorities raises fundamental questions.⁵⁷

It seems that the Framework Convention leaves the decision as to who constitutes a national minority to the States concerned. Combined with that rights contained in the Framework Convention are not enforceable, and observable by the Court, that the Convention contains no definition makes the document very ineffective.

The Convention on Human Rights and Medicine

As for the Convention on Human Rights and Biomedicine, there are several problems. First of all, it does not clearly define the 'human being' the Convention applies to. The human being in the Convention aims to protect remains undefined.⁵⁸ According to the Convention, human being may exist in three different legal categories: 'human life', 'embryo' and 'personhood'. However, while each is entitled to an inherent set of different rights, none of these categories are clearly defined. Therefore, the Convention leaves it to national authorities to determine at what point a human being belongs to which category. Apparently, this creates a serious problem, since national law has to define its own foundation and to protect a being it is unable to define.⁵⁹

Another problem is stemmed from the fact that the provisions of the Convention are too restrictive with regards to research, especially on embryo. Due to the restrictive character of the Convention, and domestic particularities as well, some of the States Parties to the European Convention on Human Rights have been hesitant to

⁵¹ Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights,' 737.

⁵² *Ibid.*, 738.

⁵³ Gilbert, 'The Council of Europe and Minority Rights,' 162.

⁵⁴ *Ibid.*, 162.

⁵⁵ *Ibid.*, 170.

⁵⁶ The Council of Europe website, http://www.coe.int/T/E/Human_rights/prothr_eng.pdf.

⁵⁷ Gilbert, 'The Council of Europe and Minority Rights,' 162.

⁵⁸ Lars Reuter, 'Human is What is Born of a Human: Personhood, Rationality, and an European Convention,' *Journal of Medicine and Philosophy*, Vol. 25, Issue 2 (2000): 182.

⁵⁹ *Ibid.*, 181.

sign it. These countries include some of the initial signatories to the Convention on Human Rights, such as Belgium, Germany, Ireland, and the United Kingdom.⁶⁰ This state of reluctance toward signing the treaty surely undermines its ability to effectively deal with bioethical issues.

There are also problems of articulation between the Convention and the Joint Explanatory Report, problems of formulation within the Convention, which appear in the articles concerning state prohibitions without any distinction, relativization, contextualization and sense of evolution, and problems of substance that lead to the conclusion that "the Convention is not a good illustration of the human rights philosophical tradition in the name of which it has been proclaimed."⁶¹

To conclude the discussion concerning the effectiveness of the Convention on Human Rights and Medicine, while it has been heralded as an "epoch-making document opening a new era in bioethics and biolaw", Mori and Neri argue that it is a very poor document, "lacking intellectual depth and based on criteria which are totally inadequate to face most bioethical issues."⁶²

CONCLUSION

Notwithstanding that the Council of Europe has made enormous progress in promoting human rights standards in Europe, treaties adopted under its auspices, which frame the fundamental protection mechanism of the organization, those legal texts are still far beyond meeting the expectations. The European Convention on Human Rights, a highly regarded and acclaimed tool, although unprecedented in many respects, is a disappointing product of the Council, due to its narrow scope and likely misinterpretation and abuse by the States Parties to it.

Of course, the Convention is only a complementary text which guarantees the basic rights only. In other words, it was designed as a common denominator that would appeal the States to become a party to it. In fact, even the entire human rights protection system based on the Convention and the Court is frequently referred to as 'subsidiary,' a term used to indicate its secondary status *vis-à-vis* national judicial systems. But this is exactly the root of the problem: that the national authorities are assumed to have competence and authority to address the human rights issues. This premise is simply based on the long-surviving and well-observed and respected notion 'sovereignty' and the tribute to the equally popular principle of 'non-intervention.'

Moreover, it could also be argued that the reason for that the European Convention was designed as a less comprehensive and having remarkable defects is that the conditions by the time it was adopted required doing so. Considering that it is one of the early documents in the field of human rights, its defects might be understandable. However, it is equally true that these defects could have easily been corrected over the time. Although some corrections have been made through subsequent pro-

⁶⁰ *Ibid.*, 183.

⁶¹ Gilbert Hottois, 'A Philosophical and Critical Analysis of the European Convention of Bioethics,' *Journal of Medicine and Philosophy*, Vol. 25, Issue 2 (2000): 133.

⁶² Maurizio Mori and Demetrio Neri, 'Perils and Deficiencies of the European Convention on Human Rights and Biomedicine,' *Journal of Medicine and Philosophy*, Vol. 26, Issue 3 (2001): 323-324.

to the European Convention, some major defects have persisted. Due to the rapid enlargement of the Council of Europe and to the increase in the number of State Parties to the Convention, the quite high human rights standards set at the inception have been diluted.

International human rights documents adopted under the auspices of the Council of Europe other than the European Convention on Human Rights are no different than other 'regular' treaties of the field, since they do not have effective enforcement mechanisms. As a consequence, those treaties are usually perceived by the States Parties as a variant of 'standard of common achievement'. All in all, the adherence to and compliance with them is left to national authorities.

The logical and practical consequence of the large discretion recognized to States Parties in the implementation and enforcement of the treaties and other legal instruments adopted under the auspices of the Council of Europe is that in the absence of a supervisory organ monitoring the implementation and compliance States Parties feel free to interpret and thus implement the treaty concerned as they understand it. Of course, this does not necessarily mean that the legal mechanisms created by the Council are completely useless and unfruitful. The organization established several bodies charged with the supervision of the compliance with the legal rules maintained by the relevant Council organs by States Parties. Especially, the compliance with the rulings of the European Court of Human Rights by the States Parties is considered extremely important. Therefore, for the purpose of ensuring the compliance, the Committee of Ministers is charged with monitoring States' responses to the judgments of the Court.

However, the implementations of the Council treaties other than the European Convention on Human Rights are not strictly monitored. And even in case of non-compliance with the judgments of the Court whose decisions are based on provisions of the Convention, the heaviest sanction for the non-complier is, most of the time, suspension of membership privileges. In very rare cases, any Member States is expelled from the organization on the grounds of non-compliance. However, it should be noted it is not an easy decision to make, as it requires taking political risks.