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Limitations Related To National Security In CoE Framework Convention on AI CINGO's Position

The Council of Europe Convention on Human Rights (ECHR) and its protocols are the centrepiece of the CoE 46 Member States' human rights system. Other specific human rights issues are covered by other CoE Conventions, but the ECHR remains, in the own words of the Council of Europe, "the cornerstone of all its activities".¹ Furthermore, the ratification of the ECHR is a **pre-condition for States to join the Council of Europe.**

As also acknowledged by the CoE Parliamentary Assembly, the CoE strives to achieve close cooperation with other countries "on the basis of democratic constitutions and the European Convention on Human Rights".² Therefore, **all cooperation with other non-CoE countries aimed at promoting global standard setting must not undermine or bypass the basic thresholds enshrined in the ECHR.**

The ECHR explicitly includes "national security" in its scope as a legitimate ground for restrictions of rights, further imposing that such restrictions must be established by law and be necessary and proportionate in a democratic society.³ The European Court of Human Rights ("ECtHR") further recognises that national courts hold a "margin of appreciation" in weighing up the protection of rights with legitimate grounds for restrictions, but equally makes it crystal clear that this margin of appreciation **does not provide blanket exceptions in the application of rights.**⁴

"National security" is equally included in the scope of other overarching international treaties – such as the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR) and the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), among others – as a legitimate ground for restrictions of rights, further imposing that such restrictions must be clearly established by law and be necessary and proportionate in a democratic society.⁵

The forthcoming CoE Framework Convention on Artificial Intelligence ("AI") and Human Rights, Rule of Law and Democracy is a **horizontal instrument covering all human rights and fundamental freedoms included in the ECHR**, even if with specific reference to the AI sector. Therefore, **it is not justifiable to introduce a blanket exemption on national security**, even arguing that in any case the ECHR would apply as "lex generalis": it is crucial to remind that the CoE Framework Convention on AI and Human Rights, Rule of Law and Democracy:

- a) Will likely be ratified by non-CoE Observer States participating in the negotiations (Mexico, US, Canada Japan, Israel) – and **these will not be bound by the ECHR**, unless its core standards are explicitly referred to in the Framework Convention itself;
- b) Is being promoted as a **global standard setting instrument open to accession/ratification by other non-CoE Member states worldwide** – and **the latter too will not be bound by the ECHR**, unless its core standards are explicitly referred to in the Framework Convention itself;

Therefore, **national security should:**

1. either **not be mentioned at all** in the Framework Convention on AI, leaving it to the national courts of each Party to determine how to weigh it up in the balancing of human rights protection, compatibly with the international human rights treaties (including the ICCPR, ICESCRs etc., for non CoE Member States);
2. or **be referred to only as a legitimate ground for restrictions** of the rights outlined in the Framework Convention that must be **clearly established by law and be necessary and proportionate in a democratic society.**

¹<https://coe.int/en/web/human-rights-convention/>

² See Recommendation 1247 (1994): <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15281>

³ See ECHR, Articles 6 (right to a fair trial), 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of assembly and association), Protocol 4 (securing certain rights and freedoms other than those already included in the Convention and in the First Protocol), Article 2; Protocol 7, Article 1, para 2.

⁴ See ECtHR, Handyside v UK (1976) paras 47-49: <http://www.bailii.org/eu/cases/ECHR/1976/5.html>

⁵ For ICCPR, see Articles 12-14, 19,21-22; for ICESCR, see Article 8 (a), (c).