

The Ability of European Convention on Human Rights in Preventing Gross Violations of Human Rights

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ABSTRACT

The humanity faced very tragic consequences of war and other cruel treatments from state practices in history. To minimise the human rights violations, international community started to construct human rights protection systems. United Nations was established in 1945. The Universal Declaration of Human Rights was followed by main human rights protection treaties and monitoring systems established by those treaties. The European Convention on Human Rights was adopted on 4 November 1950 and entered into force on 3 September 1953. It's the first international legally binding human rights treaty. The human rights protection system of European Convention is unique comparing with other international treaties. It is the first international system that provides individuals with right to complaint the state for violation of their human rights guaranteed in the Convention. It includes "international common law" feature and also it is self-referential regime. Because of its case law, Court is bound by their previous jurisprudence. This is its common law future. The Council of Europe bodies work independently from courts and legal systems of states' parties. Strasbourg is not appeal court of states parties; it interprets their domestic law and practise only in terms of compatibility with the Convention.

The European Convention on Human Rights and its supervisory system have made considerable contributions to the whole human rights development in the world. The question in this study that does the Convention has the effective mechanism to combat with gross human rights violations. Gross and systematic violations are not common in the states parties of the Convention during the last four decades. It is a common view that there is no place for gross violations in so-called democracies of Western Europe. Such practices are confined to dictatorial regimes in other parts of the world. But somehow if gross and mass human rights violations occur in a member state to Convention, have the Convention and its implementation mechanism ability to fight with such violations?

Keywords: European Convention on Human Rights, Gross Human Rights Violations, European Court of Human Rights, Preventing Human Rights Violations

Avrupa İnsan Hakları Sözleşmesinin Yaygın İnsan Hakları İhlallerini Önleme Kapasitesi

ÖZET

İnsanlık tarih içerisinde devletlerin baskıcı yönetimleri ve savaşlar sonucunda çok trajik sonuçlarla karşı karşıya kalmıştır. 2. Dünya savaşı sonucunda milyonlarca insan hayatını kaybetmiş, yine bir o kadar insan yerinden yurdundan olmuştur. Uluslararası toplum insan bu sonuçlar üzerine insanların sahip olduğu temel hak ve hürriyet ihlallerini en aza indirmek üzere yeni bir uluslararası sistem içinde insan hakları koruma sistemlerini inşa etmeye başlamıştır. Milletler ve devletler arasındaki uyuşmazlıkları barışçıl yollarla çözmek üzere 1945 yılında Birleşmiş Milletler kurulmuştur. Evrensel İnsan Hakları beyannamesi ve takip eden Uluslararası İnsan Hakları Sözleşmeleri imzalanmış ve bu Sözleşmelerle temel hak ve hürriyetleri koruma mekanizmaları oluşturulmuştur. Bölgesel bir İnsan Hakları sistemi kuran Avrupa İnsan Hakları Sözleşmesi 4 Kasım 1950'de kabul edilmiş ve 3 Eylül 1953'de yürürlüğe girmiştir. Bu Sözleşme hukuki bağlayıcılığa sahip ilk uluslararası insan hakları sözleşmesidir. Diğer uluslararası sözleşmelerle karşılaştırıldığında Avrupa Sözleşmesi bu alanda nevi şahsına münhasırdır. Bireyleri, sözleşmede garanti edilen temel hak ve hürriyetleri ihlal eden devleti şikayet etme hakkı ile donatan ilk uluslararası sistemi kuran sözleşmedir. Uluslararası İçtihat Hukukunu da içeren ve kendi kendine referans veren bir rejime sahiptir. Çünkü kendi içtihat hukukuna dayanarak Mahkeme önceki kararları ile bağlıdır. Bu İçtihat Hukuku sisteminin bir özelliğidir. Avrupa Konseyi üye devletlerin mahkeme ve hukuk sistemlerinden bağımsız olarak çalışır. Strasbourg Mahkemesi üye devletlerin bir temyiz mahkemesi değildir, iç hukuklarını sadece Sözleşmeye uygunluk bakımından yormalar.

Avrupa İnsan Hakları Sözleşmesi ve denetim mekanizması bütün Dünya'da İnsan haklarının gelişimine önemli bir katkı yapmıştır. Bu çalışmadaki so rise Sözleşme ve meknaizmasının yaygın insan hakları ihlalleri ile mücadele edip edemeyeceğidir. Sözleşmeye taraf ülkelerde yaygın ve sistematik ihlaller on yıllardır görülmemektedir. Batı Avrupa Demokrasileri olarak adlandırılan ülkelerde bu tür yaygın ve sistematik ihlaller yer olmadığı şeklinde yaygın ve genel bir inanç vardır. Bu tür pratiklerin

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dünyanın diğer bölgelerindeki diktatörlük rejimlerine ait olduğuna inanılmaktadır. Fakat bir an bir şekilde Sözleşmeye taraf bir ülkede yaygın ihlallerin olması durumunda Sözleşme ve control mekanizması bu tür yaygın işlemlerle başa çıkabilecek midir? Bu çalışmamız bu soruya cevap aramaktadır.

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi, Yaygın İnsan Hakları İhlalleri, Avrupa İnsan Hakları Mahkemesi, İnsan Hakları İhlallerinin Önlenmesi

INTRODUCTION

After World War II, considering tragic consequences of war, international community started to construct human rights protection systems. United Nations was established in 1945. The Universal Declaration of Human Rights was followed by main human rights protection treaties and monitoring systems established by those treaties. The European Convention on Human Rights was adopted on 4 November 1950 and entered into force on 3 September 1953. It's the first international legally binding human rights treaty. The human rights protection system of European Convention is unique comparing with other international treaties. It is the first international system that provides individuals with right to complaint the state for violation of their human rights guaranteed in the Convention. It includes "international common law" feature and also it is self-referential regime. Because of its case law, commission and court are bound by their previous jurisprudence. This is its common law future. The Council of Europe bodies work independently from courts and legal systems of states' parties. Strasbourg is not appeal court of states parties; it interprets their domestic law and practise only in terms of compatibility with the Convention.¹

Undoubtedly The European Convention on Human Rights² and its supervisory system have made considerable contributions to the whole human rights development in the world. The question is that does the Convention have the effective mechanism to combat with gross human rights violations. Gross and systematic violations are not common in the states parties of the Convention during the last four decades. It is a common view that there is no place for gross violations in so-called democracies of Western Europe. Such practices are confined to dictatorial regimes in other parts of the world.

There existed some instances, which the Convention has been invoked to response gross violations. These instances are torture in Greece after the military coup d'etat in 1967, torture in the Northern Ireland during 1970's, human rights abuses in Cyprus following the military activities of Turkey in 1974, torture after military coup d'etat in 1980 and since 1989 allegations of wide scale human rights abuses by the Turkish security forces during the struggle between state agents and terrorist PKK organization. In this paper I will examine the supervisory system of the Convention and its effectiveness of response to gross violation situations especially to that of Turkey's experiment.

Definition of Gross Violations of Human Rights

There is no a legal definition of 'gross violations' in international human rights treaties. As a descriptive term, 'gross violations' expresses the situations of human rights abuses that also be called 'wide-spread' or 'large scale'.³ The language about gross violation concept can be found in 1503 and 1235 resolutions of United Nations Economic and Social Council. In those resolutions the authority was given to the United Nations Human Rights Commission and Sub-Commission (in words of resolution) "to examine information relevant to gross violations of human rights and fundamental freedoms". United Nations resolutions state that The Human Rights Commission is authorised to establish a procedure for the examination of communications pertaining to 'situations which appear to reveal a *consistent pattern* of gross and reliably attested violations of human rights requiring consideration by the Commission" (emphasis added). These resolutions do not define 'gross violations' clearly as well. Because of the vagueness of the gross violations concept it is more useful to recognise that concept in practice rather than to describe in theory. European Commission for Human Rights and European Court of Human Rights in its case law have developed the concept of the "administrative practice" with regard to allegations concerned wide

¹ Donna Gomien, David Harris, Leo Zwaak, *law of the European Convention on Human Rights and European Social Charter*, (Council of Europe Publishing, printed in Germany, 1999) p.15

² Hereafter the Convention

³ Aisling Reidy, Unpublished LL.M dissertation Essex University 1993, p.3

scale human rights abuses. According to the Commission's decision an 'administrative practice' consists of two elements: a) repetition of acts and b) Official tolerance⁴. The Commission explained these two elements as follows:

“By ‘repetition of acts’ is meant a substantial number of acts of torture or ill-treatment which are the expression of a general situation. The pattern of such acts may be either, on the one hand, that they occurred in the same place, that they were attributable to the agents of the same policy or military authority, or that the victims belonged to the same political category; or, on the other hand, that they occurred in several places or at the hands of distinct authorities, or were inflicted on persons of varying political affiliations. By ‘official tolerance’ is meant that, though acts of torture or ill treatment are plainly illegal, they are tolerated in the sense of that the superiors of those immediately responsible though cognisant of such acts, take no action *to punish them or prevent their repetition* (emphasis added); or that higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceeding, a fair hearing of such complaints is denied.”⁵ As a reason for gross violation ‘official tolerance’ concept established by the Commission gives significant facility to understand the gross violations practice. It directly is a reason of gravity of violation. The commission emphasised that “...the higher the organ tolerating the acts the more serious the violation involved.”⁶ A pattern of systematic and gross violation of human rights does not occur in a vacuum or a result simply of negligence or default on the part of governmental authorities. On the contrary such a practice requires the sanction of the state at some level.⁷

In conclusion, in the situations those allegations of human rights abuses are widespread the Commission can identify the elements of and administrative practice’ and especially official tolerance at a higher level, so it can be implied that the Commission is dealing with a situation of gross violation.

Prevention of Gross Violations

The European Commission of Human Rights and the scholars in the field generally have the opinion that gross violations of human rights exist as a result of political approval of policies, which lead to those practices. It is widely observed that Dictators are the most egregious abusers of human rights, often supporting international efforts to eliminate violations while continuing to abuse their citizens.⁸

It is a legitimate question to ask Why do governments abuse human rights, and what can be done to deter and reverse abusive practices? The basic answer could be expressed as abuse stems, centrally, from conflict and institutions.⁹

Thus the situation can not be changed solely by new legislation or by punishing the perpetrators. There is need the political will to be able to change the policy. It is believed by some writers that international human treaties may be failing to make a difference in those states most in need of reform – the world's worst abusers – even though they have been the targets of the human rights regime from the very beginning.¹⁰

If ‘gross violations’ occur despite the already existed law then rewriting the law can not eliminate the gross violations practice. Official tolerance element as established by the case law of Commission must be eliminated. In this regard, in the torture field the Special Rapporteur on torture expressed that:

⁴ Denmark, Norway, Sweden, Netherlands v. Greece (hereafter the Greek case), Report of the Commission 5 November 1969, Yearbook Vol.XII (1969) p.195

⁵ The Greek case, Commission Report, 05.11.1969 paras. 28-29

⁶ Ireland v. United Kingdom, Report of the Commission, Series B Vol.23-1 (1976-1978) p.395-396

⁷ Aisling Reidy, Françoise Hampson and Kevin Boyle; *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the case of Turkey*, in Netherlands Quarterly of Human Rights Volume 15 No. 2 June 1997

⁸ Conrad, Courtenay R., ‘Divergent Incentives for Dictators: Domestic Institutions and (International Promises Not to) Torture’, Journal of Conflict Resolution 2014 58:34

⁹ Hafner-Burton, Emilie M., ‘A Social Science of Human Rights’, Journal of Peace Research 2014, Vol. 51(2) 273–286

¹⁰ Hafner-Burton, Emilie M.; Kiyoteru Tsutsui, ‘Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most’ Journal of Peace Research, vol. 44, no. 4, 2007, pp. 407–425

“In the final analysis, the elimination of torture is a matter of political will. Its persistence is a testimony to the failure of political will.” This approach can be applied in all gross violations practices. We can come to conclusion that as gross violations are matters of politics, the solution of the problem should be political as well.

United Nations mechanism has special means to combat with pattern of gross violations. Economic Social Council has authorised the Human Rights Commission and its sub-commission to establish procedures by 1503 and 1235 resolutions to combat such situations. There are three different procedures used by the Human Rights Commission to address gross violations. Those procedures are: (1) confidential consideration of a situation under 1503 procedure; (2) public debate under the 1235 procedure, which may lead to the appointment of a Special Rapporteur of the Commission, a Special Representative of the Secretary-General, or some other designated individual or group to investigate a situation and (3) the designation of a thematic rapporteur or Working group to investigate violations anywhere relating to a specific theme such as torture, disappearances or arbitrary detention.¹¹ Those procedures do not have judicial power. They do not provide binding decisions on states, which are complained for gross violations. They aim dialogue and political impact on concerning states to achieve result of prevention of gross violations. The effect of a treaty on a state—and hence the state’s willingness to commit to it—is largely determined by the domestic enforcement of the treaty and the treaty’s collateral consequences.¹²

The United Nations Committee Against Torture (CAT) established by the International Convention Against Torture and the European Committee for the Prevention of Torture (CPT) includes the possibility to decide to carry out investigations into situations in the territories of Contracting Parties and to publish reports on their findings if necessary. As this mechanism allows the Committee to investigate the totality of a situation and can involve the state party in a dialogue that may provide more results than a decision of a Committee on an individual complaint, this approach to investigate human rights abuses seems to be more effective to determine the problem and to reach the solution.¹³ We could rightly claim therefore that treaties with stronger monitoring provisions evince higher levels of compliance.¹⁴

The Supervisory System of European Convention on Human Rights

The Convention provides two complaint procedures when alleged violation of fundamental rights and freedoms set forth in the Convention occurs. The states parties of Convention has the right to bring communications against another state party alleging that it violated the rights guaranteed by the Convention. The more revolutionary complaint system of the Convention is the individual petition procedure. The European Convention on Human Rights is the first international treaty, which provides the individuals as subject of International Law, allowing them to bring complaint against the state before an international tribunal.¹⁵

Inter-State Complaint Procedure

Article 33 (former Art.24) of the Convention provides:

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.

¹¹ Steiner, J.Henry, Alston, Philip, *International Human Rights In Context Law Politics Morals*, (Oxford University Press, Oxford - New York, 2000) p.611

¹² Hathaway, Oona A., ‘Why Do Countries Commit to Human Rights Treaties?’ *Journal of Conflict Resolution*, Volume 51 Number 4, August 2007

¹³ M. Nowak and W.Süntinger, International Mechanisms for the Prevention of Torture in *Monitoring Human Rights in Europe*, A.. Bloed, L.Leicht, M.Nowak and A. Rosas (eds.), (Martinus Nijhoff Publishers, Netherlands, 1993) p.145

¹⁴ Cole, Wade M. and Ramirez, Francisco O., ‘Conditional Decoupling: Assessing the Impact of National Human Rights Institutions, 1981 to 2004’, *American Sociological Review*, 2013 78:702

¹⁵ P.van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law and Taxation Publishers, Deventer-Boston, 1990) p.37

Any high contracting state party of the Convention can bring a complaint concerning violations committed against persons who are not its nationals or against persons who are not nationals of any of the contracting States, or are stateless, and even about violations against nationals of the respondent State. States can bring complaint about the incompatibility with the Convention of the national legislation or of an administrative practice of another State party without having to allege a violation against any specified person. Therefore any state party of Convention has the right to bring a complaint concerning alleged violation of the Convention, notwithstanding whether there is a special relation between the rights and interests of the Applicant State and alleged violation.¹⁶ Inter-state application procedure is based on a system of collective guarantees by the contracting states.

Individual Complaint Procedure

Article 34 (former 26) of the convention provides:

The Court may receive applications from any person, non-governmental organisation 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.

This article is the most progressive provision of the Convention. It makes the individual the subject of the international law contrary to the general definition of international law that it is the law of states. The individual have to be victim of violation to be able to complaint against state. The word victim refers to the person directly affected by the act or omission at issue.¹⁷ In general, individual complaint procedures are not considered as proper means of dealing with gross violations.¹⁸

Case of Turkey and Gross Violations

Turkey had been subject to examination of Convention institutions as a violator of systematic human rights abuses. After military coupe d'état on 12 September 1980 the Governments of Denmark, Norway, Sweden, Netherlands and France on 1 July 1982 brought an inter-state complaint before Commission alleging wide scale human rights abuses during the military governance. The systematic practice of torture and of detainees as a breach of Art.3 and violations of Art.5, 6, 9, 10, 11 and 15(3) were claimed by applicant states. Examining the case the Commission had declared that the parties agreed on the friendly settlement. The settlement included the obligation on Turkey to combat torture by measures which the internal law and practice of Turkey ensures the effective implementation of Article 3 the Convention. However the settlement didn't include any provision about other alleged violations. Furthermore there was no provision about how implementation of those measures would be monitored. The settlement didn't answer the question of remedies for the victims suffered from torture. Another deficiency was the no provision about bringing of torturers to justice.¹⁹ For these deficiencies, the settlement was criticised by the scholars in the area.²⁰ Prof. Kamminga stated that the settlement had been agreed only after strong pressure from the United States that had long regarded Turkey with special eyes in view of its strategic position vis-a vis the Soviet Union and the Middle East.²¹ However, when deciding to agree on friendly settlement the Commission obliged to ensure that the settlement has been reached 'on the basis of respect for Human Rights' as defined in the Convention.

Since 1989, the European Convention on Human Rights has been invoked against Turkey, by a large number of citizens of Kurdish origin. They claimed to be victims of practices of violation including ill

¹⁶ *ibid*, p.33

¹⁷ *De Jong Balget & Van Den Brink v. Netherlands* series A No: 77, Judgement of 22 May 1984 p.20

¹⁸ *supra* note, 7

¹⁹ *Denmark, Sweden, Netherlands, Norway and France v. Turkey*, Friendly settlement Report of the Commission of 07 December 1985, 41 D & R 31, 38

²⁰ Kamminga, Menno T. "Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations." In *Netherlands Quarterly of Human Rights* 1994, Volume 12 No: 2 p.153-164 at 158

²¹ *ibid*

treatment in detention, killings, disappearances, and destruction of villages by the security forces in the region of emergency of the South East. Those violations occurred as at the time of conflict between state security forces and terrorist PKK (Kurdistan Worker's Party) organization. At the admissibility stage the Commission mostly declared that the applications were admissible. However so far, Turkey has been able to agree a friendly settlement for the cases. This means that by agreeing to pay compensation the Turkish Government has been allowed to avoid a decision on the merits. Can it really be said to respecting the Convention, if a State is consistently permitted to buy off its violations?²² An effective implementation procedure should aim to punish perpetrators and to end the violation; solely to compensate the victims is not sufficient.²³ The Commission and Court in those applications from South-East Turkey didn't address the question of a practice of wide scale human rights abuses. The Commission and Court had been reluctant to accept claims of the existence of a governmental policy that leads to serious and wide scale violations.²⁴ This approach decreases the effectiveness of the Convention in situations of alleged gross violation of human rights.

Conclusion

The states Parties of Convention first of all, should secure the rights and freedoms set forth in the Convention at their domestic level. According to the whole structure of the Convention, protection of Convention institutions is subsidiary to that of national legal systems.²⁵ Unlike the United Nations system, the European Convention does not have special procedures to examine gross violations. The monitoring of respect for the fundamental rights and freedoms guaranteed in the Convention is monitored mainly by means of the bringing of complaint by one or more states against another State, or by individuals. So far, to address the practices of wide scale violations of the Convention's rights the inter-state mechanism has been invoked. Unfortunately, because of the states' political concerns there is no intention to use this mechanism effectively among the states parties of the Convention. As for individual complaint mechanism, as it was stated earlier this mechanism is not suitable to deal with the gross violations. The political will that is necessary to change the gross violation situations can't be achieved by consideration of individual complaints.

Bibliography

Aisling Reidy, Francoise Hampson and Kevin Boyle; *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the case of Turkey*, in Netherlands Quarterly of Human Rights Volume 15 No. 2 June 1997

Beth Stephens, *Conceptualising violence: Present and future developments in international law; Panel I: Human Rights & Civil wrongs at home and abroad; old problems and new paradigms: Conceptualising violence under international law: Do tort remedies fit the crime?* Albany Law Review, 1997

Cole, Wade M. and Ramirez, Francisco O., 'Conditional Decoupling: Assessing the Impact of National Human Rights Institutions, 1981 to 2004', *American Sociological Review*, 78:702, 2013

Conrad, Courtenay R., 'Divergent Incentives for Dictators: Domestic Institutions and (International Promises Not to) Torture', *Journal of Conflict Resolution* 2014 58:34

Donna Gomien, David Harris, Leo Zwaak, *law of the European Convention on Human Rights and European Social Charter*, (Council of Europe Publishing, printed in Germany, 1999)

²² supra note 3, p.47

²³ "...for the victims and survivors of human rights abuses, tort remedies meet some, if not all, of their needs. These include investigation leading to identification of those responsible, punishment of wrongdoers and compensation for their injuries." Beth Stephens, *Conceptualising violence: Present and future developments in international law; Panel I: Human Rights & Civil wrongs at home and abroad; old problems and new paradigms: Conceptualising violence under international law: Do tort remedies fit the crime?* In Albany Law Review, 1997 accessing from lexis

²⁴ Kurt v. Turkey, Report of the Commission adopted on 5 December 1995, Aksoy v. Turkey, ECHR judgement of 27 September 1995

²⁵ "...the primary responsibility of the states to secure the enjoyment of human rights is enhanced and the effective discharge of the subsidiary role of the institutions is facilitated." D.J Harris, M. O'Boyle, C. Warbrick; *Law of the European Convention on Human Rights*, (Butterworths, Edinburgh, 1995)

D.J Harris, M. O'Boyle, C. Warbrick; *Law of the European Convention on Human Rights*, (Butterworths, London, Dublin, Edinburgh, 1995)

Hafner-Burton, Emilie m.; Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most* Journal of Peace Research, vol. 44, no. 4, 2007,

Hafner-urton, Emilie M., *'A Social Science of Human Rights'*, Journal of Peace Research, Vol. 51(2), 2014,
Hathaway, Oona A., *'Why Do Countries Commit to Human Rights Treaties?'* Journal of Conflict Resolution, Volume 51 Number 4, August 2007

Kamminga, Menno T. "Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations." In *Netherlands Quarterly of Human Rights*, Volume 12 No: 2, 1994

M. Nowak and W.Süntinger, *International Mechanisms for the Prevention of Torture in Monitoring Human Rights in Europe*, A.. Bloed, L.Lleicht, M.Nowak and A. Rosas (eds.), (Martinus Nijhoff Publishers, Netherlands, 1993)

P.van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law and Taxation Publishers, Deventer-Boston, 1990)

Steiner, J.Henry, Alston, Philip, *International Human Rights In Context Law Politics Morals*, (Oxford University Press, Oxford - New York, 2000)