To Deniz

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS IMPACT ON THE LEGAL SYSTEMS OF THE PARTICIPATING STATES

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September 2001

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Political Science and Public Administration.

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Dr. Scott Spehr
Supervisor

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Political Science and Public Administration.

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ABSTRACT

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS IMPACT ON THE LEGAL SYSTEMS OF THE PARTICIPATING STATES

Altıntaş, İlkem

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This study analyzes the implications of the European Convention of Human Rights on the domestic governance of the participating states. The European Convention is not a traditional type of international treaty. It has an implementation mechanism, which forces the participating states to abide by the rulings of the Convention. This situation is a prominent example of the transformations that have taken place in the field of human rights since the Second World War. This thesis focuses on the responses of the contracting states to the judgments of the European Court of Human Rights, an organ of the Council of Europe, in order to establish the impact of supranational organizations on member states domestic policy-making in the context of an evolving global order.

Keywords: European Convention on Human Rights, Domestic legislation, Human rights, Turkey

ÖZET

AVRUPA İNSAN HAKLARI SÖZLEŞMESİ VE TARAF ÜLKELERİN HUKUK SİSTEMLERİNE ETKİSİ

Altıntaş, İlkem

Yüksek Lisans, Siyaset Bilimi ve Kamu Yönetimi Bölümü

Tez Yöneticisi: Dr. Scott Spehr

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Bu çalışma Avrupa İnsan Hakları Sözleşmesi'nin taraf ülkelerin iç yönetimlerine etkilerini incelemektedir. Avrupa İnsan Hakları Sözleşmesi geleneksel anlamda bir uluslararası sözleşme değildir. Taraf ülkeleri Sözleşme'nin kurallarına uymaya zorlayan bir mekanizması vardır. Bu durum 2. Dünya Savaşı'ndan sonra insan hakları alanında gerçekleşen değişimlerin çarpıcı bir örneğidir. Bu tez, uluslarüstü kuruluşların, bu kuruluşlara üye ülkelerin iç yönetimlerine olan etkilerini ortaya çıkarmak amacıyla Avrupa Konseyi'nin bir organı olan Avrupa İnsan Hakları Mahkemesi'nin kararlarına karşı Sözleşme'ye taraf ülkelerin aldıkları tavırları incelemiştir.

Anahtar Kelimeler: Avrupa İnsan Hakları Sözleşmesi, İç hukuk, İnsan hakları, Türkiye

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INTRODUCTION

The epoch after the Second World War witnessed significant transformations in global politics. The transformations in the field of human rights influenced international law, the concept of state sovereignty, and the governance of the states fundamentally. The process, that can be referred to as "the internationalization of human rights", considerably altered the shape of politics. The aim of this study is to explore the fundamental change that has occurred in the governance of states in Europe brought about by the supranational decision-making institutions regarding human rights. The supranational forces that are pushing states for promotion and implementation of human rights have had great influence on the governance of states. In this study these transformations will be explored by focusing on the European Convention for the Protection of Human Rights and Fundamental Freedoms and its system.

The first chapter will explore the historical evolution of and the basic premises upon which the concept of human rights rest. In this respect the general purpose of the first chapter is to explore the internationalization of human rights in historical perspective. The evolution of the concept of human rights will be depicted by tracing the concept back to the seventeenth century. Then efforts to make the concept of human rights an international

concern will be explored. Additionally the relationship between sovereignty and human rights will be examined. In the new era it is evident that the concept of sovereignty is being challenged through the process of the internationalization of human rights. As state sovereignty necessitates independence of action within territorial boundaries, the prevailing international order with regard to human rights is one of the major issues that challenge sovereignty.

Furthermore, in the first chapter the significant role of the non-governmental organizations (NGOs) will be emphasized in the promotion and implementation of human rights. The focus will be on the activities of NGOs within the context of the United Nations.

The second chapter consists of the study of the institutional framework of the Council of Europe and the European Court of Human Rights. This chapter will cover the evolution of the Council of Europe, the Convention and the Court. The underlying pillars that led to the establishment of such enforcement mechanisms will be underlined. Furthermore the main characteristics of the Convention will be examined. The eleventh protocol which entered into force on 1 November 1998 will explored. Through this protocol fundamental changes occurred in the functioning of the mechanism. The focus will be on the functioning of the new Court in order to clarify the enforcement procedure of the system as applied to the member states.

In the third chapter the main attempt will be to underline the growing impact of the Convention and its system on the member states. In this regard the Committee of Ministers, which has the supervising task of implementation of judgments of the Court will be examined. The means of the Committee of Ministers to force states to abide by the judgments of the Court will be explored. For instance the resolutions and recommendations of the Committee of Ministers will be underlined. The efforts of the contracting states to harmonize their domestic legislation with ECHR rulings will be depicted through examples from certain cases. Furthermore, the re-examination of the cases upon the finding of violations by the Court, which is an issue that the Committee of Ministers has stressed in recent years, will be examined. The role of the Committee of Ministers in re-examination is important in order to understand the influence of the Convention on contracting states. Thus this chapter is important in order to realize how the Convention and its system influence the domestic governance of the contracting states in terms of human rights policies. Finally, the efforts by the Parliamentary Assembly to urge member states to comply with judgments more strictly will be examined. Recent resolutions will be under focus to display the importance that is rendered to the implementation of Courts judgment by the organs of the Council of Europe.

The final chapter will cover relations between Turkey and the Convention organs. The underlying aim is the exploration of the responses of Turkey to the judgments of the Court and how it has shaped domestic

governance in terms of the enactment of legislation and amendments in the national legislation of Turkey. First, the historical background of Turkey and the Convention will be examined. Then the problematic issues before the Committee of Ministers that effect relations between Turkey and the Council of Europe will be made clear. In this respect the resolutions that force Turkey to abide by the judgments of the Court and their implications for Turkey will be explored. Lastly, the activities that have taken place in Turkey to promote human rights and to increase the level of awareness with regard to human rights will be depicted. The activities undertaken with the cooperation of the Council of Europe in the education of human rights demonstrate the importance that is given to preventing violations of human rights rather than to punishing states after a violation has occurred.

The main aim of the whole study will be to explore the fundamental changes that have occurred with the internationalization of human rights and the emergence of supranational organizations after the Second World War. Obviously, this touches on issues of sovereignty, authority, and the role of the state as the central political institution in the contemporary global political context. Human rights regimes can thus be regarded as reflective of a large change, as a precursor to the expansion of the power and influence of supranational organizations in general.

In the field of human rights the decision making organ of a state which is a member of the Council of Europe is no longer her government

but the Committee of Ministers. In this regard a main focus of the study is to explore that shift in the decision-making bodies.

CHAPTER I

INTERNATIONALIZATION OF HUMAN RIGHTS

The process of the internationalization of human rights is a part of a significant transformation in global politics. In this chapter I will discuss the issue of the internationalization of human rights. Before explaining this concept it is useful to define human rights. It is a concept that defines itself. Human rights are the rights that one has simply because one is human (Donnelly, 1989). This simple definition has important political and social consequences.

The issue of the internationalization of human rights entered the arena of international law and politics approximately 50 years ago with the adoption by the United Nations of the Universal Declaration of Human Rights in 1948. It is fundamental to note that in the light of developments in the past decades, human rights have become another branch of international law and politics. The impetus for the internationalization of human rights was World War II and atrocities associated with it.

Nazi Germany's genocidal policies regarding Jews prompted international society to take action to prevent such atrocities happening again. In this way the concept of human rights entered the mainstream of international law and politics.

In one very important way international human rights differs from the classical understanding of international law, in that individuals are the subjects of international human rights. The classical understanding of international law and politics deals with sovereign states. States possess rights and commitments. The state-oriented view of international law meant that individuals had no legal status. However, fundamental to the concept of international human rights is the proposal that individuals have rights. Thus one result of the entrance of human rights into the international arena is the change that has occurred in the understanding and the context of the sovereignty of states.

1.1 Historical Background

In order to understand the notion of the internationalization of human rights we should look at the historical background of the concept of human rights. The concept of human rights has its roots in the liberal thought of Western Europe. It can be proposed that the modern idea of human rights evolved from the Lockean conception of natural rights. According to the enlightenment philosopher Thomas Locke the medieval notion of natural law gives natural rights to human beings. For Locke the natural rights that are rendered to individuals are the right to life, liberty and property (Jones,1994). The doctrine of natural law states that there are laws of nature or laws of God. Natural law differs from positive law since the establishment of positive law is based on the consent of the governors.

However, natural law derives from God. There are natural rights such as the right to life and the right to liberty that are rendered to human beings through natural law regardless of their existence in positive law (Jones,1994).

These natural rights found a place in the American Declaration of Independence of 1776 and the French Declaration of the Rights of Man and the Citizen of 1789. In 1776 the American Declaration of Independence proclaimed the inalienable rights of all men to life, liberty and the pursuit of happiness. In 1789 the French Revolution produced the Declaration of the Rights of Man and the Citizen. The second article of this declaration reads as follows: “The aim of all political association is the conservation of the natural and inalienable rights of man.” These rights are liberty, property, security, and resistance to oppression (Robertson, Merrills, 1996).

The adoption of the American and French Declarations marked the beginning of an expanding period of constitutionalism. States such as the Netherlands, Sweden, and Norway took the principles of French and American Declarations and applied them to their constitutions.

In the nineteenth century efforts to abolish slavery were the very first signs of international concern for human rights. In most of the European states slavery was a legal action before the nineteenth century (Robertson, Merrills, 1996). The major European states agreed on the prohibition of slavery at the Congress of Vienna in 1815. Until World War I the most comprehensive agreement on the prohibition of slavery was the

Anti-Slavery Act that was ratified by eighteen states at the Brussels Conference in 1890. In this act slavery and the slave trade were condemned and some measures were taken to suppress slavery (Robertson, Merrills, 1996). After World War I, "the International Convention on the Abolition of Slavery and the Slave Trade" was signed in 1926 and it was agreed to maintain "the complete suppression of slavery in all forms and of the slave trade by land and sea." In contemporary human rights instruments the abolition of slavery finds its place. For example, Article 4 of the Universal Declaration on Human Rights and Article 8 of the International Covenant on Civil and Political Rights (ICCPR) prohibit all forms of slavery and the slave trade.

The second attempt at the protection of human rights at the international level was protection for the victims of war. In the nineteenth century the European states also ratified agreements to make war less inhumane. The 1863 Geneva International Conference founded the International Committee of Red Cross (ICRC) for the purpose of reducing the horror of war. The next year, the Geneva Convention of 1864 was signed and the contracting states undertook to respect military hospitals and their staff under the sign of the Red Cross that care for soldiers regardless of their nationality. In 1919 the ICRC was internationally recognized by Article 25 of the Covenant of the League of Nations. The scope of humanitarian law was widened by the Geneva Protocol of 1925. In this protocol the usage of poisonous and other gases was prohibited. After the

atrocities of the Second World War the states concluded the four Geneva Conventions of 1949. In these conventions the following topics were deal with:

- the amelioration of the conditions of the sick and wounded in the field.
- the amelioration of the conditions of the sick, wounded and shipwrecked members of the armed forces at sea.
- treatment of prisoners of war.
- the protection of the civilian population in the time of war (Robertson, Merrills, 1996:301).

The Geneva Conventions of 1949 were accepted by 185 states. The number of states that ratified the Convention demonstrates the importance that was given to reducing the horror of war.

Following World War I, the League of Nations was established in order to try to prevent the outbreak of such conflicts. Although in the Covenant of the League of Nations the issue of human rights was not included, there was a provision regarding improvements in the conditions of labor. Moreover, there were provisions concerning the rights of minorities.

Other international efforts to support the rights of the individual appeared at about the same time. For example in 1919 the International Labor Organization (ILO) was established in order to protect the rights of industrial workers and to improve working conditions.

However, these initial attempts to protect human rights were insufficient due to the absence of enforcement capabilities. As David Forsythe (1991:16) notes:

> all of these pre-1945 attempts at international action in behalf of human rights, whether morally or politically motivated, represented small exceptions to the basic principle that human rights was normally a domestic affair of nation-states. Most of the international action for human rights prior to 1945 did not intrude on the state's authority within its territorial jurisdiction in any significant way.

This fact was realized dramatically in the 1930's, when the German Nazis began to systematically persecute German Jews. The international community could not initially find an effective way of condemning Germany, since how a government treated its own citizens was considered a matter of sovereign domestic jurisdiction. The League of Nations did not challenge the national sovereignty of states.

1.2 The United Nations Period

The Holocaust and the human rights violations of the Second World War contributed greatly to the establishment of the United Nations. The United Nations was established through the United Nations Charter in 1945. The number of member states was fifty-six. Although the United Nations Charter recognized the importance of non-interference in the internal affairs

of states[1], the charter also established human rights as a matter of international concern. Article 1 of the Charter states that one of the aims of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. Furthermore, Article 55 of the Charter provides that the United Nations shall promote " universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

By most scholars, the works of the United Nations in the field of human rights are classified according to three categories: a) the formulation and definition of international norms of human rights; b) the promotion of human rights through information education and training about human rights; c) the implementation of human rights norms (Claude, Weston, 1989).

The formulation of human rights norms began with the establishment of the United Nations Commission on Human Rights (UN Commission) in 1946, which is the most important United Nations body in the human rights field. The UN Commission is the organ that drafts the Universal Declaration of Human Rights and forwards it to the General Assembly for ratification (Robertson, Merrills,1996). On 10 December 1948, the United Nations General Assembly adopted the Universal

[1] The article 2 of the Charter states that the United Nations should not intervene " in matters which are essentially within the domestic jurisdiction of any State ..."

Declaration of Human Rights, which even today provides the most prominent statement of international human rights norms.

However, the Universal Declaration of Human Rights does not have a binding nature among states since it was a resolution of the General Assembly not a treaty that can bind states by their ratification[2]. Although the Declaration cannot be regarded as binding, it has great implications for forming a common standard of human rights (Donnelly,1998). The provisions of the Declaration gave inspiration to the regional human rights treaties of Europe, Africa and the Americas.

Since the establishment of the United Nations, the General Secretariat has received many applications from individuals concerning violations of human rights. However, until 1966 The UN Commission on Human Rights did not take into consideration any such complaint about violations of human rights. In 1966 the General Assembly invited the Economic and Social Council and the Commission through Resolution 2144(XX) "to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they might occur" (Robertson, Merrills,1996:79). The reason behind this fundamental change can be traced to the increase in the number of members of the UN, due mostly to the new African and Asian states.

[2] Although there is a debate that the Universal Declaration of Human Rights has, over time, become a part of customary international law which means that it has binding effect on states, a binding nature can not be attributed to the Declaration (Donnely,1998).

Another important reason was the adoption of the Convention on the Elimination of All Forms of Racial Discrimination. In Article 14 of the Convention a procedure was accepted that recognizes the right to submit a complaint by individuals or groups against states. The new orientation of the United Nations broke the understanding that accepts Article 2/7 of the UN Charter as a hindrance to the international implementation of human rights.

These developments led to the adoption of the procedure called Resolution 1235 by the ECOSOC in June 1967[3]. Through this resolution the ECOSOC permits the UN Commission to consider specific complaints about specific countries (Forsythe, 2000: 67). Thus the Economic and Social Council authorized the UN Commission and the Sub-Commission on prevention of Discrimination and Protection of Minorities to examine the gross human rights violations contained in the individual applications.

In 1948 the drafters of the declaration had envisioned adopting a covenant for giving a binding nature to the human rights that are established in the declaration (Robertson, Merrills, 1996). But it was not until December 1966 that the International Human Rights Covenants were

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[3] The relevant parts of the resolution reads as follows:
"…The Economic and Social Council,
1. authorizes the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities …to examine information relevant to gross violations of human rights and fundamental freedoms, …

2. decides that the Commission on Human Rights may inappropriate cases, and after careful consideration of the information thus made available to it… make a thorough study of situations which reveal consistent pattern of violations of human rights … and report, with recommendations thereon, to the Economic and Social Council.

opened to signature and subsequently entered into force in 1976. There were two covenants:

1) International Covenant on Civil and Political Rights (ICCPR)

2) International Covenant on Economic, Social and Cultural Rights (ICESCR).

Between the years 1948 and 1976 while the drafting process of ICCPR and ICESCR was going on, the General Assembly adopted a considerable number of conventions that form the skeleton of international human rights norms, such as the Convention on the Elimination of all forms of Racial Discrimination (1965), the International Convention on the Suppression and Punishment of the Crime of Apartheid (1975), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and The Convention on the Political Rights of Women (1952). In addition Article 28 of the ICCPR provides for establishing a Human Rights Committee, which became the principal organ of implementation of the Covenant. The implementation organ of the ICESCR became the existing Economic and Social Council.

Through these covenants and the Universal Declaration of Human Rights a great number of human rights have become internationally recognized. However, although the United Nations has had great influence in the formulation and definition of human rights through treaties that she has drafted, the implementation function is missing. There is no force that makes states respect human rights even if they are a party to the treaties of

the United Nations. The organs of the United Nations monitor the violations of human rights in states, however, there is no international legislative body to impose sanctions on the states due to their violations of human rights. Nevertheless in 1978 the adoption of the Optional Protocol to the International Covenant on Civil and Political Rights paved the way for individual communication to an international organization. Now individuals under the jurisdiction of a state have a right to make an individual application to the UN Human Rights Committee if their rights are violated as set forth in the ICCPR. This fundamental change, which gives a place to individuals in the international protection of human rights, was one of the concrete signs of the significant developments that have taken place in the internationalization of human rights. Although the European Convention on Human Rights has provided the right of individual application since 1954, it was a regional arrangement. However, the effectiveness of the Optional Protocol is not sufficient due to its optional nature. The ratification of the optional protocol is in the hands of the state concerned.

The establishment of the United Nations can be regarded as the one of the major steps in the process of the internationalization of human rights, although the charter does not permit the organization to intervene in the internal affairs of states. The reason for putting such a provision in the charter is the strong tradition of state sovereignty that can trace its roots all the way to the Peace of Westphalia of 1648.

1.3 Sovereignty and Human Rights

One of the significant aspects of the internationalization of human rights is its impact on the sovereignty of the state. The establishment of international standards and their implementation mechanisms on human rights are challenging the idea of sovereignty (Falk,2000). Falk notes the dual nature of state sovereignty which serves as both a shield to enable government to engage in human rights violations toward its own citizens and can protect a progressive government against an intervention that seeks to exert pressure on a weaker state.

The impact of human rights on sovereignty has two dimensions. When sovereignty is regarded as the sovereignty of people in a given territorial area, the internationalization process of human rights which aims to protect the rights of people in that territorial area is not in conflict with sovereignty (Falk,2000; Reisman,1990). As Reisman (1990) states international law keeps protecting sovereignty but "people's sovereignty rather than sovereign's sovereignty."

The sovereign state can be defined as the state that has the supreme power of exerting jurisdiction over a given territory (Rosas,1995). Sovereignty also requires equality with other states in the international arena. The penetration of international human rights norms into the domestic law of states through treaties that the states agree to be bound by is one of the pivotal signs that the power of jurisdiction in terms of law-making is not entirely in the hands of sovereign states. Besides, the

enforcement mechanisms of international human rights norms through the organs of supranational organizations challenge the judicial power and executive power of sovereign states. Another challenge to state sovereignty comes from non- governmental organizations (NGOs) that "express new modes of transnational political action relying on networks, norms, information and media access as instruments of persuasion" on human rights (Falk, 2000).

1.4 The Role of Non-Governmental Organizations

In this section the role of Non-Governmental Organizations (NGOs) in the promotion, implementation and enforcement of human rights will be examined, especially within the context of the UN System.

The role of NGOs in the process of the internationalization of human rights was inevitable. They contribute to the development of human rights and have become a vital part of the broader human rights movement. The Post- Cold War era witnessed the exponential growth of these organizations, many of which have made great contributions to the implementation of international human rights. By 1980, there were some 200 NGOs in the United States alone that dealt with human rights and about the same number in Britain (Donnelly, 1998).

The promotion and protection of human rights is accomplished through the interplay of the Inter Governmental Organizations (IGOs), governments and NGOs in the new era. NGOs maintain the following

functions: First, NGOs lobby the intergovernmental organizations in the process of standard setting. Second, they lobby governments to persuade them to adopt international standards. Third, they monitor compliance of governments with their treaty obligations. Last, they uncover human rights violations.

According to Hobe (1998), non-governmental organizations represent the non-state sector, and their increasing presence is indicative of the growing need for states to recognize non-state actors. Hobe further mentions that if some non-state actors possess an international legal personality, the state-centered perspective of the international system and international law will be modified to reflect the impact of NGOs. Thus the public interest that is represented through states in the international arena will also be represented through the activities of NGOs.

Another importance of the NGOs stems from their independence while promoting human rights (Luard, 1990). They are independent since they don't need to represent the political priorities of any state. They are more independent than intergovernmental organizations as well since NGOs don't have an interdependent nature like these organizations (Luard, 1990). On the other hand another significance of NGOs is their opportunity to establish direct contact when an abuse of human rights occurred.

The growing importance of NGOs is reflected in explicit recognition of these organizations in the UN Charter.

Article 71 of the UN Charter reads as follows:

> The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Under the Charter, the Economic and Social Council may consult with non-governmental organizations concerned with matters within the Council's competence. The Council recognizes that these organizations should have the opportunity to express their views, and that they possess special experience or technical knowledge of value to the Council's work.

Over 1,500 non-governmental organizations have consultative status with the Council. They are classified into three categories: Category I organizations are those concerned with most of the Council's activities; Category II organizations have special competence in specific areas; and Category III organizations can make an occasional contribution to the Council, its subsidiary organs or other United Nations bodies (Steiner, Alston, 1996).

NGOs with consultative or observer status may send observers to public meetings of the Council and its subsidiary bodies and may submit written statements relevant to the Council's work. They may also consult with the United Nations Secretariat on matters of mutual concern (Steiner, Alston, 1996). This indicates that NGOs are actively involved in the norm-creating process of the United Nations.

CHAPTER II

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND ITS SYSTEM

In this chapter, the purpose is to examine the European Convention for the protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") and its legal system and supranational jurisdiction. The historical evolution of the Convention and its organs will be evaluated in order to understand the contribution of the Convention and its system to the implementation of human rights and its impact on the domestic governance of the members of the Council of Europe.

2.1 The Council of Europe

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 4 November 1950 and entered into force in 1953. The underlying organ that led to the creation of the Convention is the Council of Europe, which was established in 1949 by a group of ten states. Firstly, then, the history of the Council of Europe will be

explored to in order to understand the underlying purposes in forming the Convention.

The main impetus for the establishment of the Council of Europe was World War II[4]. After the massive destruction of World War II in Europe the Western European countries were receptive to the idea of creating a new Europe with a new structure which could lead to integration, economic and eventually political. The Hague Congress, begun on 7 May 1948, met to realize these ends. At the end of the Congress, it was concluded that constructive steps should be taken immediately for the creation of an economic and political union to guarantee security, economic independence and social progress, the establishment of a consultative assembly elected by national parliaments, and the drafting of a European charter of human rights and the setting up of a court to enforce its decisions (Robertson, Merrils,1993).

On 5 May 1949, in London, the treaty constituting the Statute of the Council of Europe was signed by ten countries: Belgium, France, Luxembourg, the Netherlands, the United Kingdom, Ireland, Italy, Denmark, Norway and Sweden (Steiner, Alston, 1996). Turkey became a member on 9August 1949. The Council of Europe's first sessions were held in Strasbourg, which was to become its permanent seat. The first major

[4] In his speech of 19 September 1946 in Zurich, Winston Churchill proposed a plan to prevent Europe from experiencing such a tragedy again. According to him what was needed was " a remedy which would transform the whole scene and in a few years make all Europe as free and happy as Switzerland is today. We must build a kind of United States of Europe."

convention was drawn up as concluded in the Hague Congress: the European Convention on Human Rights, signed in Rome on 4 November 1950 and coming into force on 3 September 1953 (Steiner, Alston, 1996).

In the statute of the Council of Europe the main concerns of the Council are cited with the following words:

> The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles, which are their common heritage, and facilitating their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms.(Article 1 of the Statute of Council of Europe)

Today, the Council of Europe proclaims its aims as follows:

- to protect human rights, pluralist democracy and the rule of law.
- to promote awareness and encourage the development of Europe's cultural identity and diversity.
- to seek solutions to problems facing European society.
- to help consolidate democratic stability in Europe by backing political, legislative and constitutional reform[5].

Thus two crucial aims that lie behind the establishment of the Council of Europe can be summarized as the promotion of democracy and encouragement of respect for human rights among the member states. At the outset the members of the Council of Europe consisted of only Western European countries. However the Post Cold War period made a great impact

[5] For further information on the objectives of Council of Europe, see http://www.coe.int

upon the Council. The Eastern European countries also started to join the Council. Today the Council of Europe has 43 members.

It is beyond doubt that the Council of Europe is a part of the broader European institutional context. The European Union is another major mechanism in Europe, which has relations with the Council of Europe in terms of co-operation. As the oldest organization for intergovernmental cooperation, the Council of Europe played an active role in the debate on the shape and the political role of the European Union (B.Haller et al.(eds), 2000). From the outset the relationship between the Council of Europe and the European Community has been based on cooperation.

The 1992 Maastricht Treaty on European Union does not refer directly to co-operation with the Council of Europe. However, there is a reference to the Convention, stating that the Union respects fundamental rights as guaranteed in this Convention. (B.Haller et al.(eds), 2000). In this regard it can be concluded that the legal instruments of the Council of Europe constitute a reference point for the legal system of the European Union.

The Council of Europe consists of two main bodies:

1) The Parliamentary Assembly which is the deliberative body of the Council of Europe, composed of 301 representatives (and the same number of substitutes) appointed by the 43 member states' national parliaments. The Assembly deals with topics of current or potential importance including problems of contemporary society and aspects of international politics. The Assembly also elects the Council of Europe's Secretary General and Deputy Secretary General, the Secretary General of the Assembly and the judges of the European Court of Human Rights.

2) The Committee of Ministers is the decision making body of the Council of Europe. Its function is to consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by the governments of a common policy with regard to particular matters (Van Dijk, Van Hoof, 1998). The Committee of Ministers will be discussed in Chapter 3 in detail due to the its crucial function as supervisory machinery of the implementation of the judgments of European Court of Human Rights (hereinafter the Court) between member states.

2.2 THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.2.1 The Main Features of the Convention

The Convention, although now just one among many human rights treaties, is certainly the most developed and the best observed. (Robertson, Merrills,1994) The main importance of the Convention derives from the right of individual application rendered to the citizens of the contracting states. The right of individual application enables individuals to gain a legal personality in the field of international law. This was, beyond doubt, a remarkable innovation in international law. For the first time sovereign states accepted the competence of an international legal system through the Convention. The understanding that human rights is a domestic affair of

states was broken. The treatment of citizens by sovereign states was brought into the international arena.

Although the convention is an international treaty, the distinctive part of the Convention when compared to other international human rights treaties is its strong enforcement mechanism. One of the significant features of the Convention is its effect on the domestic law of the contracting parties. The application of the Convention in domestic law and the fundamental change that has occurred in the governance of states will be explained in detail in Chapter 3.

The Convention was inspired by the Universal Declaration on Human Rights which is noted in the Preamble of the Convention. Moreover, the governments were resolved to take the first steps for collective enforcement of the rights stated in the Universal Declaration on Human Rights (Macdonald et al.,1993). Furthermore, the Convention gave inspiration to other treaties establishing international human rights machinery. For example the American Convention on Human Rights, and the Optional Protocol to the ICCPR.

Human rights in the Universal Declaration are commonly divided into civil and political rights on the one hand, and economic, social and cultural rights on the other. However, the Convention protects predominantly civil and political rights. The reason for excluding economic, social and cultural rights from the Convention is that the immediate need

was for a short, non-controversial text which governments could accept at once while the tide for human rights was strong (Harris et al,1995).

2.2.2 The rights guaranteed under the Convention.

Under Article 1 of the Convention, the contracting states are bound to secure for everyone within their jurisdiction the rights and freedoms set forth in Section 1 of the Convention. The rights and freedoms secured in section 1 of the Convention are as follows:

Right to life (Article 2), prohibition of torture (Article 3), prohibition of slavery and forced labour (Article 4), right to liberty and security (Article 5), right to a fair trial (Article 6), no punishment without law (Article 7), right to respect for private and family law (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), right to marry (Article 12), right to an effective remedy (Article 13), prohibition of discrimination (Article 14), derogation in time of emergency (Article 15), restrictions on political activity of aliens (Article 16), prohibition of abuse of rights (Article 17), limitation on use of restrictions on rights (Article 18) (The European Convention on Human Rights).

In March 1952, the First Protocol to the Convention was signed which comprises three rights, namely, protection of property, right to education, right to free elections. Respectively on 16 October 1963, 8 April 1983, and 22 November 1984, the Fourth Protocol, the Sixth Protocol, and

the Seventh Protocol were added to the Convention, which recognize additional rights; freedom from imprisonment for civil debt, freedom of movement and of residence, prohibition of expulsion of nationals and the right of nationals to enter their own country, prohibition of the collective expulsion of aliens, prohibition of the death penalty in time of peace, the right of an alien not to be expelled without due process of law, the right to appeal in criminal cases, the right to compensation for miscarriage of justice, immunity from being prosecuted twice for the same offence, equality of rights and responsibility of spouses (Protocols to the European Convention on Human Rights).

2.3 THE ORGANS OF THE CONVENTION

2.3.1 The European Court of Human Rights

Article 19 of the Convention reads as follows:

> To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

In this regard the function of European Court of Human Rights is to ensure the compliance of the Contracting states to the Convention.

Before November 1998 the institutional framework of the Convention had a dual character, which was comprised of the European Commission and the European Court of Human Rights. As the years passed this dual structure became insufficient due to the part-time functioning of

the Commission and the Court and the steady growth in the number of cases brought before the Convention institutions, which made it increasingly difficult to keep the length of proceedings within acceptable limits. The problem was aggravated by the accession of new Contracting States beginning in 1990[7]. This situation necessitated a reform in the institutional structure of the implementation mechanism of the Convention. The solution was the adoption of a single full-time court.

With the entrance of Protocol No. 11 to the Convention into force fundamental changes occurred in the composition of the Convention System. Firstly, a permanent European Court of Human Rights replaced the Commission and Court as well as the Committee of Ministers. The Committee of Ministers of the Council of Europe used to have a role in deciding on applications. According to the former Article 32 of the Convention, if an application on which the Commission has submitted a report has not within a period of three month, been referred to the Court, the final decision is taken by the Committee of Ministers. Therefore the Committee of Ministers had a judicial or quasi-judicial function (Robertson, Merrils,1993). Through Protocol No.11 the competence of the Committee of Ministers is limited to the supervision of the execution of judgments (Drzemczewski, Meyer-Ladewig,1994). The Committee of Ministers which has great influence on the implementation of judgments in the domestic law of contracting states will be examined extensively in Chapter 3.

[7] For detailed information concerning the remarkable increase in the number of cases see

Furthermore, the acceptance of the right of individual application and jurisdiction of the Court is compulsory for every contracting state in the new system. Under the old system, applications by individuals could only be made if the state concerned had accepted the Commission's and Court's competence (Drzemczewski,2000). However, according to Mahoney (1999) Protocol No. 11 does not alter the legal impact of the ECHR on national legal systems since the new single Court has no power to abrogate national laws, quash administrative decisions or overrule judgments found to be in violation of the Convention. It only streamlined and fully judicialised the Strasbourg system of human rights protection (Mahoney,1999).

2.3.1.1. Composition of the Court

The Court has its seat in Strasbourg. The Court consists of a number of judges equal to that of the members of the Council of Europe according to Article 20 of the Convention. The Court sits in committees, Chambers, and a Grand Chamber. Committees are composed of three judges, Chambers of seven judges, and the Grand Chamber of seventeen judges (Drzemczewski,2000).

2.3.1.2 The Procedure Before the Court

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web page of ECHR http://www.echr .coe.int

According to Articles 33 and 34 of the Convention the Court receives applications from any person, non-governmental organization or group of individuals claiming to be a victim of a violation of the Convention by one of the state parties, or a state party in the case of inter-state applications (Article 33 and 34 of the Convention).

Once an application is lodged with the Court, a committee of 3 judges will examine the application and decide whether the application is admissible. The Committee has a right to declare the application inadmissible and strike it from the list of cases. It is incumbent on the committee to render the inadmissibility decision unanimously. In case the application is not deemed inadmissible it is sent to a chamber for further examination on admissibility and the merits of the case.

Before deciding on admissibility, the chamber invites the respondent state to submit her observations on the allegations of the applicant. After evaluating the facts of the case in the light of the establishment of facts submitted by both parties, the chamber decides whether the application is admissible or not. If the decision of admissibility is rendered, the merits of the application are examined by the Chamber. The procedure is in principle written, however it can be oral if the special circumstances of the case necessitates a hearing. The applicant side submits a response to the observations of the respondent states. The chamber may also demand observations from both sides concerning issues that are focal (Explanatory Report to Protocol No.11)

While the proceedings before the chamber are going on, the dispute between the parties may be settled by way of friendly settlement. According to Article 38 of the Convention in order to "secure a friendly settlement" the consent of both parties is required. In case a friendly settlement is effected the application will be struck from the list by the Court (Article 39 of the Convention). When a friendly settlement is not reached between the parties, the Chamber continues with its examination on the merits of the case and delivers a judgment.

Following the judgment both parties have the right to bring the case to the Grand Chamber and request the re-examination of the case. According to Article 42 of the Convention, the Grand Chamber may accept this request if there are justified doubts concerning the "interpretation or application of the Convention or its protocols" or "if the case raises an issue of general importance." A panel of five judges of the Grand Chamber decides on whether a case is to be accepted for re-examination (Explanatory Report to Protocol No.11).

The judgments of the Grand Chamber are final. According to Article 44§2 of the Convention, if the case is not referred to the Grand Chamber, the judgment of the Chamber becomes final. Final judgments of the Court have a binding nature. After the judgment is rendered the Committee of Ministers monitors its execution (Explanatory Report to Protocol No.11).

CHAPTER III

THE IMPACT OF THE EUROPEAN CONVENTION ON DOMESTIC LAW

In this chapter the changes that have occurred in the domestic law of the member states through the judgments of the Court will be examined. From this perspective, firstly, the incorporation of the Convention into domestic legislation will be discussed by giving examples from the member states. Secondly, the role of the Committee of Ministers, an organ of the Council of Europe in the supervision of the judgments of the Court, will be the focus. Examples from case-law will be given to show the responses of the contracting states to convention violations.

The main aim of this chapter is to explore the growing impact of the convention on the domestic law and the human rights policies of the contracting states brought about by the supervision function of Committee of Ministers and the complementary role of other organs of the Council of Europe. To explore the importance that is placed on the implementation of the Convention system by the Council of Europe, the resolutions and recommendations adopted by the Parliamentary Assembly that urge the member states to comply with the judgments more strictly and invite the Committee of Ministers and the Court to take measures against the

contracting states that fail to comply with the execution of judgments will be examined.

3.1 The Impact of The Convention on Domestic Governance

Before examining the implications of the Convention on the domestic law of the member states it will be useful to bear in mind that the Convention is an international treaty. International law determines the validity of treaties in the international legal system. However, it is the national legal system which determines the status which will be given to a treaty within that legal system (Leary, 1982: 726). The Convention, unlike many other human rights treaties, has a highly sophisticated judicial control mechanism that puts a country's legal system under close scrutiny in Strasburg (Drzemczewski,1995).

Article 1 of the Convention reads as follows:

> The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.

As mentioned in the article above, the primary task of the contracting states is to secure the rights and freedoms set forth in the Convention. On the other hand the Convention does not impose upon the contracting states the obligation to make the Convention part of domestic law. Furthermore the Court has declared the same argument on several occasions[8]. However, this

[8] The main judgments in which the Court states that the Convention does not oblige contracting states to incorporate its provisions into national law are as follows: James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 47 § 84,

does not mean that the contracting state can escape from the obligations set forth in the Convention due to the conflicts that occur between the provisions of the Convention and national legislation. Article 27 of the Vienna Convention on the Law of Treaties provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Since the Convention does not require any obligation concerning incorporation into domestic law, the status of the Convention in the domestic law of the contracting states varies from one state to another (Polakiewicz, 1996). In some states like Belgium, Luxembourg, and the Netherlands the rights and freedoms of the Convention were applied by the Courts immediately after ratification. In states like Germany, the United Kingdom, Italy and most of the States of Eastern and Central Europe the Convention should be transformed into domestic law, which means that the Convention should be ratified by an act in the domestic law (Drzemczewski,1995). Besides, the position of the international treaties in domestic legislation differs. In some states like Austria the treaties are part of the constitution. In some states they take on the force of law.

3.2 The Committee of Ministers

The Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, p. 39, § 90, McCann and others judgment of 27 September 1995, Series A no.324 p.47, § 153.

The Committee of Ministers is the decision-making body of the Council of Europe. Ministers are the ministers of foreign affairs of each member state. Each member state appoints a deputy who has the decision-making power of the ministers since it is difficult to maintain the presence of ministers in each meeting of the Committee of Ministers. Each member state also has a permanent representative who resides in Strasbourg and deals with the daily work of the Committee of Ministers (Macdonald et al, 1993). The Committee meets at the ministerial level twice a year, in May and November. Ministers' Deputies meet once a week. Furthermore the deputies hold regular meetings to exercise the Committee's functions under Article 46 of the Convention.

According to Article 15 of the Statute of Council of Europe;

> a) on the recommendation of the Parliamentary Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters.
>
> b) In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it measures taken by them with regard to such recommendations.

In the light of the provisions concerning Committee of Ministers in the Statute of the Council of Europe and the practice of the organ, the tasks and activities of the Committee of Ministers can be summarized as follows:

- to invite European States to become members of the Council of Europe. The Committee of Ministers also has the authority to suspend or terminate membership.

- to monitor compliance of member states with the commitments that they have undertaken.

- to conclude conventions and agreements; to adopt treaties.

- to make recommendations to member states on matters which the Committee has agreed are common policy.

- to supervise the execution of judgments of the European Court of Human Rights[9].

Among the tasks and activities of the Committee of Ministers, its authority as a Convention organ will be explored in this chapter. According to Article 46§2 of the Convention; "The final judgments shall be transmitted to the Committee of Ministers, which shall supervise its execution." As Harman (2000) notes, due to the vagueness of this provision the Committee of Ministers has developed its own practice and adopted its own rules.

3.2.1 The Procedure before the Committee of Ministers.

On 10 January 2001, at the 736th meeting of the Ministers' Deputies the Committee of Ministers adopted the text concerning the rules for the

[9] For further information on the tasks and activities of the Committee of Ministers see web page of Committee of Ministers: http://www.cm.coe.int

application of Article 46§2 of the Convention. According to the rules, after the Court delivered a final judgment, the case should be included on the agenda of the Committee of Ministers immediately (Rule2). When a final judgment is rendered by the Court that there has been a violation of the Convention and an award of just satisfaction comes before the Committee of Ministers, the work of the Committee begins by ensuring that the sum of the just satisfaction awarded by the Court has been paid (Rule 3/a). Furthermore, the Committee of Ministers has the task to force the state concerned to restore the injured party to the position before the violation occurred through the taking of individual measures. Thirdly, besides individuals measures, The Committee of Ministers requires the state concerned to take general measures in order to prevent repetition of similar violations (Rule 3/b).

The state that is required to pay just satisfaction and to take individual and general measures must prove to the Committee of Ministers that she has fulfilled her responsibilities concerning the judgment. Unless she fulfills these obligations the case will remain on the agenda of each human rights meeting of the Committee of Ministers.

3.2.2 Interim Resolutions

Sometimes the respondent state has difficulties complying with the Court's judgment. This may occur due to the incompatibility of a judgment with domestic legislation or due to "political imperatives or strongly held cultural

or moral ideas" (Harman,2000). As the European Court has no power of sanction other than financial penalty represented as just satisfaction awarded to the injured party, it is the task of the Committee of Ministers to ensure that the violation is stopped and justice is done according to the judgment of the Court in order to maintain the credibility of the system. In some cases, the Committee of Ministers may adopt interim resolutions, in order to force the state concerned to abide by the judgments of the court or to be informed on "the state of progress of the execution" or to make relevant suggestions with respect to the execution of a judgments and realization of individual and general measures (Rule 7). According to Harman (2000) interim resolutions should not be interpreted as unfriendly acts: on the contrary, they may serve as an encouragement to achieve progress. In 2000 and 2001, the Committee of Ministers adopted interim resolutions concerning the judgment of Loizidou v. Turkey (Int ResDH (2000) 105), excessive length of judicial proceedings in Italy (Int ResDH (2000) 135), the judgment of Scozzari and Giunta v. Italy (Int ResDH (2001) 65), the judgment of Matthews v. United Kingdom (Int ResDH (2001) 79), the judgment of Loizidou v. Turkey (Int ResDH (2001) 80), and violations of freedom of expression in Turkey (Int ResDH (2001) 106) that attempt to force the states concerned to comply with their obligations under the Convention. The interim resolutions adopted concerning Turkey will be examined in Chapter 4.

3.2.3 Final resolutions

If the Committee of Ministers is satisfied that the state concerned has fulfilled all her obligations under Article 46 of the Convention, the Committee adopts a final resolution concluding that its function under Article 46§2 of the Convention have been exercised (Rule 8).

In case the contracting state does not abide by the judgment The Committee of Ministers may impose sanctions such as suspension or termination of the membership to the state concerned according to Article 8 of the Statute of the Council of Europe.

3.2.4 Recommendations

Besides resolutions, the Committee of Ministers may adopt recommendations to encourage member states on certain subjects. "The Recommendation to Member States on the Re-Examination or Re-opening of Certain Cases at the Domestic Level following Judgments of the European Court of Human Rights" which was adopted by the Committee of Ministers on 19 January 2000 is a good example of recommendations that display the influence of the Committee of Ministers on member states. In this recommendation member states are reminded that the supervising function of the Committee of Ministers is not limited to insuring that payment of just satisfaction is made. One of the main tasks of the Committee is to ensure the injured applicant is returned to the position prior to the violation. In this respect the Committee of Ministers invites the

member states to ensure that there exist adequate possibilities for re-examination of the case where the Court has found a violation of the Convention. The Committee of Ministers requests that member states undertake the re-examination of a case especially if:

> the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or re-opening
>
> or
>
> the judgment of the Court leads to the conclusion that the impugned domestic legislation is on merits contrary to the Convention, or the violation found based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of (Recommendation on re-examination) .

Currently, Austria, Bulgaria, Croatia, France, Germany, Greece, Luxembourg, Norway, Poland, Slovenia, and Switzerland have made the necessary amendments to their legislation that have led the way for re-examination of cases where the Court has found a violation of the Convention. Denmark, Finland, Spain, and Sweden began the re-examination procedure without any amendments to their legislation by interpreting their existing legislation more broadly. To be more accurate, for example, in Denmark Article 977 of the Code of Criminal Procedure provides that the convicted can request that proceedings be reopened if "special circumstances" strongly indicate that the evidence was not rightly judged. In this regard a judgment of the Court may lead to the re-examination of proceedings by virtue of being considered "a special

circumstance." The re-examination issue is one of the remarkable instances that indicate the impact of the Convention system on contracting states.

3.3 Further Implications for the Contracting States

Besides the impact of the Court and the Committee of Ministers as Convention organs on the domestic law of the contracting states, the Parliamentary Assembly of the Council of Europe, which has the task of promotion of human rights, democracy and rule of law among the member states of the Council of Europe, has implications for the domestic governance (legislation) of the states. The work of the Assembly is based on the principles and standards laid down in the Statute of the Council of Europe and the Convention as well as in further basic agreements on the protection of human rights. Through its composition the Assembly is linked with the national parliaments; through resolutions and statements it can express its own opinions; through its recommendations and the responses they evoke it is in contact with the Committee of Ministers (Bindig, 2000). On 28 September 2000, the Parliamentary Assembly adopted a resolution concerning the execution of judgments of the European Court of Human Rights. In this resolution the Assembly stated that some judgments of the Court have not been executed for many years. This situation threatens the credibility of the system. The Assembly further stated that the states who fail to comply with the judgments, the Court which fails to render accurate judgments, and the Committee of Ministers which does not force the states

which have failed to comply with the judgments are responsible for the current situation. The Assembly noted that some measures should be taken at both the national and Council of Europe level and listed the possible solutions as follows:

At the national level:

- Legislators should ensure that new legislation fully complies with the Convention.

- Governments should take the necessary action to execute the Court's judgments in order to avoid any recurrence of violations.

- Governments should remedy the applicant's individual situation and, where necessary they should ensure that their legislation provides for the revision of a trial following a judgment of the Court.

- Judges and administrators should work towards giving direct effect to the Court's judgment so that national court authorities can directly apply them.

- National authorities should make sure that the Court's case-law is adequately circulated in the language of the country.

- Until the definitive reforms come into effect, domestic authorities and courts should adopt interim measures.

At the Council of Europe level:

the Committee of Ministers should:

...

- be more strict towards member states which will fail in their obligations to execute decisions and take the measures provided for in Article 8 of the Statute in case of continued refusal.

- ensure that measures taken are effective means of preventing further violations.

- keep the Assembly informed of progress in the execution of judgments, in particular more systematic use of interim resolutions setting a time table for carrying out the reforms necessary within signatory states in view of their execution (Resolution 1226).

Consequently the Assembly invites the contracting states to take necessary action to ensure that the above-mentioned measures are taken. On the same day of the adoption of the resolution, the Assembly adopted a recommendation to be referred to the Committee of Ministers. In the recommendation numbered 1477 the Assembly urge the Committee of Ministers, referring to the above-mentioned resolution:

> to be more strict towards member states which fail in their obligation to execute judgments of the Court.
>
> to ensure that measures taken constitute effective means to prevent further violations to be committed.
>
> to keep the Assembly informed of progress in the execution of judgments, in particular by more systematic use of interim resolutions setting a timetable for carrying out the reforms planned (Resolution 1226).

The Resolution and the recommendation reflect the importance that the Parliamentary Assembly places upon the implementation of judgments of the Court and the harmonization of the legislation of the contracting states with the Convention.

3.4 Examples from the Case-Law of the Court

In the case of **Bulut v. Austria (Application no:17358/90)** Mikdat Bulut, the applicant, who lives in Innsbruck, Austria faced charges of attempting to bribe staff of the Innsbruck Employment Agency in 1990. He had offered money to two civil servants as an inducement to issue him false certificates. On 6 March 1990, before the trial at the Innsbruck Regional Court he was found guilty as charged and fined 25,200 Austrian schillings (ATS), suspended for three years.

Mr. Bulut filed an appeal against the sentence to the Austrian Supreme Court. On 29 June 1990, the Attorney-General filed the observations with the Supreme Court which states that the applicant's appeal should be dismissed according to Article 285d§1 of the Code of Criminal Procedure. These observations were not disclosed to the defense. On 7 August 1990 the Supreme Court rejected the applicant's appeal under Article 285d§1 of the Code of Criminal Procedure.

Mr. Bulut applied to the European Commission on Human Rights on 5 October 1990. He relied on Article 6§1 of the Convention, complaining that the Attorney-General had submitted to the Supreme Court observations which had not been made available to the defense. The Commission declared the application admissible on 2 April 1993. In its report of 8 September 1994, it expressed the opinion that there had been a violation of Article 6 § 1 of the Convention (Report of the Commission concerning the case of Bulut v. Austria). The case was referred to the Court. On 22 February 1996, the proceedings concluded with the judgment of the Court in

which was decided that there has been a breach of Article 6§1 of the Convention on the grounds that the right to a fair trial has not been respected due to the Attorney-General's submission of observations to the Supreme Court without the applicant's knowledge.

Upon the judgment of the Court, Article 35§2 of the Austrian Code of Criminal Procedure, the provision that caused the violation, was modified immediately as a result of entry into force on 1 March 1997 of Act No. 762 of 30 December 1996. According to the new wording of this article, the communication of the observations submitted by the public prosecutor in response to the accused's appeal for setting aside may be dispensed with only if the prosecutor takes a position in favour of the accused or if the tribunal allows his or her appeal in full.

In the case of **Vogt v. Germany (Application no:17851/91)**, the applicant, Ms. Dorothea Vogt, a German national, living in Jever, Germany, while studying literature and languages at the university, became a member of the German Communist Party *(Deutsche Kommunistische Partie- "DKP")*. On 1 August 1977 she obtained a post as a teacher, with "the status of probationary civil servant", in a state secondary school in Jever. On 1 February 1979 she was appointed a permanent civil servant. On 13 July 1982 a disciplinary proceeding was initiated against the applicant by the Weser-Ems Regional Council on the ground that she had failed to comply with the duty of "Loyalty to the Constitution" that she owed as a civil servant by engaging in various political activities on behalf of the

DKP. By an order on 12 August 1986 of the Weser-Ems Regional Council she was temporarily suspended from her post. The case was referred to the administrative court. The Court also decided that active membership of a political party that pursued anti-constitutional aims was incompatible with a civil servant's duty of political loyalty. The applicant lodged an appeal against the judgment with the Disciplinary Court. In a judgment of 31 October 1989 the Disciplinary Court dismissed Ms. Vogt's appeal and upheld the administrative Court's judgment. Finally the applicant lodged a constitutional complaint with the Federal Constitutional Court, however, the said court decided that her dismissal from civil service did not amount to a breach of her constitutional rights

Ms. Vogt applied to the European Commission on Human Rights on 13 February 1991. She alleged that her freedom of expression and freedom of association which had been secured in Article 10 and 11 of the Convention were violated. The Commission declared the application admissible. The case was referred to the Court. On 22 September 1995, The Court decided that the dismissal of the applicant from civil service due to her political activities on behalf of the German Communist Party amounted to the violation of Article 10 and 11 of the Convention.

Upon the judgment of the Court immediate administrative measures were taken. On 17 June 1996 the German Federal Ministry of the Interior transmitted the judgment with a letter to the relevant authorities indicating that all future cases of this kind should be examined in detail, in light of the

Court's judgment in order to prevent the repetition of violations similar to those found in the present case.

As can be deduced from the illustrative cases above, the contracting states generally respond the judgments of the Court in order to prevent repetition of violations, by a change in their domestic legislation as in the case of Bulut v. Austria, or taking administrative measures as in the case of Vogt v. Germany. In some cases the responding government orders a change in a rule that is applied in practice since its application constitutes a violation of the Convention. Another measure that is generally taken by the contracting states is the dissemination of judgments of the Court to the relevant domestic authorities in order to increase the level of awareness of the authorities who are going to apply the rules.

CHAPTER IV

THE IMPACT OF THE CONVENTION SYSTEM ON TURKEY

4.1 Turkey and the Convention

According to Article 90 of the Turkish Constitution, the ratification of international agreements depends on the approval of the Turkish Grand National Assembly (TGNA). In this way they obtain the force of statutory law. The significance of international treaties that enter into force via the TGNA is that they have immunity from revision by the Constitutional Court. This gives the international treaties a privileged position vis à vis statutory law. In this regard the convention comprises a part of Turkish national legislation and should be implemented *ex officio* which means that it requires no new regulations to be implemented and that the Convention can not be regarded as contrary to the Turkish Constitution.

The European Convention was incorporated into the Turkish Legal System in 1954 in Law No. 6366 of 10 March 1954 (Official Gazette No.8662). The First Protocol was ratified at the same time as the Convention. The other protocols were ratified thereafter with the exception of the Sixth Protocol on the abolition of the death penalty (Rumpf, 1993). Turkey has been pressured to ratify the Sixth Protocol by both the Parliamentary Assembly and the Committee of Ministers. Since her domestic legislation is not in conformity with the provisions of the Sixth

Protocol, Turkey has hesitated to ratify it. Ratification would mean essentially that Turkey agrees to abandon a practice that has implications regarding the security of the state. The death penalty is in practice resorted to or threatened only in cases of national security as interpreted by powerful state actors, especially the military. Thus like the Loizidou case discussed below, Turkey's approach to the Convention has been to attempt to distinguish between issues closely connected to national security and the acceptance of the Convention's applicability regarding matters of a less political nature.

Thus, given that Turkey has not ratified the Sixth Protocol, on 28 January 1987 Turkey accepted the right of individual application to the Commission. On 22 January 1990, Turkey recognized the compulsory jurisdiction of the Court (Gözübüyük, 1996).

Since 1987, the year Turkey accepted the right of individual application, 167 judgments have been rendered by human rights mechanisms (i.e. the European Commission of Human Rights, the European Court of Human Rights and Council of Europe's Committee of Ministers) in respect of the cases lodged against Turkey. In 10 of these decisions it was decided that no violation took place while in 157, Turkey was found to have violated the Convention. In the year 2000, according to the Court 735 applications against Turkey were registered. Including these applications the

total number of applications lodged against Turkey before the ECHR rose to 2700[10].

4.2 The Problematic Issues before the Convention Organs Concerning Turkey

4.2.1 Freedom of Expression

Freedom of expression is arising as one of the most problematic subjects in regarding Turkey's relationship with the European Court of Human Rights. In this context it is planned to amend Article 312 of the *Turkish Criminal Code (TCC)* and to revise Article 7 and 8 of the *Prevention of Terrorism Act No. 3713* Since their wording is in conflict with Article 10 of the Convention concerning freedom of expression.

On 23 July 2001, The Committee of Ministers adopted an "interim resolution relating to the execution of a number of judgments of the Court finding violations of freedom of expression" in Turkey. In this resolution the Committee of Ministers:

> urged the Turkish authorities, without further delay, to take measures allowing the consequences of the applicants' convictions contrary to the Convention cases concerning freedom of expression to be rapidly and fully erased and decides to resume consideration of these cases at each of its meetings until the adoption of measure required. (Int ResDH (2001)106)

[10]These figures are drawn from the Statistic Report of the Ministry of Foreign Affairs concerning the cases before the Court against Turkey

and

> invites the Turkish authorities to bring to a successful conclusion the comprehensive reforms planned to bring Turkish law into conformity with the requirements of Article 10 of the Convention. (Int ResDH (2001)106)

4.3 Modifications in the Turkish Legislation

Since the acceptance of the right of individual application, Turkey has made efforts to bring in line its legislation with its obligations as a State Party to the European Convention on Human Rights and standards established by the jurisprudence of the European Court of Human Rights.

For example, due to the conflict between the period for which criminal suspects may remain in police custody before being formally charged established according to the case-law of the Court and the domestic legislation concerning custody periods, Turkey was found to have violated the Convention[11]. The alignment of custody regimes has been achieved partly with the amendment of the *Code on Criminal Procedures* in 1997. However, the fact that the custody period can be extended by a Turkish judge upon the examination of a suspects file and in the absence of the suspect, there remains problems in Turkey's relationship with the European Court of Human Rights over this issue.

A new Regulation on Apprehension, Detention and Interrogation Procedures, envisaging more strict guidelines regarding suspected criminals,

[11] The cases that constitute the violation are Kutlu Sargın v. Turkey, Sadi Mansur v. Turkey, Rıza Dinç v. Turkey, Metin Emine Dikme v. Turkey.

entered into force in October 1998. A circular regarding effective implementation and stringent verification of the implementation of this regulation was issued by the Prime Minister in June 1999.

A law concerning the issue of ill-treatment and abuse of power by civil servants, amending articles 243, 245, 354, of the Turkish Criminal Code entered into force in August 1999, which redefines torture, ill-treatment and abuse of power by civil servants against individuals. These amendments increase sentences for public officials who commit such offences, as well as medical personnel who draft false reports to conceal torture.

Judgments of the Court concerning Turkey[12] that indicate that the presence of a military judge on the bench of the State Security Courts infringes the right to be tried before an independent and impartial tribunal, a right secured in Article 6 of the Convention. As a result, Constitutional and legal amendments were entered into force on the restructuring of the State Security Courts in 1999. As a result of these amendments, all members of the State Security Courts are now chosen from among civilian judges.

Likewise a large number of applications lodged against Turkey relate to public expropriations and the interest rates applied in cases of delayed payments. Law on the increase in legal interest rates for delayed

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[12] The judgments are İbrahim İncal v. Turkey, Cengiz Çıraklar v. Turkey, Pelin Şener v. Turkey, Haluk Gerger v. Turkey.

compensations in cases involving public expropriations entered into force in January 1998. This law aims to make interest rates compatible with inflation and safeguard the rights of individuals.

As for some other state parties to the Convention, judgments of the Court have been considered as a reason to re-examine some criminal proceedings or revise the judgments of Turkish national courts.

Erasing of the consequences of the applicants' convictions requires the establishment of a re-examination procedure under Turkish Law, which is not possible under existing legislation. Although the establishment of re-examination procedure for the judgments of the Court has been widely discussed by the judicial authorities in Turkey, its implementation while appearing to be inevitable may take some time.

The issue of re-examination of cases in Turkey via the judgments of the Court became part of the agenda of the Committee of Ministers with regard to Turkey by way of the interim resolution concerning freedom of expression. The requirements of the Committee of Ministers can only be fulfilled by the re-examination of certain cases.

The re-examination of criminal proceedings in Turkish domestic law is a subject extensively discussed by judicial authorities. Hence the President of the Constitutional Court in his speech on the 39th anniversary of the establishment of the Constitutional Court stressed the necessity of initiating such a procedure in Turkey and the related modification of the relevant provisions of the Constitution in this regard. For example,

compensation paid by the state as a result of judgments of the European Court is under discussion. The enactment of necessary provisions as well as the adoption of new regulations on this subject if necessary, will have a preventive effect on the violations of the Convention and thereby on the judgments of the Court.

4.4 Mechanisms for enhanced transposition of the ECHR

The judgments and decisions rendered by the Court concerning the applications lodged against Turkey are translated into Turkish and published on the web page of the Ministry of Justice. Furthermore, since 1998 the judgments have been published in the periodical "Bulletin of Judicial Legislation" issued by the said Ministry. Hence access of the members of the judiciary to these judgments is maintained. Additionally, seminars and meetings concerning the education of judges and prosecutors have been held by the Ministry of Justice since 1998. In September 2001 a symposiumon "Education in Human Rights" will be arranged by the Ministry of Justice jointly with the European Council in which 7,761 judges and prosecutors who are active in civil judiciary are expected to participate.

4.5 The Loizidou versus Turkey Case

Loizidou v. Turkey is one of the most problematic issues before the Committee of Ministers, which effects relations between Turkey and the Council of Europe. The circumstances of the case are as follows:

On 22 July 1989, Ms. Titina Loizidou introduced an application with the European Commission of Human Rights, concerning her deprivation of access to her property in North Cyprus. She alleged violations of Article 3 and 5 and a continuing violation of Article 8 of the Convention and Article 1 of Protocol No.1. She claimed that all acts complained of were carried out by Turkish military forces stationed in the northern part of Cyprus or by forces acting under their authority.

On 4 March 1991 the European Commission of Human Rights declared inadmissible the applicant's complaints of continuing violations of Article 8 of the Convention and Article 1 of Protocol No.1 (Report of the Commission on Loizidou v. Turkey) .

On 9 November 1993, the Greek Cypriot Administration, who took part as a third party intervener, brought the Loizidou case before the Court.

On 18 December 1996, the Court gave its decision, with a majority of eleven votes to six that, as the Turkish Republic of Northern Cyprus (TRNC) was not regarded by the international community as a state under international law, it could not attribute legal validity for the proposes of the Convention to the TRNC Constitution and that the applicant was still to be regarded as the legal owner of the property in North Cyprus.

On 28 July 1998, the Court adopted in the same case its decision related to pecuniary compensation. According to the said decision Turkey is to pay about 875,000 US Dollars as pecuniary compensation to Ms.

Loizidou for depriving her the access and the use of her property in Northern Cyprus.

Both Turkey and the TRNC announced that they considered the decision inapplicable. After the judgment of the Court, the Loizidou case was transmitted to the Committee of Ministers for supervision of its execution in accordance with former Article 54 of the Convention. At the meetings of the Committee of Ministers Turkey underlined that she had always abided by all the decisions of the Court. However, the Loizidou case was "exceptional in nature" according to the Court itself. It also underlined that the question of payment of the just satisfaction could not be isolated from the other issues at stake in the Cyprus negotiations, notably the property issue which had been of central importance since 1975.

On 6 October 1999, the Committee of Ministers of the Council of Europe adopted an Interim Resolution on the execution of the Loizidou judgment. In the said Interim Resolution, the Committee of Ministers strongly urged Turkey to review its position and to pay the just satisfaction awarded in the Loizidou case in accordance with the conditions set out by the ECHR.

After the adoption of the Interim Resolution in the meetings of the Committee of Ministers, Turkey stressed that the Loizidou case could only be implemented in the context of the global settlement of the property issues, which was being negotiated under the auspices of the United Nations.

On 7 June 2000, the Committee of Ministers, at its 713th meeting instructed the Secretariat to prepare a draft for a second Interim Resolution, which was adopted on 12 July 2000.

In the second Interim Resolution the Committee declared that "the refusal of Turkey to execute the judgment of the Court demonstrated a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and a member State of the Council of Europe" and insisted strongly, in view of the gravity of the matter, that Turkey should comply fully and without any further delay with the ECHR judgment of 28 July 1998.

Turkey declared that she had neither the capacity nor jurisdiction to execute the judgment of the Court in the Loizidou case. However, Turkey made efforts to find a solution to conclude the examination of this judgment before the Committee of Ministers and to preserve the credibility of the Court. Turkey brought a declaration before the Committee of Ministers in which was proposed that the amount of just satisfaction awarded in the judgment would be deposited to a special account of the Council of Europe and it would be paid to Ms. Loizidou when an overall solution is reached in the Cyprus problem. In this declaration Turkey stressed that the deposit of the amount does not constitute an acceptance of the violation of protection of property secured in Article 1 of the Protocol 1. However this declaration was not endorsed by the Committee of Ministers.

On 15 February 2001, the Committee instructed the Secretariat to prepare the draft of a third Interim Resolution, stronger in terms than the two previous ones to be adopted at their meeting on 4-5 April.

On 26 June 2001 the Committee of Ministers adopted a third interim resolution. The committee referred to the second interim resolution and stressed that "the refusal of Turkey to execute the judgment of the Court demonstrated a manifest disregard for Turkey's international obligations, both as a High Contracting Party to the Convention and as a member State of the Council of Europe" (ResDH(2001)80). Furthermore the resolution stated that acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership in the Council of Europe and called upon the member states to take action against the position of Turkey.

Upon the issuance of the interim resolution Turkey declared that the exceptional nature of the case had been disregarded in the interim resolution and stressed that the judgment did not reflect the facts in Cyprus, was unfair and devoid of legal basis and that these issues concerned the Turkish Republic of Northern Cyprus (TRNC) not Turkey (Press Release of Turkey concerning interim resolution).

Thus, at this point in time, the interplay of the Council of Europe and Turkey with regard to the Loizidou Case can be viewed as a "deadlock" when the attitudes of both sides are taken into consideration. This raises an interesting point regarding the relationship between the legal authority and

those entities subject to it. That is, there appears to be more flexibility in the arrangement between the court and member states regarding compliance with rulings that perhaps is the case in a wholly domestic setting. While the Court (through the Committee) can ultimately punish states, which fail to comply with rulings through expulsion from the Council of Europe, states still have the ability to "bargain" over Court rulings. In this sense states retain a degree of power vis à vis supranational authority that is absent in the context strong state versus individual citizen. In states where institutions are weak, one sees similar bargaining. Thus, one might conclude that such institutions are reflective of a relatively weak supranational apparatus, in this case the Council of Europe. But that does not mean that such will always be the case. If one sees the European Union as the logical extension of the idea behind the Council of Europe, it is not difficult to foresee the growing strength of supranational structures and a change in the power relationship between the whole and its parts.

CONCLUSION

The main focus of this study is the exploration of the significant transformations that have taken place in the field of human rights and which have had a remarkable influence on the state apparatus in terms of policy-making.

After the Second World War the number and significance of supranational organizations increased remarkably. States have come to accept the legitimacy of these organizations to the point that some policy formulation bodies are no more solely under the control of the governments of these states but rather subject to the organs of the supranational organizations. This process is very significant in the field of human rights. The United Nations placed the promotion of human rights in the center of the international arena. At this initiative, the internationalization of human rights became a main concern of international law and politics.

The process of the internationalization of human rights was explored in the first chapter to make clear how the supranational organizations effect the domestic governance of states. The first chapter outlined the impact of the internationalization of human rights on state sovereignty. The first chapter further analyzed the interplay of non-governmental organizations (NGOs), intergovernmental organizations and states and the contributions of NGOs to the internationalization process. NGOs are the non-state actors that represent the public interests in the international arena. They have influence

on intergovernmental organizations as well as governments in terms of promoting human rights.

It is evident that as states subject themselves to supranational organizations the more legitimate these organizations and their policies become. Based on this proposal, in the second chapter and following chapters the European Convention and its system was examined. Even though this system is a product of the Council of Europe, which is a regional mechanism, it has implications in global context. The European System represents the developments that have taken place all around the world in a most significant way. It is beyond doubt that the European Convention with its system impacts legal systems and the human rights policies of member states. The international system cannot help but be effected by this development. As a precedent, the system, its enforcement, and the compliance of member states will play a role in global efforts to construct similar regimes.

In the second chapter the institutional structure of the Council of Europe and the European Court of Human Rights was examined. The aim was to display its institutional procedure for human rights implementation. The institutionalized scope of the European human rights protection system was portrayed in the second and third chapters in order to deepen the understanding how the Convention and its system is shaping the policy formulation of the contracting states. Additionally, the empirical case studies have been used to show how the contracting states respond to

finding of violations. These case studies explicitly demonstrate that domestic policies and domestic legislation are open to modifications the Convention organs require.

In the third chapter the operation of the Committee of Ministers with regard to the supervisory task of the execution of judgments was introduced. This procedure is a concrete example of what has been proposed throughout the whole study. The decisions of the Committee of Ministers taken by a majority of member states can be legally imposed on the other member states (McGrew,1992). This situation undermines the domestic policy making processes in the field of human rights since the member states of the Council of Europe subject themselves to that supranational mechanism and are pressured to implement the policies imposed on them.

Finally, in the last chapter the focus was Turkey and its relations with the Convention organs. The modifications that have occurred in domestic legislation in order to harmonize the Convention and Turkish legislation was examined. The aim was to demonstrate the influence of the Convention on the legal system of Turkey. Some developments have occurred in the Turkish legal system, which have had very significant political and social consequences since the incorporation of the Convention into domestic legislation. Such were depicted in the fourth chapter. Furthermore, the conflicts that Turkey has faced when she has failed to comply with judgments due to her political priorities, such as in the Loizidou v. Turkey case, were explored. The Loizidou v. Turkey case

indicates that the political conflict that is going on in the Cyprus Region has more to do with "politics and diplomacy than with European judicial scrutiny based on the isolated case of Loizidou" as Judge Pettiti noted in his dissenting opinion to the Loizidou judgment. A similar observation could be made with regard to Turkey's failure to ratify the Sixth Protocol of the Convention concerning the Death Penalty, given the coupling of this practice and questions of national security. Both of these issues point to the present limitations of supranational legal authority, at least in regard to the Turkish case.

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