Background document [*]

to the intervention made by Mr. Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights (AS/Jur) of the Parliamentary Assembly of the Council of Europe

at the conference: "Strengthening Subsidiarity – Integrating the Court's Case-Law into National Law and Judicial Practice" (Skopje, 1-2 October 2010)

[*] Document prepared by the Secretariat of the Assembly's Legal Affairs and Human Rights Departmant upon the instructions of Mr. Pourgourides.

A. Introductory remarks

The Interlaken Declaration of 19 February 2010 specifies, in its Preamble, "*the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities, i.e., governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level*". Also, the Interlaken Action Plan calls upon member states to commit themselves to take into account "*the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system*." (Point B. Implementation of the Convention at the national level, §4.c).

It follows that, when the authorities in a State Party to the Convention (the executive, the courts, the legislature) are aware of standards stemming from the ECHR case law in cases concerning not only their own country but also other states, and these standards are applied, this invariably has the potential for limiting the number of applications brought before the European Court of Human Rights based on the latter's well-established case law.

An increasing number of examples exist in the practice of the States Parties of how the interpretative authority (*res interpretata)* of the Strasbourg Court is now taking root.

The ECHR case law - especially that of the Grand Chamber's judgments of principle - creates a body of law which encompasses 'common European standards' by which states, and in particular their judicial authorities, are bound. This European supervision functions without prejudice to the advisability of ensuring higher standards of human rights protection, where possible (Article 53 of the Convention).

B. Extracts from Council of Europe texts

1. Report of the Wise Persons to the Committee of Ministers of 15 November 2006

CM(2006)203, paras. 66-68

https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

"B. Concerning the relations between the Court and the States Parties to the Convention

3. Enhancing the authority of the Court's case-law in the States Parties

66 The dissemination of the Court's case-law and recognition of its authority above and beyond the judgment's binding effect on the parties would no doubt be important elements in ensuring the effectiveness of the Convention's judicial control mechanism.

67 It was with this in mind that, in the interim report, the Group referred to the possibility of making certain recommendations on "judgments of principle".

68 After discussing the matter in greater depth, the Group believes that it would be difficult to arrive at a precise definition of this category of judgments. Furthermore, it is not always possible to identify in advance all the cases that might give rise to judgments of principle.

69 The Group therefore does not make any proposal as to a specific procedure for dealing with such cases. It merely recommends that judgments of principle – like all judgments which the Court considers particularly important – be more widely disseminated.

70 The authority of the Court's case-law could also be enhanced through judicial co-operation with national courts. This aspect is dealt with in paragraphs 76 et seq.

71 The Group considers that national judicial and administrative institutions should be able to have access to the case-law of the Court in their respective language. This would assist them in identifying any judgments which might be relevant to deciding the cases before them."

2. L'autorité de la jurisprudence de la Cour, Discours de M. Jean-Paul Costa, Président CEDH, 20 Septembre 2007

Conférence régionale:Le rôle des cours suprêmes dans la mise en oeuvre de la Convention européenne des droits de l'homme au niveau interne, Belgrade, 20 septembre 2007

http://www.echr.coe.int/NR/rdonlyres/0157C854-37BA-485C-AB8C-5C12FF78C4DC/0/2007Belgrade2021septembre.pdf

"J'en viens à l'autorité des arrêts. Elle a pour conséquence que l'Etat condamné doit exécuter la décision de la Cour. [...] Il n'est pas rare en effet que des Etats doivent modifier leur ordre juridique interne pour se mettre en conformité avec un arrêt de la Cour, et éviter de réitérer la violation des droits de l'homme dénoncée par celle-ci.

Toutefois, cette autorité des arrêts comporte des limites car les jugements de la Cour ne sont revêtus que de l'autorité relative de la chose jugée et n'ont pas de valeur erga omnes, seuls les Etats condamnés étant, du moins en droit, liés par la décision rendue.

Il arrive cependant que la législation de certains Etats soit analogue à celle qui a donné lieu à une condamnation pour un autre Etat. **Du fait de l'absence d'effet erga omnes, les Etats non concernés directement par les arrêts n'ont pas l'obligation de s'y conformer.** [emphasis added] Ceci a pour conséquence, par exemple, que l'on verra, après une condamnation d'un Etat par la Cour et une modification consécutive du système de cet Etat, coexister au sein des Etats parties à la Convention des législations réformées sur la base de la jurisprudence de la Cour et d'autres qui continueront de fonctionner sous l'empire d'un système jugé contraire à la Convention.

[...]

[D]e plus en plus, les pays cherchent à devancer d'éventuelles condamnations à Strasbourg, qui ne sont jamais agréables, ce qui fait que, au moins de facto, l'autorité de nos arrêts joue même pour les Etats non parties au litige. [emphasis added]

Cette autorité est en outre renforcée par le rôle que joue le Comité des ministres pour assurer leur exécution. [...]

[...]

Qu'en est-il de l'autorité de la jurisprudence, second thème que je souhaite développer et qui va à mon sens au-delà de l'autorité des arrêts ? Elle est réelle et tend à se développer au-delà des cas d'espèce.

J'ai cité les Pays-Bas à propos des enfants conçus hors mariage. On rencontre de plus en plus souvent des **cas d'application horizontale** *des arrêts de la Cour* [emphasis added]: des Etats qui n'ont fait l'objet d'aucune condamnation décident de s'aligner sur la jurisprudence de la Cour. La situation a donc évolué dans le bon sens et on peut vraiment parler d'autorité de la jurisprudence.

Ainsi, en France, dans le domaine du respect de la vie privée et familiale (l'article 8 de la Convention), on a vu les juridictions et le législateur prendre en compte la jurisprudence de la Cour en matière de droit des étrangers : le Conseil d'Etat s'est inspiré de la jurisprudence de la Cour, protectrice des droits des étrangers en cas d'éloignement forcé du territoire (après l'arrêt Moustaquim c. Belgique de 1988, le Conseil d'Etat français a, dès 1991, modifié sa jurisprudence en matière d'expulsion des étrangers).

Cette **application horizontale** [emphasis added] de la jurisprudence de la Cour oblige les Etats à suivre très attentivement la jurisprudence de manière à voir comment elle peut trouver à s'appliquer dans leur propre cas.

Mais l'application de la jurisprudence de la Cour ne s'effectue pas uniquement dans l'espace. Il est important d'évoquer son application dans le temps.

Les juridictions des Etats membres, et à cet égard je rends hommage aux cours suprêmes, anticipent l'évolution jurisprudentielle de Strasbourg, même lorsque la Cour ne s'est pas encore prononcé*e*. [emphasis added] Ou encore les juridictions nationales, procédant par analogie, s'inspirent de la jurisprudence globale de notre Cour pour faire évoluer la leur. On peut citer, à titre d'exemple, la conception extensive de la notion de biens, qui englobe les créances certaines et même l'espérance légitime de détenir un bien, ou la primauté du principe de la liberté d'expression sur les exceptions prévues au paragraphe 2 de l'article 10, ou encore la notion d'impartialité des tribunaux et d'équité du procès.

Cette imprégnation jurisprudentielle est un réflexe naturel, car le juge interne a le droit et le devoir d'assurer la primauté de la Convention.

Dans la plupart de nos Etats membres, c'est quotidiennement que la Convention est invoquée devant les juridictions suprêmes (mais aussi devant les juridictions ordinaires) et appliquée par elles, et ce en dehors de toute jurisprudence déjà existante de notre Cour.

A titre d'exemple, dans un pays comme le Royaume-Uni, qui ne connaît l'application directe de la Convention que depuis l'an 2000 avec l'adoption du Human Rights Act, la House of Lords fait preuve d'anticipation, par exemple en matière de lutte contre le terrorisme.

Le corollaire de cette réceptivité de la jurisprudence de la Cour de la part des juridictions nationales est le fait que parfois notre Cour s'inspire elle-même de décisions rendues au niveau national.

La décision Von Maltzan et autres c. Allemagne, que j'ai déjà citée, avait trait au dédommagement des personnes victimes d'expropriations s'étant produites soit, entre 1945 et 1949, dans la zone d'occupation soviétique en Allemagne à la suite de la réforme agraire, soit, après 1949, en République démocratique allemande (RDA). Dans cette affaire, la Cour s'est clairement et expressément appuyée sur la jurisprudence de la Cour constitutionnelle de Karlsruhe, laquelle mettait l'accent sur l'ample marge d'appréciation dont dispose le législateur dans le cadre du règlement global des suites de la réunification allemande.

Notre Cour n'hésite pas à reprendre à la lettre, le cas échéant, le raisonnement suivi par le juge national […]

[…]

L'autorité de la jurisprudence est donc un fait acquis. Comment la renforcer ?

Cela passe incontestablement par une meilleure information des Etats et des juridictions nationales. […]

[…]

Chaque jour, dans les juridictions nationales de nos Etats membres, la Convention européenne des droits de l'homme est invoquée par les avocats et citée et appliquée par les juges. Je vois là l'apport le plus considérable de ces 45 années de jurisprudence : un droit, considéré il y a peu comme extérieur, a imprégné à ce point les mentalités judiciaires qu'il constitue un élément essentiel de la décision du juge.

Un véritable dialogue entre le juge national et le juge européen a vu le jour. Ce dialogue est indispensable ; les juges internationaux sont d'ailleurs souvent d'anciens juges internes ; et les juridictions nationales sont les responsables au premier chef de l'interprétation et de l'application d'un traité tel que la Convention européenne des droits de l'homme : il ne faut pas oublier que la Cour de Strasbourg s'impose le respect du principe de subsidiarité, élément- clé du système de protection des droits de l'homme, qu'a rappelé Philippe Boillat dans son exposé.

Mais il lui incombe d'exercer en dernière analyse un « contrôle européen ». Ce rôle est tout d'abord nécessaire à l'égard des tribunaux internes. Certes, nous n'avons pas à nous ériger en quatrième instance et à rejuger ce qui l'a été au plan national. Mais nous devons veiller aux exigences du procès équitable, garanti par l'article 6 de la Convention. A cet égard, je ne saurais trop insister sur la nécessaire indépendance et impartialité des juridictions nationales. Sans juges compétents, sans juges indépendants, sans juges impartiaux, il n'y a pas de respect possible de l'équité des procès et, en définitive, il n'existe pas de protection efficace des droits de l'homme. Mon éminent prédécesseur René Cassin aimait à dire que l'article 6 occupait une place centrale dans la Convention, l'absence de procès équitable rendant illusoire la protection des droits de l'homme au niveau national. Ce contrôle de notre Cour joue aussi à l'égard des législateurs nationaux. Un tel rôle est indispensable si on veut maintenir et développer une Europe des droits de l'homme. Les Etats doivent considérer la Convention et ses protocoles, tels qu'appliqués et interprétés par la Cour, comme établissant des standards minimaux. Je rappelle qu'en vertu de l'article 53 de la Convention, rien n'interdit évidemment aux Etats membres de dépasser ces standards et d'assurer une protection accrue des droits conventionnels."

3. Memorandum of the President of the Strasbourg Court to states with a view of preparing the Interlaken Conference, 3 July 2009

http://www.echr.coe.int/NR/rdonlyres/80B918C6-6319-4D50-B37B-5F951C1C5B30/2792/03072009_Memo_Interlaken_anglais1.pdf

Pages 6-7: Short and Medium term changes: "In addition, consensus could make it possible to give binding effect to the Court's judgments in respect of their interpretation of the Convention. This would strengthen the States' obligation to prevent Convention violations. It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. **The binding effect of interpretation by the Court goes beyond res judicata in the strict sense.** [emphasis added] Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law ("direct effect") and the notion of ownership of the Convention by the States. It will constitute a new step in the evolution of

Convention law, whose effectiveness and positive consequences for all concerned should not be underestimated."

4. Interlaken Action Plan of 19 February 2010

http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf

"B. Implementation of the Convention at the national level

4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:

[…]

b) fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations;

c) **taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State**, [emphasis added] where the same problem of principle exists within their own legal system;"

5. Additional background reading/documents

See also:

Alleweldt, Ralf/ Emmert , Frank/ Hammer, Leonard and Marcus, Isabel (eds.): The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, Eleven International Publishing, Utrecht, 2010 (forthcoming)

European Court of Human Rights (2010): Principle of Subsidiarity, Interlaken Follow-Up, Doc. 3188076 of 8 July 2010

European Court of Human Rights (2010): Clarity and Consistency of the Courts Case Law, Interlaken Follow-Up, Doc. 3197955 of 8 July 2010

Polakiewicz, Jörg (2009): International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts, in: Max Planck Encyclopaedia of Public International Law, (www.mpepil.com)

Keller, Helen / Stone Sweet, Alec: A Europe of rights - the impact of the ECHR on national legal systems, Oxford University Press, 2008

C. Extracts from Parliamentary Assembly texts

1. The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process. Conclusions of the Chairperson of the Committee of Legal Affairs and Human Rights, Mrs. Herta Däubler-Gmelin, of the hearing held in Paris on 16 December 2009

AS/Jur (2010) 06, of 21 January 2010, declassified by the AS/Jur Committee on 26 January 2010

http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12221.pdf

"IV. The authority and effectiveness of the ECHR at the national level: stemming the flood of applications

12. These two subjects were dealt together at the hearing; both touch upon issues in relation to which we parliamentarians – in our dual capacity as national legislators and members of the Assembly – have a crucial role to play. They also concern the "principle of subsidiarity", in that states have primary responsibility to prevent human rights violations and to remedy them when they occur.

13. National parliaments can and should ensure the compatibility of draft laws, existing legislation and administrative practice with Convention standards, and in particular possess "specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries" (Assembly Resolution 1516 (2006), paragraph 22.1). For present purposes suffice to recall work we have been undertaking on this subject since 2000, the hearing we had in November 2009 on "parliamentary scrutiny of ECHR standards" (highlighting the effectiveness of parliamentary procedures in the United Kingdom and in the Netherlands), and the fact that too few parliaments have, to date, set up appropriate oversight mechanisms to ensure the rapid and effective implementation of Strasbourg Court judgments.

14. The Strasbourg supervisory mechanism is "subsidiary" in nature. States are responsible for the effective implementation of the Convention and it is the shared duty of all state organs (the executive, the courts and the legislature) to prevent or remedy human rights violations at the national level. This is principally, but not exclusively, the responsibility of the judiciary. […]

15. One subject of particular significance, discussed at the hearing, was the need to enhance the authority and direct application of the Strasbourg Court's findings in domestic law. Rather than refer to the erga omnes effect of Grand Chamber judgments of principle, it is probably more accurate to refer to its interpretative authority (res interpretata) within the legal orders of states other than the respondent state in a given case. Here, I have in mind the United Kingdom's 1998 Human Rights Act, Section 2 § 1 of which specifies that national courts "must take into account" Strasbourg Court judgments, and Article 17 of Ukrainian Law No.3477–IV of 2006, which reads: "Courts shall apply the Convention [ECHR] and the case-law of the [Strasbourg] Court as a source of law". This subject merits special attention in Interlaken."

2. Report: Effective implementation of the European Convention on Human Rights: the Interlaken process, 2010

Assembly Doc. 12221, of 27 April 2010

http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12221.htm

"B. Explanatory memorandum by Mrs Bemelmans-Videc, rapporteur

[…]

11. With respect to the texts adopted at Interlaken, I wish to draw the Committee's – and the Assembly's – attention to the following matters:

• I find it inappropriate for the Action Plan to refer, in its paragraph 9.b, to the Court's role as being subsidiary in the "interpretation" of the ECHR. This is simply legally wrong: see Article 19 of the Convention, which states that the Court was established to "ensure" the observance of the engagements undertaken by the High Contracting Parties. I do not find satisfactory the (purported) justification to have kept this word in the text by assuming that it refers only to issues of admissibility. Indeed, I consider the tenor of paragraph 9 somewhat dirigiste with

respect to an independent judicial body, even though the veiled criticism directed at the Court is somewhat camouflaged by reference to shared responsibility "between the States Parties and the Court".

[…]

21. Here, I fully endorse the views of Mr Christos Pourgourides, the Chairperson and rapporteur of the Legal Affairs Committee on the implementation of judgments of the Court, who – in all his country visits – systematically stresses the (urgent) need to reinforce parliamentary involvement in [the implementation of the Courts judgments]. He has even gone so far as to suggest that "the Assembly may – in the future – seriously need to consider suspending the voting rights of a national delegation where its national parliament does not seriously exercise parliamentary control over the executive in cases of non-implementation of Strasbourg Court judgments". This thinking is in line with the strong position our Committee appears to be taking on this subject as I had the opportunity to explain at a colloquy organised in Stockholm, in June 2008, entitled "Towards stronger implementation of the ECHR at national level".

[…]

25. Paragraph 4.c of the Action Plan touches upon, what I believe, is a subject that merits specific attention, namely the need to ensure, in a clear fashion, the interpretative authority (res interpretata) of the Court's Grand Chamber judgments of principle within the legal orders of states other than the respondent state in a given case. Here, I refer, in particular, to what the Court's President, Jean-Paul Costa, has written: "[I]t is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system". "Subsidiarity" requires that the authority of the Court's case-law be reinforced in national law, as was also highlighted by experts in the hearing our Committee had on the "Interlaken process" in December 2009 (see Mrs Däubler- Gmelin's "Reflections" in Appendix II, paragraph 15), as well as by the Secretary General in his Interlaken contribution. This merits perhaps being one of the key subjects of discussion at a conference "the former Yugoslav Republic of Macedonia" (the in-coming Chairmanship of the Committee of Ministers) is to organise on [1-2 October] 2010, entitled "Strengthening subsidiarity – integrating the Strasbourg Court's case-law in national law and practice.""

D. Pertinent extracts from Strasbourg Court judgments

Judgments can be retrieved from:
http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/

1. Ireland v. United Kingdom (1978)

Judgment of 18 January 1978, Application. No. 5310/71, Series A No. 25

Para. 154: "Nevertheless, the Court considers that the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3. The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19)

The conclusion thus arrived at by the Court is, moreover, confirmed by paragraph 3 of Rule 47 of the Rules of Court. If the Court may proceed with the consideration of a case and give a ruling

thereon even in the event of a "notice of discontinuance, friendly settlement, arrangement" or "other fact of a kind to provide a solution of the matter", it is entitled a fortiori to adopt such a course of action when the conditions for the application of this Rule are not present."

2. Ahmet Sadik v. Greece (1996), Partly Dissenting Opinion of Judge Martens, joined by Judge Foighel

Annexed to judgment of 25 October 1996

Para. 11: "It follows that under the Convention the same rule applies as has been accepted by the Court of Justice of the European Communities with respect to Community law: in those cases where domestic courts, under their national law, are in a position to apply the Convention ex officio, those courts must do so under the Convention. That is an obvious demand of the effectiveness both of the Convention as a constitutional instrument of European public order (ordre public) and of the "national human right systems"."

Para. 12: "[...] I do suggest [...] is that in a case where an applicant has taken his case to the appropriate domestic courts and where, under domestic law, those courts were - either under their national law or, as indicated in paragraph 11 above, under the Convention - bound to apply the Convention even when the applicant failed to invoke it, in the Strasbourg proceedings the respondent State should not be permitted to rely on the non-exhaustion of domestic remedies rule. Admittedly, in such cases the applicant's lawyer was in default, but so were the domestic courts and under a true pro victima interpretation of Article 26 (art. 26) the latter default should prevail: I do not see why the principle of nemo auditur propriam turpitudinem allegans should not apply to States."

Para. 14: "There is one more remark to be made on the onus in the present context. In my opinion the distribution of proof is such that it is for the applicant to satisfy the Court that, in principle, the domestic courts were in a position to apply the Convention ex officio, whilst -once this burden of proof has been discharged - it is incumbent on the Government which nevertheless maintain their objection to establish that, due to the special circumstances obtaining in the concrete case, the domestic courts were not in a position to base their judgment on such ex officio application of the Convention."

3. Pretty v. United Kingdom (2002)

Judgment of 29 April 2002, Application. No. 2346/02

Para. 75: "The applicant's counsel attempted to persuade the Court that a finding of a violation in this case would not create a general precedent or any risk to others. It is true that it is not this Court's role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases."

4. Opuz v. Turkey (2009)

Judgment 9 June 2009, Application No. 33401/0

163. "In carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have" sufficiently taken into account

the principles flowing from its judgments on similar issues, even when they concern other States.

5. Rantsev v. Cyprus and Russia (2010)

Judgment of 7 January 2010, Application. No. 25965/04

Para. 197: "Finally, the Court reiterates that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (see Ireland v. the United Kingdom, 18 January 1978, § 154, Series A no. 25; Guzzardi v. Italy, 6 November 1980, § 86, Series A no. 39; and Karner v. Austria, no. 40016/98, § 26, ECHR 2003-IX). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see Karner, cited above, § 26; and Capital Bank AD v. Bulgaria, no. 49429/99, §§ 78 to 79, ECHR 2005-XII (extracts))."

E. Selection of examples/extracts from constitutional/legislative provisions and from decisions of national courts

1. Belgium

Cour de cassation de Belgique, arrêt P.09.0547.F/1 *(2009)*

Cour de cassation de Belgique, arrêt, P.09.0547.F/1, 10 juin 2009

"En raison de l'autorité de la chose interprétée qui s'attache actuellement à cet arrêt et de la primauté, sur le droit interne, de la règle de droit international issue d'un traité ratifié par la Belgique, la Cour est contrainte de rejeter l'application des articles 342 et 348 du Code d'instruction criminelle en tant qu'ils consacrent la règle, aujourd'hui condamnée par la Cour européenne, suivant laquelle la déclaration du jury n'est pas motivée. "

2. Cyprus

a. Electoral Law Amendment of 2006

Council of Europe document DH-PR (2006)004 rev Bil.

In the light of the judgment of the ECtHR in the case of Hirst v The United Kingdom, the Electoral Law of Cyprus was amended following legal advice from the Human Rights Sector on behalf of the Attorney-General, so as to give the right to prisoners to vote in elections (parliamentary, presidential and local elections). The Law was enacted before the Parliamentary elections held in May 2006 and prisoners were able to vote under the amended law. This is of course very important since the Human Rights Sector in Cyprus identified, at an early stage, the possible negative effects of this judgment (in which Cyprus was not party) on Cyprus domestic legal order.

Relevant passage from Hirst v. UK (Judgement of 6 October 2005, Application No. 74025/01) that pushed for the legislative change:

"33. According to the Government's survey based on information obtained from its diplomatic representation, eighteen countries allowed prisoners to vote without restriction (Albania, Azerbaijan, Croatia, the Czech Republic, Denmark, Finland, the Former Yugoslav Republic of Macedonia, Germany, Iceland, Lithuania, Moldova, Montenegro, the Netherlands, Portugal, Slovenia, Sweden, Switzerland, Ukraine), in thirteen states all prisoners were barred from or unable to vote (Armenia, Belgium, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, Russia, Serbia, Slovakia, Turkey, the United Kingdom), while in 12 states the right to vote of prisoners could be limited in some other way (Austria, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania, Spain.

34. Other material before the Court indicates that in Romania prisoners may be debarred from voting if the principal sentence exceeds two years, while in Latvia prisoners serving a sentence of imprisonment in penitentiaries are not entitled to vote, as are prisoners in Liechtenstein."

b. Yiallourou v. Evgenios Nicolaou (2001)

Judgment of 8 May 2001, Civil Action No. 9931

http://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=177

In the case of Yiallourou v. Evgenios Nicolaou, which concerned a civil claim for damages brought by an individual against another individual, for violation of his right to private life contrary to Articles 15(1) and 17 of the Constitution, the Supreme Court established a court remedy for human rights violations. The Supreme Court held that claims for human rights violations were actionable rights that can be pursued in civil courts, by instituting civil proceedings for recovering damages and for other appropriate relief for the violation either against the State or private individuals. Civil proceedings can result in a judgment regarding the alleged violation and in adequate redress. Such a judgment is based on Article 35 of the Constitution, which is analogous to Article 1 of the ECHR. It places a duty on the legislative, executive and judicial authorities in Cyprus, to secure within the limits of their respective competence, the efficient application of the constitutional provisions safeguarding fundamental rights and liberties.

The Supreme Court held that the effect of Article 35 is to render the protection and effective application of fundamental rights and liberties, a primary obligation of the State in all its functions, and that the ascertainment of violation of rights and the grant of a remedy, falls within the ambit of the functions of the judiciary, without any need to resort to any statutory provisions. In determining the matter, the Supreme Court took into account the case-law of the ECtHR, and applied ECHR criteria concerning the interpretation of Article 13 of the ECHR. It added that district courts also have a duty under Article 13 of the ECHR, which forms part of the domestic law, to provide an effective remedy for violation of human rights provisions corresponding to those of the ECHR. As a result of the judgment, district courts can apply Article 35 of the Constitution in civil proceedings, to secure the effective application of fundamental rights and liberties safeguarded by the Constitution and the ECHR. The practical effect of this ruling is that claims of violation of human rights can be pursued in civil courts in the absence of additional legislation creating specific private law causes of action for the particular violation.

c. Additional information

See also:

Paraskeva, Costas: The Relationship Between Domestic Implementation of the European Convention on Human Rights and the Ongoing Reforms of the European Court of Human Rights: With a Case Study on Cyprus and Turkey, Intersentia, 2010, at. pp. 113-159

3. France

a. Act of 4 March 2002 on family names

Following Burghartz v. Switzerland (2004), France passed a law of 4 March 2002 on the change of names and surnames. (see also: Keller, Helen / Stone Sweet, Alec (2008): A Europe of rights - the impact of the ECHR on national legal systems, Oxford University Press, at p. 126)

b. Decree No. 87-634

Decree No. 87-634 of 4 August 1987

Following Luedicke, Belkacem and Koc v. Germany (1987), France made changes in the law regulating costs of translation in the criminal trial.

c. Additional information

See also:

Discours de M. Jean-Paul Costa, L'autorité de la jurisprudence de la Cour Président CEDH, 20 Septembre 2007 (above)

Lambert, Elisabeth/ Jonathan, Gérard Cohen/ Flauss, Jean-François (1999) : Les effets des arrêts de la Cour européenne des droits de l'homme, Bruxelles, Bruylant, as of p. 340

4. Germany

a. Görgülü judgment (2004)

BVerfG, 2 BvR 1481/04 of 14 October 2004

http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html

"Head Notes

1. The principle that the judge is bound by statute and law (Article 20.3 of the Basic Law (Grundgesetz – GG)) includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights (ECHR) as part of a methodologically justifiable interpretation of the law.

2. **Both a failure to consider a decision of the ECHR and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law."** [emphasis added]

para 35: "[T]he Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last instance in the German constitution. There is therefore no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law of international agreements, provided this is the only way in which a violation of fundamental principles of the constitution can be averted."

para 46: “The obligation of the States parties, integrated into federal law by the consent Act, to create a domestic instance at which the person affected can have an “effective remedy” against particular conduct by the state (Article 13 of the Convention) already extends into the domestic structure of the state system and is not restricted to the executive branch, which is competent to act externally. In addition, the States parties must guarantee the “effective implementation of any of the provisions” of the European Convention on Human Rights in their domestic law (see Article 52 of the Convention), which is possible in a state under the rule of law governed by the principle of the separation of powers only if all the organisations responsible for sovereign power are bound by the guarantees of the Convention (on this, see Order of the Second Senate of the Federal Constitutional Court (preliminary examination committee) of 11 October 1985 – 2 BvR 336/85 – Pakelli, Europäische Grundrechte-Zeitschrift 1985, p. 654 (656)). **In this view, the German courts too are under a duty to take the decisions of the ECHR into account**.” [emphasis added]

para 63: “Against this background, it must at all events be possible, on the basis of the relevant fundamental right, to raise the objection in proceedings before the Federal Constitutional Court that state bodies disregarded or failed to take into account a decision of the ECHR. In this process, the fundamental right is closely connected to the priority of statute embodied in the principle of the rule of law, under which all state bodies are bound by statute and law within their competence (see BVerfGE 6, 32 (41)).”

b. Vienna Convention on Consular Relations judgment (2006)

BVerfG, 2 BvR 2115/01 of 19 September 2006

http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html

Para. 43: “Das Bundesverfassungsgericht hat sich mehrfach mit dem Grundsatz der **Völkerrechtsfreundlichkeit** des Grundgesetzes befasst und daraus die **Pflicht der Fachgerichte zur Berücksichtigung der Entscheidungen eines völkervertraglich ins Leben gerufenen internationalen Gerichts abgeleitet** [emphasis added] (vgl. BVerfGE 74, 358 <370>; 111, 307 <315 ff.> zur Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte). Es hat festgestellt, dass diese **verfassungsunmittelbare Berücksichtigungspflicht** [emphasis added], die auch bei der Anwendung der Grundrechte zum Tragen kommt (BVerfGE 111, 307 <329>), nicht für jede Bestimmung des Völkerrechts anzunehmen ist, sondern nur, soweit dies von dem in den Art.23 bis 26 GG sowie in den Art. 1 Abs. 2, Art.16 Abs. 2 Satz 2 GG niedergelegten Konzept des Grundgesetzes verlangt wird (BVerfGE 112, 1 <25>). Sind diese Bereiche betroffen, muss es nach der Rechtsprechung des Bundesverfassungsgerichts jedenfalls möglich sein, gestützt auf das einschlägige Grundrecht, in einem Verfahren vor dem Bundesverfassungsgericht zu rügen, staatliche Organe hätten eine Entscheidung des zuständigen internationalen Gerichts missachtet oder nicht berücksichtigt (BVerfGE 111, 307 <329 f.>).”

Para. 54: “d) Das Grundgesetz legt die deutsche öffentliche Gewalt programmatisch auf die internationale Zusammenarbeit (Art. 24 GG) und die europäische Integration (Art. 23 GG) fest und bindet sie darüber hinaus an das Völkervertrags- (Art. 20 Abs. 3 GG in Verbindung mit Art. 59 Abs. 2 Satz 1 GG) und Völkergewohnheitsrecht (Art. 20 Abs. 3 GG in Verbindung mit Art. 25 GG). Es ist Ausdruck der Völkerrechtsfreundlichkeit des Grundgesetzes, dass dieses nach Möglichkeit so auszulegen ist, dass ein Konflikt mit völkerrechtlichen Verpflichtungen der Bundesrepublik Deutschland nicht entsteht. Hieraus ergibt sich eine verfassungsunmittelbare Pflicht der deutschen Gerichte, einschlägige Judikate der für Deutschland zuständigen internationalen Gerichte zur Kenntnis zu nehmen und sich mit ihnen auseinanderzusetzen.”

Para. 55: “aa) Ungeachtet des Umstands, dass die Gewährleistungen der Menschenrechtskonvention in ihrer Auslegung durch den Europäischen Gerichtshof für Menschenrechte kein unmittelbarer verfassungsrechtlicher Prüfungsmaßstab sind (BVerfGE 74, 102 <128>; 111, 307 <317>), hat das Bundesverwaltungsgericht zutreffend festgestellt, dass die deutschen Gerichte eine Pflicht zur vorrangigen Beachtung gefestigter Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte zur Menschenrechtskonvention treffe (BVerwGE 110, 203 <210>). Der Auslegung der Konvention durch den Gerichtshof kann über den entschiedenen Einzelfall hinaus eine normative Leitfunktion beigemessen werden, an der sich die Vertragsparteien zu orientieren haben. Diesem Ansatz hat sich der Bundesgerichtshof angeschlossen (vgl. BGHSt 45, 321 <328 ff.>; 47, 44 <47 ff.>).”

Para. 56: “Internationale Gerichtshöfe im Sinne von Art. 16 Abs. 2 Satz 2 GG können Urteile mit unmittelbarer Wirkung für Einzelne erlassen. Ihre Rechtsprechung ist von deutschen Gerichten zu beachten, die das internationale Strafrecht der Bundesrepublik Deutschland anzuwenden haben (vgl. Beschluss der 4. Kammer des Zweiten Senats des Bundesverfassungsgerichts vom 12. Dezember 2000 - 2 BvR 1290/99 -, NJW 2001, S. 1848 <1849>). Für den Bereich der internationalen Strafgerichtsbarkeit bildet Art. 16 Abs. 2 Satz 2 GG damit die Grundlage der verfassungsrechtlichen Pflicht zur Berücksichtigung der Entscheidungen der zuständigen internationalen Gerichte und Tribunale auch bei der Auslegung der Grundrechte (vgl. BVerfGE 112, 1 <25>).”

Para 61: “**Für Staaten, die nicht an einem Verfahren beteiligt sind, haben die Urteile des Internationalen Gerichtshofs Orientierungswirkung, da die darin vertretene Auslegung Autorität bei der Auslegung der Konvention entfaltet**. [emphasis added] Die besondere Bedeutung der Entscheidungen ergibt sich ferner aus der institutionellen Stellung des Internationalen Gerichtshofs als "Hauptrechtsprechungsorgan der Vereinten Nationen" (Art. 92 UN-Charta), das nach Art. I des Fakultativprotokolls zum Konsularrechtsübereinkommen zur gerichtlichen Beilegung von Streitigkeiten über die Auslegung oder Anwendung des Übereinkommens berufen ist. Faktisch müssen sich die Vertragsstaaten, schon um die künftige Feststellung von Konventionsverletzungen gegen sich zu vermeiden, daher auch nach Urteilen richten, die gegen andere Staaten ergangen sind.”

Para. 69: “bb) Der Bundesgerichtshof hat [...] zwar einführend auf das LaGrand-Urteil verwiesen und zutreffend festgestellt, dass Art. 36 Abs. 1 WÜK auch subjektive Rechte eines einzelnen Staatsangehörigen begründen könne. Im Zusammenhang mit der eigentlich entscheidungserheblichen Frage nach dem Schutzzweck der Belehrungspflicht hat [der Bundesgerichtshof] sich jedoch nicht mit den Schlussfolgerungen des Internationalen Gerichtshofs auseinandergesetzt. [...] Die angegriffenen Beschlüsse des Bundesgerichtshofs sind daher nicht mit der verfassungsunmittelbaren Pflicht zur Berücksichtigung der Urteile des Internationalen Gerichtshofs in den Fällen "LaGrand" und "Avena" vereinbar.”

5. Ireland

a. European Convention on Human Rights Act 2003

http://www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf

“Section 4: Judicial notice shall be taken of the Convention provisions and of

(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights.

[...]

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

Section 5,

[...]

(5) In advising the Government on the amount of compensation for the purposes of subsection (4), an advisor shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention."

b. Electoral (Amendment) Act 2006

Electoral (Amendment) Act 2006, No. 33 of 2006, 11 December 2006

http://www.oireachtas.ie/documents/bills28/acts/2006/a3306.pdf

In the light of the judgment of the ECtHR in the case of Hirst v The United Kingdom, the Electoral Law of Ireland was amended as it had a blanket voting ban upon prisoners beforehand.

See also: House of Commons (2010): Prisoners' Voting Rights, Standard note SN/PC/01764, p. 4 http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf

6. Netherlands

a. Speech of Mr. Geert Cortens, President of the Supreme Court of the Netherlands, 'Dialogue between Judges', seminar organised by the Strasbourg Court, 29 January 2010

Original French version: http://www.echr.coe.int/NR/rdonlyres/B7BAA2F0-EAB2-4B27-9298-781BB0FB310E/0/20100129_Discours_President_Corstens_Seminaire.pdf

"The implications of the subsidiarity principle are diverse. [...]

(i)the member States [...] must also follow the case-law of the Court closely and apply it diligently;

(ii)the Court must steer the protection of human rights by delivering clear and well-reasoned judgments that enable the domestic authorities and courts to ascertain how the Convention should be interpreted in specific cases.

[...]

[**The Court's] mission is to guide this legal protection** by delivering clear judgments on the interpretation of the Convention in specific cases which **indicate the precedent to be followed** [emphasis added]. These judgments must then be executed quickly by the member States, with the domestic courts, the national legislatures and the national authorities being bound to comply with that case-law.

Allow me to give you a number of examples from my country. [...] Immediately after [the Strasbourg Court had delivered its leading judgment in Salduz v. Turkey (2008)], the Netherlands Supreme Court amended its case-law, making express reference to it. In a judgment of 30 June 2009 [(LJN BH3079)], it undertook a thorough examination of the implications of the Salduz judgment for judicial practice in the Netherlands, as much at the request of the trial judges as at that of the Public Prosecution Service and the Bar. A swift reaction like that serves society best. Indeed, after the Court had settled the urgent question, the

Supreme Court assumed its responsibility at national level, as required by the subsidiarity principle. Thus did it accomplish the task of, I quote, "securing the rights and liberties it [the Convention] enshrines". Applications to "Strasbourg" were thus, I am sure, avoided in many cases.

There are many other examples of the subsidiarity principle being implemented, not only by the courts but also by the legislature and the executive. I shall briefly refer to some here.

[...]

[Another example is Goodwin v. the United Kingdom (1996) judgment] on freedom of the press. Within six weeks the Supreme Court of the Netherlands had delivered a judgment in which it adapted its established case-law1.

The Brogan and Others v. the United Kingdom [(1988)] case also received a lot of publicity [...]. Although it was not a party to the case, it made the Netherlands aware that it did not always comply with the provision of Article 5 of the Convention which says that any arrested person must be brought promptly before a judge. An authoritative commission (the Moons Commission) was then instructed to give an emergency opinion to the legislature, which then took the necessary steps2. The Public Prosecution Service and the police did not wait, moreover, for the amendment to take effect before following the Court's case-law3.

[...]

All these examples show that, after a leading judgment has been delivered by the Court, each and every member State should ask itself to what extent its practices are in conformity with the case-law thus established. This approach may lead the domestic courts to adapt their established case-law – as happened after the Salduz case, concerning assistance by a lawyer during police custody – or the legislature to amend the law – as happened with regard to the question raised by the Benthem case – or the prosecution to adapt its practices – as required by the Brogan and Others case. It is, moreover, highly likely that one and the same judgment will require action by two, or even three, of these actors. Citizens are entitled to demand that administrators of justice respect human rights, firstly because that is a legitimate requirement but also because it is a declaration of the principle of subsidiarity. Accordingly, the cause of human rights will be swiftly and effectively served and the Court will be able to fulfil the mission vested in it: interpreting human rights and giving them form. The core of its activities should not consist in repeating – because States have failed to comply with them – decisions that it has already taken. It should be pointed out, lastly, **that States should not confine themselves to reacting only in those cases in which they are directly concerned. That would be too severe a limitation on the value of the Court's case-law, and on the principle of subsidiarity**. [emphasis added]. As certain examples given here have shown, the Netherlands does not in any way – whether it be in the courts or in academic debate or in any other context – draw a distinction between cases that concern them directly and judgments concerning another State.

[...]

[1] LJN ZC2072, NJ 1996, p. 578.

[2]. This rule, laid down in Article 59a of the Code of Criminal Procedure, came into force on 1 October 1994.

[3]. The Public Prosecution Service had already laid down a policy to be followed on the basis of the judgment in question.

The frequency of repetitive applications is proof that certain **member States do not properly comply with their obligations to apply the Court's case-law** [emphasis added].

b. Additional information

See Sanoma v. Netherlands, judgment of 14 September 2010, application no. 38224/03, para. 36

"36.[...] The principle [that a journalist had to disclose its sources when asked ask as witness] was overturned by the Supreme Court in a landmark judgment of 10 May 1996 on the basis of the principles set out in the Court's judgment of 27 March 1996 in the case of Goodwin v. the United Kingdom [...]. In this ruling, the Supreme Court accepted that, pursuant to Article 10 of the Convention, a journalist was in principle entitled to non-disclosure of an information source unless, on the basis of arguments to be presented by the party seeking disclosure of a source, the judge was satisfied that such disclosure was necessary in a democratic society for one or more of the legitimate aims set out in Article 10 § 2 of the Convention (Nederlandse Jurisprudentie (Netherlands Law Reports, "NJ") 1996, no. 578)."

7. Poland

Current developments

Examples provided by Dr. Adam Bodnar, Warsaw University

There are extremely interesting recent examples as regards the implementation of *res interpretata*.

1. In Poland, following Copland v. UK, the Ombudsman initiated discussion on the need to regulate in detail different aspect of privacy of employees at the workplace. This issue has been followed by the General Inspector of Data Protection, who in January 2010 proposed to the Government a set of required changes in the law. However, changes have not yet been adopted.

2. In Poland, a couple of days after the Chamber judgment in Kiss v. Hungary, the Ombudsman requested the statement by the Minister of Justice as regards compliance of the Polish Constitution (Article 62 Section 2) with the Convention. The Constitution deprives all persons with mental incapacity (ubezwłasnowolnienie) of the right to vote. The similar regulation is in Hungary (Article 70 Section 5 of the Hungarian Constitution). The ECHR declared that such automatic deprivation of the right to vote violates Article 3 Section 1 of the Convention. Discussion on the need to change the Polish Constitution is now pending.

3. Following the recent Chamber judgment of the Strasbourg Court in the case of Uzun v. Germany, discussion has started whether Poland should regulate in detail ways of using the GPS system in surveillance of suspects. It seems that Polish law is well behind German standards in this regard. It is interesting example, because the Strasbourg Court did not find a violation of Article 8 of the Convention. However, the assessment of the quality of legislation made by the Court should be also be takeing into account by other member states in order to avoid future violations of the Convention.

8. Russian Federation

a. Article 15 of the Constitution of 12 December 1993

http://www.constitution.ru/en/10003000-01.htm

Art. 15 (4): "Universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied."

b. *Supreme Court judgment, 21-Г10-2 of 27 July 2010*

In this case the Supreme Court refers to judgements of the European Court of Human Rights not limiting itself to cases brought against the Russian Federation. It referred in particular to the ECtHR judgement in the case Castells v. Spain (1992).

c. *Current developments in the case-law of the Constitutional Court*

The Constitutional Court of the Russian Federation in its rulings regularly takes into account the reasoning of the European Court of human rights, irrespective of the state against which the judgment was rendered. (See, in this connection, the speech made by the Consitutional Court's President Valery Zorkin "Rule of Law and Legal Awareness" (2007) (http://www.stetson.edu/artsci/polsci/media/worldruleoflaw.pdf, p. 46))

Subsequent examples provided by Professor Mark L. Entin, Director of the Institute of European Law, Moscow:

1. In a judgment of 26 February 2010 the Constitutional Court referred specifically to the interpretation of the ECtHR in the cases Hornsby v. Greece and Ryabykh v. Russia.

2. The Constitutional Court ruling 524-О-П/2010 of 08 April 2010 took into account ECtHR judgements Keegan v. the United Kingdom of 18 July 2006, Gebermedhin v. France of 26 April 2007, Ormanni v. Italy of 17 July 2007 and Hammern v. Norway of 11 February 2003. (decision in Russian: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=73258)

3. In the decision 8-П/2010 of 19 April 2010 the Court referred to the ECtHR judgements De Cubber v. Belgium of 26 October 1984, Remli v. France of 23 April 1996 and Sander v. the United Kingdom of 9 May 2000. (decision in Russian: http://files.sudrf.ru/169/norm_akt/doc20100524-140230.doc)

4. In another recent decision of 08.06.2010 the Court stated that, "Article 8 of the European Convention of Human Rights, establishing the right to respect of private and family life, as interpreted by the European Court of Human Rights, obliges national authorities to ensure the fair balance between competing interests and in determination of such a balance to accord high importance to the fundamental interests of a child, which, depending on their nature and significance, could take priority over interests of his or her parents"

5. In its decision *15-П/2010 of 13 July 2010 t*he Court referred to referred to the ECtHR judgements Sunday Times v. the United Kingdom (No. 1) of 26 April 1979, Baranowski v. Poland of 28 March 2000 and Jecius v. Lithuania of 31 July 2000 (d*ecision in Russian: http://www.rg.ru/printable/2010/07/23/ks-sud-dok.html*)

d. *Supreme Court Resolution on the application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation (2003)*

Supreme Court Plenum Decree/Practice Direction No. 5, 10 October 2003

(unofficial English translation)

http://www.medialaw.ru/e_pages/laws/russian/supc-10-10-2003.htm

(Decision in Russian: http://www.rg.ru/2003/12/02/pravo-doc.html)

Preamble: "Commonly recognized principles and norms of the international law and the international treaties under Item 4 of Article 15 of the Constitution of the Russian Federation are a component part of its legal system.

[...]

1. [...] [T]he rights and liberties of man in conformity with commonly recognized principles and the norms of the international law, as well as the international treaties of the Russian Federation shall have direct effect within the jurisdiction of the Russian Federation. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local governments, and shall be secured by the judiciary.

[...]

The commonly recognised principles of the international law, in particular, comprise the principle of universal respect for human rights and the principle of fair implementation of international obligations.

[...]

10. To clarify to courts that the interpretation of an international treaty should be [carried out] in accordance with the Vienna Convention on the Law of the Treaties of 23 May, 1969 (Section 3; Articles 31-33).

In accordance with Subitem «b» of Item 3 of Article 31 of the Vienna Convention, in interpreting the international treaty, one should, together with its context, take into account the follow-up practice of the treaty which establishes an agreement of its members with regard to its interpretation.

The *Russian Federation*, as a member-state of the Convention on Protection of Human Rights and Basic Freedoms **recognises the jurisdiction of the European Court on Human Rights as mandatory with respect to interpretation and application of the Convention and Protocols** [emphasis added] thereof in the event of an assumed breach by the Russian Federation of provisions of these treaty acts when the assumed breach has taken place after their entry into force in respect to the Russian Federation (Article 1 of the Federal Law "On Ratification of the Convention on Protection of Human Rights and Fundamental Freedoms and Protocols thereof » No 54-FZ of 30 March, 1998). **That is why the application by courts of the said Convention should take into account the practice of the European Court on Human Rights to avoid any violation of the Convention on Human Rights and Fundamental Freedoms.** [emphasis added]

11. [...] The courts within their scope of competence should act so as to ensure the implementation of obligations of the State stemming from the participation of the Russian Federation in the Convention on Protection of Human Rights and Fundamental Freedoms."

Hereinafter, the Supreme Court of the Russian Federation describes what national courts must take into account when resolving various issues. Its ruling mentions: "l**egal positions worked out by the European Court on Human Rights**" (para. 12, alike para. 14), "**taking into consideration decisions of the European Court on Human Rights**" (para. 13), "**the practice of application of the [Convention] by the European Court on Human Rights**" (para. 15), "**requirements contained in decisions of the European Court on Human Rights**" (para. 15) [emphasis added]

"16. In case difficulties arise in interpreting commonly recognised principles and norms of the international law, the international treaties of the Russian Federation the courts should be recommended to use acts and decisions of international organisations [...].

17. [...] To recommend to the Judicial Department under the Supreme Court of the Russian Federation: in co-ordination with the Commissioner of the Russian Federation [(Ombudsman)]to the European Court on Human Rights to inform judges on the practice of the European Court on Human Rights, especially with regard to [judgments] regarding the Russian Federation by distributing authentic texts and their Russian translations; to provide on a regular and timely basis the judges with authentic texts and official translations of the international treaties of the Russian Federation and other acts of the international law."

e. Supreme Court Resolution on Judicial Practice At Disposal Of Cases on Protection of Honour and Dignity of Persons, and Also Business Reputation of Persons and Legal Entities (2005)

Supreme Court Plenum Decree/Practice DirectionNo. 3, 24 February 2005

(unofficial English translation)

http://www.medialaw.ru/e_pages/laws/russian/supc-24-2005.htm

Preamble: "At the same time the provisions of the given norm should be interpreted according to the legal position of the European Court on Human Rights, expressed in its judgments.

Taking this into account, the Plenum of the Supreme Court of the Russian Federation with a view of maintenance of correct and uniform application of the legislation regulating specified legal relations, d e c i d e s to give to the courts the following explanations:"

Para. 1: "[Russian] courts should be guided not only by the norms of the Russian legislation [...], but also by virtue of article 1 of the Federal law dated March, 30, 1998 No. 54-FZ «On the Ratification of the Convention on Protection of Human Rights and Fundamental Freedoms and its Protocols» to take into account legal position of the European Court of Human Rights, expressed in its decisions concerning questions of interpretation and application of the given Convention [...]."

f. Additional information

See also:

Burkov, Anton: The Impact of the European Convention on Human Rights on Russian Law, ibidem, Stuttgart, 2007

Marochkin, Sergei Yu (2007): International Law in the Courts of the Russian Federation: Practice of Application, Chinese Journal of International Law, Vol. 6 No. 2, 329-344

9. Slovakia

Speech of Mr Štefan Harabin, Deputy Prime Minister and Minister for Justice of the Slovak Republic, 2008

Seminar: The role of government agents in ensuring effective human rights protection, Bratislava, 3-4 April 2008

http://www.coe.int/t/e/human_rights/awareness/9._publications/bratislava/PROCEEDINGS&COVER.pdf

Pages 14-15: "Naturally, the wording itself of a law, no matter how much in harmony with international guarantees, is not sufficient. It must be linked to such application by the domestic bodies that would equally re**spect the established case-law of the European Court of Human Rights**. For this purpose, **it is necessary to ensure that domestic bodies of law application first know and secondly respect this case-law**. [emphasis added] In this context, the extended information on judgments of the European Court of Human Rights becomes more significant. Therefore, in scope of execution of a specific judgment in the Slovak Republic, the latter is translated into the Slovak language and through minister's or agent's letter the judgment is distributed to the domestic bodies concerned, in particular to the courts. **The domestic bodies must also, however, be acquainted with judgments against other states, since they also may, with regard to the interpretation powers of judgments of the European Court of Human Rights, affect the Slovak application practice** [emphasis added]. In the Slovak Republic, the general information on the case-law of the European Court of Human Rights is also provided through publication of judgments in the journal for judicial practice named "The Judicial Revue" (Justična revue) the publisher of which is the Ministry of Justice. This journal publishes the Slovak translations of all the judgments and selected decisions against the Slovak Republic, as well as the Slovak translations of selected judgments against other states. [...] This journal is distributed to all the courts in the Slovak Republic and equally available to any and all of the barristers, public prosecutors and other legal professions, including the public at large.

[...] Government agent[s] also participate[] at regular meetings of the presidents of district and regional courts. At the meetings, the government agents can inform on the latest case-law of the European Court of Human Rights that must be respected without delay, and [they] can also point out to some defects in the judicial practice, and he/she equally can respond immediately to the questions concerning the issues of human rights and fundamental freedoms protection."

10. Slovenia

a. Article 15 of the Slovenian Constitution of 1991

http://www.servat.unibe.ch/icl/si00000_.html

Note: Constitution predates the accession to the European Convention on Human Rights in 1994

"Article 15 (Exercise and Limitation of Rights)

(1) Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution. [...]

(5) No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent."

b. Implementing European Standards into the Case-Law of the Constitutional Court, Presentation by Ciril Ribičič, Judge of the Constitutional Court of the Republic of Slovenia, 1 October 2004

http://www.us-rs.si/o-sodiscu/konference/pcceu-bled-30-september-2-oktober-2004/presentation-by-dr-ciril-ribicic-judge-of-the-cons-3379/

"From the viewpoint of the future role of the Constitutional Court, while resolving individual disputes it has been most important to consider the European Convention on Human Rights

and the case-law of the European Court of Human Rights, not only regarding constitutional complaints but also when reviewing the constitutionality of regulations. [...]

Minimum standards for the protection of human rights determined in the case-law of the European Court of Human Rights, are binding on all the member states of the Council of Europe. [emphasis added] [...]

The [Constitutional Court has directly cited and referred to the Convention and the Strasbourg Court's case-law] in the reasonings of its decisions. [...] Furthermore, it must be considered that often the expert materials (the reports which are drafted by the legal advisers of the Constitutional Court), which are a basis for the decisions of the Constitutional Court, contain an overview of the case-law of the European Court of Human Rights without always directly mentioning such in the text of the decision. Since the ratification of the European Convention on Human Rights in 1994, references to the Convention and the case-law of the European Commission for Human Rights and the European Court of Human Rights has continuously increased, and as a consequence in recent years there has hardly been any important decision which has not arisen from an analysis of the decisions of the European Court of Human Rights. Thus, the Constitutional Court has referred to the European Convention on Human Rights and the case-law of the European Court of Human Rights ***also in cases in which the complainants have not mentioned them in their applications*** [emphasis added].

The Constitutional Court is naturally not restricted to cases in which the European Court of Human Rights decided on the basis of applications from Slovenia, although the Court pays particular attention to them [emphasis added]. [...]

[I]n Slovenia the European Convention on Human Rights is a binding legal act, superior to national legislation. **Moreover, it is also <u>entirely undisputed</u> that regarding the <u>interpretation of the European Convention</u> on Human Rights, the <u>opinion of the European Court of Human Rights is decisive</u>**. [emphasis added] Such interpretation is not formally binding on the Constitutional Court, however in reality it must nevertheless be respected considering similar subsequent cases if the Court does not wish to risk Slovenia being found in violation before the European Court of Human Rights.

[...]

Moreover, the Constitutional Court refers to the Constitution in cases in which the Constitution guarantees a higher level of the protection of an individual right compared to the European Convention on Human Rights. **In cases in which the European Convention on Human Rights is more demanding than the Constitution <u>or</u> the case-law of the European Court of Human Rights guarantees a higher level of protection of rights, the Constitutional Court refers to the European Convention on Human Rights and the decisions of the European Court of Human Rights.** [emphasis added] Only such manner of deciding by the Constitutional Court is in compliance with the last paragraph of Article 15 of the Constitution, which explicitly determines that no rights regulated by legal acts in force in Slovenia (the European Convention on Human Rights is undoubtedly such an act) may be restricted on the grounds that this Constitution does not recognize that right or recognizes it to a lesser extent."

c. Additional information

Letnar Cernec, Jernej/Avbelj, Matej (2010): Implementation of the European Convention on Human Rights and Fundamental Freedoms in Slovenia, in: Alleweldt, Ralf/ Emmert , Frank/ Hammer, Leonard and Marcus, Isabel (eds.): The European Convention on Human Rights and

Fundamental Freedoms in Central and Eastern Europe, Eleven International Publishing, Utrecht, forthcoming

Extracts:

> "The Constitutional Court has dealt intensively with the ECHR. The Court referred to the ECHR even before it became binding on Slovenia. [...]The Court noted that while Slovenia had not yet signed and ratified the Convention, considering its desire and need to join the Council of Europe, the Slovenian legislation had to be adjusted to meet the criteria of the Convention as soon as possible.
>
> It is estimated that the Constitutional Court has so far referred to the ECHR in more than 600 cases and relied on the ECtHR jurisprudence in more than 100 cases. [...] Moreover, the Constitutional Court carefully scrutinizes the jurisprudence of the ECtHR before handing down any potentially more important and resounding decision. [...]
>
> While there are no written limits to the effect of the ECtHR rulings in Slovenia, the ECHR is generally assumed to lay down only minimum standards of human rights protection that are normally surpassed by the national constitutional standards. Therefore the Constitutional Court usually grants precedence to the Constitution, unless the ECHR as expounded in the Strasbourg jurisprudence provides for a higher standard of protection. [...]
>
> However, if a case arises in which the Constitution would not explicitly contain a right stemming from the ECHR as expounded by the ECtHR, the Constitutional Court would rely directly on the ECHR following the mandate of Article 15 of the Constitution on the basis of which no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognize that right or that is recognized to a lesser extent. This occurred in case Up-555/03 and Up-827/04 where a petitioner relied on the ECHR Article 13 containing, inter alia, the right to an independent thorough and efficient investigation of the circumstances in which a person lost his life during a police action. As the state had not provided for such an investigation, the Constitutional court issued a declaratory judgment identifying its breach of Article 15 of the Constitution in combination with Article 13 of the ECHR."

11. Switzerland

Federal Court decision ATF 112 (1986) 290

http://relevancy.bger.ch/php/clir/http/index.php?lang=de&type=show_document&page=1&from_date=&to_date=&from_year=1954&to_year=2010&sort=relevance&insertion_date=&from_date_push=&top_subcollection_clir=bge&query_words=&part=all&de_fr=&de_it=&fr_de=&fr_it=&it_de=&it_fr=&orig=&translation=&rank=0&highlight_docid=atf%3A%2F%2F112-IA-290%3Ade&number_of_ranks=0&azaclir=clir#id11606

In the decision the Swiss Federal Court amended its own case-law in the wake of the judgments of De Cubber and Piersack against Beligum. (See also: ATF 113 (1987) 72 and ATF 114 (1988) 50)

Page 297: "Le poids de cette argumentation ne saurait être ignoré, compte tenu des critiques formulées par la doctrine (cf. consid. 3d ci-dessus) et des récentes décisions rendues par les organes de la Convention européenne des droits de l'homme (arrêts précités Piersack et, surtout, De Cubber). La jurisprudence du Tribunal fédéral doit donc être soumise à un nouvel examen. [...]De la même manière, la question de savoir si les critères retenus dans l'arrêt De

Cubber permettent ou non de maintenir la jurisprudence définissant la portée de l'art. 58 Cst. ne doit pas être examinée abstraitement. Il convient, bien plutôt, de rechercher si le droit valaisan a assuré au recourant un juge satisfaisant aux exigences qui découlent de la garantie d'impartialité."

12. Turkey

a. Article 90 of the Turkish Constitution of 7 November 1982 as amended 17 October 2001

http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf

"Article 90 Ratification of International Treaties [...]

(5) International agreements duly put into effect bear the force of law. [...] In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

b. Constitutional Court of Turkey Judgement No. 2003/33 of 10 April 2003

http://www.anayasa.gov.tr/index.php?l=manage_karar&ref=show&action=karar&id=1840&content=

The Constitutional Court of Turkey, in its decision 2003/33 on expropriation in the public interest, referred to the Strasbourg Court's decisions which did not involve Turkey, namely: Papamichalopoulos v. Greece of 24 June 1993, Carbonara and Venture v. Italy of 11 December 2003) and Belvedere Alberghiera S.R.L. v. Italy of 30 October 2003.

13. Ukraine

Ukrainian Law No.3477–IV of 2006

Annexed to Parliamentary Assembly Report on the implementation of judgments of the European Court of Human Rights, by Mr. Erik Jurgens, 18 September 2006, Assembly Doc. 11020

http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc06/edoc11020.htm#P1169_169391

"Section 4. Application of the Convention and the case-law of the European Court of Human Rights in Ukraine

Article 17. Application by courts

17.1. While adjudicating cases **courts shall apply** the Convention and **the case-law of the Court as a source of law**. [emphasis added]

Article 18. Order reference

[...]

18.2. In order to make a reference to judgments and decisions of the Court and decisions of the Commission courts shall use translations published in the outlet specified in Article 6 of this Law.

18.3. In case of the absence of the translation of Judgment or decision of the Court or decision of the Commission, courts shall use their original texts. [...]

18.5. If a linguistic discrepancy between the original texts is found and/or if need be to carry out a linguistic interpretation of the original text courts shall use the relevant case-law of the Court.

Article 19. Application in the legislative sphere and administrative practice

19.1. The Office of the Government's Agent shall carry out a legal review of all draft laws, as well as by-laws subject to state registration, as to their compliance with the Convention and shall prepare an opinion thereon.

19.2. If the review specified in part 1 of this Article was not carried out or an opinion on the inconsistency of the by-law was issued, its state registration refused.

19.3. The Office of the Government's Agent shall provide **regular and reasonably periodic examination of current legislation on its consistency with** the Convention and **the Court's case-law**, especially in the spheres relating to the activity of law-enforcement bodies, criminal proceedings, and restriction of liberty. [emphasis added]

19.4. Following the examination set forth in Article 19.3. of this Law, the Office of the Government's Agent shall submit proposals to the Cabinet of Ministers of Ukraine on amendments to the current legislation in order to bring it in conformity with requirements of the Convention and the relevant Court's case-law.

19.5. The ministries and departments shall provide within their competence a systematic control over the **adherence of administrative practice** to the Convention **and the Court's case-law**." [emphasis added]

14. United Kingdom

a. Human Rights Act 1998

Human Rights Act 1998 (c. 42)

http://www.legislation.gov.uk/ukpga/1998/42/data.pdf

Section 2: Interpretation of Convention rights.

(1) "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any —

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission [...] adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

b. Statement of Home Secretary of State for the Home Department on Search Powers under Section 44 of the Terrorism Act 2000, 8 July 2010

House of Commons Debate, 8 July 2010, c540

http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100708/debtext/100708-0001.htm#10070875001177

"Mr Speaker, I would like to make a statement on stop and search powers under section 44 of the Terrorism Act 2000.

On Wednesday last week, the European Court of Human Rights [...] found that the stop and search powers granted under section 44 of the Terrorism Act 2000 amount to the violation of the right to a private life. [...]

I can, therefore, tell the House that I will not allow the continued use of section 44 in contravention of the European Court's ruling and, more importantly, in contravention of our civil liberties. [...]

In order to comply with the judgment-but to avoid pre-empting the review of counter-terrorism legislation-I have decided to introduce interim guidelines for the police."

c. *The Supreme Court – Annual Reports and Accounts 2009-2010*

http://*www*.supremecourt.gov.uk/docs/ar_2009_10.pdf

Page 26-27: "On 9 December 2009, the Supreme Court dismissed an appeal relating to the admission of hearsay evidence in criminal trials. In so doing it **did not follow a recent decision of the European Court of Human Rights** [emphasis added] (ECHR) in Strasbourg, which had held that convictions based solely or to a decisive extent on the evidence of witnesses that were not available for cross-examination in court breached the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights.

The **Supreme Court unanimously held that courts take into account <u>any</u> judgment of the Strasbourg court** in relation to the evidence of witnesses unavailable for cross-examination. [emphasis added] However on rare occasions, such as R v Horncastle and others this did not mean a breach of Article 6.

The Court expressed concerns that the decision of the Strasbourg court had not sufficiently appreciated or accommodated particular aspects of the UK trial process and the safeguards in the statutory scheme. The ECHR decision had not fully considered whether it was justified to impose the rule equally on common law and continental jurisdictions and it would create severe practical difficulties if applied to English criminal procedure."

d. *R (GC & C) v Commissioner of the Police of the Metropolis (2010)*

*R (*GC & C*) v Commissioner of the Police of the Metropolis [2010] EWHC 2225, Case No. CO/15170/2009 of* 16. July 2010

http://www.bailii.org/ew/cases/EWHC/Admin/2010/2225.html

Lord Moses:

"30. In my judgment, this court is bound by the decision of the House of Lords. The doctrine of precedent and the legal certainty which that doctrine protects demands that this court follows the decision in <u>S and Marper</u>."

"31. In K & Ors v Lambeth Borough Council [2006] 2 AC page 465, Lord Bingham identified that principle and its application in relation to conflicting decisions of the House of Lords with the Strasbourg court. He said:

> "44. There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The **Strasbourg court authoritatively expounds the interpretation of the rights embodied in the**

Convention and its protocols, [emphasis added] as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.'"

"33. [...] The fact that the parties were the same, both in the House of Lords and in Strasbourg affords no ground for failing to follow the decision of the House of Lords."

"35. Accordingly, I conclude that this court is bound by the decision of the House of Lords. The appropriate course that I would take is that which is indicated in page 43 of the speech of Lord Bingham, namely, that this court should give permission to appeal and order a leapfrog appeal to which I should record both the defendant and the Secretary of State have specifically accented. "

e. R v Horncastle and others (2009)

R v Horncastle and others [2009] UKSC 14

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0073_Judgment.pdf

Para 11: "The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or acommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case."

f. R (RJM) v Secretary of State for Work and Pensions (2008)

R (RJM) v Secretary of State for Work and Pensions [2008] 3 WLR 1023

http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd081022/rjm-3.htm

"64. Where the Court of Appeal considers that an earlier decision of this House, which would otherwise be binding on it, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then (absent wholly exceptional circumstances) the court should faithfully follow the decision of the House, and leave it to your Lordships to decide whether to modify or reverse its earlier decision. To hold otherwise would be to go against what Lord Bingham decided. As a matter of principle, it should be for this House, not for the Court of Appeal, to determine whether one of its earlier decisions has been overtaken by a decision of the ECtHR. As a matter of practice, as the recent decision of this House in Animal Defenders [2008] 2 WLR 781 shows, decisions of the ECtHR are not always followed as literally as some might expect. As to what would constitute exceptional circumstances, I cannot do better than to refer back to the exceptional features which Lord Bingham identified as justifying the Court of Appeal's approach in East Berkshire [2004] QB 558: see Kay [2006] 2 AC 465, para 45.

65. When it comes to its own previous decisions, I consider that different considerations apply. It is clear from what was said in Young [1944] KB 718 that the Court of Appeal is freer to depart from its earlier decisions than from those of this House: a decision of this House could not, I think, be held by the Court of Appeal to have been arrived at per incuriam. Further, more recent jurisprudence suggests that the concept of per incuriam in this context has been interpreted rather generously - see the discussion in the judgment of Lloyd LJ in Desnousse v Newham London Borough Council [2006] EWCA Civ 547, [2006] QB 831, paras 71 to 75.

66. The principle promulgated in Young [1944] KB 718 was, of course, laid down at a time when there were no international courts whose decisions had the domestic force which decisions of the ECtHR now have, following the passing of the 1998 Act, and in particular section 2(1)(a). **In my judgment, the law in areas such as that of precedent should be free to develop**, [emphasis added] albeit in a principled and cautious fashion, to take into account such changes. Accordingly, I would hold that, where it concludes that one of its previous decisions is inconsistent with a subsequent decision of the ECtHR, the Court of Appeal should be free (but not obliged) to depart from that decision."

g. R (Ullah) v Special Adjudicator (2004)

R (Ullah) v Special Adjudicator [2004] 2 AC 323, per Lord Bingham

http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-2.htm

"20. In determining the present question, **the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court**:[emphasis added] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, paragraph 26. This reflects the fact that the **Convention** is an international instrument, the **correct interpretation of which can be authoritatively expounded only by the Strasbourg** court. From this it follows that a **national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law**. [emphasis added] It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. **The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less**. [emphasis added]"

h. Al Skeini and others (2004)

Al Skeini [2004] EWHC 2911, Case No: CO/2242/2004

http://www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html

This case is a very good example on how a British divisional Court ploughed its way through all the Strasbourg case law to determine the scope of the extraterritorial application of the UK's human rights obligations.

Para. 108: "There is a rich jurisprudence emanating from Strasbourg concerning the jurisdiction of the Convention, on which we have been addressed in detailed written and oral

submissions on behalf of the claimants and the Secretary of State respectively. It is not possible to do justice to the parties' submissions without setting out the basic material of that jurisprudence, [...]"

Para. 116: "In the light of these conflicting submissions, there is no alternative to reviewing in detail the Strasbourg authorities presented to us. To give focus and point to that review, while at the same time mindful of the different readings given by the parties to *Bankovic* itself, we think it is appropriate and necessary to start with some reference to the Court's reasoning in *Bankovic*, before we put it in its place as part of a chronological account of the Strasbourg jurisprudence."

i. Re McKerr (2004)

Re McKerr [2004] 1 WLR 807 at para 65-66 per Lord Hoffmann

http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040311/mckerr-3.htm

"65. It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law. [...] That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg."

"66. This last point is demonstrated by the provision in section 2(1) that a court determining a question which has arisen in connection with a Convention right must "take into account" any judgment of the Strasbourg court. Under the Convention, the United Kingdom is bound to accept a judgment of the Strasbourg court as binding: Article 46(1). But a court adjudicating in litigation in the United Kingdom about a domestic "Convention right" is not bound by a decision of the Strasbourg court. It must take it into account."

F. Extracts from EU Charter of Fundamental Rights

1. Charter of Fundament Rights of the European Union of 12 December 2000

2000/C 364/01 of 19.12.2000

http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Preamble: "This Charter reaffirms, with due regard for [...] the principle of subsidiarity, the rights as they result, in particular, from the [...] European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Art. 52 (3): "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

Art. 53: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by

Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

2. Note from the Praesidium: Text of the explanations relating to the complete text of the Charter of Fundament Rights of the European Union of 12 December 2000

Brussels, 11 October 2000, Charte 4473/00

http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

Article 52 explanations: "The purpose of Article 52 is to set the scope of the rights guaranteed. […] Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the principle that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR without thereby adversely affecting the autonomy of Community law and of that of the Court of Justice of the European Communities.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and **the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights** [emphasis added] and by the Court of Justice of the European Communities. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR. […]"

Article 53 explanations: "This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR. The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR."