
ARTICLES

Principles of Interpretation of the European Convention on Human Rights

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1. Introduction

Interpreting legal norms is a difficult and controversial procedure. Norms of international law, including of international treaties are no exception. In the opinion of one scholar "The interpretation of treaties and of legal norms in general is sometimes considered to be more an art than a procedure in which legal rules and principles are applied."¹

Of the many international treaties there is a particular significance granted to the European Convention on Human Rights (1950). Georgia became a party to it in 1999. The European Court of Human Rights and the European Commission² recognise it "as a constitutional instrument of European public order".³

The European Convention on Human Rights became part of the Georgian legislation and is thus a source of national law that courts ought to apply for dispute settlement. Georgian courts ought to interpret the provisions of the European Convention on the basis of the principles established by international law in general and the European Court of Human Rights. If Georgian courts do not interpret the European Convention on Human Rights with the principles applied by the European Court of Human Rights then the probability of interpretation of the provisions of Human Rights envisaged by the European Convention in a more restricted way would be considerable and consequently legal and natural persons will not be able to enjoy fully the rights that European Convention grants.

This article examines the general principles of interpretation of the norms of international treaties determined by international law and the rules applied by the European Court of Human Rights in interpreting the European Convention. In addition it offers a review of how European countries interpret international treaties on human rights. On the basis of this analysis several conclusions are drawn to improve the practice of interpreting the European Convention on Human Rights by Georgian courts.

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¹ *Bernhardt*, Thoughts on the Interpretation of Human-Rights Treaties, in: *Protecting Human Rights: The European Dimension*, Studies in Honour of *Wiarda, Matscher/Petzold* (Eds.), 1988, 65.

² Before reform of the supervisory system of the European Convention (1998) the European Commission of Human Rights considered the admissibility of an individual application. The Commission ceased to exist as a result of the reform.

³ *Chrysostomos v. Turkey*, judgment of 4 March 1991, application 15299-15311/89, Para. 22; *Loizidou v. Turkey*, judgment of 23 March 1995, Series A No.310, para. 75.

2. General Principles of Interpretation of the Norms of International Treaties

The starting point for interpreting international treaties, including the European Convention on Human Rights is Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties, which determine the general rules for interpreting international treaties.⁴

From a formal point of view the Vienna Convention does not apply to the European Convention on Human Rights because the latter was adopted earlier (1950) than the Vienna Convention (1969).⁵ However, the European Court of Human Rights has acknowledged that Articles 31-33 of the Vienna Convention reflect the norms of customary international law with regard to the interpretation of the norms of international treaties. For this reason the European Court applies the provisions of Vienna Convention in interpreting the European Convention.⁶

Article 31, para. 1 of the Vienna Convention is of particular importance in terms of interpreting the European Convention, according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

Article 31, para. 1 of the Vienna Convention states that in interpreting an international treaty attention should be drawn to the object and purpose of the treaty.⁷ This means that the provisions of the European Convention should be interpreted in terms of its object and purpose.⁸ The object and purpose of the European Convention is “the maintenance and further realisation of human rights and fundamental freedoms” by “an effective political democracy” and “rule of law”.⁹ In interpreting the provisions of the European Convention in terms of its object and purpose, the text of the Convention must be approached in a more creative manner than looking up the meaning of its term in a dictionary.¹⁰

The European Convention on Human Rights should be interpreted in such a way to ensure the effective protection of human rights. In one of its cases the European Court of Human Rights in the 1970s stated that it is necessary to seek an interpretation of the Convention that is most appropriate to realise the aim and achieve the object of the treaty, not that which would restrict the obligations undertaken by the parties to the greatest possible degree.¹¹

⁴ For Georgian translation of the Vienna Convention see *Korkelia*, International Treaty in International and National Law, 1998, 268.

⁵ According to Article 4 of the Vienna Convention, the Convention is not retroactive.

⁶ *Golder v. the United Kingdom*, 21 February 1975, Series A No.35, paras. 29, 30, 34-36; *Luedicke, Belkacem and Koç v. Germany*, 28 November 1978, Series A No.29, para. 39; *Johnston and Others v. Ireland*, 18 December 1986, Series A No.112, paras. 51-52; *Bankovic and Others v. NATO Member States*, judgment of 12 December 2001, paras. 55-55.e. See also *Merrils*, The Development of International Law by the European Court of Human Rights, 1993, 69-70.

⁷ *Van Dijk/van Hoof*, Theory and Practice of the European Convention on Human Rights, 1998, 72.

⁸ *Preto and Others v. Italy*, 8 December 1983, Series A No. 71, para. 26; *Aksen v. Germany*, 8 December 1983, Series A No. 72, para. 31. See also *Bernhardt*, Thoughts on the Interpretation of Human-Rights Treaties, in: Protecting Human Rights: The European Dimension, Studies in Honour of *Wiarda, Matscher/Petzold* (Eds.), 1988, 65-66.

⁹ Paras. 4-6 of the Preamble of the European Convention.

¹⁰ *Merrils*, The Development of International Law by the European Court of Human Rights, 1993, 76.

¹¹ *Wemhoff v. Germany*, 27 June 1968, Series A No.7, para. 8; *Airey v. Ireland*, 9 October 1979, Series A No.32, para. 24; *Artico v. Italy*, 13 May 1980, Series A No.37, para. 33.

3. Principles of Interpretation Established by the European Court of Human Rights

What principles does the European Court of Human Rights apply in interpreting the European Convention, other than the general rules set by the 1969 Vienna Convention?

There are several principles developed by the European Court by which it interprets the provisions of the European Convention. These are:

- a) the principle of evolutionary (dynamic) interpretation;
- b) the principle of autonomous interpretation;
- c) the principle of effectiveness;
- d) the principle of proportionality;
- e) the doctrine of the margin of appreciation.

3.1 The Principle of Evolutionary (dynamic) Interpretation

One of the most important principles applied by the European Court of Human Rights when interpreting the provisions of the European Convention is the evolutionary (dynamic) interpretation. The European Court and the Commission of Human Rights recognise the Convention as a “living instrument”, which means that its provisions should be interpreted in the light of present-day conditions.

According to this principle the concepts used in the Convention should be understood in the light of present-day conditions and not those that existed five decades ago when the Convention was made.¹² The change of awareness of European society influences social values, including moral issues and thus the provisions of the European Convention should be interpreted in terms of these changes.¹³

Interpreting the European Convention in the light of *current* conditions and the development of European society has a direct affect on the general rules of interpretation of the provisions of international treaties specified in the Vienna Convention. Under Article 32 of the Convention, preparatory work of the treaty (*travaux préparatoires*) may be applied as a supplementary means of interpretation.¹⁴ If the role of preparatory work, as a means of determining the parties’ intention, is important for interpreting the norms with regard to international treaties in general, in terms of evolutionary (dynamic) interpretation of the European Convention, the role of supplementary means is minor.¹⁵ As the European Court

¹² *Merrils*, The Development of International Law by the European Court of Human Rights, 1993, 90-91.

¹³ *Polakiewicz*, The Implementation of the ECHR and of the Decisions of the Strasbourg Court in Western Europe: An Evaluation, The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe (Eds. *Alkema/Bellekom/Drzemczewski et al.*), 1992, 154.

¹⁴ *Bankovic and Others v. NATO Member States*, judgment of 12 December 2001, Paras. 19-21.

¹⁵ *Mann*, Foreign Affairs in English Courts, 1986, 109; *Bernhardt*, Human Rights and Judicial Review: The European Court of Human Rights, in: *Human Rights and Judicial Review: A Comparative Perspective*, Beaty (Ed.), 1994, 307; *Van Dijk/van Hoof*, Theory and Practice of the European Convention on Human Rights, 1998, 78.

has stated that the Convention should be interpreted dynamically, the significance of historic (including on the basis of preparatory work) interpretation with regard to the European Convention diminishes. Thus, the application of preparatory work of the Convention should be treated carefully.¹⁶

The following cases illustrate the dynamic interpretation of the European Convention by the European Court of Human Rights.

In *Tyrer v. the United Kingdom* (1978) concerning the application of corporal punishment such as striking of birches on juveniles in one of the parts of the United Kingdom, namely the Isle of Man, the European Court stated that “the Convention is a living instrument, which [...] must be interpreted in the light of present-day conditions.”¹⁷ The European Court also asserted that “the Court cannot but be influenced by developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”¹⁸ In this case, the European Court held that corporal punishment (striking of birches) is a degrading treatment prohibited under Article 3 of the European Convention on Human Rights.¹⁹

The case of *Marckx v. Belgium* (1979) concerned restrictions envisaged by Belgian legislation with regard to the rights of children born out of wedlock compared with the children born in wedlock. In this case the European Court stated that in the 1950s it was regarded as permissible and normal in many European countries to draw a distinction in this area between “illegitimate” and “legitimate” children. However, the Court recalled that Article 8 (right to respect of one’s private and family life) of the Convention must be interpreted in the light of present-day conditions as shown by the changed approaches reflected in the countries’ legislation. The European Court found that European countries’ approach towards the status of legitimate and illegitimate children has changed and such a distinction now contradicts Article 8 of the Convention.²⁰

In the case of *Dudgeon v. the United Kingdom* (1981) regarding homosexual relationships between adult males, which under the United Kingdom legislation constituted a criminal offence, the European Court of Human Rights stated that as compared with the era when that legislation was enacted, there is now a better understanding and as a consequence an increased tolerance of homosexual behaviour. The Court also asserted that in the majority of the member states of the Council of Europe it is no longer considered necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of criminal law should be applied. The Court also pointed out that it could not overlook the marked changes that have occurred in this regard in the domestic law of the member states.²¹

¹⁶ *Jacobs/White*, The European Convention on Human Rights, 1996, 33.

¹⁷ 25 February 1978, Series A No.26, para. 31.

¹⁸ *Ibid.*

¹⁹ *Merrils*, The Development of International Law by the European Court of Human Rights, 1993, 79-80.

²⁰ 13 July 1979, Series A No.31, para. 41.

²¹ 22 October 1981, Series A No.45, para. 60. see also *Norris v. Ireland*, 26 October 1988, Series A No.142, para. 46.

The interpretation of the provisions of the European Convention on Human Rights at different times sheds light on the dynamics of interpretation in the light of the changed conditions and the contents by which human rights are protected.

3.2 The Principle of Autonomous Interpretation

The European Court of Human Rights interprets principles and legal terms provided by the European Convention in an autonomous sense. Their interpretation may not coincide with the meaning that these principles and terms are given under the national legislation.²²

Since many principles and legal terms provided in the European Convention and Protocols are well known to the national courts, the temptation of national courts to give these principles and legal terms the meaning they are understood under the national legislation is understandable.²³ Notwithstanding such a temptation, it is incorrect to interpret the principles and legal terms envisaged by the Convention in a national “meaning”, because the European Convention on Human Rights is adopted not for one single state but for all European states with distinct legal systems and traditions.²⁴

Unless these principles and terms are interpreted autonomously they would be interpreted as under the domestic legislation. Interpretation of these principles and legal terms as prescribed by national legislation would presumably lead to different interpretations. For instance, the principles and terms such as, “criminal charge”, “civil rights and obligations”, “private and family life”²⁵, “home”, “correspondence”, “independent and impartial tribunal” would have different meanings in different states. This would make it impossible to set and protect common human rights standards for all states.²⁶ This is the reason for giving autonomous meaning to the principles and terms of the Convention.²⁷

A case in point is that of *Engel and Others v. Netherlands* (1976).²⁸ This concerned the imposition of various penalties on soldiers serving in the Dutch armed forces for offences against military discipline. In their application the applicants asserted that the proceedings against them violated Article 6 of the Convention (right to fair trial), which prescribes procedural requirements on matters concerning “criminal charge”. The European Court

²² *Strasser*, The European Convention on Human Rights: Some Reflections on its Role in the Light of the Practice of the Convention Organs, in: Austrian-Soviet Round-Table on the Protection of Human Rights, *Matscher/Karl* (Eds.), 1992, 105.

²³ *Bernhardt*, Thoughts on the Interpretation of Human-Rights Treaties, in: Protecting Human Rights: The European Dimension, Studies in Honour of *Wiarda*, *Matscher/Petzold* (Eds.), 1988, 66.

²⁴ *Matscher*, Methods of Interpretation of the Convention, in: The European System for the Protection of Human Rights, *Macdonald/Matscher/Petzold* (Eds.), 1993, 70-71.

²⁵ *Keegan v. Ireland*, 26 May 1994, paras. 44-45.

²⁶ *Frowein*, The European Convention on Human Rights as the Public Order of Europe, in: Collected Courses of the Academy of European Law, 1990, vol. I(2) 1992, 305.

²⁷ *Van Dijk/van Hoof*, Theory and Practice of the European Convention on Human Rights, 1998, 77.

²⁸ Series A no. 22.

faced the question of determining whether Article 6 of the Convention applies to disciplinary offences or not? Under Dutch law such an offence is disciplinary and not criminal. However, the European Court held that it was necessary to determine whether classification of an offence as disciplinary or criminal is decisive for the purposes of the Convention.²⁹

Having deemed that a “criminal charge” must be interpreted autonomously the European Court also held that “if the contracting states were able at their discretion to classify an offence as disciplinary instead of criminal [...] the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. Such latitude might lead to results incompatible with the purpose and object of the Convention”.³⁰

Another example relates to the interpretation of the term “court” mentioned in Articles 5 of the European Convention that may not coincide with its meaning under national legislation. The European Court of Human Rights stated that the term “court” referred to in Articles 5 and 6 of the Convention does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of a country.³¹ The European Court held that the “court” under the meaning of the Convention should denote the body that exhibits not only common fundamental features, of which the most important is independence of the executive and of the parties to the case..., but also guarantees judicial procedure”.³²

Since the European Court interprets principles and terms of the European Convention in an autonomous way a national court should apply the case-law of the European Court of Human Rights to determine the meaning of those principles and terms. Unless a national court takes into account the European Court’s case-law, it may not protect the Convention rights under the standards established by the case-law of the European Court. This is due to the simple reason that a national lawmaker might give a different and rather restrained meaning to the principle or term prescribed by national legislation than the meaning given to it by the European Court. This once again proves that for proper interpretation of the provisions of the Convention a national court should apply not only the text of the European Convention on Human Rights but also the case-law of the European Court of Human Rights.³³

Furthermore, in specific cases the European Court refers to the law of a relevant state. For instance, in order to deem the deprivation of liberty of a person admissible under Article 5 (right to liberty and security) of the European Convention, such deprivation of

²⁹ *Merrils*, The Development of International Law by the European Court of Human Rights, 1993, 71-72.

³⁰ Series A No.22, para. 81.

³¹ *Weeks v. the United Kingdom*, A 114 (1987), 10 EHRR 293, para. 61.

³² *De Wilde, Ooms and Versyp v. Belgium*, Series A No.12, para. 78.

³³ *Korkelia*, The Role of the Case-Law of the European Court of Human Rights in the Practice of Georgian Courts, in: Protection of Human Rights in National and International Law, *Korkelia* (Ed.), 2002, 53-109.

liberty should be carried out under a procedure prescribed by law and detention or imprisonment must be legitimate. In addition when assessing whether the restriction of human rights under paragraph 2 of Articles 8-11 of the European Convention is legitimate or not, the European Court refers to the law of the state. Despite the European Convention's general reference to the law of the state, the European Convention defines the requirements of "law". Under the case-law of the European Court, the law of a state, in order to satisfy the requirement of the European Convention, must be accessible and foreseeable. Under the case-law of the European Court accessibility of law means its publication (e.g. a normative act of internal (office) use can not be regarded accessible). As for foreseeability of law, under the case-law of the European Court in order that the law is regarded as such "it must be formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".³⁴

3.3 The Principle of Effectiveness

In its judgments the European Court of Human Rights has pointed out that the Convention provides not theoretical and illusory, but practical and effective protection.³⁵

Airey v. Ireland is frequently quoted case in terms of the effective interpretation of the European Convention's provisions.³⁶ In this case the European Court considered whether the applicant (Airey) had the right to effectively protect her interests with regard to her divorce. The applicant alleged that she was not represented by a lawyer before the court because of not being in a financial position to meet the costs involved. The Irish legal aid system did not provide free legal aid in civil cases. The respondent (the Government of Ireland) contended that she was free to go before a court without the assistance of a lawyer. The European Court of Human Rights was not convinced with the respondent's argument and expressed its opinion stating that it is not realistic to suppose that in litigation of this nature, the applicant could effectively conduct her own case. In this regard the Court held that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".³⁷

Although Article 6 (the right to a fair trial) of the European Convention on Human Rights does not envisage free legal aid in civil cases (such aid is provided for by Article 6.3.c of the Convention related to criminal proceedings), the European Court held that Article 6 of the Convention may sometimes compel a state to provide for legal assistance when such

³⁴ *Sunday Times v. the United Kingdom*, 26 April 1979, Series A No.30, para. 49.

³⁵ *Strasser*, The European Convention on Human Rights: Some Reflections on its Role in the light of the Practice of the Convention Organs, in: Austrian-Soviet Round-Table on the Protection of Human Rights, *Matscher/Karl* (Eds.), 1992, 105-106.

³⁶ *Airey v. Ireland*, 9 October 1979, Series A No.32, para. 32. See also *Frowein*, The European Convention on Human Rights as the Public Order of Europe, in: *Collected Courses of the Academy of European Law*, 1990, vol. I(2) 1992, 287-288.

³⁷ *Airey v. Ireland*, 9 October 1979, Series A No.32, para. 24.

assistance proves indispensable for effective access to court (e.g. by reason of the complexity of the procedure or of the case).³⁸

To illustrate the effective interpretation of the Convention by the European Court another example could be cited. According to Article 6.3.c of the European Convention “Everyone charged with a criminal offence has the right, *inter alia*, to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. The case of *Artico v. Italy* (1980) examined by the European Court of Human Rights concerned the appointment of a lawyer by the Court of Cassation of Italy to represent the applicant’s interest before the Court of Cassation. Due to health reasons the lawyer appointed by the state was unable to perform the task – defend the applicant before the Court of Cassation. Despite the applicant’s repeated requests to appoint another lawyer, the Italian Court refused as a result of which the applicant had to defend himself in person.

When defending his rights before the European Court of Human Rights the applicant referred to Article 6.3.c of the European Convention. The Italian government responded that Italy performed its obligations under the Convention when it appointed a lawyer to the applicant but could not be required to take additional measures under the Convention. The government of Italy pointed out that under the Convention a state is not obliged to appoint another lawyer because the appointment of a substitute lawyer is not guaranteed by the Convention.³⁹

The European Court of Human Rights was not convinced with the position of the Italian government and pointed out:

“The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive [...]. As the Commission’s Delegates correctly emphasized, Article 6. 3.c speaks of “assistance” and not of “nomination”. Mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government’s restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) and

³⁸ *Airey v. Ireland*, 9 October 1979, Series A No.32, para. 26. For comparison see Article 47.2 of the Civil Procedure Code of Georgia, according to which “if a party can not afford lawyer’s fee the court has the right to invite upon that party’s solicitation a lawyer at the state’s expense if it is reasonable to involve a lawyer in this proceedings due to the significance and complexity of the case under consideration.”

³⁹ *Merrills*, *The Development of International Law by the European Court of Human Rights*, 1993, 99.

the structure of Article 6 taken as a whole, because in many instances free legal assistance might prove to be worthless".⁴⁰

The effective interpretation of the European Convention on Human Rights is linked with the state's positive obligation to guarantee those rights envisaged by the European Convention. For effective provision of all rights and freedoms under the European Convention by the state it should take not only negative but sometimes positive measures as well for the provision of these guarantees.

To illustrate a positive obligation the case of *Plattform "Ärzte für das Leben" v. Austria* concerning the violation of Article 11 (freedom of assembly and association)⁴¹ of the Convention is of particular importance. In this case the European Court held that effective enjoyment of the right under Article 11 of the Convention cannot be reduced to a mere duty on the part of the state not to interfere. By interpreting the right under Article 11 on the basis of the principle of effectiveness, the Court held that the state is obliged to take reasonable and appropriate measures to ensure peaceful conduct of legitimate demonstration including defending demonstrators against the physical violence of their opponents.⁴²

These examples illustrate the principle of effectiveness set by the European Court, according to which any provision of the Convention is interpreted in a way to ensure the effective protection of human rights.

3.4 The Principle of Proportionality

The European Court of Human Rights also applies the principle of proportionality on the basis of which it strikes a balance between public and private interests.⁴³ Many provisions of the Convention envisage a restriction of human rights provided that the principle of proportionality is observed in addition to meeting other conditions set by the Convention. Under this principle, the restriction of any right must be proportional to the achievement of one of the aims set forth under the Convention.

Numerous provisions of the European Convention and its Protocols provide for the necessity to observe the principle of proportionality. These include the provisions of paras. 2, Articles 8-11 of the Convention pursuant to which a restriction of a human right must be "necessary in a democratic society".⁴⁴ The principle of proportionality is also applied with regard to Article 15 of the Convention concerning the protection of human rights in time of

⁴⁰ *Artico v. Italy*, 13 May 1980, Series A No.37, para. 33.

⁴¹ 1988, Series A No.139.

⁴² 1988, Series A No.139, para. 32. On the Georgian judicial practice see *Korkelia*, State's Positive Obligation in Securing Protection of Human Rights, *Georgian Law Review*, 5/2002, 404-408.

⁴³ *Starmer*, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, 169-176; *Plowden/Kerrigan*, *Advocacy and Human Rights: Using the Convention in Court and Tribunals*, 2002, 39-40.

⁴⁴ *Eissen*, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in: *The European System for the Protection of Human Rights*, Macdonald/Matscher/Petzold (Eds.), 1993, 126.

war or other public emergency⁴⁵ and to Article 14 of the Convention prohibiting discrimination.⁴⁶ Although Article 14 of the Convention does not explicitly stipulate that all discriminatory treatment should not be deemed as a violation of the Convention's requirements, it is wrong to assume that all differential treatment violates this article of the Convention. A state must prove that discriminatory treatment is proportional to the restriction of human rights towards certain categories of persons.

Apart from some rights that are of an absolute character, the provisions of the European Convention on Human Rights require that a balance be made between opposing rights and interests in particular circumstances. The Convention provides different conditions for setting such a balance: such restrictions should be prescribed by the law, pursue legitimate aims and a restriction of a right must be proportionate to the aim pursued. Among these three conditions the principle of proportionality is particularly important.

In determining whether a restriction of human rights is necessary to achieve a legitimate aim⁴⁷ or whether a restriction of human rights in time of emergency/war is proportionate to the exigency of the situation, it is clear that the balance should be struck between the rights and interests of the parties. When striking a balance the restriction of human rights derives from a "pressing social need".

In its case-law the European Court of Human Rights has pointed out that the balance between a person's right and the public interest may be struck only if restriction of person's right is strictly proportionate to a legitimate aim that the state wishes to achieve by making the restriction. When a state restricts human rights it must prove that the measure taken is appropriate and necessary to achieve a legitimate aim as prescribed by the European Convention.⁴⁸

The European Court of Human Rights has set several criteria to work this out. For example, if a state can achieve a legitimate aim by taking a less strict but equally effective measure then taking a stricter measure will be considered unjustified and not proportionate to the achievement of the aim pursued. In the case of *Campbell v. the United Kingdom* the European Court held that opening of all prisoners' letters to check whether they contained banned material was not proportionate because taking a less strict measure – opening only those letters that might contain such materials would be sufficient to achieve the legitimate aim.⁴⁹

⁴⁵ *Korkelia*, Protection of Human Rights in Time of Emergency: Comparative Analysis of the European Convention on Human Rights and Fundamental Freedoms and the Georgian Legislation, *Georgian Law Review*, 3/4, 2000, 61-79.

⁴⁶ *Cremona*, The Proportionality Principle in the Jurisprudence of the European Court of Human Rights, *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt, Beyerlin/Bothe/Hofmann/Petersmann*, 1995, 323-324.

⁴⁷ For example, in the interests of national security, public safety or the economic well-being of the country, or the protection of health or morals, or of the rights and freedoms of others.

⁴⁸ *Jersild v. Denmark*, 23 September 1994, para. 31.

⁴⁹ *Starmer*, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, 173.

3.5 The Doctrine of the Margin of Appreciation

The principle of proportionality is closely linked to the doctrine of the margin of appreciation. The European Commission and the Court have often pointed out that countries have “a margin of appreciation” with regard to the protection of rights under the Convention.⁵⁰ The contracting states have a certain freedom to determine restrictions of rights and freedoms that are necessary due to tradition and cultural specificities.⁵¹ The European Court takes these specificities into account when determining whether a state has guaranteed rights under the Convention.⁵² In addition the European Court has stated that such freedom is not unrestricted and is subject to supervision by the European Court.

Thus, the European Court takes the doctrine of the margin of appreciation into account when determining whether a restriction of human rights by a state is admissible. The Court may hold that a state has a margin of appreciation because the restriction does not exceed a prescribed margin. In other words the restriction is proportionate to the legitimate aim pursued by the Convention.

Should Georgian courts apply the doctrine of the margin of appreciation in determining legality of a restriction of human rights?

National courts (and administrative authorities) should take into account the peculiarity of this doctrine. The doctrine was created by the European Court to identify *differences between European countries* when it comes to assessing the legality of restrictions of human rights and freedoms.⁵³ For example, the European Court might consider a restriction of a right under the Convention in one country legally unjustified while justified in another country due to a pressing social need in the latter country.

However, Georgian courts must take into account the essence of this doctrine when applying the case-law of the European Court. If in its case-law the European Court has found that a restriction of a certain right is admissible in some country given a pressing social need, Georgian courts should not automatically consider that this is admissible in Georgia too. A pressing social need to restrict such a right might not exist in Georgia and accordingly restricting that right must be deemed unjustified and inadmissible.

⁵⁰ Macdonald, The Margin of Appreciation, in: The European System for the Protection of Human Rights, Macdonald/Matscher/Petzold (Eds.), 1993, 83 *et seq.*

⁵¹ Bernhardt, Thoughts on the Interpretation of Human-Rights Treaties, in: Protecting Human Rights: The European Dimension, Studies in Honour of Wiarda, Matscher/Petzold (Eds.), 1988, 68

⁵² *Inter alia*, Handyside v. the United Kingdom, 7 December 1976, Series A No.24; Dudgeon v. the United Kingdom, 22 October 1981, Series A No.45.

⁵³ Bernhardt, Human Rights and Judicial Review: The European Court of Human Rights, in: Human Rights and Judicial Review: A Comparative Perspective, Beaty (Ed.), 1994, 309; Plowden/Kerrigan, Advocacy and Human Rights: Using the Convention in Court and Tribunals, 2002, 105-107; See also case considered by the Lords Chamber of Great Britain *R v. DPP ex p Kebilene and Others*, 2000, 2 AC 380H.

4. The Practice of States with regard to Interpretation of the Provisions of the European Convention on Human Rights

In interpreting the provisions of the European Convention on Human Rights, Georgian courts must take account of both general principles of international law and the rules of interpretation set by the European Court of Human Rights. Also they must take into account the practice of other European countries in interpreting international treaties, including the European Convention on Human Rights.

4.1 The Principle of Interpretation

One of the most significant principles that the courts of European countries apply when interpreting international treaties including the European Convention on Human Rights is the "principle of interpretation".⁵⁴ Under this principle if a court finds an incompatibility between national legislation and the European Convention, it will try to interpret its national law in such a way to comply with international obligations.⁵⁵ In this way the court ensures interpretation of national legislation that avoids violation of a state's international obligations.⁵⁶

From this same principle it also proceeds that if a domestic court can give a double interpretation to domestic law it must interpret it in a way that best suits the rights and freedoms guaranteed by the European Convention.⁵⁷

The principle of interpretation has been formed differently in the European countries. In some countries this principle was formed on the basis of a normative act while in others on the basis of judicial practice. Article 91(2) of the Constitution of Poland stipulates that an international treaty shall have precedence over laws if the law cannot be reconciled with the provisions of such a treaty. This rule implies that if compliance of a law with a treaty is doubtful, the Polish court will try to interpret the law in a way to comply with the respective international treaty. If a court considers such interpretation impossible it will give priority to the ratified international treaty.⁵⁸ Article 3(1) of the Human Rights Act of the United Kingdom (1998) specifies that as far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights.⁵⁹

⁵⁴ *Polakiewicz*, The Implementation of the ECHR and of the Decisions of the Strasbourg Court in Western Europe: An Evaluation, The Domestic Implementation of the European Convention on Human Rights in Eastern and Western Europe (eds. *Alkema/Bellekom/Drzemczewski et al.*), 1992, 153.

⁵⁵ *Mikkelsen*, The Implementation in National Law of the Rights and Freedoms Embodied in the European Convention on Human Rights, in: The Implementation in National Law of the European Convention on Human Rights, Proceedings of the Fourth Copenhagen Conference on Human Rights, 28-29 October, 1988, 1989, 8.

⁵⁶ *Nørgaard*, Danish Perspectives on Incorporation of the Convention, in: Aspects of Incorporation of the European Convention of Human Rights into Domestic Law, *Gardner* (Ed.), 1993, 42.

⁵⁷ *Jensen*, The European Convention on Human Rights in Scandinavian Law: A Case Law Study, 1992, 110.

⁵⁸ *Garlicki*, The European Convention on Human Rights and its Application before National Court, written contribution made at the Annual Judicial Training Centers Meeting, 28-29 April 2002, Tbilisi, Georgia, 3.

⁵⁹ For the text of the Human Rights Act see *Starmer*, European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights, 1999, 718 *et seq.*

In other states the principle of interpretation was formed by judicial practice. In the practice of German courts a rule was introduced according to which German legislation must be interpreted in a way to ensure Germany's international obligations.⁶⁰ In its decision the Federal Constitutional Court pointed out that one of the tasks of the court is to provide interpretation of the legislation that avoid violating the country's international obligations, and international legal responsibility.⁶¹ Italian courts also frequently apply the principle of interpretation.⁶²

The scope of application of the principle of interpretation is restricted. It is applied only when it is possible to interpret a normative act in a way to avoid violating international obligations undertaken by the state. Despite this principle, the incompatibility between domestic normative acts and the European Convention could be so obvious that it would be impossible to apply the principle of interpretation. In such a situation the national court must apply the act (European Convention or national legal act), which stands higher in the legal hierarchy.

4.2 The Principle of Presumption

The principle of presumption is closely linked with the principle of interpretation. Under the principle of presumption national courts presume that the legislature does not wish to adopt domestic laws that contradict the international agreements⁶³ and in particular the European Convention on Human Rights.⁶⁴ Many European countries apply the principle of presumption to avoid violating obligations under the European Convention.⁶⁵

To illustrate this principle the Law of Georgia on Healthcare may be referred to as an example. This Law concerns, *inter alia*, access to the information about health. Article 7 of the Law specifies that "every Georgian citizen has the right ... to receive comprehensive and impartial information ... about his/her own health". Considering that Article 14 of the European Convention and the Protocol 12 thereto prohibits discrimination on any ground,⁶⁶

⁶⁰ *Simma/Khan/Zöckler/Geiger*, The Role of German Courts in the Enforcement of International Human Rights, in: *Enforcing International Human Rights in Domestic Courts*, *Conforti/Francioni* (Eds.), 1997, 94.

⁶¹ Case BVerfGE 58, 34. Cited. *Frowein*, Federal Republic of Germany, in: *The Effect of Treaties in Domestic Law*, *F. Jacobs/S. Roberts* (Eds.), 1987, 69.

⁶² *Bianco v. Institute Nazionale della Previdenza Sociale and Istituto Nazionale per l'Assicurazione contro le malattie*, No. 527/1979, 5 *Italian Yearbook of International Law*, (1980-1981), 266.

⁶³ *Frowein*, International Law in Municipal Courts, *American Society of International Law*, Proceedings of the 91st Annual Meeting 1997, (1998), 291.

⁶⁴ *Rodríguez*, The European Convention on Human Rights in the Domestic Legal Order of Italy and Spain: A Comparison, in: 49 *Jahrbuch Des Öffentlichen Rechts Der Gegenwart* 2001, 392; *Jensen*, The European Convention on Human Rights in Scandinavian Law: A Case Law Study, 1992, 14-15.

⁶⁵ *Polakiewicz*, The Application of the European Convention on Human Rights in Domestic Law, 17 *Human Rights Law Journal*, N11-12, 1996, 410. See also *Gauksdóttir*, Iceland, in: *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000)*, *Blackburn/Polakiewicz* (Eds.), 2001, 402-403.

⁶⁶ Together with other international treaties see International Pact on Civil and Political Rights and Protocol 12 to the European Convention on Human Rights. The latter, although ratified by Georgia, is not yet put into effect for it is not ratified by sufficient number of states.

one could argue that this provision stipulates discriminatory treatment against permanent residents in Georgia, stateless persons and other foreign nationals.⁶⁷ If every Georgian citizen has the right to obtain comprehensive and impartial information on his/her own health, the permanent residents in Georgia and foreign nationals either do not have the right to obtain information about their health at all or they do have such right but information might not be comprehensive and impartial.

Such an interpretation of this provision certainly contradicts international treaties on human rights, including the European Convention. As the court must try to interpret Georgian legislation, including the term "citizen" so that it does not violate international obligations, then the definition of the term "citizen" must cover not only Georgian citizens but any individual including permanent residents in Georgia and other foreign nationals too.⁶⁸

Another example can be proffered. According to Article 14 of the Constitution of Georgia "Everyone is born free and is equal before the law, regardless of race, colour, language, sex, religion, political and other beliefs, national, ethnic and social origin, property and title of nobility or place of residence". Unlike this Article of the Constitution Article 14 of the European Convention in addition prohibits discrimination on the grounds of "birth". While the Constitution exhaustively lists the grounds for discrimination, the European Convention refers to "other status" too.⁶⁹ If a judge guides himself with the principle of presumption, namely if he interprets the provisions of the Constitution and European Convention so that they are not incompatible with each other, the Court's decision will as much as possible effectively protect the rights of legal and natural persons.

Thus, the principle of presumption must be implemented in the Georgian judicial practice according to which the body adopting the normative act does not aim to violate Georgia's international obligations.⁷⁰

4.3 Autonomous Interpretation of the Provisions of the European Convention by the National Courts

As already mentioned the European Court of Human Rights interprets autonomously the principles and legal terms of the European Convention on Human Rights. They might not coincide with the meaning national legislation may give to these principles

⁶⁷ Report of Ombudsman of Georgia on the Situation of Protection of Human Rights and Freedoms in Georgia: First Half of 2001, Tbilisi, 2001, 45.

⁶⁸ See also Article 35.1 of the Georgian Constitution, according to which *everyone* has the right to education and Para. 3 of this Article, which stipulates that *citizens* have the right to get secondary, vocational and higher education free of charge at the state educational institutions. For details see: Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, HRCAD(2001)2, 2001, 120-121, 130-131.

⁶⁹ Study on the Compatibility of Georgian Law with the Requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, HRCAD(2001)2, 2001, 64.

⁷⁰ *Korkelia*, The Role of Court in the Application of International Treaty, "An Individual and Constitution", No.1, 1998, 108.

and legal terms. So, when applying the principles and terms envisaged in the European Convention domestic courts must apply methods established not on a national but rather on an international (European) level.⁷¹ Unless a national court applies these principles and methods to interpret the provisions of the European Convention on Human Rights, most probably the court will interpret it differently than the European Court.⁷²

The application of methods set by national legislation when interpreting the European Convention on Human Rights (as well as international treaties on human rights in general) is one of the key causes for the wrong interpretation of the provisions of the Convention.⁷³ Since the European Convention on Human Rights is declared a part of a country's legislation, domestic courts tend to unconsciously apply the methods for interpreting the domestic legislation when interpreting the provisions of the Convention.⁷⁴

The same term can have different meanings under the European Convention and under Georgian legislation. Additionally their scope might not fully coincide.⁷⁵ For this reason a national court must interpret the European Convention in the meaning it is given by being an international act and not in the meaning of Georgian legislation. Although the European Convention is an integral part of Georgian legislation, the provisions of the Convention must still be interpreted by principles that are in general established by international law and the European Court of Human Rights.

Not only states' practice but also scholarly research proves that international treaties are to be interpreted by methods that international courts (bodies) apply. The International Law Institute in studying the role of national judges in a country's international relationship, pointed out in its 1993 Resolution that national courts must interpret international treaties in the way they are interpreted by international tribunals.⁷⁶ An international conference devoted to the role of national judges in the application of international law norms stated that a judge must interpret domestic law in such a way that it is in accordance with the international treaty and other sources of international law.⁷⁷

⁷¹ *Stamer*, European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights, 1999, 18; *Gauksdóttir*, Iceland, in: Fundamental Rights in Europe: The European Convention on Human Rights and its Member States (1950-2000), *Blackburn/Polakiewicz* (Eds.), 2001, 405.

⁷² *Scovazzi*, The Application by Italian Court of Human Rights Treaty Law, in: Enforcing International Human Rights in Domestic Courts, *Conforti /Francioni* (Eds.), 1997, 63-64.

⁷³ *Velu*, Report on "Responsibilities for States Parties to the European Convention", in: Proceedings of the Sixth International Colloquy about The European Convention on Human Rights, 13-16 November 1985, 1988, 592.

⁷⁴ Second Report, Committee on International Law in National Courts, International Law Association, 1996, 12.

⁷⁵ *Schreuer*, The Interpretation of Treaties by Domestic Courts, 45 *British Yearbook of International Law* 1971, 264.

⁷⁶ Resolution of the Institut de Droit International on "The Activities of National Courts and the International Relations of their State" (7 September 1993), Para. 5.3, Institut de Droit International, *Annuaire*, Vol. 65, Tome II, Session de Milan 1993, 323.

⁷⁷ "The Judge and International Law", Bucharest, 28-30 November 1995, Conclusions of the Conference, "Right to Fair Trial", publication of the Georgian Young Lawyers' Association, Tbilisi, 2001, 187.

5. Mechanisms to Interpret Properly the European Convention by National Courts

The above analysis demonstrates that states have established several principles to interpret the European Convention. What kind of measures should be taken in Georgia to introduce principles and methods in judicial practice to interpret the European Convention?

5.1 Adoption of Recommendation on Interpretation of the Provisions of International Instruments including the European Convention

State practice varies in terms of the proper interpretation of the provisions of the European Convention by national courts. Despite such differences a significant role in the introduction of the practice of the proper application of international treaties in most states is played by the courts of high instance.⁷⁸ In some states supreme courts adopt guidelines or recommendations for lower courts on the principles and methods established at an international level including by European Court and on the basis of which the provisions of the European Convention on Human Rights should be interpreted. It also provides guidelines on the principles by which courts must interpret the provisions of the European Convention so as not to violate the state's international obligations.⁷⁹ For example, in 1995 the Supreme Court of Russia adopted a decree to support the introduction of the practice of the application of international treaties by Russian courts.⁸⁰

In Georgia under the legislation that existed before judicial reform the Supreme Court was entitled to adopt a decree by which it would interpret the contents of a normative act and which was legally binding for lower courts. Now the Supreme Court does not have such a right. The Supreme Court is not entitled to adopt even a recommendation that interprets for general courts the principles and methods by which they should be guided when applying international acts including the European Convention on Human Rights. Even though the Supreme Court is not entitled to adopt such an act the Scientific-Consultative Council established at the Supreme Court to support proper court practice may play a significant role in this respect.⁸¹ Although this Council has the competence to elaborate only recommendatory acts it could be presumed that its recommendations will positively influence the establishment of the practice of the proper application of international treaties including the European Convention.

⁷⁸ Compatibility of Hungarian Law with the European Convention on Human Rights: Preparatory Work Prior to Ratification, March 1995, H(95)2, Para. 8.

⁷⁹ The Effect of Treaties in Domestic Law, *Jacobs/Roberts* (Eds.), 1987.

⁸⁰ *Danilenko*, International Law in the Russian Legal System, American Society of International Law, Proceedings of the 91st Annual Meeting 1997, (1998), 297.

⁸¹ See the Statute of Scientific-Advisory Council of the Supreme Court of Georgia (new edition), available on website of the Georgian Supreme Court: www.supremecourt.ge.

5.2 Executive Advice

The Office of the General Representative of Georgia to the European Court of Human Rights established at the Ministry of Justice of Georgia could also contribute to the introduction of the practice of the application of the European Convention by Georgian Courts. This Office, which represents the government before the European Court of Human Rights, is competent on the European Convention and the case-law of the European Court. If a general court believes that its decision might lead to a violation of human rights standards as prescribed by the European Convention, it must be free to apply to this Office to obtain advice. In this way a court may obtain advice on the standards of protection of human right set by the European Convention and the case-law of the European Court as well as on the interpretation of a provision of the Convention by the European Court, whether the Convention protects a particular right (which often is manifested only from the case-law of the European Court and not from the text of the Convention), or whether a restriction of any right meets the standards set by the Convention. This conclusion may also explain the European Court's position taken with regard to similar cases.

It should be emphasised that the advice of the Office of the General Representative can only be recommendatory. The legally binding nature of such advice would infringe upon the independence of the courts.⁸² Certainly courts must be entitled to independently interpret and apply the European Convention (as well as international treaties in general).

The receipt of advice from the executive is acknowledged in the study of the International Law Institute concerning the role of courts in a state's international relationship. The Resolution of the Institute reads, *inter alia*, that courts should not be precluded from consulting with the executive, as long as the opinion is not legally binding.⁸³

It should be noted that the European Court of Human Rights has considered this practice. This once again proves how rich the case-law of the European Court is. In the case of *Beaumartin v. France* concerning the conduct of an independent trial, the French administrative court applied a legally binding decision of the Ministry of Foreign Affairs of France when making a decision on the case. The European Court held that there had been a breach of Article 6 in that the applicants' case was not heard by an independent "tribunal".⁸⁴

Both setting up of an advisory group and the establishment of practice of adoption of advisory conclusions should probably be temporary measures. As soon as the practice

⁸² *De Rochère*, France, in: *The Effect of Treaties in Domestic Law*, *Jacobs/Roberts* (Eds.), 1987, 51-52.

⁸³ Resolution of the Institut de Droit International on "The Activities of National Courts and the International Relations of their State" (7 September 1993), Para. 5.3, Institut de Droit International, *Annuaire*, Vol. 65, Tome II, Session de Milan 1993, 321.

⁸⁴ *Beaumartin v. France*, 24 November 1994, Series A no. 296-B, para. 38; *Frowein*, *International Law in Municipal Courts*, *American Society of International Law, Proceedings of the 91st Annual Meeting 1997*, (1998), 292; Report of the Sixty-Eighth Conference, *International Law Association* (1998), 1998, 669-670.

of the proper interpretation of the European Convention is introduced in Georgian courts such advice from the executive will no longer be required.

5.3 Establishment of an Advisory Group on the European Convention

The proper interpretation of the European Convention by Georgian courts will be promoted by the establishment within the Supreme Court of an advisory group composed of experts. This will be authorised to receive requests of courts to issue advice.⁸⁵ Unlike the Consultative-Scientific Council the advisory group on European Convention could have the authority to issue conclusions with regard to concrete court cases, although its recommendations should not be legally binding for the court.

6. Conclusion

From the issues dealt here several conclusions can be drawn with regard to interpretation of the European Convention on Human Rights by the Georgian courts. Although the Convention has become a part of Georgian legislation courts must interpret the Convention by principles set under the international law in general and by the European Court. Otherwise, Georgian courts might interpret the Convention and protocols in a more narrow meaning but as a result legal and natural persons would not fully enjoy the rights guaranteed by the European Convention.

The Convention's interpretation in the light of its purpose and object is particularly important among the general principles of interpretation set by international law. As for the principles of interpretation set by the European Court, Georgian courts must take into account the principles such as evolutionary (dynamic) interpretation, autonomous interpretation, effective interpretation, proportionality of the provisions of the Convention as well as the doctrine of the margin of appreciation. Georgian courts must also consider the principles of interpretation that are implemented in the judicial practice of European countries, particularly the principles of interpretation and presumption.

Several proposals can be made to establish the practice of the proper interpretation of the European Convention. Among various proposals that might be made in this respect, particular emphasis should be given to the adoption of recommendations to improve the practice of interpretation of the provisions of the international acts including the European Convention on Human Rights, obtaining of advice from the executive and establishing an advisory group on the European Convention authorised to issue advisory conclusions with regard to concrete litigation on the European Convention and case-law of the European Court.

Whichever proposal is supported, it remains of paramount importance for the Georgian judicial system to implement from the very beginning the proper judicial practice of the interpretation and application of the international acts including the European Convention on Human Rights.

⁸⁵ Report of the Sixty-Eighth Conference, International Law Association (1998), 1998, 668.