IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS BY NATIONAL COURTS

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I. Introduction

There is no doubt that implementation of existing international human rights norms is currently more important than adopting new international human rights instruments. The process of implementation should go on both international and municipal levels and should first and foremost concern the application of international human rights norms in domestic court practice. It is in national courts that millions of human fates are faced each day on the whole planet, and these millions of people look with expectations not only at their national constitutions and laws, but also – and sometimes even with greater hope – at international human rights standards that should be observed. If not, they may have international courts in reserve which though not as quickly as is desired might bring justice home. Although the international courts significance "is pale compared with that of their domestic counterparts, such tribunals offer a convenient point of departure towards an understanding of international law and process."[1] The European Court of

1 *D. F. Vagts, H. H. Koh, H. J. Steiner*, Steiner, Vagts and Koh's Transnational Legal Problems, Materials and Texts, 4th ed., 1994, 227.

Human Rights (hereinafter ECHR) is one of such courts at which many unjustly indicted by domestic courts expect to find justice. All Ukraine is now following *Lutsenko vs. Ukraine* and *Tymoshmko vs. Ukraine* cases in the ECHR with the majority having no doubts that the decision would be against Ukraine. This situation could have been avoided if domestic courts in Ukraine had applied norms of the 1950 Convention for the Protection of .Human Rights and Fundamental Freedoms (hereinafter the European Convention).

Though individuals of many states may exercise their right to international judicial defence, many aspects of human rights and fundamental freedoms remain in die inner competence of states, and guaranteeing of even international human rights standards remains mostly an internal affair of a state. In this respect the role of national courts is crucial as they play the most important role in enforcement of law. As Igor Lukashuk stated this role is determined by the place of a court within the system of bodies of state power, the general position of a state towards international law; and by the level of international legal consciousness of society.[2]

In this chapter I will analyze theoretical aspects of correlation of international and municipal law and problems of implementation of international treaties in domestic legal order with main attention paid to municipal practice regarding application of international human rights instruments by domestic courts. Special emphasis will be on the implementation of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention), and the European Convention by domestic courts. The former Soviet Union republics' case law will be given main attention.

I. General Problems of Implementation of International Law in the Internal Legal Order

1. Application of International Law in the Municipal Law Systems

Though international human rights are concentrated in international norms, procedures and institutions, they are also directly connected with domestic law systems as international treaties become valid in states due to national, laws on implementation, and human rights protection is committed primarily by national courts. As Volodymyr Denysov observes, "it is in national law system that a great mass of abstract norms of international law obtains real vital meaning both for the state and for the international community as a whole".[3]

2 *И.И. Лукашук,* Осуществление международного права: суд, личность, общественность, Моск. журнал межд. права 1 (1993), 113.

3 *В. Денисов,* Міжнародне право як складова частина правової системи України, in: Проблеми гармонізації законодавства України з міжнародним правом. Матеріали науково-практичної конференції, 1998, 64.

The issue of correlation of international and domestic law is complicated and well-researched by scholars. Different scholarly opinions for many decades have ranged "from the view, at one extreme, that international law is not law at all but mere rules of international morality, through varying version of dualism or pluralism, to a monistic conception, at other extreme, that international law dictates the content of national law.[4]

a) Monistic Concepts

The essence of monistic concepts lies in recognition of unity of both international and national law. Both of them are considered to be parts of one law system. However, some adherents of monistic concepts support primacy of state law, others — primacy of international law. The latter one has been more substantially grounded in international law doctrine. As fairly stated by J.G. Starke, "the thesis of the ultimate primacy of State law breaks down in two crucial cases: (a) If international law drew its validity only from a State Constitution, it would necessarily cease to be in force once the Constitution on which its authority rested disappeared. But nothing is more certain than that the valid operation of international law is independent of change or abolition of Constitutions, or of revolutions.... (b) The entry of new States into the international Society. It is well established that international law binds the new State without its consent, and such consent if expressed is merely declaratory of the true legal position."[5] It definitely refers to generally recognized principles of international law and international customary law, as international treaties need states' consent for their application.

b) Dualist Theories

The dualist theory which prevails among lawyers was concisely formulated by L. Oppenheim: "Neither can International *Law per se* create or invalidate Municipal haw, nor can Municipal Law *per se* create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different-bodies of law which have nothing in common except that they are both branches — but separate branches — of the tree of law. Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become *ipso facto* rules of Municipal Law."[6] Last decades were marked by greater interest among western international lawyers to dualist conception and deviation from the monistic theory. As Ian Brownlie wrote (analysing Hersch Lauterpacht's monistic theory), monism is antipathetic to the

4 *D. F. Vagts, H. H. Koh, H. J. Steiner,* (note 1), 575.

5 *J.G. Starke,* An Introduction to International Law, 5th ed., 1963, 71.

6 *L. Oppenheim,* Introduction to Picciotto, Cyril Moses (1888-1940), 1915, 10.

legal corollaries of the existence of sovereign states, and reduces municipal law to the status of pensioner of international law.[7]

W. Friedmann, also having in mind the adherent of monistic theory H. Lauterpachr, noted that followers of monistic view try to prove, despite of the facts that demonstrate the opposite, that international law as such incorporates into the English law[8] Q. Wright wrote that it is necessary ro accept the dualistic point of view. International courts apply international law, national courts — national law.[9]

There exist different dualistic concepts of correlation of international and municipal law Under the positivist theory, "the rules of international law cannot directly and ex proprio vigore be applied within the municipal sphere by State Courts or otherwise; in order to be so applied such rules must undergo a process of specific adoption by, or specific incorporation into, municipal law. Since, according to positivist theory, international law and State law constitute two strictly separate and structurally different systems, the former cannot impinge upon State law unless the latter, a logically complete system, allows its constitutional machinery to be used for that purpose."[10] Thus under positivist approach international law may not interfere into municipal law unless the latter allows it.

Under another dualistic conception there goes transformation of international law into domestic law. Such a conception has been adopted in Finland where an international treaty has to be "transformed" into national law to become law applicable in domestic courts. As M. Pellonpaa writes, "since customary international law can be left aside, the influence of international law on domestic law is then a question of the effectiveness of the transformation of treaties. In regard to Finland … they are transformed (or incorporated) as such into Finish law by what are called "bianco" enactments; i.e. pieces of legislation (or administrative acts) in which the treaty is simply given the status of national law. The hierarchical position of the municipal norms thus produced depends on the contents of the treaty in question. If the instrument "belongs to die sphere of legislation", which primarily means that the treaty provisions deviate from some existing act of Parliament, they also have to be transformed through a statute enacted by Parliament. Moreover, if the conflict between the treaty and the domestic law affects some provisions of constitutional nature, a special procedure for constitutional deviations may be needed also for the enactment of the "bianco statute"... In practice many treaties, for example the Covenant on Civil and Political Rights, have been transformed both by a statute and a decree: those provisions which belong

8 *W. Friedmann,* Legal Theory, 5th ed., 1967, 577.

9 *Q. Wright,* Treaties as Law in National Courts, Treaties and Executive Agreements. Hearing before the Subcommittee on the Judiciary, Washington (D.C.), 1958, 476.

10 *J.G. Starke,* (note 5), 72.

11 *M. Pellonpää,* Expulsion in International Law: A Study in International Aliens Law and Human Rights with Special Reference to Finland, 1984, 481–482.

The conception of transformation of international legal norms into domestic legal norms has been widely researched in international law doctrine in light of correlation of international and national law. It is evident that the theory of "transformation" as "a way of enforcing international law by means of enacting domestic normative acts by a state … to provide fulfilling her international obligation"[12], as a norm creative process correctly reveals the essence of formal legal correlation of two law systems, however the term "transformation" is disputable. Thus A. Khachaturian considers that this term is absolutely inadequate to the process that goes on while transformation. Norms of two law systems cannot transform into each other because of their absolutely different nature and destination. In any case they remain the norms of the law system in which they appeared.[13] V.V. Rudnitskiy is of die same view as "transformation" literally means conversion (reorganization) of international legal norms which does not happen. "In fact there goes national legal reception of the main content of international legal norm which is often accompanied by its addition, concretization and adaptation to conditions of a new law system and society. This process is not enforcing of an international legal norm in a strict legal sense.[14]

The transformation theory has been opposed by the delegation theory according to which "there is delegated to each State Constitution by constitutional rules of international law, the right to determine when the provisions of a treaty or Convention are to come into force and the manner in which they are to be embodied in State law"[15]" By constitutional rules of international law the generally recognized principles and norms are meant.

Some states may be monistic in relations to international customary law (i.e. open to its application) and dualistic in relation to a treaty (i.e. closed to its direct application).[16]" In the USA such an approach was confirmed already in the decision of the Supreme Court of the USA in 1900 in *Tlx Paquete Habana* Case, where it was ruled that if there is no treaty and no controlling executive or legislative act or judicial decision, resort must be made to the customs and usages of civilized nations.[17]

Along with the above mentioned monistic and dualist theories there exists another modern doctrine of international law based upon theories of

12 *Е.Т. Усенко,* Теоретические проблемы соотношения международного и внутригосударственного права, in: Сов. ежегодник межд. права, 1977.– М., 1978, 69.

13 *А.Г. Хачатурян,* Унификация коллизионных норм в международном частном праве, Київ, Наукова думка, 1993, 29.

14 *В.В. Рудницкий,* Имплементация международных норм о правах человека в конституционном праве государств – членов ООН, in: Международное сотрудничество государств в области прав человека, 1987, 55.

15 *J.G. Starke,* (note 5), 73.

16 *Г.М. Даниленко,* Международная защита прав человека. Вводный курс: Учеб. пособие, 2000, 58.

17 *The Paquete Habana*, 175 U.S. 677 (1900).

"harmonization of two law system", "priority of international law over domestic law" or "primacy of international law" which as V. Denysov writes "reject monistic and dualist theories that may not be recognized in the existing conditions of unity of international community approach to interaction of international and domestic law."[18] This is a doctrine of parallel application of international and domestic legal norms which is mostly used in newly independent states undergoing transformation of their legal systems from monistic to dualist ones.

2. **Application of International Treaties in the Domestic Legal Order**

The issue of application of international law in the domestic legal order includes three aspects: 1) application of international treaties; 2) application of international customary norms; 3) application of decisions of international judicial and control bodies in national jurisprudence. State practice of application of international law norms depends upon law system in general (Anglo-Saxon, continental, practice of the USA and some other states which have their specific features) and upon state's law on implementation.

All international human rights instruments aim first and foremost at ensuring the rights incorporated in them at the municipal level, not that much (though naturally additionally to) in judicial and control bodies at the international level. It goes without saying that efficacy of international human rights instruments is determined by their observance and application in national legal systems. This, in its turn, depends upon the state legislation and die application of international legal norms by national courts. On the one hand, under the 1969 Vienna Convention on the Law of Treaties, the state may not invoke the provisions of its internal law as justification for its failure to perform a treaty (article 27).[19] On die other hand, the Permanent Court of International justice and its successor the International Court of Justice have usually reached their solutions after very careful examination of the relevant municipal law.

Ratification or other means of expressing state's consent to be bound by a treaty do not always mean its automatic application in the domestic legal order and states' practices differ. Scholars (in Ukraine and abroad) have widely researched implementation of international legal acts into national law systems,[20] however it

18 *В. Денисов*, Міжнародне право як складова частина правової системи України, in: Проблеми гармонізації законодавства України з міжнародним правом. Матеріали науково-практичної конференції, 67.

19 Vienna Convention on the Law of Treaties, (1969) 1155 U.N.T.S. 331, in force 1980.

20 See: *В. Євінтов*, Пряме застосування міжнародних стандартів прав людини (Коментар до ст. 9 Конституції України), Укр. часопис прав людини 1 (1998), 27; *В.П. Паліюк*, Рішення Європейського суду з прав людини і практика розгляду цивільних справ судами України, Вісник Верховного Суду України 2 (2001), 53–56; *П. Рабінович, Н. Раданович*, Імплементація міжнародних договорів в Україні та гармонізація з ними національного законодавства (деякі

would be interesting to compare such state practices of implementation of international human rights norms into case law, in particular, in such states as the United Kingdom of Great Britain and Northern Ireland, Ireland, the USA, The Russian Federation, and Ukraine which represent different law systems and in which different means of implementation are used. The concept of "case law" will not be analyzed here and the broad definition of court practice will be used to determine the results of activity of all levels of court system in a state.

a) British Practice

As is well known court practice of states concerning application of international treaties depends upon different factors.[21] Thus courts of the United Kingdom of Great Britain and Northern Ireland refer only to those international legal acts which are incorporated into municipal law by adopting relevant (proper) domestic acts. This is the result of the British practice as to treaties conditioned "by the constitutional principles governing the relations between die Executive (that is to say, the Crown) and Parliament."[22] Since the power to make and to ratify treaties belongs to the Crown, any treaty which requires a change in English law in order to make that law conform with the provisions of the treaty, and thus ensure that those provisions are cognizable and. enforceable in the English courts, requires that die necessary legislation be enacted. [23]

However most treaties, as for example treaties concerning individual rights of British citizens need to be approved by the Parliament with the relative act. The British court practice has also preserved some elements of the incorporation doctrine concerning the customary international law which are revealed, firstly, in "a rule of construction" and, secondly, in "a rule of evidence." Under the rule of construction Parliamentary acts should be interpreted in such a way as not to conflict with international law. There is a presumption that the Parliament should not violate

загальнотеоретичні аспекти), Вісник Академії правових наук України, 1 (1999), 80–86; *С. Шевчук*, Європейська конвенція про захист прав та основних свобод: практика застосування та принципи тлумачення у контексті сучасного українського право розуміння, Практика Європейського суду з прав людини: Рішення. Коментарі 2 (1999) 236–237; *А.Б. Алексеева, В.М. Жуйков, И.И. Лукашук,* Международные нормы о правах человека и применение их судами Российской Федерации: Практическое пособие, 1996; *М. Мерлен-Демартис,* Застосування Європейської Конвенції з прав людини на національному рівні на прикладі Франції, Вісник Конституційного Суду України 4 (2002), 49–51; *I. Cameron*, The Swedish Experience of the European Convention on Human Rights since Incorporation, Int'l & Compar. L. Q. 48 (1999); *T. Choudhury, G. Moon,* Complying with International Human Rights Obligations: The United Kingdom and Article 26 of the International Covenant on Civil and Political Rights, Eur. Hum Rts L. Rev. 3 (2003); *R. Walker*, Opinion: The Impact of European Standards on the Right to a Fair Trial in Civil Proceedings in United Kingdom Domestic Law, Eur. Hum Rts L. Rev. 1 (1999), etc.

21 *М. Антонович,* Застосування міжнародних актів з прав людини в судовій практиці держав, Українське право 1 (2004), 165.

22 *J.G. Starke,* (note 5), 79.

23 International Law and Relations, 719.

international law. Under the rule of evidence, international law does not need to be proved as foreign law by an expertise or in other way. Nevertheless where "a Statute contains provisions which are unambiguously inconsistent with those of an earlier treaty, a British municipal Court must apply the Statute in preference to the treaty."[24]

The UN Human Rights Committee while following how states—members of the UN comply with international human rights obligations often criticizes them for the absence of norms in domestic law which would ensure the rights recognized by ICCPR and hence the inability for their citizens to apply to domestic courts for their protection. In its Concluding Observations on the United Kingdom's fifth periodic report, the Human Rights Committee, while welcoming the incorporation of many ICCPR rights into the domestic legal order through the Human Rights Act 1998, regretted the failure to accord the same level of protection to other Covenant rights, including the provisions of article 26 on prohibiting any form of discrimination.[25]' As T. Choudhury and G. Moon point out, the combination of the common law; the Human Rights Act and anti-discrimination laws[26] ensure that there is substantia] compliance with article 26 of ICCPR. 'The protection for equality before the law meets Article 26 obligations. But significant gaps remain between domestic law and Article 26 in the equal protection of the law and most notably in the prohibition of discrimination.[27] For this the incorporation of a general principle of equality in a comprehensive unified code is proposed so that there is an overriding principle of UK domestic law that no unjustified discrimination is permissible on the foundation provided by article 26 of the ICCPR.[28] At the same time, the Committee notes that the obligation of states parties to "respect and to ensure the rights recognized in the Covenant" does not go so far as requiring a state to incorporate the treaty into domestic law[29]"

K. Monaghan also indicates the inconsistent protection against: discrimination on the grounds of race, sex and disablement in the British antidiscrimination legislation, and absolute lack of protection against: discrimination on the basis of sexual orientation, age, language; in the Northern Ireland — lack of protection against discrimination on the basis of religious and political opinion.[30] KMonaghan suggests

24 *J.G. Starke,* (note 5), 80.

25 Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. 06/12/2001, CCPR/CO/73/Un.King., para 7.

26 Sex Discrimination Act 1975, the Race Relation Act 1976, the Fair Emploiment (Northern Ireland) Acts 1976 and 1989, the Disability Discrimination Act 1995.

27 *T. Choudhury, G. Moon,* Complying with International Human Rights Obligations: The United Kingdom and Article 26 of the International Covenant on Civil and Political Rights, European Human Rights Law Review 3 (2003), 306.

28 *T. Choudhury, G. Moon* (note 27), 307.

29 Human Rights Committee General Comment 3, Article 2 Implementation at the national level (13th session, 1981), para 1.

30 *K. Monaghan,* Limitations and Opportunities: A Review of the Likely Domestic Impact of Article 14 ECHR, European Human Rights Law Review 2 (2001), 168.

a way of improving domestic antidiscrimination protection through application of article 14 of die European Convention, which may help in filling the gap in national antidiscrimination legislation and liberalize the definition of the concept of "discrimination".[31] However Protocol 12 to the European Convention which foresees the right to freedom from any form of discrimination, in particular by any public body remains unratified by majority of states — members of the Council of Europe, including Great Britain.

b) USA Practice

As different from British practice concerning treaties American practice depends not upon coordination (agreement) between legislative and executive power, but upon provisions of the USA Constitution which provide that "treaties are the supreme law of the land" (article VI, para 2) as well as upon a distinction drawn by American Courts between "self-executing" and "non-self-executing" treaties,[32] and judges have to enforce "self-executing" treaties even if there are provisions in the Constitution or other laws which contradict them. That distinguishes American practice as to treaties from Great Britain and Ireland's practice where international legal acts may be enforced only after their incorporation into national legislation through adopting national acts.

As Chief Justice Marshall pointed out in the Case of the US Supreme Court *Foster v. Net/son,* "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, die object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract — when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court."[33] The same thought was expressed by Justice Miller a half century later, in the *Head Money* Cases: "A treaty is primarily a conttact between independent nations. It depends for the enforcement of its provisions on the interest and the honour of the governments which are parties of it.... But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."[34]

32 *J.G. Starke,* (note 5), 81-82.

33 *Foster v. Neilson,* 27 U.S. 253, 314 (1829).

34 *The Head Money Cases* 112 U.S. 580, 598 (1884).

As was pointed out in the judgement of the California Supreme Court in *Sei Fujii* Case, drawing a distinction between "self-executing" and "non-self-executing" treaties the courts determine the intention of the signatory parries as it is expressed in the terms of the treaty and the surrounding circumstances. A self-executing treaty is one which does not in the view of American Courts expressly or by its nature require legislation to make it operative within the municipal field, while non-self-executing treaties are not binding upon American Courts until the necessary legislation is enacted.[35]" In this case it was held that the human rights provisions of the UN Charter were not self-executing but the provisions relative to the privileges and immunities of the United Nations were. Thus for example article 104 of the Charter: "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purpose," and article 105: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes" are formulated in clear and accurate language that testifies to the intention to create provisions tihat act without additional legislature. These provisions were recognized self-executing in Cur*ran v. City of New York* Case[36]. Another example of enforcing self-executing international norms on human rights is the US Supreme Court Case *Roper v. Simmons,* in which death penalty was recognized disproportionately cruel and unusual punishment for criminals younger dian 18 years old,[37] which corresponds to article 6 (5) of the International Covenant on Civil and Political Rights (hereinafter ICCPR) that states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age..."

c) Continental State Practices

What concerns states with continental law system, there is no uniform practice on the application of treaties within their domestic sphere. Each state has its own peculiarities in questions of legislative approval of treaty provisions, promulgation, and so on. J.G. Starke gives examples of Austria, German Federal Republic, Belgium and France. While in Austria "treaties automatically bind the Administration without publication, but need to be gazetted in order to affect rights of public in general," in the German Federal Republic courts will, like American courts, give effect to self-executing tteaties. In Belgium, "legislative enactment or legislative approval is necessary for almost all treaties, particularly those which affect the status of private citizens. As to conflicts between the provisions of treaties and earlier or later Statutes, it is only in relatively few countries that the superiority of the treaty in this regard is established. France is a case in point, for if a treaty has been duly ratified

35 *Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952).

36 *Curran v. City of New York*, 77 N.Y.S.2d 206, 212 (N.Y. Sup. Ct. 1947).

37 *Roper v. Simmons*, 543 U.S. 551 (2005).

in accordance with law, French tribunals, both judicial and administrative, will give effect to it, notwithstanding a conflict with internal legislation.[38]

In some modern constitutions there are norms providing for international law being treated as an integral part of municipal law. Thus article 25 of the Basic Law for the Federal Republic of Germany {The West German Republic) states that "the general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."[39]

Law system of the former USSR was characterized by a dualist concept; however under the pressure of needs for international relations the partial implementation of international norms into domestic law was recognized.[40] It is understandable that in years of "cold war" the USA and the USSR for different reasons have not accepted the idea of direct application by national courts of the international law norms regulating relations between people and thek own governments. However after the end of "cold war", as L.F Damrosh writes, it's time to ask if former rivals are at last ready to fully implement international human rights law in their national courts[41]

After the collapse of the Soviet Union the former Soviet republics went different ways regarding application of international law. G. Danilenko groups Commonwealth of Independent States (hereinafter CIS) countries into three different types according to the provisions included into their Constitutions concerning international law, usually tteaty law: 1) in which international law is part of the law of the land (Russia, Moldova, Azerbaijan, Kazakhstan, Georgia, Tajikistan, theoretically Belarus); 2) in which constitutions declare that international law forms part of the law of the land, but fail to establish the hierarchical status of international rules in the domestic legal system (Ukraine, Kirgliizstan); 3) in which only vague reference to international law is incorporated (Uzbekistan, Turkmenistan).[42] In accordance with this classification practices of application of the European Convention by domestic courts of CIS countries may be also divided in three relative groups.

Under article 15 (4) of the 1993 Constitution of the Russian Federation: "The universally-recognised norms of international law and international treaties and agreements of die Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other

38 *J.G. Starke,* (note 5), 84.

39 The Basic Law for the Federal Republic of Germany (Grundgesedz) as amended up to and including 20 December 1993, Internet: http://www.iuscomp.org/gla/statutes/GG.htm#25. 31/12/2012.

40 *А.Ж. Гинзбург,* Соотношение международного и внутреннего права в СССР и России, Государство и право 3 (1994), 108.

41 *L.F. Damrosh,* International Human Rights Law in Soviet and American Courts, The Yale Law Journal 100 (1991), 2315.

42 *G. Danilenko,* Implementation of International Law in CIS States: Theory and Practice, European Journal of International Law 10 (1999), 51–53.

rules than those envisaged by law, the rules of the international agreement shall be applied."[43] However as G.M. Danilenko points out, the Constitutional Court of the Russian Federation quite often does not distinguish between different by their legal nature categories of international norms and combines under the ambiguous formula of "international treaties" both legally binding norms and recommendations of international organizations".[44]

As in the USA, in Russian Federation there is distinction between self-executing and non-self-executing international treaties though these terms themselves are not used in Russian legislation. Under article 5 (3) of die Federal Law on "International Treaties of die Russian Federation", "die provisions of the officially published treaties of the Russian Federation which do not require the promulgation of domestic acts for application, shall operate in the Russian Federation directly. In order to effectuate other provisions of international treaties of the Russian Federation, the relevant legal acts shall be adopted." Along with this, the 2003 Russian Supreme Court Ruling No 5 "On 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" pays attention of judges to the fact that "the consent for the international treaty to be mandatory for the Russian Federation should be expressed in the form of a federal law, provided that this treaty stipulates other rules than the federal laws (Item 4 of Article 15 of the Constitution of the Russian Federation, Items 1 and 2 of Article 5, Article 14, Item 1 «a» of Article 15 of the of the Federal Law "On the International Treaties of the Russian Federation", Item 2 of Article 1 of the Civil and Procedural Code of the Russian Federation, Item 3 of Article 1 of the Criminal and Procedural Code of the Russian Federation).[45]

As G. Danilenko writes, while the Russian Constitutional Court refused to draw any distinction between self-executing and non-self-executing treaties, the legislature took the initiative.[46] Modern Russian conception of self-executing treaties is formulated in part 1 of the 1994 Civil Code of die Russian Federation, article 7 (2) of which declares that "The international treaties of the Russian Federation shall be direcdy applied toward the relations, indicated in Items 1 and 2 of Article 2 of the present Code, with the exception of the cases, when it follows from the international treaty that for it to be applied, a special intra-state act shall be issued. If the rules, laid down in the international treaty of the Russian Federation, differ

43 The Constitution of the Russian Federation (with the Amendments and Additions of December 30, 2008), Internet: http://constitution.garant.ru/english/. 31/12/2012.

44 *Г.М. Даниленко*, Международная защита прав человека. Вводный курс: Учеб. пособие, 2000, 116.

45 Resolution adopted by the Plenum of the Supreme Court of Russian Federation No 5 10 October 2003 On 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, Internet: http://www.vsrf.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801. 31.12.2012.

46 *G. Danilenko*, (note 42), 65; *Г.М. Даниленко*, Применение международного права во внутренней правовой системе России: практика Конституционного суда, Государство и право 11 (1995), 122.

from those stipulated by the civil legislation, the rules of the international treaty shall be applied."[47]

e) Ukraine's Practice

While the Russian Federation, declared universally-recognised norms of international law and international treaties an integral part of her legal system, article 9 (2) of the Constitution of Ukraine lays down that "International treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine."[48] There is a definite advantage of the Russian provision on norms of international law and international treaties being part of domestic law system over the Ukrainian one on international treaties being an integral part of the national legislation. The generally recognized principles and norms of international law are mentioned only in the context of foreign political activity of Ukraine (article 18 of the Ukraine's Constitution). In article 22 of the Constitution of Ukraine it is stated that "the constitutional rights and freedoms shall be guaranteed and shall not be abolished" (not all rights in general), and they shall not be diminished by an adoption of new laws or by introducing amendments to the effective laws. As M. Koziubra points out, more substantial constitutional grounds for priority of norms of the international treaties ratified by the Verkhovna Rada (Parliament) of Ukraine concerning human rights and freedoms over norms of national legislation of Ukraine are in provisions of article 8 (1) of the Constitution which establishes the principle of the rule of law, in case subjective and objective law is not opposed.[49]

Ukraine as well as many other states — former Soviet Union Republics recognized the principle of priority of international law over domestic law. However after adopting the 1996 Constitution of Ukraine this priority of international norms over norms of national legislation is questioned.[50]" Under article 19 (2) of the 2004 Law of Ukraine on International Treaties, if an international treaty which became valid in accordance with due procedure establishes other rules than those which are provided in the relative legislative act of Ukraine, the norms of an international treaty shall be applied.[51] Article 9 (1) of the Constitution of Ukraine provides that

47 The Civil Code of the Russian Federation (with the Additions and Amendments of February 20, August 12, 1996, October 24, 1997, July 8, December 17, 1999, April 16, May 15, November 26, 2001, March 21, November 14, 26, 2002, January 10, March 26, November 11, December 23, 2003), Internet: http://www.russian-civil-code.com/. 31.12.2012.

48 Constitution of Ukraine, Internet: http://static.rada.gov.ua/site/const_eng/constitution_eng.htm#c1 . 31.12.2012.

49 *M. Козюбра*, Тенденції розвитку джерел права України в контексті європейських правоінтеграційних процесів, Наукові записки НаУКМА: Юридичні науки 26 (2004),4–5.

50 See: *M. Козюбра*, (note 49), 4.

51 Закон України "Про міжнародні договори України" від 29 червня 2004 р. // ВВР.– 2004.– № 50.– Ст. 540.

"International treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine."[52] Such a provision is disputable as an international treaty may not be a part of legislation, radier of the legal system of the state in general.

At the same time, article 9 (2) of the Constitution of Ukraine lays down that "Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution of Ukraine," which establishes supremacy of the Constitution of Ukraine over international treaties. The Supreme Court of Ukraine has interpreted this norm in its Ruling No 9 of 1 November 1996: "A court may not: apply a law which regulates legal relations under stipulation in a different way than an international treaty. At the same time international treaties are applied if they do not contradict to the Constitution of Ukraine."[53] However the place of these treaties is not clearly defined — are they superior to all laws, both earlier and later, or only to earlier laws? Even decisions of the Constitutional Court of Ukraine do not answer this question definitely. In its 1998 Decision on the interpretation of the term "legislation" the Constitutional Court of Ukraine placed legislative acts in such a sequence: laws of Ukraine, international treaties of Ukraine consented by the Verkhovna Rada of Ukraine as binding, decrees of the Verkhovna Rada of Ukraine, decrees of the President of Ukraine, decrees and rulings of the Cabinet of Ministers, adopted in their discretion and in accordance with the Constitution and laws of Ukraine.[54]

Meanwhile Ukraine is being criticized by the UN Human Rights Committee for inconsistency between her obligations under the ICCPR and national law. The Committee expressed concern on Ukraine's fifth periodic report, in particular, because in case of collision of human rights under the ICCPR and inner legislation the latter might have priority. As noted by members of the Committee, it was not clear from the text of the Constitution of Ukraine if norms of the Covenant might be directly applied like the provisions of the Constitution, i.e. if they might be directly enforced by courts. The members of the Committee asked concrete questions as to the number of court cases in which there was reference to articles of the ICCPR. Though under article 9 of the Ukrainian Constitution the Covenant is a part of the national legislation, it has not (as members of the Committee stated) obtained the higher status for ensuring its priority in case of conflict with the Ukrainian legislation. The attempts of the Ukrainian

52 Constitution of Ukraine, Internet: http://static.rada.gov.ua/site/const_eng/constitution_eng.htm#c1 . 31.12.2012.

53 Про застосування Конституції України при здійсненні правосуддя: Постанова Пленуму № 9 від 1 листопада 1996 р. , Постанови Пленуму Верховного Суду України (1995–1998). Правові позиції щодо розгляду судами окремих категорій цивільних справ / Відп. редактор П.І. Шевчук, Юрінком Інтер, Київ, 1998.– С. 51.

54 Справа про тлумачення терміна «законодавство». Рішення Конституційного Суду України № 12-рп/98 9 липн. 1998 р., Вісник Конституційного Суду України 4 (1998), 26.

Ombudsman to amend this article of the Constitution were greeted b the Committee.[55]

In the process of judicial enforcement of international human rights treaties the Ukrainian courts, as different, for example, from the American courts, do not thus far draw a distinction between self-executing and non self-executing treaties as the Ukrainian legislation itself does not yet regulate establishing such self-executiveness of international treaties. While Ukraine is in the initial stage of implementing process, when the cases of application of international norms by domestic courts are not: numerous, it might be too early to speak about such distinction. On the one hand, research on the issue of self-executing and non self-executing treaties is highly needed."[56] On the other hand, such direct application of international norms is doubted by some scholars. As V. Denysov writes, interaction of international norms and domestic law from practical point: of view requires application of international norms in such a way that they might be used in the legal system and first of all, when necessary, by national courts, and the ideology if international law does not connect the priority of international law with its immediate action, viewing such an approach as irrational."[57]

Moreover, there exists such state practice when international legal norms are used along with national law or as principles in light: of which the law norms are applied.[58] As M. Selivon points out, the peculiar feature of the Ukrainian national legislation consisting of international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, is that its norms do not transform into new, merely national norms, but are realized independently, in some cases — together with a domestic legal act, adopted at the process of implementation of a treaty into the state legal system."[59] As testified by Ukrainian judicial practice, the process of such parallel application of international human rights norms and national legal norms has already started in Ukraine.

55 Consideration of reports submitted by States Parties under article 40 of the Covenant, in: Human Rights Committee 73rd Session Summary Record of the first part of the 1959th meeting, 16 October 2001, Art. 38.

56 Such research has already been conducted in Russia. See: *Г. Даниленко*, Применение... (note 46),115–125; *А.Б. Алексеева, В.М. Жуйков, И.И. Лукашук,* (note 20).

57 *В.Н. Денисов*, Статус міжнародних договорів в Конституції України, Вісник Академії правових наук України 1 (1997), 34.

58 *М.М. Антонович*, Конвенція про захист прав людини та основних свобод у судах європейських держав та перспективи її застосування в Україні, Право України 8 (2000), 45.

59 *М. Селівон*, Гармонізація положень національного законодавства з нормами міжнародного права та їх застосування в практиці Конституційного Суду України, Вісник Конституційного Суду України 3 (2003), 38.

III. Application of the 1948 Convention for the Prevention of the Crime of Genocide by National Courts

1. Domestic Courts Jurisdiction under the Genocide Convention

The Genocide Convention includes the norm of judicial enforcement by means of national courts in case of committing a crime of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, complicity in genocide — persons charged with any of these acts "shall be tried by a competent tribunal of the state in the territory of which the act was committed..." (article VI).[60] Thus it is interesting to analyze how states parties to the Genocide Convention in the territory of which these acts were committed follow the obligation to try perpetrators of genocide. States may and should held perpetrators of genocide responsible even without a relative norm in their national legislation.

It is evident that the regimes who planned or organized genocides will never confront those responsible for genocides (Turkey; former Soviet Union, Cambodia under "Khmer Rouge, Sudan etc.). The new governments are quite often also unwilling or unable to provide justice. However at the end of XX beginning of XXI century in some states in the territory of which crimes of genocide were committed the governments changed and new governments were interested in punishing for genocide

National courts in Rwanda, Bosnia-Herzegovina, Croatia, Kosovo, Iraq, Estonia, Latvia, Lithuania and some other states, and in 2010 in Ukraine (Decree of the Kyiv Court of Appeal) based their decisions on judging for genocide, committed in their territory, either on national legislation, or Genocide Convention, or on both sources.

National. Courts of Israel, Germany, Belgium and Switzerland also hold cases of genocide and took decisions on the basis of universal jurisdiction, thus filling the gaps in the Genocide Convention.[61] The Convention itself does not include universal jurisdiction, though the draft Convention prepared by the UN Secretariat in 1947 stated that "The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place the offence has been committed."[62] Nevertheless this draft article was not adopted by most states because of contradiction to "traditional principles of international law" and violation of "the sovereignty of states."[63]

60 Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly Res. 260(III)A on 9 December 1948, 78 UNTS (1951), 277.

61 *W. A. Schabas*, National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes', Journal of Int'l Criminal Justice 1 (2003), 39.

62 UNO, ECOSOC, Draft Convention on the Crime of Genocide, UN Doc. E/447 (1947), 5-13 (art. VII).

63 *P. Akhavan*, Enforcement of the Genocide Convention: A Challenge to Civilization, Harv. Hum. Rts J. 8 (1995), 234 (pp. 229-258)

In Adolf Eichmann case the district court of Israel rejecting the denial by the defendant of die jurisdiction of this court on the basis of the Genocide Convention referred to the 1951 Advisory Opinion of the International Court of Justice in which the Court stated that "the principles underlying the Convention are principles recognized by civilized nations as binding on States, even without any conventional obligation."[64]

In some states, as for example in Rwanda, national courts have already taken thousands of decisions on judging for genocide on the basis of the Genocide Convention, in other states — only a few decisions. It is interesting that: in Rwanda where numerous charges of genocide were made the national legislation implementing the Genocide Convention was not adopted. That problem was regulated by a legislator in the Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990. Article 1 (la) lays down that "The purpose of this organic law is the organization of criminal proceedings against persons who are accused of having since 1 October 1990, committed acts set out and sanctioned under the Penal Code and which constitute: a) either the crime of genocide or crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its additional protocols, as well as in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968.. ,"[65]

The analysis of the national case law on the implementation of the Genocide Convention shows different ways states are following the obligation to punish for genocide. Some states have included articles on the crime of genocide into their national law, others have not done so. The last decades faced crucial changes in this respect. Thus the Code of Crimes against International Law was adopted in Germany in 2001; Canadian Parliament passed Crimes against Humanity and War Crimes Act (2000) which provide universal jurisdiction for crimes under international law including genocide, crimes against humanity and war crimes. Before adopting this Act, under the Criminal Code of Canada the Canadian courts had jurisdiction on war crimes and crimes against humanity committed outside Canada only if a person was in the territory of Canada after committing this act or omission.[66]

Ukraine and some other former Soviet Union republics have also included the norm on responsibility for genocide in their new Criminal Codes.

64 Reservations to the Convention on Genocide Case Adv. Op., 15 ICJ Reports 1951, 7.

65 Organic Law No 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, Internet: http://www.preventgenocide.org/law/domestic/rwanda.htm. 11.01.2013.

66 Criminal Code. – Ch. 46. – Para. 7 (3.71) (b) (R.S.C.).

2. **Baltic States Practice**

Among former Soviet Union republics courts of Estonia, Latvia and Lithuania applied norms of the international criminal law and charged those who deported population of diese countries in 1941 and in 1949 and took part in other mass repressions on accusation in crimes against humanity and/or genocide. It is interesting that in national legislation of one group of post-soviet states the norm on genocide was included in the same wording as in the Genocide Convention; other group of post-soviet states included it in somewhat changed wording than in international law Thus in the new Estonian Penal Code definition of the crime of 'genocide' includes among the protected groups the "groups offering resistance to the occupation regime or other social groups." The inclusion of "groups offering resistance to the occupation regime or other social groups" in the definition of "genocide" went further from the definition set out in the 1948 Genocide Convention. As Lauri Malksoo notes, this seems to confirm die international trend of including the "political groups" in the definition of 'genocide,' notwithstanding the restrictive definition of the 1948 Genocide Convention.[67] In particular, political groups were included in the. definition of genocide in Criminal Codes of France and Iithuania.

Before adopting new Criminal Code in 2001, Estonian courts ruled their decisions on the basis of article 61 of the Criminal Code which was amended to the previous Estonian Criminal Code and was entitled "Climes against Humanity." Part 1 of article 61 provides punishment widi the loss of freedom from eight until fifteen years or with the life sentence or with death penalty for committingg crimes against humanity'; including genocide, as these crimes are defined in norms of international law, i.e., for wilful acts which aimed to completely or partially destroy a national, ethnic, racial, religious group, a group offering resistance to the occupation regime or other social group, for killing a member of such group or inflicting upon him serious or very serious bodily or mental damage or for torturing him, for forced removal of cliildren, for the deportation or expulsion of the indigenous population during an armed attack, occupation or annexation, or the denial of their economic, political and social human rights or die stripping of such rights. Thus the definition of crimes against humanity in this article of the Estonian Criminal Code includes the crime of genocide and some of its acts as defined in the Genocide Convention.

Part 2 of article 61 of the former Estonian Criminal Code lays down that "the representative of the state authorities, with whose approval the crimes mentioned in this article's first paragraph were committed, shall be punished due to his involvement as an accessory in accordance with § 17 para. 6."

Several cases of Estonian courts concerned accusations on die bases of article 61 of the Criminal Code of Estonia.[68] The last deportation case which was analyzed

67 *L. Mälksoo*, Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law, Leiden Journal of International Law 14 (2001), 772.

68 *L. Mälksoo*, (note 67), 775.

by L. Malksoo has been the one against Mikhail Neverovski (born in 1920). The Parnu County Court started to hear his criminal case on 19 July 1999. According to the indictment, the defendant worked as an operative plenipotentiary of the NKVD in Parnu and participated in the deportation of March 1949. Thus, pursuant to the indictment, he had "caused, through his deliberate acts, the deportation of natives from the annexed Republic of Estonia with the purpose to destroy in part a national group which was offering resistance to the occupying power and a social group which was declared 'kulaks'." He was thus accused in having committed a crime under § 61 (1) of the Estonian Criminal Code, whereas the indictment did not specify explicidy whether the crime was to be called "crime against humanity" or "genocide." Of more than a hundred victims, about sixty appeared in die courtroom. On 30 July 1999 the Parnu County Court found the defendant guilty under § 61'(1) of the Estonian Criminal Code, and sentenced him to four years in a closed prison[69]. The convicted appealed the judgement and on 1 November 1999 the Tallinn Circuit: Court relieved Neverovski from actual imprisonment and replaced the punishment with four years of imprisonment on a three year probationary period."

To some up, the Baltic states are following their obligation under the Genocide Convention to punish for the crime of genocide by national courts having extended the definition of genocide given in the Genocide Convention in their Criminal Codes. That, unfortunately, may not be said about other former Soviet Union republics in the territory of which genocide was committed.

3. Ukraine's Experience

In Ukraine the Ruling of the Kyiv Court of Appeals of 13th January 2010 on the Holodomor lays down that Judge of the Criminal Chamber of the Kyiv Court of Appeals carried out a preliminary examination of criminal case № 1-33/2010, initiated by the Security Service of Ukraine pursuant to section 1, Article 442 of the Criminal Code of Ukraine, based upon the fact of the crime of genocide committed in Ukraine during the years 1932-1933.[71] The Ruling is based both upon article 442 of the new Penal Code of Ukraine which entered into force in 2001 and upon articles of the 1948 Genocide Convention, ratified by Ukraine on 22 July 1954. However as different from the Baltic states the definition of genocide in article 442 of the Criminal Code absolutely corresponds to the definition of genocide in the Genocide Convention.

70 Act No. 11-1/810.

71 Ruling of the Kyiv Court of Appeals Concerning the Commission of the Crime of Genocide Perpetrated by Yo.V. Stalin (Dzhugashvili), Yo.V. Molotov (Skriabin), L.N. Kaganovich, P.P. Postyshev, S.V. Kossior, V.Ya. Chubar, and M.M. Khatayevich, 13 January 2010, in: The Holodomor of 1932-1933 in Ukraine as a Crime of Genocide under International Law /V. Vasylenko, M. Antonovych, eds., 2012, 294.

Following the provisions of the Ukrainian legislation and the 1948 UN Convention, die Court confirmed the correct and legal balance of the position, according to which "the issue concerning the review of the factual circumstances of perpetrating the crime of genocide against a part of the Ukrainian national group, and the conclusions of the pre-trial investigation body thereon, and the closure of the case should be specifically decided by the court, in this case the Kyiv Court of Appeals."

The Court also stressed that provisions set out in Article VI of the 1948 UN Convention exclude the jurisdiction of the courts of other countries in die criminal case of the Holodomor and require that die case be examined "by a competent tribunal of the State in the territory of which the act was committed." Thus, as die Kyiv Court of Appeal ruled, the decisions taken by the courts of other states, including the Russian Federation, in the capital of which — Moscow — in 1932-1933 a number of documents were adopted which led to the artificial famine (the Holodomor) in Ukraine as a means of perpetrating the crime of genocide against a part of the Ukrainian national group, would have no legal force, as diose courts would lack the relevant jurisdiction.

The Court of Appeals has used the reasoning of die pre-trial investigatory body with regard to the retroactive applicability of Article 442 of the Criminal Code of Ukraine to the period of the commission of the crime of genocide by means of the Holodomor of 1932—1933 on the basis of provisions of domestic and international legislation, namely:

- Article 49 of the Criminal Code of Ukraine under which the passage of time as a basis for waiver of criminal liability (as well as a basis for the establishment of the commission of a crime) "shall not: apply in the case of the commission of a crime against the peace and security of humanity as provided for in Articles 437 through 439 and section 1, Article 442 of this Code;"
- Article *442:* 'Genocide", which is contained in Chapter XX of the Criminal Code of Ukraine: "Crimes against peace, humanity and international order;"
- Article 7 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, dated November 4,1950, which provides that the principle of non-retroactivity of criminal law "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations;"
- The UN Convention "On the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity", dated November 26, 1968 and ratified by the UkrSSR on March 25, 1969 which provides that genocide is criminally punishable even if such acts do not: constitute a violation of the domestic law of the country in which they were committed (Article 1 of the Convention).

As the Court stated, having reviewed the factual circumstances of the case set forth in the findings of the pre-trial investigatory body, "the conclusions set forth

in these findings as to the commission, by Stalin (Dzhugasbvili), J.V., Molotov (Skriabin), V.M., Kaganovich, L.M., Postyshev, P.P., Kossior, S.V., Chubar, V.Ya., and Khatayevich, M.M., of the crime correctly identified in accordance with section 1, Article 442 of the Criminal Code of Ukraine as genocide of a part of the Ukrainian national group, are substantiated and proven."

The established factual circumstances of the case proved that the criminal actions of these persons were directed against the very existence of a part of the Ukrainian national group. The gathered and verified proofs confirmed that the conditions inflicted on the Ukrainian national group were meant to bring about its partial physical destruction by means of the Holodomor, which resulted in the extermination of 3 million 941 thousand people.

Though the Court stated that there were no legal grounds for closing the criminal case due to the lack of the event of the crime or the absence, in the actions of J.V. Stalin (Dzhugashvili), V.M.Molotov (Skriabin), L.M. Kaganovich, P.P. Postyshev, S.V. Kossior, V.Ya. Chubar, and M M . Khatayevich, of the elements of the crime of genocide, the case was closed due to their death. However it's crucially important that the very fact of the Holodomor as a crime of genocide was proved by the Kyiv Court of Appeals both on the basis of Ukrailnian legislation and international, law.

In general, the practice of enforcing the Genocide Convention in national courts testifies either to its direct application, or application of the relative norm on the crime of genocide in national legislation, formulated in accordance with the definition of genocide in the Genocide Convention or extendedly, or application of both sources. The establishment of effective enforcement: mechanisms for genocide among which national, courts prevail is in process, however this process is too slow and the perpetrators of the crime of genocide in many states remain unpunished.

In this respect the establishment of the Platform of European Memory and Conscience in the frame of the EU was very important which called for the creation of a supranational judicial body for the gravest crimes committed by the Communist dictatorships.[72]

IV. Application of the European Convention for the Protection of Human Rights and Fundamental Freedoms in National Jurisprudence

Article 13 of the European Convention ensures that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been

72 Internet: http://www.memoryandconscience.eu/2012/06/07/platform-will-seek-establishment-of-a-supranational-court-for-international-crimes-committed-by-communists. 4.01.2013.

committed by persons acting in an official capacity." As is clear from the travaux préparatoires,[73] the object of it is to provide a means whereby "individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court."[74] The margin of appreciation recognizes that the solutions compatible with human rights may be available to the national authorities and ideally there should be appropriate procedures provided in domestic courts. For this European Convention should be used in national jurisprudence. As European states belong either to common law or continental law system, it would be interesting to compare how they apply the European Convention. Among states with continental law system CIS countries are most interesting as they started to cite the Convention not long ago while still undergoing constitutional reforms and being in transition from an authoritarian state to democratic states with the rule of law and independent judiciary.

1. Common Law States Practice

As stated above, courts of the United Kingdom, Ireland, Australia and other common law states apply only those international legal acts which are incorporated into national legislation through adopting relevant municipal acts. The European Convention was incorporated into domestic law of the United Kingdom by the Human Rights Act in 1998. Since then The European Convention is being cited in argument before domestic courts. The House of Lords has emphasized in *Regina u A* (2001), diat legislation must be construed and applied in appropriate cases under section 3, Human Rights Act 1998, and "so far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with die Convention rights."[75] Hence die courts continue to develop the common law to ensure it is consistent with the European Convention. At the same time, courts can only make a declaration that primary legislation is incompatible with the European Convention, but they cannot strike it down. As a rule, Parliament will then amend the legislation to make it compatible with the Convention, but it is unlikely to do so retrospectively.[76]

Similar practice of application of international treaties exists in Ireland. Though Ireland has ratified the European Convention and the ICCPR, until recendy they were not incoqjorated into domestic law primarily on the basis of the Constitution of Ireland. The Belfast Agreement of 1998 committed the Irish Government to

73 See: The Collected Edition of the "Travaux Preparatoires" of the European Convention on Human Rights, Vol. II, 485, 490; Vol. III, 651.

74 *I. Wildhaber,* A Constitutional Future for the European Court of Human Rights?, Human Rights Law Journal 23 (2002), 162.

75 *Regina v. A,* UKHL 25 (2001), Para. 11.

76 See: *D. Thomas,* Book Review "Taking a Case to the European Court of Human Rights" by Philip Leach (Blackstone Press, 2001), Eur. Hum. Rts L. Rev. 5 (2001), 597.

"ensure at least an equivalent level of protection of human rights" in the Republic of Ireland as would pertain in Northern Ireland after adopting 1998 Human Rights Act.'[7] There were arguments against direct legislative incorporation of the European Convention into national legislation as "the margin of appreciation would move from the legislature to the judiciary because it: would be judges who would decide, in any given case, whether any law or state action fell within or without die terms of the Convention.[78] In their torn Irish courts have refused to apply decisions of the ECHR even when the decision was made against Ireland. When Irish judges cited the European Convention it was only to provide additional back-up support for a decision of the domestic court.'[9]

The European Convention was incorporated in Ireland by the 2001 European Convention on Human Rights Bill under which any statutory provision, defined in section 1 of diis Bill and any rule of law shall be interpreted, in so far as possible, in a manner compatible with the state's obligations under the Convention.[80] This section applies retrospectively and prospectively. Under the European Convention BIA all state organs (it is interesting that courts are excluded from them) shall perform their functions in a manner compatible with the State's obligations under the European Convention. The Bill also provides for an *ex gratia* payment of compensation to an injured party by the Government, not by die courts, as the courts could not award damages where there was no violation of statutory provision or rule of law that, while incompatible with the European Convention, remains constitutionally valid in Ireland.

Exclusion of courts from state organs is, as Murphy writes, a crucial omission of the Bill as many of the decisions handed down by the ECHR relate to issues of fair trial and due process, and it is in contrast widi the broad definition of "public authority" under section 6 of the Human Rights Act.[8]' Under the European Convention Bill Irish courts are not bound to apply decisions of the ECHR, however they are required to interpret any statutory provision or rule of law, in so far as possible, in a manner compatible with the obligations under the European Convention. Similar to the United Kingdom, where there is a declaration of incompatibility of the national legislation with the European Convention, judges have no power to strike down the legislation — this is the responsibility of the Dail / Parliament.

The question remains concerning taking cases to the ECHR after the European Convention was incorporated into domestic legislation in common law states and

78 *Attorney-General Michael McDowell*, Opening Address , Law Society of Ireland Conference on The Incorporation of the European Convention on Human Rights into Irish Law (Oct. 14, 2000), 4.

79 *R. Murphy*, The Incorporation of the European Convention on Human Rights into Irish Domestic Law, Eur. Hum. Rts L. Rev 6 (2001), 643–644.

80 The European Convention on Human Rights Bill.– 2001.– Sec. 2(1). Internet: http://www.ihrc.ie/enquiriesandlegal/europeanconvent.html. 30.12.2012.

81 *R. Murphy*, (note 79), 652.

thus "brought home." Domestic courts should cope with the cases concerning violation of rights provided in the Convention. Nevertheless, the number of case in ECHR against Great Britain and other states remains huge.

2. **CIS States Experience**

As G. Danilenko points out, the Russian Constitutional Court has developed an extensive jurisprudence based on international law, including the European Convention.[82] Thus in the *Case Concerning Certain Normative Acts of the City of Moscow and Some Other Regions,*[83] which dealt with attempts on the part of local authorities to reintroduce the residence permit practice, the Constitutional Court noted that the right to freedom of movement and the right to freely choose a place of temporary or permanent residence is guaranteed not only by the Constitution but also by the ICCPR (article 12), other international legal acts, including Protocol 4 to the European Convention (article 2).

If up to 2004 the Russian Constitutional Court had applied provisions of the European Convention, but mosdy without reference to the ECHR case law, there were significant changes in the Constitutional Court's practice since then. In its judgment of 5 February 2007 the Constitutional Court interpreted the status of the case law of the ECHR under article 15 (4) of the Constitution: the European Convention and "the judgments of the European Court of Human Rights — insofar as on the basis of generally recognized principles and norms of international law they give interpretation of the Convention concerning the guaranteed rights... — form part of die Russian legal system and thus shall be taken into account by die federal legislature... and by the law enforcement bodies."[84]

What concerns the Supreme Court of the Russian Federation, after promulgation of the Regulation No. 5 of October 2003 by the Plenum of the Supreme Court "On the Application by Courts of General Jurisdiction of die Generally-Recognized Principles and Norms of International Law and die International Treaties of the Russian Federation" the number of judgements of the Supreme Court in which the Court referred to the European Convention has not increased much — only in 32 judgments out of 3,723 between 2004 and 2007.[85] As Anton Burkov considers, only in cases where a national court actually referred to the jurisprudence of the ECHR is it possible to say that the court actually applied the European Convention.[86] And as

82 *G. Danilenko,* (note 42), 56.

83 Vesnik Konstitutsionnoho Suda RF (Herald of the Constitutional Court of RF), 2 (1996), 42.

84 Constitutional Court's judgment of 5 February 2007 No. 2-P, Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii 1(2007), 48.

85 *A. Burkov,* Russia, in: The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, 2012, 455-456.

86 *A. Burkov,* (note 85), 457.

different from other countries of CIS, the jurisprudence of the district courts in Russian Federation seems to indicate a better understanding of the European Convention and the occasions when courts referred to the Convention were not exceptional.[87] Nevertheless, Russian courts of general jurisdiction have much less experience in applying international law that the Constitutional Court of Russia.

In Moldova the Plenary Supreme Court of Justice explained in 2000 that the European Convention should be applied directly by courts. However only in recent years "the number of references to the Convention in court decisions has increased, mostly because of social pressure on the judiciary and the growing number of EuCrtHR decisions involving Moldova."[88] These references mostly concern reopened proceedings after a judgment by the Strasbourg court, after cases have been stricken out by the Court following friendly settlements, or after unilateral declarations of the Government.[89] Thus, in the case of *Ciorap v. 1 'he Ministry of Internal Affairs and the Ministry of finance* the Supreme Court of Justice found in its judgment that there was sufficient evidence to support the applicants allegations of torture, that the Prosecutor Office's investigation had been inefficient, and that there had been a violation of the applicant's rights guaranteed by Article 3 of the European Convention.'*[1] The applicant was awarded compensation which however was later found by Strasbourg Court to be inadequate and such decisions of domestic courts did not appear to be part of their consistent policy offering real remedies against breaches of the European Convention.[91]

In *Drugalev v. The Ministry of Internal Affairs and the Ministry of Finance* Case the applicant claimed and received compensation for having been held in inhuman and degrading conditions for about six months. The Chisinau Court of Appeal based its award of compensation on Articles 2 and 3 of the European Convention.[92] At the same time there were several cases in which the Supreme Court of justice overturned decisions of lower courts based on the European Convention and Protocols to it, in breach of the Convention.[9]'

The Constitutional Court of Azerbaijan has also referred to the European Convention in its decisions. However in most cases the Constitutional Court elaborated an article of the Constitution by interpreting it in the light of article of the Convention. Thus in a case of *Zulfugarov,* the Constitutional Court held that the failure of the appeal instance court to notify Mr. Zulfugarov of the time and place

87 *A. Burkov*, (note 85), 460.

88 *V. Gribincea, N. Hriptievschi and M. Chicu,* Moldova, in: The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, 2012, 344.

89 *V. Gribincea, N. Hriptievschi and M. Chicu,* (note 88), 345.

90 Final Judgment of the Supreme Court of Justice of 19 December 2007.

91 *V. Gribincea, N. Hriptievschi and M. Chicu,* (note 88), 346.

92 Final Judgment of the The Chişinău Court of Appeal of 26 October 2004.

93 *V. Gribincea, N. Hriptievschi and M. Chicu,* (note), 346.

of the judicial session violated his rights under Article 60 of the Constitution, and also referred to the European Convention's Article 6 (1), and cited *Krcmdf* decision of the ECHR.[94] There are also cases of application of the European Convention by district courts in Azerbaijan.

In Georgia, between 1999 and 2004 there were 41 cases, in which Georgian courts referred to the European Convention provisions, and even in those cases, as K. Korkelia notes, reference was formal and did not have any influence on the outcome of the disputed case.[95] Since then the situation with application of the European Convention has not improved much. Thus, in the decision of the Supreme Court of Georgia, Chamber for Civil, Commercial and Insolvency Cases no. A.558-A-17-08 dated 21 July 2008, the Supreme Court dismissed die applicants claim after winning the case in the ECHR and revealed a negative trend in terms of wholesale application of the European Convention by die Georgian courts."[96] Moreover, the Supreme Court of Georgia declared that the ECHR had no competence to invalidate domestic laws or rulings of domestic courts by reason of their noncompliance with the European Convention.[97] However, there are examples of accurate applications of the ECHR decisions by the Constitutional Court of Georgia in which the Court invoked the concept of 'public interest' in the context of Article 1 of Protocol No. 1 of the European Convention.[98]

3. Ukraine's Practice

The norms of the European Convention have been used by Ukrainian courts of different levels and in different contexts. The Constitutional Court of Ukraine referred to the provisions of international treaties in more than a third of its decisions. Among cases concerning official interpretation of Constitutional provisions and laws of Ukraine initiated by individuals about 60% contain reference to international treaties including the European Convention while justifying legal positions of the Court.[99]

Among the first cases in which the Constitutional Court relied on the European standards was the Case Concerning Articles 3, 23,31,47,48 of the Law of Ukraine on Information and Article 12 of the Law of Ukraine on the Procuracy initiated

94 See *J.Gadirov,* Azerbaijan, in: The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, 2012, 89.

95 See: *B. Pataraia and E. Lomtatidze,* Georgia, in: The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe, 2012, 206.

96 *B. Pataraia and E. Lomtatidze,* (note 95), 207.

97 Decision No. A-558-A-17-08 of the Supreme Court of Georgia, 21 July 2008, Motivation Part of the Decision.

98 Judgement of the Constitutional Court of Georgia No. 2/1-370,382,390,402,405; 18 May 2007, Internet: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm. 4.01.2013.

99 *M. Ceniom,* (note 59), C. 38.

by a private person. K. G. Ustymenko. That case dealt with access to personal data concerning the psychiatric treatment of citizens. The Court found that in respect of protecting confidential data in the sphere of mental health the Ukrainian legislation failed to meet international standards. In particular, the Court noted diat "the Ukrainian legislation had not been brought into conformity with the European standards governing the protection of personal information and data".[100] The Court referred to the 1977 Recommendation of the Parliamentary Assembly of the Council of Europe on the Situation of the Mentally Ill.[101]

In motivation part of the decision in the *Residents of the City of Zhovti Vody on official interpretation of Articles 55, 64, 124 of the Constitution of Ukraine Case* the Constitutional Court of Ukraine stated, that "Part 1 of article 55 of the Constitution of Ukraine corresponds to the obligations of Ukraine which appeared, in particular, after ratification of the International Covenant on Civil and Political Rights, Convention on the Protection of Human Rights and Fundamental Freedoms (Rome, 1950), which under article 9 of the Constitution "constitute an integral part of the national legislation of Ukraine".[102]

The Supreme Court of Ukraine also addresses provisions of the European Convention in decrees of Plenum of the Court. Thus in the Decree of Plenum No. 5 adopted on 25 May 2001, "On Changes and Ammendments to the Decree No. 4 of 31 March "On Judicial Practice in Cases of Compensation for Moral (Non-Pecuniary) Damage" the Supreme Court ruled that though courts mainly correctly apply norms of the legislation on the right of physical and legal persons to compensation of moral (non-pecuniary) damage caused as a result of violation of their rights and freedoms and lawful interests, they rarely use international treaties in force, consented by the Verkhovna Rada of Ukraine. Point 1 of the Decree No. 4 was amended by paragraph 2 which lays down that in accordance with article 9 of the Constitution, international treaties in force are part of national legislation of Ukraine. In particular, the European Convention belongs to such treaties ratified by the Verkhovna Rada and is to be applied by domestic courts.[103]

Courts of several regions of Ukraine have also referred to the norms of the European Convention. As stated by judge VP. Paliuk, the result of die theoretical and informational measures of the Council of Europe was the decision of the judicial

100 Visnyk Konstytutsiynoho Sudu Ukrayiny (Herald of the Constitutional Court of Ukraine), 2 (1997), 31.

101 Recommendation of the Parliamentary Assembly of the Council of Europe on the Situation of the Mentally Ill 818 (1977), Council of Europe. Parliamentary Assembly. Texts Adoped by the Assembly, 1977.

102 Decision of the Constitutional Court of Ukraine in the *Case on the Application of the Residents of the City of Zhvti Vody of the Official Interpretation of Articles 55, 64, 124 of the Constitution of* Ukraine, No.9-зп/1997, 25 December 1997, Visnyk Konstytutsiynoho Sudu Ukrayiny 1 (1998), 36.

103 The Decree of the Supreme Court of Ukraine No.5 *On Changes and Ammendments to the Decree No. 4 of 31 March "On Judicial Practice in Cases of Compensation for Moral (Non-Pecuniary) Damage,* adopted on 25 May 2001, Internet: zakon1.rada.gov.ua/cgi-bin/laws/main.zgi?nreg=v0004700-95.

collegium in civil cases of the Mykolaiv regional court which while hearing the cassation claim of T. and K. on the decision of the Pervomaisk city court of 6 May 2000 relied on the provisions of article 10 of the European Convention and on the decision of the ECHR in *Ungens v. Austria* Case."[4] While hearing the case on the claim of K.A. on the Ruling of the Circuit Election Commission of die Circuit 133 (Mykolaiv region) at the elections of the people's deputies (members of Parliament) of Ukraine, die Court applied provisions on fair trial of article 6 of the European Convention.[105]

In general, the court practice of application of international human rights instruments is far from being effective in Ukraine. The reasons for this are both subjective (unpreparedness of judges, problems with legal education etc.) and objective. Until the judicial reform is conducted in Ukraine the situation is not likely to change substantially.

V. Conclusions

Though numerous international human rights instruments were concluded and international, judicial and control bodies were established for the protection of international human rights and freedoms their ensuring remains predominancy the inner matter of states. The role of domestic courts in this respect should be decisive as international human rights treaties were adopted with the main aim of obliging states to fulfil their human rights obligations and their efficacy depends upon their application by national courts. At the same time inner courts may refer to international human rights instruments only in case the state legal system foresees the validity of international treaties in the territory of the state. In most states there should be implementation of international human rights treaties into national legislation for their application by domestic courts.

The court practice of states on application of international human rights instruments is very different - from their direct application, direct application of only self-executing treaties to application of only those international treaties which were duly incorporated into national legislation, by adopting appropriate national law.

The analysis of the municipal courts' practice of application of such important international human rights instruments as the Genocide Convention and the European Convention proves that domestic courts may either refer to the norms of appropriate national legislation or the international norms. They might also parallelly apply both sources of law as the court practice of Ukraine and other states prove. Such parallel application of international and domestic legal norms is mostly used in newly independent states which undergo transformation of their legal systems and

104 *В.П. Пилюк*, (note 20), 55.

105 *В.П. Пилюк*, (note 20), С. 30.

are in the process of harmonization of national and international law systems. The case law of Ukraine and other former Soviet Union republics concerning application of international human rights instruments is in the process of establishing.

All in all, the practice of application of international human rights instruments by domestic courts lags behind constitutional provisions of states. It concerns even those European states which have ratified the European Convention over sixty years ago and have recognized its direct application. The European Convention remains the subsidiary source of law and the constitutional norms have priority. On the other hand, there is a clear tendency towards more active application of international legal acts by domestic courts which corresponds to the tendency of growing of the role of national courts in functioning of international law.

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