Russia and the European Convention on Human Rights: The Role of Courts and NGOs

Anton Burkov, kandidat uridicheskich nauk (Tiumen' State University); LL.M (University of Essex), PhD candidate in law (University of Cambridge), Staff Attorney with the Urals Centre for Constitutional and International Human Rights Protection of the NGO Sutyajnik. Please contact the author at ab636@cam.ac.uk should you have any questions.

Outline

For more details on the domestic implementation of the Convention by Russian courts please refer to Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law* (Stuttgart: ibidem-Verlag, 2007), www.sutyajnik.ru/bal/ibidem

I. Introduction

Let me start with a citation from an interview at a press-conference with the Chief Justice of one of the Russian High Courts, the Sverdlovsk Oblast Court, Ivan Ovcharuk. On my question whether the High Court initiated any training on the European Convention on Human Rights, the Chief Justice stated:

> No, we do not hold any special trainings on the Convention. What sort of training does one need in order to honour the provisions of Article 6? All you need is to follow the national legislation.[1]

This answer is indicative of the way Russian judges deal with the issue of implementation of the Convention – judges are convinced that they do not need to possess knowledge on the Convention or with respect to international law in general. Ironically the online conference of the Chief Justice was called "Judge Shall Know Everything." This is a typical reason why so many cases from the Russian Federation go to Strasbourg.

Now the question is whether this situation exists because the judiciary lack knowledge on the Convention? Or is it because of the lack of independence of the judiciary? Or the lack of initiative from applicants to ask a judge to apply the Convention? Or is it something else? During this talk we will try to find the answer by looking at

1. The history of the Russian Federation's accession to the Council of Europe
2. The quality of implementation of the Convention by Russian courts, particularly the status of the Convention in the Russian legal system, and the way this status is being realized in judicial practice. We will look at most levels of the Russian judicial system
3. Finally we will look at how the current situation is being dealt with by Russian NGOs.

[1] Online interview with the Chief Justice of Sverdlovsk Oblast Court, Ivan Ovcharuk, "Sud'ia Dolzhen Znat' Vse," *News Agency Uralpolit.Ru*, 30 August 2004, http://www.uralpolit.ru/regions/svr/30-08-2004/page_29757.html (as of 25 August 2006).

II. Dualistic Heritage and Political Accession of the Russian Federation to the Council of Europe

On 28 February 1996, the Russian Federation was allowed to accede to the Statute of the Council of Europe without meeting all the requirements for member States. Russia was accepted despite an unfavourable ad hoc Eminent Lawyers Report, which concluded "that the legal order of the Russian Federation does not meet the Council of Europe standards." The same evaluation of the Russian legal system was given by the Director of the Legal Department of the Russian Ministry for Foreign Affairs, A. Khodakov, in *The Explanatory Note on the Issue of Signing the European Convention for the Protection of Human Rights and Fundamental Freedoms by the Russian Federation*.

The process of accession to the Council of Europe was very much of a political nature where, apparently, human rights were not a priority goal. This is evident from the minutes of the debates in the State Duma (state legislature)[2] and the Parliamentary Assembly of the Council of Europe. For the most part, neither the Council of Europe nor Russia presented "human rights" arguments for the accession.

It was emphasized by scholars that such a political accession is troubling for the future of compliance with Strasburg law because, *inter alia*, "given Russia's lack of experience in protecting human rights, it is likely that a great many violations of European human rights law will be committed there, and that they will not be remedied domestically."[3] In spite of this the Russian Federation acceded to the Council of Europe on 28 February 1996. Ten years after the accession, Russia is a leading country in the number of applications brought before the European Court of Human Rights. As at 1 November 2006 there were 19,000 applications (21.2 %) against Russia pending out of a total 89,600 applications. As a comparison, only 2,350 applications (2.6%) are pending against the UK.

This flow of applications from Russia exists not only because of the lack of history in protection of human rights, but also because of the concept of international law that existed in the Soviet legal system and the foreign policy of the Soviet Union.

---

[2] The transcripts of the debate is produced in Glotov, S. A. (1996). Pravo Soveta Evropi i Rossii. Krasnodar. P. 95-117. Cited from Bowring, B. (1997). "Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?" European Human Rights Law Review(6). P. 633.

[3] Janis, M. (1997). "Russia and the «Legality» of Strasbourg Law." Journal of International Law(1). P. 98.

For many years, the Soviet Union was a dualistic country. The Soviet Union ratified more human rights treaties than any other country at the time. But the treaties were never incorporated into the domestic legislation; they have never been implemented domestically by judges. International law simply did not exist for a Soviet judge. Even today we cannot expect a local judge to look at international human rights guaranties simply because their value system was formed during Soviet time.

I will give you two examples. The Chief Justice of the Severdlovsk Oblast Court has been in charge of his court for 20 years. (Since 1987!, Since the last century!). Another example is the Chief Justice of the Russian Supreme Court who has been holding his position for 18 years (Since 1989! Since the last century!) How can we expect a different approach towards domestic application of international law from a judge who was in charge of a court since Soviet times?! Without any prejudice towards experienced justices, from my point of view, changes come to a legal system not only with new constitutions and legislation, but mostly with new approaches in looking at international law, new approaches in teaching international law, therefore with the arrival of newly educated judges. Unfortunately, the latter changes have not taken place in Russia as of yet.

And now we will see the way the Convention is being implemented by judges whose value systems were formed during the Soviet time, or by judges who are supervised by such long-living chief justices.

III. Quality of Implementation of the Convention by Russian Courts

Under Article 1 of the European Convention on Human Rights, Russia has undertaken an obligation "to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention." It appears to be that in Russia this obligation is generally understood as the Russian Government's recognition of the authority of the European Court of Human Rights (ECHR) to adjudicate cases brought to Strasburg by those under Russian jurisdiction. In other words, the ratification of the Convention is perceived in Russia as the right "to write to Strasbourg", or as the right to complain to an international body. However, the main idea of international human right law is "to bring human rights home". The core of this idea is in Article 1 of the Convention – the basis for the domestic application of the European Convention.

Although most official Russian statements reflect positively on the application of the Convention by Russian courts, particularly by the Russian Constitutional Court (the latter is true to a certain extent), in my research I have found that to date the impact of the Convention on the Russian legal system in terms of its implementation by domestic courts is unsatisfactory.

First, let's see the legal basis for the application of the Convention in Russian law.

1) Status of the Convention in Russian law

Unlike the Constitutions of the USSR or RSFSR (the Russian Soviet Federal Socialist Republic), the first sentence of Article 15(4) of the Russian Constitution clearly identifies the Russian Federation as a monistic country. It states that "the international treaties signed by the Russian Federation shall be a component part of its legal system." It is no longer necessary to transform these treaties into the domestic legal system.

Moreover, there is no bar to the domestic use of the interpretation of the European Convention on Human Rights advanced by the ECHR. The case law of the ECHR may thus be gradually transformed into Russian domestic jurisprudence.[4] The Russian Federation recognised compulsory jurisdiction of the ECHR in regard to the interpretation and application of the Convention.

Thus, theoretically there is no difference between the Convention and, for example, the Russian Civil Procedure Code in terms of their implementation in national courts. More than that, the legal order set by the Constitution is more favourable towards the Convention. The second sentence of Article 15(4) of the Constitution sets out the priority of an international treaty over national statutes, stating that "[i]f an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply." The Convention is placed in between the Constitution on one side, and federal constitutional laws and federal laws on the other side. Many federal laws reiterate Constitutional provisions regarding to the domestic applicability of international law, but do not develop them.

The Constitutional Court went further then any statutes or the Constitution itself. In one of the judgments, the Constitutional Court provided an interpretation which "established an

[4] Danilenko, "Implementation of International Law in CIS States: Theory and Practice," *European Journal of International Law* 10:1 (1999): P. 68.

obligation to give direct domestic effect to decisions of international bodies, including the European Court of Human Rights."[5]

We shall stress how important this statement of the Constitutional Court is. For a lawyer from a common law country to apply a statute or the Convention means to look at the text of the instrument through the prism of the court decision. "As Chief Justice Hughes [of the United States Supreme Court] once said […] the Constitution is what the judges say it is."[6] The same can be said about the European Convention on Human Rights which is often called a "living instrument" for its evolvement in the course of development of ECHR case-law. Now for a Russian judge who is a civil law judge, law means a statute. Case-law does not exist in Russia, meaning it is not accessible, not reported. The exception is the jurisprudence of the Constitutional Court. Usually judges consult a limited number of Supreme Court regulations, or they consult each other or even a higher court judge, on how to deliver a judgment in order to avoid its quashing by a higher court. There is no custom of looking at case-law in order to interpret the meaning of statutes.

The most unusual element of the domestic application machinery is the practice of issuing "Regulations" (*postanovleniia*) or "guiding explanations" (*rukovodiaschie raziasneniia*). They are passed by the Plenum of the Supreme Court and the Plenum of the Supreme Arbitration (Commercial) Court of the Russian Federation (Articles 126, 127 of the Constitution). Regulations are explanations of judicial practice issues based on the overview and generalization of the lower courts' and the supreme courts' jurisprudence. They are abstract opinions that are legally binding on all lower courts, summarizing the judicial practice of lower courts and explaining the way a particular provision of the law should be applied.[7] They are employed for the purpose of consistent application of Russian law by explaining how the law shall be invoked. Regulations have their legal basis in Articles 126 and 127 of the Constitution.

The first Regulation by the Supreme Court entirely devoted to the implementation of international law was called "On the Application by Courts of General Jurisdiction of the Generally-recognized Principles and Norms of International Law and the International Treaties of the Russian Federation," and was passed five and a half years after the Convention entered

[5] Danilenko, "Implementation of International Law in CIS States": P. 68.

[6] David, R. and J. E. C. Brierley (1978). Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law. London, Stevens & Sons. P. 409.

[7] For more detail as to the legal character of the regulations (explanations), refer to Demian Bakhrakh, Anton Burkov, "Sudebnie Acty kak Istochniki Administrativnogo Prava," *Zhurnal Rossiiskogo Prava* 2 (2004): P. 11, http://www.sutyajnik.ru/rus/library/ articles/2004/bahrah_burkov_akti_pravosudia.html (as of 25 August 2006).

into force (the 2003 Regulation).[8] This Regulation is more, however insufficiently, advanced in terms of clarifying for judges their obligation to apply international law provisions, the Convention in particular. There are several points to emphasize.

- First of all, the Supreme Court again stressed the direct applicability of international treaties, and in particular the Convention, and its priority over national laws. There is nothing new in this statement comparing to the Constitution. But it is closer to a lower judge then the Constitution. And yet again we shall take into account the custom of a Russian judge. It is more likely that they would apply subsidiary legislation, a particular decree of the Government, rather then the Constitution itself.

- The Supreme Court also explained that, according to Article 31(3)b of the Vienna Convention on the Law of Treaties,[9] when applying the Convention judges should interpret the treaty by taking into account any subsequent practice of a treaty body.

- For the first time it was stressed that non-application of an international treaty[10] can bear the same consequences as non-application of domestic law – namely, the quashing or altering of a judgment.[11]

- Another feature of the 2003 Regulation is that it provided a brief overview of ECHR case-law on Articles 3, 5, 6, and 13 of the Convention, albeit without mentioning any specific ECHR cases. It is obvious that this overview was prompted by previous judgments by the Court against Russia.[12] Without a doubt, this is a positive development.

Thus, this is the mechanism of implementation of the Convention as defined in the legislation. Now we will explore the judicial practice of application of the Convention.

2) Judicial Practice of the Application of the Convention

[8] *Ibid.,* P. 12 (2003).

[9] The Vienna Convention on the Law of Treaties (with annex) was concluded at Vienna on 23 May 1969 and came into force on 27 January 1980.

[10] Including non-application of the treaty itself, application of a treaty that is non-applicable under particular circumstances, and the incorrect interpretation of a treaty.

[11] Section 9 of the 2003 Regulation. In Section 4 of the Plenum of the Supreme Court Regulation no. 23 of 19 December 2003 "On Court Decision," the Supreme Court stressed the necessity of citing in the declaration section of the decision the material law applied, *inter alia*, the Convention, by taking into account judgments of the European Court of Human Rights, *Bulleten' Verkhovnogo Suda Rossiiskoi Federatsii* 2 (2004).

[12] For example, *Burdov* v. *Russia*. Judgment of 7 May 2002. Reports of Judgments and Decisions 2002-III (on Article 6(1) and Article 1 of Protocol 1); *Kalashnikov* v. *Russia*. Judgment of 15 July 2002. Reports of Judgments and Decisions 2002-VI (on Articles 3, 5(3), 6(1)); *Posokhov* v. *Russia*. Judgment of 4 March 2003. Reports of Judgments and Decisions 2003-IV (on Article 6(1)).

To date there is an imbalance between normative provisions on the domestic implementation of the Convention and the jurisprudence. On the one hand, there are Constitutional and subsidiary legislation provisions as well as general rules by the Constitutional and Supreme Court which stipulate that the Convention is a part of the law of the land and shall be applied directly. The provisions also state that the Convention shall be applied as it is interpreted by the European Court of Human Rights. On the other hand, there is judicial practice which follows neither legislation nor Supreme Court explanations.

i. Supreme Court

The jurisprudence of the Supreme Court and the Supreme Commercial Court reveals an attempt to demonstrate to the Council of Europe that the Convention is being applied, however when analyzing deeper the judicial practice of the Supreme Courts, it appears that the Convention is not actually being implemented. Just a simple example: The Supreme Court in its legally binding regulations explained to the lower courts that when implementing the Convention, judges shall take into account case-law of the ECHR. However, the Supreme Court itself does not follow its own advice.

Statistic will reveal more. Under scrutiny, there were 3,911 judgments of the Russian Supreme Court rendered during the period 5 May 1998 to 1 August 2004. Of these judgments, there are only 12 which mention the Convention. Of these 12 judgments, only 8 contain the Supreme Court's 'assessment' of compliance with the Convention. Not a single reference to the case-law of the ECHR. In addition, the manner in which the Convention is being implemented is very brief and imprecise. Usually only the number of an article is cited. In the best instances, the Supreme Court merely states verbatim the content of an article. The worst example is when it is simply stated that a particular government's act does not contradict the Convention as a whole.

Moreover, the implementation of the Convention on its own leads to incorrect application of the instrument. For example, in one case the Supreme Court applied Article 14 of the Convention as if it were a free-standing article. In the case of Kolotkov v. the Government of the Russian Federation,[13] concerning the right to compensation for government officials' moving expenses, the Supreme Court applied Article 14, although in favour of the Government, stating that there was no discrimination on the grounds of place of employment. The reason for doing so resulted from the Supreme Court's failure to refer to the case-law of the ECHR. Article

For more details on the domestic implementation of the Convention by Russian courts please refer to Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law* (Stuttgart: ibidem-Verlag, 2007), www.sutyajnik.ru/bal/ibidem

14 is clear that it "does not prohibit discrimination as such in any context, but only in 'the enjoyment of the rights and freedoms set forth in this Convention'."[14] The article comes into play if (1) there has been a violation of one of those rights of the Convention or (2) there has been no violation of that other Article taken alone, but there may be a violation of Article 14 considered together with that other article of the Convention.[15] In the case of the Supreme Court, it employed Article 14 when considering a right which was not secured in the Convention. In this case, it was inappropriate to apply the Convention. Again, in the case discussed, Article 19(2) of the Russian Constitution gave enough protection against discrimination.

ii. Commercial Courts

The jurisprudence of the Commercial Courts resembles the situation with the Supreme Court. The overall number of judgments rendered by the Commercial Courts under scrutiny was 38,068. Of this total number, there are only 23 judgments that mention the Convention. Of these, only 8 contain the Courts' citation of an article of the Convention. In the other 15 cases, the Courts briefly cite the arguments of a party based on the Convention, but did not provide any assessment of those arguments. The 8 judgments do not contain a single reference to the case-law of the ECHR. Typically, only the number of a given article is cited. In the best instances, the Courts merely state verbatim the content of the article in question. As in the case with the Supreme Court, the worst example is when the Commercial Court stated that a particular act does not contradict the Convention as a whole. For that reason, the way the Convention is being applied by the Commercial Courts cannot be defined as "implementation" as such, because the Convention cannot be engaged without reference to the case-law.

CONCLUSION: Besides the fact that the Supreme Court's as well as Commercial Courts' jurisprudence implements the Convention on rare occasions and without addressing ECHR case-law, the Supreme Court implements the Convention where there is no justification for the Convention to be engaged and refuses to implement the Convention where there is justification.

---

[13] Judgment of 13 March 2003 no. ГКПИ 03-97, http://www.sutyajnik.ru/rus/echr/rus_judgments/sup_court/13_03_2003_art14.html (as of 30 August 2006).

[14] Ovey, White, *Jacobs and White, the European Convention on Human Rights*, 348.

[15] Ovey, White, *Jacobs and White, the European Convention on Human Rights*, 348-349; Grandrath v. Federal Republic of Germany. no. 2299/64. Decision of Committee of Ministers. 29 June 1967. 10 Yearbook (1967), 629.

iii. Constitutional Court

By August 2004 there were 54 Constitutional Court judgments[16] which cited the Convention, out of a total 215 judgments rendered since the establishment of the Constitutional Court,[17] out of a total of 166 judgments rendered since Russia's accession to the Statute of the Council of Europe,[18] and out of a total of 116 judgments rendered since the Convention came into force.[19] It should be borne in mind that, since the Constitutional Court primarily considers applications concerning human rights granted by the Constitution, which contains an "extensive catalogue of human rights based on the generally recognised international human rights standards,"[20] theoretically the Convention can be applied in almost every case brought before this Court.

The Constitutional Court started to apply the Convention right after Russia's accession to the Statute of the Council of Europe, long before the Convention's ratification. The first judgment citing the Convention, its Article 2 of Protocol 4 (the Right to Freedom of Movement), is dated 4 April 1996.[21] Between the date of Russia's accession and the Convention's ratification, a total of three judgments and one dissenting opinion had cited the Convention. It was suggested that because the Convention at that time was not yet legally binding for the Russian Federation, citation of the Convention could be seen as having a "subsidiary" character to "enrich the court's argument."[22] The Constitutional Court had not invoked any of the ECHR case-law at that time. Its appeal to the Convention was limited only to citing articles of the Convention. For example, in the judgment of 16 March 1998, the Constitutional Court invoked Article 6 of the Convention in conjunction with Articles 7, 8, and 10 of the Universal Declaration of Human Rights (UDHR) and Article 14 of the International Covenant of Civil and

[16] These and all the following statistics came from an analysis of the database of the Constitutional Court judgments at http://www.consultant.ru/online (as of 15 September 2004).

[17] 12 July 1991 (adoption of the Federal Constitutional Law "On the Constitutional Court of the RSFSR").

[18] 28 February 1996.

[19] 5 May 1998.

[20] Danilenko, "Implementation of International Law in CIS States": P. 62.

[21] The Case Concerning Constitutional Review of a Number of Acts of Moscow and Moscow Oblast, Stavropolskii Krai, Voronezh Oblast and the City of Voronezh which Regulate an Order of the Registration of Citizens Arriving for Permanent Residence at Mentioned Regions. The Russian Constitutional Court. Judgment no. 9-P of 4 April 1996, in *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* 16 (1996): Article 1909.

[22] Oleg Tiunov, "O Primenenii Konstitutsionnim Sudom Norm Mezhdunarodnogo Prava," in *Pervaia Nauchno-Prakticheskaia Konferentsiia po Voprosam Primeneniia Norm Mezhdunarodnogo Prava Rossiiskimi Pravookhranitel'nimi Organami, 7–9 Fevralia 1996* (Moskva, 1996). Cited in Salikov, "Mezhdunarodnoe Pravo i Zashchita Prav Cheloveka Rossiiskim Konstitutsionnim Sudom," P. 112.

Political Rights (ICCPR) by explaining the content of the articles and stating that those provisions "are a component part of the Russian legal system as they are related to the universally-recognized principles and norms of international law according to Article 15(4) of the Constitution."[23] However, as time passed and with the ratification of the Convention, the practice of the Convention's implementation has not changed dramatically.

It is true that unlike Supreme Court, the Constitutional Court has been applying not only the Convention but the case-law of the ECHR as well. The issue here is not that the Constitutional Court employs the Convention but the manner and frequency with which it invokes the case-law. By August 2004 there had been only 12 cases[24] referring to ECHR case-law out of a total of 54 judgments by the Constitutional Court citing the Convention. This number in itself does not promise anything optimistic, especially taking into account the fact that the ECHR always refers to its case-law in order to determine the true meaning of the Convention's provisions. In all 12 instances, the entire analysis of the case-law never occupies more than a paragraph.

There is another minor concern about the accuracy of the Constitutional Court's references to the ECHR case-law. Ten of the twelve judgments by the Constitutional Court containing the case-law do not provide the numbers of the paragraphs from an ECHR judgment which is cited,[25] seven have no reference to a source from which the case was reported, two references do not contain the name of the case at all, and one contains an incorrect date of the judgment.[26] These circumstances inevitably deter any lawyer or lower court judge wishing to use an argument contained in a Constitutional Court judgment in any other hearings.

---

[23] The Case Concerning the Constitutional Review of Article 44 of the Criminal Procedure Code of the RSFSR and Article 123 of the Civil Procedure Code of the RSFSR. The Russian Constitutional Court. Judgment of 16 March 1998. Para 4. *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* 12 (1998). Article 1459.

[24] These are: Judgment of 17 November 1998. Para 3(11); judgment of 23 November 1999. Para 4(4); Judgment of 16 May 2000. Para 3, 5(2, 3); Judgment of 27 June 2000. Para. 3(5); Judgment of 12 March 2001. Para 1.3(2); Judgment of 30 July 2001. Para 2(2); Judgment of 13 December 2001. Para 3(6); Judgment of 15 January 2002. Para. 4(3); Judgment of 24 January 2002. Para 3(7); Judgment of 19 June 2002. Para 8(2); Judgment of 30 October 2003. Para 2, 3; Judgment of 24 February 2004. Para 5.2(8). Extracts from these judgments are available at http://www.sutyajnik.ru/rus/echr/ rus_judgments/con_court/judg_with_case_law.htm (as of 26 August 2006).

[25] Judgment of 17 November 1998. Para 3(11); Judgment of 23 November 1999. Para 4(4); Judgment of 12 March 2001. Para 1.3(2); Judgment of 30 July 2001. Para 2(2); Judgment of 13 December 2001. Para 3(6); Judgment of 15 January 2002. Para 4(3); Judgment of 24 January 2002. Para 3(7); Judgment of 19 June 2002. Para 8(2); Judgment of 30 October 2003. Para 2, 3; Judgment of 24 February 2004. Para 5.2(8), http://www.sutyajnik.ru/rus/echr/rus_judgments/con_court/judg_with_case_law.htm (as of 26 August 2006).

[26] Judgment of 19 June 2002. Para 8(2), http://www.sutyajnik.ru/rus/echr/rus_judgments /con_court/judg_with_case_law.htm (as of 26 August 2006).

Thus, the Russian Constitutional Court mostly applies provisions of the Convention without reference to the case-law. Where there is a reference to the case-law, it cannot be said that the reference is of proper quality according to the ECHR's standards.

However, it would be fair to highlight recent changes in the Constitutional Court's practice. Angelika Nussberger, reporter on Russia and Ukraine in the research project "The Reception of the European Convention on Human Rights in Europe" noted that

> …it can be observed that in the last two years [2004-2006] this approach [when jurisprudence of the European Court of Human Rights is quoted only in relatively small number of cases] is being changed. For 2005 seven and for the first months of 2006 three decisions containing direct references to the jurisprudence of the Court are reported. The Russian Constitutional Court does not only refer to the jurisprudence concerning Russia, but also concerning other States members of the Convention and thus underscores the *erga omnes* effect of the decisions.[27]

Apparently the changes were triggered by the newly appointed Justice Krasavchikova, a professor of civil law, who has never served as a judge before.

For example, on 14 July 2005 the applicants challenged the constitutionality of the Government regulation. The regulation specified the rules of execution of the court decisions obliging the Treasury of the Russian Federation to reimburse incurred damages for illegal actions of the state authorities or their officials. According to the Government regulation, such court rulings are executed by the Russian Federation Ministry of Finance under the procedure specified by the Government of the Russian Federation rather than the bailiff under the procedure established by a statute. The mentioned regulation does not contain a mechanism to hold the Ministry of Finance of Russia responsible for not carrying out its duty. In its ruling the Constitutional Court recognized as unconstitutional the authority of the Government of the Russian Federation to regulate execution of the court rulings against the Russian Federation. The Court vested this duty on the legislator.

[27] Angelika Nussberger, "The Implementation of the European Convention on Human Rights in Russia and Ukraine." (Draft report presented at the conference "The Reception of the European Convention on Human Rights in Europe," Zurich, 26-27 October 2006), P. 17.

But more importantly this judgment is unique due to the fact that the Court for the first time applied four (!) European Court of Human Rights cases on Article 6 and Article 1 Protocol 1 to the Convention on Human Rights and Fundamental Freedoms (right to property). Particularly, the Court stated that execution of a judgment is a component part of the administration of justice process and that "the right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party" (*Hornsby* v. *Greece*). The Court then quoted from the first case against Russia *Burdov* v. *Russia* stating that by failing to comply with the judgments, the national authorities prevented the applicant from receiving the money he could reasonably have expected to receive. A lack of funds cannot justify such an omission. The Court also applied the principle expressed in the *Stran Greek Refineries and Stratis Andreadis* v. *Greece* case that nobody can be a judge in its own case.[28]

iv. District Courts: Methods of Implementation of the Convention

The jurisprudence which has emerged from the decisions of the District Courts seems to indicate a better understanding of the spirit and purpose of the Convention. This achievement cannot be ascribed to the Supreme Court or Supreme Commercial Court's jurisprudence or their Regulations. There is evidence that those rare occasions of implementation of the Convention by the District Courts were prompted by the applicants' arguments based on ECHR case-law rather than the courts' own initiative.

There is evidence of interdependence between persistent applicants' arguments based on ECHR case-law before the courts and the quality of implementation of the Convention by the courts, as well as the development of Convention implementation.

Campaigners' observations. In this regard the practice of two Russian NGOs was studied. The Glastnost Defence Foundation and the Ural Centre for the Constitutional and International Protection of Human Rights have organised a strategic litigation campaign with the aim to employ the Convention in all cases where their lawyers were involved. It was noted that where legal proceedings merely cited the Convention, resolution of the case was not based on international law principles. The lawyers of these NGOs changed their method from simply citing the Convention in their court memoranda to submitting comprehensive memoranda

[28] For more details on the case refer to http://sutyajnik.ru/cgi-bin/news.php?id=127&year=2005&month=08

including direct implementation of the Convention and case-law. The purpose of the memoranda was to convince the courts that the Convention has the status of a federal law and that the Convention can be interpreted and implemented through the prism of the ECHR case-law. Unlike Supreme Courts, the District Courts indeed have been citing ECHR case-law. However, if there is a 'willingness' to rule against the defendant, the judges simply do not notice the case-law on purpose.

There is a strong resistance on the part of judges to invoke the Convention. General observations reveal four possible reasons for the courts to not consider international legal arguments.

(1) Judges lack knowledge and experience in the implementation of international law. However, the more judges face arguments based on ECHR case-law, the more likely they will implement it.
(2) Incorrect understanding of the phenomenon of precedent.
(3) Biased consideration of a case.
(4) A possible ruling on a particular right could result in far reaching consequences for a state body or official of the Russian Federation as to the lawfulness of their actions.

From 2000 to 2004, the Ural Centre held a strategic litigation campaign on the problem of the legality of lay judges (assessors). Under the *Law on Lay Judges*, lay judges are common citizens that are called for judicial duty once a year for a maximum period of 14 days to administer justice along with a professional judge. The court proceedings are conducted by one professional judge and two lay judges. The widespread problem with lay judges was that, in violation of the *Law on Lay Judges*, they typically served on a regular basis instead of only 14 days a year. This situation was in place for about two years, meaning that during this two year period, all decisions delivered by lay judges were unconstitutional and did not have any legal force.

In a number of cases, applicants complained about a violation of their right to a fair trial by arguing that their cases had not been decided by a court established by law (e.g., their cases were considered by lay judges who served in this capacity for years, instead of 14 days as prescribed by law). This violation took place because District Courts were not given the list of lay judges by the regional legislative organ. The Ural Centre organised a campaign to change this situation with lay judges.

For more details on the domestic implementation of the Convention by Russian courts please refer to Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law* (Stuttgart: ibidem-Verlag, 2007), www.sutyajnik.ru/bal/ibidem

First, the Centre's lawyers filed law suits before the Supreme Court seeking to challenge the Presidential Decree of 25 January 2000 which, in violation of the *Law on Lay Judges,* extended the 14-day term to an indefinite date. The action was dismissed without consideration on the merits due to the Court's conclusion that Presidential Decrees were not subject to judicial review.

Secondly, in every court proceeding the lawyers had pleaded a challenge to lay judges on the ground of breach of Article 6(1) of the Convention (right to a fair hearing by a tribunal established by law). Not a single success.

Thirdly, all judgments delivered by an unlawfully composed bench of lay judges were appealed to a high court on the same ground. Not a single success.

Fourthly, the applicants petitioned to the legislative body of the Sverdlovsk region and the Judicial Department at the Supreme Court of the Russian Federation, which were responsible for drafting the list of lay judges. No success.

Finally, after *Posokhov* v. *Russia*, the case that challenged the legality of the described situation, the strategic litigation campaign culminated in the proceedings of *Beliaev* v. *Sverdlovsk Oblast Duma.*

First, some details on the *Posokhov* case. Posokhov was convicted by the lay judges court for smuggling considerable amounts of vodka. During the judicial proceedings, he pleaded that lay judges could not consider his case due to the fact that their term had expired. The European Court ruled that the applicant's case had not been decided by "a tribunal established by law" therefore his right to a fair trial was violated and he was awarded compensation.

In the case of *Beliaev* v. *Sverdlovsk Oblast Duma,* the applicant complained about a violation of his right to a fair trial by arguing that all the District Courts of the region could not be considered to be "tribunals established by law" because they had been composed in breach of the *Law on Lay Judges*. The applicant based his case on *Posokhov* v. *Russia*. The original court completely ignored the arguments based on the Convention. The Court of Cassation rejected the applicant's reference to the *Posokhov* case as an authority for a similar case and similar question of law by simply stating that

> Mr. Posokhov had been protecting his right breached in the particular case [a criminal case with the accusation against him]; however, Mr. Beliaev complained about the defendants' behaviour

> [not following the existing order of lay judges appointment] in general.[29]

However, finally the lawyers of the Ural Centre harvested the results of the strategic litigation campaign. On 13 July 2005, the Presidium of the Sverdlovsk Oblast Court (the court of extra-judicial instance) quashed the lower court decision in *State* v. *Parshukov* due to a violation of Article 6 of the Convention, comprehensively citing the *Posokhov* v. *Russia* judgement. This case was similar to the *Posokhov* case – the quashed decision was delivered by a professional judge and two lay judges. It was found that the latter were serving more than allowed by the Act.

As a result of the *Posokhov* case, the only general 'remedy' that the Russian Federation provided was the abolition of the lay judges' institute in criminal cases on 1 January 2004 and in civil cases on 1 February 2003, instead of dealing with the substance of the problem of lay judges.

IV. The Role of NGOs in Domestic Application of the Convention

We have seen that there is a strong resistance on the part of national judges to invoke the Convention.

As soon as the Ural Centre began their strategic litigation campaign, they felt ignorance, and in the first place their own ignorance. Sergey Beliaev, the President of the Ural Centre commented: **"In 1996 neither us, nor anybody else in Russia, knew how to apply the Convention"**. **Nobody knew (1) 'where to use it' or (2) 'how to use it.'** There were no classes on the Convention in law schools, not to mention in text-books. The only way to get to know the system was self-education. As a result of the joint project with the London-based NGO, Interights, the Centre started its strategic litigation campaign by **educating themselves.** This was done by inviting international experts from Essex University for a series of trainings.

Then the Centre continued its litigation campaign with **filing law-suits.** Each law-suit contained a paragraph on the Convention and ECHR case-law. Each case memo contained a section on the Convention. Each trial speech contained arguments based on the Convention.

---

[29] *Beliaev* v. *Sverdlovsk Oblast Duma and the Judicial Department at the Supreme Court of the Russian Federation*, in Burkov, ed., *Primenenie Evropeiskoi Konventsii o Zashchite Prav Cheloveka v Sudakh Rossii*, P. 244-246.

The Centre's lawyers observed that the main reason for the courts' ignoring arguments based on the Convention was that judges **lack any knowledge and experience** in the implementation of international law. However, the more a judge faces these arguments, the more likely he/she will implement it.

At this moment, the Centre's lawyers realised the real picture of knowledge of the European Convention. In addition to the strategic litigation campaign itself, the Centre started to

a. **teach** what they learned and experienced when litigating cases based on the European Convention.
    i. at special trainings
    ii. at universities (mostly private)
b. **publish**
    i. newspaper and law-journal articles
    ii. books (providing them to judges and lawyers who participated in trainings)
c. **conduct PR-campaigns**
    i. press-releases on each case where the Centre sought to apply the Convention
    ii. press-conferences
    iii. round tables
    iv. conferences and talks
d. **web-site** "Learning How to Apply the Convention"
e. and of course the Centre began to bring cases to the European Court as a last resort.

V. Conclusion

The conclusion is that the impact of the Convention on the Russian legal system, in terms of its implementation by domestic courts, is unsatisfactory. The jurisprudence of the Supreme Court and Supreme Arbitration Court reveals an attempt to *demonstrate* to the Council of Europe that the Convention is being applied, rather than to actually *implement* the Convention. In contrast, the jurisprudence emerging from decisions of the Russian Federation's Constitutional Court and District Courts indicates a better understanding of the spirit of the European Convention on Human Rights. Still, the rare instances in which domestic courts in

For more details on the domestic implementation of the Convention by Russian courts please refer to Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law* (Stuttgart: ibidem-Verlag, 2007), www.sutyajnik.ru/bal/ibidem

Russia have implemented the Convention were, more often than not, prompted by applicants' arguments based on ECHR case-law, rather than by the courts.

We shall be optimistic. It took the United Kingdom about 50 years to incorporate the Convention. The Russian Federation undertook positive steps within the first decade of its membership in the Council of Europe. We have some signs that the practice of the courts is changing. More and more news reports appear on court disputes solved domestically due to the implementation of the Convention. Some judges have begun to apply the case-law of the European Court of Human Rights.

Indeed it would be impossible without first judgements against Russia that started to come from Strasbourg; without same sort of campaigns conducted by other Russian NGOs.

One should not expect any initiative from a judge. As a rule, changes take place due to the efforts of the non-governmental sector. As we can see, not only are litigation efforts prompting changes, but a variety of methods used together can give positive results.

For more details on the domestic implementation of the Convention by Russian courts please refer to Anton Burkov, *The Impact of the European Convention on Human Rights on Russian Law* (Stuttgart: ibidem-Verlag, 2007), www.sutyajnik.ru/bal/ibidem