UCL
Université catholique de Louvain

INTERNATIONAL HUMAN RIGHTS
LouvainX online course [Louv2.01x] - prof. Olivier De Schutter

READING MATERIAL
Related to: section 1, sub-section 5, unit 1: *The Jus Commune of Human Rights* (ex. 3)

European Court of Human Rights (GC), *Demir and Baykara v. Turkey* (Application no. 34503/97), Judgement of 12 November 2008 (excerpts):

The practice of interpreting Convention provisions in the light of other international texts and instruments

(a) Basis

65. In order to determine the meaning of the terms and phrases used in the Convention, the Court is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention (see, for example, Golder v. the United Kingdom, 21 February 1975, § 29, Series A no. 18; Johnston and Others v. Ireland, 18 December 1986, §§ 51 et seq., Series A no. 112; Lithgow and Others v. the United Kingdom, 8 July 1986, §§ 114 and 117, Series A no. 102; and Witold Litwa v. Poland, no. 26629/95, §§ 57-59, ECHR 2000-III). In accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see Golder, cited above, § 29; Johnston and Others, cited above, § 51; and Article 31 § 1 of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable (see Article 32 of the Vienna Convention, and Saadi v. the United Kingdom [GC], no. 13229/03, § 62, ECHR 2008-I).

66. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, Stec and Others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X).

67. In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see Saadi, cited above, § 62; Al-Adsani, cited above, § 55; Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, § 150, ECHR 2005-VI; and Article 31 § 3 (c) of the Vienna Convention).

68. The Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of

evolving norms of national and international law in its interpretation of Convention provisions (see Soering v. the United Kingdom, 7 July 1989, § 102, Series A no. 161; Vo v. France [GC], no. 53924/00, § 82, ECHR 2004-VIII; and Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).

(b) Diversity of international texts and instruments used for the interpretation of the Convention

(i) General international law

69. The precise obligations that the substantive provisions of the Convention impose on Contracting States may be interpreted, firstly, in the light of relevant international treaties that are applicable in the particular sphere (thus, for example, the Court has interpreted Article 8 of the Convention in the light of the United Nations Convention on the Rights of the Child of 20 November 1989 and the European Convention on the Adoption of Children of 24 April 1967 – see Pini and Others v. Romania, nos. 78028/01 and 78030/01, §§ 139 and 144, ECHR 2004-V, and Emonet and Others v. Switzerland, no. 39051/03, §§ 65-66, 13 December 2007).

70. In another case where reference was made to international treaties other than the Convention, the Court, in order to establish the State's positive obligation concerning "the prohibition on domestic slavery" took into account the provisions of universal international conventions (the ILO Forced Labour Convention; the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and the United Nations Convention on the Rights of the Child – see Siliadin v. France, no. 73316/01, §§ 85-87, ECHR 2005-VII). After referring to the relevant provisions of these international instruments, the Court considered that limiting the question of compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective (ibid., § 89).

71. Moreover, as the Court indicated in the Golder case (cited above, § 35), the relevant rules of international law applicable in the relations between the parties also include "general principles of law recognised by civilized nations" (see Article 38 § 1 (c) of the Statute of the International Court of Justice). The Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court [would] necessarily [have to] apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, vol. III, no. 93, p. 982, paragraph 5).

72. In the Soering judgment (cited above), the Court took into consideration the principles laid down by texts of universal scope in developing its case-law concerning Article 3 of the Convention in respect of extradition to third countries. Firstly, it considered, with reference to the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights, that the prohibition of treatment contrary to Article 3 of the Convention had become an internationally accepted standard. Secondly, it considered that the fact that the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibited the extradition of a person to another State where he would be in danger of being subjected to torture did not mean that an essentially similar obligation was not already inherent in the general terms of Article 3 of the European Convention.

73. Furthermore, the Court found in its Al-Adsani judgment, with reference to universal instruments (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, Articles 2 and 4 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment) and their interpretation by international criminal courts (judgment of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v. Furundzija, 10 December 1998) and domestic courts (judgment of the

House of Lords in Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet (No. 3)), that the prohibition of torture had attained the status of a peremptory norm of international law, or jus cogens, which it incorporated into its case-law in this sphere (see Al-Adsani, cited above, § 60).

(ii) Council of Europe instruments

74. In a number of judgments the Court has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly (see, among other authorities, Öneryıldız v. Turkey [GC], no. 48939/99, §§ 59, 71, 90 and 93, ECHR 2004-XII).

75. These methods of interpretation have also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court has, for example, made use of the work of the European Commission for Democracy through Law ("the Venice Commission") (see, among other authorities, Russian Conservative Party of Entrepreneurs and Others v. Russia, nos. 55066/00 and 55638/00, §§ 70-73, 11 January 2007; Basque Nationalist Party – Iparralde Regional Organisation v. France, no. 71251/01, §§ 45-52, ECHR 2007-II; and Çiloğlu and Others v. Turkey, no. 73333/01, § 17, 6 March 2007), of that of the European Commission against Racism and Intolerance (see, for example, Bekos and Koutropoulos v. Greece, no. 15250/02, §§ 33-36, ECHR 2005-XIII; Ivanova v. Bulgaria, no. 52435/99, §§ 65-66, 12 April 2007; Cobzaru v. Romania, no. 48254/99, §§ 49-50, 26 July 2007; and D.H. and Others v. the Czech Republic [GC], no. 57325/00, §§ 59-65, 184, 192, 200 and 205, ECHR 2007-IV) and of the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (see, for example, Aerts v. Belgium, 30 July 1998, § 42, Reports of Judgments and Decisions 1998-V; Slimani v. France, no. 57671/00, §§ 22 et seq., ECHR 2004-IX; Nazarenko v. Ukraine, no. 39483/98, §§ 94-102, 29 April 2003; Kalashnikov v. Russia, no. 47095/99, § 97, ECHR 2002-VI; and Kadiķis v. Latvia (no. 2), no. 62393/00, § 52, 4 May 2006).

(iii) Consideration by the Court

76. The Court recently confirmed, in its Saadi judgment (cited above, § 63), that when it considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.

77. By way of example, in finding that the right to organise had a negative aspect which excluded closed-shop agreements, the Court considered, largely on the basis of the European Social Charter and the case-law of its supervisory organs, together with other European or universal instruments, that there was a growing measure of agreement on the subject at international level (see Sigurður A. Sigurjónsson v. Iceland, 30 June 1993, § 35, Series A no. 264, and Sørensen and Rasmussen v. Denmark [GC], nos. 52562/99 and 52620/99, §§ 72-75, ECHR 2006-I).

78. The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.

79. Thus, in the Marckx v. Belgium case, concerning the legal status of children born out of wedlock, the Court based its interpretation on two international conventions of 1962 and 1975 that Belgium,

like other States Parties to the Convention, had not yet ratified at the time (see Marckx v. Belgium, 13 June 1979, §§ 20 and 41, Series A no. 31). The Court considered that the small number of ratifications of these instruments could not be relied on in opposition to the continuing evolution of the domestic law of the great majority of the member States, together with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est".

80. Moreover, in the cases of Christine Goodwin v. the United Kingdom ([GC], no. 28957/95, ECHR 2002-VI), Vilho Eskelinen and Others v. Finland ([GC], no. 63235/00, ECHR 2007-II) and Sørensen and Rasmussen (cited above), the Court was guided by the European Union's Charter of Fundamental Rights, even though this instrument was not binding. Furthermore, in the cases of McElhinney v. Ireland ([GC], no. 31253/96, ECHR 2001-XI), Al-Adsani (cited above) and Fogarty v. the United Kingdom ([GC], no. 37112/97, ECHR 2001-XI), the Court took note of the European Convention on State Immunity, which had only been ratified at the time by eight member States.

81. In addition, in its Glass v. the United Kingdom judgment, the Court took account, in interpreting Article 8 of the Convention, of the standards enshrined in the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997, even though that instrument had not been ratified by all the States Parties to the Convention (see Glass v. the United Kingdom, no. 61827/00, § 75, ECHR 2004-II).

82. In order to determine the criteria for State responsibility under Article 2 of the Convention in respect of dangerous activities, the Court, in the Öneryıldız judgment, referred among other texts to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (ETS no. 150 – Lugano, 21 June 1993) and the Convention on the Protection of the Environment through Criminal Law (ETS no. 172 – Strasbourg, 4 November 1998). The majority of member States, including Turkey, had neither signed nor ratified these two conventions (see Öneryıldız, cited above, § 59).

83. In the Taşkın and Others v. Turkey case, the Court built on its case-law concerning Article 8 of the Convention in matters of environmental protection (an aspect regarded as forming part of the individual's private life) largely on the basis of principles enshrined in the United Nations Economic Commission for Europe's Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43) (see Taşkın and Others v. Turkey, no. 49517/99, §§ 99 and 119, 4 December 2003). Turkey had not signed the Aarhus Convention.

84. The Court notes that the Government further invoked the absence of political support on the part of member States, in the context of the work of the Steering Committee for Human Rights, for the creation of an additional protocol to extend the Convention system to certain economic and social rights. The Court observes, however, that this attitude of member States was accompanied, as acknowledged by the Government, by a wish to strengthen the mechanism of the European Social Charter. The Court regards this as an argument in support of the existence of a consensus among Contracting States to promote economic and social rights. It is not precluded from taking this general wish of Contracting States into consideration when interpreting the provisions of the Convention.

4. Conclusion

85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.

86. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies (see, mutatis mutandis, Marckx, cited above, § 41). (...)

[The right for municipal civil servants to collective bargaining]

147. The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively. Adopted in 1949, this text, which is one of the fundamental instruments concerning international labour standards, was ratified by Turkey in 1952. It states in Article 6 that it does not deal with the position of "public servants engaged in the administration of the State". However, the ILO Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the State. With that exception, all other persons employed by government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No. 98 in the same manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages (see paragraph 43 above).

148. The Court further notes that ILO Convention No. 151 (which was adopted in 1978, entered into force in 1981 and has been ratified by Turkey) on labour relations in the public service ("Convention No. 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service") leaves States free to choose whether or not members of the armed forces or of the police should be accorded the right to take part in the determination of working conditions, but provides that this right applies everywhere else in the public service, if need be under specific conditions. In addition, the provisions of Convention No. 151, under its Article 1 § 1, cannot be used to reduce the extent of the guarantees provided for in Convention No. 98 (see paragraph 44 above).

149. As to European instruments, the Court finds that the European Social Charter, in its Article 6 § 2 (which Turkey has not ratified), affords to all workers, and to all trade unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to the meaning attributed by the ECSR to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations.

150. As to the European Union's Charter of Fundamental Rights, which is one of the most recent European instruments, it provides in Article 28 that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

151. As to the practice of European States, the Court reiterates that, in the vast majority of them, the right of civil servants to bargain collectively with the authorities has been recognised, subject to various exceptions so as to exclude certain areas regarded as sensitive or certain categories of civil servants who hold exclusive powers of the State. In particular, the right of public servants employed by local authorities and not holding State powers to engage in collective bargaining in order to determine their wages and working conditions has been recognised in the majority of Contracting States. The remaining exceptions can be justified only by particular circumstances (see paragraph 52 above).

152. It is also appropriate to take into account the evolution in the Turkish situation since the application was lodged. Following its ratification of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, Turkey amended, in 1995, Article 53 of its Constitution by inserting a paragraph providing for the right of trade unions formed by public officials to take or defend court proceedings and to engage in collective bargaining with authorities. Later on, Law no. 4688 of 25 June 2001 laid down the terms governing the exercise by civil servants of their right to bargain collectively.

153. In the light of these developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 (see Swedish Engine Drivers' Union, cited above, § 39, and Schmidt and Dahlström, cited above, § 34) should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see Vilho Eskelinen and Others, cited above, § 56).

154. Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants, except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of Article 11 § 2 – a category to which the applicants in the present case do not, however, belong.